SUPREME COURT OF NOVA SCOTIA
Citation: *Gabriel v. Downing*, 2023 NSSC 414

Date: 20231220
Docket: 505877
Registry: Halifax

Between:

Stan Gabriel

Plaintiff/Responding Party to the Motion

v.

Joseph Downing and 9182-9184 Quebec Inc.

Defendants/Moving Party on the Motion

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	October 16, 2023, in Halifax, Nova Scotia
Oral Decision:	December 20, 2023
Written Decision:	December 22, 2023
Counsel:	Janus Siebrits and Czerianne Nocon-Mantolino, Counsel for the Plaintiff Jeremy Doucet, Counsel for the Defendants

By the Court (orally):

Background

[1] On May 2, 2019, the Defendant, Joseph Downing, was driving a transport truck along Route 102 near Bedford, Nova Scotia, in the course of his employment with the Defendant, 9182-9184 Quebec Inc. Mr. Downing is a commercial truck driver who had just completed a delivery in Halifax. He was driving a Peterbilt Model 369 transport truck, which weighs 20,000 pounds (see Affidavit of Joseph Downing, at paras. 4 and 17). He was also hauling an empty trailer. The Plaintiff, Stan Gabriel, was driving his own car in the same direction when it was involved in a collision with the Defendants' truck.

[2] The section of Route 102 on which the accident occurred has three lanes. The left and middle lanes are lanes of travel, while the lane on the right is an exit lane for Exit 4C. At the time of the accident, traffic in the middle lane was stopped, so the Defendant was driving in the left lane (see Affidavit of Joseph Downing, at para. 10). The Plaintiff was also driving in the left lane behind the Defendant. Near Exit 4C, the Defendant moved into the middle lane. The Plaintiff, seeking to use Exit 4C, passed the Defendant in the left lane and then entered the middle lane in front of the truck (Discovery of Stan Gabriel, at para. 41). The Plaintiff braked to slow his car before entering the exit lane. Mr. Downing also claims to have braked but was unable to stop in time (see Affidavit of Joseph Downing, at para. 13). The front of the truck collided with the rear of the Plaintiff's car.

[3] The Defendants now move for summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04.

Issue

[4] Should the Defendants' motion for summary judgment on the evidence be granted?

Applicable Civil Procedure Rules

Summary judgment under Rule 13.04

[5] The rules and procedure for granting summary judgment are set out in *Civil Procedure Rule* 13.04:

13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

(a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

Analysis

The appropriate test for summary judgment

[6] In *Shannex Inc v. Dora Construction Ltd*, 2016 NSCA 89 at paras. 34-42, the Court of Appeal clarified *Rule* 13.04 and created a five-step test for judges considering whether to grant summary judgment on the evidence. In determining whether to grant summary judgment, the Court found, a judge is required to ask themselves five sequential questions. The questions are (as recently summarized

by the Court of Appeal in *Arguson Projects Inc v. Gil-Son Construction Limited*, 2023 NSCA 72 at para. 33):

1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

The presumption of fault in a rear end collision

[7] Both parties agree that it is well settled law that the driver who rear-ends another vehicle is presumed to be at fault for the accident. However, the presumption is rebuttable. It is open to the driver who rear-ended another vehicle to demonstrate that they were not at fault for the accident: *Thompson v. Compton & Island Advertising*, [1983] NSJ No. 460 at para. 7.

Fault and degree of fault are questions of fact

[8] Section 5 of the *Contributory Negligence Act*, RSNS 1989, c 95, states that "In every action, the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact." The case law also treats the determination of fault and (if appropriate) the apportionment of liability as questions of fact rather than questions of law. For example, in *Ingles v. Tutkaluk Construction Ltd*, 2000 SCC 12, at para. 42, the Supreme Court of Canada found that "the determination of whether a defendant has met the standard of care required in the circumstances is a question of fact." Additionally, in *Shelburne Marine Ltd v. MacKinnon & Olding Ltd*, [1997] NSJ No. 463, at para. 70, Saunders J of the Nova Scotia Supreme Court (as he then was) found that, "Obviously the extent of damage or loss and the apportionment of fault are questions of fact for me to decide."

