

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Burnside Pulp Ltd. v. Graham, 2007 NSSM 36

BETWEEN:

BURNSIDE PULP LIMITED

Claimant

- and -

GORDON GRAHAM and BETTY GRAHAM

Defendants

DECISION

Adjudicator: David T.R. Parker

HEARD: May 22, 2007

DECISION: JULY 20, 2007

Cases Noticed:

Emco Supply v. Vivian [1984] 46Nfld & P.E.I.R. 257

Wacky's Carpet & Floor Centre v. Maritime Floor Management Inc et al. [2006] N.S.J. No. 98 as appealed [2006] N.S.J. No. 478

Statutes Noticed:

Limitation of Actions Act R.S.N.S.1989, c.258

Authors and Works Noticed:

Fridman, The Law of Contract In Canada 5th Ed. p.558-561

Counsel: The Claimant was represented by Alain J. Begin

The Defendants were represented by Charles A. Thompson

Parker: -this claim was commenced in the Supreme Court of Nova Scotia and concerned an outstanding amount on a loan. The amount of the loan was \$37,000.00 and the amount claimed to be outstanding was \$20,000.00. The claim was also for prejudgment interest at 2% per month along with costs. The action was subsequently transferred to the Small Claims Court of Nova Scotia.

The defence filed with the court provides a general denial and pleads the Limitation of Actions Act stating 'the plaintiff was required to file the within action within six years of the last payment due, September 1, 2004, which the plaintiff failed to do and accordingly the within action is barred.[The evidence subsequently showed that the date intended here was September 1, 1998] further, the defendant pleads that even if there was a contract, the payment of the outstanding balance was waived and forgiven by the plaintiff.

The defendant also stated in their defense, if the Plaintiff did have a debt, the contract was transferred to Stewiacke Valley Harvesting Limited, and that the contract is not with the defendants but with the company and therefore pleads novation.

In a counterclaim the defendants plead *quantum meruit* for work done for the Plaintiff and also claims against the Plaintiff for loss of stumpage profits.

The defense pleadings were submitted by the defendants' former counsel and not their present counsel. Mr. Thompson. There have been no further pleadings or amendments to any of the pleadings in this action.

The Defendants borrowed money from the plaintiff in 1994 in the amount of \$37,000.00. This was reduced into a written promissory note, prepared by counsel and the defendants had independent counsel at the time they signed the promissory note. The loan was to act as a down payment for a wood processor for a company that was to be subsequently incorporated called Stewiacke Valley Harvesting Limited.

Payments were made on the loan starting in October 1995 with the last payment made December 2000 for a total amount of \$17,000.00 paid on the said loan. The amount that remained outstanding was \$20,000.00, which represents the present claim.

I'm not going to repeat what Mr. Begin read into evidence from discovery, and which he used to cross examine the defendant, but it clearly supports the position there was no novation, no forgiveness of the loan, no support for a claim of past wages due and no claim for stumpage losses.

The defendants' consistent and only argument that has any merit and that was heard during this trial through the defendants and their witnesses were that the loan was forgiven. I do not accept testimony that the owner of the claimant company forgave repayment of the loan after he became very sick and prior to his passing.

The defendant Gordon Graham said he never mentioned this forgiveness of the loan to his wife Betty Graham, as he was a very private person. Gordon Graham's daughter never mentioned it to her father until after this action became an issue and the owner of the plaintiff company had expired. The daughter Denise Graham in her testimony said her grandfather, being the owner of the plaintiff company said to her that Dad [meaning Gordon Graham] is not going to worry about paying the loan back. This does not mean that he said, Gordon Graham does not have to pay the loan back. Further it is contrary to the majority of evidence of Gordon Graham and his wife Betty Graham that they intended to pay the loan back. They just didn't have the money. I'm also reluctant to accept the statement about deathbed forgiveness of a loan, which is contrary to the actions of the deceased all along.

The defendants had counsel before they executed the promissory note, which document has all the properties of a specialty contract and in my view that is another reason the Limitation of Actions Act does not apply in this case. The defendant in his counterclaim for lost wages said in his testimony that he just put that in when he had the action commenced against him. It has no merit, and there's no foundation for the hours in which he claims he worked for nothing for his father or the Claimant Company. As well the claim for loss of stumpage profits has absolutely no merit. The defendant claims that because his father cut trees off the property that his father owned and which the defendant acquired after his father's death takes away the value of the property, simply has no merit. For all these reasons the claimant shall succeed in its claim. The defendants are jointly and severally liable for the payment of the outstanding debt. I do not believe that prejudgment interest was requested by counsel, in summation, but was certainly

pleaded and interest in the vicinity of 2% per annum is justifiable. I shall award interest from approximately the date the action commenced and determine that amount to be \$900.00. The claimant will also be awarded costs.