SUPREME COURT OF NOVA SCOTIA
Citation: Strait Excavating v. LeFrank, 2013 NSSC 420

Date:20131216
Docket: Amh. 416211
Registry: Amherst

Between:

Steven Jamieson, dba Strait Excavating

Appellant

v.

George LeFrank and Velda LeFrank

Defendant

DECISION

Before: The Honourable Justice E. Van den Eynden

Heard: November 21, 2013, in Amherst, Nova Scotia

Written Decision: December 16, 2013

Counsel: Steven Jamieson, Appellant, self-represented

George LeFrank, Defendant, self-represented

By the Court:

Introduction

[1] This matter is an appeal from a decision of a Small Claims Court Adjudicator rendered on May 27, 2013. The only stated ground of appeal is:

> *Failure to follow the requirements of natural justice.*

[2] The particulars of the error or failure as set out in the Appellant's Notice of Appeal is as follows:

> *A mix-up in the Court date. I had marked in my day planer (sic) and house calendar the 28th of May. When I got my paperwork out I seen the date and caller (sic) the Court house.*

[3] The Appellant (Defendant in the Small Claims Court matter) acknowledged the asserted date mix-up was solely his mistake.

[4] The Appellant did not allege or argue any errors or failures made by the Adjudicator based on the facts before him.

Procedural History

[5] The Claimants (George LeFrank and Velda LeFrank) filed a Notice of Claim (the "Claim") dated January 2, 2013. Therein they claimed return of

their $9,000.00 deposit plus costs. The stated reason noted in their Claim was they gave the Appellant $9,000.00 to purchase rock for a proposed contract that did not materialize.

[6] The Claim clearly set out the time, date and place of hearing. The hearing date was May 16, 2013 at 6:00 p.m. at the Amherst Justice Centre. The Claim was personally served upon the Appellant on January 6, 2013.

[7] On January 16, 2013 the Appellant filed a Defence/Counterclaim and sent it to the Claimants by registered mail on January 17, 2013, which the Claimants subsequently received.

[8] In his Defence the Appellant sought to retain $1,454.75 of the $9,000.00 deposit; asserting the Claimants owed an outstanding invoice of $1,454.75. The Appellant also counterclaimed for an additional sum of $1,600.00; purportedly for additional costs associated with scheduling of the job which did not materialize and legal fees. As noted in his Defence and Counterclaim the total sum the Appellant sought to retain from the $9,000.00 was $3,054.75.

[9] The Small Claims Court hearing proceeded on May 16, 2013 as originally scheduled. The Claimants were in attendance and presented evidence in support of their claim. The Appellant was a no show.

[10] The Adjudicator rendered his decision on May 27, 2013 and filed same with the Prothonotary on May 28, 2013. I understand it is the practice of the Prothonotary to promptly send out the decision/order upon receiving same from the Adjudicator.

[11] After receipt of the Adjudicator's Order, the Appellant filed a Notice of Appeal on June 3, 2013. The Appeal was served upon the Respondents on June 15, 2013.

[12] Following the filing of the Notice of Appeal the Adjudicator prepared a Summary Report dated August 28, 2013. Given its succinct nature, I include the full report which is as follows:

> 1. This is the Summary Report prepared in response to the Appeal of Steven Jamieson, in relation to a hearing held on the 16th day of May, 2013.
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> 2. This is a proceeding that arises out of a transaction to perform various work which was never undertaken.
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> 3. Neither party was represented in this proceeding. George and Velda LeFrank attended, however, Steven Jamieson did not, although he did file a defence.
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> 4. The Respondents were seeking $9,000.00 plus costs for the return of a deposit for work never undertaken. The Appellant stated in his defence that there was an outstanding account for $1,454.75 and that he had offered the difference several times. He counter claimed for $1,600.00 for scheduling the job and legal fees.

5. As the Appellant did not appear and offered no proof of the cost of "scheduling the job" or legal fees incurred, the counterclaim was dismissed.

