IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Atlantic Home Warranty Program v. Austin Contracting Ltd., 2014 NSSM 74

Claim No: SCCH 426289

BETWEEN:

Name	Atlantic Home Warranty Program	**Claimant**
Address	c/o Tyana R. Caplan Stewart McKelvey 900 – 1959 Upper Water Street Halifax, NS B3J 2 X2	
Phone	(902) 420-3200	

Name	Austin Contracting Limited and James Taylor	**Defendants**
Address	c/o Bernie Conway Anderson Sinclair Barristers & Solicitors 92 Webster Street Kentville, NS B4N 1H9	
Phone	(902) 679-0110	

Tyana R. Caplan and Ian Breneman appeared on behalf of the Claimant.

Bernie Conway and Zachary Chisholm (Articled Clerk) appeared on behalf of the Defendants.

DECISION

This matter was originally set down for hearing on November 25, 2014. However, two issues subsequently arose. The most recent was an adjournment, which I granted, due to Mr. Taylor's illness. Mr. Conway provided the court with a scanned copy of a note from Mr. Taylor's doctor. Ms. Caplan consented. The other motion is for a stay of proceedings on the ground that an action was started in the Supreme Court of Nova Scotia on the same grounds as provided in the Notice of Claim. That is the subject matter of this decision.

For the reasons that follow, I dismiss the motion of the Defendants and order the matter to be rescheduled for hearing on its own merits in the Small Claims Court.

No evidence has been heard by me. The basis for this motion can be readily ascertained from the file. The file consists of pleadings, several subpoenas, two briefs filed by the Claimant, one a pre-hearing brief for when the matter proceeds to trial, the other pertains to this motion. Mr. Conway also submitted a brief for his motion. While the allegations in the pleadings are contested, the facts surrounding the motion are not.

The Facts

The Atlantic Home Warranty Program commenced its claim against the Defendants by a Notice of Claim dated April 11, 2014. The Claimant is described in the Claim as "a not-for-profit organization that provides new home warranty certification for its builder members". The Defendant, Austin Contracting Limited ("Austin Contracting") is a "builder member" and the Defendant, James Taylor, is the owner, officer and director of the company. The claim alleges that work was performed at a certain property in Beaverbank. The Claimant found certain aspects of the work to be deficient. On April 24, as provided in the warranty, AHWP directed the Defendant company to correct the deficiencies. The Defendant did not do so, and a new contractor was hired to complete the work. The Claimant sought repayment from both Austin Contracting and Mr. Taylor personally. Mr. Taylor is purported to have signed a personal guarantee. The claim is for $4975.75 plus interest and costs.

The Defendants filed a Defence on May 15, 2014. The Defence is effectively a *pro forma* denial of liability and, in addition, alleges the Claimant is attempting to split its claim. The Defense contains an error referring to section 9(2) of the *Small Claims Court Act*; s. 13 of the *Act* deals with division of claims.

The Defendants commenced an action on May 15, 2014, in the Supreme Court of Nova Scotia alleging the Claimant made payments out of funds held by it, and further their actions were "unnecessary, excessive or negligent". It then states (Austin Contracting and Taylor) have suffered a loss and (ANHW) has received a benefit. They allege breach of contract and unjust enrichment. Austin Contracting and Taylor are seeking unspecified special damages, general damages, prejudgment interest, costs and "a declaration that (Austin Contracting and Taylor) and both of them do not owe (ANHW) any monies."

Subsequently, Austin Contracting and Taylor filed a new Claim in Small Claims Court on their own accord alleging similar grounds to the Supreme Court action (SCCH 433487).

Issues

The issue is straightforward, have the Defendants established grounds for a stay of proceedings due to the commencement of the Supreme Court action?

The Law and Findings

Concurrent Jurisdiction

The Small Claims Court is a statutorily created court, whose structure and procedures are governed by the *Small Claims Court Act*. It is a court of limited jurisdiction whose cases may be appealed to the Supreme Court of Nova Scotia. As a result, the *Act* makes provision for the resolution of concurrent pleadings in both levels of court through section 15 which states as follows:

"The Court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19."

