SUPREME COURT OF NOVA SCOTIA
Citation: *Owen v. Armstrong*, 2015 NSSC 306

Date: 20150603
Docket: *Ken* No. 436936A (SCK434370)
Registry: Kentville

Between:

Derrick Owen

Appellant

v.

Ian Armstrong, Suzanne Handley

Respondents

Judge: The Honourable Justice John D. Murphy

Heard: May 21, 2015, in Kentville, Nova Scotia

Written Decision: October 26, 2015
{Oral decision rendered June 3, 2015.}

Counsel: Zeb Brown, for the Appellant
Jon Cuming; Chrystal Penney, for the Respondents

By the Court:

INTRODUCTION

[1] The Defendant in a Small Claims Court proceeding appeals the Adjudicator's refusal to set aside a "quick", or default, judgment.

BACKGROUND

[2] The Appellant was served with a Notice of Claim in a Small Claims Court proceeding on December 11, 2014. The claim was for $25,000 and related to barn renovation work done by the Appellant for the Respondents ("Claimants") between August and November of 2014. The Claimants and the Clerk of the Small Claims Court used the standard Notice of Claim form which identifies the parties and sets out minimum particulars of the claim. The blank space for the Clerk to indicate the hearing date was filled in as February 2, 2015, and the Clerk signed the one-page form in the middle immediately below the setting out of the hearing date. Also near the middle of the page, just below the hearing date and the Clerk's signature, there was a box containing a notice to the Defendant. That notice required the filing of a defence within 20 days if the Defendant intended to contest the claim, and the operative words in the box, indicating that an order could be made against a defendant who failed to do so, were in bold letters. Below that box was a blank form to be completed when a defence and/or counterclaim was filed.

[3] The Appellant did not file a defence within the prescribed time; the Respondents filed for and obtained a "quick judgment." The Quick Judgment Order issued by the Adjudicator was filed on January 28, 2015 and received by the Appellant on January 30, 2015.

[4] The Appellant applied on February 2nd to set aside the Quick Judgment and on February 5th he appeared before the Adjudicator on the Motion to Set Aside the Judgment. The Adjudicator dismissed that Motion and provided a summary report dated April 7th giving reasons for that decision. I will later refer to that report in more detail.

[5] The Appellant appeals the Adjudicator's decision not to set aside the judgment. This Appeal is brought pursuant to s.32(1) of the *Small Claims Court Act*, and the only ground raised by the Appeal is error of law.

[6] On March 31, 2015, the Appellant obtained a Stay of Execution of the Quick Judgment pending the hearing of this Appeal on May 21, 2015.

[7] The parties agree the issue on the Appeal which is "whether the Adjudicator erred in law by failing to correctly interpret the term "reasonable excuse" as the phrase is used in s.23(2)(a) of the *Small Claims Court Act*." That provision is as follows:

> Setting Aside of Default Order
>
> …
>
> (2) Where a defendant against whom an order has been made pursuant to subsection (1) [that is the Default Judgment section] appears, upon notice to the claimant, before the adjudicator who made the order and the adjudicator is satisfied that
>
> (a) the defendant has a reasonable excuse for failing to file a defence within the time required; and
>
> (b) the defendant appeared before the adjudicator without unreasonable delay after learning of the order, [not an issue in this case]
>
> the adjudicator may set aside the order and set the claim down for hearing.

PRELIMINARY ISSUE – RELEVANT FACTS

[8] An issue arose at the start of the Appeal hearing concerning whether I could consider on the Appeal hearing itself the affidavit that the Appellant filed on the Motion for Stay. In that affidavit, which was dated March 5th, the Appellant described his version of events. I determined that I would not consider that evidence, but that I could rely on the following facts in deciding this Appeal:

(a) When the Appellant received the Notice of Claim he was nervous, he did not read the middle section of that document which contained the information about filing the defence, but he noted the hearing date and always planned to attend on February 2nd to contest the claim. [Those findings are set out in the Adjudicator's Summary Report and are not contested by the Respondents.]

(b) The Adjudicator also determined that the Appellant had no health or literacy issues.

STANDARD OF REVIEW

[9] The only ground of appeal in this case is error of law. Both parties submit and I agree that the standard of review in this court is correctness.

ANALYSIS

[10] I have considered the Appellant's arguments, the Respondents' arguments, and authorities which both parties advanced. The Appellant maintains that the Adjudicator did not interpret or apply the term "reasonable excuse" as used in s.23(2)(a) of the Act, but, rather, focused on other considerations. I respectfully disagree with the Appellant's characterization of the Adjudicator's analysis. Although not consistently couched in terms of reasonable excuse, the theme and effect of the Adjudicator's decision and reasons constitute a determination whether the Appellant did or did not have a reasonable excuse.

[11] The essence of the Adjudicator's conclusion is that the Appellant did not read the entire Notice of Claim form, and failed to provide a reasonable excuse for not doing so.

[12] The Adjudicator found the Appellant did not read the bottom half of the form, starting with the box setting out the requirement to file a defence. That is not disputed by the Appellant; and in any event, that he did not read the entire form is a fact which was found by the Adjudicator, and it is not this Court's role to revisit that finding.

[13] I proceed therefore on the basis that the Appellant did not read the part of the form setting out the requirement to file a defence. The question for me is whether the Small Claims Court Adjudicator erred in finding he did not have a reasonable excuse for not reading it.

