SUPREME COURT OF NOVA SCOTIA

Citation: *Harbouredge Mortgage Investment Corporation v. Amherst (Town)*, 2016 NSSC 337

Date: 20161208
Docket: Amherst, No. 434167
Registry: Amherst

Between:

Harbouredge Mortgage Investment Corporation, a body corporate on behalf of Victoria Arms Holdings Inc., a body corporate

Plaintiff

v.

The Town of Amherst, a body corporate and Bowsers' Construction Ltd., a body corporate

Defendant

DECISION

SUMMARY JUDGMENT MOTION – EVIDENCE

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	July 26 & 28, 2016, in Amherst, Nova Scotia
Written Decision:	December 8, 2016

Counsel:	Josh Santimaw/Geoffrey Franklin, Solicitors for the Plaintiff Brian Creighton/Catherine Hirbour, Solicitors for the Defendant, The Town of Amherst Mark Canty, Solicitor for the Defendant, Bowsers' Construction

By the Court:

[1] The parties in this matter have filed several competing motions on various issues. Counsel have agreed to a "batting order" for addressing these motions as follows:

1. Motion for Summary Judgment on Pleadings brought by the Defendant, Bowsers' Construction.

2. Motion for Summary Judgment on Evidence brought by the Defendant, Town of Amherst, seeking dismissal of the claim on various jurisdictional and limitation grounds.

3. Motion for Summary Judgment on Evidence by the Plaintiff, Harbouredge seeking the setting aside of the Defences of the Town of Amherst and Bowsers' Construction Ltd.

[2] By way of orientation to the current status, I note that the first stage set out above has been completed. The Summary Judgment Motion on Pleadings brought by the Defendant, Bowsers' Construction has been heard and dismissed by the Court.

[3] This decision will address the second Motion listed above.

[4] The third Motion is adjourned and will proceed at a future date.

Facts

[5] The factual background against which the Motion was argued by the parties was as follows:

1. The dispute arises out of a fire at 31 East Victoria Street in the Town of Amherst which occurred on August 27, 2012.
2. At the time of the fire, the property was owned by Victoria Arms Holdings Inc. ("Victoria Arms"). A collateral mortgage on the lot and building was held by Harbouredge Mortgage Investment Corporation ("Harbouredge").
3. The fire resulted in a complete loss of the structure. In the immediate aftermath of the fire certain safety and remedial steps were taken, either by the owner or their insurer.
4. This work consisted of some demolition and debris cleanup. This was completed in early September 2012. After this initial cleanup the foundation walls were partially intact and the site essentially consisted of an empty pit partially surrounded by a low mesh fence.
5. Unsurprisingly this situation was not found to be acceptable in the long term. The property is situated on a main street of Amherst.
6. On September 20, 2012, the Town delivered a notice to Victoria Arms that the property was dangerous and unsightly in accordance with s. 346(1) of the ***Municipal Government Act,*** **S.N.S 1989, c. 18**, as amended.
7. The owners advised the Town that their insurer would be acting to erect a more substantial fence. This did happen. A steel mesh fence was subsequently erected.
8. Additional fencing work was required by the Town later in 2012 and after some delay this was eventually carried out either by, or on behalf of, the owners in early January, 2013.
9. On May 21, 2013 (roughly eight months' post fire) the Town gave 60 days' notice to the owner that if the property was not in the process of redevelopment then they would require that the pit be filled in. This notice also gave details of the owner's right to appeal the order.
10. The Town did not receive a response from the owner and, in fact, no further communication was subsequently received from the owner.

11. On July 11, 2013, a worrying development occurred. The contractor who had erected the safety fencing advised the Town that they intended to remove the safety fencing due to a lack of payment from or on behalf of the owner.

12. The Town could not allow the site to be unfenced. Representatives of the Town contacted the contractor and were advised that the monthly rental cost for the safety fencing was $313.95. To maintain the fencing the Town accepted the quote and agreed to pay for the perimeter fencing rental commencing July 11, 2013.