These sections require the Small Claims Court to stay those matters which are already before another Court. Mr. Conway acknowledges the matter was not already before the Supreme Court of Nova Scotia. I note there is no motion or request to transfer the Supreme Court action to Small Claims.

Transfer or Joinder of Claims

The procedure for transferring cases down from the Supreme Court to the Small Claims Court is, as noted, provided in s. 19:

"(2) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court or a city court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the defendant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court or the clerk of the city court, as the case may be, shall transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.
(3) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the claimant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.
(4) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, a judge of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act."

Mr. Conway submits that I should consolidate the matters as they arise from the same issue. I quote s. 25 of the Act:

"**Joinder of hearing of claims**

25 Where an adjudicator is satisfied that there are two or more claims before the adjudicator which would be best dealt with together, the adjudicator may in his discretion hear the claims at the same time."

There has been a matter filed subsequently in this Court which resembles the Supreme Court action. It appears to have been filed by Mr. Taylor on his own; clearly, it was not prepared by counsel. However, given that the same issue is already before the Supreme Court, it is not clear if that matter will be able to proceed in Small Claims Court in light of the clear language of s. 15.

Like the Supreme Court action, it lacks particulars. Thus, I am unable to conclude the matters are related. The Small Claims Court lacks authority to consolidate a Claim with a Supreme Court action or to compel the Supreme Court to accept a transfer of one of its cases. That is a prerogative of the superior court. Should a party feel there is a need to consolidate the matters, the application is to be sought before the Supreme Court. In any event, no motion was made to dismiss Claim SCCH 433487 or order it consolidated with the instant case.

In summary, there is no jurisdiction to transfer the instant case to Supreme Court or consolidate it with SH 427393. The only option available to me is a stay of proceedings.

Stay of Proceedings

The test for a stay of proceedings is found in the jurisprudence arising from the decision of Hallett, J.A., in *Fulton Insurance Agencies v. Purdy* (1990), 100 N.S.R. (2d) 341 (CA). In her brief, Ms. Caplan cites a case which followed this decision, namely, *American Home Assurance Company et al. v. Brett Pontiac Buick GMC et al.*, (1991), 105 N.S.R. (2d) 425. In that case, Saunders, J. (as he then was) stated the following:

"In **Canadian Imperial Bank of Commerce v. Ria-Mar Fisheries Limited**, (1985), 71 N.S.R. (2d) 446 (T.D.), Mr. Justice Kelly applied the test for a stay of proceedings as laid down in **St. Pierre et.al. v. South American Stores (Garth and Chaves)**, Limited et.al. (1936) 1 K.B. 382. There Scott, L.J., said mere inconvenience to the defendant would not be enough to deprive the plaintiff from bringing his action. He went on to express a two-fold test for granting a stay:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and
>
> (b) the stay must not cause an injustice to the Plaintiff. On both the burden is on the defendant." (at p. 398).

While inconvenient, there is no evidence before me of any "prejudice" to the applicants. The defendants' claims are authorized by statute and so cannot amount to an abuse of process: **Northeast Building Supplies Limited v. Ridgeway Investments Limited**, (1989), 90 N.S.R. (2d) 373.

It is also an important consideration that these claimants have opted to have their cases decided expeditiously in the Small Claims Court. In **MacDonnell v. Willton**; **Hall v. Chisholm**, (1986), 70 N.S.R. (2d) 76, Hall, L.J.S.C. refused to transfer proceedings from Truro to Sydney as to do so would delay the hearing. At p. 77 he wrote:

> " Certainly, to the parties, an early trial date is a most significant consideration so that their claims may be disposed of as soon as possible. It is an important factor in any litigation. It seems to me that it would be unreasonable for me to grant an application that would cause a further delay of at least nine (9) months and possibly a year or even more in the conclusion of the proceedings by transferring the trials to Sydney."

