

RULE 20
SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

- 20.01** (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
- (2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

To Defendant

- (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

AFFIDAVITS

- 20.02** An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but on the hearing of the motion an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

FACTUMS REQUIRED

- 20.03** On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party, and file it, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

DISPOSITION OF MOTION

General

- 20.04** (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
- (2) The court shall grant summary judgment if,
- (a) The court is satisfied there is no genuine issue for trial with respect to a claim or defence; or
- (b) The parties agree to have all or part of the

claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Only Genuine Issue is Amount

- (3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue is Question of Law

- (4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly.

Only Claim is for an Accounting

- (5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

WHERE A TRIAL IS NECESSARY

Powers of Court

- 20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and may order that the action proceed to trial by being placed forthwith, or within a specified time, on the docket.
- (2) At the trial the facts so specified shall be deemed to be established and the trial shall be conducted accordingly, unless the trial judge orders otherwise to prevent injustice.

Imposition of Terms

- (3) Where an action is ordered to proceed to trial, in whole or in part, the court may give such directions or impose such terms as are just, including an order,
- (a) for payment into court of all or part of the claim;
 - (b) for security for costs; and
 - (c) that the nature and scope of discovery, if any, be limited to matters not covered by the affidavits filed on the motion and any cross-examinations on them, and that the affidavits and cross-examinations may be used at trial in the same manner as an examination for discovery.

Failure to Comply with Order

- (4) Where a party fails to comply with an order for payment into court or for security for costs, the court on motion of the opposite party may

dismiss the action, strike out the statement of defence or make such other order as is just.

- (5) Where on a motion under subrule (4) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

Where Motion Fails

- 20.06** (1) Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on a solicitor and client basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.

Where a Party has Acted in Bad Faith

- (2) Where it appears to the court that a party to a motion for summary judgment has acted in bad faith or primarily for the purpose of delay, the court may fix the costs of the motion on a solicitor and client basis and order the party to pay them forthwith.

EFFECT OF SUMMARY JUDGMENT

- 20.07** A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

STAY OF EXECUTION

- 20.08** Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

- 20.09** Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Johnston v. CADC & Ors. 2007 PESCTD 7

The summary judgment procedure can be used in a civil conspiracy case. The defendant's motion for summary judgment was granted because the plaintiff's claim that the defendant conspired with others against the plaintiff could not survive a good hard look.

Ayangma v. French School Board and Ano. 2007 PESCTD 12

The plaintiff's motion for summary judgment was dismissed. Pursuant to Rule 20.06(1), the court ordered the plaintiff to pay the defendants' costs of the motion on a substantial indemnity basis.

Ayangma v. French School Board and Ano. 2006 PESCTD 37; (2006), 259 Nfld & P.E.I.R. 354

A motion for summary judgment is not to be heard in stages but is to be considered as a whole after both parties have filed their evidence with respect to the motion. It is not proper to split a motion for summary judgment requiring the respondent to only file evidence if and when the mover meets the burden of establishing a basic case.

Metro Credit Union Ltd. v. McInnis 2005 PESCTD 39

The court granted partial summary judgment; granted a stay on the execution of that judgment pursuant to Rule 20.08 pending resolution of the remainder of the claims and, pursuant to Rule 20.05(2), the court made some material factual findings regarding part of the claim.

MacPherson v. Ellis 2005 PESCAD 10

Pursuant to rule 20.04 the onus is on the moving party to establish there is no genuine issue for trial. Once this onus has been discharged, the responding party has the evidentiary burden of showing there is a real chance of success on the pleading it has filed.

BMO v. Masseau 2004 PESCTD 09

The bank's motion for summary judgment was granted. The bank established there was no genuine issue for trial on the material facts and the defendant failed to establish there were material facts in issue which would raise a genuine issue for trial.

