

NOVA SCOTIA COURT OF APPEAL

Citation: Nyiti v. Cape Breton University, 2009 NSCA 54

Date: 20090522

Docket: CA 307022

Registry: Halifax

Between:

Raphael Nyiti

Applicant

v.

The Board of Governors, Cape Breton University

Respondent

Judge: The Honourable Chief Justice MacDonald

Application Heard: May 21, 2009, in Chambers

Held: Motion to amend notice of appeal is dismissed, with costs of \$500.00 payable forthwith to the respondent.

Counsel: Hugh R. McLeod, for the appellant
Nancy F. Barteaux and Krista Smith, for the respondent

Decision:

[1] The appellant seeks to amend his notice of appeal.

Background

[2] The appellant, a former professor at the respondent university, claims that he has been denied pension benefits as a result of the respondent's wrongdoing. Justice Edwards of the Supreme Court struck a portion of the claim and dismissed Mr. Nyiti's application to amend his statement of claim. In February of this year, the respondent filed an appeal which is set to be heard by a panel of this court in a few weeks' time. Now the appellant seeks to amend his notice of appeal.

[3] The respondent in its pre-motion brief succinctly sets out the history of the pleadings:

6. On September 7, 2005 the Appellant filed a Statement of Claim against the Respondent for negligence, non-compliance with the *Pension Benefits Act* and breach of fiduciary duty.
7. The nature of the Appellant's claim related to his pension benefits with Cape Breton University and its predecessor, St. Francis Xavier University. The Appellant claimed that he was not aware of his ability to join the pension plan until membership in the plan became mandatory in 1987. He further alleged that this affected the amount of pension benefits he was entitled to receive and that the Respondent was liable for his losses.
8. Upon application by the Respondent, Justice Simon J. MacDonald in Chambers dismissed the claim against St. Francis Xavier University. With respect to the claims against the Respondent, Justice MacDonald struck out the claim for negligence on the basis that it was barred by the *Limitation of Actions Act*. Only the claim for breach of fiduciary duty remained.
9. After having all of his claims struck except breach of fiduciary duty, the Appellant applied to amend his Statement of Claim to add claims of fraud and breaches of implied trust, classic trust and contract against the Respondent.

10. By order dated January 22, 2009 Justice Frank Edwards in Chambers dismissed the Appellant's application to amend his Statement of Claim and granted the application of the Respondent dismissing the Appellant's fraud claim.
11. On February 5, 2009 the Appellant filed Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) of Justice Edwards' decision.
12. On May 1, 2009, the Appellant filed his Factum and applied for leave to amend the Notice of Appeal.

Analysis:

[4] Here are the relevant *Civil Procedure Rules* dealing with the filing of notices of appeal and my jurisdiction to allow amendments:

90.06 Notice of appeal (general)

- (1) A notice of appeal (general) must have the standard heading as shown in Form 90.06, be entitled "Notice of Appeal (General)", be dated and signed by each appellant or their counsel, and include all of the following:
 - (a) a notice that the appellant appeals a judgment, including the name of the court appealed from, the date of the order or decision, the effect of the order or decision, and in the case of an appeal from a court order, the court number and name of judge;
 - (b) a statement of whether the whole or a part of the order or judgment under appeal is being appealed from, and if it is a part, a statement describing the part;
 - (c) a concise statement of all grounds of appeal, a citation of the statutory authority for the appeal, and a concise description of the order to be sought at the conclusion of the appeal;
 - (d) a statement that the appellant will, no later than eighty days after the day the notice of appeal is filed, make a motion to a judge of the Court of Appeal to set the time and date for the appeal to be heard and to provide directions;

(e) if there is only one appellant, an address for delivery of documents to the appellant and, if there is more than one appellant, a designation of a single address for delivery to all or separate addresses for each;

(f) the names and addresses of the persons to whom a copy of the notice of appeal is to be delivered.

(2) The notice of appeal (general) may be in Form 90.06.

90.11 - Ground and decision

(1) An appellant may not rely on any ground of appeal not specified in the notice, unless the Court of Appeal or a judge of the Court of Appeal permits otherwise.

(2) A copy of the decision and order must be filed with the notice of appeal, if the decision or order is in writing.

90.39 - Amending notice of appeal

(1) A party may amend a notice of appeal, notice of cross-appeal, or notice of contention no more than fifteen days after the day the notice is filed.

(2) A judge of the Court of Appeal may permit a party to amend a document filed at any time.

(3) An amended document must be filed and served immediately after it is amended.

[5] When considering such requests, I am guided primarily by two considerations - (a) whether the amendments are reasonably necessary, and (b) the extent of any resulting prejudice. For example, in **Lane v. Carsen Group**, 2003 NSCA 42, Saunders, J.A. permitted an amendment to a notice of appeal holding:

[12] In conclusion, I am persuaded that the inclusion of this additional ground is reasonably necessary for the proper presentation of the appeal, that it will enable justice to be done between the parties and that the amendment will not cause any prejudice to the respondent.

