S.C.A. Nos. 02788 & 02799

NOVA SCOTIA COURT OF APPEAL
Cite as: Marissink v. Kold-Pak Inc., 1993 NSCA 143

Hallett, Chipman and Pugsley, JJ.A.

BETWEEN:

TONY MARISSINK Appellant - and - KOLD-PAK INC., WINDSOR-WEST HANTS BUSINESS DEVELOPMENT CENTRE LIMITED, BARRY ALEXANDER, DAVID BURLETON, GLENN HYMERS, BANK OF NOVA SCOTIA, MARTOCK LOBSTER & SEAFOOD SHOP Respondents	)	James J. White for the Appellant Leanne M. Rodwell Hayes for the Respondents Appeal Heard: May 26, 1993 Judgment Delivered: May 26, 1993

THE COURT: Appeal and cross-appeal dismissed with costs in the amount of $300.00 to the respondent per reasons for judgment of Chipman, J.A.; Hallett and Pugsley, JJ.A. concurring.

CHIPMAN, J.A.

This is an appeal from a decision of the Supreme Court in chambers setting aside a default judgment obtained by the appellant against the respondent Windsor-West Hants Business Development Centre (WHBDC), one of seven defendants in the proceeding.

The appellant's statement of claim sought recovery of just over $40,000.00 which he claims to have invested in Kold-Pak Inc., one of the defendant companies. A number of allegations against the seven defendants assigned fault to each of them which was said to have caused or contributed to the plaintiff's loss. The two allegations against the respondent are contained in paragraphs 27 - 31 of the statement of claim:

> "27. The Plaintiff, and his new solicitor, attempted many times to get the Defendant Burleton to provide accurate financial statements and attempted to enlist the Defendant shareholders WHBDC and Hymers to assist in this demand. Defendant Alexander, acting at this point for the Defendants Kold-Pak, Burleton, Hymers and the WHBDC blocked any attempts to discuss this issue and thereby breached his duty to the Plaintiff. At the same time the Defendants WHBDC and Hymers breached their duty of care to their fellow shareholder, the Plaintiff, by actively preventing discussion of the financial state of the company.
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> 28. Finally the Plaintiff, using the powers of The Companies Act forced a shareholders meeting on June 29, 1992 attended by the Defendant Alexander, the Plaintiff, the Defendant Burleton and Ken Crichton, Executive Director of the Defendant WHBDC and Bob Marsters, a chartered accountant of Mount Denson in the County of Hants, the company's duly appointed auditor.
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> 29. At that meeting a motion was passed authorizing Marsters to prepare an accurate set of financial statements for the Defendant Kold-Pak and review and detail the transactions between Kold-Pak and Lobster.
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> 30. At the same meeting a motion requiring confirmation that two signing officers for the company, the Plaintiff and the Defendant Burleton were required, was defeated as a result of the Defendant WHBDC joining with Burleton to defeat the motion.
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> 31. The Plaintiff claims the defeat of this motion by two clients of the defendant Alexander amounts to a breach of duty of care to the Plaintiff by the defendant WHBDC and the lack of financial controls

> on the Defendant Kold-Pak resulted in substantial loss to the Plaintiff. The Plaintiff further claims that in acting for the Defendant company, the Defendant Burleton and the Defendant WHBDC, the Defendant Alexander was in a conflict of interest which caused him to advise his clients improperly resulting in the defeat of motions designed to place proper financial controls on the management of the Defendant company."

The originating notice and statement of claim was served on the respondent through its recognized agent on September 3, 1992. The ten days allowed by the Civil Procedure Rules for filing a defence expired on September 14, 1992, September 13 being a Sunday. On the following day, September 15, the appellant filed a default judgment against the respondent. On November 25, 1992, the respondent applied in chambers to set aside the default judgment based on the affidavit of Kenneth Crichton, who styled himself as a representative of WHBDC.

Following a hearing in chambers on December 2, 1992, the chambers judge ordered the default judgment set aside with costs in the amount of $300.00, to be paid by the respondent to the appellant.

The chambers judge referred to the affidavit filed on behalf of the respondent. The deponent stated that upon being served with the originating notice, he interpreted the ten days for filing a defence to mean ten business days as opposed to ten calendar days. He therefore attended at the office of his solicitor on September 15, 1992. Upon the solicitor contacting the appellant's counsel, he was informed that a default judgment had already been taken out that morning.

The affidavit then dealt with WHBDC's position on the merits stating:

> "7. THAT to the best of my understanding and knowledge, and based on the interpretation of the Statement of Claim given me by my solicitor, the claim against the defendant, Windsor West Hants Business Development Centre Limited arises from a shareholders meeting which occurred on June 29, 1992."

The deponent went on to dispute paragraph 30 of the statement of claim by saying that while there was a motion which was defeated, it was not defeated as a result of the respondent voting against it. The deponent stated that the respondent abstained from voting and that in any

event regardless of what way the respondent voted, the result would have been the same. The affidavit concluded with a statement that after consultation with the respondent's solicitor the deponent was advised that there was a good defence available to the respondent.

