SUPREME COURT OF NOVA SCOTIA

Citation: *J.W. Bird and Company Limited v. Allcrete Restoration Limited*, 2019 NSSC 311

Date: 20191011
Docket: Hfx No. 484831
Registry: Halifax

Between:

J.W. Bird and Company Limited

Plaintiff

v.

Allcrete Restoration Limited, Eastern Infrastructure Inc., and Brian Wheaton

Defendants

Judge: The Honourable Justice Christa M. Brothers

Heard: April 18, 2019, in Halifax, Nova Scotia

Further Written Submissions: April 25, May 8 and May 14, 2019

Counsel: Michael Blades, Jillian D'Alessio, Counsel for the Plaintiff
Kevin A. MacDonald, Counsel for the Defendant, Brian Wheaton

Overview

[1] The individual defendant, Brian Wheaton ("Wheaton"), brings this motion seeking to set aside a default judgment issued on March 6, 2019, in favour of the plaintiff, J.W. Bird and Company Limited ("J.W. Bird"). The default judgment encompasses two claims – one concerning a personal guarantee of the debts of Allcrete Restoration Limited ("Allcrete") and the second being a personal guarantee of the debts of Eastern Infrastructure Inc. ("Eastern").

[2] The defendant must satisfy a two-part test in order to set aside the default judgment. Despite ample opportunity, including permission to provide direct evidence at the hearing to supplement affidavit evidence and being permitted additional submissions post-hearing, the defendant has failed to discharge the burden to satisfy the Court that this default judgment should be set aside.

Background

[3] This is a debt action commenced by the plaintiff, a company in the business of selling construction materials. Both of the defendant companies, Allcrete and Eastern, held separate credit accounts with J.W. Bird. Matt Brunt, an employee of J.W. Bird, swore an affidavit on March 27, 2019, providing evidence that credit applications were applied for and approved in relation to Allcrete and Eastern. Wheaton signed these credit applications on behalf of the companies and also signed personal guarantees.

[4] The Eastern and Allcrete credit balances were $129,177.36, and $142,958.99, respectively. The actual amounts due on the various invoices have not been contested by Wheaton. It is accepted by all that Allcrete and Eastern have entered into a receivership process and any claims against them in this proceeding have been stayed. A consent order issued by the Honourable Justice Pierre L. Muise, on February 4, 2019, provides support for that statement.

[5] The following is the history of this proceeding.

[6] J.W. Bird sent a formal demand letter to Wheaton on January 25, 2019. The letter was sent to all three defendants. Proof of service was provided in the affidavit of counsel stating that the formal demand letter was sent via Canada Post registered mail. Wheaton retrieved his letter. The demand letter attached to counsel's affidavit is addressed to all three defendants separately, and indicates that it is addressed to Wheaton "Personally". Importantly, the demand contains the following in bold:

> **Please also be advised that any such legal action will include a claim for personal liability against Mr. Brian Wheaton on the basis of his personal guarantees of both Eastern's and Allcrete's debts owed to Bird Stairs.**

[7] Wheaton's failure to respond to this legal demand is undisputed. As a result of the failure of all three defendants to respond to the demand letter, a Notice of Action for Debt was commenced by J.W. Bird on February 4, 2019. Wheaton was

again, specifically, named in the Notice of Action in his personal capacity. Paragraph four of the Statement of Claim states that Wheaton is a "personal guarantor in respect of all debts owed to J.W. Bird by Allcrete and Eastern".

[8] Proof that personal service was affected on Wheaton is established by the affidavit of counsel. A process server served Wheaton on February 11, 2019. Furthermore, the Notice of Action for Debt sets out the following claim:

> 400. Mr. Wheaton has executed personal guarantees, guaranteeing all debts and liabilities of both Allcrete and Eastern to Bird Stairs. Bird Stairs says that Mr. Wheaton is therefore, jointly and severally liable for the full amount of both of the foregoing debts owed to Bird Stairs by Allcrete and Eastern.