13. In early August, 2013 the Town wrote to the owner advising of their mounting concerns and advising the owner that unless Victoria Arms acted the Town would undertake the site remediation work.

14. The letter advised that the cost of this work would be added to the tax bill and, accordingly, constitute a lien on the property.

15. Through early to mid-August, 2013 the Town went through the steps of preparing and issuing a Request for Quotes on the backfilling and grading of the site.

16. On August 15, 2013, a communication went out to the owner (by regular, registered and email) that a contract had been awarded for the site work. It repeated the warning with respect to the inclusion of the costs within the property tax account.

17. Bowsers' Construction Limited ("Bowsers") was the successful bidder for the site remediation work and they began work on August 21, 2013.

18. The initial site work carried out by Bowsers was uneventful. However, later in the day on August 21, 2013 the following occurred [this is taken from the pleading of Bowsers Construction, para 5(g)]:

> g. on August 21, 2013, the defendant Bowsers' punctured an underground storage tank on the subject property and the defendant Bowsers' immediately stopped work, contacted the Defendant Town and called the Amherst Fire Department who subsequently contacted the Nova Scotia Department of Environment.

19. There are two views as to what resulted from this puncture during the excavation work being conducted by Bowsers. Either:

i. Bowsers' work uncovered an old abandoned oil tank which had been seeping for some time. During their work they put an inconsequential puncture in the top of the tank which did not add to the seepage; or

ii. Bowsers' work uncovered an old abandoned oil tank which may or may not have been seeping for some time, but during their work Bowsers put a puncture in the tank which contributed to leakage, contamination and resultant cost.

20. The Town hired an environmental consulting firm to oversee the remediation of the site. Contaminated soil was removed and disposed of in accordance with regulations. Something over 700 tonnes of material was removed and disposed of. This work ended in early September, 2013.

21. On October 10, 2013, the Town sent communication to Victoria Arms advising that the sum of $90,883.45 was being added to the tax bill for the property. This represented the cost of the original work together with the remediation costs arising from the oil tank leakage.

22. On March 10, 2014, the Town advised Harbouredge that it intended to sell the property at tax sale then scheduled for May 13, 2014. Harbouredge notes that this was the first date at which it was aware of the tax arrears or the environmental contamination. The Town does not challenge this time line for purposes of this motion.

23. The tax sale was adjourned on consent.

24. On May 8, 2014 Harbouredge paid the property tax arrears excepting the remediation costs.

25. On November 28, 2014 Harbouredge served the Town with its Notice of Intended Action. The Action itself was filed on December 1, 2014 and served on the Town on February 27, 2015.

[6] The evidence filed in this matter was as follows:

- Affidavit of Trevor Eisnor (sworn January 11, 2016);

- Affidavit of Brian Creighton (sworn January 16, 2016);
- Affidavit of William Medley Crossman (sworn January 19, 2016);
- Affidavit of Tim Dwyer (sworn September 25, 2015);
- Affidavit of Larry Dunn (sworn January 14, 2016);
- Affidavit of Larry Dunn (sworn June 29, 2016);
- Affidavit of Robbie Broad (sworn June 29, 2016);
- Package of documents admitted by consent (Exhibit #1).

[7] No cross-examinations were sought. Accordingly, the evidence is as contained in the Affidavits and Exhibit #1.

[8] Against the background facts the following issues are to be determined in this Motion. These have been termed the "jurisdictional" issues:

1. Does Harbouredge have standing to advance this proceeding?
2. Is the proceeding advanced by Harbouredge barred by the one year limitation period found in the ***Municipal Government Act***?
3. Is the proceeding advanced by Harbouredge barred by the requirement in s. 512(3) of the ***Municipal Government Act*** that an intended Plaintiff provide one month notice of intended action.
4. Is the Municipality exempt from liability pursuant to sections 353 or 503 of the ***Municipal Government Act*** such that Summary Judgment is mandated at this stage?

