NOVA SCOTIA COURT OF APPEAL

Citation: *McAvoy v. Credit Union Atlantic Ltd.*, 2002 NSCA 145

Date: 20021126
Docket: CA 181981
Registry: Halifax

Between:

Diana McAvoy

Appellant

v.

Credit Union Atlantic Limited

Respondent

Judges:	Glube, C.J.N.S.; Cromwell and Hamilton, JJ.A.
Appeal Heard:	November 15, 2002, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Hamilton, J.A. concurring.
Counsel:	Patrick J. Duncan, Q.C., for the appellant Kevin D. Gibson, for the respondent

Reasons for judgment:

[1] The appellant-defendant appeals from the refusal by McDougall, J. to set aside a default judgment taken out by the respondent- plaintiff.

[2] The action claimed roughly $50,000 which the appellant allegedly converted to her own benefit by forgery while employed by the respondent. It is not in dispute that the appellant received notice of the action and sought legal advice. According to her affidavit evidence she was advised as to the costs of defending the action and concluded that they were far in excess of what she could afford. She also deposed that she did not understand that she could file a Defence on her own behalf. She was not cross-examined on this evidence and it was not in any way contradicted by other evidence. In light of her circumstances and state of knowledge, she concluded in effect that she had no choice but to allow judgment to be taken out, decided not to file a defence and advised counsel for the respondent that she would not be defending the action.

[3] Judgment was properly taken out and the appellant's wages garnished. She sought different legal counsel who agreed to act on terms she could afford and who promptly requested the respondent's counsel to consent to setting aside the judgment. Refusal to do so led to the Chambers application which gave rise to the order under appeal.

[4] The judge refused to set aside the judgment. It was common ground before him that the first branch of the familiar test in **Ives v. Dewar**, [1949] 2 D.L.R. 204 (N.S.S.C.), that there be a substantial issue to be tried, was satisfied. The single issue before the judge was, therefore, whether the appellant had made out a reasonable excuse for the delay in filing the defence.

[5] The judge held she had not, stating as follows:

> [15] In respect to this issue, it is clear that the applicant decided not to file a defence. She communicated this to the plaintiff's solicitor on the very day that default judgment could have been entered. She was told that default judgment would be entered against her, however, she did not ask for additional time to either consult with a lawyer or to file a defence on her own behalf. She followed-up his telephone conversation with an E-mail later that day and this E-mail did not request additional time to have a defence filed. Her main concern was whether the plaintiff intended to garnish her wages. This to me demonstrates her apparent

> knowledge of the process that would likely follow the issuance of a default judgment.
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> [16] The applicant, despite not getting an undertaking to be provided with advance notice of the garnishee, did nothing. She let matters take their normal course and it was only after her wages were garnished that she acted. Not only has she failed to provide a reasonable excuse for the delay, she has also made it perfectly clear that she had no intention of filing a defence. In the case of *Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.*, [1995] N.S.J. No. 171, Justice Saunders, then of the Supreme Court of Nova Scotia, Trial Division, wrote:
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> > The first branch of the two-fold test may be dispensed with quickly. Mr Stobie concedes that there are triable issues between these parties. However, he says that the defendant has failed to establish any reasonable excuse for its failure to file a defence. I agree with Mr. Stobie. This was not a mistake or an oversight. This was not an omission through inadvertence or insufficient time or other pressing business. It was not a failure to file a defence but rather, a deliberate decision not to file a defence. I can come to no other conclusion from a clear reading of the correspondence passing between Mr. Stobie and Ms. Roberts.
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> [17] He goes on to say:
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> > I find there is no basis for me to exercise my discretion in favour of this defence.
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> [18] I realize that this decision has been overturned on appeal, but it was reversed on other grounds.
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> [19] Under the circumstances of the present case, I do not see this as an appropriate case in which to set aside the default judgment. Both the applicant's failure to provide a reasonable excuse for the delay, as well as her expressed intention not to file a defence, prevent me from granting this request.

[6] With respect to the judge, it is clear from his reasons that he erred in principle. He focussed, incorrectly, on whether the appellant had decided not to file a defence instead of, as he ought to have, on the question of whether she had a reasonable excuse for doing so. At no point in his reasons does he consider in relation to this issue the appellant's evidence that she had no means to defend even though she had sought advice and that she believed she could not file a defence on

her own behalf. While a deliberate decision not to defend will often negate the presence of reasonable excuse as it did in **Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.** (1995), 140 N.S.R. (2d) 295; N.S.J. No 171 (Q.L.) (S.C.); reversed on other grounds (1995), 146 N.S.R. (2d) 203; N.S.J. No. 481 (Q.L.)(N.S.C.A.), it is still necessary in every case to examine the circumstances with a view to determining whether a reasonable excuse exists. This the judge did not do.

[7] Having decided that the judge erred in principle, it is appropriate for this Court to exercise its discretion on the merits of the application to set aside the default judgment. In my opinion, the evidence in the record makes out a reasonable excuse. The uncontradicted evidence was that the appellant did not defend because she thought she lacked the means to do so and that she formed this view after having received legal advice. Moreover, the allegations in the statement of claim have been consistently denied by the appellant throughout, the delay between entry of the judgment and communication by the appellant to respondent's counsel that she had new counsel and wished to set aside the judgment and defend was only a matter of two months, and there is no evidence of any prejudice to the respondent that cannot be compensated by costs. I would, therefore, set aside the judgment and the execution order, but on terms.

[8] The terms are these. The appellant will file a defence within 10 days of today's date. Although the execution order will be set aside, the funds realized pursuant to it will not be returned to the appellant at this time. The funds realized from the garnishment, except for the $500 in costs ordered to be paid to the respondent by McDougall, J. and the $150 in fees thrown away, will be paid into court to the credit of this action and their disposition will abide that of the main action. The costs order in favour of the respondent by the Chamber's judge will stand. In addition, the appellant shall pay to the respondent the fees thrown away of $150.00. There will be no costs awarded on appeal.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Hamilton, J.A.