[9] In addition, at paragraphs 401 and 402 of the claim, J.W. Bird sets forth the sums being claimed from Allcrete, Eastern, and Wheaton on a joint and several basis. As a result of Wheaton failing to respond to the Notice of Action for Debt, a default order for judgment was issued against Wheaton on March 6, 2019.

[10] Thereafter, J.W. Bird registered the judgment in the Land Registry system against thirteen parcels of real property owned by Wheaton. The registration occurred on March 8, 2019. It was only then that Wheaton took any steps to respond to the claim. On March 20, 2019, an email was delivered by counsel, Mr. John Dillon, on behalf of Wheaton. This was the first communication J.W. Bird received with respect to this action.

[11] On March 21, 2019, Wheaton, in his personal capacity, filed a motion to set aside the default judgment.

Issues

[12] To set aside the default judgment, the defendant must satisfy the court of the following:

1. Does the defendant have a fairly arguable defence?
2. Does the defendant have a reasonable excuse for the delay?

Law and Analysis

Materials Filed while Self Represented

[13] Wheaton brings this motion pursuant to Civil Procedure Rule 8, originally filing motion documents with the court on March 21, 2019. These included his own affidavit, sworn on March 21, 2019.

[14] In the original motion materials, which were drafted and filed by Wheaton, who was self-represented at the time, he denied signing a personal guarantee. He deposed in his original affidavit:

> 6. I Brian Wheaton did not sign a personal guarantee for Allcrete Restoration or Eastern Infrastructure Inc. to J.W. Bird and Company Limited.

[15] Wheaton then retained counsel, who filed additional materials on April 9, 2019, including a second affidavit of Wheaton, sworn April 8, 2019, as well as a brief. In that affidavit, Wheaton deposed that he is the President of Eastern, one of the two other parties named in the action. He stated that Allcrete is owned and operated by others. He further deposed that all actions against Eastern and Allcrete have been stayed as a result of an order of the Supreme Court sitting in Bankruptcy and Insolvency.

[16] Notably, in paragraph twelve of the affidavit sworn April 8, 2019, Wheaton acknowledged, contrary to his earlier affidavit, that he did indeed sign the personal guarantees as alleged by J.W. Bird.

[17] The defendant now argues that despite being served with the action on behalf of J.W. Bird, he did not realize that the lawsuit was brought against himself. Wheaton argues that the guarantee in relation to Allcrete was rescinded, and in any event, that the debt actions against Allcrete and Eastern have been stayed.

[18] During the hearing on April 18, 2019, counsel for Wheaton sought to file additional written submissions with regard to their position that Wheaton has a fairly arguable defence. In particular, the three legal issues they sought to provide further written submissions included:

1. Whether the damages claimed against Wheaton are properly characterized as liquidated damages;
2. Whether and how a personal guarantor can unilaterally terminate their guarantee obligations; and,
3. Whether the personal guarantee given by Wheaton in respect of the debts can be interpreted as being limited to $80,000.

[19] Instead of focusing solely on those three additional issues, which the Court granted permission to address, Wheaton raises three additional new issues in post-hearing submissions, arguing:

1. The personal guarantee is more of a pledge to give a guarantee;
2. A demand is required to trigger the guarantee obligations; and,
3. There is no entitlement to claim interest on the face of the documents.

[20] I will deal with all of the issues raised by Wheaton.

Rule and Legal Test

[21] Civil Procedure Rule 8.09 provides a judge with the ability to set aside a default judgment:

> 8.09 A judge may set aside a default judgment issued by the prothonotary or made on an *ex parte* motion by a judge.

[22] The test on such a motion is well established, and set forth by Justice Roscoe in *Lewis-Choi Company v. Western Glove Works Ltd.*, (1990), 98 N.S.R. (2d) 282, 1990 CarswellNS 318 (S.C.T.D.), at para. 12:

> When the cases are all considered, I do not think there is any doubt as to what is the test to be applied in Nova Scotia. In order to succeed on an application to set aside a default judgment, the applicant must show two things:
>
> (1) a fairly arguable defense, or a serious issue to be tried; and,
>
> (2) a reasonable excuse for the delay in filing the defence.