Bank of Montreal v. Dockendorf 2004 PESCTD 33; *Dockendorf v. Bank of Montreal* 2005 PESCAD 9

The bank's motion for summary judgment was granted. The defendant did not file any evidence in response to the motion and the defendant failed to establish there was a genuine issue for trial.

Royal Bank v. McCabe 2004 PESCTD 45

A motion for summary judgment brought by the bank was denied. The defendant's statement of defense, and the evidence she presented on the motion established there was a genuine issue for trial.

Mullin v. PriceWaterhouseCoopers 2003 PESCTD 82

The defendant sought summary judgment on the issue of whether the pleadings disclosed a genuine issue for trial. The issue allegedly raised by the pleading was whether the defendant owed a duty of care to the plaintiff in relation to opinions provided to a third party. The court granted the defendant summary judgment finding the plaintiff had not established a genuine issue for trial.

Blue Heron Enterprises Inc. v. Bradley & ors., [1999] P.E.I.J. No. 22 (Q.L.) (P.E.I.S.C.-T.D.)

Summary judgment is not available in an action to enforce a lien under the *Mechanics Lien Act*, R.S.P.E.I. 1988, Cap M-4.

Ayangma v. NAV Canada & Navaux 2001 PESCAD 1

The challenge on a motion for summary judgment in a defamation action is in distinguishing between questions of law and fact. If the only issue relates to a question of law, the defamation action could be finally resolved by the Motions judge on a motion for summary judgment. On the other hand, if there are issues of fact, the Motions judge must decide if it is

a genuine issue of material fact which requires a trial for resolution.

Gallant v. Piccott 2000 PESCAD 17

A statutory onus provision - s.287 of *Highway Traffic Act* R.S.P.E.I. 1988 Cap. H-5 - created a genuine issue for trial which, in the circumstances of this case, could only be resolved by a trial.

Murphy v. Tignish Credit Union Ltd. and Aylward (1997), 147 Nfld. & P.E.I.R. 188 (P.E.I.S.C.-A.D.)

Appeal from an order of the Chambers judge dismissing an application for summary judgment. It was not for the Chambers' judge, or the court on appeal, to assess whether the allegations of the plaintiff are true or sufficient, on a balance of probabilities, to establish the plaintiff's claim. The role of the Chambers judge is to assess the evidence presented on the motion and make a determination whether it raises a genuine issue for trial.

Canfield et al. v. P.E.I (1996), 144 Nfld. & P.E.I.R. 165 (P.E.I.S.C.-T.D.)

Applicant seeking order for summary judgment. Mechanism to resolve a proceeding when there is no genuine issue for trial. Party making motion must satisfy the court of this.

Simmonds v. Murphy (1996), 137 Nfld. & P.E.I.R. 332 (P.E.I.S.C.-T.D.)

Application for summary judgment - Purpose of Rule 20 is to remove from the trial system all matters where there is no genuine issue to go to trial. On hearing a motion, the chambers judge is to take a hard look at the evidence that is brought forth on the motion. The onus of establishing there is no triable issue is on the moving party; however, a respondent cannot sit back. If the respondent wishes to succeed it should put its best foot forward. When an issue of genuine credibility arises, a trial is required.

MacCallum v. Charlottetown (City) (1995), 127 Nfld. & P.E.I.R. 300 (P.E.I.S.C.-A.D.)

There must be no question as to all the material facts disclosed by the pleadings before the court can find there is no genuine issue for trial. The onus is upon the applicant to prove there is no issue as to all the material facts, and if discharged, the responding party must then show there is a genuine issue arising from the material facts, which requires a trial for determination.

Read v. Read et al. (1995), 133 Nfld. & P.E.I.R. 166

Partial summary judgment can be obtained in a situation where the claims are separate and distinct. Summary judgment can also be obtained for part of a single claim where such part is severable and liability for the balance of the claim is not affected.

Johnston v. Montreal Trust Co. of Canada (1994), 123 Nfld. & P.E.I.R. 245 (P.E.I.S.C.-A.D.)

