SUPREME COURT OF NOVA SCOTIA
Citation: Rice v. Armco Capital Inc., 2010 NSSC 369

Date: 20101013
Docket: Hfx. No. 322416
Registry: Halifax

Between:

Mark Rice and Glenda Rice

Plaintiffs

v.

Armco Capital Inc., Kenneth Rayne, Angela Rayne and Paula Condran

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	June 3, 2010, in Halifax, Nova Scotia
Counsel:	Lester Jesudason, for the applicant, Armco Capital Inc. Christopher Robinson, for the respondents, Mark Rice and Glenda Rice Blair Mitchell, for the defendants, Kenneth and Angela Rayne

By the Court:

[1] This is an application for summary judgment on the pleadings pursuant to *Civil Procedure Rule* 13.03 and for summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04.

Background

[2] The plaintiffs are the owners of Lots 17 and 23 in the Armco Canterbury Crossing residential development in Upper Sackville, NS. The defendants, Kenneth C. Rayne and Angela E. Rayne, own lot 16. The defendant Armco is the developer. The defendant Paula Condran is the solicitor who acted for the plaintiffs when they purchased their lots.

[3] The conveyances of lots by Armco to the plaintiffs and to the Rayneses contained various restrictive covenants relating to the usage of the lots, including a covenant forbidding “horses ... or animals other than household pets” from being kept on the lands. Armco waived the restrictive covenant dealing with animals, permitting the Rayneses to keep a horse on their lot. The plaintiffs allege that the restrictive covenants could only be waived with the agreement of the owners of the

lots for whose benefit the covenants existed. Armco, however, asserts that it could waive any restrictive covenant pursuant to clauses 27 and 28, which provided:

> 27 Provided always that notwithstanding anything herein contained, Grantor and his successors shall have the power, by instruments in writing from time to time, to waive, alter or modify the above restrictions an application to the said lands or to any part thereof without notice having to be given to the owner of any other lots in the said lands.
>
> 28 Contraventions shall not affect the validity or enforceability or any other restrictions. The Grantor is not responsible for the enforcement of compliance with these covenants, however in the event that the Grantor chooses to enforce compliance with the covenants, the party in fault with the covenants, is responsible to the Grantor for all costs, ie. providing letters to third parties confirming non compliance with the terms of these covenants, claims, damages, costs or expenses resulting therefrom, including legal fees on a solicitor-client basis.

[4] Since the hearing of the motion the plaintiffs have discontinued their action against the Rayneses, but the action against Armco and Ms. Condran continues.

Issues

[5] Should the plaintiff's claim against Armco be struck (1) as disclosing no cause of action or (2) as disclosing no genuine issue for trial? I will address the application under Rule 13.03 first.

The Law

[6] The relevant provisions of the *Civil Procedure Rules* provide, in part, as follows:

> Object of these Rules
>
> 1.01 These rules are for the just, speedy and inexpensive determination of every proceeding.
>
> ....
>
> Summary judgment on pleadings
>
> 13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;

(b) ....

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) ....

(b) dismissal of the proceeding, when the statement of claim is set aside wholly;

(c) ...

(d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

Position of the Parties

[7] Armco argues that the Statement of Claim does not set out a cause of action against it. It is necessary for the plaintiff to plead a cause of action with sufficient clarity to permit the opposite party to know the case it has to meet. The general principles of pleading are reaffirmed at Rule 38.02:

> (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.
>
> (4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.

[8] An addition to this general codification of the rules of pleading is found at Rule 38.04, which provides that "[t]he performance or occurrence of a condition necessary to a claim is implied from the pleading of the claim and need not be included in a statement of claim, and the party who alleges non-performance or non-occurrence of the condition must specifically plead it in the statement of defence." This exception does not arise here.

