SUPREME COURT OF NOVA SCOTIA

Citation: *The Dawson Group Inc. v.1259963 Ontario Ltd.*, 2025 NSSC 60

Date: 20250211
Docket: *HFX* No. 519920
Registry: Halifax

Between:

The Dawson Group Inc. a body corporate

Plaintiff

v.

1259963 Ontario Ltd., a body corporate and

1259513 Ontario Ltd., a body corporate

Defendants

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	January 21, 2025, in Halifax, Nova Scotia
Counsel:	Nicholas Mott and Meaghan Kells, for the Plaintiff Robert O'Toole, Directing Mind of the Defendant Corporations

By the Court:

Introduction

[1] By Agreement of Purchase and Sale dated August 26, 1997 (the "**APS**"), Brian G Roberts, Paula Elaine Roberts, and Charles W MacIntosh. Q.C. (the "**Vendors**") agreed to sell certain lands located on Purcell's Island in Prospect Bay Nova Scotia for $370,000. Robert O'Toole signed the APS as Purchaser although the terms of the Agreement made it clear he was signing on behalf of certain companies to be incorporated. Prior to closing the transaction, Mr. O'Toole incorporated the defendant companies 1259513 Ontario Limited and 1259963 Ontario Limited (the "**Defendants**") who acquired Mr. O'Toole's rights and interests under the Agreement.

[2] The transaction eventually closed on October 28, 1997, at which point the Defendants paid the $370,000 purchase price as follows:

1. $80,000 cash; and
2. A $290,000 vendor take-back mortgage in favour of the Vendors and registered on title to the Island as Document 47719, Book 6141, Pages 57 – 70 in the Halifax County Registry of Deeds (the "**VTB Mortgage**")

[3] On April 15, 2009, the Vendors assigned any and all interest in the VTB Mortgage to the Plaintiff.

[4] By Notice of Action filed December 13, 2022, the Plaintiff alleged default under the terms of the VTB mortgage and seeks to proceed with foreclosure.

[5] By Notice of Defence filed December 5, 2023 and amended on September 24, 2024, the Defendants deny any actionable default under the terms of the VTB Mortgage and ask that the motion be dismissed.

[6] In this motion, the Plaintiff applies for summary judgment on evidence under Civil Procedure Rule 13.04. It asks that the Defence be struck on the basis that there is no genuine issue of material fact and, in turn, no chance the Defendants might

succeed on the law. If the claim is struck, the Plaintiff seeks to move forward with anticipated foreclosure proceedings.

[7] The parties agree that the issues in dispute may be distilled to the following:

1. Whether the Plaintiff (as assignee under the VTB Mortgage) is under a continuing legal obligation to convey title to (or a right of way over) a parcel of land called the "Bay Right of Way";
2. Whether the terms of payment under the VTB Mortgage were amended such that the failure to make the payments expressly due under the VTB Mortgage does not constitute a default in the circumstances; and
3. Whether payments being made by the Plaintiff in respect of property taxes ought properly be characterized as payments from the Plaintiff/mortgagee (thus representing a default under the VTB Mortgage) or, alternatively, as payments made on behalf of the Defendants/mortgagors (thus representing compliance with the terms of the VTB Mortgage). By way of background and in very simple terms, the Defendants allege that:
    a. Jeff Dawson (now deceased) was the Plaintiffs directing mind;
    b. Mr. Dawson was also, at certain material times, an officer and director of the Defendants and, as well, the Defendants' bookkeeper;
    c. Given Mr. Dawson's prior obligations to the Defendants, any payments by the Plaintiff mortgagee for property taxes were made on behalf of (or in trust for) the Defendants.

[8] Immediately following the hearing on January 21, 2025, I concluded that:

1. The Plaintiff's motion for summary judgment was dismissed. There are genuine issues of material fact; however,
2. Consistent with the requirements of Civil Procedure Rule 13.08(1) and the comments of Saunders, J.A. at paras. 17 – 20 of *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, I exercised my discretion to convert this action to an application in court which will move forward on a reasonably expedited schedule agreeable to

> the parties. Given that I developed this schedule, I agreed to remain seized of the application in court hearing.

[9] I stated that reasons would follow. These are my reasons.

The Test on a Motion for Summary Judgment

[10] Motions for summary judgment represent a powerful procedural tool designed to weed out claims or defences which do not require the time, expense and procedural rigours associated with a full trial.