6. After hearing all of the evidence, the Claim herein was granted and the Appellant was ordered to pay the Respondent the sum of $9,000.00 plus $182.94 for filing fees for a total of $9,182.94.

7. The Respondent, Mr. George LeFrank, was sworn and testified on his own behalf and was the only witness for the Claimants. He testified in a straight forward and credible manner. I found that he did not embellish or exaggerate his testimony. I further found that his testimony was logically consistent with the evidence presented by both parties.

8. I found that the Respondents paid the Appellant for a number of different jobs in full upon presentment of the account. One job involved the Defendant having to return in the Spring to complete the work. This is the job identified by the quote of $3,882.40, which the Respondents paid in full. The Respondent testified that the work done under the invoice of May 24, 2012 was in fact the completion of this job. In the absence of any contrary testimony, I found the Respondent to have paid for the full scope of work when they paid the original invoice.

9. The Respondents stated that they attempted to have the Appellant refund them on several occasions unsuccessfully. As a result, they filed the claim.

10. Given that my interpretation of the invoices was consistent with the testimony of the Respondent, as to the "outstanding" invoice being for work already paid for, and in the absence of any other explanation for the unpaid invoice, I found that the Respondents had established their claim.

[13] The parties first appeared in Court on October 3, 2013. At that time, the Appeal hearing was set for November 21, 2013 as well as the date for filing of the Appellant and Respondent briefs.

[14] The Appellant and Respondents both submitted briefs. In summary the Appellant wanted the matter reheard or to be permitted to present to this Court the evidence he could have presented at the Small Claims Court Hearing held on May 16, 2013. If heard by this Court such would be fresh evidence.

[15] The Respondents requested the appeal be dismissed and relied on the record in support of their submission.

Preliminary Address by the Court

[16] At the outset of the hearing, I took the time to carefully explain the following to the Appellant:

(a) An Appeal of an Adjudicator's decision is not a new hearing and the Appellant does not have the absolute right to introduce new or fresh evidence on Appeal;

(b) An Appeal of an Adjudicator's decision is based on the record. The record is the Adjudicator's Summary Report (which sets out the Adjudicator's findings of fact and law); the exhibits presented during the hearing; the pleadings and certain materials contained in the Small Claims Court file;

(c) The procedure and test for fresh evidence the Appellant would have to meet in order for this Court to consider fresh evidence; and

(d) The provisions of Section 23(3) and (4) of the **Small Claims Court Act** were reviewed. I inquired whether the Appellant, upon learning he missed his hearing date, considered making an application under Section 23(4) to have the Adjudicator set aside his order and set the Claim down for another hearing. The Appellant stated he was unaware of this provision. I advised the Appellant that such relief was in the discretion of the Adjudicator and I could not comment on whether he could meet the requirements of Section 23(4). The Appellant was provided with the option to request an adjournment of his appeal to allow the Appellant to write to the Adjudicator for consideration of a re-hearing pursuant to Section 23(4) of the **Small Claims Court Act**.

[17] The Appellant indicated he understood the foregoing and did not wish to seek to adduce fresh evidence on appeal nor did he wish to seek an adjournment of his appeal in order to seek potential relief under Section 23(4) of the **Small Claims Court Act**. The Appellant wanted the Appeal to proceed based upon

my review of the record and did not want the determination of his appeal to be delayed any further.

Issue

Was there a denial of nature justice and, if so, what would be the appropriate relief?

Decision

[18] I find no denial of natural justice and the appeal is dismissed.

Reasons for decision

[19] Section 2 of the **Small Claims Court Act** provides as follows:

> *It is the intent and purpose of this Act to constitute a court wherein **claims** up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and **natural justice**.*

[20] Section 32(1) of the **Small Claims Court Act** sets out the grounds for Appeal. Section 32(1) provides:

> A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) Jurisdictional error;
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> (b) Error of law; or
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> (c) Failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[21] The only ground alleged in this appeal is (c). The sole foundation for this ground arises from the circumstances surrounding the Appellant missing his hearing date – by no fault but his own.