Material before the chambers judge disclosed there was a genuine issue for trial as to whether there was a default by the primary debtor thereby triggering the liability of the guarantor. Order of the chambers judge entering summary judgment was set aside.

Agpro Services Inc. v. MacKinnon et al. (1994), 119 Nfld. & P.E.I.R. 239 (P.E.I.S.C.-T.D.)

The material filed in support of the motion for summary judgment and the material filed in opposition to the motion satisfied the court that a genuine issue of trial did exist. Although the plaintiff was unsuccessful in bringing the motion, it was not unreasonable to have done so. The defendants were awarded party and party costs to be assessed and payable forthwith.

Westland Homes Ltd. et al. v. Schurman (M.F.) Ltd. (1993), 101 Nfld. & P.E.I.R. 122 (P.E.I.S.C.A.D.)

On hearing an application for summary judgment the chambers judge may assess the facts and the applicable law to determine if there is a genuine issue for trial.

Barclays Bank Agricultural Finance Corp. v. Miscouche Sales & Service Ltd. et al. (1992), 100 Nfld. & P.E.I.R. 129 (P.E.I.S.C.-T.D.)

The applicant must set out specific facts and cogent evidence organized to show that there is a genuine issue for trial.

The following decisions also address issues arising on an application for summary judgment and they affirm the principles set forth in the cases noted above.

Jay v. DHL 2007 PESCTD 5

S.P. v. Child & Family Services 2005 PESCAD 10

Taylor & ors. v. Corney & ors. 2004 PESCTD 71

Collings & Collings v. PEI Mutual Insurance Co. 2002 PESCTD 59

National Bank v. Stevenson 2000 PESCTD 17, (2000) 184 Nfld. & P.E.I.R. 95

DesRoches v. Di-Carra Inc. & Carragher, [1999] P.E.I.J. No. 33 (Q.L.) (P.E.I.S.C.-T.D.)

The Bank of Nova Scotia v. Savoie, [1999] P.E.I.J. No. 29 (Q.L.) (P.E.I.S.C.-T.D.)

Dale v. The Guardian & ors., [1999] P.E.I.J. No. 18 (Q.L.) (P.E.I.S.C.-T.D.)

United Brotherhood of Carpenters and Joiners v. Bradley & ors. (1999), 174 Nfld. & P.E.I.R. 102 (P.E.I.S.C.-T.D.)

Stevenson v. National Bank of Canada (1998), 161 Nfld. & P.E.I.R. 33 (P.E.I.S.C.-T.D.)

Parker v. Ledwell, Larter and Driscoll (1997), 159 Nfld. & P.E.I.R. 58 (P.E.I.S.C.-T.D.)

Davis v. Walkup (1997), 150 Nfld. & P.E.I.R. 233 (P.E.I.S.C.-T.D.)

Stewart v. MacLeod (1997), 158 Nfld. & P.E.I.R. 11 (P.E.I.S.C.-T.D.)

Stratford (Town) v. Ellsworth (1997), 157 Nfld. & P.E.I.R. 177 (P.E.I.S.C.-A.D.)

MacLeod (c.o.b. Grant MacLeod Construction Management) v. 2950243 Canada Inc. [1997] 1 P.E.I.R. 419 (P.E.I.S.C.-T.D.)

Lenentine v. Robichaud (1996), 140 Nfld. & P.E.I.R. 270 (P.E.I.S.C.-A.D.)

Read v. Read et al. (No.2) (1995), 131 Nfld. & P.E.I.R. 102 (P.E.I.S.C.-T.D.)

Lotito v. Scantlebury (1995), 129 Nfld. & P.E.I.R. 58 (P.E.I.S.C.-T.D.)

Canadian Imperial Bank of Commerce v. MacKenzie (1995), 135 Nfld. & P.E.I.R. 203 (P.E.I.S.C.-T.D.)

