IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Arcadia International v Janmeja, 2008 NSSC 91

Date: 20080328
Docket: S.H. 286770
Registry: Halifax

Between:

Arcadia International, LLC, a Minnesota Limited Liability Company; North Loop, LLC, a Minnesota Limited Liability Company

Plaintiffs

and

Ashish Janmeja

Defendant

Judge:	The Honourable Justice John M. Davison
Heard:	January 30, February 1, and February 4, 2008 in Halifax, Nova Scotia
Written Decision:	March 28, 2008
Counsel:	W. Harry Thurlow, for the plaintiffs
	Philip Whitehead and Andrew Trider, for the defendant

Davison, J.:

[1] This proceeding is an application for an order to enforce a United States judgment against the defendant for $2,065,666.63 USD. On December 1st, 2005 that judgement was made by the U.S. District Court of Minnesota (herein referred to as the Minnesota judgment) and it was a judgment by default. The order the plaintiffs seek would include provision that the Minnesota judgment would be entered as a judgment of this court.

[2] Counsel for the defendant stated, quite properly, there is agreement on the law which governs this proceeding but there is no agreement on the facts.

LAW

[3] Counsel for the defendant states the issues of this proceeding are fraud and that denial of natural justice is a challenge to the inclusion of the Minnesota judgment as a judgment of this court.

[4] Consideration must be given to the principles laid down by the Supreme Court of Canada in **Beals v. Saldanha**, [2003] 3 S.C.R. 416 when faced with the issue of denial of natural justice. That which is relevant is the Canadian concept of natural justice which must be satisfied. If the defendant proves the denial, the court should refuse the enforcement.

[5] The major principles in the reasons of Justice Major on the defence of natural justice began at para. 60:

> 60 A domestic court enforcing a judgment has a heightened duty to protect the interests of defendants when the judgment to be enforced is a foreign one. The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court.
>
> 61 The enforcing court must ensure that the defendant was granted a fair process. Contrary to the position taken by my colleague LeBel J., it is not the duty of the plaintiff in the foreign action to establish that the legal system from which the judgment originates is a fair one in order to seek enforcement. The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.
>
> 62 Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. This

determination will need to be made for all foreign judgments. Obviously, it is simpler for domestic courts to assess the fairness afforded to a Canadian defendant in another province in Canada. In the case of judgements made by courts outside Canada, the review may be more difficult but is mandatory and the enforcing court must be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.

63 In the present case, the Florida judgment is from a legal system similar, but not identical, to our own. If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. If fair process was not provided to the defendant, recognition and enforcement of the judgment may be denied.

64 The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.

65 In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be <u>given adequate notice of the claim made against him and that he be granted an opportunity to defend</u>. The Florida proceedings were not contrary to the Canadian concept of natural justice. The appellants concede that they received notice of all the legal procedure taken in the Florida action and that the judge of the foreign court respected the procedure of that jurisdiction. The appellants submit, however, that they were denied natural justice because they were not given sufficient notice to enable them to discover the extent of their financial jeopardy. (Emphasis added.)

FACTS

[6] The defendant lives in Fox Point, Lunenburg County, Nova Scotia. From March 26th, 2000 to December 27th, 2004 (the date he moved to Canada) he resided in Minneapolis in the State of Minnesota. In his affidavit the defendant said that Scott Ritter and he were in business together from about November, 2001 until September, 2004. Scott Ritter is the President of Arcadia International LLC (Arcadia) and North Loop LLC (North Loop).

[7] This application was advanced by the filing of a number of affidavits and by the cross-examination of affiants. The plaintiffs filed the affidavits of Scott Ritter, Shawn Gardner, Vice President with Venture Bank and Robert A. Gust, a practising attorney in Minneapolis and counsel for the plaintiffs in this matter. The defendant filed his own affidavit, the affidavit of Gerry Power, who works with the defendant, Barry Coleman, who is a friend and business associate of the defendant and Dan Knight, a former employee with Arcadia.

[8] The defendant was never served with notice of the lawsuit. Gerry Power states that near the end of November, 2006 he noticed in an issue of the Halifax

Chronical Herald an item which referred to the defendant and he called the defendant and told him about that which was in the newspaper. The defendant went to Mr. Power's house and was shown the item in the newspaper and at that time Mr. Power stated in his affidavit the defendant "was visibly shocked and upset". There was no mention of a law suit in the newspaper but a claim for money from the defendant was indicated.