The language of this Claim is clear. The Claimant seeks compensation for the remediation of work performed by it and paid out of the Atlantic Home Warranty Program. The Statement of Claim in the Supreme Court action lacks any particulars as to the locations of any work or properties. In making this finding, I need not find the pleadings are sufficient to allow the matter to continue. However, there must be more of a nexus other than to state that its actions were part of "several claims for the work and material provided by (Austin Contracting)" and they "contracted with third parties to further address the complaints to the objection of (Austin Contracting)". The standard must be higher in order to establish a connection. Virtually any claim under the Program to be heard in this Court or the Supreme Court could fit into this

description. I find the Defendant has not discharged the onus to justify a stay on this ground. Before moving from this subject, I note the words of Justice Saunders:

"Section 15 provides:"The court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with subsection (2) of Section 19."

I do not regard Section 15 as a means by which a defendant could thwart any action taken against it by simply deciding to sue as a plaintiff in the Supreme Court. Such an attempt to oust the jurisdiction of the Small Claims Court would be attributing a meaning to words which would defeat the purpose of the legislation. In other words it would be the very abuse of process about which these applicants have complained.

The words in Section 15 should be given their plain meaning. The word "already" must refer, in my respectful view, to proceedings previously commenced in either the County Court or the Supreme Court. In all cases the court may consider the pleadings to ensure that they are properly prepared, motivated and show a legitimate cause of action. There is no evidence that these actions, previously commenced in the Small Claims Court were abusive, or launched with any mala fide intent."

In her brief, Ms. Caplan has cited decisions of my colleagues, Adjudicator Augustus Richardson, QC, in *Lake Mechanical v. Ainsworth Atlantic* 2006 NSSM 18 and Adjudicator Michael J. O'Hara in *The Roofing Connection v. Select Projects Ltd.*, 2011 NSSM 20. I have found their decisions helpful and I am in full agreement with their reasoning. However, as I have already made my findings, I need not offer any further comment or make reference to these cases.

Division of Claims

In their Defence, the Defendants allege that the matter is truly part of a larger claim commenced in the Supreme Court. The hearing of such a claim is contrary to s. 13 of the Act. That provision states as follows:

"A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the Court."

Mr. Conway relies on the decision of Justice Saunders in *Paul Revere Life Insurance Company v. Herbin* (1996), 149 N.S.R. (2d) 200. In that case, Justice Saunders was considering a case of an insured making a claim against his policy of disability insurance. The insured sought to file a claim annually to bring the matter under the *Small Claims Court Act* rather than address it in the Supreme Court. His Lordship stated the following:

"I accept Ms. Smith's submission that there is a real likelihood here of as many as 69 separate applications by Mr. Herbin before the Small Claims Court tribunal, with a potential exposure of almost half a million dollars. All of that could well lead to contradictory decisions from different adjudicators on what would arguably be the same material evidence, to say nothing of the added and continuing expense of having to relitigate the same issues, with perhaps the same testimony, repeated by the same witnesses, including experts every time the matter was heard in the Small Claims Court.

For those reasons, I conclude that it would be an abuse of process for this matter to remain in the Small Claims Court....

.... I accept counsel's submission on behalf of the insurer that the very rationale for the establishment of the Small Claims Court was that *small claims* would be quickly and inexpensively adjudicated. Naturally, such claims are heard without access to the usual pre-trial procedures, productions, discovery of parties and discovery of experts, as would be accommodated under our own **Civil Procedure Rules**.

This case is anything but a *small claim*. Having found as I do that there is a real potential for this claim to lead to repeated and identically issue-based claims approaching half a million dollars, it seems to me that the Legislature could hardly have intended the statute to apply to cases such as this." (underlining mine)

Adjudicator Richardson considered the issue in *Rayner v. Smith* 2010 NSSM 6. He provided the following:

"[41] Finally, there is the issue of s.9 of the *Small Claims Court Act*. The section provides that a person "may make a claim under this Act

a. seeking a monetary award in respect of ***a*** matter or thing arising under ***a*** contract or ***a*** tort where the claim does not exceed $25,000.00 ...
b. [not relevant]
c. requesting the delivery to the person of specific personal property where ***the*** person property does not have a value in excess of $25,000.00; ***or***
d. [not relevant].

