

SUPREME COURT OF NOVA SCOTIA

Citation: *Gamma Windows and Wall International Inc. v. Queen's Marque Developments Limited*, 2023 NSSC 236

Date: 20230721

Docket: Hfx. No. 514949

Registry: Halifax

Between:

Gamma Windows and Wall International Inc.

Plaintiff

v.

Queen's Marque Developments Limited, Queen's Marque Limited, Queen's Marque North Limited, Queen's Marque South Limited, The Residences at Queen's Marque Limited, Develop Nova Scotia Limited, Stewart McKelvey, The Manufacturer's Life Insurance Company, and Business Development Bank of Canada

Defendants

Judge: The Honourable Justice John A. Keith

Heard: July 18, 2023, in Halifax, Nova Scotia

Oral Decision: July 19, 2023

Counsel: Nathan Sutherland and George Franklin, for the Plaintiffs
William L. Ryan, K.C., for the Defendants Queen's Marque
and Stewart McKelvey
Jeff Aucoin, for the Defendant The Manufacturer's Life
Insurance Company
Robert Purdy, K.C. and Heather Wyse, for the Defendant
Business Development Bank of Canada
James D. MacNeil, for the Defendant Develop Nova Scotia
Limited

By the Court:

[1] The Plaintiff Gamma Windows and Wall International Inc. (“**Gamma**”) filed an action seeking payment of amounts allegedly owing in relation to the construction of the Queen’s Marque residential and commercial complex on the Halifax Waterfront. Manufacturers Life Insurance Company (identified by the parties in their submissions using the trade name “**Manulife**”) is one of the many named Defendants.

[2] In March 2023, Manulife filed a Notice of Motion for summary judgment on the pleadings. The hearing was scheduled for July 24, 2023.

[3] By Friday, July 7, 2023, Gamma proposed to avoid Manulife’s motion for summary judgement on the pleadings by amending its Statement of Claim.

[4] The specific deficiencies in the Statement of Claim which Gamma sought to correct by way of amendments were based upon (and in response to) concerns first raised by Manulife – not deficiencies proactively identified by Gamma. In an email sent at 9:33 a.m. on July 7, 2023, Gamma’s counsel wrote to Manulife’s counsel stating, among other things:

I understand you are intending to file your summary judgment motion materials today. Before doing so, I wanted to be clear that we are proposing to avoid the summary judgment motion by amending our pleadings on consent. Specifically, we would amend to add a new subparagraph 51 that seeks a declaration that Gamma’s lien stands in prior to Manulife’s mortgage to the extent of any increase in the value of the property in accordance with section 8 of the Builders’ Lien Act (as already set out at paragraph 45 of Gamma’s Statement of Claim).

[5] However, by this time (July 7, 2023), two further problems had arisen:

1. Under Rule 23.11, Manulife’s deadline for filing its written submissions in advance of the half day summary judgment motion was that day, July 7, 2023 - ten clear days in advance of the July 24, 2023 hearing; and
2. If Gamma wanted to pre-empt Manulife’s half day motion for summary judgment with its own amendment motion, the minimum notice period for filing these materials was also that same day - ten clear day in advance of the half day motion. (Rule 23.11) This presumes Gamma was entitled to append its motion on to Manulife’s previously scheduled motion for summary judgment, an issue I return to below.

[6] Manulife proceeded to file its written brief and authorities on Friday, July 7, 2023, as required under the *Civil Procedure Rules*.

[7] On Monday, July 10, 2023, Gamma provided additional specifics regarding its proposed amendments to all opposing counsel, although the essential nature of the changes was the same as stated in Gamma's July 7, 2023 email. Gamma also said that it would be filing an amendment motion on Tuesday, July 11, 2023.

[8] On Wednesday, July 12, 2023, Gamma filed a motion to amend its Statement of Claim. Gamma requires its amendment motion be heard on July 24, 2023 because the proposed amendments are necessary to address identified weaknesses in its Statement of Claim and thereby fully defend itself against Manulife's motion for summary judgment.

