IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Nova Scotia v. Galeco Trading Company Ltd.*, 2006 NSSC 241

Date: 20060802
Docket: SH 253064
Registry: Halifax

Between:

The Bank of Nova Scotia

Applicant/Plaintiff

v.

Galeco Trading Company Limited and J. Gaile Smith

Respondent/Defendant

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: July 19, 2006, in Halifax, Nova Scotia

Counsel: Stephen Kingston, Esq., for the applicant/plaintiff
Andrew S. Nickerson, Q.C., for the respondent/defendant

By the Court:

BACKGROUND:

[1] This application for summary judgment is supported by the affidavits of Richard Randall who from March 11, 2003 to July 9, 2004 worked at the Bank's

Yarmouth Branch in the capacity of Relationship Manager for the client, Galeco Trading Company Limited, a position previously occupied by a Al Covey whose affidavit confirms his relationship with the defendant company from 2001 to 2003. The application is also supported by the Answer to Interrogatories of the defendant, J. Gaile Smith answered November 24, 2005.

[2] Neither party chose to conduct cross-examination on the affidavits. The affidavit of Mr. Covey indicates the bank in accordance with its standard practice conducted an annual review of the company's account each year and a new commitment letter was issued each year stating the terms and conditions governing the operating of the account and the various credit facilities extended to the company by the Bank. The first commitment letter was dated July 9, 2001, amended January 22, 2002. The amendment related to the requirements of the "borrowing base" calculation which was one of the general conditions under the commitment letter. The commitment letter of May 16, 2002 is attached to his affidavit and he indicates that the Bank during 2002 became increasingly concerned with respect to, in its view, the company's poor financial performance with the financial statements showing a loss of $206,000 for the six months ending June 2002 giving the debt to total net worth ratio of 3.31:1 which was in default of the commitment letter (2.50:1). The default

letter was issued September 10, 2002 followed by a letter October 23, 2002 which produced personal guarantees and a capital injection. Mr. Covey indicates he is unaware of any waiver by the Bank of any of the terms and conditions set out in the various commitment letters.

[3] This affidavit was followed by Mr. Randall's first affidavit where he refers to the loss of the company to March 31, 2003 of $46,797.03 and that the company at that time continued to be in default of the requirements of the debt to net worth ratio and of the commitment letter. He references a meeting May 13, 2002 with the defendant Ms. Smith and her spouse and daughter. He advised them that the Bank was only prepared to renew the company's credit facilities to June 30, 2003 due to the Bank's concern over the company's ongoing losses and in the Bank's view that in the company was technically bankruptcy. Losses reported by the company for four months ending April 30, 2003 received by the Bank in June 2003 showed losses of $134,000 and continual breach. There was a default letter of July 30, 2003 and this letter specifically indicated the Bank's agreement to continue credits in the interim was not to be taken as any indication that the Bank waived or acquiesced to the defaults as stated in the letter or any other defaults. The Bank filed a letter from the company's solicitor dated August 7, 2003 which acknowledged the company's non-

compliance with the requirements of the commitment letter. This was responded to by the Bank August 11, 2003 where the Bank indicated it would continue to extend credit given their attempt to reduce indebtedness, etc., and this letter specifically stated the Bank's previous and current concerns had not be eliminated and the agreement to continue with credits did not constitute a waiver by the Bank of any events of default and this letter was accepted by the company. The company paid out it operating line in January 2004 and throughout generally the Bank made it clear to the company that they ought to find a new banker and that the bank was not willing to continue its relationship with the company. At all times this was indicated to be without waiving any defaults or any of the Bank's rights and remedies. The actual correspondence referred to is attached and before me on this application and very clearly the company's solicitors' letter of August 7, 2003 states, "Galeco acknowledges the non-compliance with your commitment letter", and the response of August 11, 2000 very clearly states, "the Bank's agreeing to continue with credits does not constitute a waiver by the Bank of any events of defaults that now or hereafter exist, nor does it constitute a waiver of the Bank's rights and remedies".