[9] I want to begin with an overview of the new ***Civil Procedure Rule*** respecting summary judgment on evidence.

[10] The Summary Judgment rule in Nova Scotia was amended on February 26, 2016. This matter proceeded under the new Rule 13.04 which provides as follows:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) There is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) The claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) 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.

> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) Determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) Adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[11] It has been recognized that the new Rule has eliminated the two-part test that had been previously employed in the application of the summary judgment analysis.

[12] Under the new formulation the burden remains on the Applicant to satisfy the Court that there is no genuine issue of material fact for trial, and no question of law requiring determination.

[13] The obligation of the responding party is to put their best foot forward in showing what that material fact could be or what the question of law might be.

[14] The following direction from the Nova Scotia Court of Appeal in ***Coady v. Burton Canada***, 2013 NSCA 95 remains applicable to a determination of what is a "material fact for trial" [para. 87]:

> …
>
> 2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no

material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

…

4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

…

6. …The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

…

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

…

10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.

11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

Standing

[15] The position of the Municipality is that Harbouredge lacks legal capacity to advance the present claim.

[16] They argue that summary judgment is warranted on this basis alone.

[17] In ***Abrams, MacGuinness and Brechen, Canadian Civil Procedure Law***, 2nd ed. (Lexis Nexis, 2010) the authors address the issue of standing in the following terms:

> (para 3.44) Standing is the legal right to initiate a legal proceeding with respect to a specified cause of action. It involves the threshold issue in a legal proceeding of whether the complainant is entitled to have the Court decide the merits of the dispute or of particular issues. To enjoy standing the complainant must be sufficiently affected by the matter that gives rise to the cause of action. In general, to enjoy standing, the complainant must have suffered injury or damage in fact, in the form of some invasion of a legally protected, concrete and particularized interest belonging to that complainant. The injury or damage must be actual or imminent, rather than conjectural or hypothetical. (emphasis added)

[18] Justice Muise of this Court has very recently reviewed a situation where standing was challenged. In ***Spicer v. Middleton***, 2014 NSSC 66, the validity of a tax sale was challenged. The proceeding was brought by a party who was neither the tax payor or the Town which conducted the sale. The party in question claimed an interest in the property but their legal standing to launch the proceeding was challenged.

[19] The Court referred at length to the text written by Justice Cromwell (prior to his appointment to the Supreme Court) on the subject of standing. Justice Muise wrote as follows:

> 63 At pages 123 to 125, Cromwell, as he then was, indicated that the "cause of action" approach used in Cowan no longer represented the law in Canada. He went on, at pages 125 to 131, to describe a broadly interpreted rights or interests approach, focusing on the reality of the economic or other significance of the issue in question to the applicants, or whether the declaration sought has some practical value to them, as representing the law in Canada. At page 146, he summarized the approach as follows:
>
> Putting aside the constitutional cases for a moment, the test for standing to seek declarations appears to be that the plaintiff must have "an interest" in the issue sought to be litigated. The term "interest" has been given a variety of meanings, but the most recent cases have given it a broad interpretation. Notions of privity between the parties and private law concepts of pecuniary and proprietary interests have given way to a more pragmatic, if not well articulated approach. The tendency has been to abandon formalistic analysis and to examine the real significance of the issue to the plaintiff.
>
> 65 In ***Walmsley,*** *Re:* PEISCTD 37 (T.D.), an adverse claimant to land conveyed in a deed was found to have standing to challenge the validity of that deed even though he was not a party to the transaction and was not claiming an interest from or under the grantor.
>
> 66 In the case at hand, if the deed into Brocklin is declared invalid, there would have been no transfer of ownership authorizing Brocklin to redeem the property. That would result in an invalid redemption and the Applicant's being entitled to a tax deed to the property. Their pending right to acquire the property by tax-deed following the redemption period has been prevented form ripening by the redemption. If Brocklin was not authorized to redeem due to the deed into it being invalid, the Applicants were wrongfully deprived of the ripening of their right to obtain a tax-deed. They have suffered a real injury or damage, not a hypothetical one. Therefore, in my view: the Applicants have a legal interest in relation to the property which has been affected by the conveyance into Brocklin; the validity of the conveyance has a real economic significance to them; a declaration of invalidity has practical value to them; and, the validity of the

> conveyance is an element in the dispute regarding the validity of the redemption, irrespective of whether the Applicants were a party to the conveyance.