[9] Gamma filed its amendment motion only seven clear days before July 24, 2023. As such, Gamma was compelled to also seek an Order under Rule 2.02 abridging (shortening) the notice period established by the *Civil Procedure Rules*.

[10] On July 14, 2023, counsel for Manulife confirmed that it would oppose Gamma's request for an abridgement of time to bring an 11th hour amendment motion designed, in part, to stave off summary judgment on the pleadings.

[11] I convened a case management call on July 18, 2023 to discuss the Plaintiff's motion to amend, among other things. The following counsel participated in the call:

- Nathan Sutherland on behalf of the Plaintiff, Gamma;
- Jeff Aucoin on behalf of the Defendant, Manulife;
- William (Mick) Ryan, K.C. on behalf of the five Defendant Queen's Marque entities named in the action, as well as the law firm Stewart McKelvey which is also a named Defendant; and
- Jennifer Wyse on behalf of the Defendant, Business Development Bank of Canada.

[12] The one-remaining party (the Defendant Develop Nova Scotia Limited, now called Build Nova Scotia) did not participate in the call. Counsel for Build Nova Scotia (Jamie MacNeil) confirmed that his client takes no position on either

Manulife's motion for summary judgment or Gamma's motion to amend – and that he did not need to participate in the call or the motions.

[13] The July 18, 2023 conference call occurred on-the-record. I raised the option of deciding the abridgment issue in advance of the July 24, 2023 hearing. Counsel for all the participating parties agreed that I could, on an accelerated basis, hear and decide the Plaintiff's request for an abridgement of time on July 19, 2023.

[14] I commend the parties for their agreement and accommodation in the unique circumstances of this case. The abridgement issue created procedural uncertainty around whether Gamma is even entitled to bring its amendment motion of July 24, 2023. Clearing this issue at an early stage would result in significant advantages and reduce avoidable expense. Among other things, an early determination on Gamma's abridgement request would eliminate the need to prepare for the various permutations and potential outcomes which might arise, depending on how the abridgement issue is determined.

[15] For example, if Gamma's request for an abridgment of time is granted, Manulife and the other participating Defendants candidly acknowledged that Gamma's motion to amend would be unopposed having regard to the caselaw in Nova Scotia. However, given Gamma's late filing, the impact of the proposed amendments on Manulife's motion for summary judgment were unclear. At a minimum, Manulife's motion would need to be adjourned to provide Manulife a reasonable opportunity to re-group; assess the impact of the amendments; and proceed accordingly.

[16] By contrast, if Gamma's request for an abridgement of time is denied, the parties would need to be prepared to argue the motion for summary judgment.

[17] Either way, determining the abridgment issue in advance could result in significant savings of time and expense.

[18] That said, I am compelled to say that this sort of hurried process for determining a preliminary abridgment request should not be encouraged and should be viewed as a very rare exception. The circumstances of this case are unique and included the participating parties' acknowledgement that the amendments would be unopposed if the abridgement issue was determined in advance. Moreover, importantly, the Court (not the parties) initiated this process. I exercised my discretion to determine the abridgement request for the reasons discussed above.

Generally speaking, no party should presume an entitlement to have an abridgement request determined in advance of a proposed motion.

[19] I turn to the main issue. The question is whether the notice period for Gamma to bring its amendment motion should be abridged.

[20] Rule 2.03(1)(c) confirms the general judicial discretion to “excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.”

