

Date: 20020718
Docket: S. H. 171426

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *Colbyphysio Clinic v. Ruiz*, 2002 NSSC 183]

BETWEEN:

COLBY PHYSIOCLINIC LIMITED

PLAINTIFF

- and -

PHILIP RUIZ

DEFENDANT

- and between -

PHILIP RUIZ

PLAINTIFF BY COUNTERCLAIM

- and -

COLBY PHYSIOCLINIC LIMITED, MIKE
SUTTON and ANNE NELSON

DEFENDANTS BY COUNTERCLAIM

DECISION

HEARD BEFORE: **The Honourable Justice Glen G. McDougall, Supreme Court
of Nova Scotia, on April 25th, 2002, at Halifax, in Chambers**

DECISION: **April 25, 2002 (Orally)**

WRITTEN DECISION: **July 18th, 2002**

COUNSEL: **Mr. G. Grant Machum, for the Plaintiff
Mr. Jason P. Gavras, for the Defendant**

McDougall, J.:

BACKGROUND FACTS:

- [1] Philip Ruiz (“Ruiz”) was employed as a physiotherapist by Colby Physioclinic Limited (“Physioclinic”). He ran their Pictou clinic.
- [2] By letter dated April 26, 2001, Ruiz gave notice to his employer of his resignation effective May 24, 2001. Physioclinic, for reasons that need not be mentioned here, terminated its contractual relationship with Ruiz on May 14, 2001.
- [3] In addition, Physioclinic filed suit against Ruiz on May 15, 2001. This originating notice (action) and statement of claim was filed at Halifax, where Physioclinic had its head office.
- [4] Ruiz filed a defence and counterclaim on June 8, 2001 and later an amended defence and counterclaim on June 18, 2001. The counterclaim added the names of two of the principals of Physioclinic personally as defendants. The additional defendants named in the counterclaim reside and/or work in Halifax.
- [5] Ruiz now seeks an order for a change of venue under *Civil Procedure Rule* 28.02. He offers a number of factors that he contends would warrant a move from Halifax to Pictou, including:

1. The cause of the action arose in Pictou (paras 10-15, Ex. "A", Statement of Claim, *Ruiz Affidavit*);
2. The defendant resides in Pictou with his wife and two young daughters and is the sole provider for his young family (para 6, *Ruiz Affidavit*);
3. Both of the clinics involved in this action are located on main street in Pictou and are convenient for viewing (para 5, *Ruiz Affidavit*);
4. The defendant intends to call most, if not all, of the approximately 25 patients that transferred from the Pictou Physioclinic to Back to Basics to give evidence in response to the plaintiff's allegation that they were solicited by the defendant. These patients live in Pictou County (para 11, *Ruiz Affidavit*; paras 10, 15(a) Statement of Claim, Ex. "A", *Ruiz Affidavit*);
5. Some of the transfer patients suffer from multiple sclerosis and it would be difficult for them to travel to Halifax (para 7, *Ruiz Affidavit*);
6. The defendant currently intends to call many, if not all, of the 7 - 10 doctors to whom the defendants by counterclaim sent letters to provide evidence in support of the defendants counterclaim for defamation (para 10, *Ruiz Affidavit*);
7. The trial may be 2 - 3 weeks long and the defendant will have to close his clinic down if the trial is in Halifax which will leave his secretary and kinesiologist unemployed for that period of time (paras 13 - 14, *Ruiz Affidavit*);
8. The plaintiff would not have to close any clinics down since the representatives of the plaintiff act in an administrative capacity and do not run clinics (paras 18 - 19, *Ruiz Affidavit*);