[20] In the present case Harbouredge can point to the following:

- If the "remediation" costs are added to the tax account their security is impaired in that it would be moved down the priority chain;
- If they are not permitted to challenge the inclusion of the charges, then these amounts will be unchallenged as the owner has ceased to participate in this matter;
- Harbouredge has a right under their security document to take steps to preserve their security and security position;
- As a mortgage holder Harbouredge has a legal interest in the property, thus their involvement is not "arbitrary or speculative".

[21] I find that Harbouredge has met the burden of showing that its interest in the outcome of the matter is real and non-speculative. Their pecuniary interests will be directly impacted depending on how the remediation costs are treated. While the factual situation in the ***Spicer v. Middleton*** case is different from the present situation, the principles applied by the Court there have application in the present circumstance. The application of the analysis from ***Spicer*** leads me to conclude

that Harbouredge has standing such that the test for summary judgment on this point is not met.

Limitation Period Issue

[22] Section 512 of the ***Municipal Government Act*** creates a 12 month limitation period for certain claims involving a municipal authority. The provision is as follows:

> 512(1) For the purpose of the ***Limitation of Actions Act***, the limitation period for an action or proceeding against a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them is twelve months.

[23] There is no real dispute between the parties that this limitation period would not begin to run until the material facts underpinning the cause of action became known to the Plaintiff, or should have become known, through the exercise of reasonable diligence.

[24] The Plaintiff's position is that for the purposes of calculation, the limitation period began to run in or around March, 2014 which it asserts was the point Harbouredge learned of the property tax arrears including remediation costs. The evidence of Harbouredge is that while they were previously aware of the fire loss

they were not aware, prior to March, 2014 of any issues involving an alleged oil spill and remediation costs as they related to the tax bill.

[25] There is no question that the owner, Victoria Arms, and its principals were aware of the circumstances of the spill. There is no such evidence with respect to Harbouredge.

[26] The record does not disclose any knowledge by Harbouredge of the remediation cost issues prior to March 10, 2014. This was the date of the written Notice of Tax Sale provided by the Town to Harbouredge. I conclude this was the point from which the limitation period ought to run.

[27] Given that the limitation period commenced no earlier than March 10, 2014 the filing of the Notice of Action did fall within the applicable limitation period.

S. 512(3) Issue

[28] The Town has raised the issue of Harbouredge having apparently failed to comply with s.512(3) of the ***Municipal Government Act***. This section provides as follows:

> 512(3) No action shall be brought against any parties listed in subsection (1) or (2) unless notice is served on the intended defendant at least one month prior to the commencement of the action stating the cause of action, the name and address

> of the person intending to sue and the name and address of that person's solicitor or agent, if any.

[29] This section was canvassed in ***Spicer v. Middleton***, supra. Justice Muise reviewed in some detail the applicable law. He stated at para 49:

> The purposes of requiring notice to the Crown, and also municipal units, are referenced in ***Lloyd v. Richard***, at paragraph 10, and in ***Petten v. E.Y.E. Marine Consultants***, at para 77. They include giving the municipal unit the opportunity to:
>
> > Gather and preserve evidence;
> >
> > Consider whether to settle the claim or contest it, to avoid the expense and embarrassment of litigation; and,
> >
> > Plan for potential future financial liability.

In ***Spicer*** the notice was argued to have been defective in a number of ways. The Court stated as part of its conclusions that (para 45):

> …provisions requiring notice to municipal units ought not be interpreted as strictly as those requiring notice to the Crown.

