SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Samira Meshal* v *Brian Dort – Providence Property Managemen*t
2023 NSSM 53

Date: 20231003
Docket: 22-517581
Registry: Halifax

Between:

Samira Meshal

Claimant

v.

Brian Dort – Providence Property Management & Halifax County Condominium Corporation # 38

Defendant

Ruling on Non-Suit Application

Adjudicator:	Dale Darling, KC
Heard:	May 26, 2023 and August 31, 2023, in Halifax, Nova Scotia
Decision	October 3, 2023
Counsel:	The Claimant was self represented Michael Blades & Grace Levy, for the Defendant

By the Court:

[1] This is a claim for damages, quantified at time of filing of the Claim at $24,421.72, which the Claimant Ms. Meshal says in her claim are for "expenses related to harassment during the renovation of my private property located at 1326 Lower Water Street, Unit 220, Halifax, Nova Scotia". A Defence and Counterclaim were filed. The Claimant was self-represented, and Mr. Blades and Ms. Levy appeared for the Defendants.

[2] I am allowing this motion for non-suit in part. My reasons follow.

[3] A hearing via Microsoft Teams was commenced on May 26, 2023 before me. Due to the difficulty the Claimant was having with the virtual platform, the hearing was adjourned and I made a request to the Court that the proceeding be scheduled for an in-person hearing on August 31, 2023.

[4] At that hearing, Ms. Meshel called Fadil Shabiu, her contractor in the renovation, George Ash, the lawyer who represented Ms. Meshel in the when she sold the property in the fall of 2021, and Zuheir Hamnude, her real estate agent in the sale transaction. Mr. Arthur Ferguson, a friend of Ms. Meshel who also resided at 1326 Lower Water Street, was prepared to testify on behalf of

Ms. Meshal. It became clear that Mr. Ferguson's testimony was intended to provide and "stand in the shoes" of Ms. Meshal's evidence, as all he would know about the transactions between the parties, was what she had told him. An objection from Mr. Blades followed, which was sustained. Although hearsay is by implication and practice admissible in Small Claims Court under section 28 of the Small Claims Court Act, RSNS 1989, c. 430, in this case, the testimony in question was intended to replace the testimony of the Claimant, who was present and available to give evidence.

[5] Ms. Meshel then gave her evidence, and closed her case. Due to the lateness of the hour, the matter was then adjourned to reconvene online on September 11, 2023, for the defence to open their case and the hearing to be completed.

[6] On September 5th, 2023 Mr. Blades advised of his intention to bring a motion for non-suit. As a result the September 11, 2023 hearing was further adjourned pending a decision on that issue.

[7] In preparation for this decision I have reviewed the brief and authorities received from the Applicant Defendant, and the Rebuttal Materials received from the Respondent, as well as reviewing the compendious documentation submitted into evidence on August 31, 2023. In addition, Ms. Meshel sent me a copy of a

September 20, 2023 decision of Justice Norton, setting aside a Default Judgement that had been issued respecting a claim for defamation filed by the Defendant parties against Ms. Meshal.

[8] I find that the setting aside of the Default Judgement in Supreme Court is not relevant to the decision before me, which is assessing the evidence provided in the context of a non-suit application. The action in Supreme Court is for defamation, which is excluded from the jurisdiction of the Small Claims Court under section 10 (c) of the Act. I note that the Counterclaim filed by the Defendants in this Court is for defamation, but dealing with that issue is not part of this decision. What is of relevance, is the submissions made by Ms. Meshel, which are a combination of argument, and some material which arguably constitutes additional evidence.

[9] Ms. Meshal speaks in her submissions of her difficulty in navigating the Court process, and I was aware during the proceeding on August 31, 2023 that she was finding it difficult to express her evidence. As a result, I spent considerable time reviewing her documents with Ms. Meshal to ensure that she had an opportunity to provide her evidence.

[10] I do also note that Ms. Meshal says in her response that she graduated from law school in Egypt in 1974. Her knowledge and education are superior to that of

many self-represented litigants. The arguments she makes opposing the non-suit are clear and well organized, albeit including evidence.

