*Town of Norman Wells v Mallon et al*, 2020 NWTSC 02 S-1-CV-2019-000167

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**TOWN OF NORMAN WELLS**

**Plaintiff**

**-v-**

**CATHERINE MALLON, NATHAN WATSON AND**

**507314 N.W.T. LTD.**

**Defendants**

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**Transcript of the Reasons for Decision held before the Honourable Justice K.M. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 4th day of December, 2019**

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**APPEARANCES:**

M. Penner: Counsel for the Plaintiff

M. Turzansky: Counsel for the Defendant Nathan

 Watson

M. Woodley: Counsel for the Defendant Catherine

 Mallon

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**I N D E X**

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**RULINGS, REASONS**

Reasons for decision 1

THE COURT: We typically hear about miscarriages of justice in a criminal context. However, they do happen in the civil context albeit typically with monetary consequences rather than consequences for our freedoms. This is one of those cases.

 This started as an application by the three defendants to set aside an order for a *Mareva* injunction and a writ of attachment, both of which were made and granted on an *ex parte* basis, as well as an application for costs on a solicitor and client basis.

 The Plaintiff has consented to the relief in which the defendants are seeking to have the order for the injunction and the attachment set aside. But, the plaintiff contends that costs should be reserved for the conclusion of the suit so that the Court has the benefit of having the full body of evidence before it. The defendants, who are also the applicants, contend that this is a discrete issue that can be determined at this stage and moreover, that having to respond to the *ex parte* order and attachment has cost them a lot of money, which has essentially left them in a financial hole before the litigation proper has even begun.

 In my view, and as I alluded to this morning in my discourse with the Town’s solicitor, Mr. Penner, it is appropriate to deal with costs relating to the application for the *Mareva* injunction and the writ of attachment at this stage.

 The action against the defendants alleges that they participated in what is termed a “fraudulent scheme,” which cost the Town of Norman Wells over a million dollars. Ms. Mallon is the former senior administrative officer; Mr. Watson is the former mayor and the defendant numbered company is a company owned by Mr. Watson.

 The Statement of Claim was filed on May 3, 2019, and on that same day the Town applied for the *ex parte* orders. In support, the Town relied on the evidence of Cathy Clarke, who at the time the affidavit was sworn, was the senior administrative officer.

 She swore, among other things, that she reviewed the Town’s records and that she had spoken with former and current employees. Town counsellors and representatives from the Government of the Northwest Territories Department of Municipal and Community Affairs.

 She also said that she had reviewed a report which was “drafted by” EPR, an accounting firm. She referred to the accounting firm throughout her affidavit as a “forensic accountant.” That report, as it turned out, was neither forensic nor was it finalized at the time Ms. Clarke swore her affidavit. Importantly, it was not placed in evidence before the judge who granted the *ex parte* applications.

 Ms. Clarke deposed that based on her own review of the Town’s records and the analysis of the forensic accountant, it appeared that the defendant Ms. Mallon, working in what Ms. Clarke referred to as a “conspiracy” with the defendant Watson, misappropriated or defrauded the Town of just over 1.2 million dollars. Ms. Clarke swore that Ms. Mallon and Mr. Watson were able to do this in a number of ways, including providing Ms. Mallon with a new employment contract with a more lucrative renumeration package, which she said was not approved by Town Council and which she suggested was kept secret from the Town Council.

 Among the things she stated in support of a need to proceed *ex parte* and the need to enjoin Ms. Mallon and Mr. Watson and the numbered company from using their assets was that she was aware the numbered company had recently purchased or leased two semitrailer trucks, but how Watson would have acquired the funds to do so was “a mystery” to her, given that he was unemployed and owed taxes to the Town.

 She also said that she thought Ms. Mallon may abscond from the Northwest Territory if she was to be given notice of the application. She then went on to say later, at paragraph 53 of her affidavit, that Ms. Mallon *had* absconded from the Northwest Territories.

 Under the heading “Full Disclosure” in her affidavit, Clarke stated she was aware the Town had a duty of full, fair and frank disclosure when seeking this type of order and the obligation to advise the Court of facts in favour of the defendants. On this point she stated that some of the payments made to Ms. Mallon or Mr. Watson may have been appropriate. However, she stated that the Town believed that a significant portion of the payments were not legitimate. When she was cross-examined on her affidavit Ms. Clarke stated that in fact she had no knowledge of any payments being made to Mr. Watson other than legitimate payments for his salary as mayor.

 Pre-trial injunctive relief, particularly in the form of a writ of attachment or a *Mareva* injunction, is extraordinary, as is any form of *ex parte* relief. The general rules of litigation are that consequences must follow the event and be based on findings of fact, made after the parties have had an opportunity to, among other things, present evidence and be heard. Imposing a restriction on a party’s ability to use their assets before a trial is inimical to our sense of justice and rightly so. Accordingly, this type of relief is to be used sparingly and only in the clearest of cases.

 Moreover, when a party proceeds without notice, particularly in an application like the *ex parte* one here, it is incumbent upon them to put a full, balanced and honest account before the judge. That is a very old and well-known principle. Anything else creates danger and that has been borne out here.

 Based on what was initially put before the judge who considered the *ex parte* motion, there was a basis for granting relief. Had the whole picture been put in front of him, however, I doubt very much that the order would have been granted.

 All of the information that is before me today, which contradicts many of the key points in the Clarke affidavit, was available to the Town of Norman Wells when it applied for the injunctive relief. That is extremely troubling. The judge who heard the *ex parte* application did not have the benefit of a balanced presentation of the evidence. Some of the evidence before him was downright misleading, such as Ms. Clarke’s characterization of the EPR report as “forensic” and her failure to disclose that it was not final.

 This is also true of her statement, as I noted earlier, that there had been payments made to Watson when in fact she stated on cross-examination on her affidavit that she had no knowledge of any payments being made to him other than, as I said, legitimate payments for his salary.

 The defendants ask for solicitor and client costs, and so the question is whether or not the plaintiff’s actions were so reprehensible as to attract solicitor and client cost.

 The term “reprehensible” has different meanings in different contexts. Conduct that is deliberately designed to delay, derail or otherwise undermine the litigation process is clearly reprehensible. That said, even conduct that does not have one of these things as its primary feature can be reprehensible. Parties to litigation have a responsibility to conduct themselves responsibly and in accordance with the requirements of the law.

 That just did not happen in this case. Regardless of whether the omissions and misleading statements were made deliberately or just through a careless and sloppy approach to putting forth the facts, this has resulted in an egregious miscarriage of justice. It resulted in a very powerful, oppressive and sweeping order being made. The plaintiff did not exercise diligence in ensuring it was putting forward the evidence before the judge in a fair, balanced and transparent manner and, in my view, its conduct was reprehensible.

 The practical result for the defendants is that they are out a lot of money. As I have said before in other cases, litigation is serious business. It is expensive, time consuming and stressful. It ties up public and private resources and this kind of behaviour that must be discouraged. There must to be consequences.

 First, the Court has to send a message that this type of conduct, this type of sloppy work, will not be tolerated. Second, the Court also has to do justice to the defendants who, but for this sloppy work, would not have had to respond to these very serious and sweeping orders.

 Accordingly, and with the consent of the plaintiff, the *ex parte* orders for the *Mareva* injunction and the writ of attachment are satisfied. With respect to costs, the defendants shall each be entitled to their solicitor and client costs relating to this application. If the parties are unable to agree as to what reasonable solicitor and client costs are, then they may apply to the Clerk for a taxation.

**(RULING CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 22nd day of January, 2020.



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Kim Neeson

Principal