

NOVA SCOTIA COURT OF APPEAL
Citation: *Fotherby v. Cowan*, 2012 NSCA 119

Date: 20121130
Docket: CA 392849
Registry: Halifax

Between:

Lynne Fotherby and Brilyn Bed & Breakfast and Nature Tours

Appellant

v.

Brent Cowan and Tiffany Properties Ventures Limited

Respondents

Judges: Saunders, Hamilton and Beveridge, J.J.A.

Appeal Heard: November 22, 2012, in Halifax, Nova Scotia

Held: Appeal is dismissed with total costs payable by the appellant to the respondents in the amount of \$2,000, inclusive of disbursements, per reasons for judgment of Hamilton, J.A., Saunders and Beveridge, J.J.A. concurring.

Counsel: Appellant, in person
Ezra B. van Gelder, for the respondent

Reasons for judgment:

[1] The appellant, Lynne Fotherby, appeals Justice Gerald R. P. Moir's May 10, 2012 order summarily (1) dismissing her claims against the respondents and (2) granting the respondents, Brent Cowan and Tiffany Properties Ventures Limited, judgment against her. The summary judgment motions were made on evidence pursuant to **Civil Procedure Rule 13.04**.

[2] The relevant background is set out in **Fotherby v. Cowan**, 2012 NSCA 77, where Justice J. E. Fichaud of this Court granted the respondents' motion for security for costs:

[5] Ms. Fotherby and her husband operate an unincorporated proprietorship, Brilyn Bed & Breakfast and Nature Tours. Ms. Fotherby and Tiffany signed a Lease of premises at 1246 Ketch Harbour Road in Halifax. The Lease operated from August 1, 2010 for a term of one year. It had an option to renew for another year, but the option was not exercised.

[6] One month after signing the Lease, Ms. Fotherby did not pay her rent. By January 2011, \$2,175 was due. Tiffany agreed to forbear its remedies in return for Ms. Fotherby's agreement to pay the arrears. Ms. Fotherby again defaulted in July 2011. Tiffany gave notice to quit as of August 31, 2011. Ms. Fotherby remained in possession after that date, without paying rent. For the over-holding period, Justice Moir calculated occupation rent at the Lease rate. Justice Moir said (para 59):

There is no dispute about the amount of rent in arrears.

[7] Ms. Fotherby's defence to Tiffany's rent claim was to set off her rent arrears against the amount of her damages claimed in her civil action. In the proceeding before Justice Moir, and in her response to Tiffany's motion for security before me, Ms. Fotherby submitted that, before she signed the Lease, Mr. Cowan under-represented the amount of municipal taxes that would be assessed against the property. This allegation premised much of Ms. Fotherby's claim against Tiffany. On that point, Justice Moir concluded: (1) there was "no evidentiary foundation" for this alleged misrepresentation, (2) there was no suggestion of a misrepresentation as to an existing fact - the current taxes - and (3) any promise or prediction of future taxes was subsumed by the later contract. The later Lease did not warrant a quantified level of taxes and said that Ms. Fotherby would pay "all general property taxes during the Lease term".

[8] After reviewing all of Ms. Fotherby's claims, Justice Moir concluded:

[85] There was nothing to set-off against the arrears of rent and the amount due for taxes. The lack of evidence supporting any set-off is such that I must conclude there is no genuine issue requiring a trial on that subject.

[3] In her factum, Ms. Fotherby argues the judge erred by misinterpreting the evidence, drawing conclusions not permitted on a summary judgment motion and ignoring relevant evidence which she says establishes a genuine issue for trial. At the hearing, her relevant arguments focussed on the respondents' alleged misrepresentation as to the amount of municipal taxes and the provisions in the lease which she argues excused her from paying the taxes until she was provided with a copy of the tax invoice. The appellant's arguments surrounding the broader issues she wishes to bring to the attention of the Nova Scotia public, concerning the environmental state of the Province, are not relevant to this appeal.

[4] It is important to remember that this is an appeal. It is not a rehearing of the motions that were before the judge. The standard of review we are to apply on appeal is clear. We are not to interfere with the judge's decision unless he applied wrong principles of law or an injustice would result; **Maritime Travel Inc. v. Go Travel Direct.Com Inc.**, 2007 NSCA 11.

[5] The judge's reasons (2012 NSSC 182) set out the test for summary judgment motions on evidence:

[5] Rule 13.04(1) requires a judge to grant summary judgment when it is shown, by evidence or lack of evidence, "that a statement of claim or defence fails to raise a genuine issue for trial". This continued the law on summary judgment for defendants from before Rule 13 - Summary Judgment came into effect. "Summary Judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success": *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38 at para. 8.

[6] Rule 13.04(4) continues the best foot forward principle:

A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party,

affidavit filed by another party, cross-examination, or other means permitted by a judge.

[7] A summary judgment motion is not an opportunity to test credibility, or to seek resolution of conflicting evidence. The only questions are whether there is no genuine issue of material fact requiring a trial and whether the claim or defence under attack has a real chance of success. See both the majority and the minority opinions in *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 and *Globex Foreign Exchange Corp. v. Launt*, 2011 NSCA 67.

[8] Summary judgment may be granted where the only genuine issue for trial is a question of law: Rule 13.04(5). ...

[6] A review of the record and the judge's 26 page decision satisfies me that he did not misinterpret the evidence, draw conclusions not permitted on a summary judgment motion or ignore relevant evidence. His reasons demonstrate he did not err when he concluded there was no evidentiary foundation of a misrepresentation of an existing fact concerning the taxes and that the lease did not excuse Ms. Fotherby from paying the taxes as they became due.

[7] Having read the record, heard oral argument, reviewed the judge's reasons and considered the standard of review, I am satisfied the judge did not apply wrong principles of law and that an injustice did not result from his dismissal of the appellant's claim and his granting of the respondents' claim.

[8] I would dismiss the appeal and order the appellant to pay \$1,500 costs including disbursements forthwith to the respondents with respect to the appeal. In addition, I would order the appellant to pay forthwith to the respondents the \$500 costs Justice Fichaud ordered be paid in the cause as a result of the security for costs motion. The above costs shall be deemed to be partially paid by the Registrar of the Court paying to the respondents the \$1,000 plus interest that was paid into Court by the appellant as security for costs.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.