[22] As noted in **Spencer v. Bennett**, 2009 NSSC 368, "natural justice" is not a defined term in the **Small Claims Court Act**. Natural justice was discussed by Justice M. S. Richardson-Bryson in **Spencer v. Bennett;** para. 15 and 16 therein provide as follows:

> 15 **Natural Justice** is not defined in the **Small Claims Court Act.** Nevertheless it is a familiar concept to the common law, although elusive of definition. In **Lloyd v. McMahone,** [1987] A.C. 625 at 702, Lord Bridge puts it this way:
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> > …the so called rules of **natural justice** are not engraved on tablets of stone…what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.
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> These criteria have been echoed and amplified in **Baker v. Canada**, [1999] S.C.J. No. 39; [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193 (S.C.C.), (per L'Heureux-Dube).
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> 16 **Natural Justice** really means that the parties are entitled to a fair process. The two rules habitually taken to exemplify that process are expressed in the Latin maxims *nemo judex in causa sua* and *audi alteram partem*. They literally mean that no one should be a judge in his own cause (the adjudicator must be independent) and that one should always hear "the other side."

[23] In the facts of this appeal, apart from considering the defence and counterclaim, "the other side" was not heard by the Adjudicator. The

Adjudicator appropriately proceeded with the hearing in the absence of the Defendant/Applicant and made his decision based on the evidence before him.

[24] In **Kemp v. Prescesky**, [2006] N.S.J. No. 174 Justice J. Warner stated at para. 19 of his decision:

> In my view, it is a breach of the requirements of **natural justice** not to have a mechanism in **Small Claims** Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable defence that should be heard on its merits, **and he or she has a reasonable excuse for defaulting and is not just stalling**, (emphasis added) and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside. In light of the increase in the monetary jurisdiction of the court, it is as relevant to natural justice in the **Small Claims** Court as it is in the Supreme Court. There is still a requirement that the applicant show sufficient bases for the court to exercise discretion to avoid abuse.

[25] In **Farrow v. Butts** [2010] N.S.J. No. 537, Justice P. J. Murray dealt with an issue respecting a denial of **natural justice** which arose from an Appellant's failure to appear at the scheduled hearing. In that case Justice Murray adopted the reasoning of Justice Warner in the **Kemp v. Prescesky** case and, in particular, the position that an appellant must demonstrate that he or she has a reasonable excuse for defaulting. I quote from Justice Murray's decision in **Farrow v. Butts** and, in particular paragraphs 6, 7 and 16:

> (6) The right to be heard, with or without a meritorious defence, is a right which must be strictly guarded by any Court. When a judgment is made in the absence of the Defendant, the standard becomes the highest to ensure due process is followed and that no breach of **natural justice** occurs.

> (7) Fundamental to **natural justice** is the notion that a party gets to "have its say". This appeal is such a case because the Appellant was ordered to pay "upon default", the sum referred to above, without being present. This is commonly referred to as "entering default judgment". In such cases, the reviewing (Appeal) Court's level of circumspection must be at its highest. Even in such cases, the Claimant, the Respondent in this appeal, must still prove the validity of their claim.
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> (16) In considering a person's right to be heard, it does not automatically follow that just because they were not present, that their appeal will be allowed. The Court must also view the Respondent's actions, and the courts record of events, in determining whether due process was followed and whether the Rules and Regulations prescribed by the Court were adhered to.

[26] In **Farrow v. Betts**, Justice Murray found no denial of natural justice and dismissed the appeal.

