S.C.A. No. 01686

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Macdonald and Matthews, JJ.A.

BETWEEN:

MALCOLM MACKAY and CLAUDIA MACKAY	)	Richard A. Murtha for the appellants
Appellants	)	W. Brian Smith for the respondent
- and -	)	Appeal Heard: February 10, 1987
J.D. ROSS CONSTRUCTION LIMITED	)	Judgment Delivered: March 4, 1987
Respondent	)	

THE COURT: Appeal dismissed with costs to the respondent to be taxed per reasons for judgment of Jones, J.A.; Macdonald and Matthews, JJ.A. concurring.

JONES, J.A.:

This is an appeal from a judgment in a mechanics' lien action.

J.D. Ross Construction Company (Ross Construction) constructed a house for the appellants at Lower Sackville. On January 3, 1985, Ross Construction filed a mechanics' lien for $12,700.00 being the balance due under the construction agreement. The statement of claim was served personally on the appellants. A defence was filed by Mr. Robert Cragg as solicitor for the appellants. The defence was a simple denial that the appellants owed any money to Ross Construction.

A meeting was held between the parties and their solicitors on April 15, 1985. It was agreed that the appellants would pay $12,000.00 in trust to their solicitor in settlement of the claim and payable to Ross Construction upon satisfactory repair of a leakage problem in the basement of the home.

On June 17, 1985, Mr. Cragg wrote to Mr. Brian Smith, solicitor for Ross Construction stating "that I have now in my trust account the sum of $10,000.00 and would expect to have a further $2,000.00 on or before the end of June". Ross Construction commenced the remedial work. On December 3, 1985, Mr. Smith wrote to Mr. Cragg advising him that the remedial work had been completed and requesting the payment of the funds. In a subsequent telephone conversation Mr. Cragg advised Mr. Smith that he did not have any funds in the trust

account in respect of the claim. Two cheques received from Mr. MacKay, one for $9,000.00 dated June 10, 1985 and a second for $1,000.00 dated June 13, 1985 were not deposited as Mr. MacKay advised Mr. Cragg that he did not have the funds in his account.

On January 27, 1986, Mr. Smith applied to the County Court for an order fixing a date for the trial of the mechanics' lien action. On February 4th, he served a notice of trial on Mr. Cragg for February 14, 1986. On February 12, 1986, Mr. Cragg advised Mr. Smith that he was prepared to consent to judgment. When Mr. Smith advised that he was proceeding to trial, Mr. Cragg advised Mr. Smith that Mr. MacKay had a copy of his file and would be acting for himself on the trial.

The matter was tried before Anderson, J.C.C. on February 14. No one appeared on behalf of the appellants. Mr. Smith stated to the Court:

> "There had been an indication from Mr. Cragg who was the solicitor, according to the records, and still is the solicitor for Mr. MacKay that he was not going to be acting for Mr. MacKay and that Mr. MacKay was acting for himself. Mr. Cragg had told me the day before yesterday that he had photocopied his file and given it to Mr. MacKay. Umm ... he didn't anticipate that anyone was going to be here."

Mr. Cragg was still solicitor of record for the appellants.

Ross Construction proceeded to prove the claim and judgment was entered for $14,245.89. A copy of the order

was subsequently served on Mr. Cragg. On February 28, 1986, Mr. MacKay made an assignment in bankruptcy. On August 22, September 5 and September 19, 1986, Ross Construction published a notice of sale of the appellants' home pursuant to the judgment.

Affidavits were filed by the appellants in which they claim they never received notice of the trial and were first informed of the order on August 29, 1986, when a neighbour brought the notice of sale in the newspaper to their attention.

