SUPREME COURT OF NOVA SCOTIA
Citation: *Vaughan v. Green*, 2019 NSSC 331

Date: 20191108
Docket: Hfx No. 488957
Registry: Halifax

Between:

Victoria Vaughan

Plaintiff

v.

Dwayne Green, Jamaica Vibes Restaurant and Lelah Naas

Defendants

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	November 6, 2019, in Halifax, Nova Scotia
Written Decision:	November 8, 2019
Counsel:	Mark J. Charles and Ashley Hill, for the Plaintiff Craig L. Arsenault, for the Defendant Lelah Naas Nathan Kaulback, Articled Clerk, for the Defendants Dwayne Green and Jamaica Vibes Restaurant (watching brief)

By the Court:

INTRODUCTION

[1] The Plaintiff, Victoria Vaughan (Ms. Vaughan), filed a Notice of Action for Debt on June 6, 2019. This was served on each of the Defendants on June 19, 2019. Two of the three Defendants filed their Defence on August 12, 2019. On October 15, 2019, the third Defendant, Lelah Naas (Ms. Naas), attempted to file her Defence. This was rejected by the Prothonotary as the Plaintiff had taken out Default Judgment on August 19, 2019.

[2] On October 17, 2019, Mr. Arsenault, counsel for Ms. Naas, became aware of the Default Judgment. The next day he filed the within motion for an Order to set aside the Default Judgment and to forthwith file a Defence.

[3] The moving party relies on Civil Procedure Rules 1.01, 2.02(2)(c), 8.08 and 8.10. In terms of evidence, Ms. Naas relies on her affidavit filed October 21, 2019 and the affidavit of her lawyer, Mr. Arsneault, filed October 18, 2019. Ms. Naas also provided the Court with a brief and enclosures filed on October 21, 2019 and a draft form of Order.

[4] By way of response, on October 29, 2019, Ms. Vaughan filed an affidavit as well as an affidavit of her counsel, Mr. Charles. The next day, Ms. Vaughan filed her brief and enclosures.

[5] The Court heard oral argument and Ms. Naas and Ms. Vaughan were cross-examined on their affidavits. During Ms. Vaughan's cross-examination, exhibit 1 was introduced by consent, the promissory note drafted by Ms. Vaughan in respect of her $30,000.00 loan to the first Defendant, Dwayne Green (Mr. Green).

THE NOTICE OF ACTION FOR DEBT

[6] In the Notice of Action for Debt, Ms. Naas is referred to in paras. 5, 21, 22, 23, 25, 26 and 27. The pleading alleges that she, Mr. Green and the second Defendant, Jamaica Vibes Restaurant are "guilty of breach of contract; and/or negligent misrepresentation and/or fraudulent misrepresentation" (para. 27).

[7] Based on the Notice of Action for Debt alone, Ms. Naas would not appear to be "guilty" (the term used in the pleading) of any of the three civil claims. Accordingly, I am left to question the issuance of the default judgment in the first

place. In this regard, although not cited on this motion, I am mindful of Rule 8.06 which reads:

> **When amount is determined by prothonotary**
>
> 8.06 A prothonotary must refer the assessment of the amount of a default judgment to a judge, unless the judgment is sought in an action brought by notice of action for debt, or the pleadings of the party who makes a motion for default judgment provide both of the following:
>
> (a) a claim in the same amount as in the default judgment or a claim for an amount to be calculated in accordance with a formula that leads to the same amount as in the proposed default judgment;
>
> (b) pleaded facts that, taken as admitted, clearly show that the amount is due, such as a liquidated demand pleaded in sufficient detail.

[8] The file discloses that the prothonotary did not refer the assessment of the amount of the default judgment to a judge, presumably because it was determined that the judgment sought in the action was brought by Notice of Action for Debt. While on its face the filed pleading is indeed a Notice of Action for Debt, when one reads the pleading in its entirety, it is clear that the debt was occasioned by Ms. Vaughan loaning Mr. Green $30,000.00 and the two signing the promissory note (exhibit 1) on December 12, 2018. Whereas it is alleged that the terms of the promissory note "have not yet been met", an objective reading of the pleading discloses that it is Mr. Green who is alleged to owe the principal (less $2,750.00 paid by Mr. Green towards the $30,000.00).

[9] In all of the circumstances I am not satisfied that the pleadings of Ms. Vaughan are in keeping with Rule 8.06 *vis-à-vis* Ms. Naas. It is for this reason that I question the issuance of default judgment against her

[10] In *Murphy v. Burke*, 2014 NSSC 359, Justice Moir had cause to review Rule 8.06. His comments at paras. 10 – 12 are of some application here:

> 10 Under the 2008 Rules, a liquidated demand is merely an example of the kind of claim that can be quantified on default without resort to an assessment. The principle is in the broader words, "pleaded facts that, taken as admitted, clearly show that the amount is due".
>
> 11 The pleading for a judgment in a specific amount in each of the three cases ($5,170.53, $19,649.85, and $4,811.93) does not, of itself, clearly show that the amount is due. Rule 8.06(b) requires that the quantification be demonstrated. Nothing has changed in that regard since the 1972 Rules. Merely pleading a specific amount does not assist.