[27] In **Kemp v. Prescesky** the decision of the arbitrator was set aside and a new hearing was ordered. The facts in the **Kemp v. Prescesky** case are materially different than the facts on this appeal. In this case:

(a) The only "excuse" offered by the Appellant for missing his hearing date was that he wrote the date down wrong on his day planner and house calendar for the 28th of May. The hearing date was scheduled for May 16, 2013;

(b) The Appellant offered no explanation as to how he could have entered the dates wrong on his house calendar and day planner. Only that he did;

(c) The Appellant did not provide the Court with a copy of or his original house calendar or day timer to support the veracity of his excuse;

(d) Coincidentally, the Appellant filed his appeal very close in time to having received the Arbitrator's order which was filed with the Prothonotary on May 28, 2013 and sent out to the parties by the

Prothonotary shortly thereafter. This calls into question whether the Appellant actually documented incorrect dates; rather upon receiving the Order of the Adjudicator he commenced his appeal;

(e) The Appellant in essence conceded both in his Defence filed on January 16, 2013 and his Appeal brief that he is not entitled to the majority of the $9,000.00 deposit. That said, up until the hearing date of his appeal on November 21, 2013, he failed even to return the uncontested portion to the Claimants;

(f) At the hearing, the Complainant, George LeFrank, gave the following evidence respecting the invoice the Appellant claimed was outstanding in his defence:

> I received an invoice in the amount of $1,454.75, for work I already paid for. I called Mr. Jamieson and he said if you are not comfortable with the bill, don't pay it and I stated that I am not comfortable with it and he then said tear it up.

[28] As noted in the procedural history, Mr. LeFrank was sworn and testified on his own behalf during the Small Claims Court hearing on May 16, 2013. As part of his evidence, Mr. LeFrank provided the Court with a prepared statement which summarized his dealings with the Defendant/Appellant. The statement is maintained in the Small Claims Court file. The above quote found at (f) was extracted from that portion of the record.

[29] Given my opening explanation to the parties that an appeal of an Adjudicator's decision was not a new (*de novo*) hearing and the limits on the Court hearing fresh/new evidence, I reference the following relevant cases:

[30] In **Lacombe v. Sutherland** [2008] N.S.J. No. 603, Justice D. R. Beveridge noted the following with respect to Small Claims Court appeals at paragraphs 27, 28 and 29:

> (27) In Nova Scotia the **Small Claims Court Act** provides an appeal as of right to the Nova Scotia Supreme Court. Section 32 sets out the grounds of appeal that can be raised. Oddly enough the **Act** does not set out the powers that the Supreme Court has if it finds an error of law, jurisdiction or breach of natural justice. Typically the case law in Nova Scotia is that where any such error is found a re-hearing is ordered before a different adjudicator.
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> (28) It is well established that in the ordinary course, absent some special power on appeal, such as an appeal by way of a hearing *de novo,* the appellate court does not engage in a re-hearing of the dispute. Findings by the court below are accorded considerable deference. They can only be interfered with in this regime if the appellant makes out one of the three grounds for an appeal. That is, an error in law, jurisdiction or a breach of natural justice.
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> (29) Furthermore, in a typical situation an appellate court cannot consider, absent leave being granted, any fresh or new evidence on the hearing of an appeal. Here the **Small Claims Court Act** contains no specific provision setting out a power to hear fresh evidence. I need not decide today if the parties to an appeal from a Small Claims Court adjudicator can adduce fresh evidence other than evidence that may go to establishing a jurisdictional error or a breach of natural justice. Neither party sought to adduce any new evidence before me.

[31] In the decision **Killam Properties Inc. v. Mark Patriquin**, 2011 NSSC 338, Justice Glen McDougall made similar findings. In particular, at para. 6, 7 & 8 of that decision, Justice McDougall stated:

> (6) With regard to affidavit evidence, clearly, the **Small Claims Court Act** appeal provisions do not provide for the submission of any new evidence. The appeal is not a hearing *de novo*. It is a hearing based on the record. By record, I mean the contents of the Small Claims Court file which is requested and provided to our Court when a notice of appeal is filed. The entire record, including any exhibits filed in the hearing before the Small Claims Court, are all included in that file and they are all open to review by this Court. In addition to that, the adjudicator is