This analysis was based partly on the fact that by allowing claims to be made against it the Crown (as opposed to an incorporated municipal unit) was relaxing its traditional absolute immunity from suit.

[30] Case law has clarified that a municipal unit is to be distinguished from the "Crown" in that it is an incorporated body to which provincial legislation has

delegated authority: ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2.

[31] In ***Spicer*** the Court concluded that the municipal unit was not prejudiced by any procedural irregularities. I have reached the same conclusion in the present case. The Notice of Action was filed earlier than it ought to have been. The service of the Notice however was not immediate. When service did occur it was in compliance with the ***Civil Procedure Rules***. There was no evidence adduced that the position or decision making of the Town was in any way impacted by the sequence or timing of the Notice and filing.

[32] I conclude that none of the claims advanced ought to be dismissed solely because of technical irregularities with the Notice of Intended Action. It is possible that an argument could be mounted that some cost consequences might flow as the result of procedural irregularities. These issues would be for later argument, if appropriate.

Statutory Exemption

[33] Counsel for the Municipality argues that the Town enjoys a statutory exemption under s.353 and 503 of the ***Municipal Government Act***:

> 353 No action shall be maintained against a municipality or against the administrator or any other employee of a municipality for anything done pursuant to this Part (Part XV).
>
> ….
>
> 503(1) Where a council, village commission, committee or community council or the engineer, the administrator or another employee of a municipality lawfully directs that anything be done and it is not done, the council, the village commission, engineer, administrator or employee may cause it to be done at the expense of the person in default.
>
> (2) No action shall be maintained against a municipality, a village or any agent, servant or employee of the municipality or the village for anything done pursuant to this Section.

[34] Based on these sections, they assert that Harbouredge's action is statute barred and subject to summary judgment.

[35] As a starting point, it has been recognized that statutory provisions limiting liability of a municipality will be strictly construed: see ***Swinamer v. Nova Scotia (AG)***, [1994] 1 S.C.R. 445 at 456; see also The Law of Municipal Liability in Canada, (Boghosian and Davison, Lexis Nexis, 2011) at para 2.163.

[36] In ***Delport Realty Ltd v. Halifax (Regional Municipality)*** 2010 NSSC 290, Bryson, J., as he then was, dealt with a matter which included a challenge to the inclusion in a property tax account of certain costs incurred by a municipality in the course of a clean up. The lot in question had been the subject of a clean up order by the municipality. During the course of the dispute over the clean up the

municipality commissioned and paid for a survey. The lot owner disputed the inclusion of this cost in the total to be applied against the tax account.

[37] Justice Bryson weighed the circumstances and concluded that, while such an expense might not always be recoverable, in the circumstances of that case he would permit its inclusion in the tax account. For our purposes it is relevant that Justice Bryson concluded that in some circumstances a charge could be subject to challenge and exclusion. If the statutory immunity operated as an absolute shield against raising such a challenge he presumably could not have reached that conclusion.

[38] The conclusion reached by Justice Bryson accords with common sense. It would not seem appropriate to create a situation where parties had no right to challenge charges being added to tax bills. It is important to note that, at its core, this is the right being asserted in this case.

[39] Harbouredge asserts that the test for summary judgment has not been met. In addition to the question of material facts in dispute (the issue of causation by Bowsers as agent for the Town) they further argue that the application of the MGA sections in question are a legal issue requiring determination at trial.

[40] I conclude that the Defendant Town has not met the burden on it to demonstrate there are no genuine issues for trial and the absence of any question of law requiring determination.

Conclusion

[41] In accordance with the findings made above I decline, in all the circumstances, to enter an order for summary judgment.

[42] Pursuant to CPR 13.08(1) I am directing that a status conference be organized at the first reasonable opportunity for the purpose of confirming next steps and a time frame for the advancement of this matter.

[43] Finally, in the event the parties are unable to reach an agreement with respect to costs, I would be prepared to receive written submissions within 30 days.

Justice Jeffrey R. Hunt

12/08/16