SUPREME COURT OF NOVA SCOTIA

Citation: Farrow v. Butts, 2010 NSSC 387

Date: 2010/10/21
Docket: Syd. No. 330822
Registry: Sydney

Between:

Jeffery William Farrow

Appellant

v.

Kelsey Butts

Respondent

Judge: The Honourable Justice Patrick J. Murray

Heard: September 30, 2010, in Sydney, Nova Scotia

Written decision: October 21, 2010

Counsel: Jeffery William Farrow in person

Kelsey Butts in person

By the Court:

[1] The matter before the Court is an Appeal from a decision of the Smalls Claims Court of Nova Scotia. On May 18th, 2010 ,the Adjudicator issued a decision against the Appellant, Jeffery Farrow in favour of the Respondent, Kelsey Butts in the amount of $10,852 plus costs of $139.35 for a total of $11,031.35.

[2] The Appellant appeals that decision by Notice of Appeal (form 9) dated June 16th, 2010, filed with the Court on the same date and, within the 30 day appeal period. The singular ground of appeal cited in the Appellant's Notice is a "Failure to Follow the Requirements of Natural Justice".

[3] The particulars of the Appellant's Appeal are based mainly on his claim that he did not know the hearing took place and, when he failed to show up, a Judgment was awarded against him. The learned Adjudicator,

after numerous attempts by the Respondent to serve the Appellant, issued an Order for Substituted Service.

[4] The terms of that Order required that personal service be effected on the Respondent's mother , and as well that he (the Appellant) be notified by "text message" as to the date of the hearing in the Small Claims Court by the Respondent. These matters were both completed by the Respondent prior to the hearing date of May the 18th, 2010.

[5] In any Appeal under the *Small Claims Court Act* the Small Claims Court must issue to the Prothonotary a "Stated Case "for review by the Supreme Court on appeal. Section 32(4) of the Act states as follows:

> "(4) Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision."

The Stated Case in this matter is set out below by the learned adjudicator and is straight forward.

STATED CASE

TO: The Prothonotary

Summary report of findings of John G. Khattar, an Adjudicator of the Small Claims Court of Nova Scotia.

1. The matter first came before Small Claims Court with an affidavit to request an Order for Substituted Service, dated April 2, 2010.

2. The hearing was held on April 6, 2010 and an Order for Substituted Service was issued on the 20th day of April, 2010, with the adjudicator issuing an Order for Substituted Service by serving a copy of the claim on the Defendant's mother and by texting to the Defendant the new hearing date.

3. The matter was to return to court on May 18, 2010.

4. At the hearing on May 18, 2010, an Affidavit of Service was produced showing the document had been served on Debbie Monahan, mother of the Defendant on May 6, 2010.

5. In addition, copies of text messages between the Claimant and Defendant were introduced which showed that the Defendant was made aware that the hearing was set down for May 18, 2010, by text message by the Claimant.

6. The adjudicator was satisfied that the requirements of the Order for Substituted Service had been met and t he matter proceeded.

7. The Claimant proved her claim as evidenced by Exhibit “2" and judgment for the claimant was awarded in the amount of $10,852.00 plus costs of $139.35 for a total of $11.031.35.

8. An Order was issued for this amount.

DATED at Sydney, Nova Scotia, this 12th day of July, 2010.

(Signed John G. Khattar, Adjudicator)

[6] The right to be heard, with or without a meritorious defence , is a right which must be strictly guarded by any Court. When a judgment is made in the absence of the Defendant , the standard becomes the highest to ensure due process is followed and that no breach of natural justice occurs.

[7] Fundamental to natural justice is the notion that a party gets to “have its say”. This appeal is such a case because the Appellant was ordered to pay “upon default”, the sum referred to above, without the being present. This is commonly referred to as “entering default judgment”. In such cases, the reviewing (Appeal) Court’s level of circumspection must be at it’s highest. Even in such cases, the Claimant, the Respondent in this appeal, must still prove the validity of their claim.

[8] In the case of **Kemp v. Prescesky**, {2006} NSJ No. 174 Justice G. M. Warner considered the issue of setting aside default judgments (in Small

Claims Court) as they relate to the requirements of natural justice. In paragraph 19 Justice Warner stated:

> " In my view, it is a breach of the requirements of natural justice not to have a mechanism in Small Claims Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable defence that should be heard on its merits, **and he or she has a reasonable excuse for defaulting and is not just stalling**, (emphasis added) and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside. In light of the increase in the monetary jurisdiction of the court, it is as relevant to nature justice in the Small Claims Court as it is in the Supreme Court. There is still a requirement that the applicant show sufficient bases for the court to exercise discretion to avoid abuse."

[9] This Court hereby adopts the reasoning of Justice Warner and in particular that which states that an Appellant must demonstrate that he or she has a reasonable excuse for defaulting.

[10] In **Kemp v. Prescesky** case (supra) ,the Appellant, mistakenly showed up for the hearing on the wrong date, which was one day after the actual hearing. While waiting around for half an hour or more, he checked the doors of the Court House several times, then assumed that Court was cancelled because of bad weather. The Appellant, in that case, then

realized that it was the wrong day when he looked at the Notice of Claim then or the next day.

