SUPREME COURT OF NOVA SCOTIA

Citation: *Fares Construction Limited v. Lead Structural Formwork Limited*, 2024 NSSC 52

Date: 20240221
Docket: 503819
Registry: Halifax

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Between:

Fares Construction Limited and W. M. Fares Family Incorporated

Plaintiffs

v.

Lead Structural Formwork Limited

Defendant

v.

W. M. Fares Architects Inc., Grove US LLC, Rapicon Inc., Rapicon Tower Crane West Ltd., APA Inc., BMR Structural Engineering Limited, Forgeron Engineering Limited, and Passmore Inspection & Consulting Ltd.

Third Parties

v.

Cherubini Group Of Companies and Cherubini Metal Works

Fourth Parties

v.

Lead Structural Formwork Limited, Grove US LLC, Rapicon Inc., Rapicon Tower Crane West Ltd., APA Inc., BMR Structural Engineering Limited, Forgeron Engineering Limited, and Passmore Inspection & Consulting Ltd.

Fifth Parties

DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON EVIDENCE

Judge: The Honourable Justice Scott C. Norton

Heard: January 25 and 26, 2024, in Halifax, Nova Scotia

Decision: February 21, 2024

Counsel: Gavin Giles, K.C. and Jeff Aucoin, for the Plaintiffs
Wayne Francis, for the Defendant
Rachel Cooper, for the Third and Fifth Party, Grove US LLC

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By the Court:

Introduction

[1] On September 7, 2019, Hurricane "Dorian" arrived in Halifax, Nova Scotia as a tropical or post-tropical storm. Notoriously, at approximately 5:00 p.m. that day, a tower crane located at a construction project, collapsed. Before the court is a motion for summary judgment on evidence filed by the plaintiff builders of the construction project seeking judgment against the defendant crane owner and operator, with damages to be assessed at a later date.

[2] The collapse of the tower crane has resulted in five separate legal actions that I have been appointed to case manage. The five actions have not, as yet, been consolidated. The summary judgment motion is filed only in the proceeding styled as Hfx No. 503819. In this action alone there are 10 additional third and fourth parties facing claims for contribution or indemnity. The Third Party, Grove US LLC, filed a brief on the motion that, in essence, supported the position of the Defendant, Lead Structural Formwork Limited ("Lead"). No other party filed any written submissions and no party from any of the other proceedings sought to intervene on the motion.

[3] The Plaintiff, W. M. Fares Family Incorporated ("Family"), is the owner and developer of Brenton Suites, a 17 story residential apartment building. The Plaintiff, Fares Construction Limited ("Fares Construction"), was the general contractor. Fares Construction contracted with Lead to provide the forming and pouring of the structural concrete framing for the building.

[4] The evidence filed on the motion by the Plaintiffs is comprised of the jointly sworn and affirmed affidavit of Maurice Fares, Vice President and Chief Operating Officer of the Fares group of companies, and Zana Fares-Choueri, P. Eng., Vice President of Construction of the Fares group of companies. These affiants were not cross-examined.

[5] Lead filed affidavit evidence from David Pottier, P. Eng., Lead's President, Director and owner. Mr. Pottier was extensively cross-examined.

[6] The Court is aware from its case management function that there has been some production of documents in accordance with the case management schedule but no discovery examinations have yet been held on liability issues.

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[7] Fares Construction and Lead executed a CCDC1 form of Stipulated Price Sub-Contract made on July 18, 2018. The contract included a one-page "Formwork Scope of Work" that bound Lead to supply a tower crane and to undertake the related hoisting.

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[8] Noteworthy is that, given the unusual circumstance of a construction crane collapsing during storm conditions, neither party filed any qualified and properly admitted expert evidence as to the cause-in-fact of the collapse.

[9] The Plaintiffs' position is summarized in their brief at para. 65:

> 65) Respectfully, of course, Fares submits that one ought not to require much in the way of common sense to be able to safely and reliably arrive at the conclusion that the Tower Crane ought not to have collapsed. Extending from there to the conclusion that Lead, as the party, and the only party, responsible to Fares for all issues vis-a-vis the Tower Crane, had to have played the predominant role in the collapse.

[10] In essence, the Plaintiffs ask the court to draw inferences from circumstantial evidence to determine that the crane collapsed due to breaches of contract and negligence by Lead.