Shannex Analysis

Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

[9] In this case, liability is clearly in dispute. The Plaintiff alleges that the Defendant caused the accident by failing to stop, while the Defendants allege that the Plaintiff caused the accident by cutting off the Defendant and suddenly braking. Both section 5 of the *Contributory Negligence Act* and the case law strongly suggest that the determination of fault and degree of fault are questions of fact. The Plaintiff's pleading therefore does disclose a genuine issue of material fact; namely, which party was at fault for the accident. The answer to this first question is "yes". The Court is clear in *Shannex*, at para. 34, that, in cases where there is an affirmative answer to the first question, the matter "should not be determined by summary judgment".

Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

[10] The *Contributory Negligence Act* states that liability is a question of fact. If, however, the question of liability is not a question of fact, then it must be a question of law, either pure, or mixed with a question of fact. In that case, the challenged pleading would require the determination of a question of law.

If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

[11] The Court found in *Shannex* that, in a case where there is no issue of material fact and only an issue of law, that the judge "may" grant or deny summary judgment according to their discretion. In determining whether to grant summary judgment, the trial judge should ask themselves whether the pleading has a real chance of success: *Shannex*, at para. 34.

[12] It is for the responding party to show a real chance of success. In *Coady v. Burton*, 2013 NSCA 95, Justice Saunders explained how to ascertain if there is a "real chance of success":

> [42] ...Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether the claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position?

> It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?
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> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
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> [44] The phrase "real chance" should be given its ordinary meaning — that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts?*
>
> the answer would be yes.

[13] The Plaintiff in this case has a real chance of success. The Defendant rear-ended him. As both parties acknowledge, this creates the presumption that the Defendant was 100% at fault for the accident. The presumption of fault in a rear-end collision has been described by the Court in *MacNeil v. Black* [1998] NSJ No. 83, at paragraph 8 as a "considerably heav[y]" burden. A successful summary judgment motion by a defendant who rear-ended another vehicle would be exceedingly rare. While there are cases where rear-ended plaintiffs have succeeded on summary judgment motions, there have not been any cases that I have located where a defendant has managed to do so: *MacNeil, supra*; *Fournier v. Green*, 2005 NSSC 253; *Walji v. Boudreau*, 2009 NSSC 349.

[14] It is possible that the Defendants will meet the burden and demonstrate that he was not at fault for the collision and that he could not have stopped in time. It is also possible that he will fail to do so. Since there is a real chance that he will not meet the burden, there is a real chance that the Plaintiff's challenged pleading will succeed.

If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

[15] Judges on summary judgment motions are not permitted to weigh evidence or evaluate credibility: *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61, at paras. 25-31. Whether the Defendants were

negligent hinges on whether Joseph Downing had enough time to successfully stop or adequately slow his 20,000-pound truck so as not to hit the Plaintiff's vehicle from behind. With only the information available at this motion, it is not possible to determine that. Neither side has called an expert who can speak to whether Joseph Downing had enough time to stop a truck of that weight.

[16] Moreover, the Defendant, Joseph Downing, has not been cross-examined. There is disagreement between the parties regarding Joseph Downing's assertion that he applied his brakes: Affidavit of Joseph Downing at para. 13; Statement of claim at para. 7; Defendants' brief on law at para. 36; Plaintiff's brief on law at page 2. Joseph Downing claims to have attempted to stop in his affidavit, while the Plaintiff in his Statement of claim claims that Joseph Downing "failed to slow or stop" and failed to "take any steps to avoid a collision.": Statement of claim at paras. 7 and 8(b). Cross-examination of Joseph Downing could be useful for evaluating his credibility and determining whether he applied his brakes and attempted to stop, which would go to the question of whether or not he met his duty of care.

Conclusion

[17] Liability is in dispute. The determination of liability is a question of fact, so ought not to be decided by summary judgment. Alternatively, if determining liability is a question of law, then the Plaintiff's challenged pleading has a real chance of success. Since Joseph Downing's credibility cannot be evaluated at this stage and there is insufficient information to determine whether Joseph Downing had enough time to stop his 20,000-pound truck to avoid the collision, the Court refuses to exercise its discretion to finally determine the issue, and the matter should proceed to trial.

[18] The Defendants' motion is dismissed, with costs to the Plaintiff. If the parties are unable to agree to costs, within 30 days of today's date, I will receive submissions from the parties. I would ask counsel for the Plaintiff to prepare the Order.

[19] The parties have agreed to continue the matter as an action and require no further direction at this time.

Bodurtha, J.