[4] Galeco signed a copy of this letter confirming acceptance of the arrangements, terms and conditions set out. This acknowledgement and acceptance was dated August 15, 2003.

[5] The affidavit of J. Gaile Smith raises certain issues with respect to the claim against her by way of guarantee, etc. The initial application filed by the Bank of Nova Scotia was for summary judgment against Galeco of $175,898.92 as of August 17, 2005 and separately against Ms. Smith for $71,673.10.

The Bank of Nova Scotia acknowledged that her affidavit and memorandum filed by her solicitor raised certain issues that did not permit proceeding at this time with the application for summary judgment against Ms. Smith and so the application comes before me solely for summary judgment against Galeco in the amount of $175,898.92 as of July 19, 2006.

CIVIL PROCEDURE RULES:

[6] Civil Procedure Rule 13.01 is as follows:

> **Application for a summary judgment**
> 13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

(b) there is no arguable issue to be tried with respect to the defence or any part thereof; or

(c) the only arguable issue to be tried is as to the amount of any damages claimed. [Amend. 31/05/02]

TEST FOR SUMMARY JUDGMENT:

[7] In *Alternative Sports Ltd. (Trustee of) v. County Realty Ltd.*, [2006] N.S.J. No. 164 (April 21, 2006), the Court stated:

> 10 The test for summary judgment in Nova Scotia is well established. In Canadian Imperial Bank of Commerce v. Tench (1990), 97 N.S.R. (2d) 325 (C.A.), Macdonald, J.A. stated at paragraph 9:
>
> > The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an arguable issue to be tried - see Bank of Nova Scotia v. Dombrowski (1977), 23 N.S.R. (2d) 532; 32 A.P.R. 532 ... Under the circumstances of this case, if the allegations contained in the statement of defence are correct, they would afford an answer to the bank's claim.
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> 11 In D.E. & Son Fisheries Ltd. v. Goreham (2003), 217 N.S.R. (2d) 199, (N.S.C.A.), Cromwell, J.A. stated at para. 2:
>
> > Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. Bank of Nova Scotia and Simpson (Robert) Eastern v. Dombrowski (1978), 23 N.S.R. (2d) 532, 31 A.P.R. 532 (C.A.) At 537; Oceanus Marine Inc. v. Saunders (1996), 153 N.S.R. (2d) 267, 450 A.P.R. 267 (C.A.) at para. 15.
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> 12 There is no meaningful difference between an "arguable" issue and a "genuine" or "bona fide" issue: see Roscoe, J.A. in United Gulf Developments Ltd. V. Iskandar, [2004] N.S.J. No. 66, 2004 NSCA 35, (N.S.C.A.).
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> ....

> 14
> .... Gruchy, J. stated well, the defendant's position in Prenor Trust Company v. Gupta (S.B.) Investments Limited (1991), 105 N.S.R. (2d) 251 (T.D.) quoting the often cited case of Featherstonhaugh v. Featherstonhaugh, [1939] 2 D.L.R. 262 (Ont. C.A.).
> Robertson, C.J.O., stated at paragraph 23:
>
>> The Defendant needs to show the nature of his Defence and to disclose such facts as may be deemed sufficient to enable him to defend, and it is upon his success or failure in doing so that the fate of the motion must turn. In a sense, the usual role is reversed for this special purpose, and the burden of proof, such as it is, lies upon the Defendant and not upon the Plaintiff.

Gruchy, J. goes on to state in paragraph 25 as follows:

> It is clear from a reading of Rule 13 and of the cases above cited, an onus rests upon the Defendants to bring forth sufficient facts which I would conclude that a bona fide Defence or issue exists which ought to be tried.

