1987 S.H. No. 62006

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

SMITH'S FIELD MANOR DEVELOPMENT LIMITED

Plaintiff

- and -

CITY OF HALIFAX

Defendant

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice John M. Davison, in Chambers, on Monday, May 9th, 1988

DECISION: June 16, 1988

COUNSEL: Charles D. Lienaux, Esq., for the Plaintiff
Wayne Anstey, Q.C., for the Defendant

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DAVISON, J.:

This is an application for an Order striking out the Defence of the Defendant pursuant to Rule 14.25(b) and (c) on the grounds that it is false, frivolous and vexatious or that it will prejudice or delay the fair trial of the proceedings. In the alternative, the Plaintiff seeks an Order, pursuant to Rule 13.01, granting summary judgment.

HISTORY OF THE PROCEEDINGS

On the 6th day of June, 1987, an application was made to a judge in Chambers for an Order in the nature of a mandamus to require the Development Officer of the City of Halifax to issue a Municipal Development Permit and to require the Building

Inspector of the City of Halifax to issue a Building Permit in respect of á development in which the Plaintiff had an interest. Specifically, the Originating Notice set forth the following:

> **The Plaintiff claims an Order of the Court in the nature of Mandamus compelling the City of Halifax to issue to H. W. Corkum Construction Limited a Municipal Development Permit and a Building Permit to authorize Smith's Field Manor Development Limited to proceed forthwith with construction of a 14 unit senior citizens' apartment building valued at $2,800,000.00 at 5266 - 5270 Green Street in the City of Halifax.**

The application was refused by the Chambers judge and the Plaintiff herein appealed to the Appeal Division of our court. The Appeal Division allowed the appeal and an Order issued on the 11th day of February, 1988, requiring the appropriate officials of the City of Halifax to issue the Municipal Development Permit and the Building Permit.

On the 28th day of September, 1987, a second action, the one of which this proceeding forms a part, was commenced whereby it was alleged that various officers of the City of Halifax owed a duty to the Plaintiff and acted negligently and in bad faith by refusing permits. The Plaintiff claimed damages from the City which related to alleged losses incurred by reason of the delay in the issue of the permits.

On November 30th, 1987, the City filed an extensive Defence. It should be noted that at this time the City's position

was bolstered by the decision of the Chambers' judge and the decision of the Appeal Division had not been rendered.

On the 24th day of March, 1988, after the decision of the Appeal Division, the Plaintiff amended its Defence which document incorporated some of the findings of the Appeal Division and added further items of damage including general damages for loss of reputation and business interruption.

On the 3rd of April, 1988, the City filed a Defence and raised the defence of res judicata. By the time of the hearing before me, the City stipulated that the only defence on which it relied was the defence of res judicata which is more particularly set forth in the Defence document as follows:

> **6. The Defendant further says that the issues involved in the mandamus application are the same as the issues raised in this action, namely whether the Development Officer of the City of Halifax and the Building Inspector of the City of Halifax wrongfully withheld a municipal development permit and a building permit, respectively for the Plaintiff's Development.**
>
> **7. Based on the allegations contained in paragraphs 5 and 6 of this Defense, the Defendant says that the Plaintiff should have made its claim for damages at the same time as it made its claim for the order in the nature of mandamus and says further that any claim for damages up to the date of the decision of Court of Appeal is merged in the judgement and is res judicata.**

APPLICATION FOR SUMMARY JUDGMENT - RULE 13.01

Before granting an Order for summary judgment, I must be satisfied that there is no fairly arguable point to be argued on behalf of the Defendant: **Carl B. Potter v. Antil Canada Limited (1976), 15 N.S.R. (2d) 408 (C.A.).** There is no question that there is an arguable point as is evidenced by the very difficult issues raised by both counsel during the proceeding. An application for summary judgment is inappropriate and is refused.

APPLICATION TO STRIKE DEFENCE - RULE 14.25(b) and (c)

Civil Procedure Rule 14.25 reads as follows:

> **14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,**
>
> **(a) it discloses no reasonable cause of action or defence;**
>
> **(b) it is false, scandalous, frivolous or vexatious;**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the proceedings;**
>
> **(d) it is otherwise an abuse of the process of the court;**
>
> **and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.**
>
> **(2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).**

The Plaintiff initially sought an Order striking the pleadings on the ground that it disclosed no reasonable cause of action or defence but this was abandoned and the application before me is under 14.25(1)(b) and (c). Presumably, this was to avoid the prohibition against affidavit evidence by virtue of Civil Procedure Rule 14.25(2).

During the course of the argument, I raised with counsel the appropriateness of an application under Civil Procedure Rule 14.25. The solicitor for the City of Halifax had misgivings but it seemed to me, at the time, that the issue was one of law and one where the facts were all a matter of public record. It seemed desirable to have the issue determined at this stage rather than wait until the assessment of damages. I indicated to counsel that I would consider the matters in their briefs and render a written decision.

Since the hearing, I have reconsidered authorities such as **Seacoast Towers Services Limited v. MacLean (1987), 75 N.S.R. (2d) 70** and the authorities therein cited included **Curry v. Dargie (1984), 62 N.S.R. (2d) 416** and **Fulton v. Pinegrove Women's Institute (1984), 64 N.S.R. (2d) 98.**

In Fulton, an application was made before Chief Justice Glube pursuant to Civil Procedure Rule 25.01 where a declaration that the action against him was res judicata. In the alternative,

the application included a motion to strike the Statement of Claim under Civil Procedure Rule 14.25. Chief Justice Glube found that the application under Rule 25.01 was appropriate even without an agreed Statement of Facts because all of the facts were a matter of public record. Alternatively, she struck out the Statement of Claim under Civil Procedure Rule 14.25(1)(b) or 14.25(1)(d).

In Seacoast Towers Service Limited v. MacLean, (supra), Mr. Justice Matthews dealt specifically with Chief Justice Glube's decision in Fulton and pointed out that she probably had not had the assistance of Curry v. Dargie, (supra), and he goes on to refer to the words of MacDonald, J.A. in Curry at page 430:

> **To my mind the only proper method of having the issue of Crown immunity determined in this case before trial was on a proper application under Rule 25. This rule, however, appears to be applicable only where the parties agree to submit a question of law to the court based upon an agreed statement of fact - McCallum v. Pepsi Cola Canada Ltd. et al. (1974), 15 N.S.R.(2d) 27; 14 A.P.R. 27.**
>
> **The parties in this matter did not submit a question of law based on an agreed statement of fact. It follows that, in my opinion, there was no valid application under Rule 25 before Mr. Justice MacIntosh.**

With respect to a claim under Civil Procedure Rule 14.25, Mr. Justice Matthews in Seacoast had this to say at page 73:

> **A statement of claim may be struck-out under rule 14.25(1)(a) where it is clear**

> **on the face on the pleadings that no reasonable cause of action is disclosed or, to put it another way, that, on the face of the pleadings, the action is obviously unsustainable. Here, the judge in chambers did not follow the principle that the purpose of an application under that rule is not to try issues, but determine if there are issues to be tried.**

Despite the fact that I believe that it is in the interest of all parties to have this issue determined summarily, it seems to me, from the foregoing authorities, that the only way this issue of law can be decided is under Civil Procedure Rule 25 and then only if it is decided on an agreed statement of facts.

The application as constituted must be dismissed but, of course, the issue has not been resolved and it can still be resolved in summary manner pursuant to Civil Procedure Rule 25 or at trial. In view of the fact that the main issue has yet to be determined, the costs of the application shall be costs in the cause.

J.

Halifax, Nova Scotia
June 16, 1988