[9] Robert A. Gust testified as to the procedure adopted by the plaintiffs in the application to the Minnesota court. The plaintiffs made use of Rule 4.04 (a) of the Minnesota Rules of Civil Procedure which reads:

> **4.04 Service by Publications; Personal Service Out of State**
>
> **a) Service by Publications.** Service by publication shall be sufficient to confer jurisdiction:
>
> (1) When the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent;
>
> The summons may be served by three weeks' published notice in any of the cases enumerated herein when the complaint and an affidavit of the plaintiff or the plaintiff's attorney have been filed with the court. The affidavit shall state the existence of one of the enumerated cases, and that the affiant believes the defendant is not a resident of the state or cannot be found therein, and either that

> the affiant has mailed a copy of the summons to the defendant at the defendant's place of residence or that such residence is not known to the affiant. The service of the summons shall be deemed complete 21 days after the first publication.

[10] The lawsuit was commenced in Minnesota with a request by the plaintiffs for pre-judgment garnishment. The affidavit of Mr. Gust stated, "the plaintiffs made every attempt to provide actual notice to the defendant". In the certificate of notice prepared by Mr. Gust it was said the whereabouts of the defendant was unknown but the defendant advised Mr. Ritter that he would travel to India but subsequent investigation initiated by Ritter indicates the defendant was and is in Canada.

[11] Don Knight filed an affidavit and testified at the hearing. Part of his affidavit reads:

> 10. In December of 2004 Ash spoke to Scott and I of his intention to move to Canada.
>
> 11. On or about December 23, 2004, I was doing some last minute Christmas shopping at the Mall of the America's. While at the Mall, I bumped into Scott and Ash.
>
> 12. During our conversation we spoke of Ash's move to Canada and joked about the name of the Canadian dollar coins.

> 13. It is my understanding from Ash that he and his family left town within days of this meeting as had been discussed in front of me.
>
> 14. Over the years since Ash has left the U.S. we have remained in contact and I have been aware of where he lives.
>
> 15. Throughout this time, I have had the same telephone number.
>
> 16. Scott has never contacted me to ask if I knew of Ash's whereabouts or to ever discuss any legal proceeding involving Ash.

[12] I believed Mr. Knight was telling the truth. I advised counsel of this during the hearing.

[13] It is often difficult to explain why a witness should be believed when you are relying on his demeanour. I have a profound conviction Mr. Knight was telling the truth. It is not only what a witness said, it is how it is said and it was my observation that from his natural inflections, he was telling the truth. His evidence is supported by the evidence of the defendant and I did not disbelieve the defendant. Mr. Knight was unshaken in cross-examination. He came to the hearing from Minnesota and testified in a manner which impressed me.

[14] Mr. Ritter denied that the meeting took place. This is one reason why I have concerns about the testimony of Mr. Ritter. I find, as a fact, that the meeting and discussions referred to by Mr. Knight did take place and took place on December 23rd, 2004 which was three or four days before the defendant went to Canada. I find the discussion included the fact the defendant was going to Canada.

[15] Mr. Ritter knew on December 23rd, 2004 that the defendant was going to Canada. Even before that date, in September, 2004 Mr. Ritter knew the defendant was trying to go to Canada. There was filed as an exhibit to the defendant's affidavit an undated letter signed by Mr. Ritter to Ms. Brady of the Canadian Consulate General's office which said:

> Mr. Ashish Janmeja informed me that you were trying to get in touch with me. I am writing to let you know that the best number to get in touch with me is 612.998.7799. I will be happy to answer any questions you may have regarding Mr. Janmeja's employment with Arcadia International.

[16] There is also filed as an exhibit to the defendants' affidavit a letter from the defendant, dated September 3rd, 2004 and directed to Ms. Brady, the same person in the Canadian Consulate's office who received Mr. Ritter's letter. There was information in the letter concerning the defendant's work experience with Arcadia

International and there was set out in the letter a number of telephone numbers by which Mr. Ritter could be reached including the number referred to in Mr. Ritter's undated letter.

[17] Mr. Whitehead advances the submission that Mr. Ritter did not want to give adequate notice to the defendant about the legal action. He indicates his position was that the Minnesota court was fraudulently misinformed. The persons who filed affidavits in aid of the plaintiff's desire to make the Minnesota judgment a judgment of this court urge that they took substantial steps to provide notice to the defendant. I accept the position taken by Mr. Whitehead that they failed to advise the Minnesota judge of other ways to obtain effective service.

[18] Mr. Ritter knew the defendant had a home in India where his parents lived. It was said that they sent letters by regular mail to that home but no further steps were taken to contact the defendant's family. On the other hand, they sent mail by registered mail to a home the defendant had in Minnesota when they were aware the process server had advised there was no sign of activity around that home.

