IN THE SUPREME COURT OF NOVA SCOTIA
Citation: 2301072 Nova Scotia Ltd. v. Lienaux, 2006 NSSC 210

Date: 20060809
Docket: SH 102390
Registry: Halifax

Between:

2301072 Nova Scotia Limited

Plaintiff/Applicant

v.

Charles D. Lienaux and Karen L. Turner-Lienaux

Defendants/Respondents
(Charles D. Lienaux, Defendant by crossclaim)

and

Marvin C. Block, Q.C.

Defendant
(Plaintiff by crossclaim)

Judge: The Honourable Justice Glen G. McDougall

Heard: May 25, 2006, in Halifax, Nova Scotia

Counsel: Alan Parish, Q.C. and Gavin Giles, Q.C., for the plaintiff/applicant
Charles D. Lienaux, Esq., for the defendants/respondents

John Merrick, Q.C. and Lisa Taylor, Esq., interested parties on behalf of the defendant/plaintiff by crossclaim
Dufferin Harper, Esq., interested party on behalf of the Toronto Dominion Bank

By the Court:

[1] The plaintiff, 2301072 Nova Scotia Limited (the "Applicant"), makes this application for an order requiring the defendants, Charles D. Lienaux and Karen L. Turner-Lienaux (the "respondents"), to post security for costs pursuant to the provisions of **Civil Procedure Rule** 42.

[2] The Interlocutory Notice (Application Inter Partes) commencing this application was filed on May 15, 2006. The Style of Cause appeared as follows:

> *Form 37.02A* S.H. Number: 93-5807 (102390)
> 2003 (The Consolidation of S.H. Numbers: 93-5807 and 93-5909)
>
> IN THE SUPREME COURT OF NOVA SCOTIA
>
> BETWEEN:
>
> 2301072 NOVA SCOTIA LIMITED
>
> Plaintiff
>
> - and -
>
> CHARLES D. LIENAUX and
> KAREN L. TURNER-LIENAUX
>
> Defendants
>
> - and -
>
> MARVEN C. BLOCK, Q.C.
>
> Defendant
> (And Plaintiff By Cross-Claim)
>
> - and -
>
> THE TORONTO-DOMINION BANK
>
> Defendant By Counter-Claim
>
> - and -
>
> WESLEY G. CAMPBELL and GRANT E. MacNUTT
>
> Third Parties

[3] During the course of a pre-hearing telephone conference in which all parties participated either in person or by counsel, the proper style of cause was determined. Given the history of this litigation it is not surprising that there would be some confusion regarding the identity of the parties and the nature of their involvement. To lose track of one order amongst the many that have been granted throughout the course of this rather lengthy proceeding (being the consolidation of two actions commenced in 1993) is understandable.

[4] For now, at least, the identity of the parties and the nature of their involvement in this action are as shown in the Style of Cause used for this decision. It reflects both the Consent Order granted by the Honourable Justice Margaret J. Stewart of this Court on the 8th day of February, 1999 and the verbal notice given (during a telephone conference call held on May 3, 2006) by the defendant, Charles D. Lienaux, acting on his own behalf and on behalf of the co-defendant, Karen L. Turner-Lienaux (who is his wife and on whose behalf he normally speaks) that the third party claim against Grant MacNutt (now deceased) has been discontinued and will be withdrawn. A Consent Order reflecting this has now been issued.

[5] The clarification of that which under normal circumstances would have been obvious to the litigants and their counsel has helped considerably in sorting out the applications which are now pending and those which are still being contemplated.

[6] During another telephone conference call, involving all the parties or their representatives, held subsequent to the hearing of the security for costs application, certain other matters were discussed and some agreements were reached.

[7] The respondents have decided to file an amended application to seek leave to amend their defence and to have counsel for the applicant removed as solicitors of record. Another application seeking further production will be filed no later than August 11, 2006 should the respondents decide to proceed with it. All pending and contemplated applications are at the instance of the respondents herein.

[8] According to correspondence dated May 28, 2006 (received via facsimile on May 29, 2006) Mr. Lienaux indicated that:

> This is to advise that Mrs. Turner-Lienaux and myself will be filing an amended application in place of the application filed December 12, 2005. This application will be amended in two ways:
>
> (i) it will show the correct parties to the proceeding in accordance with the order which has been circulated (this will *ipso facto* eliminate the counterclaim against the Bank); and
>
> (ii) it will amend the defence to include additional remedies raised by information contained in documents contained in Mr. Parish's list of documents filed on April 25, 2006. Our

> amended application -- as did the original application -- will apply for leave to amend the defence.
>
> The substantive relief sought in the application will not be changed because we will be seeking leave: (a) to amend; and (b) to remove Parish and Giles from the action because they will be called as witnesses for the defence. We will also still be calling Mr. Harper as a witness for the defence but since the Bank is no longer a party it is no longer necessary to have him removed as counsel so his name will be dropped from the application.