[42] The use of "or" between s.9(c) and s.9(d) means that the subparagraphs of s.9 are to be read disjunctively. That, and the fact that the subparagraphs refer to "***a*** contract" or to "***specific*** personal property," indicate to me that the Legislature intended the $25,000.00 limit to apply to specific and particular contracts, torts or pieces of personal property. In other words, so long as each was separate and distinct a claimant could launch a claim on such contracts even if the total of all such contracts exceeded $25,000.00.

[43] So for example if there were three joint loans, each for $25,000.00, taken out over the course of a relationship, into which one partner had also had brought a family heirloom worth $25,000.00, then in my view s.9 would permit the following:

a. one claim in respect of each loan, and
b. one claim in respect of the family heirloom.

[44] The fact that the total value of four claims exceeded $25,000.00 would not bar the individual claims ***so long as*** each contract was separate and distinct from the other.

[45] The trick of course will be to distinguish between those contracts which are separate and distinct and those which are part and parcel of a larger, ongoing relationship in which there was a "basic agreement" that loans taken out would be either gifts or equally shared." (underlining mine)

In my opinion, these two cases are not inconsistent with each other or the facts in this case. In the *Herbin* case, Justice Saunders was dealing with one insured in a policy related specifically to him, and one cause of disability. In *Rayner*, the parties had several issues to be addressed in the breakdown of a common law relationship. These were separate issues authorized by statute. I find the circumstances under this type of policy are more akin to the situation experienced by Adjudicator Richardson. Indeed, I find the logic of his decision applies more strongly to this case.

I recently had occasion to consider this issue in *Morris v. Mariana Cowan Real Estate Ltd. et al.*, 2014 NSSM 56. In that case, I stated the following, which I believe applies here as well:

"Section 13 exists to prohibit fanciful arguments designed to make one claim with identical facts sound like two or more separate actions. Justice Saunders' comments regarding the wrongful dismissal claim, namely a plaintiff seeking to divide the year's claim down into smaller claims each based on one month of damages, in order to take advantage of the monetary limit of the *Small Claims Court* is an example of such an abuse. In my view, that is why his Lordship characterized the analogy by the insurer's counsel, Ms. Smith (now Associate Chief Justice Deborah K. Smith of the Supreme Court of Nova Scotia), as apt. However, s. 13 is not designed to prevent the severance of legitimate claims arising out of distinct circumstances or contracts."

The Atlantic Home Warranty Program coverage is like an insurance contract, however, it differs in many respects from the insurance contracts in *Paul Revere Life Insurance Company v. Herbin* and *Imperial Life Financial v. Langille* 1998 NSSC 1611. This case concerns the application of the AHWP to a home in a specific set of alleged deficiencies. Mr. Conway submits that this is one matter, and all individual claims ought to be considered together. With respect, I do not agree. The application of the Program is more similar to a contract of automobile or homeowners' insurance than a disability insurance claim based on one injury or illness. While I acknowledge the relationship differs due to the subrogation of the insurer typically found in an automobile insurance policy, any of the cases dealing with the Program cannot be presumed to arise from the same facts. The hearing of construction cases with different facts, different contracts between the aggrieved parties and the individual builder members, and, indeed, different homes, all create different relationships. The hearing of them together would be unwieldy.

I reject that this is a division of a larger claim for the reasons mentioned in this section. As noted previously, I also find a lack of sufficient particulars in the Supreme Court pleadings to establish a connection.

Summary

For the foregoing reasons, the application for a stay of proceedings is denied:

- The original claim was filed prior to the action in Supreme Court. Thus, I have the option to either stay the proceedings or seek to consolidate them with SCCH 433487. I do not have the jurisdiction to compel the Supreme Court of Nova Scotia to accept jurisdiction over this matter.

- The pleadings in the Supreme Court action lack sufficient particulars to demonstrate that they apply to the facts alleged in this matter. Thus, the Defendants have not discharged the onus to establish that a stay is warranted.

- The Defendant has not demonstrated that the matter is a divided claim.

For any or all of the above reasons, the motion is denied. I order the matter set down on a night for a special hearing, that is, a hearing in excess of two hours.

Dated at Halifax, NS,
on December 22, 2014.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)