[11] Lead's response position is in three parts:

1. Lead says that the motion is premature, with discovery on liability yet to occur. However, they did not request an adjournment of the motion.
2. Lead has, through the evidence, demonstrated that there is a genuine material issue of fact in issue – why did the crane collapse?
3. Lead asserts that the Court should consider the Fares' motion in the large context of the interconnected actions arising from this loss incident. In this action alone, there are eight Third Parties – including an entity closely related to the Plaintiffs - as well as Fourth and Fifth Party actions. In addition, there are four other related actions under case management. Those actions include some parties which are not party to this action and some include the Plaintiffs in this case as Defendants. A summary judgment ruling on liability in this action alone would be inappropriate in this context as it would create the possibility of future inconsistent findings.

[12] I find that the motion for summary judgment should be dismissed. The Plaintiffs failed to establish that there is no genuine issue of material fact for trial of the claim or the defence. Unless and until the question of why the crane collapsed can be answered, no determination can be made of whether Lead breached its contract or was negligent in a manner that caused or materially contributed to the collapse.

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[13] Further, I agree with Lead that in the circumstances of this case, a summary judgment ruling on liability in this action alone would be inappropriate as it would create the possibility of future inconsistent findings.

[14] I will expand on this analysis below.

Issues

[15] The issues for the Court to consider on this motion are:

1. What is the test for summary judgment?
2. Do interest of justice issues pre-empt summary judgment in these circumstances?
3. Are there genuine issues of material fact requiring trial?

Analysis

The Test for Summary Judgment

[16] The parties agree that the motion is governed by the provisions of *Civil Procedure Rule* 13.04 and that the authorities interpreting this rule are consistent that claims and defences which do not have a realistic prospect of being successful should be determined at an early stage. The analytical framework for a motion for summary judgment on evidence is as was set out by Justice Fichaud in *Shannex Inc. v. Dora Construction*, 2016 NSCA 89, and most recently approved by the Nova Scotia Court of Appeal in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, where at para. 33, the Court stated:

> [33] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to the then recently amended Rule 13.04 (paras. [34] through [42])[2]:
>
> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?

2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

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…

[35] The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own (*i.e.*, whether an email was sent and received) or it can be mixed with a question of law (*i.e.*, an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). At the first stage, a motion judge looks only at whether the material fact – was an email sent and received – is in dispute. It is irrelevant at this stage whether there is a question of law mixed with the material fact (*i.e.*, the application of the contractual provisions in determining the legal significance of the email) – that consideration belongs in the second step.

[36] In *Shannex*, Justice Fichaud noted " 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" (para. [34]). And further:

> 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.

[37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.

[38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal

> issues not raised by the pleadings or what evidence could possibly be called at the time of trial.
>
> [Emphasis added.]

Are there genuine issues of material fact requiring trial?

[17] Determining what, in fact, caused the tower crane to collapse could not be a clearer genuine question of material fact. It is essential to the analysis of a cause of action for breach of contract or negligence.

[18] As stated in *Shannex*, *supra*, at para. 36:

> [36] "**Best foot forward**": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton,* para. 87.

[19] The pleadings dispute the material facts that led to the collapse of the crane. The Plaintiffs allege, with particulars, that Lead negligently, or in breach of contract, or both, selected, inspected, installed, certified, operated, and maintained the tower crane (para. 39 of Second Amended Statement of Claim). Lead's defence denies the allegations and says that it complied with all applicable standards, regulations and crane manufacturer specifications and industry practices regarding the selection, installation, inspection, maintenance, modification and operation of the tower crane (para. 8(c) of the Defence). The Plaintiffs also allege that Lead failed to consider and take account of the wind conditions predicted for September 7, 2019 and how such conditions would or could effect the structural integrity of crane (para. 39(j)). The Defence says that Lead was aware of weather conditions forecast for Halifax for September 7, 2019, and took all recommended measures to prepare the crane for those conditions.

[20] The Defendant did not merely rely on the bald allegations in the Defence. Mr. Pottier's affidavit and testimony in cross-examination addressed all of these issues and established, to my satisfaction, that they are genuine issues of material fact requiring a trial.

[21] The Plaintiffs did not put forward any evidence as to the cause of the crane collapse. The Plaintiff led no direct evidence as to the alleged acts said to be negligent or a breach of contract. The Plaintiff filed no expert evidence as to the

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cause of the collapse of the tower crane. In their brief and in oral argument the Plaintiffs referred to an opinion in the material filed with the court suggesting that the cause of the collapse was a bad weld. There was no admissible opinion evidence filed with the court. The documents containing this opinion were filed with the court for the purpose of establishing the fact that Lead had complied with certain orders issued to it by the Department of Labour after the collapse and not for the opinion evidence they contain. The authors of the opinions were not called as witnesses, did not file affidavits, and were not qualified to give opinion evidence. I give no weight to the opinion evidence they contain.