[11] In her submissions, Ms. Meshal takes the position that she should be permitted to reopen her case, and call additional witnesses, in particular witnesses such as Mr. Dort and some Board members, who arguably would have been called by the Defendant, and if this non-suit application is successful, will not be testifying.

[12] I find that this is not an unusual reaction for those faced with a non-suit motion, once it becomes clear that the Defendants witnesses may not be called. I do not agree that she was denied an opportunity to present her case, and I am proceeding with this decision on the non-suit application.

The Test for Non-Suit:

[13] The authorities provided by the Applicant make it clear that application for non-suit are available in Small Claims Court, and that they are available against self-represented litigants.

[14] In *Butler v Pet Focus Veterinary Group Inc.*, 2022 NSSM 59, cited in the Defendant's brief, Adjudicator Slone provides the *Nova Scotia Civil Procedure Rules* direction on the grounds for a non suit application:

> [4] There is nothing in the *Small Claims Court Act* or Regulations that governs non-suit motions, so it is appropriate to be guided by the Civil Procedure Rules:
>
> **51.06 Non suit**
>
> (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.
>
> (2) A defendant who unsuccessfully makes a motion for a non-suit must elect whether to open the defendant's case and call evidence when the motion is dismissed.

[15] Adjudicator Slone goes on to cite the position of the Nova Scotia Supreme Court on the relevant test:

> 5 The task of the court on a non-suit motion was further elaborated upon by the Nova Scotia Supreme Court in *Salman v. Al-Sheikh Ali*, 2010 NSSC 450:
>
> > 13 The test is therefore whether there is any evidence upon which a properly instructed jury could find that the defendants or any of them slandered the plaintiffs. It has been re-stated as whether there is a prima facie case against the defendants or whether there is a reasonable prospect of success.
> >
> > 14 Edwards, J. in Morrison in paragraph 4 quoted from MacDonell v. M & M Developments Ltd. (1998), 1998 NSCA 49, 165 N.S.R. (2d) 115 (N.S. C.A.) for the test. He went on to say in paragraph 6:
> >
> > Although the threshold for a plaintiff in establishing a prima facie case is low, evidence upon which an alleged prima facie case is based must be sufficient to generate a reasonable prospect of success. In other words, it is not enough for a plaintiff to show that some evidence has been elicited on a necessary element of their case without also

> satisfying the Court that said evidence is probatively sufficient in the context of the legal framework of each cause of action alleged.

15 In paragraph, he also 8 quoted from *Petten v. E.Y.E. Marine Consultants,* [1995] N.J. No. 197 (Nfld. T.D.) at paragraph 10:

> What is contemplated by the probative sufficiency test is nothing more than a threshold common-sense screening of the evidence to ensure that it has some meaning and is not fanciful or ridiculous....

[16] It is worth producing the entirety of paragraph 10 in *Petten, supra* as to what "fanciful or ridiculous" intensely subjective terms, mean:

> What is contemplated by the probative sufficiency test is nothing more than a threshold common sense screening of the evidence to ensure that it has some meaning and is not fanciful or ridiculous. Thus, it would not be enough to resist a non-suit motion simply to point to the fact that words were uttered during viva voce testimony or were contained in a documentary exhibit which, if taken literally and outside of their context, could result in the trier of fact finding liability. If the words, judged by common experience or when viewed in the context of the remainder of that witness's evidence (including, say, an unequivocal later retraction) are insensible or ridiculous and cannot have any real meaning or substance or cannot have their literal meaning, the judge on a non-suit motion would be entitled, notwithstanding their existence, to conclude that the words themselves did not have enough probative sufficiency from which a jury, reasonably instructed, could infer liability. Beyond that, however, the weighing and assessment process is for the trier of fact and not the judge on the motion. The judge sitting without a jury, although the ultimate trier of fact, must nevertheless resist the temptation at the non-suit stage to weigh the plaintiff's evidence to determine whether on a balance of probabilities the case has been proven to that point. The plaintiff is entitled, on putting forward as part of his or her case some evidence of probative sufficiency from which a trier of fact could infer liability at that stage, to require the defendant to put his or her case before the court and to take advantage, if possible, of evidence so tendered that might bolster the plaintiff's case.[emphasis added]

[17] The conclusion of Adjudicator Slone, and myself as well, can be summarized as follows:

> [i] If there is no evidence pertaining to all of the constituent elements of the

cause of action, the matter should be dismissed;

[ii] If there is some evidence pertaining to the constitute elements, the matter should be dismissed if that evidence is not more than "fanciful or ridiculous" and completely void of "probative sufficiency".