The following paragraphs are from the affidavit filed by Mrs. MacKay sworn September 22, 1986:

> "THAT on or about the 14th day of February, 1986, a Notice of Trial was issued by the solicitor for the Respondent and forwarded to my lawyer, Robert G. Cragg, and other interested parties. A copy of the said Notice is annexed to this my Affidavit and marked as Exhibit "1". I never received a copy of that Notice until very recently when a copy was obtained from the court file.
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> THAT a trial was held on the 14th day of February, 1986, at the hour of 9:30 o'clock in the forenoon. In attendance was the counsel for the Respondent, the Respondent and a witness for J.D. Ross Construction Limited. I did not attend the trial, nor did my husband, nor did our solicitor, Mr. Cragg.
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> THAT I did not attend the hearing of the trial because I was not informed of the date and time of the hearing. Had I been so informed, I would have attended with my husband and whatever other witness or witnesses would be required to effect a full and complete hearing of the dispute, which I maintain has to this day continued.
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> THAT I am informed, having read the record of the hearing obtained from the Court file of this matter, that the Court was advised by counsel for the Respondent that our solicitor had photocopied his file and given it to my husband. Mr. Smith was

> informed that Mr. Cragg was not going to be acting for us and he did not expect anyone would be present. I have never received notification from Mr. Cragg that he was not acting as our counsel in this matter. I have never received, nor has my husband ever received to the best of my knowledge, information and belief, a copy of our file on this matter. I enclose herewith page 1 of the decision in this matter and humbly direct the Court's attention to lines 6 through 13, a copy of which is annexed hereto and marked Exhibit '2' to this my Affidavit. I have never received, nor has my husband ever received to the best of my knowledge, information and belief, a copy of the Notice of Trial on this matter and had I received such notice, as stated previously, I would have attended at the trial dated February 14, 1986.
>
> THAT following the trial of the matter, an Order was prepared on the 27th day of February, 1986, setting out a judgment in favour of the Respondent. The Order was directed to counsel only and I never received a copy of this Order, nor did my husband to the best of my knowledge, information and belief. Had I received a copy of this Order, I would have acted upon it before now. A copy of the said Order is annexed hereto and marked as Exhibit '3' to this my Affidavit."

On September 15, 1986 the appellants made an application in the County Court to set aside the order. The application was dismissed for lack of jurisdiction. On September 22, 1986, the appellants filed a notice of appeal from the original order. Morrison, J.A. granted the appellants leave to appeal and issued a stay of proceedings in relation to the order.

On February 3, 1987 the respondent's solicitor gave notice to Mr. Cragg that on the hearing of the appeal,

> "the Respondent herein seeks relief in this matter by way of costs on a solicitor and his client basis".

Mr. Cragg appeared on the appeal and made representations in the matter. He was given time to file an affidavit which he has now done. Mr. Cragg states in his affidavit that he informed Mr. Smith by telephone on or about June 18th, 1985 that he did not have the funds in his trust account to cover the two cheques. Mr. Cragg also states that he advised Mr. Smith several times during the month of December, 1985, that he was no longer acting for the appellants, although he did not file a notice of change of solicitor. He also states that he advised Mr. MacKay of the date of trial and that he would not be acting for the appellants. According to Mr. Cragg, Mr. MacKay acknowledged owing $12,000.00 to the respondent.

A further affidavit was filed by Mr. J.D. Ross on behalf of the respondent. Attached to Mr. Ross' affidavit is a copy of a letter that Mr. Smith wrote to Mr. Cragg on December 20, 1985. The letter provides as follows:

> "I had expected to hear from you on Monday, December 16, 1985, following our conversation of Friday, December 13, 1985 respecting the difficulty which has arisen with respect to the settlement reached between our clients in the amount of $12,000.00, which arose out of the construction of your client's personal residence by J.D. Ross Construction Limited.
>
> As you are aware, the situation was to be resolved by my client undertaking the repair of basement leaks in Mr. MacKay's residence, but that repairs would only be undertaken at such a time when we had received confirmation that in fact the moneys were in your hands and held in trust until the satisfactory completion of the work. In your correspondence of June 17, 1985, you confirmed to me that you were in receipt of $10,000.00 of the agreed sum and it was upon this basis that Mr. Ross

commenced and concluded the remedial work at Mr. MacKay's home. I confirm your advice to me, that the work has been concluded satisfactorily. Mr. MacKay has informed Mr. Ross of his satisfaction.

I wrote to you on December 3, 1985 respecting payment of the $10,000.00, however have not had a reply to that correspondence.