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[22] Instead, the Plaintiffs advance the following argument that there is no genuine issue of material fact, at paras. 50 – 51 of their brief:

> 50) Plain as is the nose on one's face is that the Tower Crane was installed for the purposes of the construction of the poured concrete structural framing of Brenton Suite. There could not have been other than an intention, by Lead and by all others, that the Tower Crane would remain as it had been installed for the hoisting and lifting operations related to Lead's CCDC1 with Construction. Tower Crane's do not just fall down. They are not intended to be open to any such eventuality. They are huge. They are heavy. When they just fall down, property tends to be severely damaged. And people tend to get severely injured or even killed.
>
> 51) Thus, there should not be much in the way of evidence required to demonstrate that the only reason the Tower Crane collapsed was that it was old, insufficiently maintained, and in a poor condition as a result, or that it hade [*sic*] been installed improperly, or that it had not been operated, inspected, and maintained properly after it had been installed.

[23] This, of course, is an argument of *res ipsa loquitur*. The Plaintiffs acknowledge that doctrine has been displaced as a stand alone doctrine affecting findings of causation (*Fontaine v. British Columbia* [1998] 1 S.C.R. 424). However, the Plaintiffs argue that it remains open to the court to infer causation from circumstantial evidence. The Plaintiffs refer the court to *Barron v. Barron*, 2003 NSSC 90, and *E. Weyman Construction (1989) Limited v. Tutty*, 2018 NSSC 328, as cases where the court discussed drawing an inference of causation from circumstantial evidence.

[24] However, both those cases were trial decisions, and in both cases the judges clearly stated that in drawing an inference they were weighing the circumstantial evidence before them.

[25] In order to draw an inference as requested by the Plaintiffs here, the court must weigh the evidence to make the required findings of fact from which the requested inference can be drawn.

[26] The ability of a judge on a summary judgment motion to weigh evidence or draw an inference of fact is severely limited. The judge can only draw an inference of fact based on undisputed facts before the court and as long as the inference is strongly supported by the facts. *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11; *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at para. 30; both cited in *Burton Canada Company v. Coady*, 2013 NSCA 95, at para. 28.

[27] In *Burton*, *supra*, at para. 87, Justice Saunders clearly stated: "Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts".

[28] Although the summary judgment rule was amended after *Burton*, the Court of Appeal in *Shannex*, *supra*, found that the tests described in *Burton* did not materially change (at para. 46).

[29] These issues were further addressed by the Nova Scotia Court of Appeal in *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61. After referring to the test in *Shannex*, Justice Farrar, for the court, summarized the case law on weighing evidence and drawing inferences, at paras. 23-32:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
>> [87] ...

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> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact**, or the appropriate inferences to be drawn from disputed facts**.
>
> 11. **Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility**.
>
> [Emphasis added]

[26] The law is clear that judges on summary judgment motions under Rule 13.04 are not permitted to weigh evidence; but what does “weighing the evidence” mean?

[27] *Black’s Law Dictionary*(10th ed.) defines weight as follows:

> **weight of the evidence**. (17c) The persuasiveness of some evidence in comparison with other evidence <because the verdict is against the great weight of the evidence, a new trial should be granted>. See BURDEN OF PERSUASION.
>
> *Black’s Law Dictionary*, 10th ed, sub verdo “weight of the evidence”

[28] *Wigmore on Evidence* explains the distinction between admissibility and weight at §12:

> Admissibility, then, is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, - that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that is received by the tribunal for the purpose of being weighed with other evidence.
>
> [Emphasis added]
>
> John Henry Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Vol 1 (Toronto: Little, Brown and Company, 1983)

[29] The *Canadian Encyclopedic Digest*, volume 24, Title 62, also addresses the issue:

> 52. Admissibility is always a question of law for the trial judge. Questions of admissibility should not be confused with questions of weight, which is the emphasis placed upon the evidence once admitted. Evidence is often admissible, yet afforded no weight by the trier of fact. So long as it is admissible, the strength of the evidence, and the use to which it is put, is a question of fact, and not one of law.
>
> [Emphasis added]

[30] Weighing the evidence is to determine what use can be made of the evidence or the persuasiveness of it on a matter in issue in the proceeding once it is admitted.

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> [31] On this motion, admissibility of the experts reports was acknowledged for the purposes of the motion. Therefore, it was conceded they were relevant and had probative value. The only issue remaining was the weight to be given to the evidence, which is a question of fact.
>
> [32] In my view, the motions judge erred in weighing the evidence in arriving at the conclusion that summary judgment should be granted.