The Positions of the Parties:

[9] **Applicant** — The applicant seeks an order against the respondents to post security for costs for the following reasons:

> (i) In a previous application the Court ordered solicitor-client costs against the respondents in the sum of $27,606.93. This costs award was upheld on appeal. The Court of Appeal then ordered the respondents to pay additional costs of $6,000.00 plus disbursements. Despite numerous demands for payment, these costs remain outstanding.
>
> (ii) In other related litigation, one of the respondents, Ms. Turner-Lienaux, was ordered to pay solicitor-client costs to Mr. Wesley G. Campbell. Mr. Campbell was at one time a third party in this action but the claim against him was eventually discontinued. If post judgment interest is added, the total amount of costs still outstanding on this other file likely exceeds $400,000.00. As of March 30, 2006, some five years after the first judgment on solicitor-client costs was obtained, only $6,465.15 has been paid by way of a garnishee of Ms. Turner-Lienaux's salary.
>
> The failure to pay previous costs awards has been previously commented upon by Justice T.E. Scanlan in an unreported decision rendered October 25, 2000. This arose in the context of the other related matter. As well, in a decision rendered by Justice N. J. Bateman of the Nova Scotia Court of Appeal in **Smith's Field Manor Development Ltd.** v. **Campbell**, [2001] N.S.J. No. 333 at para 29, reference was made to yet another case in which Ms. Turner-Lienaux had an outstanding judgment against her for costs in the amount of $59,000.00.

This arose out of an unsuccessful legal action taken by her against the Province of Nova Scotia.

(iii) The respondents propose amending their application which was originally filed with the Court on December 12, 2005. They seek leave to amend their defence as permitted in **Lienaux** v. **2301072 Nova Scotia Ltd.**, [2005] N.S.J. No. 247, a decision of the Nova Scotia Court of Appeal written by Roscoe, J.A. on the 21st day of June, 2005. They also seek an order to have counsel for the applicant removed as counsel of record. The respondents propose to amend this application to seek permission to make additional amendments to their statement of defence over and above those permitted by the Court of Appeal. Also, since the Toronto-Dominion Bank is no longer a party to the action and has not been since February 8, 1999, the counterclaim will be dropped from the proposed amendments. The applicant argues that these applications are being made in an effort to launch further attacks against them and are not being made to simply sure up a defence. As such the Court should order the respondents to post security for costs before they are allowed to go on the offensive.

[10] **Respondents** — The respondents oppose the application for the following three reasons:

(i) 2301072 Nova Scotia Limited is not a lawful plaintiff in this proceeding;

(ii) 2301072 Nova Scotia Limited and the Toronto-Dominion Bank committed fraud upon the Court by concealing from the Court documents which disclose that in or about 1996 the Bank, CDIC and 2301072 entered into a champertous agreement whereby the Bank and CDIC agreed to allow 2301072 to attempt to doubly recover moneys owing pursuant to the Notes and Mortgages; and

(iii) Mr. Alan Parish, Q.C., has not complied with Justice F.C. Edwards' direction to make full disclosure of all documents which might provide any information to the Lienauxs to assist in the preparation of their defence of this application.

THE LAW

[11] **Civil Procedure Rule** 42 deals with security for costs. The rule states that:

> 42.01. (1) The court may order security for costs to be given in a proceeding whenever it deems it just, and without limiting the generality of the foregoing, it may order security to be given where,
>
> (a) a plaintiff resides out of the jurisdiction; [E.23/1(1)]
>
> (b) a plaintiff is ordinarily resident out of the jurisdiction, though he is temporarily within the jurisdiction;
>
> (c) a plaintiff commences a proceeding to enforce a cause of action that is the subject matter of an earlier proceeding commenced by the plaintiff and still pending;
>
> (d) a plaintiff, or any person through or under whom he claims, has a judgement or order against him for costs that have not been paid;
>
> (e) a proceeding is brought by a nominal plaintiff; [E. 21/1(1)]
>
> (f) upon the examination of a plaintiff it appears that there is good reason to believe that the proceeding is frivolous and vexatious, and that the plaintiff is not possessed of sufficient property within the jurisdiction to pay costs;
>
> (g) a proceeding is brought on behalf of a class and the plaintiff is not possessed of sufficient property to answer the costs, and it appears that the plaintiff is put forward or instigated to sue by others;
>
> (h) by an enactment, a party is entitled to security for costs;
>
> (i) a plaintiff, with the view to evading the consequences of the litigation, has not stated his address in the originating notice, or stated it incorrectly therein, or changed his address during the course of the proceeding. [E. 23/1(1)]

[12] **Rule** 42.04 states:

> 42.04. The provisions of Rule 42 shall apply to counterclaims and third party proceedings, with any necessary modification.

