SUPREME COURT OF NOVA SCOTIA
Citation: George L. Mitchell Electrical v. Rouvalis, 2010 NSSC 203

Date: 20100526
Docket: Hfx. No. 319620A
Registry: Halifax

Between:

George L. Mitchell Electrical

Plaintiff

v.

Peter Rouvalis, Agrys Rouvalis

Respondents

Revised decision:	The text of the original decision has been corrected according to the erratum dated June 21, 2010. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	March 9, 2010, in Halifax, Nova Scotia
Final Written Submissions:	February 24, 2010
Counsel:	Matthew Moir & Spencer Dellapinna, for the Appellant Peter Rumscheidt, for the Respondents

By the Court:

[1] The appellant, Mitchell Electrical, appeals the decision of an adjudicator of the Small Claims Court to set aside a default judgment previously granted to the appellant.

Background

[2] The claimant commenced proceedings against the defendants for payment for electrical services and material. The Notice of Claim was served on the defendants on June 27, 2009. It indicated that a hearing would be held on September 21, 2009. On July 21, 2009, the adjudicator granted the appellant's application for quick judgment on the basis that the defendants had not filed a defence within the time specified by the *Small Claims Court Act*.

[3] The claimant's counsel sent a copy of the order granting judgment to the defendants by letter dated July 28, 2009. On August 24, counsel for the claimant notified the defendants by letter that a certificate of judgment would be registered in the Land Registry Offices. The defendants retained legal counsel on September 4. Subsequent discussions about the possibility of

setting aside the default judgment failed, and the defendants successfully applied to set the judgment aside on October 20, 2009.

Issue

[4] The issue is whether the adjudicator properly exercised his discretion in setting aside the default judgment.

Legislation

[5] The relevant provisions of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, include ss. 23(1) and (2), which state:

> Default of defence or appearance
> 23 (1) Where a defendant has not filed a defence to a claim within the time required by the regulations and the adjudicator is satisfied that
>
> > (a) each defendant was served with the claim and the form of defence and with notice of the time and place of adjudication; and
> >
> > (b) based on the adjudicator's assessment of the documentary evidence accompanying the claim, the merits of the claim would result in judgment for the claimant,
>
> the adjudicator may, without a hearing, make an order against the defendant.
>
> (2) Where a defendant against whom an order has been made pursuant to subsection (1) 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,
>
> the adjudicator may set aside the order and set the claim down for hearing. [...]

[6] The *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93 as am. to N.S. Reg. 153/2009, provide, at s. 5(1), that "[t]he time for filing a defence/counterclaim and serving it on the claimant shall be within 20 days from the date on which the defendant was served or within any additional time the clerk or adjudicator may allow."

The adjudicator's decision and the arguments on appeal

[7] The claimant admitted that there was a potential meritorious defence. The adjudicator determined that the defendants had a reasonable excuse for failing to file a defence within the time required and that they had acted without unreasonable delay after learning of the order.

[8] The adjudicator referred to s. 2 of the *Small Claims Court Act*, which provides that "[i]t is the intent and purpose of this Act to constitute a court

wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice."

[9] The appellant maintains that the adjudicator's finding that there was a reasonable excuse for the failure to file a defence is not supportable, given that the defendants failed to read through the Notice of Claim. On seeing the scheduled hearing date of September 14, 2009, the defendants simply stopped reading, thus missing the direction (on the second page of the Notice) that they must file a defence within 20 days of receiving the Notice of Claim, failing which, "the court may make an order against you without hearing from you."

[10] The respondent maintains that the defendants had a reasonable excuse for failing to file the defence and that the decision of the adjudicator should be affirmed.

Appellate review of Small Claims Court decisions

[11] Subsection 32(1) of the *Small Claims Court Act* permits a party to a proceeding before the Small Claims Court to appeal from "an order or determination of an adjudicator" on the basis of (a) jurisdictional error, (b) error of law or (c) failure to follow the requirements of natural justice. Pursuant to s. 32(6), this court's decision on appeal is "final and not subject to appeal."

