NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50

Date: 20170613
Docket: CA 460158
Registry: Halifax

Between:

The Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund by its Trustees Lynette Johnson, Carl Crouse, Mike MacArthur, Ken MacDermid, Blaise MacNeil, Jim Mott, Gerri Oakley, Bruce Quigley, Bruce Thomson and Claire Westhaver

Appellant

v.

Simone Amirault

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	May 24, 2017, in Halifax, Nova Scotia
Subject:	**Appeals. Civil procedure. Summary judgment.**
Summary:	Ms. Amirault made a total disability claim under the Association's Long Term Disability Plan Trust. Her claim was rejected and she appealed under the Plan. By appealing, she agreed to forego litigation. Her appeal was rejected, and she sued for the same relief. The trustees of the Plan applied for summary judgment on evidence. Ms. Amirault led no evidence and resisted the application, arguing that she did not understand some documents she signed and there was "an imbalance of power" between the parties. The application judge dismissed the application and the trustees appealed.

Issues: Were there any factual or legal issues that would preclude granting summary judgment?

Result: Appeal allowed. Summary judgment granted. Ms. Amirault elected to forego litigation by appealing under the Plan. She neither pleaded nor led evidence that vitiated her choice to appeal. Her action was unsustainable and should have been dismissed by granting the trustees summary judgment.

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v.

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Respondent

Judges:	Fichaud, Beveridge, and Bryson, JJ.A.
Appeal Heard:	May 24, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Bryson, J.A.; Fichaud and Beveridge, JJ.A. concurring
Counsel:	David G. Hutt and Keith D. Lehwald, for the appellant Lynette Muise, for the respondent

Reasons for judgment:

[1] Simone Amirault was formerly employed as an environmental sciences worker at Villa Acadienne. She says that since August 2013 she has been disabled. As an employee of the former Southwest District Health Authority, Ms. Amirault was enrolled in a long term disability plan established by the Nova Scotia Association of Health Organizations. The individual appellants are trustees of that plan.

[2] Ms. Amirault made a "total disability" claim which was initially rejected. The plan provides for two levels of reassessment. The first stage permits reconsideration of a claim based on additional evidence. If the claimant's reconsideration is unsuccessful, a hearing review is available before an independent appeal board. However, resort to the appeal board is an alternative to legal action. The claimant must choose legal action or the appeal, but not both. In this case, Ms. Amirault purported to pursue both. Having lost her appeal, she commenced a legal action.

[3] Because taking legal action contravened the terms of the plan, the trustees brought a motion for summary judgment on evidence. Ms. Amirault resisted the summary judgment motion. But she filed no responding affidavit. She did not testify. The trustees' affiant was not cross-examined.

[4] Her lawyer suggested in argument that Ms. Amirault did not know "what she was signing" and that there was an "inequality of bargaining power" between the parties.

[5] The Honourable Justice Mona Lynch dismissed the trustees' motion, holding that there was ". . . some evidence that [Ms. Amirault] may not have understood at least one of the documents that she signed". Regarding "unequal bargaining position" the judge observed, "The circumstances in each case must be examined and the imbalance of power is a fact to be proven." The judge concluded, "As there is at least one material fact in dispute I will not separate a question of law from other proceedings under *CPR* 12.02 or determine whether there has been an abuse of process under *CPR* 88.02" (2016 NSSC 293).

[6] The trustees now appeal.

[7] The appeal should be allowed and summary judgment entered for the trustees because:

1. There was no evidence before the chambers judge that gave rise to a dispute of material fact;
2. No question of law arises from any of the legal arguments raised by Ms. Amirault;

[8] Accordingly, the trustees established that Ms. Amirault had no sustainable cause of action.

Interlocutory appeals

[9] Appeal of an interlocutory motion requires leave of the Court. To obtain leave, the appellant must demonstrate an "arguable issue", (*MacRury v. Keybase Financial Group Inc.*, 2017 NSCA 8 at ¶ 19, citing *Burton Canada Company v. Coady*, 2013 NSCA 95 at ¶ 18).

[10] This Court will only intervene with respect to an interlocutory decision if wrong principles of law have been applied or, to the extent that the judge was exercising a discretion, a patent injustice would result, (*Burton* at ¶ 19).

[11] Reliance on evidence not properly before the Court and on arguments depending on evidence not tendered, raise arguable issues.

The law of summary judgment

[12] *Civil Procedure Rule* 13.04 describes summary judgment on evidence:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established,

> summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[13] In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 this Court explained how the rule should be applied:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> - **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton*'s first step.
>
> 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: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> 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. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

- **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion

> was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[14] Importantly for this case, the parties have an obligation to put their "best foot forward" and tender evidence on all live issues. Again relying upon Fichaud J.A. in *Shannex*:

> [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.
>
> [Emphasis added]

[15] Putting one's best foot forward is an important obligation of parties to a summary judgment motion. A respondent to a summary judgment motion "must lead trump or risk losing" (*Goudie v. Ottawa (City)*, 2003 SCC 14 at ¶ 32). Assuming there has been adequate time for disclosure, an absence of evidence cannot be overcome by arguing that something might turn up in the future. The Supreme Court emphasized the obligation of the parties in *Canada (Attorney General) v. Lameman*, 2008 SCC 14:

> [19] We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. ***A summary judgment motion cannot be defeated by vague references to what may be adduced in the future***, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.
>
> [Emphasis added]

No evidence of disputed material fact

[16] The trustees filed a detailed affidavit from Sue Eisener-Murphy, Disability Program Specialist with the plan administered by the trustees, exhibiting a series of

documents including a copy of the plan and materials dealing with Ms. Amirault's disability claim.