During our conversation of Friday, December 13th, you indicated that Mr. MacKay's cheques had been returned from the Bank N.S.F. and that you had only received these cheques within the last few days. That explanation is not acceptable. Had Mr. MacKay's cheques been returned by the bank shortly after your letter of June 17, 1985, it is clear that you had an obligation to inform me of that fact, so that Mr. Ross would not proceed to his further detriment with respect to the remedial work. For were it not for your confirmation that the moneys were held by you, my client would not have returned to Mr. MacKay's residence to do any work. Both myself and Mr. Ross have relied on your representation and I must say that I am outraged when I find that the payment has not been forthcoming as previously agreed. Consequently, it is imperative that your cheque be received by this office not later than noon on the 23rd day of December, 1985. Should your cheque not be received by us at that time, I have been instructed to commence an action founded in breach of an undertaking, breach of contract and negligent mis-statement. Please oblige."

Additional affidavits have been filed on behalf of the appellants. These affidavits deal largely with the dispute between the appellants and Mr. Cragg. Needless to say they contradict Mr. Cragg's evidence. In view of the conclusions which I have reached regarding the merits of the appeal itself the dispute as to Mr. Cragg's position in this case has become largely redundant.

With respect to the merits of the appeal itself the appellants raise the following issues:

> "(1) Whether the learned trial judge erred in law in hearing the action between the parties, after having been advised that the Appellants were not represented by counsel and whether he further erred in not directing that a copy of the order for judgment be served on the Appellants personally;
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> (2) Whether the Respondent at the time the sale was set down had the legal capacity to carry this action in that the Respondent company was revoked by the Registrar of Joint Stock Companies on the 26th day of May, 1986, for non-payment of annual fees."

With respect to the first ground of appeal sections 33(1) and 35 of the Mechanics' Lien Act, R.S.N.S. 1967, c. 178 provide:

> "33(1) The liens created by this Act may be enforced by an action to be brought and tried in the county court of the county court district in which the lands are situated, whether the amount claimed is over fifty thousand dollars or not, and according to the ordinary procedure of such court, except where the same is varied by this Act.
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> 35 The party who obtains an appointment fixing the day and place of trial, shall, at least eight clear days before the day fixed for the trial, serve a notice of trial, which may be in Form J in the Schedule, or to the like effect, upon the solicitors for the defendants who appear by solicitors, and upon all lien holders who have registered their liens as required by this Act, and upon all other persons having any registered charge or incumbrance [encumbrance] or claim on the said lands who are not parties, or, who being parties, appear personally in the said action, and such service shall be personal unless otherwise directed by the court or judge who is to try the action, and the court or judge may, in lieu of personal service, direct in which manner the notice of trial shall be served."

To summarize s. 33(1) provides that the ordinary procedure of the court shall apply and s. 35 provides for service of the notice of trial on the solicitor on the record.

Rule 10.12 of the Civil Procedure Rules provides that where personal service is not required, a document may be served by leaving the document or a copy at the address for service of a party's solicitor.

Rules 44.01(1) and 44.06(1) provide as follows:

> 44.01(1) A party who sues or defends by a solicitor may change his solicitor without an order, but until notice of the change is filed with the prothonotary and served on every other party, the former solicitor shall, subject to rules 44.05 or.44.06, be considered the solicitor of the party until the conclusion of the proceeding.
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> 44.06(1) Where a solicitor, who has acted for a party in a proceeding has ceased so to act and the party has not given notice of change in accordance with rule 44.01, or notice of intention to act in person in accordance with rule 44.04, the solicitor may apply to the court for an order declaring that he has ceased to be the solicitor acting for the party, and the court or Appeal Division, as the case may be, may so order, but unless and until the solicitor files the order with the prothonotary and serves a copy of the order on every party, the solicitor shall be considered the solicitor of the party until the conclusion of the proceeding."

In P.P.G. Industries Ltd. v. J.W. Lindsay Enterprises Ltd. et al 138 D.L.R. (3d) a mechanics' lien action, in delivering the judgment of this Court I stated at p. 714:

> "Under the provisions of the **County Court Act**, R.S.N.S. 1967, c. 64, the jurisdiction of the county court in contract and in actions for damages is limited to $50,000. Section 47 of the **County Court Act** provides:
>
> '47 Except where it is otherwise provided:
>
> (a) the practice and procedure; and
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> (b) the process and forms, with such changes in the title of the court, and the style of the officer of the court, and such other changes as

> are necessary to make such process and forms applicable to the conditions of a county court;
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> which for the time being are prescribed for similar actions and matters, and under like conditions, in the Supreme Court, shall apply and be adopted in every county court in actions and matters within the limits of its jurisdiction.'

