SUPREME COURT OF NOVA SCOTIA
Citation: *Sutcliffe v. Sotvedt*, 2015 NSSC 194

Date: 20150630
Docket: *Ken* No. 438992
Registry: Kentville

Between:

Brigid Sutcliffe

Applicant

v.

James Sotvedt and Karen Sotvedt

Respondents

Judge: The Honourable Justice Michael J. Wood

Heard: June 25, 2015, in Kentville, Nova Scotia

Counsel: Brigid Sutcliffe, self-represented
Ronald Richter, for the Respondents

By the Court:

[1] In the summer of 2013 James and Karen Sotvedt of Kingston, Nova Scotia exchanged houses with Brigid Sutcliffe and Frank Rose in London, England. The exchange did not go as smoothly as either party might have hoped. The most serious complaint was the allegation by Ms. Sutcliffe and Mr. Rose that the Sotvedts had damaged the finish on their kitchen cabinets.

[2] The Sotvedts denied responsibility for any damage to the cabinets and refused to consider the claim for compensation advanced by Ms. Sutcliffe. In November 2013 Ms. Sutcliffe started a law suit in the Northampton County Court against Mr. and Ms. Sotvedt claiming the expenses for repairing the cabinets of £2,652.83 along with costs of £249.60. In accordance with the English Civil Procedure Rules Mr. and Ms. Sotvedt were served with the claim form and twenty-two pages of supporting evidence by international registered mail with the date of service being November 27, 2013. No defence was filed and separate default judgments in the amount £2,902.43 against each of the Sotvedts were entered on April 1, 2014.

[3] On May 6, 2015 Ms. Sutcliffe commenced these proceedings to register the judgments in Nova Scotia pursuant to the *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, R.S.N.S. 1989, c.52 (the "*Act*").

[4] Mr. and Ms. Sotvedt were served with a copy of the notice of application in chambers and filed a notice of contest which was subsequently amended. The amended notice objects to registration of the judgments which it says were obtained by fraud because the information provided to the Northampton County Court was untrue.

[5] This is my decision on the application to register the English judgments.

Refusal to Enforce a Foreign Judgment on the Basis of Fraud

[6] The enforcement of judgments between Canada and the United Kingdom is governed by a convention which has been adopted in Nova Scotia by the *Act*. Article IV of the convention permits the court to refuse or set aside registration of a

foreign judgment in certain circumstances. The only provision relied on by the Sotvedts is s.1(d) which states as follows:

> (d) the judgment was obtained by fraud;

[7] The Supreme Court of Canada dealt with the defence of fraud to the enforcement of a foreign judgment in *Beals v. Saldanha* 2003 SCC 72. That case involved residents of Ontario who had sold a vacant lot in Florida which resulted in litigation against them and two other defendants. They did not defend as required and default judgment was entered against them. A jury trial took place to establish damages, however the Ontario residents did not participate in that hearing. When the plaintiffs applied to register the Florida judgment in Canada it was opposed, in part, on the basis that the Florida jury was given misleading information concerning the damages suffered.

[8] There is no reciprocal enforcement legislation in Ontario governing Florida judgments and so the *Beals* decision was governed by common law principles.

[9] The Supreme Court of Canada made it clear that the defence of fraud to enforcement of a foreign judgment should be narrowly construed. A party should not be given the opportunity to re-litigate an action previously decided. The rationale for this position is found in para. 44:

> Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this Court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.

[10] The nature of the evidence that will be sufficient to establish fraud was adopted by the Supreme Court from an earlier Court of Appeal decision in *Jacobs v. Beaver* as indicated at paragraph 47 of the *Beals* decision:

> *Woodruff, supra*, was subsequently modified by the Ontario Court of Appeal. See *Jacobs v. Beaver* (1908), 17 O.L.R. 496, at p. 506:

> ... the fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by the judgment. This estoppel cannot, in my opinion, be disturbed except upon the allegation and proof of new and material facts, or newly discovered and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud. The burden of that issue is upon the defendant, and until he at least gives prima facie evidence in support of it, the estoppel stands. And it may be, as I have before stated, that when such evidence is given, and in order to fully prove this new issue, the whole case should be re-opened. [Emphasis added.]