[6] In **2301072 Nova Scotia Ltd. v. Lienux**, 2007 NSCA 4, Cromwell, J.A. (as he then was) similarly permitted the appellant to amend their notice of appeal stating:

[10] In my view, the amendment is reasonably necessary for the presentation of the appeal and will not occasion prejudice in the sense which is relevant to this application.

[7] After carefully considering all the material filed in this case, the just result is to deny the appellant's request. I have reached this conclusion for the following reasons.

[8] Firstly, the main amendment proposed by the appellant involves, by his own admission, a matter that was not before the trial judge. For example, in his pre-motion brief, the appellant concedes:

By oversight on the part of the Appellant Section ag in the *Pensions Benefit Act* 1980 R.S.N.S. [sic] and Section 20 B(1) and 20 B(2) in the 1970 *Pensions Benefit Act* was not brought to Judge [sic] Edward's attention. The Amended Notice of Appeal more clearly identifies those errors made in law and particularly the Learned Chambers Judge failure to note, implement and act on the *Pensions Benefit Act* 1988, R.S.N.S., [sic] Section 30, and Section AG, and also in his failure to recognize and implement the 1977 *Pensions Benefit Act*, Section 20 (b) (1) and Section 20 (b) (2). All of these provisions impose a duty [on] an employer to provide written notice to its employees of the terms of any pension plan. This was completely ignored in the Learned Chambers Judge's decision and resulted in serious errors and prejudice to the Appellant, Raphael Nyiti.

[9] Here is the corresponding proposed amendment:

(3) The learned chambers Judge erred in law by failing to consider the impact of definition section ag in the Pension Benefits Act 1988 R.S.N.S. [sic] and Section 30(1) and amendments thereto and further he failed to consider Section 20 B(1) and 20 B(2) in 1977 *Pension Benefits Act* R.S.N.S. [sic] and particularly the affect [sic] of 20 B(2) which mandated that all employers give their employees written notification of the terms of the pension. The learned trial judge failed to recognize the duty on the employer mandated by statute and this caused him to strike serious issues forward by the Plaintiff (Appellant) against CBU in relations [sic] to issues of fraud, trust and contract.

...

- (6) Again the learned chambers judge entered into matters of controversy and erred in law. It is the position of the Appellant that it was also a deception hiding and suppress material facts like the pension plan from Dr. Nyiti and others. That is fraud by the definition. There is certainly an arguable issue to be heard and the issue of credibility between the parties will be a key component in the Trial. The Trial Judge [sic] erred in law when he failed to consider the 1977 *Pension Benefit Act* R.S.N.S., S 20 B(2) and Section 20 B(1) and Section 30 (1) in the 1988 *Pension Benefit Act* R.S.N.S. and wrongly removed from trial judge or jury the right to make findings relating to fraud and trust.

[10] Considering that this issue is raised for the first time on appeal and considering this late date, I am not prepared to allow it to be advanced. For example, in **Hapi Feet Promotions Inc. v. Martin**, 2005 NSCA 83, Justice Oland for the court commented on the difficulties in raising new arguments on appeal. In that case, she found:

[17] Alternatively, I would dismiss these grounds of appeal on the basis that the appellants are seeking to raise a new issue on appeal. They made no request for an undertaking before the Chambers judge. There was little information before him in regard to an undertaking. This is a situation where additional material and further submission might well have been made by both parties had that issue been raised upon the application and consequently it would be unfair to permit the appellant to raise a new issue on appeal. See *S-Marque Inc. v. Homburg Industries Ltd.* (1999), 176 N.S.R.(2d) 218 (C.A.) at § 27.

[11] Secondly, the remainder of the proposed amendments appear to represent the appellant's attempt to elaborate upon his plea that the University acted fraudulently. Yet in oral argument, I understood the appellant to assert that his goal in seeking the amendment was simply to clarify grounds of appeal that have already been plead. If so, the amendment may not even be necessary. In any event, again at this late stage, I am not prepared to grant any further amendments in this regard.

[12] Finally, I am also concerned about that prejudice these proposed amendments will cause the respondent. As noted, this appeal will be heard in just three weeks and the respondent's factum is due next week. Neither party proposes an adjournment. I agree with the respondent that a careful review of this file demonstrates that this claim has represented a continuously moving target. This

present motion is but one more example. The initial grounds of appeal are regrettably confusing and read more like a factum as opposed to a notice of appeal; the proposed amended grounds only add to the confusion. Ironically this appeal involves a rejected application to amend the pleadings. I am not prepared to prejudice the respondent further by having it respond to yet another proposed amendment.

[13] The motion is dismissed with costs of \$500.00 payable forthwith to the respondent.

MacDonald, C.J.N.S.