[9] Armco relies on *Rowe v. New Cap Inc. et al.* (1994), 134 N.S.R. (2d) 52, 1994 CarswellNS 186 (S.C.), where Goodfellow, J. ruled on the effect of the Rule 14.04 of the *Civil Procedure Rules (1972)*, the predecessor to Rule 13.03. He said, at paras. 12 and 15:

> The object of the Civil Procedure Rules is to secure the just, speedy and inexpensive determination of every proceeding. This must be kept in mind from the commencement of a proceeding to its conclusion if necessary, on appeal. Civil Procedure Rule 14.04 is one of the most fundamental rules that must be followed to achieve the mandated objective. The requirement of every pleading containing a statement setting out material facts in summary form must be followed, otherwise the opposing side will not know with sufficient certainty what is in issue. Only by clearly outlining what is in issue can the matter proceed fairly, which means without surprise or abuse.
>
> ...
>
> The pleadings inform the other side of the nature of the case to be met as distinguished from the evidence which is the manner in which a party hopes to prove his/her case. In addition to preventing a party from being taken by surprise, it defines the issues to be tried and by so doing, it places some limit on the costs of litigation that would otherwise arise.

[10] In *MacNeil v. Bethune*, 2005 NSSC 59, 2005 CarswellNS 122, affirmed 2006 NSCA 21, Robertson, J. stated, at para. 22, that "[a] mere plea of wrongdoing is not sufficient — there must be facts pleaded to support it." In *Haase v. Vladi Private Islands Ltd.* (1990), 96 N.S.R. (2d) 323, 1990 CarswellNS 447 (S.C.A.D.), MacDonald, J.A. said, at para. 9:

> The proper test to be applied when considering an application to strike out a statement of claim has been considered by this Court on numerous occasions. It is clear from the authorities that a judge must proceed on the assumption that the facts contained in the statement of claim are true and, assuming those facts to be true, consider whether a claim is made out. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is "obviously unsustainable".

[11] A motion to strike, if granted, is a drastic measure. The Court of Appeal has indicated that a trial judge must find that the pleadings are “certain to fail” or “absolutely unsustainable” before granting that relief: *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, at para. 18.

[12] Armco says the Amended Statement of Claim does not disclose any recognizable claim against the applicant in contract or in tort. It submits that there is no allegation against it of a breach of contract or of negligence, nor have the plaintiffs claimed any misrepresentation by Armco. The plaintiffs do not claim that they were unaware of the terms of the restrictive covenants or that the applicant engaged in any activity that resulted in their suffering any damages. The primary allegation, it is submitted, is a claim in negligence by the plaintiffs against their solicitor, Ms. Condran, which does not extend to, or include, Armco by reference.

[13] On a review of the Amended Statement of Claim, the only possible claim against Armco appears to be that the plaintiffs were told by their current solicitor that clause 27 was illegal at common law and consequently of no force and effect, and that Armco had no authority to waive any such restriction. Armco asserts that whatever might be the form or content of the legal advice provided by the plaintiffs' current solicitor, this does not constitute a cause of action as against it.

[14] The plaintiffs seek to establish that the building scheme created a contractual relationship between the beneficiaries. They have not pleaded, however, that Armco is the beneficiary of the building scheme. It is insufficient to simply plead that the clause allowing Armco to waive a restrictive covenant at its discretion is illegal because a valid building scheme was established. The existence of a valid building scheme does not create a cause of action against Armco for the Rayneses' alleged breach of the building scheme restriction on stabling horses. As a result, it is not necessary to answer whether it is sufficient to plead the establishment of a building scheme or whether the requisite elements of the building scheme must be pleaded.

[15] Rule 38.02(4) suggests that a point of law, the existence of the building scheme, can be pleaded so long as the material facts necessary to support this point of law are also pleaded. On the law governing the establishment of a valid building scheme, in *Sawlor v. Naugle* (1990), 101 N.S.R. (2d) 160, 1990 CarswellNS 510 (S.C.T.D.), Tidman, J. cited a line of cases that set out the following requirements, at para. 17 (ultimately referring to *Elliston v. Reacher*, [1908] 2 Ch. 374):

> It must be proved (1) that both the plaintiffs and the defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other lots retained by the vendor; (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

[16] The plaintiffs have not pleaded that the covenants were intended to be for the benefit of all of the lots intended to be sold and that plaintiffs and defendants, or their predecessors in title, purchased their lots from the common vendor or upon the footing that the restrictions subject to which the purchases were made were to

inure for the benefit of the other lots included in the general scheme regardless whether they would enure for the benefit of other lands retained by the vendor.