[21] There is very little caselaw as to how the discretion in Rule 2.03 is exercised. In my view, the following considerations may help guide the discretion:

1. The party seeking an abridgement of time bears the burden of proving that being excused from compliance with the Rules is reasonable and just in the circumstances. (See *Aurelius Capital Partners v. General Motors Corporation*, 2009 NSSC 100 at paragraph 9).
2. The *Civil Procedure Rules* offer litigants clarity, consistency and predictability in the prosecution and defence of actions and applications. Generally speaking, the deadlines established by the *Civil Procedure Rules* must be respected. More generally, the integrity of the *Civil Procedure Rules* should be protected. Excusing compliance with the Rules must be considered a rare and exceptional occurrence.
3. The advantages achieved by excusing compliance of the Rules must be substantial and must significantly outweigh the prejudice which would be caused by strict compliance. With respect to a requested abridgement of time, the factors which the Court might consider and weigh include:
 - a) The length of the delay in requesting an abridgment of time;
 - b) The reasons for the delay resulting in a request for an abridgment of time;
 - c) The relative advantages and disadvantages which would accrue by excusing strict compliance. This Court should consider these issues in the context of whether the requested abridgement will advance the litigation consistent with Rule 1.01’s promise of a “just, speedy, and inexpensive determination of every proceeding” and, as well, the Supreme Court of Canada’s call in *Hyrniak v Mauldin*, 2014 SCC 7 for more efficient civil proceedings;

- d) The presence of misconduct or procedural mischief including, for example, bad faith, abuse of process or taking unfair advantage;
- e) The prejudice suffered by a moving party if the abridgement request is denied, having regard to the nature and significance of the primary relief being sought by the moving party;
- f) The prejudice suffered by a responding party if the abridgement request is allowed;
- g) The factors set out in Rule 2.03(2) which state:
 - A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:
 - (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
 - (b) require an excused person to do anything in substitution for compliance;
 - (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.
- h) The extent to which the specific restrictions on a judge's general discretion as set out in Rule 2.03(3) apply. Rule 2.03(3) confirms that the Court's general discretion does not override any of the following kinds of provisions in these Rules:
 - (a) a mandatory provision requiring a judge to do, or not do, something;
 - (b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;
 - (c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

None of the restrictions in Rule 2.03(3) apply in the circumstances of this case.

[22] For clarity, these factors are intended to be considerations which a judge may take into account as an analytical aid. They are not comprehensive and definitive listing of every applicable factor, regardless of the underlying circumstances. And

they are not an attempt to rigidly confine the general judicial discretion within a particular framework.

[23] In my view, Gamma's request for an abridgement of time should be allowed. My reasons include:

1. As indicated, the minimum notice requirement for a half-day motion is ten clear days. Gamma filed its motion materials for the proposed amendment seven clear days before July 24, 2023. The delay was only 3 clear days. Moreover, in terms of developing a response and as the parties effectively concede, the proposed motion for amendments is not exceedingly complex. In these circumstances, while only having seven clear days to prepare a response for the proposed amendments is certainly not ideal, it is not exceedingly prejudicial either. However, it must equally be said that this presumes Gamma was entitled to tack its motion to (or "piggyback" onto) the half-day which Manulife had previously reserved for its summary judgment motion. Gamma had no such entitlement. Rule 23.05 confirms that motions which are a half-day or less are scheduled through the Court.
2. As indicated, Gamma's reasons for having to bring an amendment motion on short notice is directly related to Manulife's upcoming motion for summary judgment. The following excerpts from Gamma's written submissions filed on Friday, July 14, 2023¹ highlight the connection between Gamma's opposition to Manulife's motion for summary judgment and its proposed amendments to the Statement of Claim:
 - a) Paragraph 4 of Gamma's submissions stated, "The proposed Second Amended Statement of Claim clearly articulates a claim against [the Defendant] Manulife."
 - b) Paragraph 17 of Gamma's submissions stated, "As a preliminary point, the Court should consider Manulife's motion for summary judgment on the basis of Gamma's proposed Second Amended Statement of Claim, or should decline to hear Manulife's motion until Gamma's motion to amend is decided. To do otherwise would result in a patent injustice."

¹ By filing responding submissions five clear days before the July 24, 2023 hearing, Gamma met the minimum notice requirements established under Rule 23.11 for a half-day motion although, again, Gamma's arguments were predicated, in part, on proposed amendments to the pleadings that were not yet approved.