[18] Drawing upon *Patten, supra,* the decision maker on a non-suit application is not weighing the evidence on a balance of probabilities and looking for sufficient "proof" of the claim, only for some probative or substantiating evidence, sufficient to require a response from the Defendant.

Findings of Fact

[i] Ms. Meshal, through her company Meshal Holdings, purchased Unit # 220 at 1326 Lower Water Street, Waterfront Place, Halifax, Nova Scotia ("Unit 220"), on February 1, 2021. The sale price was $334,000.00.

[ii] The building containing Unit 220 is a condominium, registered as Condominium Corporation No. 38. One of the Defendants, Mr. Brian Dort (the other named Defendant), of Providence Property Management, is the Property Manager for the Corporation.

[iii] On February 27, 2021, Ms. Meshal through Meshal Holdings entered into a contract with LOAA Construction Ltd., whose principle is Mr. Fabil Shabiu, for renovations at Unit 220. That contract is in evidence before me in Exhibit C-1.

[iv] The Bylaws under which the Condominium Corporation governs require prior written approval of the Board of Directors prior to the performance of plumbing or electrical repairs or alterations in any unit or wall (Exhibit C-3 and Exhibit D-1 Tab 3). There is some dispute as to exactly what was included, (specifically whether alterations occurred), but the facts confirm that some of the above repairs were contemplated.

[v] Thereafter, construction work began on the unit sometime after February 28, 2021.

[vi] A work stoppage on alterations occurred on March 5th, 2021. This was confirmed by the evidence of Mr. Shabiu and Ms. Meshal, and also that work recommenced on March 11, 2023 after a signed Alteration Agreement was received by the Corporation and approved. That Agreement was provided in evidence at Exhibit D-1, Tab 9. It provided for a $500.00 security deposit to be used to “help cover any costs incurred by HCCC #38

as a result of damages, repairs or cleaning resulting due to the alterations; otherwise it will be held in trust until the final inspection is completed by building management." It also included a "$150.00 (non-refundable) deposit payable to Providence Property Management".

[vii] There was another partial work stoppage from April 5, 2021 which was Easter Monday to April 15, 2021. This occurred because April 5th was Easter Monday and the Defendant did not allow construction work on a holiday. The parties dispute whether Easter Monday is a holiday. There was at the time a dispute as to the approval of a drop ceiling, and that work recommenced on April 15, 2021, and included adjustments to sprinklers by the Corporation.

[viii] By July 31, 2021, 11 Incident Reports (Exhibit D-1 Tab 38) had been generated by building management regarding concerns about where contractors were parking, use of elevators and noise ensured, construction debris, as well as concerns raised by residents about contractors not wearing masks. I take notice of the fact that this renovation occurred in 2021 during a time of ongoing COVID-19 restrictions.

[ix] A Stop Work Order was Issued to LOAA Construction with an attached Trespass Notice dated August 1, 2021. (Exhibit D-1, Tab 37).

[x] Before me, Mr. Shabiu's evidence was that he continued worked in August of 2021 despite the stop order, because he "worked for Ms. Meshal".

[xi] Ms. Meshal's evidence confirms that the renovations were completed in late August 2021. The property was listed for sale on September 23, 2021, according to a cut sheet provided in the Claimant's evidence, C-1, showing a sold price of $550,000.00. The reason for its listing is a matter in dispute between the parties, with Ms. Meshal saying she was forced to list due to unwarranted conflict with the Defendants.