Boertien v. Carter et al. (1995), 131 Nfld. & P.E.I.R. 8 (P.E.I.S.C.-T.D.)

Century 21 Colonial Realty Inc. v. Dickson-Thompson (1995), 128 Nfld. & P.E.I.R. 165 (P.E.I.S.C.-T.D.)

Pitre v. Jeffery (1994), 119 Nfld. & P.E.I.R. 335 (P.E.I.S.C.-T.D.)

MacKinnon v. MacDonald (1994), 120 Nfld. & P.E.I.R. 178 (P.E.I.S.C.-T.D.)

Arsenault v. Holland College, [1994] 2 P.E.I.R. 230 (P.E.I.S.C.-T.D.)
Royal Trust Corp. of Canada v. Jamieson, [1994] 2 P.E.I.R. 193 (P.E.I.S.C.-T.D.)
Crosby's Construction Ltd. v. Matheson, [1994] 1 P.E.I.R. 123 (P.E.I.S.C.-T.D.)
Morrissey v. Morrissey (1993), 114 Nfld. & P.E.I.R. 122 (P.E.I.S.C.A.D.)
Tignish Credit Union Ltd. v. Murphy (1993), 109 Nfld. & P.E.I.R. 287 (P.E.I.S.C.-T.D.)
Singh v. Mills (1992), 97 Nfld. & P.E.I.R. 165 (P.E.I.S.C.-T.D.)
Central Guaranty Trust Co. v. Peters, [1992] 2 P.E.I.R. D29 (P.E.I.S.C.-T.D.)
Wheatley v. MacLeod, [1991] 2 P.E.I.R. D33 (P.E.I.S.C.-T.D.)

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION**

Citation: Ayangma v French School Board & Ano 2006 PESCTD 37 Date: 20060728
Docket: GSC-17005
Registry: Charlottetown

BETWEEN:

NOËL AYANGMA

PLAINTIFF

AND:

FRENCH SCHOOL BOARD and GABRIEL ARSENAULT

DEFENDANTS

BEFORE: The Honourable Justice Benjamin B. Taylor

Appearances:

Noël Ayangma
Christopher S. Montigny and Erin T. Mitchell

Representing Himself
Solicitors for the Defendants

Place and Date of Hearing

Charlottetown, Prince Edward Island
June 7, 2006

Place and Date of Decision

Charlottetown, Prince Edward Island
July 28, 2006

BETWEEN:

NOËL AYANGMA

PLAINTIFF

AND:

FRENCH SCHOOL BOARD and GABRIEL ARSENAULT

DEFENDANTS

Prince Edward Island Supreme Court - Trial Division

Before: Taylor J.

(Chambers)

Date Heard: June 1, 2006

Date of Decision: July 28, 2006

[2 Pages]

Civil Procedure - summary judgment - motion not to be heard in stages.

Cases Referred to: ***Fasken v. Time/System International APS***, [1986] O.J. No. 972 (Ont. HC); ***ITN Corp. v. ACC Long Distance Ltd.***, [1992] O.J. No. 1119 (Gen. Div.); ***ITN Corp. v. ACC Long Distance***, [1996] O.J. No. 1066 (Ont. C.A.); ***Hi-Tech Group Inc. v. Sears Canada Inc.***, [2001] O.J. No. 33 (Ont. C.A.).

Rule Referred to: ***Prince Edward Island Rules of Civil Procedure***, Rule 20.02 and 20.04.

Noël Ayangma, appearing on his own behalf
Christopher Montigny and Erin Mitchell, solicitors for the defendants

Taylor, J.:

[1] The plaintiff brought a motion for summary judgment against the defendants to be heard in March, 2006. The plaintiff filed a multi-volume motion record and gave the notice required by the Rules of Court. The defendants requested an adjournment saying the claim was complicated and they would need months to respond. I adjourned the motion until two dates in June. The defendants later asked for additional time to file evidence, saying they had not originally appreciated the time they would need. The defendants suggested that during the two June dates the parties could address whether the plaintiff had met his burden on the motion. If the plaintiff had not met his burden, the defendants suggested the motion would be finished, and time and expense would be saved. If he had, the defendants said they would file their evidence in the months to follow.