[23] The test was further confirmed in *Ross Barrett & Scott v. Simanic*, (1994), 137 N.S.R. (2d) 45, 1994 CarswellNS 90 (C.A.). This case also confirms that the burden in such motions is upon the moving party, here Wheaton. In order to be successful, Wheaton must discharge the burden of proof on each element of the *Lewis-Choi* test.

Fairly Arguable Defence

[24] When considering this part of the test, I am guided by the comments of Parker, J. in *Ives v. Dewar*, [1949] 2 D.L.R. 204 (N.S.S.C. in banco) at page 206:

> Before the interlocutory judgment should have been set aside…it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits: not necessarily a defence that would succeed at the trial because the action was not being tried on that application; but facts which would at least show beyond question that there was a substantial issue between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the Rules.

[25] I will review the defences advanced by the defendant.

Wheaton did not sign the Guarantee

[26] Initially, Wheaton swore an affidavit dated March 21, 2019, stating as follows:

> 6. There was an error of fact and an error of law. I Brian Wheaton did not sign a personal guarantee for Allcrete Restoration or Eastern Infrastructure Inc to J.W. Bird and Company Limited.

[27] A second affidavit of the applicant was sworn on April 8, 2019. In that affidavit, the applicant indicated that his earlier affidavit was incorrect, and stated:

> 12. While it is accurate that now that I have reviewed the documentation filed that it appears that I signed the Personal Guarantee but it is also the case that I be relieved of any Guarantee between myself and J.W. Bird as alleged or otherwise.

[28] There is no defence on this basis.

Guarantees were Rescinded

[29] Wheaton's next purported defence is that, while he did indeed sign the personal guarantees, he was allegedly relieved of those obligations in relation to debts incurred by Allcrete and consequently that guarantee is of no force and effect. All that is provided to the court in support of this contention and argument is a letter Wheaton sent to Matt Brunt in April 2013 requesting that he be removed from the guarantee. There are no documents confirming that the guarantee is of no force and effect. In fact, the documents support the conclusion that the guarantee was not only in effect, but that Wheaton knew it.

[30] In his second affidavit, Wheaton attached an undated, unsigned document which he deposed was provided to Allcrete. This document purported to advise J.W. Bird that Wheaton, on December 10, 2012, divested himself of shares and

interests in Allcrete. Consequently, Wheaton requested that he be released as guarantor for the debts owing by Allcrete. The document said:

> I request that you sign a copy of this letter indicating you are in receipt of this information and that I have been released by any and all Personal Guarantees I may have signed with regard to Allcrete Restoration Limited.

[31] Wheaton does not, however, provide any documentary evidence indicating that this document was:

1. Provided to Allcrete and,
2. That it was signed and accepted by Allcrete.

[32] What has been provided to the court is an email from Wheaton to Matt Brunt ("Brunt"), Division Manager, Construction Products for J.W. Bird. In this email, dated April 19, 2013, Wheaton indicated among other things, that Allcrete had been sold to three former employees. He stated in the email:

> I'm currently out of the country so e-mail is probably easier than phone tag. You're correct the credit was going to be applied to our account with reference to a Nudura project. We purchased block for our project at 22 Bakery Lane Enfield recently (3 – 4 months ago) and if possible I'd [sic] you to apply the entire credit to that project. On another note as of Dec 11th Allcrete Restoration Ltd. has been sold to three of my former employees. As a result in the near future you will be receiving notice from my lawyer of the sale and a request to remove me from your records as a guarantor.

[33] Brunt responded on the same day to the April 19, 2013, from Mr. Wheaton, stating the following:

> Consider it done.
>
> Congratulations on the successful sale of your company. Once we receive the notice we will have the guys complete a new credit application etc. and remove the old one from our files.

[34] There is no documentary evidence that the Notice was provided to Allcrete by Wheaton, or that it was signed or accepted. Wheaton said in evidence that he would have dropped the document off at the company's front desk. Wheaton testified his intent was to be released from debts moving forward.