[xii] At the time of the sale, an Estoppel Certificate was issued by the Defendant Corporation against Unit 220 for the amount of $7764.66, found at Exhibit D-1, Tab 62. The breakdown of that Certificate was:

- Condominium fee - $668.12
- Late admin fees - $250.00
- NSF fees - $50.00
- Fire Watch - $134.50

- Late fee x 4 - $200.00
- Legal fee - $4,418.30
- Admin fee - $1,270.75
- Cease and desist notice - $547.40
- Admin fee - $50.00

The Amounts Sought by the Claimant

[19] In the hearing before me, following on the limited factual findings above, and using documents filed by the Claimant in Exhibit C-2, I confirmed with Ms. Meshal in her evidence the exact relief she is seeking from the Court, and it is as follows:

Out of pocket expense over and above condominium fees paid in full

- The total additional charge for contractor work delays - $10,000.00
- The total extracted at sale as per the estoppel certificate - $7,764.66

- The amount of the refundable alteration deposit never refunded - $500.00

- The amount of the bogus non-refundable deposit to Mr. Dort himself - $150.00

Total - $18,414.66

Condominium Fees Paid

- Total of condominium fees/or whatever amount this Court sees fit to award

Total - $6,007.66

Total of all losses - $24,421.72

[20] There was also reference by Ms. Meshal to court costs and applicable interest.

The Jurisdiction of the Court in this matter:

[21] In their brief, the Defendant argues that the Claimant's pleaded cause of action "harassment", is not a recognized cause of action in Nova Scotia, and provided authorities to that effect.

[22] While the Defendant also conceded the Court can consider causes of action not specifically pleaded, they state "it is respectfully submitted that the line of authority would not extend to permitting the Court to entertain any and all causes

of action that might appear to potentially be relevant on emerging evidence throughout a trial".

[23] I disagree. To a certain extent, I am required to do so. I have concluded that based upon the authorities provided to me, and taking into account the language of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, section 3, which specifically directs that claims within the monetary jurisdiction of the court are to be "adjudicated informally and inexpensively but in accordance with established principles of law and natural justice". I find that causes of action that can be established based upon the evidence provided, can be considered by this Court, and I intend to do so.

[24] I take note of the following in *Allen v. Thorne*, 2007 NSSM 31, in which Adjudicator Parker commented:

> There is no specific pleading that there was a fraudulent or negligent misrepresentation. Certainly within the context of the Supreme Court of Nova Scotia a Claimant would be unable to proceed successfully without pleading specifically these allegations. However, it would seem that the Small Claims Court is not bound by these restrictions. The case of *Popular Shoe Store limited v. Simoni* 1998 CanLii 18099 (NL CA), [1998] N.J. No. 57 where Justice Green of the Newfoundland Court of Appeal stated at paragraph 24 and 25 the following:

> "24 Both the Trial and Appeal Court judges erred in law in not so characterizing Popular's claim. Particularly in Small Claims Court, where claimants, as here, are often unrepresented, a liberal approach ought to be taken to the pleadings that are presented so as to ensure that access to proper adjudication of claims is not prevented on a technicality. Even in superior court, the basic rule of pleading is that a party must plead material facts and is not required, as a condition of relief, to be correct in fitting those facts, as a matter of pleading, into a particular legal pigeon-hole. This is particularly appropriate for litigation in the Small Claims Court where technicalities are to be avoided and unrepresented parties (as Popular and Mrs. Claeys were in this case) are required to express their claims in their own words. If a claimant by his or her pleading or evidence states facts which, if accepted by the trier of fact, constitute a cause of action known to the law, the claimant should prima facie be entitled to the remedy claimed if that is appropriate to vindicate that cause of action. The only limitation would be the obvious one that if the case takes a turn completely different from that disclosed or inferentially referenced in the Statement of Claim, thereby causing prejudice to the other side in being able properly to prepare for or respond thereto, the court may either decline to give relief or allow further time to the other side to make a proper response.
>
> 25 A Small Claims Court judge has a duty, on being presented with facts that fall broadly within the umbrella of the circumstances described in the Statement of Claim, to determine whether those facts constitute a cause of action known to the law, regardless of whether it can be said that the claimant, as a matter of pleading, has asserted that or any other particular cause of action. Subject to considerations of fairness and surprise to the other side, if a cause of action has been established, the appropriate remedy, within the subject-matter jurisdiction of the court, ought to be granted."