DISCUSSION:

[13] The respondents are defendants in the main action while Mr. Lienaux is also a defendant by cross-claim. They have not counterclaimed against the applicant. Although the application filed on December 12, 2005 originally included a counterclaim against the Toronto-Dominion Bank, Mr. Lienaux subsequently indicated that they intended to drop their claim and proceed with amendments to the defence only.

[14] In the very latest development of this rather protracted piece of litigation, Mr. Lienaux notified the Court in writing by letter dated June 15, 2006 that:

> In the process of drafting an amended defence to this action it is becoming apparent that the only proper manner in which it can be defended is if the Toronto-Dominion Bank is a party.

[15] He went on to state:

> ..... the defendants shall also be applying for an order of the Court reinstating the Toronto-Dominion Bank as a plaintiff in this proceeding.

[16] This led to another round of written submissions from counsel all of which were received with the Court's permission. I have considered all of these supplementary written submissions in arriving at this decision.

[17] The respondents are entitled to defend themselves against the claims made by the applicant and the Third Party. The Nova Scotia Court of Appeal in the decision of Roscoe, J.A., *supra*, clearly spells out just what new issues may be raised by the respondents in their defence.

[18] However, the respondents have served notice that they plan on raising other issues that they say only came to light after there receipt of further disclosure from counsel for the applicant.

[19] In addition, they continue to raise allegations that the applicant and the Toronto-Dominion Bank committed fraud upon the Court. Also, in the course of arguing against the application, Mr. Lienaux suggested that the applicant was improperly

maintaining the lawsuit against him and Mrs. Turner-Lienaux and were therefore violating the laws against maintenance and champerty. An interesting argument but not one that deserves much consideration whatsoever at this stage. It simply serves to hi-lite the kind of persistent attacks which the respondents have made and continue to make in this case of which, to date, none have been found to have any merit whatsoever.

[20] There can be no doubt that the respondents are permitted to amend their defence in accordance with the earlier decision of Justice Roscoe, *supra*. Any amendments over and above those permitted by the Court of Appeal will, unless agreed to be all counsel, have to be the subject of an application. Before any such application will be heard, the respondents will be required to post security for costs as hereinafter ordered.

[21] With regard to the application to have Mr. Giles, Q.C., and Mr. Parish, Q.C., removed as counsel for the applicant, the respondents will also be required to post security for costs before this will be allowed to proceed. Given the respondents track record for failing or perhaps ignoring to pay previous costs awarded against them, I believe it is only fitting that they be ordered to post security for costs even though they are not plaintiffs. Clearly, they have indicated their intention to aggressively pursue not only a defence but also monetary damages, as well. They might wish to characterize such intended action as being part of their defence but it has a very thin disguise and not one that the court is fooled by. It involves a counterclaim and if the respondents decide to pursue it then they must obtain the consent of counsel or else make application in accordance with the **Civil Procedure Rules**

[22] In respect to any other contemplated applications that are not for the express purpose of enabling the respondents to amend their defence in accordance with the earlier decision of the Court of Appeal, the respondents will be required to post additional security for costs as hereinafter stipulated.

DECISION

[23] Prior to the hearing of any application to amend the defence beyond that allowed by the Nova Scotia Court of Appeal, *supra*, or the hearing of the respondents application to have counsel for the applicant removed as counsel of record, the respondents shall post security for costs of $25,000.00.

[24] Should the respondents decide to proceed with an application to join the Toronto-Dominion Bank as a party, additional security for costs of $10,000.00 will have to be posted when the documents are filed. If the respondents decide to make any other applications, including an application for further production as referred to previously, the issue of security for costs might have to be re-visited at that time.

[25] Additionally, before any applications either for further amendments to the defence or otherwise (other than the permitted amendments authorized by the Nova Scotia Court of Appeal) will be heard, all awards of costs previously made by this Court and the Nova Scotia Court of Appeal in this particular matter (S.H. No. 102390) must first be paid along with any and all interest that has accrued to the date of payment. Until these sums and the other amounts indicated in this decision have been paid only those amendments to the defence permitted in the Roscoe, J.A. decision, *supra*, will be allowed to be made.

[26] The costs of this particular application shall be in the cause.

J.