Claim No. SCCH 265354
Date:20070101

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Gulf Trading Inc. v. Irving Oil Ltd., 2007 NSSM 1

BETWEEN:

GULF TRADING INCORPORATED, doing business as MARKLAND INN BY THE SEA

Claimant

- and -

IRVING OIL LIMITED

Defendant

Adjudicator: David TR Parker
Heard: November 9, 2006

Counsel: The Claimant was represented by Charles MacLean
The Defendant was represented by Counsel, Donn Fraser

ORDER

Parker:-This matter came before the Small Claims Court of Halifax and Province of Nova Scotia on the 9th day of November, A.D. 2006

The Claimant was represented by Charles MacLean.

The Defendant was represented by Counsel Donn Fraser.

Mr. MacLean is the owner and operator of the Claimant Company which company operates as a tourist type business primarily between mid-June and mid-October.

The Claim is for $25,000.00 representing "charges (to the Claimant) for propane that leaked from their equipment."

Charles MacLean provided testimony for the Claimant and after closing its case and tendering its exhibits Counsel for the Defendant brought forward a motion for non-suit and for judgment against the Claimant on the Defendant's counterclaim.

With respect to the Counterclaim of the Defendant and Claimant by Counterclaim, the Claimant and Defendant by Counterclaim acknowledged that it received goods and supplies from the Defendant and that the amount outstanding is acknowledged as being $8,529.03.

The question that I am faced with is the following; is there sufficient evidence before me to allow the claim to go forward? When layperson's are involved in the Small Claims Court process it is often necessary for an Adjudicator hearing the matter to advise that person of steps in the proceeding prior to its commencement.

The question that is always asked of both sides is, do they any questions about the procedure in the Small Claims Court or do they have any questions about presenting their case? Even in no questions come forward the parties are advised particularly if a layperson is involved, that it is necessary for The Claimant to show there was a contract and there was a breach of contract or there was a tort either intentional or unintentional that was committed. Secondly for a claim to succeed a claimant must prove damage and damages ensuing from the breach of contract or civil wrong committed. Basic rules of evidence are explained, in particularly weight given or rather lack of weight given to affidavit evidence or critical documentary evidence they intend to submit to prove their claim, where the author of that evidence is not present to be cross-examined and it is challenged by the opposing side. The Claimant is also explained the onus of proof required in civil litigation and the concept of balance of probabilities. It is also not unusual to advise all parties that it is not unusual for the parties to talk to each other if they

have not done so with a view of settling their affairs and that no inference one way or the other will be drawn by the court if they wish to do so. This is often done at the beginning of the court proceedings especially when more than one case is set down for hearings on that particular day.

After these preliminary functions are performed, the parties are asked if there are any objections as to the case not proceeding, and they are also asked if either party wishes to make any preliminary motions to the Court prior to commencing with the evidence. The parties are then asked who their witnesses are and then they are asked if there is any request for exclusion of witnesses. Once these preliminary matters are dealt with, then the Claimant may make a preliminary statement if he should desire to do so and then the Claimant's witness is sworn in or affirmed by the Court, and the trail proceeds accordingly. These steps were followed in this case.

As is often the case the pleadings of a lay Claimant are often not particularized to determine easily if it is a breach of contract for which the Claimant is taking an action or is it a result of tort committed. The Small Claims Court operates on the Legislative directive of natural justice and this allows the Court to hear the evidence of the Claimant and then make a determination of what area of the law the claim is founded. Among other things it is necessary for the Adjudicator to consider all the elements or simple or specialty contacts all the elements of an unintentional tort and the classifications of intentional torts that are recognized by the Courts and then determine if they are present before the court.

The Law

I will first layout the law on non-suit motions.

The case of *Walker v. Scotia Career Academy Ltd.* 117 N.S.R. (2d) 316 was submitted by Counsel which I thank him for, and deals with a Small Claims Court matter that was appealed to the Supreme Court wherein the Small Claims Court refused a motion for non-suit. The motion for non-suit would succeed only if the evidence before the Small Claims Court would show there was a fundamental breach of contract that would lead to a total lack of consideration on the part of the Appellant. The Supreme Court looked at the facts as determined by the Small

Claims Court and said those facts did not amount to a fundamental breach and since it had to exist in order for the Respondent (Claimant) to succeed the motion for non-suit should have been granted.