On March 1, 1972, the **Nova Scotia Civil Procedure Rules** came into force. Rule 1.02 provides:

> '1.02 These Rules govern every proceeding in the Supreme Court and a County Court except where an enactment otherwise provides.'

By virtue of s. 43 of the **Judicature Act**, 1972 (N.S.), c. 2, the rules have the force of law."

There is no question in this case that Mr. Cragg accepted service of the notice of trial on behalf of the appellants. Neither Mr. Cragg nor the appellants took any action to bring about a change of solicitor on the record. The following passage is from The Law of Civil Procedure by Williston and Rolls at p. 61:

> "In taking proceedings, a solicitor warrants the authority of his client; it makes no difference that a solicitor who acts without authority does so unwittingly. Accordingly, if he takes or continues proceedings on behalf of a plaintiff without authority, those proceedings will be stayed, and he will be ordered to pay the plaintiff's costs as between a solicitor and his client, together with any costs which the plaintiff might have been ordered to pay the defendant and the defendant's additional costs as between a solicitor and his client.
>
> If a solicitor has been purporting to act for a defendant without authority, the defence will be struck out and a converse order will be made as to costs. If the solicitor has wilfully acted without authority, he may also be made subject to attachment or committal, and, in addition, he is liable to an action for damages for breach of warranty of

authority."

The authors further state at p. 99:

> "A solicitor has great latitude in deciding whether he should act for a client, and is not obligated to do so if there is any proper reason which, in his opinion, justifies his refusal. Once he has accepted the retainer, however, he cannot withdraw without just cause. In **Ely v. Rosen**, the Senior Master (Marriott) held that a solicitor is required to make out a **prima facie** case before an order that he has ceased to act should be granted."

Both in fact and in law Mr. Cragg continued as solicitor for the appellants until the conclusion of the proceedings in the mechanics' lien action. Under the provisions of the Mechanics' Lien Act the respondents were only required to serve the solicitor with notice of trial and having done so they were entitled to proceed to judgment. (See **The Supreme Court Practice** 1982, Vol. 1 at p. 1153).

In Lady De La Pole v. Dick (1885) 29 Ch.D. 351 an application was made to vary the order. The defendant had gone abroad and it was impossible to serve him with the order. The question was whether the notice of motion in the Court of Appeal could be served on his solicitor. The solicitors claimed they had ceased to act for the defendant. Cotton, L.J. in delivering judgment in the Court of Appeal stated at p. 356:

> "The neglecting to change a solicitor when he ceases to act does not discharge him. Rolle, C.J., lays down in **Lawrence v. Harrison** (2) a principle on which we may act. He says, 'The only question is, whether the warrant of attorney be determined by the judgment given in the suit wherein he was

> retained; and I conceive it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution'. According to that principle, until the judgment has been worked out, there is a duty imposed on the solicitor on the record to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharges him but substitutes another solicitor on the record."

In view of the provisions of the Mechanics' Lien Act and the Rules of Civil Procedure I do not think that the appellants can now be heard to say that they did not receive notice of trial in this action. To permit them to do so on the facts of this case would be to render the provisions of the Act nugatory. I would dismiss the first ground of appeal.

With respect to the second ground of appeal it is without merit. At the time of the action and when judgment was entered the respondent company was in good standing. It was subsequently suspended for non-payment of annual fees. This has now been rectified.

In the result the appeal must be dismissed with costs to the respondent to be taxed. The respondents are entitled to proceed with the enforcement of the judgment. Counsel have advised that there has been a payment into court to cover the judgment. In view of the result the application for costs by the respondent against Mr. Cragg is dismissed.

Whether the appellants have a right of recovery against their solicitor for any loss they may have suffered is not before the Court at this time.

J.A.

Concurred in:

Macdonald, J.A.

Matthews, J.A.