SUPREME COURT OF NOVA SCOTIA
Citation: *Tawil v. Lawen*, 2020 NSSC 343

Date: 20201201
Docket: Hfx No. 453283
Registry: Halifax

Between:

Catherine Tawil, Samia Khoury, and Mary Lawen, by her Litigation Guardian, Catherine Tawil

Plaintiffs

v.

Joseph Lawen, in his capacity as Executor of the Last Will and Testament of Jack Lawen

Defendant

and

Michael Lawen

Intervenor

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	October 21, 2020, in Halifax, Nova Scotia
Last correspondence from counsel:	November 10, 2020
Counsel:	Peter C. Rumscheidt, for the Plaintiffs Richard W. Norman, for the Intervenor A. Lawrence Graham, Q.C., for the Defendant

By the Court:

[1] This is a motion brought by Michael Lawen for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04.

Background

[2] To begin with, Catherine Tawil (“Catherine”), Samia Khoury (“Samia”), and Mary Lawen (“Mary”), by her litigation guardian, Catherine Tawil, (hereinafter collectively referred to as "the Plaintiffs") had commenced an action pursuant to the *Testators' Family Maintenance Act* ("*TFMA*"). It was against Joseph Lawen (the deceased's brother) in his capacity as Executor of the estate of their late father, Jack Lawen (hereinafter referred to as either "the estate" or "the Defendant"). Michael Lawen, who is a sibling of the Plaintiffs, then successfully applied to be added as an Intervenor.

[3] Subsequent to this, Michael and Joseph Lawen (as first and second Applicants) initiated other Court proceedings. In SH #470647 they sought a declaration that sections 2(b) and 3(1) of the *TFMA* violate sections 2(a) and/or 7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The Plaintiffs did not participate in that proceeding.

[4] In the course of rendering his decision, my colleague, Justice Bodurtha, in *Lawen Estate v. Nova Scotia (Attorney General)*, 2019 NSSC 162 (“the *Lawen* decision”) concluded that the impugned sections were unconstitutional, and that the appropriate remedy to address this unconstitutionality was to read down those sections to exclude nondependent adult children. This decision has been appealed by the Attorney General, and the appeal is scheduled be heard by our Court of Appeal on February 4, 2021.

The Parties’ Positions

[5] Against this background, the Intervenor brings a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04. Michael Lawen says that the basis of the statutory (hence, legal) edifice upon which the adult Plaintiffs' claim was built has vanished as a result of Justice Bodurtha's decision. Notwithstanding the fact that the appeal of the *Lawen* decision is soon to be heard, he argues that, at the present time, there is no basis in law for the adult Plaintiff's

claim and no material factual issues to decide. As a consequence, "Michael Lawen says that the claims of two of the Plaintiffs – Catherine Tawil and Samia Khoury – are now barred … and should be dismissed by this Court" (*Intervenor's brief, October 6, 2020, p.1*)

[6] Catherine and Samia each acknowledge "... for the purposes of the motion that if the appeal is unsuccessful and the decision and order of Justice Bodurtha remains in place, they would not have standing to maintain their action under the *TFMA*." (*Brief, October 10, 2020, p.*1). They argue that if this Court were disposed to grant an Order for summary judgment at the present time, that it should also grant a stay of that judgment until after the appeal is heard on February 4, 2021.

A. Summary Judgment

[7] The effect of Justice Bodurtha's decision, as noted, was that the definition of "dependent" found in subsections 2(b) and 3(1) of the *TFMA* was to be read down to exclude non-dependent adult children from the ambit of those sections. Mary Lawen's status as a disabled adult participating via litigation guardian, would appear to be unaffected.

[8] If that is indeed the current state of the law, then it is correct to say that the legal basis of the first two Plaintiffs' claims has disappeared. That, coupled with these Plaintiffs' admissions, which were to the effect that they were not "dependents" of the testator at the time of his death, would mean that there were no genuine issues of material fact needing resolution either.

[9] *Civil Procedure Rule* 13.04 says that:

> 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.

[10] The test and framework articulated by Justice Fichaud in *Shannex Inc. v. Dora Construction Ltd*, 2016 NSCA 89, follows next:

34. I interpret the amended Rule 13.04 to pose five sequential questions:

- **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [*Rules* 13.04(1), (2) and (4)]

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under *Rules* 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton*'s first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [*Rules* 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. summary judgment isn't an ambush. Neither is the adjournment permission to

procrastinate. The amended *Rule* 13.04(6)(b) allows the judge to balance these factors.

- **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: *Rules* 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: *Rule* 13.04(3). Governing that discretion is the principle in *Burton's* second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended *Rule* 13.04 changes *Burton's* test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under *Rule* 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under *Rules* 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under *Rule* 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under *Rule* 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under *Rule* 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[11] At present, Catherine and Samia have conceded that the answer to the first question noted above is "no". The Intervenor and the Defendant take the position that the answer to the second question is also “no”. If they are correct, summary judgment "must" result.

[12] With respect, this premise appears to be incorrect. It is trite law that a decision of one Justice of this Court in another proceeding, while generally persuasive, is not binding upon it. I could (theoretically, at the very least) address the same issue and arrive at a contrary conclusion, if it were warranted that I do so.

[13] The answer to the second question is, therefore, “yes”.

[14] It is clear that at the third stage of the *Shannex* test, I must determine whether the proceeding has a real chance of success, and if so, the fourth would be engaged.

[15] To be fair to the parties, all appeared to assume that the answer to the first two questions in the *Shannex* framework was “no”. They therefore focussed argument upon whether the matter should be adjourned, or alternatively, whether summary judgment should be granted but stayed, under *Rule* 13.07 pending the results of the appeal of the *Lawen* decision. That said, it is nonetheless the case that I have not been provided with anything to suggest any detriment to the Plaintiffs’ prospects of success should the appeal of the *Lawen* decision be allowed.

[16] At step four, I clearly have discretion whether to decide the outstanding issue of law. Among other things, I may also adjourn the hearing of the motion for “any just purpose, <u>including</u> …” the non exhaustive reasons spelled out in *Rule* 13.04(6)(b).

[17] It is surely a “just purpose” to adjourn the matter in anticipation of the relatively imminent hearing by our Court of Appeal which will provide the answer to question two in the *Shannex* framework. The first two Plaintiffs are already aware of the impact which a dismissal of the appeal will have upon their case.

[18] Moreover, it cannot be realistically expected that I would enter into a re-examination of the state of the law and “decide” it, given the Court of Appeal’s imminent involvement in the matter. To say the least, such would not be an overly efficient deployment of current Judicial resources.

B. Stay/Adjournment

[19] I have not determined the merits of Michael Lawen's motion, so there is no need to deal with the Plaintiffs' request for a stay. I will say that, if summary judgment had been ordered, and a stay pending the result of the appeal of the *Lawen* decision was granted, it would not have provided much benefit to the Plaintiffs, in any event.

[20] In such an event, even if the appeal was eventually allowed, the stay would be lifted. The Plaintiffs would then be in the position of having to appeal the Summary Judgment Order, and/or attempting to reinstate their *TFMA* based action all over again. Among other concerns, the time limitation within which to do so, as set out in the legislation, has long since expired.

Conclusion

[21] The matter is adjourned *sine die*, pending the result of the appeal of the *Lawen* decision.

Costs

[22] Costs are fixed in the amount of $750.00, including disbursements, and shall be in the cause.

Gabriel, J.