[17] When she was initially denied her claim, Ms. Amirault applied for claim review. Article 11.07 of the plan allows her to do so, providing in part:

> An Employee whose claim for Benefits has been denied or terminated and who alleges who alleges the denial or termination of his/her Benefits was based on:
>
> a) An incomplete or erroneous medical assessment; or
>
> b) An erroneous interpretation or application of the Plan text, may file a request for a Claim Review.

[18] When her review was unsuccessful, Ms. Amirault appealed in accordance with Article 11.09 which requires an appellant to forego legal action:

> 1) The Employee may request an appeal of the Claim Review Review Decision by filing written notice of appeal with the Trustees, within 30 days of receipt of the Claim Decision or Claim Review Decision, advising of the Employee's:
>
> a) request for appeal to the Appeal Board;
>
> b) agreement to be bound by the decision of the Appeal Board; and
>
> ***c) agreement not to commence legal action with respect to the denial or termination of Benefits.***
>
> [Emphasis added]

[19] On February 3, 2014, the trustee's long term disability insurer wrote to Ms. Amirault, rejecting her claim but explaining her rights of review and appeal. That letter informed Ms. Amirault of her right to appeal a claim review decision, which also waived her right to litigate:

> If the decision is to maintain the denial, you then have an opportunity to appeal the decision further by proceeding to an Appeal Hearing. To initiate this stage of appeal you must sign another form (that is sent with the Claim Review decision) and return it within 30 days to the NSAHO offices. ***Please note, this inititates the proceedings for Appeal Hearing and waives your right to litigate and take further legal action against the Trustees of the NSAHO LTD Plan Trust Fund.***
>
> [Emphasis added]

[20] Ms. Amirault's review was unsuccessful and she appealed. That appeal was acknowledged by correspondence on April 2, 2014 which informed Ms. Amirault, amongst other things, that ". . . the hearing consists of submissions by each party,

based solely on the record. There are no witnesses, nor will evidence not contained in the record be accepted. ***The decision of the appeal board is final and binding on all participants.***" [Emphasis added]

[21] It is apparent from the foregoing that the plan precludes legal action by a claimant if she elects to appeal a denial of her claim under Article 11.09. Throughout the process Ms. Amirault was informed of this consequence, should she elect to proceed with appeal under the plan. Courts generally uphold a choice by parties to submit to alternate dispute resolution. Of course, this does not preclude judicial review, (see for example: *Symington v. Halifax (Regional Municipality),* 2007 NSCA 90, ¶ 54-71 and in a commercial context *Deuterium of Canada Ltd. v. Burns and Roe, Inc.*, [1974] S.C.J. No. 90). In this case, Ms. Amirault brought an application for judicial review, but then discontinued it.

[22] Notwithstanding her exercise of her right of appeal, Ms. Amirault commenced legal proceedings on May 20, 2015, seeking disability benefits under the plan.

[23] Ms. Amirault purported to rely on her affidavit of documents to raise an arguable issue. The judge seemed to recognize that the affidavit of documents was not properly before her as the following exchange with counsel illustrates:

> MS. MUISE: And certainly, Your Ladyship, we have four volumes of evidence that we put before the Court.
>
> THE COURT: But the thing is they're not really, I would suggest, I have the same problem that Mr. Hutt had.
>
> MS. MUISE: M-hm.
>
> THE COURT: They're the affidavits of documents.
>
> MS. MUISE: M-hm.
>
> THE COURT: They're not an affidavit of evidence contesting the – the summary judgment.

[24] Notwithstanding her recognition that these documents were not evidence on the motion, the judge nevertheless concluded in her decision that there was "some evidence" to support Ms. Amirault's argument that she "may not" have understood "at least one of" the documents she signed. There are at least four things wrong with this conclusion.

[25] First, the affidavit of documents is not evidence of anything other than the documents which a party considers to be relevant to the proceedings. *Rule* 15.03 describes the content and purpose of an affidavit of documents. It is designed to advance disclosure. No more, no less. It says nothing about how any documents might be relevant, or to whom, or with respect to what issues. It says nothing about what documents a party will rely on, considers to be correct or true, or otherwise advances a particular position in the lawsuit.

[26] A party cannot circumvent the rules of evidence by relying upon an affidavit designed for a purpose completely unrelated to the specific questions arising on a motion. Moreover, it would not serve the policy purposes of quick, inexpensive and efficient means of summary resolution of disputes if one could rely upon literally anything in an affidavit of documents which might touch upon motion issues.