[2] I granted the motion for further adjournment by oral judgment and, as it turned out, the two days set aside were only sufficient to hear the parties' submissions on whether the plaintiff had met his burden.

[3] Following submissions, I advised I would give my decision on whether the plaintiff had met his burden as soon as I could, with reasons to follow, so as to allow the defendants time to continue preparing their evidence for the next dates if the plaintiff had met his burden.

[4] On reflection, I have decided it is not proper to split a summary judgment motion so the respondent need only file evidence if and when the mover succeeds meeting the burden of establishing a basic case. To do so would give the respondent two kicks at the can, would in some cases deprive the mover of the opportunity to use some part of the respondent's motion evidence, and if the mover succeeded in meeting his burden, would give the respondent the opportunity to consider the court's reasoning and respond accordingly.

[5] Rule 20.04 clearly contemplates the respondent must file evidence, and motions are normally only heard once both sides have filed their evidence. I conclude the defendants should do so before I give my decision on whether the mover has established a basic case and whether the respondents have countered by showing a triable issue or issues.

[6] I find additional support for my view in Rule 20.02, which says the court may draw an adverse inference "...from the failure of a party to provide the evidence of persons having personal knowledge of contested facts." Of course, in this case, the respondents intend to file evidence, so I would not draw any adverse inference. Nevertheless, the section supports the view that the motion is not to be heard in stages but is to be considered as a whole, once both parties' evidence has been filed. See *Fasken v. Time/System International APS*, [1986] O.J. No. 972 (Ont. HCJ) at

paragraphs two and six; *ITN Corp. v. ACC Long Distance Ltd.*, [1992] O.J. No. 1119 (Gen. Div.) at paragraph 11, but note *ITN Corp. v. ACC Long Distance*, [1996] O.J. No. 1066 (Ont. C.A.) at paragraph six, the finding of an adverse inference was overturned because of the particular factual circumstances of the case.

[7] Finally, I note the statements of Morden J.A. in *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (Ont. C.A.) at paragraph 28, 30 and 31:

[28] ...[T]he test governing a motion for summary judgment set forth in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at 434-35, 178 D.L.R. (4th) 1...which is framed as a two-part test, involves the moving party (1) "show[ing] that there is no genuine issue of material fact requiring trial" and "therefore summary judgment is a proper question for consideration" and (2), if this showing is made, the responding party must then "establish his claim as being one with the real chance of success".

...

[30] ...[But]...the legal or persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial before summary judgment can be granted (this is what rule 20.04(2) says); and (2), by reason of rule 20.04(1), there is an evidential burden, or something akin to an evidential burden (because the motions judge does not find facts), on the responding party to respond with evidence setting out "specific facts showing that there is a genuine issue for trial". Failure of the responding party to tender evidence does not automatically result in summary judgment...

[31] The short point is that the motions judge, having considered **all** of the evidence and the parties' submissions on it, must be satisfied that there is no genuine issue for trial before he or she may grant summary judgment. This is the legal burden resting on the moving party and it never shifts. I do not think that *Guarantee Co. of North America* intended to detract from this. [Emphasis added]

[8] One of the two potential outcomes of the proposed two stage procedure would be for me to find the mover had met his burden, subject to later receiving and considering evidence from the respondents. Based on the statements of Morden J.A., I do not believe it would be proper to find the mover had met his burden, and then accept further evidence which could lead to the contrary finding that the mover had not met his burden.

[9] In the event, the continuation of this motion will be heard on dates to be fixed in the fall of 2006, and following the motion, I will give my decision on whether summary judgment should be granted.

J.

July 28,2006