[11] The scope of the fraud defence is further explained at para. 50:

> What should be the scope of the defence of fraud in relation to foreign judgments? *Jacobs, supra*, represents a reasonable approach to that defence. It effectively balances the need to guard against fraudulently obtained judgments with the need to treat foreign judgments as final. I agree with Doherty J.A. for the majority in the Court of Appeal that the "new and material facts" discussed in *Jacobs* must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.

[12] In situations where the foreign judgment was obtained by default the defendant has a heavy burden to satisfy a court that it should not be enforced. This is evident from the following comments of the Supreme Court in *Beals*:

> 53 Although *Jacobs, supra*, was a contested foreign action, the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment.
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> 54 In the present case, the appellants made a conscious decision not to defend the Florida action against them. The pleadings of the respondents then became the facts that were the basis for the Florida judgment. As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.

[13] The *Beals* decision was applied by the British Columbia Court of Appeal in *Lang v. Lapp* 2010 BCCA 517. This case arose out of an action in California by k.d. lang against a former business manager. Ms. lang obtained default judgment against the defendant for damages of approximately $2 million. She applied for registration in British Columbia which was opposed by Ms. Lapp on the basis that the California judgment was obtained by fraud. The court rejected this argument for the following reasons:

> 28 In the court below, the defendants asserted fraud on the merits in two respects. They say first that the plaintiffs misled the California Court by representing that the defendants had failed to comply with discovery obligations. Secondly, they say that the plaintiffs misled the California Court in proving damages suffered after the defendants' defence had been struck out.
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> 29 *Beals* makes clear that the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. A defendant has the burden of demonstrating that the facts raised were not before the foreign court and could not have been discovered by due diligence before the foreign judgment was obtained.
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> 30 The defendants contend that a default judgment is not a judgment on the merits, and that the facts they rely on to show fraud on the merits were not the subject of prior adjudication, and are therefore not governed by the due diligence test. However, *Beals* decided at para. 53 that:
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> > ... the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment.
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> The requirement to adduce new evidence or evidence that was not discoverable through due diligence applies to default judgments. The trial judge concluded that the defendants failed to raise new and material facts that could not have been placed before the California Court. I see no basis on which this Court could properly interfere with that conclusion.

> 31 On appeal the defendants advanced myriad reasons why Ms. Lapp failed adequately to defend the California action: Ms. Lapp was not represented by counsel; in her opinion it was not possible to respond properly to outstanding discovery requests; Ms. Lapp did not understand the nature and import of the order made by the California Court; and the limitation period to have the order reconsidered was only 10 days. However, none of these explanations suggest that the California Court was misled or point to any fraud on the merits. Nor do they relate to any new and material facts that were not before the California Court or discoverable before judgment was granted.
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> 32 As stated in *Beals*, failing to defend an action, by itself, prohibits the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceeding is evidence of fraud. There is no argument that natural justice or rules of California civil procedure were violated.

[14] It is clear from these authorities that a defendant will only be successful in opposing registration of a foreign judgment on the basis of fraud where they can demonstrate that fraud through "new and material facts" which were not before the court and could not have been discovered and brought to the attention of the court through the exercise of reasonable diligence.

[15] In circumstances where the defendant has permitted the foreign judgment to proceed to default it will be particularly difficult to argue that any of the evidence adduced in the foreign proceeding is proof of fraud.

Analysis

[16] In this case the Sotvedts do not dispute the jurisdiction of the Northampton County Court or suggest that enforcement of the judgments in Nova Scotia would be contrary to public policy. Their sole defence is that the judgments were obtained by fraud.