The case *Knox v. Maple Leaf Homes* [2002] N.S.J. No. 555, Justice LeBlanc of the Supreme Court of Nova Scotia discusses the parameters of a non-suit motion.

At paragraph 18, Justice LeBlanc referencing other cases stated,

> 18 The test on a non-suit motion is whether the plaintiff has established a prima facie case, or, as it is sometimes described, "whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff": MacDonell v. M & M Developments Ltd. (1998), 165 N.S.R. (2d) 115 (C.A.). A trial judge considering whether to grant a non-suit must consider the sufficiency of the evidence, not weigh it or evaluate its believability. The question is whether the inference the plaintiff suggests could be drawn from the evidence if the trier of fact so chose: Sopinka et al., The Law of Evidence in Canada (2d edn.)(Butterworth's, 1999) at para. 5.4. The decision depends "on all the circumstances of the case, including the issues of fact and law raised by the pleadings": J.W. Cowie Engineering Ltd. v. Allen, [1982] N.S.J. No. 39 (S.C.A.D.) at para. 15.

I also refer to Justice Nathanson's decision *David v. Halifax (Regional Municipality)* [2003] N.S.J. No. 10 where he refers to Cross on evidence (4th Edition), para 66:

> "...questions of the sufficiency of evidence are usually raised on a submission that there is no case to answer made by the opponent of the issue. When ruling on such a submission, the judge assumes that the proponent's witnesses are telling the truth in cross-examination, as well as in their evidence-in-chief, and on matters which are unfavourable to the proponent, as well as those which are in his favour. He may rule in favour of the submissions either because the proponent's evidence discloses no case as a matter of law or else because of the weakness of the proponent's evidence." [emphasis added]

The case of *Colford vs. Randell et al.* (1975) 20 N.S.R. (2d) 195 (S.C.T.D.) sets out the test for a non-suit motion and has been accepted by the Supreme Court of Nova Scotia in *Pino v. Wal-Mart Canada Inc.* [1999] N.S.R. No. 514 at page 1 where

Justice Robertson stated:

> The defendant has moved for dismissal of the case, pursuant to Rule 30.08, on the ground that upon the facts and the law no case has been made out. The case of Colford & Randall et al (1975), 20 N.S.R. (2d) 195 (S.C.T.D.) sets forth the test:
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> > "In my opinion the changes in this rule were made merely to clarify the right of defence counsel to move for dismissal at the end of the plaintiff's case without electing whether or not to call evidence. I do not believe there was any intention to change the grounds for the motion and I interpret the rule to mean that the motion ... will only be granted if there was no evidence upon which a jury properly instructed could find for the plaintiff. If a prima facie case has been made out then the weight of the evidence is for the Court."

The case of *Allied Signal Canada Inc. (c.o.b.) Allied Aerospace Canada v. Atlantic Electronics Ltd.* [1998] N.S.J. No. 423. (N.S.S.C.) summarized the law on motions for non-suit when it references Sopinka and Lederman's views in their test The Laws of Evidence in Civil Cases (Toronto Butterworths, 1974) at pages 521-522 as follows:

> If a plaintiff fails to lead sufficient material evidence, he may be faced at the close of his case by a motion for a non-suit by the defendant. If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence...

I have spent some time on this issue as to the law on a motion for non-suit as the Court is thought by some as the "people's court" and it often involves self-represented litigants. Often a case involves substantial monetary claims, such as is the case here and my sense is that Claimants are more and more being faced with

such motions, particularly by Defendants who are represented by Counsel, as is the case here. I did come across one case where the judge decided not to grant the motion it would appear simply because the Claimant was self-represented and allowed the matter to proceed. However I am more comfortable with the law as outlined above.

