

NOVA SCOTIA COURT OF APPEAL
Citation: *Dutkewych v. Riske*, 2007 NSCA 8

Date: 20070125
Docket: CA 270296
Registry: Halifax

Between:

Andreas Myroslav Dutkewych

Appellant

v.

Patricia Riske

Respondent

Judges: Bateman, Cromwell and Fichaud, JJ.A.

Appeal Heard: January 25, 2007, in Halifax, Nova Scotia

Written Reasons: January 26, 2007

Held: Leave granted and appeal allowed per oral reasons for judgment of Bateman, J.A.; Cromwell and Fichaud, JJ.A, concurring.

Counsel: Philip S. Gruchy, for the appellant
Jonathan Cuming, for the respondent

Reasons for judgment:

[1] Mr. Dutkewych (the appellant) seeks leave and, if granted, appeals from the order of Justice Gregory Warner of the Supreme Court dismissing his application to set aside a default judgment. That order was stayed by this Court pending the hearing of the appeal. (Decision reported as 2006 NSCA 105; [2006] N.S.J. No. 357 (Q.L.)).

[2] The appellant and respondent, Patricia Riske, were married and resided in the United States. Upon their separation, the appellant petitioned for divorce in California. In the summer of 1998 they appeared for trial of the divorce proceeding but entered into a settlement agreement resolving the outstanding property and support issues. The appellant thought the divorce judgment had issued at that time, but learned just this year that judgment was not granted until November 29, 2000. The respondent currently resides in Florida. The appellant now lives in Nova Scotia.

[3] On August 1, 2006 he was served with an originating notice and statement of claim filed in the Supreme Court of Nova Scotia by the respondent. It alleged that the appellant had not honoured the terms of the divorce settlement agreement, which had been incorporated into the California judgment of divorce. The respondent claimed a money judgment totalling \$38,718.82, a significant part of which was accrued interest on the amount said to be owing under the terms of the separation agreement.

[4] The background of the action and the troubling circumstances surrounding the entry of default judgment are more fully canvassed in the stay decision.

[5] The single issue on the appeal is whether Warner, J. erred at law in concluding that the default judgment must stand because the appellant had failed to demonstrate that he had a fairly arguable defence to the action (**Civil Procedure Rule** 12.06).

[6] The appellant put forward a number of points any one of which, he says, raised a fairly arguable defence or a serious issue to be tried.

[7] Without opining on all of the possible defences raised by the appellant, it is sufficient to dispose of this appeal that, we are satisfied the question of whether or to what extent he is in default of the terms of the separation agreement is a serious issue to be tried. This decision should not be understood as precluding the defendant from advancing additional defences which are otherwise properly pleaded.

[8] Accordingly, we would grant leave and allow the appeal. The default order of August 22, 2006 is set aside. The appellant may file a defence to the action within twenty days of the date of this Court's order.

[9] The respondent shall forthwith pay to the appellant costs of the application before Warner, J. and on the appeal in the total amount of \$4000.00 plus disbursements as taxed or agreed. In addition, the respondent shall forthwith pay to the appellant costs on the stay application in the amount of \$1000.00 inclusive of disbursements. The funds currently held in trust by TMC Law pursuant to the order for a stay may be released.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Fichaud, J.A.