[19] The defendant had friends in Minnesota, some of which worked with the defendant at Arcadia International L.L.C., and no attempt was made to contact any of the friends to obtain information as to where the defendant lived.

[20] I have found, as a fact, Mr. Ritter knew the defendant was in Canada and no attempt was made to obtain the address of the defendant in Canada.

[21] I accept the important parts of the evidence of the defendant including his denial that he wrote some of the e-mails or parts of e-mails. Mr.Thurlow advanced submissions that there were inconsistencies in the evidence of the defendant. I have reviewed these submissions and, with respect, they do not serve to convince me to disbelieve the defendant. The evidence of the defendant is consistent with the evidence of other witnesses and where his evidence conflicts with the evidence of Mr. Ritter, I accept the evidence of the defendant. It would appear the evidence of Mr. Gust basically are matters referred to him by Mr. Ritter.

[22] On December 27th, 2004 the defendant moved to Nova Scotia and in February, 2005 he visited his parents in India.

[23] In January, 2005 steps were taken to advance a motion of prejudgment garnishment against the defendant. It would seem the plaintiffs were not only going after a default judgment but were seeking recovery of money without notice to the defendant. This motion was under Rule 60 of the Rules of the Minnesota court. Rule 60(b) sets out grounds for relief from a final judgment, order or proceeding and the operative part reads:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for "the following reasons".

[24] One of the reasons is fraud. Rule 60 (c) is entitled "Timing and Effect of the Motion" and it reads:

> 60 (c) (1) Timing
>
> A motion under Rule 60(b) must be made within a reasonable time - and for reasons (1), (2) and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

[25] Reason 3 is fraud.

[26] The proceeding started by the plaintiffs came to the attention of the defendant three days before the time of the one year expiry date. The defendant sought legal advise but took no steps under Rule 60(b).

[27] Mr. Gust was asked how does one make the motion and he replied it could be done by telephone. I understand counsel for the defendant had no notice this evidence would be given. He raised no objection to the admission of this evidence. It seems to be in conflict with the requirement for a motion which must be a motion in court. Is there a rule of court in Minnesota which permits verbal notification of relief from final judgment? Is it a policy established by the court which permits such a telephone call? The evidence does not disclose an answer to these questions but it would seem the comment is heresay and a professional opinion, the conclusion of which were not given to counsel for the defendant before the hearing. I would rule the comment is not admissible.

[28] It should also be noted, neither the defendant nor the Nova Scotia solicitor, from whom he sought advise, would know such a motion could be stopped or delayed by a telephone call. The defendant did not get adequate notice of how he could obtain relief from the Minnesota judgment.

[29] It was stated by counsel that Exhibits 3, 4, 5 and 6 contain all of the material which was put before the judge in Minnesota. Exhibit 3 is an affidavit of Mr. Ritter's dated January 25th, 2005. Exhibit 5 is an affidavit of Mr. Ritter dated October 4th, 2005. Exhibit 5 is the plaintiff's memorandum. Exhibit 6 is an affidavit of Mr. Ritter dated January 19th, 2005. It would seem Mr. Ritter is the source of information before the judge in Minnesota.

[30] In these affidavits Mr. Ritter stated he filed a police report with the Minneapolis Police Department who turned the matter over to the F.B.I. Mr. Ritter, in his affidavit dated October 4th, 2005, stated, "it does not appear that any further actions have been taken".

[31] The request for pre-judgment garnishment was denied by the judge in Minnesota but he did allow the claim for expedited discovery. The attempts made to personally serve the defendant failed and the plaintiffs tried to effect service by publication under Rule 4.04(1)(a).

[32] The plaintiffs did not make any attempt to see that publication brought notice to the defendant. In his evidence, Mr. Gust said it was his secretary who probably picked the Dakota County Tribune because it was probably the first newspaper listed in an accepted list and Mr. Gust was unaware of the circulation when the newspaper was chosen. It turned out the circulation was 1106 people.

[33] In my opinion, the defendant has proved that fair process was not provided to him. In Canada it is clear there has not been natural justice because the defendant has not been given adequate notice of the claim against him so he could be granted an opportunity to defend.

[34] The publication notice was not designed to come to the attention of the defendant and Scott Ritter knew the defendant was going to Canada and made no effort to locate him in Canada.

[35] The defendant has proved that he has not received the minimum standard of fairness from the plaintiffs and from the court in Minnesota.

[36] The denial of natural justice as that term is used in Canada has been proved by the defendant and I refuse the enforcement of the Minnesota judgment and I determine it will not be entered as a judgment in Nova Scotia.

[37] The application is dismissed and the defendant shall have costs of the proceeding.

J.