> requested to provide a summary report of findings of law and fact made on the case on appeal. So, in addition to the decision or order of the adjudicator, the summary report is also provided to this court and is used in determining the merits of the appeal.
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> (7) As Justice Beveridge indicated in his decision of **Lacombe v. Sutherland**, [2008] N.S.J. No. 603 at para 9, there are occasions when additional affidavit evidence may be admitted. Again, I use the word "may" because it is a discretionary thing. It depends on the particular judge who hears the appeal. A request has to be made to that particular judge to adduce fresh evidence. If it is evidence that would help to establish a jurisdictional error or a breach of natural justice the request might be found to have merit. Any additional type of affidavit evidence would only be admitted if truly exceptional circumstances exist.
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> (8) The **Small Claims Court Act** and its Regulations do not contemplate an appeal by way of trial *de novo*. It is based on the record. This is not a carte blanche refusal to admit additional evidence but it would only be in very rare and exceptional circumstances that further affidavit evidence would be admitted. There are good policy reasons for this. If affidavits were routinely accepted the appeal would soon morph into a trial *de novo*. It would be tantamount to an appeal based on a transcript. The Small Claims Court is not required to record the evidence. There is no transcript. To allow affidavit evidence to be filed on appeal to the Supreme Court would add unnecessarily to the expense of the proceeding. It would also defeat the principle purpose for the Small Claims Court which is to provide an inexpensive and informal venue for people to present cases without the need to incur the expense of legal representation.

[32] Respecting the introduction of fresh evidence, I also refer to the decision of **Doyle v. Topshee Housing Co-operative Ltd.,** [2012] N.S.J. No. 570, a decision of Justice J. E. Scanlan. I quote from para. 4, 5 and 6 which provide as follows:

> (4) The Court is cognizant of the risk of having fresh evidence admitted on appeals of Small Claims Court matters. The **Small Claims Court Act** and regulations do not contemplate an appeal by way of trial *de novo*. Appeals are to be based on the record. As noted in **Killiam Properties Inc. v. Mark Patriquin**, 2011 NSSC 338 at para 8 by Justice MacDougall: …
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> (5) The present motion is governed by **Civil Procedure Rule** 7.27 which states:

> Evidence on judicial review or appeal:
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> (1) A party who proposes to introduce the evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.
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> (2) An applicant for judicial review, or an appellant, must file the affidavit when the notice for judicial review or the notice of appeal is filed, and a respondent must file the affidavit no less than five days before the day the motion for directions is to be heard.
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> (3) A motion for permission to introduce new evidence must be made at the same time as the motion for directions, unless a judge orders otherwise.
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> (6) Tests for the introduction of new evidence was stated in the Supreme Court in **R. v. Stolar** (1988), 40 C.C.C. (3d) 1. This decision was recently referred to by the Nova Scotia Court of Appeal in **Hatfield v. Mader**, 2012 NSCA 66 at para. 22. The Court said:
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> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see **McMartin v. The Queen**, [1964] S.C.R. 484.
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[33] As noted in the procedural history, the Appellant, although given the opportunity by this Court, did not make any application to introduce fresh evidence. Even if he had it is doubtful whether such application would have been successful given the context of this case and my finding that the Appellant did not offer up a reasonable excuse for missing the hearing on May 16, 2013.

[34] In this case, the Claimants/Respondents followed the rules. They took their claim seriously and marshalled it along as they were required. The same cannot

be said of the Appellant. The excuse offered by the Appellant for missing his hearing date even if true is simply not reasonable in these circumstances. Furthermore, based on the evidence before the Court, I am not satisfied that the Appellant has established a fairly arguable defence or serious issue to be tried which are considerations when determining an application to set aside a default judgment. Even if the Appellant could establish such, I find he certainly does not have a reasonable excuse for missing his hearing date.

[35] Although Small Claims Court Hearings are intended to be accessible to the parties and informal, parties need to be reasonably diligent, mindful and respectful of the process. Otherwise the integrity of and respect for the process is undermined. Justice does not require the Court to exercise its discretion and set aside the order and permit a new hearing in these circumstances.

[36] The Appeal is dismissed.

Van den Eynden, J.

12/16/2013