IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacNeil v. MacNeil, 2002 NSSC 393

Date: 20021218
Docket: SN No. 185425
Registry: Sydney

Between:

HELEN DENISE MACNEIL
DEFENDANT/APPELLANT

v.

DOROTHY E. MACNEIL
CLAIMANT/RESPONDENT

Judge:	The Honourable Justice Frank Edwards
Heard:	December 16, 2002, in Sydney, Nova Scotia
Written Decision:	December 18, 2002
Counsel:	Gus W. Postlewaite, Esq., for the defendant/appellant Allan F. Nicholson, Esq., for the claimant/respondent

Edwards, J.:

[1] This is an appeal of a Small Claims Court Decision of Adjudicator Douglas J. Lloy, dated July 21, 2002. The case dealt with a claim by Dorothy E. MacNeil that during the months of November and December 2000, she loaned the appellant, Helen Denise MacNeil, a credit card which was used

by Helen Denise MacNeil for purchasing Christmas presents. The claimant/respondent Dorothy E. MacNeil claimed the defendant/appellant Helen Denise MacNeil did not reimburse her for the full use which Helen Denise MacNeil made of the credit card. Denise MacNeil claimed that she did in fact reimburse the claimant for the use of the card and that any remaining charges to the card were that of the claimant/respondent Dorothy E. MacNeil.

[2] The matter came before Adjudicator Douglas Lloy of the Small Claims Court of Nova Scotia on October 16, 2001, and May 16, 2002. The decision in favour of the claimant/respondent was issued on July 21, 2002. The decision was therefore issued 66 days after the conclusion of the hearing of the claim.

[3] Section 29(1) of the ***Small Claims Court Act*** reads:

> Order of adjudicator
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> 29 (1) Subject to the provisions of this Act, not later than sixty days after the hearing of the claim of the claimant and any defence or counterclaim of the defendant, the adjudicator ***may***
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> (a) make an order
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> (i) dismissing the claim, defence or counterclaim, or

> (ii) requiring a party to pay money or deliver specific personal property in a total amount or value not exceeding five thousand dollars, and any pre-judgment interest as prescribed by the regulations; and
>
> (b) make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations. (Emphasis mine)

[4] The appellant relies on the decision in ***Bruce Jones v. Lloyd LeDrew*** (1996), S.N. 102161 (N.S.S.C.), wherein the court determined that a decision rendered out of time was a nullity as a breach of Section 29 of the ***Small Claims Court Act***. In ***Jones v. LeDrew***, the court concurred with the reasoning of Davison, J. in a March 29, 1996 decision ***Gordon Shaw Concrete Products Limited v. Stavely Weighing & Systems Canada Inc.***, S.H. No. 121056/SCC 32790.

[5] These decisions, while persuasive authority, are not binding upon me. The learned Justices in those cases did not have the benefit of the reasons given by our Court of Appeal in ***Langille v. Midway Motors Limited***, dated March 25, 2002 [2002] NSJ No. 133. Although the decision in ***Langille*** does not involve an appeal of a decision of the Small Claims Court, the reasoning contained therein is applicable to the case at hand. In ***Langille*** the court was dealing with an appeal from a decision by a Justice of the

Supreme Court which decision was apparently reserved for longer than the six months permitted by Section 34 of the ***Judicature Act***. At paragraph 8 on page 3 of the decision, the Court of Appeal said in part as follows:

> "Assuming without deciding that the decision in this case was reserved for longer than the six months permitted by s. 34 of the Judicature Act, we do not agree that there was a loss of jurisdiction in the circumstances. The time limit should not be considered to be mandatory but rather strongly directory. The appropriate remedy for failure to deliver a judgement after trial within six months, should be an order for mandamus, not an order for a new trial. Since the decision has now been delivered, no order is required."

[6] As I said, I believe that that reasoning is directly applicable to Section 29(1) of the ***Small Claims Court Act***. I would note in passing that Section 29 appears to be permissive rather than mandatory in nature in that it specifies that not later than 60 days after the hearing, the adjudicator ***may*** make an order. Adopting the reasoning in ***Langille***, I would therefore dismiss the first ground of appeal.

[7] The second ground of appeal is that the learned adjudicator failed to weigh the evidence correctly and apply the standard of proof necessary to establish the respondent's claim.

[8] In ***Langille***, (supra) the Court of Appeal outlined the role of the appellate court. At paragraph 10 the court stated in part as follows:

> This Court has repeatedly stated, with respect to findings of fact, that the appellate court should only interfere where the trial judge has made a palpable or overriding error which affected his assessment of the facts. Further, the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses, and of observing their demeanor and conduct.

[9] A review of the evidence in this case reveals that the learned adjudicator was cognizant of the more stringent standard of proof required in a civil case where there are criminal averments of fraud. He cited ***L & M Standard Industries Ltd. v. Cooper Industries Ltd.*** (1999), 176 N.S.R. (2d) 235 (S.C.) affirmed (2000), 181 N.S.R. (2d) 397 (C.A.); and ***Hanes v. Wawanesa Mutual Insurance Co***., [1963] S.C.R. 154 at p. 162. It is also clear that the learned Adjudicator weighed the evidence of the various witnesses and particularly of the claimant/respondent and the defendant/appellant. It is clear that the Adjudicator did not believe the evidence of Denise MacNeil. In particular, he had the advantage of hearing her explanation of her indication of indebtedness to her mother-in-law in her Statement of Property dated May 31, 2000. He had the advantage of seeing her cross-examined on this particular item of evidence and he found that her evidence "did not ring true". It is obvious that this particular item of evidence weighed heavily on the adjudicator's assessment of Denise MacNeil's credibility. I am satisfied that the adjudicator weighed all of the evidence carefully before making his final assessment. I am unable to say

that he made an palpable or overriding error which affected his assessment of the facts. I am therefore dismissing the second ground of appeal.

[10] In conclusion, I am dismissing the appeal and affirming the decision of the Small Claims Court adjudicator.

[11] Order accordingly.

J.