[17] In support of their position the Sotvedts have filed affidavits of James Sotvedt, Karen Sotvedt, and Janette Anderson. Ms. Anderson is a sister of Karen Sotvedt and visited them at the Sutcliffe home in London. The thrust of the affidavit evidence is that they did not damage the kitchen cabinets. They provide photographs of the kitchen area of the Sutcliffe home which they say shows the condition of the cabinets.

[18] The affidavit filed by Ms. Sutcliffe in support of the application to register the judgments in Nova Scotia includes a copy of the notice of claim which was served on the Sotvedts. The claim document outlines the basis on which damages are sought as well as the amount of the repair estimate. The form indicates that any documents including a defence can be filed electronically. It informs the recipient that, if no defence is filed, judgment may be entered against them. The form also includes a website where further information can be obtained.

[19] The judgment orders issued by the Northampton County Court against the Sotvedts on April 1, 2014 were served by international registered mail on May 1, 2014. The orders state that judgment was entered because of the failure to respond to the claim form, but go on to say that if the debtor believes judgment has been entered wrongly they may apply to the court office explaining why it should be set aside.

[20] The Sotvedts had clear notice of the claim against them and ample time to respond. They chose not to do so and as a result find themselves in the circumstances where they are attempting to litigate whether Ms. Sutcliffe's cabinets were damaged. There is nothing in the materials which they have filed to suggest that this information is new or was not available to them at the time Ms. Sutcliffe initiated her claim against them.

[21] Once a court of competent jurisdiction, such as the Northampton County Court, has entered judgment, the convention entered into between Canada and the United Kingdom says that Canadian courts will recognize and enforce that judgment except in the limited circumstances outlined in the *Act*. A judgment obtained by fraud is one of the available defences but the circumstances in which it will be found are very limited particularly where the foreign judgment was obtained by default.

[22] Counsel for the Sotvedts conceded that if the common law test for fraud developed by the Supreme Court in *Beals* applies to the *Act* they have no defence to the claim for registration. He argued that the application process used in the convention, and adopted in the *Act*, means that respondents such as his clients are entitled to challenge the merits of the original claim. I disagree. The convention is intended to provide reciprocity of enforcement of civil judgments between the United Kingdom and Canada. There is no reason to interpret it as making enforcement more difficult by expanding the defences available to judgment debtors. The common law principles developed in *Beals* defining the nature of the

fraud defence which will justify refusal to enforce a foreign judgement apply equally to the fraud defence under the convention and *Act*.

[23] I have no evidence as to why the Sotvedts decided not to contest the original claim in England, however they did so at their peril. The arguments which they now advance should have been made in the Northampton County Court. I will allow the application by Ms. Sutcliffe and order that the judgments of the Northampton County Court be registered as judgments of the Supreme Court of Nova Scotia.

[24] Article VII of the convention incorporated in the *Act* reads as follows:

> All matters concerning
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> (a) The conversion of the sum payable under a registered judgment into the currency of the territory of the registering court; and
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> (b) The interest payable on the judgment with respect to the period following its registration, shall be determined by the law of the registering court.

[25] Neither party made submissions with respect to the date on which the judgment should be converted from pounds to dollars nor the rate which should be used. I noted that in *David and Snape v. Sampson*, [1999] N.S.J. 350 Chief Justice Kennedy accepted the submissions of counsel that the conversion should be done as of a date which was two days before registration. The rate was obtained from a commercial bank in Halifax. I think it is appropriate to give the parties an opportunity to see if they could reach an agreement on this issue and if not they may make further written submissions.

[26] Under English Law, the judgments bear interest at a rate of 8% and this will apply until the date of this decision following which the 5% rate prescribed by the *Interest on Judgments* Act, R.S.N.S. 1989, c.233 will govern.

[27] It was agreed at the hearing that the parties would be given an opportunity to make further written submissions on the issue of costs. Ms. Sutcliffe must file her submissions by July 17 and Mr. Richter's response by July 31. Any comments on the conversion date and applicable rate should be included in these materials.

[28] As the successful party it will be Ms. Sutcliffe's responsibility to prepare the appropriate form of order once the questions of costs and conversion have been determined.

Wood, J.