[8] Galeco and Ms. Smith have essentially acknowledge the Bank's *prima facie* case through acknowledgement of the execution of the credit agreements and guarantees, the calculation of the debt and demand under the guarantees. The main area advanced as an arguable issue by Galeco is set out in paragraphs 3 and 4 of the defence referencing a discretionary credit facility extended by the Bank to Galeco as regards foreign exchange contracts. Schedule A to the continuance letter August 11, 2003 set out the terms and conditions governing the credit facilities from that date forward.

[9] Foreign Exchange Contracts are referenced on page 6 of the August 2003 "terms and conditions" as follows:

> **"CREDIT NUMBER: 05 AUTHORIZED AMOUNT: Additional Facility**
>
> At its sole discretion, the Bank may, from time to time, enter into Foreign Exchange Contracts with the borrower for maximum terms up to one year, or as otherwise specifically authorized, in approved currencies subject to documentation in a form satisfactory to the Bank.
>
> The maximum aggregate deemed risk, as calculated by the Bank, of all Foreign Exchange Contracts outstanding at one time is not to exceed $40,000 US dollars or the equivalent thereof in other approved currencies. Daily Settlement Limited $200,000 US Dollar."

> The Continuance Letter was issued in the context of the Bank having previously issued a Default Letter requiring Galeco to retire all of its loans on or before August 21, 2003.
>
> ...

[10] Counsel for Galeco argued that on a summary judgment application a provision in an agreement such as this should not be subject to interpretation and should await the evidence. However with respect, the language is clear, "at its sole discretion", and the arrangement between the parties is unequivocally acknowledged and this does not present an arguable issue.

[11] Paragraphs 5 and 6 of the defence raise what is advanced as an arguable issue with respect to waiver:

> 3. **Waiver**
>
> Paragraphs 5 and 6 of the Defence state:
>
> > "5. THAT the Defendants state that the banking and financial arrangements between the Plaintiff and Defendants are not completely set out in the documents referenced in the Statement of Claim but are based on extensive working relationship, understandings and discussions taking place over months or years.
> >
> > 6. THAT the actions of the Plaintiff are a breach of the agreement and working relationship, understanding and discussions between the parties to provide financial facilities to the Defendant Galeco Trading Company Limited."
>
> ...

[12] Messrs. Covey and Randall were the Bank's Relationship Managers for Galeco from 2001 to July, 2004. Each has filed and Affidavit clearly stating that they never told Galeco nor anyone on its behalf that the Bank was waiving any of the terms and conditions set out in the various Commitment Letters, Amendments, etc. governing the Galeco account and credit facilities.

[13] Before any allegation in a defence can constitute an arguable issue to be tried with respect of a defence there must be some recital of the particulars of a factual nature that raise an arguable issue. For example, throughout their working relationship there were in fact occasions when latitude or relaxation of the contractually stated and acknowledged relationship took place then the recital of such could well raise an arguable issue but a general statement of the nature and kind set out in paragraphs 5 and 6 of the defence does not, with respect, meet the very low threshold of raising an arguable issue.

[14] It is clear that in pleadings the mere statement of an issue meant to describe a cause of action or arguable issue does not of itself constitute an arguable issue. (*Chater v. Canada Lands Co.* 2005 NSCA 121)

RESULT:

[15] The Bank has met the threshold required of **Civil Procedure Rule 13.01** in that there is no arguable issue to be tried with respect to the claim and there is no arguable issue to be tried with respect to the defence.

[16] Summary judgment will be entered for the Bank against Galeco limited in the amount of $175,898.92 which I understand includes interest to the date of hearing, July 19, 2006. When the Bank proceeds to enter judgment it will then be entitled to further interest under the *Interest on Judgments Act*, c. 233, RSNS 1989.

COSTS:

[17] Clearly the memorandum and affidavit filed by Ms. Smith precludes the Bank from proceeding at this time with any application for summary judgment against her. Counsel are entitled to be heard on costs and my preliminary suggestion is that given the mixed success that the order provide no costs to either party.

[18] A new order is required because the draft order provided for judgment against Ms. Smith.

J.