[35] This email from Brunt indicated the new owners of the company – three former employees – would have to complete a new credit application and the old guarantee and credit application would need to be removed from the files. Wheaton testified that he assumed this was acceptance. He acknowledged that J.W. Bird required new credit applications. Wheaton testified that these were provided ,but he provided no documentary support for this assertions. There is no other evidence that this was ever done. Greer Grady ("Grady"), Sales Manager of J.W. Bird, deposed in an affidavit that Wheaton was still his contact at Allcrete, and that he would call Wheaton regularly to seek his approval to process partial payments of Allcrete's invoices on Wheaton's credit card. This was done as recently as January 2019. This is evidence that is inconsistent with an individual who believes they are removed from a personal guarantee.

[36] Wheaton agreed on cross-examination that it was contemplated that the document would be signed and a new credit application provided. He agreed that no document was signed by him or acknowledged by J.W. Bird.

[37] Brunt swore an affidavit on March 27, 2019, indicating that at no time was a new credit account ever opened for Allcrete, and at no time did any person ever seek to revoke or replace the credit application. In a supplemental affidavit, sworn April 12, 2019, Brunt confirmed that both his and other colleagues' review of the documentation confirmed that there was no record that J.W. Bird ever received any such new credit application.

[38] The only evidence before the court that Wheaton did in fact, revoke or limit his obligation under the Allcrete guarantee is his *viva voce* evidence that he delivered the revocation letter. However, there is no signed document. There is no evidence that Allcrete accepted the revocation and there is no evidence that they were actually provided with the purported document seeking the revocation of the guarantee.

[39] Wheaton's expression of a wish or an intent in the future to rescind or revoke the guarantee does not raise a fairly arguable defence that the Allcrete guarantee was rescinded. In reaching this conclusions, I rely on *Massey – Ferguson Industries Ltd. v. Waddell*, (1984), 29 Man. R. (2d) 241 (Man. C.A.) and *Dickson v. Royal Bank*, [1976] 2 S.C.R. 834.

[40] Based on the evidence, there is no fairly arguable defence with regards to the Allcrete guarantee.

Eastern Guarantee Limited to $80,000

[41] There has been no fairly arguable defence raised in relation to the Eastern guarantee. Counsel advanced an argument that the Eastern guarantee is limited to an indebtedness of $80,000. There is no support for that argument.

[42] The guarantee is on the same page as the corporate credit application, both dated March 4, 2016. They are separate legal obligations. The corporate credit application by Eastern lists the amount of credit requested, as of March 4, 2016, as $80,000. It is clear that the company negotiated and received additional credit from J.W. Bird from time to time. The personal guarantee is clear. It says:

> This guarantee shall be a continuing guarantee and shall extend to and be secured for all monies which shall be due or come due from Eastern Infrastructure Inc. to you and shall extend to the benefit of your successors and assigns.
>
> [Emphasis added]

[43] I reject Wheaton's attempt to raise a fairly arguable defence on this basis. Wheaton is seeking an interpretation of the guarantee that it is limited to $80,000 because the credit application at the time, sought credit of $80,000. This argument and possible interpretation has been rejected in *Winroc Corp. v. K & P Insulation Limited*, 2001 BCSC 255. Another case demonstrating Wheaton has raised no fairly arguable issue on this basis is *Horsman Brothers Holdings Ltd. v. Dolphin Electrical Contractors Ltd.*, (1984), 52 B.C.L.R. 334 (B.C. Co. Ct.). There the amount sought was well in excess of $20,000. Initially, the credit application was for $20,000. A guarantee was signed at that time. However, the liability was not limited to $20,000.

Liquidated Demands

[44] Wheaton argues that the prothonotary was not permitted to assess the amount of the default judgment because these were not proper liquidated demands. This action was commenced as a Notice of Action for Debt and contained in the Statement of Claim is a claim for a principal amount owed.

