

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Alternative Sports Ltd. v. County Realty Ltd., 2007 NSSC 213

Date: 20070822

Docket: SN No. 256803

Registry: Sydney

Between:

Pricewaterhouse Coopers Inc., Trustee in Bankruptcy of Alternative Sports
Limited

Plaintiff

v.

County Realty Limited

Defendant

Judge: The Honourable Justice Frank Edwards

Heard: March 29 and June 19, 2007, in Sydney, Nova Scotia

Counsel: Gail Rudderham Chernin, Q.C., for the Plaintiff
Gary Corsano, for the Defendant

By the Court:

[1] This is an assessment of damages.

[2] The Plaintiff, Pricewaterhouse Coopers Inc., received a Voluntary Assignment for Bankruptcy by the Directors of Alternative Sports Limited on September 9, 2005. This Assignment was approved by the Superintendent of Bankruptcy on September 12, 2005 and Pricewaterhouse Coopers Inc., more specifically, Rita Anderson, was appointed Trustee in Bankruptcy.

[3] The Plaintiff retained Allan Henderson (“Henderson”) as a contractual agent to value and liquidate the assets in favour of the creditors of Alternative Sports Limited, pursuant to the *Bankruptcy and Insolvency Act* [R.S. 1985, c. B-3]. When Henderson attended at the premises at 216 Charlotte Street, Sydney, Nova Scotia, to take possession of the inventory, he viewed it being loaded into a van and was unable to gain possession.

[4] The Trustee in Bankruptcy attended at the premises of 216 Charlotte Street on September 12, 2005 and advised the Defendant that the inventory was seized by the Trustee in Bankruptcy. The Defendant refused to release the inventory and, as

a result, the Plaintiff filed an Originating Notice (Action) and Statement of Claim on October 1y, 2005 claiming that the Defendant had failed to release the assets to the Trustee in accordance with the requirements of the *Bankruptcy and Insolvency Act*, (supra) thereby causing the Plaintiff loss and damages.

[5] On January 5, 2006, the Plaintiff made an application for Summary Judgement pursuant to the Nova Scotia Civil Procedure Rules, more specifically, Rule 13.01.

[6] A hearing on the application for Summary Judgement was commenced on February 21, 2006, before the Honourable Justice Walter E. Goodfellow. On February 22, 2006, the Court issued a Consent Order whereby the goods were returned to the Trustee “for the purposes of completing an inventory and liquidating the assets ...”. On July 31, 2006, Justice Goodfellow rendered a decision to grant Summary Judgement declaring that the property held by the Defendant Landlord was the property of the Bankrupt and further ordered damages to be assessed.

[7] The parties appeared before me on March 29, 2007 and June 19, 2007, for a hearing to assess the quantum of damages.

[8] The first issue is whether the Plaintiff suffered a loss because of the conduct of the Defendant. Specifically, did the possession of the bankrupt's assets by the Defendant between September 2005 and February 2006 decrease the amount realized upon sale?

[9] The Plaintiff's position is that had she been able to sell the goods at *retail* prices in October 2005, she would have realized at least \$30,000.00. Instead, the Plaintiff says that she was forced to sell the goods *wholesale* in August 2006 for \$12,000.00.

[10] Henderson had visited the premises on September 8, 2005, and took photographs of the inventory. He believed that a sale price of \$30,000.00 retail would have been realistic. That figure is approximately 25 percent of the inventory calculation done by the bankrupt. Henderson says that it was not his intention to do a full inventory but merely to spot check the inventory provided by the bankrupt.

[11] On February 23, 2006, pursuant to the Consent Order, Henderson did take possession of the inventory on behalf of the Plaintiff Trustee. In accordance with the Order, he then carried out a full inventory which, he testified, confirmed his initial view that he would have been able to get \$30,000.00 for the goods back in September/October, 2005.

[12] On August 24, 2006, Henderson sold the inventory to Bradley Latham (“Latham”) for \$12,000.00 wholesale. Latham owned the premises to which Henderson had moved the inventory in February 2006. Latham then sold the inventory on the Labour Day weekend for \$18,400.00. Latham says he was only able to sell about half the inventory and had to discard or give away the rest. It is interesting that in preparation for the sale, Latham hired two people who were knowledgeable about sports equipment. They inspected each piece of equipment to determine an appropriate price. They then had to display the inventory and advertise for sale. Latham says he made only a “marginal” profit.

[13] Henderson is critical of the timing of the Latham sale. He is probably correct that the Labour Day Weekend is not the best time with many people being

away for the holiday. Henderson says that Latham also had a poor location for the sale.

[14] I should note that the Defendant called Curtis MacNeil (“MacNeil”) who has worked for 12 years in a local sporting goods business. MacNeil valued the inventory at just \$8,000.00. Obviously, his evidence is contradicted by the Latham sale. I place no weight on MacNeil’s opinion.

[15] I am satisfied that Henderson would have fared better on a sale than Latham. Henderson has almost 30 years experience doing distress sales. In September/October 2005, he also had better located and laid out premises available to him than did Latham. And obviously the goods were one year newer in September 2005. The Defendant says that the goods could have been sold in March or April 2006. I am satisfied that the best opportunity to retail the goods had been lost even by that time. The premises initially leased by Henderson was no longer available nor was there any reasonable alternative available. I am satisfied that Henderson and the Trustee did the best that could reasonably have been expected of them.