[14] The Appellant relies on decisions which say that this Court should be lenient with defendants who do not meet procedural requirements in Small Claims Court, and that this Court should encourage determination of disputes on their merits. The Appellant cites: *Clarke v. P. F. Collier & Son Ltd.*, 1993 CANLII 3447 (NS SC); *Hirschbach v. TMC* Law, 2006 NSSM 14; *Kemp v.* Prescesky,

2006 NSSC 122; *White v. Energy Tech Sales & Service* Limited, 2000 CanLII 28166 (NS SC). Those decisions range from 9 to 22 years old.

[15] I do not disagree with this Court's comment in *Kemp* (*supra*) that procedural protections are needed in Small Claims Court; however, the statement was made in the context of an appeal claiming a breach of the requirement for natural justice. That ground of appeal is not raised in this case.

[16] A more recent approach, particularly if the issue arises when a defendant has not read the form, is found in *George L. Mitchell Electrical v. Rouvalis*, 2010 NSSC 203, and the subsequent Small Claims Court decision in *Wagner v. East Coast Paving*, 2010 NSSM 63. Those cases specifically addressed the issue of reasonable excuse in s.23 of the *Small Claims Court Act* in the context of failure to read the form, and determined that quick judgment should be granted. The operative parts of the reasons are paras.21 to 26 in *Mitchell* and paras.20 to 22 in *Wagner*.

[17] I accept and agree with the determinations that in the circumstances of *Mitchell* and *Wagner* failure to read the form in its entirety was not a reasonable excuse for not filing a defence. What I must consider is whether this case is distinguishable, and whether the Adjudicator erred in law in finding the Appellant did not have a reasonable excuse. In my view there is a factual distinction, as there was no suggestion that the form in either *Mitchell* or *Wagner* was in any way unclear, misleading or compromised.

[18] As I raised with counsel during oral argument in this case, the Notice of Claim form in this case is compromised. One of the most important sections, the key area that directs the Defendant to file a defence within 20 days, is partially overwritten by the stamp indicating the court's address. Below the hearing date and below the clerk's signature follows the notice to the Defendant about filing a defence. In this case, it is not apparent that such notice is directed to the Defendant. The word, "Defendant" is about 75 per cent obliterated by the court's address stamp. I therefore must consider on these facts whether the Adjudicator erred in law in finding the Appellant had no reasonable excuse.

[19] The completed part of the form in this case ends above the clerk's signature. No blanks are filled in to draw the Appellant's attention to printed words below that signature. That in itself is not a problem, but the address "TO THE DEFENDANT(S)" is significantly obscured and overwritten by a hand stamp in

a different color. Does that give rise to a reasonable excuse for not reading below the clerk's signature? Did the Adjudicator err in law?

[20] The adjudicator said as follows in the Summary Report at p.3:

> The difficulty that I faced in this matter was the format of the Notice of Claim Form 1. Having been a Small Claims Court Adjudicator for close to 15 years, I have had on numerous occasions individuals who appear in order to have quick judgments set aside and their only excuse is that they simply did not bother to read the form. The Appellant fell into that category. The Notice of Claim Form 1 clearly sets out in the middle of the form information to the Defendant as to when they have to file a defence counterclaim file. What they need to fill out, being Form 2, and that you have to serve it on the Claimant. The middle portion of Form 1 also clearly states that if they do not file a defence or counterclaim and return to the court within 20 days of receiving it, that the court may make an order against you without hearing from you. [underlining added]

Later in the final paragraph, the Adjudicator concluded:

> All the Appellant had to do was bother to read the form.

[21] Twice in the quotation which I have referenced, the Adjudicator said the form clearly set out or stated information concerning the filing of the defence.

[22] I respectfully disagree that the information was clearly set out for the Appellant. The capitalized address TO THE DEFENDANT(S) preceding the requirement to file a Defence is obscured – it is not clear. I do not agree with the Adjudicator's finding that the defence requirement was clearly set out for the Defendant, and that in the Adjudicator's words, all he "had to do was bother to read the form."

[23] A direction is not clear when the description of the person to whom it is addressed is overwritten. Does this amount to an error of law?

[24] Both parties invoke the same test for what constitutes an error of law, referencing *Brett Motors Leasing Limited v. Welford*, 1999 NSJ No 466 where Justice Saunders said as follows:

> Error of law is not defined, but precedent offers useful guidance as to where a superior court will interfere to redress reversible error. Examples would include where a statute has been misinterpreted or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case, or where there has been a clear error on the part of the adjudicator in the interpretation of

> documents or other evidence, or where the adjudicator has failed to appreciate a valid legal defence, or where there is no evidence to support the conclusion reached, or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result, or where the adjudicator has failed to apply the appropriate legal principles to proven facts. In such cases, this court has intervened either to overturn the decision or to impose some other remedy such as remitting the case for further consideration.

[25] That reasoning was followed in *Weller v. Hailey's Auto Sales* 2015 NSSC 120.

CONCLUSION

[26] In my view, the Adjudicator erred in this case in the interpretation of the documents or the evidence, and misapplied the evidence in a material respect, producing an unjust result. The Adjudicator found there was a clear direction to the Defendant. The documentary evidence shows the writing addressing that direction to the Defendant was significantly compromised, and that occurred in a context where the information was below all completed parts of the document, including the hearing date which the Appellant noted. I therefore find the Adjudicator made a mistake interpreting the evidence, and misapplied the evidence in a material respect, which in all of the circumstances produced an unjust result.

[27] The Adjudicator erred in law when she determined the Appellant did not have a reasonable excuse for not reading the form when the address of the direction was overwritten.

[28] For these reasons the Appeal is allowed and the Appellant will have ten days to file a defence or a counterclaim if he chooses to do so, and the case is remitted back to the Small Claims Court for hearing on the merits by a different adjudicator. An Order will issue to that effect today.

[29] By agreement, the parties will bear their own costs.

J.