[11] In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 ("***Hercules Management***"), the Supreme Court of Canada developed the following two stage test for summary judgment:

Stage 1: The moving party bears the evidentiary burden of demonstrating that there is no genuine issue of material fact for trial. If there are genuine issues of material fact, the motion for summary judgment must be dismissed; and

Stage 2: If there are no genuine issues of material fact for trial, the Court examines whether the party opposing summary judgment had a real chance of success.

(at para. 15).

See also *Guarantee Company of North America v. Gordon Capital*, [1999] 3 S.C.R. 423 at para. 27; *Burton Canada Company v. Coady*, 2013 NSCA 95 ("***Burton****")* at paras. 31, 32, 38, 39, and 42; and *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 at paras. 21 – 28.

[12] In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 ("***Shannex***"), the Nova Scotia Court of Appeal hoped to provide clarity and a degree of analytical discipline by enveloping the two-part test within the following five questions which the motion judge must consider in sequential order:

> 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? The motion judge's discretion to determine a question of law is confirmed in Civil Procedure Rule 13.04(6)(a).
>
> 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?
>
> [*Shannex*, at paras. 34 – 42]

[13] In my view, this motion founders at Question 1 of the *Shannex* test. There are genuine issues of material fact and, as a result, the motion must be dismissed. To explain this conclusion, it is first necessary to review the law which governs and constrains the assessment of whether there are genuine issues of material fact requiring trial.

The Law Around Question 1 and Genuine Issues of Material Fact

[14] A "material" fact is one which will affect the outcome of a trial (*Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4 ("***Tri-County Regional School Board***"), at para. 20). If a particular fact would impact the legal result, it is material. By contrast, "[a] dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion" (from *Shannex* at para. 34, adopting *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 ("***2420188***"), at para. 27, and *Burton* at paras. 41 and 87 (#8)).

[15] The focus at this stage is predominantly factual. The Court examines the pleadings and sifts through the evidence to isolate the material facts and determine whether there is a genuine issue or dispute around those facts. At the same time, this process does not (and cannot) occur in a legal vacuum. Material facts cannot be separated and identified without reference to the governing law. Without understanding the law which controls the impugned claim or defence, the motions judge would left meandering aimlessly through the evidence without a coherent legal framework to help guide the journey. Thus, it is useful to begin with the pleadings and undertake a careful review of the essential elements which comprise the claims or defences which are under attack in the motion for summary judgment (*Arguson*, at para. 37).

[16] While the controlling law necessarily impacts any assessment of material facts, the motion judge must remain vigilant not to entangle these factual determinations with the ultimate questions of law. The ultimate legal questions which will determine whether the impugned claim or defence will be summarily

dismissed are confronted at a later stage in the *Shannex* analysis – if it has already been determined that there are no genuine disputes of material fact.

[17] Distinguishing genuine issues of material fact from the ultimate questions of law is not always easy. The decision in *Arguson* illustrates the complexities which can arise. Nevertheless, the motions judge must be careful not to conflate issues of material fact with the ultimate question of law or collapse the multiple, sequential stages of the *Shannex* test into a simplistic, single-staged analysis.

[18] Finally, there are a number of important legal principles which:

1. on the one hand, impose certain basic evidentiary standards upon a responding party who seeks to raise a genuine issue of material fact; and
2. on the other hand, imposes certain restrictions upon a motion judge who might seeks to resolve disputes around the material facts.

[19] As to the basic evidentiary standards imposed upon a responding party alleging a genuine issue of material fact:

1. Genuine issues of material fact must be grounded in the evidence before the Court. Legitimate factual disputes cannot rest on conjectural narratives, speculative thinking, imagined assertions, or artful pleadings (*Risley v. MacDonald*, 2022 NSCA 76 at para. 56; *Burton*, at para. 87; and *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29, at para. 37);
2. There is an evidentiary obligation for responding parties to "lead trump" or "put their best foot forward". A responding party risks having its claims or defences summarily struck if it fails to make every reasonable, good faith, effort to marshal its evidence. It is insufficient for a responding party to offer hopeful forecasts or or vague suspicions about the issues and evidence that might emerge in the future. The time is now - not later. (see *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50, at paras. 14 - 15).[1]

[1] These comments assume that the responding party has been provided with a fair opportunity to respond. The motions judge retains the discretion to consider any alleged prejudice to the responding party and adjourn the motion if necessary to address and properly mitigate the prejudice. (Civil Procedure Rule 13.04(6)(b)).