- c) Paragraphs 23 and 25 – 26 similarly highlight the importance of Gamma’s proposed amendments to the arguments being made in opposition to Manulife’s motion for summary judgment on the pleadings.
- d) Gamma made the same point, perhaps more forcefully, in a letter dated July 19, 2023. Gamma argues that Manulife would not be prejudiced by the proposed amendments in the sense that it would simply be required to address new but legitimate legal arguments. By contrast, Gamma says, “If the motion for an abridgment is refused, Gamma’s motion to amend will be heard *after* Manulife’s summary judgment motion, and Gamma’s motion may be moot.” (emphasis in letter). In that same submission, Gamma further explains that it filed the “motion to amend to make clear to the Court what it proposed by way of an amendment, and allow the Court to fully consider Manulife’s motion for summary judgment, including Rule 13.04(3).”

Overall, the connection between Gamma’s proposed amendments and its defence to Manulife’s motion for summary judgment on the pleadings is clear and material.

- 3. While Gamma’s need to amend its Statement of Claim is clear, the reason for delay in bringing the required motion is less clear. Based on the evidence before me and counsel’s submissions, as indicated, the deficiencies in the current Statement of Claim were first communicated to Gamma by Manulife. However, I am uncertain when these communications occurred except that they began before July 7, 2023 when Gamma decided it was necessary to bring a motion to amend its claim and more fully defend itself against Manulife’s motion for summary judgment. By that time, however, Gamma was now also compelled to request an abridgment of time. In my view, Gamma did not act with sufficient despatch to file motion materials on time. Gamma explains that it was attempting to negotiate a “practical solution” by which the Defendants (including Manulife) would simply consent to proposed amendments and avoid the motion. Respectfully, Gamma laid undue confidence in its ability to obtain Manulife’s consent to an amendment and, in any event, began to reveal details of its proposed amendments too late.

4. Gamma will be substantially prejudiced if the abridgement of time is disallowed and strict compliance with the Rules is demanded. This is a very important factor and should be given considerable weight. Gamma faces summary judgment, dismissing its claims against Manulife. The implications are serious given the possibility that Gamma's ongoing action against Manulife might be lost, subject only to appeal. Rule 13.03 reveals a particular sensitivity to the significance of this factor in the context of summary judgment motions. It states:

A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

5. The prejudice to Gamma significantly outweighs the prejudice to Manulife. If the abridgement is allowed, Manulife faces the prospect of having to review the new arguments created by Gamma's amended pleadings but, ultimately, will only be forced to confront legitimate legal issues before claiming an entitlement to have Gamma's claims against Manulife summarily dismissed.
6. I am not unmindful of Manulife's concerns that Gamma only decided to amend its Statement of Claim after potential defects were identified by Manulife's counsel. In effect, Gamma is now using information received from Manulife to not only identify gaps in its own pleadings but then take steps to fill those gaps with an amendment – and it is doing so late in the day. While I recognize Manulife's justifiable complaints, this does not constitute the sort of procedural mischief or abuse that might definitively preclude a requested abridgement. Gamma is responding to issues raised by Manulife. It is doing so late but, in my view, the parties were acting in good faith. To the extent the concerns expressed by Manulife operate to create some form of mischief, they are better and more justly addressed through costs rather than simply denying Gamma the opportunity to fully defend itself from summary judgment.
7. There are significant procedural advantages and efficiencies to be gained by abridging the time, as discussed above. At a minimum, abridging the time will provide clarity in terms of the remaining issues to be argued and enable the participating parties to better identify and

focus their arguments. In the circumstances of this case and based on the participating Defendants' confirmation that they would not otherwise oppose the amendments, this decision will prompt an adjournment of Manulife's motion. However, again, this is an issue which is better addressed through costs rather than denying Gamma the entitlement to fully defend itself against summary judgment.

[24] Gamma's motion to abridge the time for service of its amendment motion is allowed. However, Manulife is entitled to costs in respect of this abridgment motion payable by Gamma forthwith and in any event of the cause. A schedule will be established for submissions as to costs.

Keith, J.