[27] It was an error of law for the judge to rely on the affidavit of documents as evidence in the motion.

[28] Second, Ms. Amirault provided no evidence to support the specific allegations made on her behalf by her counsel. There was literally nothing before the Court by which Ms. Amirault asserted that she misunderstood something that she had signed or that she was somehow oppressed by an alleged inequality of bargaining power.

[29] Third, the document on which counsel relies for advancing an argument of confusion on the part of her client—confusion to which her client does not testify—is the request for claim review—the penultimate review step. Ms. Amirault signed such a review request on February 17, 2014. The relevant portion of that document provides:

> I understand the article 11.07 of the NSAHO Long Term Disability Plan Text provides for a Claim Review where the claimant was denied LTD benefits and such claimant alleges the denial or termination of my benefits on the basis of:
>
> a) An incomplete or erroneous medical assessment; or
>
> b) An erroneous interpretation or application of the Plan Text.
>
> I, Simone Amirault, have considered this matter and wish to have my claim reviewed on the following basis: (A or B)
>
> A and B I feel that you should consider my claim again. As I am unable to work anymore. It is also getting harder to do my work at home.

[30] Counsel for Ms. Amirault submits that because she circled "A or B" this shows a confusion on Ms. Amirault's part about what she was signing. The form could be clearer, but it is obvious that the two grounds of "review" here can be assimilated to questions of fact or law. "A" goes to erroneous medical assessment and "B" to erroneous legal interpretation of the plan. They are not mutually exclusive. Even so, this is not evidence that Ms. Amirault was confused at all about her rights of appeal and, indeed, this review was actually an intermediate right of "appeal".

[31] Fourth, Ms. Amirault has not pleaded that her election to appeal, rather than litigate, was invalid. This election has contractual force and can only be vitiated in limited circumstances such as misrepresentation, mistake, duress and the like. She has not so pleaded.

[32] The final stage of appeal was initiated in writing by Ms. Amirault on April 1, 2014. The relevant portions of her request for appeal provide:

> 3. Article 11.09(1)(c) requires that a claimant who wishes to pursue an Appeal must agree in writing to be bound by the decision of the LTD Plan Appeal Board and ***agree not to commence court proceedings*** with respect to the denial of long term disability benefits. I may, however, withdraw my decision to participate in the appeal process at any time prior to the commencement of the hearing.
>
> I have considered this matter and wish to pursue an appeal of the denial/termination of long term disability benefits***. I agree that upon commencement of the hearing I will be bound by the decision of the Appeal Board and will not commence court proceedings with respect to the denial of long term disability benefits.***
>
> [Emphasis added]

[33] The foregoing was signed and dated by "Simone Amirault" and witnessed by "Ralph Amirault".

[34] As previously indicated, Ms. Amirault did not file an affidavit in response to the motion brought by the trustees, nor did she cross-examine the trustees' witness, nor give any viva voce evidence. She points to no evidence sustaining her legal submissions. Accordingly, there is no material fact in dispute about Ms. Amirault's right to resort to the courts. That option was foreclosed by her choice of appealing under the plan. The first *Shannex* question must be answered "no".

No question of law arises

[35] Ms. Amirault submitted two arguments to the chambers judge. First, her counsel suggested that she may not have understood some things she signed. She gives the example of the request for claim review. Even if one overcomes the absence of affidavit evidence and refers to the intermediate step of claim review requested by Ms. Amirault, there is still no evidence that she did not understand that her final appeal precluded legal action. This argument has neither legal merit nor factual foundation.

[36] The other argument advanced on behalf of Ms. Amirault was that somehow she should be relieved of the consequence of proceeding with legal action in breach of the plan terms because there was "an inequality of bargaining power" between her and the trustees. This submission misunderstands the concept of inequality of bargaining power, which is usually captured by the concept of unconscionability, invoked to relieve a contracting party of the terms of a contract, (see, for example, Fridman, *The Law of Contract in Canada*, 6th ed at p. 318). The plan is in fact a trust, providing benefits to employees who work for participating health organizations. Ms. Amirault enjoyed the benefits of the plan by being an employee of a participating employer.

[37] The plan is not a contract to which Ms. Amirault is a party or which she could negotiate. The plan itself is the result of a contract negotiated by employer and employee representatives. If Ms. Amirault were employed by a participating employer, she would receive whatever benefits the plan conferred. If not, she would not. It is as simple as that.

[38] To the extent that her election to appeal has contractual force, Ms. Amirault did not plead or lead any evidence that would vitiate the agreement arising from her choice, (¶ 31, above).

[39] The second *Shannex* question must be answered "no". Therefore, *Rule* 13.04(2) required that summary judgment be granted.

Disposition

[40] The trustees placed evidence before the motions judge that Ms. Amirault's final appeal under the plan precluded her from commencing a legal proceeding seeking the same relief.

[41] Ms. Amirault led no evidence. None of the evidence before the court raises an issue of material fact or question of law. Accordingly, summary judgment should have been granted.

[42] The appeal is allowed and summary judgment is granted to the trustees with costs of $500.00.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.