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[30] The evidence before me does not establish the factual cause of the crane collapse. The skies of Halifax are full of tower cranes. I agree with the Plaintiffs that cranes do not just fall down absent some reason. The Plaintiffs have not provided me with that reason. One could speculate on many causes. That is not the role of the judge on summary judgment on evidence. The cause of the crane collapse must be determined before the court can decide, by inference or otherwise, whether such cause would not have occurred but for any act or omission of the Defendant.

[31] The Plaintiffs have failed to meet the onus of establishing that there is no genuine issue of material fact for trial. As has been said repeatedly by the courts of this Province, the purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. That is not the case here. Accordingly, the motion must fail.

Do interest of justice issues pre-empt summary judgment in these circumstances?

[32] I consider it appropriate to address this argument despite my finding that the motion did not meet the required test.

[33] The Plaintiffs' allegations of negligence and breach of contract against Lead that are the subject of this motion are but a piece of the full scope of litigation arising from this event. In effect, it is a claim for partial summary judgment. In addition to the contributory negligence allegations and the Third Party Actions by Lead in this case, there are actions by other Plaintiffs with similar negligence allegations against Lead. In those cases, the Plaintiffs and Lead are often co-Defendants with crossclaims against each other.

[34] Even if the Court was prepared to grant the Plaintiffs' motion for summary judgment on liability in this action, there would be many other remaining liability issues. While the actions in question have yet to be formally consolidated, they are proceeding through case management together and will likely need to be consolidated or joined together for trial in some manner in the future. It is not guaranteed that I will hear the trial. Granting summary judgment on this motion

creates a real risk for inconsistent findings by the Court in dealing with those other liability issues.

[35] Interest of justice in this context was considered by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, at para 60:

> [60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

[36] The Ontario rule of procedure considered in *Hryniak* (Rule (20.04(2.1)) is different than our Rule 13. The Ontario rule specifically references the use of the Court's fact-finding powers and the consideration of the interests of justice. Despite this, in my view, those same considerations should apply in complex, interwoven cases such as this one where there are common facts and liability issues across multiple proceedings. Justice Boudreau (in *MacRury v. Keybase Financial Group Inc.*, 2016 NSSC 159, affirmed on appeal at 2017 NSCA 8), did consider this 'interest of justice' issue on a summary judgment motion:

> [69] On its face, given what is before me, I agree that contributory negligence is a live issue within this action. Having said that, I recognize that it would be possible for me to grant summary judgment on the issue of the liability of the defendant(s); leaving open the question of contributory negligence for another day.
>
> [70] However, in my view, such would not be a desirable outcome here. Frankly, I believe such a result would still require a court to hear much of the evidence in order to make a decision, as it would turn on many factors that are involved in the central liability claim: the standard of care expected of the defendant(s), the expertise/education of the plaintiffs, what information they were given, and so on. I am of the view that the issues of liability of the defendants, and liability of the plaintiffs in contributory negligence, are intimately intertwined.
>
> [71] I further see very little that would be saved, in terms of judicial resources, by resolving only the first part of that equation. I heed the warning of Justice Karakatsanis in [*Hryniak v. Mauldin,*] [2014] 1 [S.C.R.] 87, to avoid "partial" summary judgment in situations which run the risk of duplicative proceedings and inconsistent findings of fact.

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[37] MacRury involved a single proceeding with three Defendants. Such interest of justice concerns are multiplied given the web of actions and pleadings in this case.

[38] *Parks v. McAvoy*, 2022 ABQB 294, is a complex construction case that appears more similar in scope to the present case; *i.e.*, many defendants/third parties, a large volume of material and a significant damages claim. Again, while the Alberta rule for summary judgment differs from Nova Scotia's, the same principles apply to this case. In *Parks*, the plaintiff moved for summary judgment against the defendant. The court considered these same interest of justice issues, in particular the potential impact of summary judgment on the third party action:

> [103] Although none of these parties were included in this motion for summary judgment, a number of them expressed their objection to the granting of summary judgment, arguing that my findings on causation could impact the continuing litigation against them, including possibly implicating them in issues of causation when they have, as yet, had no opportunity to present evidence in defence of these claims.
>
> [104] I agree these are legitimate concerns. Even if I accepted some mash-up of expert evidence as establishing a generalized causation sufficient to grant judgment against the general contractor, how could I do so without fettering the discretion of the trial judge to some extent? What if he or she disagreed completely and found that no one had been proven negligent?

[39] Based on all the above, granting partial summary judgment to the Plaintiffs in this case would be against the interest of justice. The risk of inconsistent findings on subsequent liability trials is too significant. I would dismiss the motion on this basis as well.

Conclusion

[40] The motion is dismissed. If the parties are unable to agree on costs, I will receive written submissions on or before February 29, 2024.

Norton, J.

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