Date: 20001218
Docket: S.H. No. 167501

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Haupt v. Eco-Nova Multi-Media Productions Ltd., 2000 NSSC 87

Between: HERMAN (RICK) HAUPT

Plaintiff

- and -

ECO-NOVA MULTI-MEDIA PRODUCTIONS LIMITED and
ECO-NOVA MARKETING CORPORATION LIMITED

Defendants

D E C I S I O N

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: In Chambers Halifax, Nova Scotia

DATE HEARD: December 14, 2000

DECISION: December 18, 2000

COUNSEL: Colin D. Bryson
for the Plaintiff/Applicant

Jonathan C.K. Stobie, Q.C.
for the Defendant/Respondent

Sandra MacPherson Duncan
Intervenor for The Royal Bank of Canada

DAVISON, J.:

[1] This application was initiated by an originating notice (application inter partes) whereby the plaintiff sought “delivery of possession ... of the stock footage for the television series ‘Oceans of Mystery’.” The application was supported by the affidavit of Colin D. Bryson, counsel for the plaintiff, sworn on November 21, 2000. Mr. Bryson states in the affidavit the plaintiff was in Poland and not immediately available to swear an affidavit.

[2] Mr. Bryson states in the affidavit that the plaintiff and John Davis III were the principal shareholders of the two companies described as defendants which were engaged in the production and marketing of a television program entitled “Oceans of Mystery”. The defendants used and developed film footage known as stock footage.

[3] The issue before the court arises from an agreement dated December 21, 1999 in which the plaintiff agreed to sell shares of the defendant companies to John Davis III and agreed to purchase from the defendants assets including that set out in para. 4 of schedule “A” to the agreement which reads in part:

> THAT by an agreement dated December 21, 1999 (the “Agreement”), a true copy of which is attached hereto as Exhibit “A”, Mr. Haupt agreed to sell his shares in the Companies to Mr. Davis and (by paragraph 2.04 of the Agreement)

> agreed to purchase from the Companies certain assets specified in Schedule "A" to the Agreement, including:
>
> > "a forty-nine percent (49%) interest in the stock footage previously used in the O of M series. The parties to have joint access and control of the footage as the parties shall agree. The location of the storage of the stock footage to be at the head office at Haupt in Canada."

Mr. Bryson states in his affidavit the defendants have retained possession of the stock footage and used it for their business purposes and are not prepared to release the stock footage. The affidavit goes on to state:

> THAT I am advised by Mr. Haupt that he urgently requires the stock footage for a further production of the Oceans of Mystery shows and the continued denial of the possession and use of the stock footage by Eco-Nova may well result in financial loss to Mr. Haupt.

[4] The defendants filed an affidavit of John B. Davis III who states the plaintiff has asked that the stock footage be delivered to R.B. Communications Group Inc. and "to the best of my knowledge" that is not the head office of the plaintiff in Canada. Mr. Davis' affidavit goes on to state:

> 10. To the best of my knowledge, Mr. Haupt has not formed a company and has not rented an office in the Roy Building on Barrington Street in Halifax. Nor, so far as I am aware, is there such a thing as a "head office of Haupt in Canada".

[5] It is stated the defendants require continuous access to the stock footage. The reasons Mr. Davis agreed that stock footage would be located in the head

office of Mr. Haupt is information given by the plaintiff to Mr. Davis as follows:

> 9. Shortly prior to signing the Agreement, I had discussions with Mr. Haupt where he made the following statements to me:
>
> > (a) He would be commencing work on a new cycle of thirteen episodes of the documentary series "Oceans of Mystery" in March of 2000 and that the thirteen episodes had been fully financed;
> >
> > (b) For this purpose, he would be forming a company which would be renting an office in the Roy Building on Barrington Street in Halifax;
> >
> > (c) He would need access to the stock footage for the production of these new episodes, and asked if the stock footage could be stored at the Roy Building site;
> >
> > (d) He would provide me and the other employees of Eco-Nova all reasonable access to the stock footage if I would allow the stock footage to be stored at the Roy Building site which the company he was to form would lease in spring 2000.

[6] The Royal Bank of Canada advanced a loan to Eco-Nova Multi-Media Productions Limited and took security in the form of a copyright mortgage and assignment and Sandra MacPherson Duncan, counsel for the Royal Bank of Canada advanced an order, to which Mr. Bryson and Mr. Stobie, counsel for the defendants, consented, for leave to intervene in the proceedings. The order was granted.

[7] The written brief and oral submission of the plaintiff indicated the application was for possession of the stock footage films but that it was urged to determine this issue the court must interpret the agreement dated December 21, 1999 with particular reference that part of para. 4 of schedule "A" referred to previously in these reasons. The argument advanced by the plaintiff is that the agreement makes reference to joint access and neither party should be denied joint access.

