SUPREME COURT OF NOVA SCOTIA
Citation: Krawczyk v. Mieske, 2013 NSSC 283

Date: 20130919
Docket: Pic No. 414274
SCP 410618
Registry: Pictou

Between:

Joan Krawczyk

Appellant

v.

Yvonne Mieske and Bobby Heighton

Respondent

Judge:	The Honourable Justice Michael J. Wood
Heard:	August 22, 2013, in Pictou, Nova Scotia
Final Written Submissions:	September 5, 2013
Written Decision:	September 19, 2013
Counsel:	Joan Krawczyk, self-represented Yvonne Mieske, self-represented for both respondents Bobby Heighton, not present

By the Court:

[1] Joan Krawczyk and Yvonne Mieske share a common interest in Chinese Crested dogs. Ms. Mieske breeds and shows these dogs and Ms. Krawczyk has several which came to her for care through a rescue agency. Ms. Krawczyk is also a professional artist.

[2] In the spring of 2012, Ms. Krawczyk and Ms. Mieske decided to start a business selling pet portraits by commission. Ms. Krawczyk painted six portraits of Ms. Mieske's show dogs, which Ms. Mieske then took with her to dog shows in order to solicit other owners to commission portraits of their dogs. They agreed that for any new portraits, the net profits would be divided equally between them.

[3] Unfortunately, despite Ms. Mieske's efforts, they were unable to generate any sales. The business relationship began to deteriorate and when it was clear that it would not continue, Ms. Krawczyk demanded return of the six paintings which she claimed to own. Ms. Mieske felt that the paintings were her property and refused to deliver them to Ms. Krawczyk.

[4] In December, 2012, Ms. Krawczyk commenced proceedings against Ms. Mieske in the Small Claims Court of Nova Scotia. She claimed return of the six paintings or $1,750.00. She also included a claim for costs of repairs to an electric generator.

[5] Following a hearing at which both parties called evidence, the Small Claims Court Adjudicator issued a written decision dismissing Ms. Krawczyk's claim.

The Adjudicator found that the parties had entered into a business arrangement whereby Ms. Krawczyk would use her labour, skills and materials to paint the six dog portraits and Ms. Mieske would use her efforts and the six paintings to market and promote the sale of pet portraits. Commissioned paintings were to be sold for $250.00, and after deduction for material costs, the parties would each receive $100.00.

[6] The Adjudicator found no evidence that the parties intended that Ms. Krawczyk would be paid by Ms. Mieske for the portraits of her dogs, or that the paintings would be offered for sale to the general public. Nor was there any evidence that Ms. Krawczyk had merely loaned the paintings to Ms. Mieske.

[7] The Adjudicator stated that there was no evidence that the parties had discussed what would occur upon the termination of their business relationship with respect to the six paintings. The Adjudicator went on to draw the following inferences from the evidence:

> It can be inferred from the evidence and I do infer from the evidence; however, that as the parties agreed that the six paintings of the defendant's dogs were not for sale but rather were to be used as a marketing tool for potential sale of paintings of other dogs; and since the paintings were in fact given to the defendant for that purpose, the six paintings of the defendant's dogs were to be the property of the defendant and not the property of the claimant. The parties' agreement regarding the preparation of the paintings on one hand and the sale efforts and marketing that were to be done by the defendant on the other hand, amounted to *"quid pro quo"*. I inferred from the evidence and all the circumstances involving their business relationship that it was never the intention of the defendant, that upon termination of the business relationship, the six paintings would be returned to the claimant for the claimant's future sale, use and enjoyment or sale to whomever she wanted and for whatever price she would determine.

[8] After concluding that the paintings were to be the property of the defendant, the Adjudicator dismissed Ms. Krawczyk's claim on the basis that she had not proven that the paintings were her property and were to be returned to her upon termination of the business relationship.

[9] An appeal from the decision of the Small Claims Court is authorized by s. 32 of the *Small Claims Court Act* which provides, in part:

> 32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) jurisdictional error;
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> (b) error of law; or
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> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[10] In her notice of appeal, Ms. Krawczyk alleges that the Adjudicator failed to follow the requirements of natural justice by concluding that title to the art work had passed to Ms. Mieske.

[11] A failure to follow the requirements of natural justice arises when fairness of the hearing has been compromised due to a procedural error. This ground of appeal is not related to the substance of the decision which was reached. Ms. Krawczyk's notice of appeal and her written submissions do not allege a procedural error of the type which would amount to a breach of natural justice. Her complaint relates to the finding that title to the paintings had passed to Ms. Mieske.

[12] An inadvertent error of this nature by a self-represented party is not fatal to her appeal. Navigating the court system can be challenging for those who are not formally trained in law. It is for this reason that this Court recognizes a duty for Small Claims adjudicators to assist unrepresented litigants in forming and advancing their claims. For example, in *Clayton v. Earthcraft Landscape Ltd.*, 2002 NSSC 259, Justice LeBlanc stated as follows:

> **28** It seems clear from the cases that the requirements of natural justice create a duty for a small claims adjudicator to assist unrepresented parties, particularly where a legal or procedural issue of which the party may not be aware is relevant in assessing the merits. I conclude that, while the Learned Adjudicator did not disregard the letter of Mr. Nortje as the Appellant alleges, he did have a duty to explain to the then-unrepresented Appellant that it would receive less weight than would oral evidence from Mr. Nortje. Failing to warn the witness of this constituted a denial of natural justice.