The Court of Appeal in this Province has said:

> "We must therefore in addressing the issues keep in mind whether having regard to the law and the facts which were induced in evidence, the judge was correct in concluding there was insufficient evidence, if believed, to satisfy a reasonable person that the case could be resolved in the appellant's favour." - *Turner-Lienaux v. Nova Scotia (Attorney General)* [1993] N.S.J. No. 201.

This coupled with the notion that the facts induced in evidence which the Court of Appeal refers to is based on the premise that the Claimant's witnesses are telling the truth. It is not my role at this stage to make a determination of the weight of the evidence but rather has a prima facie case been made out. That is has there been a sufficiency of evidence to show a case in law exists or is the evidence insufficient and discloses no case in law. Further is the evidence just too weak to disclose any case upon which a decision can be made.

The Nature of the Claim

The Claimant has said that is has lost a substantial amount of propane from the Defendant's propane tank which it leased from the Defendant. The Claimant says it has paid for this loss of propane which loss should be the responsibility of the Defendant.

The Facts

1. The propane tank was filled at the end of the season in 2003 and at the beginning of the season in 2004 the tank had to be refilled. (testimony of claimant)
2. In June of 2004 the tank and lines were replaced by the Defendant (Exhibit C-3)
3. The number of litres of propane in the tank in question that was used and paid for between June 1, 2003 to December 31, 2003 was 9,827.20 litres or $6,892.66. (Exhibit C-1 provided to Claimant by Defendant)
4. The number of liters of propane in the replacement tank used between

January 1, 2004 to October 21, 2004 was 1360.60 litres or $1,047.08. (Exhibit C-1 provided to Claimant by Defendant)
5. The main part of the Claimant's business was between May/June to October each year. (testimony of Claimant)
6. The original tank and lines were installed by Irving who leased the equipment to the Claimant (testimony of Claimant)
7. The original tank and lines are owned by the Defendant (Claimant's testimony and pleadings of the Defendant)
8. The propane tank supplied propane to the Claimant's restaurant's industrial range and grill for the last five years (Claimant's testimony)

In my view there is sufficient evidence before me to conclude there was a significant difference of propane usage from the 2003 season and the 2004 season.

This difference occurred between the times the original tank was used, that is the 2003 season and the 2004 season when the replacement tank was used. The dollar amount is $5,845.58 which is basically what the Claimant is claiming he lost in 2003 due to leakage but does not factor in the difference in average cost per litre in 2003 versus 2004. Considering the loss in usage versus the 2003 price that would escalate to $5,938.35 however there could be other factors which would influence some minor adjustments in usage.

The Defendant argues there is no lease agreement before the Court and therefore the Court cannot determine what contractual responsibilities are the Defendant's or Claimant's for that matter before the Court.

The Defendant argues that there is no evidence to show the Defendant was negligent. There could be other reasons that showed a difference in the amount of propane used.

Is there enough evidence before the Court if left uncontradicted to show that there was a loss of propane from the Defendant's equipment (tank plus lines) for the year 2003? The answer to this is yes, the Claimant has provided at least a prima facie case with respect to a loss.

Is there enough evidence to show that the tank and feeding lines were the responsibility of the Defendant? The answer to this is yes. The Defendant owned and installed the equipment which it leased to the Claimant. The Claimant has

provided sufficient evidence at this stage to show it has a prima facie case in law.

There is no evidence provided by the Claimant to the Court to show usage of propane in years other than 2003 and 2004 and while the Claimant has not used Exhibit D-2 to show the loss for any other years it may be preparing to do so in final argument.

Therefore at this stage the Claimant has shown a prima facie case exists against the Defendant at least for the year 2003 in the amount of $5,845.58 and if the claim goes no further that is the Defendant does not successfully move forward or contest the prima facie case against it, then I would set off the $5,845.58 against the $8,529.03 owed to the Defendant leaving $2,683.45 owing to the Defendant.

Therefore the motion for non-suit is denied and if the parties wish to precede they should so by contacting the Court or the Defendant can appeal this determination on the non-suit motion within the 30 day period pursuant to the provisions of the Small Claims Court Act.

Dated at Halifax, on the 1 day of January, 2007.

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David T.R. Parker
Small Claims Court Adjudicator