9. The defendant also intends to call his bank manager and kinesiologist (both of whom were discovered by the plaintiff in New Glasgow) to provide evidence and they reside in Pictou County (para 7, *Ruiz Affidavit*);
 10. The current physiotherapist at the Pictou Physioclinic resides in New Glasgow and the defendant intends to call him as a witness (this would also work to the plaintiff's benefit) (para 12, *Ruiz Affidavit*);
 11. The expense of bringing all of these many witnesses and the doctors into Halifax to give evidence would be immense for the defendant and highly disruptive to the doctors, and their patients given the scheduling uncertainties at trial (paras 16 - 17, *Ruiz Affidavit*).
- [6] Physioclinic opposes the change based on the following factors:
1. The plaintiff company's head office is in Halifax;
 2. The president and sole owner of the plaintiff company, Michael Sutton, resides in Halifax;
 3. The two individuals named as parties by Ruiz reside and work in Halifax;
 4. All counsel involved in the matter reside in Halifax;
 5. All applications to date have been heard in Halifax;
 6. The defendant's employment contracts were completed in Halifax;
 7. All of the management personnel employed by the plaintiff reside in Halifax;
 8. All of the plaintiff's key witnesses reside in Halifax;
 9. The action was commenced in Halifax;

10. All discovery examinations with the exception of brief examinations were held in Halifax.

ANALYSIS:

- [7] I think the law is clear in that it is the plaintiff who decides the venue in which to commence an action. In this case Physioclinic chose Halifax and with good reason. Its base of operations, despite the fact that they probably have a number of clinics throughout the province, is here in Halifax. It was the most logical place to commence the action. No one has suggested that the decision to choose Halifax was capricious, so I will not deal with that other than to say it was obviously not.
- [8] The person or party making the application has the onus of establishing why a change of venue should be granted. Although there is not a lot of case law on point (probably due to the fact that not a lot of these kinds of applications are made) there is some case law of long standing that usually gets mentioned in any decision from this court. I refer particularly to the decision of Justice Louis Dubinsky in the case of *Shortliffe's Grocery Ltd. v. Irving Oil Co. et al* (1975), 9 N.S.R. (2d) 629. Justice Dubinsky at page 641 wrote:

All supported the principle that the plaintiff in an action has the right to control the course of litigation and to select the forum and this right is not to be interfered with unless it can be shown by strong evidence that the great preponderance of convenience warrants the change - - in short that it is just for the change to be ordered.

[9] Justice Dubinsky at page 637 also stated:

Hence, I would say that when the plaintiff has not acted capriciously in changing his venue, but there is a **manifest preponderance of convenience** [emphasis added] in trying the case . . .

[10] This, I think, is a fairly heavy onus to put on the person or party making the application, but nonetheless that is the status of the law in our province.

[11] Although there are a number of reasons why it would be more convenient for the defendant/plaintiff by counterclaim to have the venue changed, I am not satisfied that the great preponderance or the manifest preponderance of convenience has been established to warrant a change of venue.

[12] It is probably true that more witnesses will be called from outside of Halifax. How many more is a matter for speculation at this time. The exact number will not be known until the trial actually takes place. It is equally true that a number of the witnesses called will reside in and around Halifax. If I were to grant the application, the inconvenience would then be transferred to them. Regardless of where the trial takes place, someone will inevitably be inconvenienced.

- [13] The scheduling of witnesses is something counsel for both parties can try to work out to minimize the inconvenience not only to the witnesses but to the people they provide service to. I am thinking particularly of the doctors that might be called to support the defendant's counterclaim.
- [14] With regard to closing down practices to attend at trial, I think that is going to occur regardless of whether the trial is held in Halifax or in Pictou. It would, no doubt, be more convenient for the defendant to schedule patients after hours if the trial was held in Pictou, but New Glasgow is not that far removed from Halifax that he could not drive home on occasion to meet them after hours.
- [15] Indeed, if the trial date is known far enough in advance (and I suggest that the defendant will probably have sufficient lead time) then arrangements can be made to have a replacement physiotherapist covering for him. I would think that the defendant, on occasion, must have to bring in a replacement physiotherapist unless he works 52 weeks of the year. Surely if he wants to take any time off to spend with his family he must have someone cover for him in case of emergency. He should be able to make other arrangements to ensure his patients receive the care they need.

- [16] In an application of this nature it should not be left to the party proposing to call more witnesses to select the venue. In any event, a lot of the witnesses that the defendant proposes to call would not likely be on the witness stand for any great length of time. If they all had to be called, it would not take very long to go through them. This would be particularly so if they were simply called to deny that they had been solicited by the defendant.
- [17] For these reasons I am denying the application and awarding costs to the other side in the amount of \$500.00, payable forthwith.

J.