[45] The claim against Wheaton is a liquidated demand. The invoices issued by J.W. Bird are detailed, both in the formal legal demand provided to Wheaton on January 25, 2019, as well as in the Notice of Action for Debt and Statement of Claim. In the claim, specific sums of money charged for goods sold and delivered by J.W. Bird are set forth and readily ascertainable.

[46] This claim is a liquidated demand as summarized and described in *Pick O'Sea Fisheries Ltd v. National Utility Service (Canada) Ltd.,* (1995), 146 N.S.R. (2d) 203, [1995] N.S.J. No. 481 (C.A.). There at para. 37, the court quoted from Bullen and Leake's Precedents of Pleadings:

> A liquidated demand is a debt or other liquidated sum. It must be a specific sum of money due and payable, and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic. …

[47] The claims against Wheaton are for precise sums claimed in the nature of debt, due, and payable by virtue of a contract. These sums relate to goods that were supplied and delivered by J.W. Bird. There has been no contest to the fact that J.W. Bird delivered the goods and there has been no contest to the sums charged for those goods.

[48] Wheaton relies on *Shintom Co. v. M.T.C. Electronic Technologies Co*., 1994 CarswellBC 1276 (S.C.) to argue the amounts owing are not liquidated demands. *Shintom, supra*, is distinguishable. That claim included claims in excess of damages, including injunctions, accountings, and appointment of receivers. Furthermore, *Shintom, supra*, involved goods not actually delivered. There is no such suggestion in this case. Consequently, there is no fairly arguable defence based on this argument.

A Pledge to Give a Guarantee

[49] Wheaton, after the hearing, argued that that guarantees were vague and were not guarantees at all. There is no legal precedent accompanying this post-hearing submission. I do not accept this as a "fairly arguable defence".

A Demand is Required

[50] Wheaton, again for the first time, raises this defence in post-hearing submissions. There is neither sufficient explanation, nor legal support, for the contention that before the guarantee can be sued upon a demand must be made. In any event, a legal demand was in fact made both to Wheaton and to his counsel. This is despite the fact there is no legal requirement on the face of the guarantee requiring such a demand. (*Canadian Imperial Bank of Commerce v. Pittstone Developments Ltd.*, [1985] B.C.J. No. 3013 (B.C.S.C.), and *Bank of Montreal v. MacGregor*, (1980), 21 B.C.L.R. 83 (S.C.).

Interest

[51] Wheaton now argues that there is no entitlement to interest. There is no authority provided for this late submission. This argument is advanced despite the fact that the account statements set out the payment terms and that both Allcrete and Eastern are contractually obligated to pay interest on past due accounts. Wheaton's guarantees extended to "all liabilities" and "all monies" owing by the companies. I cannot understand the defence Wheaton believes exists in the face of the clear provisions.

Reasonable Excuse

[52] There is no question that J.W. Bird complied with the Rules concerning service and, in addition, contacted Mr. MacDonald, who J.W. Bird thought might be Wheaton's counsel, to ensure notice was brought to Wheaton's attention in order to afford him an opportunity to defend this debt action. J.W. Bird complied with the Rules and went further.

[53] It was not until March 20, 2019, that Wheaton took any steps to indicate an interest in the action, much less an intention to defend the action.

[54] Mr. Blades wrote to Eastern, Allcrete, and Wheaton on January 25, 2019, demanding payment no later than February 1, 2019. It was clear in this letter that an action would be filed if payment was not made. In addition, the following appears in bold in the demand letter:

> Please also be advised that any such legal action will include a claim for personal liability against Mr. Brian Wheaton on the basis of his personal guarantees of both Eastern's and Allcrete's debts owed to Bird Stairs.

[55] This letter was sent via registered mail. Wheaton signed for the letter from Canada Post. Wheaton admitted he did not read this demand letter. Additionally, Wheaton received the demand letter from his counsel as an attachment to an email. Wheaton said he glanced or skimmed the demand letter, but assumed that his counsel was dealing with it. Wheaton did not follow up with counsel. Wheaton did nothing. He testified in cross-examination that "it slipped through the cracks", it "got lost in the shuffle".