[25] Although a Newfoundland authority, this case reflect the reality of navigating a world where many litigants may not be able to legally name their dispute. The key event in this litigation is Ms. Meshal’s purchase of Unit 220, which creates obligations for both parties under the *Condominium Act*. This Court routinely hears disputes between owners of condominium units and condominium corporations over repairs, involving Estoppel Certificates, or as here, the entering into of a Development Agreement.

[26] Put as simply as possible, what Ms. Meshal has described in the facts underpinning her Claim, as I have described above, can be broadly described as contractual in nature, based upon the mutual obligations created by the specifics of condominium ownership. The only was jurisdiction could be removed was if both parties had availed themselves of section 33A of the *Condominium Act*, which states:

> ***Arbitration***
> *33A (1) Except as provided by this Section, the Commercial Arbitration Act applies to every arbitration carried out pursuant to this Section.*
> *(2) Notwithstanding the Commercial Arbitration Act, where*
> *(a) the corporation and an owner of a unit that is part of the property managed by the corporation;*
> *(b) the corporation and any person who has agreed with the corporation to manage the property;*
> *(c) the corporation and any other corporation created pursuant to this Act;*
> *(d) the corporation and the occupier of a unit that is part of the property managed by the corporation;*
> *(e) an owner of a unit and the occupier of any other unit that is part of the same property that includes the unit of the owner; or*
> *(f) two or more owners of units that are part of the property managed by the corporation,*
> *are parties to a dispute on any matter to which this Act applies, other than termination of the property and those matters for which regulations have been made pursuant to Section 33, but also including a dispute between a board and an owner of a unit that is part of the property managed by the corporation, as to whether a decision or any proposed action by the board is prejudicial to the property or the corporation, <u>any of the parties may give to the other party or parties and to the Registrar notice that the party giving the notice intends to have the dispute arbitrated by a single arbitrator appointed by the Registrar and, when the notice is given, the parties are deemed, for the purpose of the Commercial Arbitration Act, to have entered into a written agreement to submit the differences between or among them arising from the dispute to arbitration by a single arbitrator appointed by the Registrar pursuant to this Act.</u>*
> *(3) Where a notice is given to the Registrar pursuant to subsection (2), the Registrar shall appoint the arbitrator from a list of persons prescribed by the regulations, and the parties are deemed to have consented to the use of mediation by the arbitrator.*

> *(4) Service of a notice pursuant to this Section may be made by personal service, registered mail or substituted service as prescribed by the regulations.*
> *(5) Where a notice is mailed pursuant to subsection (4), it is deemed to be given within seven days after it is mailed, unless the contrary is proved.*
>
> [emphasis added]

[27] Case law (see *Adam v. Halifax County Condominium Corporation No. 267*, 2019 NSSM 54[1]), confirms that in circumstances where both parties have agreed to refer the matter to arbitration, the Small Claims Court does not have jurisdiction to hear the dispute. In the above case, Adjudicator O'Hara gave the parties 4 weeks in order to decide whether they wished to give a Notice of Intention to Submit the matter to arbitration.

[28] I assume I would be aware if such notice had been given. With no notice filed, I find that I have jurisdiction to consider a potential breach of the terms and conditions of the documents governing the relationship between the parties, and their resultant actions.

The Merits – Whether a non-suit should be granted

(a) Name of the Claimant

[1] This decision was not provided to me by the parties. I would normally share it and ask for comments, but as I consider it will not affect the decision made, I have not done so.

[29] I will begin with what the Defendant ended with in their brief, which they describe as the "elephant in the room", that being, that Ms. Meshal filed her claim naming "Samira Meshal" as the Claimant, as opposed to "Meshal Limited". The Defendant says that Ms. Meshal as an individual has "no cause of action against the Defendants".

[30] The filing of the Claim as described is in no way fatal to its validity in this Court. There is no question that the property was purchased by Meshal Holdings. However, probably in consideration of the large volume of self represented litigants in this Court, section 6 of the *Small Claims Court Forms and Procedures Regulations* made under Section 33 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 states:

> **6** A claim may be brought or defended in the name under which the business or partnership carries on its business or the name of one or more persons believed to own or carry on the business.