[8] At the opening of the hearing of the application, the court raised with counsel the fact the application is said to be advanced under *Civil Procedure Rule* 9, but that is a *Rule* which is referred to as the Commencement of Proceedings and its purpose is to direct the manner a proceeding is to be initiated. In particular with respect to this proceeding where there is a question of law or construction of a document and it is said "there is unlikely to be any substantial dispute of fact", the proceeding is commenced by filing an originating notice (application inter partes).

[9] Documents which commence a proceeding such as those referred to in *Civil Procedure Rule* 9 must have a degree of precision to advise the other parties and the court of the nature of the proceeding, the remedy sought and the statute, rule or law which permits the court to grant such a remedy. The originating notice (application inter partes) does not make reference to a

Civil Procedure Rule but does state the application is for delivery of possession of the stock footage. The written memorandum of the plaintiff started with the advice the application for possession was “brought by way of originating notice (application) pursuant to *Civil Procedure Rules (sic*) 9.02".

[10] The application was commenced pursuant to *Civil Procedure Rule* 9.02, but there is no direction in that *Rule* which pertains to procedure required to gain possession of a chattel. That *Rule* is *Civil Procedure Rule* 48 entitled “Recovery Orders” and its contents relate to the remedy of replevin. The purpose of the *Rule* is set out in *Civil Procedure Rule* 48.01(1) which reads:

> Application for an interlocutory order
>
> 8.01. (1) Any party or intervenor in a proceeding may apply for an interlocutory order to recover possession of property that was unlawfully taken or is unlawfully detained from him by any other party, or is held by an officer under any legal process issued in the proceeding.

[11] The procedure to be followed in recovery of property is explicitly set out in *Civil Procedure Rule* 48 and contains protection for all parties such as the three parties in this proceeding including instructions on the contents of affidavits and the possible requirement of a bond.

[12] In my respectful opinion the application before me should have been an application pursuant to *Civil Procedure Rule* 48 and that which is before the court does not comply with the requirement of that *Rule*. This failure requires me to dismiss the application.

[13] Furthermore, the plaintiff submits he is entitled to possession by reason of the provision for joint access and control of the stock footage referred to in para. 4 of schedule "A" of the December 21, 1999 agreement and the court is asked to interpret the clause in the schedule. It is said there is no substantial dispute of fact.

[14] *Civil Procedure Rule* 25.01(1)(a) reads:

> 25.01. (1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
>
> (a) determine any relevant question or issue of law or fact, or both;

[15] There is clear authority for the parties to proceed under this *Rule* there must, except in exceptional circumstances, be an agreed statement of facts. Reference is made to *Curry v. Dargil* (1984), 62 N.S.R. (2d) 416, *Seacoast Towers Services Ltd. v. MacLean* (1986), 75 N.S.R. (2d) 70 and *Binder v. Royal Bank of Canada et al.* (1996), 150 N.S.R. (2d) 234. As to the exception to the *Rule*, Bateman J.A. in the *Binder* case stated at p. 236:

> It was recognized in Seacoast Towers, supra, that there may be exceptional cases where an agreed statement of fact is unnecessary, for example, where the facts underlying the resolution of the legal issue are a matter of public record. This case does not fall within any such exception.

Neither does this case fall within the exception.

[16] There was no agreement of facts filed in this proceeding and indeed the submissions of counsel indicated a dispute on the facts.

[17] For the foregoing reasons the application should be dismissed. I would add the clause in the schedule to the agreement, to which counsel for the plaintiff and defendants refer, cannot be interpreted by any rule of construction because it is incomplete. It is written "the parties to have joint access and control of the footage as the parties shall agree." (emphasis added) This is an agreement to make an agreement. The parties have agreed to negotiate. As stated by *Chittey on Contracts* 28th Edition at p. 145:

> A further possibility is that the parties have simply agreed to negotiate. In spite of dicta to the contrary, it has been held that a mere agreement to negotiate is not a contract "because it is too uncertain to have any binding force." It therefore does not impose any obligations to negotiate, or to use best endeavours to reach agreement or to accept proposals that "with hindsight appear to be reasonable." Nor, where an agreement fails to satisfy the requirement of certainty, can this defect be cured by *implying* into it a term to the effect that the parties must continue to negotiate in good faith.

[18] The application has been decided on issues raised in the hearing by the court. Both counsel for the plaintiff and defendants expressed the view the court should adjudicate a solution to the differences between the parties. In my respectful view, this would constitute a mediation unsupported by any rule of law. For this reason I award no costs.

J.