[13] Similar assistance will be offered to those individuals who appeal a Small Claims Court decision to this Court. In *Rhyno v. Ideal Concrete Ltd.*, [1992] N.S.J. No. 676, a self-represented litigant appealed a Small Claims Court decision

on the ground that the adjudicator made an error of law. However, in his brief, the appellant maintained that he had been denied natural justice because he was not permitted by the adjudicator to speak at the hearing. The respondent, through counsel, argued that because a denial of natural justice was not alleged in the notice of appeal, the Court should not consider the issue. Refusing to accept the respondent's position, MacLellan, Co. Ct. J. (as he then was) stated:

> **11** I find in the circumstances where the appellant was not represented and put forward his objection to the procedure of the adjudicator in his brief, it is appropriate to deal with the denial of natural justice argument despite the fact that it was not set out in the Notice of Appeal. The preprinted appeal forms made available to the public usually in most people checking off all grounds of appeal and I do not feel that an unrepresented person should have his appeal not proceed because he or she has not checked off the proper box on the printed form. The printed forms provide for basically three grounds of appeal being:
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> (a) it is erroneous in point of law;
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> (b) it is in excess of jurisdiction; or
>
> (c) it constitutes a denial of natural justice.

[14] In this case, Ms. Krawczyk's notice of appeal and written submissions focused on whether the Adjudicator was correct in concluding that ownership of the paintings had passed to Ms. Mieske. At the hearing, I asked Ms. Krawczyk to confirm that this was the essence of her appeal and she did so. In my view, Ms. Krawczyk's complaint is more properly characterized as an error of law, rather than a breach of procedural fairness, and I have dealt with the appeal on that basis.

[15] At the time of the appeal hearing, I raised with the parties the question of the applicability of the *Partnership Act*, R.S.N.S. 1989, c. 334 and, in particular, whether the rules dealing with disposition of partnership assets upon dissolution set out in s. 47 were applicable. This issue had not been raised before the Adjudicator at the hearing and did not appear to have been considered by him. As I advised the parties, the reason that I raised this legislation was that the relationship between them appeared to be a partnership as defined in s. 4 of the *Act*, which states as follows:

> 4 Partnership is the relation which subsists between persons carrying on a business in common, with view of profit, but the relationship between members of any incorporated company or association is not a partnership within the meaning of this *Act*.

[16] In light of the fact that I was raising this issue for the first time at the hearing and that both parties were self-represented, I gave them an opportunity to file supplementary written submissions on the applicability of the *Partnership Act*. Both Ms. Mieske and Ms. Krawczyk took the opportunity to do so. In Ms. Krawczyk's supplemental submissions, she simply reiterated her position that ownership of the paintings was not transferred to Ms. Mieske. Ms. Mieske's submissions addressed the *Partnership Act*. She submitted that the parties did not consider that they had a partnership and, therefore, the legislation was not applicable. She reiterated the Adjudicator's factual findings noted above with respect to the understanding between the parties.

[17] I have reviewed this matter, including the Adjudicator's decision, the Adjudicator's report, the written briefs filed by both parties, as well as their oral submissions. I am satisfied that the relationship between Ms. Krawczyk and Ms. Mieske is a classic example of a partnership even if they did not use that term. It was a joint venture, where each contributed their time and resources with the objective of generating profit, to be split equally between them. As a result, the *Partnership Act* does apply in the circumstances. It is also clear that the partnership has been dissolved by the actions of the two partners. Section 47 of the *Partnership Act* sets out the rules for distribution of partnership assets on dissolution and provides as follows:

> 47 In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:
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> > (a) losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;
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> > (b) the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:
> >
> > > (i) in paying the debts and liabilities of the firm to persons who are not partners therein,

> (ii) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital,
>
> (iii) in paying to each partner rateably what is due from the firm to him in respect of capital,
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> (iv) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

[18] Section 47(b)(iv) indicates that after payment of all expenses, the remaining assets shall be divided in the same proportion as profits. This means that if the paintings are considered partnership property, they would be divided equally between Ms. Krawczyk and Ms. Mieske. The failure of the Adjudicator to consider and apply the provisions of the *Partnership Act* could amount to an error of law which might result in the matter being remitted for a further hearing.

[19] As Ms. Mieske pointed out in her supplemental submissions, the Adjudicator made a number of factual findings concerning the business arrangement between the parties. With respect to the paintings, he found that these were to be the property of Ms. Mieske and not Ms. Krawczyk, The Adjudicator's review of the evidence and his determination of facts are not reviewable on appeal. Despite Ms. Krawczyk's strong assertion that the Adjudicator simply got it wrong in coming to this conclusion, I am not in a position to interfere with those findings.

[20] The rules set out in s. 47 of the *Partnership Act* are expressly subject to any agreement between the parties. In this case, the Adjudicator's finding that the parties intended the portraits to be the property of Ms. Mieske amounts to such an agreement and, therefore, override the provision for equal distribution of partnership assets. Even though the Adjudicator did not consider the applicability of the *Partnership Act* his decision achieves the correct legal result by virtue of the existence of the agreement that Ms. Mieske would have the paintings.

[21] Having found that there is no reviewable error of law on the part of the Adjudicator, I will dismiss Ms. Krawczyk's appeal with respect to her claim to the paintings or their value.

[22] Ms. Krawczyk's notice of appeal makes no reference to the claim for generator repairs, although her initial written submissions mention the issue. She has provided no basis on which the Adjudicator's findings on that part of her claim should be reviewed. Even if I were to permit this issue to be raised despite its absence from the notice of appeal, I would dismiss that as well.

[23] The Adjudicator did not award costs against Ms. Krawczyk in dismissing her claim and I will not do so in dismissing her appeal.

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Wood, J.