[20] As to the restrictions which constrain a motion judge's ability to resolve genuine issues of material fact:

1. The Court will not evaluate credibility at a motion for summary judgment (*Coady* at para. 87, point 11). Credibility assessments are within the exclusive purview of the trial judge;
2. The Court will not weigh evidence. The process of assigning weight and allocating the comparative strength (or weakness) of evidence should occur at trial (*Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61 ("***Hatch***"), at paras. 26 - 30). Thus, in *Hatch*, the motions judge erred when weighing (and assigning no value) to an expert opinion (*Hatch* at paras. 44 – 45 and 50); and
3. The Court's ability to draw inferences is very limited. The motion judge "may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts" (*2420188* at para. 53, quoting with approval from the Supreme Court of Canada decision in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11 ("***Lameman***"). The same quote from *Lameman* is also included in *Coady* at para. 210, and the principle is confirmed at para. 29 of *Globex Foreign Exchange Corporation v. Launt*, 2011 NSCA 67, at para. 29.

Analysis

[21] As noted earlier, the dispute between the parties has been narrowed to the three issues summarized in para. 7 above.

[22] The first issue of law raised by the Defendants is whether the Plaintiff (as assignee under the VTB Mortgage) assumed a continuing, post-closing contractual obligation to convey title to (or a right of way over) a parcel of land called the "Bay Right of Way". At this stage in the *Shannex* analysis, the question is whether there is a genuine dispute of material fact which bears upon this legal issue.

[23] To begin, there are a number of uncontroverted material facts that explain how and why this legal issue arose:

1. First, the original Vendors (also the original mortgagees under the VTB Mortgage) knew prior to closing the transaction in 1997 that

the Defendants planned to subdivide Purcell's Island and then sell individual parcels of the subdivided land. Thus, for example, the APS and the VTB Mortgage both contained express terms which:

a. Contemplated the Defendants making additional payments under the VTB Mortgage as severed lots on the to-be subdivided island were sold;

b. Contemplated that any severed lots which were sold could be individually hived off and released from the terms of the VTB Mortgage.

2. Second, Purcell's Island, as the name suggests, is surrounded by water. The APS contemplated that the Defendants/purchasers/mortgagors would acquire a small parcel of land on the mainland close to Purcell's Island. This mainland lot could serve as a nearby land base for water crossings to and from Purcell's Island. It was referred to in the APS as the "Bay Right of Way";

3. On closing and in accordance with the terms of the APS:

    a. The warranty deeds registered on title indicate that, in addition to title over Purcell's Island, the Vendors/original mortgagees also conveyed title in fee simple to the land described as the Bay Right of Way;

    b. The VTB Mortgage registered on title indicates that, in addition to granting security over the entirety of Purcell's Island, the Purchasers/mortgagors also granted security over the land described as the Bay Right of Way.

4. However, in reality:

    a. The Vendors/original mortgagees never owned the Bay Right of Way. Therefore, contrary to the express terms of the Warranty Deeds registered on title, they could not convey title to it;

    b. The Purchasers/mortgagors never acquired title to the Bay Right of Way. Therefore, contrary to the express terms of the VTB Mortgage, they could not grant security over it.

[24] The Purchasers/mortgagors say that:

1. The contractual terms of the APS, the Warranty Deed, and the VTB Mortgage all demonstrate an ongoing, post-closing contractual commitment which bound the Vendors/original mortgagees "… to take the necessary steps to acquire title to the Bay Right of Way and to transfer the same to the Defendants post-closing.to convey title to the Bay Right of Way" (Amended Statement of Defence, para. 9);
2. The Plaintiffs, as assignees under the VTB Mortgage, equally became "… subject to the existing equities and obligations as between the mortgagees (being the same persons as the Vendors)" – including the continuing post-closing obligation to take the necessary steps to acquire title to the Bay Right of Way and convey it to the Defendants. (Amended Statement of Defence, para. 26);
3. The Vendors/original mortgagees and the Plaintiff as their assignee under the VTB Mortgage breached their post-closing, contractual commitment and failed to take the necessary steps to acquire title to the Bay Right of Way. This contractual breach, the Defendants say, "…has impeded and impaired the intended development and the sale of subdivided lots on the Island" and caused the Defendants loss and damage. (Amended Statement of Defence at para. 20).

[25] Finally, the Defendants allege, their losses and damages for contractual breach around the VTB Mortgage exceed any alleged debt due under the VTB Mortgage. They claim set-off against any amounts alleged owing under the VTB Mortgage (Amended Statement of Defence at para. 27).