[56] As promised in the demand letter, when no payment was made on the debts, let alone any contact made by Wheaton, a Notice of Action for Debt was filed by J.W. Bird. The Notice was served upon Wheaton personally on February 11,

2019, as evidenced by the Affidavit of Service. When no defence was filed, default judgment was issued by the court on March 6, 2019.

[57] The first contact made with J.W. Bird was when Mr. Dillon contacted Mr. Gavin Giles Q.C., on March 20, 2019, at 9:42 am and stated:

> Morning Gavin
>
> My client, Brian Wheaton, was in to see me yesterday regarding the J.W. Bird judgment.
>
> I realize I told him that if he had an issue he should have responded to the Notice of Action, however, he did not.
>
> He does claim to me that he has no knowledge of signing a personal Guarantee. Would you be at liberty to forward me a copy of the Guarantee?
>
> Thanks
>
> John

[58] A motion to set aside the default judgment was filed on April 9, 2019.

[59] Wheaton contends that he intended to file a defence. He says he missed the fact he was served because he had a number of other issues he was dealing with at the time. This is not a satisfactory explanation. Wheaton received the demand letter and Notice of Action for Debt. Wheaton does not explain why he did nothing upon receipt of those documents. Why did he not act upon service of the Notice of Action for Debt? Wheaton says he has no recollection of being served and assumes he thought the documents were in relation to another matter. There is no explanation for why he does not recall being served. There is no explanation for why receipt of the demand letter, coupled with the Notice of Action for Debt, did not trigger any response from him.

[60] Wheaton did nothing until after March 8, 2019, when the judgments were registered against his land interests. Is this a coincidence? I think not.

[61] The argument advanced is that Wheaton did not read the documents served on him. The law is clear that it is unreasonable to fail to review, carefully, legal documents served, let alone if one is an experienced business person like Wheaton. Evidence of Wheaton's business experience was received in detail during the motion.

[62] Wheaton now says to this court that he did not actually read or even look at the Notice of Action provided to him by J.W. Bird. Wheaton confirms he is the

President of Eastern and says that Allcrete is owned and operated by others. He claims that over the last two years he has been distracted with ongoing disputes between himself and a former business partner and the Royal Bank of Canada. On direct and cross-examination Wheaton acknowledged he was no stranger to the legal process, having been served many times with legal documents since January 2019. Wheaton testified that while he knew the Notice of Action for Debt was a legal document, he did not pass it on to his lawyer, and assumed his lawyer was served.

[63] Wheaton claims that despite being served with the Notice of Action for Debt on February 11, 2019, at his home, that he has no recollection of being served. Importantly, he does not dispute being served. In his affidavit, he makes assumptions that he thought what was being served upon him was related to other actions being handled by counsel. It is important to note that this is not appropriate evidence in an affidavit. He is making an assumption and is not giving factual evidence. This is mere speculation. Wheaton claims that he never realized that J.W. Bird had brought an action against him. He also claims that if he had known his lawyer was not dealing with it, he would have done something. There is absolutely no acceptable explanation for his lackadaisical approach to legal documents and his unfounded and foolhardy assumptions. As counsel for J.W. Bird argued, Wheaton is "not a babe in the woods being caught off guard by a foreign process." Wheaton's carelessness is inherently unreasonable.

[64] However, there is evidence before the Court that calls into question Wheaton's evidence that he did not know. Brunt's uncontested evidence in his supplemental affidavit is that after counsel for J.W. Bird provided the formal legal demand for payment, Brunt asked his sales manager, Grady, to contact Wheaton to inquire whether he was willing to make any further partial payments on either the Eastern or Allcrete accounts. Grady testified in his Affidavit that prior to J.W. Bird commencing litigation he regularly received small partial payments on both Eastern and Allcrete's credit accounts. Grady would telephone Wheaton and seek approval to process a payment on his credit card, which was kept on file. The last payment obtained from Wheaton in that manner occurred in January 2019. Wheaton acknowledged on cross-examination that Grady called him regularly to seek approval to process a partial payment on his personal credit card. He agreed that these payments would go to the debts owed by Allcrete and Eastern.