[31] The Claim as filed, is therefore valid.

(b) The amount additional charged for contractor work delays ($10,000.00)

[32] Non-suit granted: I find that based upon the test for non-suit, the application must be granted for this portion of the claim. It falls on the first ground, that being,

lack of evidence pertaining to all the elements of the cause of action. The Defendants were not parties to the contract between LOAA Construction and Ms. Meshal. Even if one draws an extremely long bow, there is no grounds for some sort of induced breach which was caused by the Defendants. There is no penalty clause in the contract for any reason, let alone "delay". The only delay shown is 11 days in March of 2021, with no evidence as to what the impact of that was. The evidence disclosed that Mr. Shabiu ignored the further notice to stop work in August of 2021. Mr. Shabiu testified in the proceeding before me. Mr. Shabiu provided absolutely no evidence to support that he considered further money owing on the contract. The evidence from Mr. Shabiu and Ms. Meshal discloses only that Ms. Meshal that Mr. Shabiu to invoice her for an additional $10,000.00 because of the "delay". He did not ask or require it. Ms. Meshal's most recent filing in reply on this application states "His extra charges were about 10% over and I thought it was fair to pay him because I know he dealt with unreasonable people for many months". That is not delay. The evidence at best discloses *ex gratia* payment from Ms. Meshal. It has no chance of success.

(c) The amount of the bogus non-refundable deposit to Mr. Dort himself ($150.00)

[33] Non-suit granted: The evidence is clear from the signed Alteration Agreement of March 2021, that the "processing fee of $150.00 (non-refundable) payable to Providence Property Management, was exactly as described – a non-refundable processing fee. The evidence provided makes it clear that the Alteration Agreement was signed, and alterations ensued, following a significant volume of email conversations between Ms. Meshal and Mr. Dort, resulting in the approval of what was sought. There is no evidence of misappropriation as described. The circumstances by which a non-refundable $150.00 processing fee occurred, that is, the processing and granting of an Alteration Agreement, are proven by the facts to have occurred. This portion of the claim has no probative evidence supporting a cause of action, and the application for non-suit must be granted.

(d) Condominium Fees Paid – Total of condominium fees/or whatever amount this court sees fit to award ($6,007.06)

[34] Non-suit granted: While the evidence is clear that the above fees were paid, there is nothing in the *Condominium Act*, or Bylaws, or any other document, which would authorize or entitle Ms. Meshal to a return of her fees, barring some miscalculation of the amounts owed, which I find is not proven. This portion of the claim has no probative evidence supporting it, and the application for non-suit must be granted, excepting the amounts related to fees referenced in part e) below.

(e) The total extracted at sale as per the estoppel certificate ($7,764.66) and the amount of the refundable alteration deposit never refunded ($500.00)

[35] Non-suit dismissed. Here we return to the test for the non-suit. The evidence is sufficient in that Ms. Meshal says that she paid these amounts, and with respect to the amounts related to the estoppel certificate, her evidence is that they were paid in order to allow the sale of the property to proceed, with her reserving her right to seek to recoup them. Some of the amounts under this heading were allegedly accrued months prior to the sale of the property. I find that on the standard required to meet a non-suit, there was enough evidence provide to require a response from the Defence of the amounts charged, a position bolstered by the evidence of Mr. Ash, solicitor for Ms. Meshal in the transaction, who described the content of the Estoppel Certificate as “unusual”, and who testified that he could not get an explanation from Mr. Dort regarding these amounts. There is some probative evidence supporting her claim, and as well as the $500.00 alteration deposit. I do not find it to be fanciful, and adjudicating this portion of the claim will require a response from the Defendant. The application for non-suit on this head of damages must be dismissed.

[36] The Claimant have a *prima facie* case on a portion of the above described claim, the Defendant is therefore put to their election as to whether they will open their defence and call evidence. I order the remainder of the claim as described above to be dismissed, for the reasons described.

Dale Darling, KC, Small Claims Court

Adjudicator

[13] [Numbered Paragraph]

[Name], J.