On the application before the chambers judge, the appellant contended that the delay period between the respondent becoming advised of the default judgment and making the application to set it aside was excessive. The appellant also submitted that the affidavit did not properly set out a defence on the merits as it did not address the breach of duty alleged in paragraph 27, but only dealt with the question of the vote at the meeting.

In granting the application, the chambers judge observed that the respondent's affidavit set out an explanation for the delay in filing the defence prior to the time default judgment was taken. The delay of over two months in making the application was, he said, explained to his satisfaction by counsel's statement that it was due to internal problems which were referred to as an upheaval within the law firm. He was satisfied that that adequately explained the second delay.

As to the respondent's defence to the merits, the chambers judge noted that the appellant's position was that the respondent's affidavit only dealt with one element of the claim - the vote at the meeting - but that there was also a claim for breach of a fiduciary duty as a fellow shareholder in a closely held company. He said:

> "I must say that it seems that that aspect of the matter has not been covered or at least not very well covered in the affidavit of Mr. Crichton."

He continued:

> "I am also satisfied that the affidavit very clearly sets up a valid, what may be a valid defence with respect to one of the complaints made by the plaintiff against the applicant. Although the affidavit does not deal specifically with the second area of complaint of the plaintiff against this applicant I am satisfied that overall the position of the applicant is that there was no breach of any fiduciary relationship or obligation as claimed by the plaintiff and indeed that there may not be such an obligation. I acknowledge that that aspect of the matter was not well covered. . . in this application but I am satisfied that that is the nature of the defence and that if it could be established it would

provide a valid defence."

Accordingly, the application was granted.

The appellant urges two errors on the part of the chambers judge: (a) that he failed to require the defendant to provide affidavit evidence showing a defence to all causes of action contained in the statement of claim; and, (b) that he did not require the defendant to show by affidavit evidence why the defendant waited two and one-half months following the default judgment to apply to set it aside.

The power to set aside a default judgment is contained in Civil Procedure Rule 12.06.

> "12.06 The court may, on such terms as it thinks just, set aside or vary any default judgment entered in pursuance of Rule 12."

The leading case in this Province on the setting aside of a default judgment is Ives v. Dewar (1949), 2 D.L.R. 204 where Parker, J. speaking for this Court said at p. 206:

> "Before the interlocutory judgment should have been set aside by the learned County Court Judge as Master before whom the first application for that purpose was made, it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits; not necessarily a defence that would succeed at the trial because the action was not being tried on that application; but facts which would at least show beyond question that there was a substantial issue between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the Rules. The reasons thus disclosed are material matters which the Judge or Court should consider in determining whether the application to set aside the judgment should be granted or refused."

The discretion of the chambers judge to grant the order is wide and this Court will not interfere except within well established guidelines. The discretion is, however, not without limit. As Cooper, J.A. said in Errol B. Hebb and Associates v. C. B. Enterprises (1977), 23 N.S.R. (2d) 369 at 374:

> "The exercise of this power is a matter within the discretion of the judge to whom the application is made. But this discretion is not untrammelled. He must have before him proper material on which he may base the exercise of his discretion . . .

> Before the interlocutory judgment should have been set aside by the learned County Court judge . . . it was necessary for the appellant to show by affidavit facts which would indicate clearly that he has a good defence to the action on the merits. . ."

The affidavit clearly responds to the allegation respecting the respondent's conduct at the meeting. It does not, as the chambers judge recognized, address itself to the provisions of paragraph 27 in specific terms. However, we agree with the chambers judge that the affidavit does, in substance, put forth a general denial of wrongdoing sufficient to answer the vague allegation set out in paragraph 27 - an allegation which may or may not set out a cause of action and which certainly invites a demand for particulars. In our opinion, the chambers judge did not err in his assessment of the respondent's affidavit as fairly setting out a defence to the merits.

As to the second point, in Ives v. Dewar, supra, Parker, J. stated the requirement to be that the affidavit show why the defence was not filed and delivered within the time limited by the rules. The affidavit filed by the respondent meets this requirement. The appellant refers, however, to Doyle v. Barrett (1989), 78 Nfld. & P.E.I. R. 280 where the court pointed out at p. 282 that consideration should also be given to any delay in making the application to set aside the judgment. Such an application should be made as soon as possible after the judgment comes to the knowledge of the defendant but mere delay will not bar the application unless irreparable injury has been done to the plaintiff or the delay has been wilful. See also Falls v. Jones (1990), 95 N.S.R. (2d) 178 (N.S.S.C.A.D.) The chambers judge accepted the verbal statement of counsel that there had been turmoil in the office. He noted that the initial delay in filing the defence in time was "a very minor delay". He further observed that the appellant's counsel was frank enough to acknowledge that his client had not been prejudiced by the delay or inaction by the respondent in filing the defence on time. He further stated that he was somewhat influenced by the fact that a defence by one or more of the other defendants had been filed so that it would appear that the matter would not be finally disposed of in any event if the default judgment were allowed to stand. In all these circumstances, we are unable to say that the chambers judge erred in the exercise of his discretion respecting the

second point.

The respondent cross-appeals respecting the disposition of costs to the chambers judge. We are not disposed to interfere with his discretion in this respect. The cross-appeal is dismissed without costs.

We dismiss the appeal with costs to be fixed at $300.00 in the cause in any event.

J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.