[65] At the direction of Mr. Brunt, Grady contacted Wheaton by telephone on or about February 15, 2019. Mr. Wheaton advised at that time that because J.W. Bird was suing him he would not be making any further payments. Grady's affidavit

evidence was not contested at the hearing. This further supports the conclusion that Wheaton did understand, contrary to his evidence, that he was being pursued on his personal guarantee.

[66] Additionally, Wheaton states in his affidavit that if he had been aware or had appreciated that the actions had been against him, he would have given instructions to enter the defence. However, he fails to explain why he did not realize these actions were filed against him. In evidence before the court is the fact that the January 25, 2019, demand letter was not only served upon Wheaton by J.W. Bird, but was also provided to Wheaton by his counsel, Mr. MacDonald, by way of email dated January 25, 2019. In this e-mail, Mr. MacDonald stated:

> Hi Folks – This is what I just replied to. Let me know early next week how you wish to respond (if at all) – Regards Kevin

[67] Wheaton failed to give any instructions to respond to the formal demand. In his affidavit, his excuse is that:

> 17. At the time this communication arrived I was receiving approximately four – five emails a day from Mr. MacDonald's office and I neglected to follow up with him to provide instructions to respond to Mr. Blade's inquiry.

[68] In his own words he explains, "I neglected". There is no reasonable excuse offered for this neglect, only that he would receive four to five emails a day. This is an unreasonable excuse. Wheaton attempts to shift the burden on to counsel for J.W. Bird, stating they did not approach Mr. MacDonald to accept service or to advise that a default judgment was going to be entered. I reject this attempt to displace responsibility onto someone else.

[69] In response to Wheaton's claim that his counsel should have been contacted with regards to the Notice of Action for Debt as well as prior to any default being entered, counsel for, J.W. Bird filed a supplemental affidavit of April 10, 2019, which was not contested. This affidavit appends emails between counsel for J.W. Bird and Mr. MacDonald. On January 25, 2019, Mr. Blades provides Mr. MacDonald with the formal legal demand. Mr. MacDonald responded that he would provide the document to his clients and would respond once he had instructions. Mr. Blades followed up with Mr. MacDonald on February 1, 2019, seeking information as to whether Mr. MacDonald had received any instructions. Mr. MacDonald responded on February 1, saying that once he heard from his clients he would let Mr. Blades know. Mr. Blades indicates that no further response was received until the email of Mr. Dillon of March 20, 2019.

[70] J.W. Bird did everything the Rules required. What else could J.W. Bird have done, short of meet Wheaton and read the document to him?

Conclusion

[71] The type of excuse offered in this case, that Wheaton failed to read a document served upon him and made assumptions about what the document said, has been rejected by other courts. Such excuses cannot be acceptable. If they were accepted, there would be no point and no possible application of the second part of the test as set forth in the caselaw. In fact, I reject Wheaton's evidence that he did not know that he was being sued personally. I did not find his evidence either reliable or credible on that point. In fact, the supplemental affidavit of Mr. Brunt, sworn April 12, 2019, and the affidavit of Grady sworn on the same day, provide uncontroverted evidence that Wheaton, in fact, did know that J.W. Bird had brought an action against him.

[72] Doing nothing but making unreasonable assumptions does not a reasonable excuse make.

[73] The second part of the applicable test on this motion is not satisfied and therefore, is fatal to the defendant's motion. The excuse Wheaton presents that he did not read the documents and thought they were in relation to the companies and not him personally is an excuse that was provided to the court in *Ocean Contractors Ltd. v. Shoreline Paving Ltd.*, 2007 NSSC 342. Like the result in that case, I find that Wheaton "chose to ignore the reality of the lawsuit against him". Wheaton has failed to satisfy the test. Default judgment stands.

Costs

[74] If the parties cannot reach agreement on costs, they may provide written submissions on the issue by November 29, 2019.

Brothers, J.