[11] In a second case, **Forsyth v Shannon**, [1995] N.S.SJ. No. 431 dealing with a default judgment issued by the Small Claims Court, Chief Justice Palmeter stated in paragraph 11 with respect to an Appeals court Review under the Act and Regulations:

> "In any interpretation of the revised legislation and regulations, it is my opinion that an appeal court has much more flexibility in looking into the hearing itself and the various grounds of appeal."

[12] The facts in **Forsyth** case**, supra** were that the Appellant's wife on the night of the hearing became ill and he was forced to attend to her and was prevented from attending the hearing. In effect the appellant made a decision that it was more important to attend to his wife's illness, which appeared suddenly, than to attend the Court hearing. At paragraph 16 of it's decision the learned Justice stated:

> "The other ground would be on the basis of denial of natural justice. Natural justice is simply fairness, including procedural fairness. The Adjudicator did nothing wrong in proceeding with the hearing. In my opinion he should not have done otherwise.

> However, in my opinion, after hearing representations made by the Appellant, this is a case which must be reheard to give all parties an opportunity to present evidence and be heard by an Adjudicator. The Court has sympathy for the Appellant and for the reason he did not attend the hearing. **Natural justice in my opinion demands that he be heard**." (Emphases added)

[13] Turning now to the appeal at hand and the submissions made, the Appellant stated that he was not in contact with his mother for an extended period (3 months). He therefore claimed he did not receive notice of the hearing. He did acknowledge having receiving the text message from the Respondent notifying him of the hearing date, which provision was directed by the adjudicator as part of the order for substituted service. The appellant further advised on the appeal that he chose to ignore the text message because he did not believe her (the Respondent) .The Appellant was questioned by this Court as to whether he made any further inquiries of the Small Claims Court to determine whether he was required to appear on that or any other date for the purpose of a hearing. He advised the Court that he did not, believing he would receive something further in writing before the matter was dealt with by the Small Claims Court.

[14] Other parts of the submission made by the Appellant did contain some inconsistencies. For example he indicated he was notified of two Court dates by the Respondent but could not provide the second court date . Further he indicated he was not in contact with his mother, to whom the order for substituted service was directed, for a period of three(3) months. At the Appeal he read from an unsworn letter signed by her (his mother) that she was not in contact with her 'family" for personal reasons. This meant presumably she, his mother, did not make him, the appellant, aware of the hearing date.

[15] The Court, however, was not persuaded by the Appellant in his submissions. The text messages submitted by the Respondent showed that the Appellant contacted the Respondent after attempts to contact his mother had been made by her ,with him asking "why are you contacting my mother ".This was at the same time that personal service was being effected on the Appellant's mother. It should be noted that new evidence on an appeal is normally inadmissible However as the issue involved the right to a fair hearing, the Appellant was allowed to present the contents of the letter as part of his submissions.

[16] In considering a person's right to be heard, it does not automatically follow that just because they were not present , that their appeal will be allowed. The Court must also view the Respondent's actions , and the courts record of events , in determining whether due process was followed and whether the Rules and Regulations prescribed by the Court were adhered to.

[17] Regulation 3(1) of the *Small Claims Court Act* states with respect to service of documents as follows:

> "Service of a Notice of Claim and a form for a Defence/Counterclaim shall be by personal service or **such other manner of as directed by the Court**." (emphasis added)

[18] In this case the Court, in control of it's own procedures, issued an Order for Substituted Service , and as outlined in the stated case, made a finding that the Order was duly served on the Appellant (on May 6th) in accordance with it's terms. In compliance with the terms, copies of the text messages between the Claimant and Defendant were introduced to show that the Defendant was made aware of the hearing set down for May 18, 2010, a hearing date the Appellant stated he chose to ignore.

[19] On that hearing date ,(as stated in clause 6 of the Stated Case), the learned Adjudicator was satisfied that the requirements for the Order for substituted service had been met and the matter proceeded. He was also satisfied (as per clause 7 of the Stated Case) that the Respondent had proven her claim and made that finding as well.

[20] Having reviewed the Stated Case throughly as well as the Notice of Appeal and, having considered the submissions of both the Appellant and the Respondent, the Court is not satisfied that there was a failure to follow the requirements of natural justice . The Appellant by his own admission was notified as to the hearing date, and by his own admission he chose to ignore it and make no further inquiries . This, is my view, does not constitute reasonable excuse as found in **Kemp, supra** nor one the Court has sympathy for, as found in **Forsyth, supra**. The Appellant was not mistaken about the date of the hearing. He was mistaken as to what would be the outcome of his absence. His conscience choice to ignore the hearing notification resulted in the judgment against him. Personal service was effected upon him by the Order for Substituted Service granted by the

Adjudicator in accordance with the provisions of the Act and regulations of the Small Claims Court. This means the Respondent did everything that she was directed to do by the Small Claim Court and the Court did what it was authorized to do by statute and the Regulations. Service having been properly effected on the Respondent, the Court is not prepared to interfere with this finding of the Small Claims Adjudicator .

[21] In the result, the Appellant must accept the consequences of his decision , to ignore the notice . While I find little merit to his argument he knew nothing of the hearing date, the finding of fact that service had been effected does not result in a failure of natural justice as the court had the jurisdiction and authority to grant such an order. It therefore follows, that the court was entitled to issue default judgement against him.

[22] I find therefore that the Appellant’s appeal is without merit.

[23] Accordingly the Appeal dismissed with costs .

J.