[16] I am not satisfied that Henderson would have gotten \$30,000.00 for the inventory. That figure was more notional than arithmetic. Henderson is not an expert on the value of sporting goods and had never individually priced the stock. There was some question about whether the \$30,000.00 figure was inclusive of Henderson's fees. I am satisfied that it was and that Henderson was mistaken when he testified that the \$30,000.00 amount was net to the Trustee. It is clear from the Calculation of Damages (Exhibit C) provided by the Trustee that the \$30,000.00 is the gross anticipated sale.

[17] Based upon the result of the Latham sale with its marginal profit, I am satisfied that the \$12,000.00 wholesale price was reasonable. When I weigh all of the factors outlined above, I am satisfied that the Henderson sale in October 2005 would on a balance of probabilities have netted the Trustee an additional \$5,000.00. I therefore award the Plaintiff \$5,000.00 damages for diminution of the value of the inventory caused by the actions of the Defendant.

[18] I have considered the Defendant's argument that the Plaintiff should have taken the opportunity he offered in November 2005 to mitigate her loss. Counsel points out that his offer was effectively the same as the terms for sale and hold

back contained in the February 2006 Consent Order. I am satisfied however that the Trustee acted reasonably in not taking up the November 2005 offer. She obviously felt that the Defendant had tried to mislead her and could not be trusted. Under the Consent Order, the same arrangement had the added security of supervision by this Court. The Trustee was correct to sign on to that Order.

[19] **2. *The Claim for the Trustee's Additional Costs:*** (a) ***Additional***

Insurance: The Plaintiff claims \$3,420.00 being the cost of insuring the inventory between March 2006 and July 2006 (\$640.00 per month). Had she been able to sell the inventory in October 2005, no insurance would have been necessary. That represents the Plaintiff's best case scenario. It is more likely that all of the stock would not have been liquidated so expeditiously. Some storage would have been required. I will allow \$1,368.00 (\$684.00 x 2) for two additional months storage caused by the conduct of the Defendant.

[20] (b) ***Additional Storage:*** The Plaintiff claims \$1,500.00 for three months additional storage. I will allow \$1,000.00 for two months.

[21] **(c) Stock taking, Possession:** The Plaintiff claims \$2,728.64 (\$3,568.64 - \$840.00) for this item. Apparently, the bankrupt had offered to move the inventory for free in September 2005. Before February 2006, he had relocated and was no longer available. The Trustee had to pay to move the goods to a secure storage site. I will allow \$500.00 for the loss of the bankrupt's services. The bulk of this claimed item is for stock taking. Henderson says that he intended only a spot check rather than a full inventory. At the same time, he was spared the exercise Latham had to go through in individually pricing each item for a retail sale. In my view, the cost of the former is completely offset by the saved cost of the latter.

[22] In short, I will allow only the \$500.00 for the loss of the bankrupt's services.

[23] **(d) Trustee Fees of Allan MacDonald, \$3,624.00:** Henderson testified that he always has a representative of the Trustee present when moving a bankrupt's stock. Presumably, that would have been the case in September 2005 had the Defendant not been involved. The Plaintiff has not proven that this was an additional expense. I deny this claim.

[24] *(e) Trustee Fees of Rita Anderson, \$20,648.00:* Counsel for the Plaintiff acknowledged that the bulk of this amount was incurred as preparation for this litigation. As such, that portion of the claim is not recoverable. Counsel argues that in the alternative, I should allow trustee fees that were incurred for the inventory taking. Counsel specifically referred me to the fees noted in paragraph 17 of Henderson's affidavit. I note that all of these fees were incurred between February 23, 2006 and March 3, 2006, that is, during the litigation. Furthermore, I am not satisfied that Ms. Anderson's presence was required any more at that time than it would have been in September 2005. I have no doubt but that the Defendant's conduct caused the Trustee to put in additional time in September 2005 but I lack sufficient evidence to fix an amount. I deny this claim.

[25] *Summary of Claim Allowed:*

Diminution of Value	\$5,000.00
Additional Insurance	1,368.00
Additional Storage	1,000.00
Taking Possession	<u>500.00</u>
Total	\$7,868.00

[26] **Legal Costs:** This assessment of damages took two full days of court time. Preparation was fairly extensive with comprehensive affidavit evidence and attachments. The Plaintiff was successful though the amount of the award (approximately \$8,000.00) was substantially less than the amount claimed (approximately \$54,000.00). Still, the Plaintiff/Trustee was justified in vigorously pursuing this litigation. The Defendant had acted in a high-handed and deceptive manner in his attempt to prevent her from doing her duty. His actions speak for themselves quite aside from any question of credibility. He had absolutely no right to do what he did.

[27] Under Tariff C, I am entitled to consider:

- 3(a) the complexity of the matter,
- (b) the importance of the matter to the parties, and
- (c) the amount of effort involving in preparing for and conducting the application.

[28] Under paragraph 2 of Tariff C, costs can be added to those calculated under Tariff A. Under Tariff A, where the amount involved is less than \$25,000.00, the

costs under Scale 2 are \$4,000.00. The Plaintiff is also entitled to \$2,000.00 for each full day, for a total of \$8,000.00.

[29] Of course, a substantial portion of the legal fees incurred by the Plaintiff were expended in establishing liability and, in particular, in prosecuting the Summary Judgement Application. Justice Goodfellow fixed costs to that stage at \$2,385.62. The Summary Judgement application also consumed two full days. I am satisfied that the Plaintiff should receive (for the assessment of damages segment of this application) one half the total of the Tariff costs (including the *per diems*). I therefore award the Plaintiff costs in the amount of \$4,000.00 plus reasonable disbursements to be taxed.

[30] The Plaintiff shall therefore have judgement for \$11,868.00 (\$7,868.00 + \$4,000.00).

Order accordingly.

J.