[12] The parties disagree as to the correct characterization of the issue on this appeal, and, accordingly, on the standard of review. The appellant maintains that the adjudicator's decision was a determination of law, which should be reviewed on a standard of correctness. The respondent argues that the decision is one of mixed law and fact, subject to a more relaxed standard of "palpable and overriding error."

[13] The Supreme Court of Canada distinguished between errors of fact, law and mixed fact and law, and the applicable standards of review, in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 2002 CarswellSask 178, where Iacobucci and Major, JJ., writing for the majority, said:

> 8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the

> trial judge with its own. Thus the standard of review on a question of law is that of correctness....
> ....
>
> 10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error"....
> ....
>
> 26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts.... On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual....
>
> 27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied....

[14] In *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76, 1999 CarswellNS 410 (S.C.), Saunders, J. (as he then was) described this court's ability to review for "error of law" as follows:

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene 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 conclusions 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 the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[15] The appellant says there was no ambiguity created by the form of notice served on the defendants. The second page of the Notice of Claim contains a boxed notice in the following words:

> **To the Defendant(s)**: This claim has been filed against you in Small Claims Court.
>
> 1. If you do not agree with this claim, you must
>
> - fill in the attached Form 2 - Defence/Counterclaim
> - file the completed Form 2 - Defence/Counterclaim by returning it to the Small Claims Court within 20 days of the date that you received this claim.
> - serve a copy of the completed Form 2 - Defence/Counterclaim on the Claimant(s)
>
> 2. If you do not file your Defence/Counterclaim by returning Form 2 to the court within 20 days after you receive the claim, the court may make an order against you without hearing from you.
>
> Read the "Additional information for Defendant" with this form.

[16] The appellant submits that the adjudicator concluded that failing to read page 2 of the Notice of Claim and not being aware of the statutory requirements constituted a reasonable excuse for failing to file a defence.

[17] The appellant relies on *Beals v. Saldanha*, 2003 SCC 72, where Major, J. (for the majority) stated, at para. 68, that "[w]ithin Canada, defendants are presumed to know the law of the jurisdiction seized with an action against them. Plaintiffs are not required to expressly or implicitly notify defendants of the steps that they must take when notified of a claim against them." The appellant says it is not an excuse at law, or a reasonable excuse in the context of an application to set aside a quick judgment, that the defendants simply stopped reading the claim with which they were served. In *Logic Alliance Inc. v. Jentree Canada Inc.*, 2005 NSSC 2, where the defendant failed to file a defence in the belief that the claim was not sustainable, Warner, J. said, at para. 32, that "[c]ourt processes would have little meaning if such excuses should merit equitable reinstatement of a right to defend an action after such rights have expired."

[18] The appellant argues that a reasonable excuse must mean more than a bare excuse. Otherwise, s. 23(2)(a) of the *Small Claims Court Act* would not refer to a "reasonable excuse for failing to file a defence within the time required". Further, the appellant notes that the intent and purpose of the Act, as described at s. 2, is to adjudicate claims "informally and inexpensively but *in accordance with established principles of law and natural justice*". [Emphasis added.]

[19] The a respondent maintains the adjudicator's decision was one of mixed law and fact and is entitled to deference. The respondent relies on *Casey v. Wheatley*, 2009 NSSC 238, [2009] N.S.J. 366, where McDougall, J. cited *McPhee v. Gwynne–Timothy*, 2005 NSCA 80, 232 N.S.R. (2d) 175, where the Court of Appeal said, at para. 33:

> On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error....

[20] The respondent maintains, then, that the standard to be applied is one of "palpable and overriding error." By this reasoning, it would be wrong to consider this appeal solely on the basis of the adjudicator's interpretation of the *Small Claims Court Act*. The respondents say the adjudicator accepted as a fact that Mr. Rouvalis intended to appear for the hearing on September 14. The adjudicator also determined that the Notice of Claim was ambiguous in the sense that the first page did not indicate that the defendants were subject to an order being made against

them if they did not file a defence. The adjudicator focussed on the overarching principle that a party is entitled to a hearing, and decided (appropriately, in the view of the respondents) to weigh the relative prejudice to the parties. He concluded that the respondents' prejudice arising from the survival of the quick judgement outweighed the prejudice to the appellant from striking it out.