[26] In a somewhat inter-connected point, the Defendants allege that in 1999 (about two years after closing the transaction), the Vendors/original mortgagees agreed to amend the terms of the VTB Mortgage such that any additional monies owing under the mortgage would be due only if and when the Defendants were able to sell lots on Purcell's Island.

[27] The Plaintiff argues that none of these historic allegations give rise to a genuine issue of material fact. It says that the Defendant's attempt to attach some legal importance to the contractual anomalies described is untenable because:

1. At best, these contractual anomalies suggest that the parties made a mistake. The Vendors obviously could not convey what they did not own. And the Defendants could not grant security over land they did not acquire. Any attempt by the Defendants to turn an obvious

mistake into a matter of contractual significance would require the Court to engage in speculation based on bald assertions – none of which has any place in a motion for summary judgment. The Court has no evidence as to why the Vendors/mortgagees made this mistake and it should not engage in guessing at the answer; and

2. Perhaps more importantly, there can be no contractual amendment or collateral contract or enforceable legal consequences associated with these anomalies because any such conclusion would run directly contrary to (and breach) other express terms the APS, including:

    a. Section 7 where the parties expressly agreed that if the Vendors/mortgagees failed to obtain marketable title to the Bay Right of Way prior to closing, the Defendants/purchasers were contractually entitled to either waive the Bay Right of Way condition and close or terminate the APS. By closing the transaction, the Plaintiff insists, the Defendants necessarily waived any right to insist upon the Bay Right of Way; and

    b. Section 18 of the APS where the parties agreed that:

> "There is no representation, warranty, collateral agreement or condition, whether direct or collateral, or express or implied, which induced any party hereto to enter into this Agreement or on which reliance is placed by any such party, or which affects this Agreement or the Property or supported hereby other than as expressed herein."

[28] Respectfully, in my view, there are genuine issues of material fact that bear upon the legal questions of whether the APS became subject to either an amendment or a collateral contract which had the effect of creating a post-closing obligation related to the Bay Right of Way.

[29] I begin with the following uncontroversial facts:

1. The APS was originally conditional upon the Vendors conveying the Bay Right of Way to the Defendants/purchasers;
2. If the Vendors were unable to convey title to the Bay Right of Way, section 7 of the APS gave the Defendants/purchasers the option of either terminating the agreement or, alternatively, waiving the condition requiring a conveyance of the Bay Right of Way and closing the transaction;

3. As at the date of closing:
    a. The Vendors never acquired, and were unable to convey title to, the Bay Right of Way;
    b. The Defendants/purchasers knew the Vendors were unable to convey title to the Bay Right of Way;
    c. The Defendants/purchasers had the option under section 7 of the APS to terminate the agreement and not close;
    d. The Defendants/purchasers did not terminate the agreement. Instead, they closed the transaction.

[30] Based on these facts alone, it may be argued that the Defendants impliedly exercised their alternative option under section 7 and, by closing, waived the condition regarding the Bay Right of Way and forfeited any right to subsequently claim an entitlement to this land.

[31] However, the following additional facts cast a degree of doubt on these arguments:

1. On closing, the Vendors signed Warranty Deeds purporting to convey title for the Bay Right of Way to the Defendants/purchasers – even though the Vendors did not own this land; and
2. On closing, the Defendants/purchasers also signed a VTB Mortgage in favour of the Vendors purporting to grant security over the Bay Right of Way – even though they did not own this land.

[32] These two written instruments (the Warranty Deeds and the VTB Mortgage) were signed by the parties, registered on title and have never been amended. In my view, they give rise to a genuine issue of material fact as to their contractual impact.

[33] The obvious question is: Why would the parties sign and exchange these documents on closing if, as the Plaintiff contends, the parties must be deemed to have relied upon section 7 and proceeded as if the Defendants/Purchasers had waived any future contractual entitlement to insist upon title to the Bay Right of Way?

[34] Respectfully, the Court cannot disregard or ignore the APS, the Warranty Deeds signed and exchanged on closing, and the VTB Mortgage (including the contradictions which they expose) as innocent or inconsequential mistakes. In my

view, the Warranty Deeds and the VTB Mortgage which were signed and exchanged on closing create genuine issues of fact including:

1. The parties' contractual intentions and whether those intentions align with the terms of the APS; and
2. The contractual meaning or force that can be ascribed to the Warranty Deeds and the VTB Mortgage in all the circumstances.