[17] Regardless of this failure, a valid building scheme or an illegal restrictive covenant in and of itself does not establish an actionable cause for the plaintiff against Armco. The plaintiffs' claim for breach of contract, if there is any such claim, would be against the Rayneses, who violated the alleged building scheme, and against whom the action has been discontinued.

[18] If the plaintiffs had wanted to bring an action against Armco successfully, it would have been necessary to argue that Armco breached a duty of good faith or fiduciary duty to the plaintiffs, or that Armco was a party to the contractual relationship established by the alleged building scheme and that Armco was the party that breached this building scheme.

[19] The statement of claim does not disclose any cause of action known to law. The Amended Statement of Claim acknowledges that the plaintiffs received the restrictive covenants, and asserts that they have been informed by their solicitor that the covenants are illegal at common law and that Armco has no authority to

waive any restrictive covenants. The plaintiffs seek an order for recession of the purchase and sale agreement, as well as liquidated damages and general damages. It is not enough for a plaintiff to simply plead that they have suffered damages in order to make out a cause of action on the pleadings. There must be a reason why the defendant is legally responsible for the damages suffered. The defendant must have wronged the plaintiff in some legally actionable way.

[20] In response to the applications to dismiss, the plaintiffs seek a determination of a question of law pursuant to Rule 13.03(5), which provides:

> 13.03 (5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:
>
> > (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
> >
> > (b) the outcome of the motion depends entirely on the answer to the question.

[21] The plaintiffs maintain that Article 27 is illegal at common law because Armco created a building scheme which has mutual benefits and burdens; consequently, the restrictive covenants cannot be waived by Armco without the

consent of all of the owners. The plaintiffs cite *Munro v. Jaehrlich*, [1995] 4 W.W.R. 85 (B.C.S.C.), where it was held that to effect a variation in a building scheme required the consent of the owners.

[22] The plaintiffs also cite *Lebeau v. Low*, 2002 BCSC 687, where the Court considered a series of restrictive covenants giving authority to the developer of a building scheme to vary or alter restrictive covenants that applied to the lands at issue. The Court held that the owner did not have a right to waive any restriction in the building scheme without all of the other owners agreeing to such waiver. The Court noted that there are types of restrictive covenants that may be imposed by a vendor, referring to *Canadian Construction Co. v. Beaver (Alta.) Lumber Ltd.*, [1955] S.C.R. 682, where Locke J. defined these, at 692, as: (1) covenants imposed by the vendor for his own benefit; (2) covenants imposed by the vendor as owner of other land of which that sold formed a part, and intended to benefit or protect such unsold land; and (3) covenants imposed by a vendor upon a sale of land to various purchasers who are intended to mutually enjoy the benefit of, and be bound by, the covenants.

[23] The plaintiffs claim that the third category would include a building scheme where it is intended that each lot owner is to be bound by restrictive covenants included for the benefit of every owner, so that every lot is both dominant and servient with respect to every other lot. The plaintiffs agree that the building scheme depends on the intentions of the parties. To consider such intentions, the Court would have to consider affidavit evidence, which is impermissible.

[24] Rule 13.03(5) does not create an independent process for answering a legal question. It only permits the court to exercise its discretion to answer a legal question as part of a motion for summary judgment on pleadings. It is my view that the question of law ought not to be considered because the answer to the question of the waiver clause's legality is not necessary to a determination of the motion. The statement of claim is bereft of any cause of action even if it is presumed that the waiver clause is illegal and of no force and effect. Therefore, the court should not exercise its discretion pursuant to Rule 13.03(5) to answer the legal question raised by the plaintiffs.

[25] Rule 13.04(5) provides that "[a] judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue

for trial is a question of law." Since I have determined that summary judgment on the pleadings should be granted, it is not necessary, nor is even possible, to determine Armco's motion for summary judgment on evidence. Therefore, it is equally unnecessary to determine the plaintiffs' conjunctive request for the determination of the legal question, and I would exercise my discretion not to answer the proposed question pursuant to Rule 13.04(5).

[26] Having determined that the motion for summary judgment on the pleadings should be granted, it is not necessary or practical to address the motion for summary judgment on evidence.

[27] Unless the parties can reach agreement on costs, they are requested to provide written submissions prior to November 1, 2010.

J.