Analysis

[21] The respondents apparently offered no ancillary reasons for not reading the Notice of Claim in its entirety, or for their failure to understand their obligations. They did not claim that the Notice was inconsistent on its face. They did not allege that the form of the Notice actually misled them.

[22] It is my view that the adjudicator made an error in law in setting aside the quick judgment which he had granted it to the appellant. He was interpreting the requirements of the *Small Claims Court Act*, specifically, the requirement for a "reasonable excuse" pursuant to s. 23(2)(a). Admittedly, the phrase "reasonable excuse" must take into account the circumstances before the decision-maker. But

determining what is meant by “reasonable excuse” is fundamentally a question of law.

[23] The adjudicator’s decision includes consideration of certain collateral factors which have little or no bearing on the ultimate decision as to whether a reasonable excuse was made out. He noted, for instance, that there was “a presumption in favour of having a hearing.” If the appellant took the appropriate steps to serve the respondents and to avail itself of the provisions of the statute by applying for quick judgment, there is no basis in the statute for the adjudicator to set the judgment aside on the basis that a litigant is presumptively entitled to a hearing. Nor is there any basis in the statute for a test of “respective prejudice” as between the parties. The burden rests on the defendant to establish that a Quick Judgment should be set aside, by appearing before the adjudicator without unreasonable delay and showing a “reasonable excuse for failing to file a defence within the time required.”

[24] I am unable to agree with the respondents’ suggestion that s. 2 of the *Small Claims Court Act* provided a basis upon which the adjudicator could set aside the judgment. Section 2 sets out the intent and purpose of the Act. It cannot override the specific requirements of s. 23.

[25] The adjudicator found that the respondents had an intention to appear on the scheduled hearing date. He did not indicate that there was an explanation for their failure to read the entire Notice of Claim. There was no suggestion that the document confused the respondents, or that they were led to believe that only the first page, where the hearing date appeared, needed to be read.

[26] While it might be preferable for the standard Notice of Claim to indicate that a defence must be filed on its first page, the fact that this information appears on the second page does not automatically provide a "reasonable excuse" for not filing a defence on time. The test is "reasonable excuse," not "any excuse." The adjudicator did not provide any reasoning that would indicate that the proper analysis was actually applied.

[27] In addition to the adjudicator's failure to identify a reasonable excuse being offered by the respondents, the facts as he found them suggest that the respondents ignored the judgment until they received notice that the judgment would be filed in the Land Registry Office. This militates against the respondents' argument that they intended to defend the action from the outset, and against any finding that

they “appeared before the adjudicator without unreasonable delay after learning of the order,” as required by s. 23(2)(b).

[28] In my view, the adjudicator’s decision must be set aside, whether the standard is one of correctness or palpable and overriding error. I am satisfied that the adjudicator did not apply the analysis mandated by the statute, leading to a decision that must be quashed under either standard.

[29] I therefore allow the appeal and reinstate the judgement in favour of the appellant. The appellant shall be entitled to costs on this appeal in the amount provided by the Regulations. The appellant shall also be entitled to the filing fee and other disbursements in the amount of $131.15.

J.

Date: 20100621
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BETWEEN:

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Respondents

ERRATUM

Revised judgment: The original judgment has been corrected according to this erratum dated **June 21, 2010.**

HEARD: March 9, 2010 in Halifax, Nova Scotia

DECISION: May 26, 2010

COUNSEL: Matthew Moir & Spencer Dellapinna, for the appellant
Peter Rumscheidt, for the respondents

Erratum:

Paragraph 29 is replaced by the following:

"I therefore allow the appeal and reinstate the judgement in favour of the appellant. The appellant shall be entitled to costs on this appeal in the amount provided by the Regulations. The appellant shall also be entitled to the filing fee and other disbursements in the amount of $131.15."