[35] The passage of 25 years since the transaction closed, and about 20 years since any monies were paid under the VTB Mortgage, constitute additional relevant material facts that complicate the underlying issues. These issues of material fact cannot be resolved in a motion for summary judgment because the motions judge is required to engage in the impermissible task of weighing the evidence and evaluating the credibility of the parties.

[36] I acknowledge the Plaintiff's arguments that the Defendants' post-closing communications fail to refer to a contractual breach or insist upon any ongoing obligation to convey title to the Bay Right of Way. Rather, they strike an apologetic note for failing to make payments otherwise due under the VTB Mortgage. They neither invoke any continuing right to the Bay Right of Way nor accuse the Vendors of contractual breach. For example, an unsigned fax from the Defendants dated April 20, 1999, sets out a proposal to the Vendors under which the Defendants speak of "[i]nvesting in spending another $65,000 to improve the island and, as well, the process to make the lots available for sale." The Defendants also refer to additional legal and architectural costs they will incur over the short term and, as well, their plan to commence building a community dock for all owners and modest landscaping. This fax concludes with a proposal to alter the monies due under the VTB Mortgage as follows:

1. Increase interest on overdue amounts to 8% a year;
2. Immediately pay installments of:
    a. $28,000 at the end of July 1999;
    b. $28,000 by the end of August 1999;
    c. $14,000 by the middle of September 1999; and
    d. A further payment of $12,000 each time a lot is sold.

[37] The fax concludes:

> Hopefully the foregoing is acceptable to you if it is we would like you to advise us as soon as you are able because then we will be able to begin our expenditures.to [sic] finalize the lots for dale [sic]. Again we appreciate your cooperation and apologize for our delays in moving this project along and getting back to you.

[38] The proposal was not immediately accepted. In any event, the communication is notable for its lack of any mention of the Vendors' alleged breach of contract and failure to convey title to (or make reasonable effort to convey title to) the Bay Right of Way.

[39] I also acknowledge the Plaintiff's arguments that the Defendants have not described their efforts to sell lots on Purcell's Island over the last 25 years in a way which might provide a full explanation supportive of their contractual claims. Nor have they quantified any alleged loss related to the Bay Right of Way. On this, I also note that the Defendants have not filed a counterclaim against the Plaintiff for contractual breach but, rather, assert these claims as a set off of any amounts found owing under the VTB Mortgage.

[40] In my view, all of these matters deepen (rather than answering) the underlying factual questions and concerns. More importantly, they demand a degree of evidentiary scrutiny that cannot be accomplished under the existing law around summary judgment.

[41] In sum, the factual issues which began when the lands connected to the Bay Right of Way were included in the Warranty Deeds and VTB Mortgage are fatal to the Plaintiff's motion for summary judgment. For clarity, I make no determinations whatsoever regarding the competing factual and legal arguments advanced by the parties. That will be for another day. These reasons should not be interpreted otherwise.

[42] In the circumstances, it is unnecessary to further examine the remaining issues listed in paragraph 7 above. Among other things, they are interconnected to a degree which would make it unsafe to grant some form of partial summary judgment by making certain factual findings around residual issues while leaving others unresolved.

[43] The Plaintiff's motion for summary judgment is dismissed.

[44] The parties agreed that the issues of material fact are narrow. In the circumstances, they cry out for a speedy and efficient determination under Civil Procedure Rule 13.08(1). After delivering my "bottom line" decision, I exercised

my discretion under this Rule and moved for an order that this action be converted to an Application in Court. To that end, I made the following additional directions:

1. The Statement of Claim shall constitute the Notice of Application in Court. The Amended Statement of Defence shall constitute the Notice of Contest. Thus, the pleadings are closed;
2. Disclosure is deemed to be complete, and the parties do not require further discovery for examination;
3. The Affidavits filed by the parties in connection with this motion for summary judgment shall be deemed to be filed in support of the parties respective positions in connect with this Application in Court – subject to my earlier findings in response to motions seeking to strike certain portions of those affidavits as inadmissible evidence. The parties reserve the right to conduct cross-examination;
4. I shall remain seized of the Application in Court and shall develop a schedule with the parties for a fair and efficient process culminating in a timely hearing. The parties shall be afforded the opportunity to file further affidavit evidence and written submissions in advance of that hearing; and
5. Costs, if any, shall be determined following the hearing of the Application in Court.

Keith, J.