IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Irvine v. Ensor*, 2021 NSSM 9

Claim: SCY No. 502115
Registry: Yarmouth

Between:

CHERYL LYNN IRVINE

Claimant

-and -

ERIC D. ENSOR

Defendant

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: April 14, 2021
Decision: April 19, 2021

Appearances: The Claimant, self-represented
The Defendant, self-represented

DECISION

Facts

[1] This matter involves a claim which is stated in the present claim as *"During preparation for a defence of for claim number SC4-499517, I reached out to professionals in the cabinet industry to determine the value of the work that was completed in the house with respect to the global contract to build and install kitchen cabinets and vanities. It was noted that Mr. Ensor's has significant material defects."* [Note: the proper case number was SCY No. 499517, but nothing turns on that]

[2] On December 9, 2020, I heard a case involving these parties in which I rendered a

decision on January 12, 2021, which has been reported as *Ensor v. Sherry Hill Farm*, 2021 NSSM 1. In the prior matter the Claimant in this case was included as a Defendant under the name “Sherry Thourburn Irvine”. Despite the discrepancy in the name of the Defendant in that case, it was apparent to me, and acknowledged to me by the parties, at the hearing of this matter, that these were in fact the same parties as in the prior proceeding, and the subject matter involved the same construction project.

[3] My prior decision contains the following:

> [11]In the documentary evidence there is a quote from Mr. Emile LeBlanc with respect to the value of the work done by Mr. Ensor on the kitchen. This is the only evidence that touches on the amount and value of the work that Mr. Ensor performed with respect to the kitchen. Mr. LeBlanc did not testify. Because of this I cannot evaluate exactly what items were, and were not, included in his quote. It is true that the Small Claims Court has significant latitude in accepting evidence that would not be strictly admissible in the Supreme Court. However, that does not mean that the quote provided by Mr. LeBlanc is to be accepted on its face. I have extreme difficulty in relying on this quote. This is because I don't have Mr. LeBlanc's evidence to explain the quote, and perhaps more importantly, because he was not called, the Claimant had no opportunity to cross-examine him. It simply leaves me unable to know what was done, or not done by Mr. Ensor relating to the items stated in the quote. Therefore , I am unable to place reliance on this quote.

And,

> [16] As I have indicated above, I don't really have clear evidence favouring the Defendant as to what the value of the work done on the kitchen is. The court has no expertise in this regard and must rely on knowledgeable witnesses in order to make that assessment. Unfortunately for the Defendant she did not provide a qualified witness to give an opinion as to the value of the work done. I have reviewed the photographs and considered the evidence given. Clearly a substantial amount of work was done. On that basis, I am satisfied that if there is any shortfall in terms of the value of the work done, it is not so obvious that I am able to evaluate it without a witness knowledgeable in carpentry or construction to assist me. Providing such evidence is the responsibility of the parties. The court has no investigation power.

> [17] It is a fundamental principle of law that the party who makes an allegation must prove it. The documentary evidence provided by Mr. LeBlanc is not sufficient to establish what the Defendant claims. It is possible that the Defendant did not get the full $15,000 worth of work, but the evidence simply doesn't establish that. I can only act on evidence; I can not speculate.

[4] In argument before me in this proceeding, Ms. Irvine acknowledged that the parties were in fact the same, but suggested that the "focus" of the prior proceeding was different.

[5] Mr. Ensor raised, albeit not in the technical terms that a lawyer would put forward, but in essence, an argument that the present claim should not proceed on the basis of *res judicata.*

Analysis

[6] *Res judicata* is a well-established and long-standing principle of law and there is an extensive jurisprudence with respect to it. I will not cite extensive precedent, but it appears to me that the Nova Scotia Court of Appeal in *Kameka v. Williams*, 2009 NSCA 107, set out the current state of the law in Nova Scotia. That case has been cited as authority in several subsequent cases. Justice Beveridge, stated:

> [12] The respondent is correct to acknowledge the significance of the doctrine of *res judicata.* It is a common law principle dating back hundreds of years. As G. Spencer Bower observed in his original text, *The Doctrine of Res Judicata* (London: Butterworth & Co., 1924) at 218 *et seq*, it is a doctrine that, if not founded upon Roman law, is fortified and illustrated by it. The doctrine's longstanding existence was commented on by Binnie J., in giving the judgment of the court in *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44:
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> > [20] The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and

> G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 § 17 *et seq.* Another, aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen,* [1983] 2 S.C.R. 594; *R. v. Litchfield,* [1993] 4 S.C.R. 333; *R.* v. *Sarson,* [1996] 2 S.C.R:. 223.
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> ***[the underlining is my emphasis]***

[7] He went on to address the manner in which *res judicata* is to be applied, adopting Justice Cromwell's analysis in *Hoque v. Montreal Trust Co. of Canada,* [1997] N.S.J. 430 and stating as follows:

> [18] ……Cromwell J.A. expressed the view that the doctrine *res judicata* required a more nuanced approach than an automatic bar to all matters that *could* have been raised in a previous proceeding. He wrote:
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> > [64] My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply fill attempt to impose a new legal conception on the same facts or whether t e present action constitutes an abuse of process.
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> > ***[the underlining is my emphasis]***

[8] As I understand the Court of Appeal's guidance, the test is really whether the matter now before me should have been raised and adjudicated in the prior proceeding, rather than the more narrow ground that it could have been raised.

[9] By the very words of this claim, the Claimant acknowledges that, not only that she was mindful of the issue presented in this case, and that there was evidence that she could have discovered and presented in the prior proceeding, but also that she had the availability of such evidence. Although not strictly speaking necessary for this decision, I would go so far as to say that the issue in the present claim was before me and was

adjudicated in the prior proceeding. In effect, the Claimant is asking to introduce additional evidence that would address an issue that was before me in the prior proceeding. I am driven to the conclusion that the claim that she now makes, and the evidence which she now proposes to introduce, both could and should have been raised in the prior proceeding.

[10] Based on my review of my prior decision, and applying the law of *res judicata*, I am satisfied that I am required to apply the principle of *res judicata* to this proceeding, and to dismiss the present claim. To do otherwise would be to allow the claimant to relitigate an issue that was, or at least should have been, before me in the original proceeding.

Dated at Yarmouth this 19th day of April, 2021

Andrew S. Nickerson Q.C., Adjudicator