> 12 What unliquidated claims are covered by the new words? I think that the value of the converted automobile in Bennett v. Savory would qualify today. On the other hand, compensation for pain, suffering, and loss of amenities is highly circumstantial, as is loss of profits on injury to a business, and damage to reputation. These are claims the qualification of which requires inquiry into varied circumstances. The value of these claims is too uncertain for any pleadings to "clearly show that the amount is due".

[11] I do not regard the pleaded facts here, taken as admitted, clearly show that $27,250.00 (plus interest and costs) is due from Ms. Naas. Indeed, I am of the view that the claims against Ms. Naas require, in the words of Moir, J., "inquiry into varied circumstances". The value of these claims is too uncertain for any pleadings to "clearly show that the amount is due".

GOVERNING LAW/ANALYSIS

[12] Both parties agree Rule 8.09 governs this application; it reads:

> **Setting aside 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.

[13] Rule 8.10 goes on to note that it is considered an abuse of process to obtain a default judgment without providing "reasonable warning" to another party. Both parties have cited the most recent authority from our Court concerning Rule 8.09, *J.W. Bird and Company Limited v. Allcrete Restoration Limited*, 2019 NSSC 311. At paras. 22 and 23 Justice Brothers sets out the test on a motion to set aside default judgment as follows:

> 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.

[14] In the result, Ms. Naas must demonstrate that she has a fairly arguable defence and a reasonable excuse for the delay.

(1) Does Ms. Naas have a fairly arguable defence?

[15] With respect to this aspect of the test, I refer to para. 24 of *J.W. Bird*:

> 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.

[16] I am satisfied on the basis of the evidence – including cross-examinations, along with the written and oral submissions – that Ms. Naas has a fairly arguable defence. I am of the view that the proposed Defence (attached to Mr. Arsenault's affidavit) is in keeping with what Justice Parker had in mind when he stated " 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". Indeed, given my analysis in the above section, I am of the view Ms. Naas has a very strong defence.

(2) Does Ms. Naas have a reasonable excuse for the delay in filing her defence?

[17] Scrutiny of the affidavits, cross-examination and caselaw is critical to answering the above. In para. 12 of her affidavit Ms. Naas says that her lawyer advised her that Mr. Charles, "denied our request for me to be removed as a Defendant and that we would be filing a Defence". These comments were not challenged on cross-examination and are backed up by Mr. Arsenault's July 2, 2019 letter to Mr. Charles where he writes:

Re: Victoria Vaughan v. Dwayne Green, Jamaica Vibes Restaurant and Lelah Naas
Our Client: Lelah Naas
Our File No.: 24/76,970

Please be advised that we have been retained by Ms. Naas with respect to the above noted matter.

We have now had the opportunity to review your Notice of Action for Debt and Statement of Claim and it is unclear why Ms. Naas was added as a Defendant in this matter. The claims against Ms. Naas are without merit and she should be removed as a Defendant in this proceeding immediately.

Further, your client has been making disparaging comments about Ms. Naas which are also without merit and suggest to me that her inclusion of Ms. Naas in this action is vexatious.

I have had an opportunity to review Ms. Naas' bank records and it is evident that on December 17th, 2018, $30,000.00 was deposited into her account and subsequently withdrawn and provided to Dwayne Green. As far as we understand, Mr. Green is not denying that he received these funds.

Your client does not have a cause of action against Ms. Naas for acting as an intermediary by depositing funds and then providing those same funds to Mr. Green. Whether or not your client failed to perform her due diligence prior to loaning funds to Mr. Green is of no concern to Ms. Naas.

I look forward to receiving an Amended Notice of Action removing Ms. Naas as a Defendant, following which I hereby undertake to produce the bank records which I confirm identifies the $30,000.00 being deposited and subsequently withdrawn and provide to Mr. Green.

Ms. Naas was not a party to any contract with Ms. Vaughan. She had no knowledge or prior relationship to Ms. Vaughan prior to being contacted by her on Facebook messenger and we reiterate that she certainly is not responsible for the repayment of a loan which she had no involvement with.

I look forward to hearing from you at your earliest convenience.

[18] On cross-examination Ms. Naas stated she "absolutely" assumed her lawyer was handling the filing of her defence; "I had it in the trusting hands of my lawyer".

[19] In Ms. Vaughan's affidavit she deposes in paras 27 – 30:

> 27 The Defendant Ms. Naas did not file a Defence to this Action, despite the Defence being due by July 12, 2019.
>
> 28 I understand from my Solicitor, whose information I verily believe, that in late July, 2019, my Solicitor spoke with the Solicitor for the Defendant Lelah Naas. My Solicitor advises me, and I do verily believe, that he informed Ms. Naas' Solicitor that we would not be removing her from the Action and if no Defence was filed I would be seeking Default Judgement.
>
> 29 On August 8, 2019, my Solicitor sent a letter to the Defendant Lelah Naas' Counsel, at my instruction, which indicate that if no Defence was filed by August 14, 2019, we would move forward with our Default Judgment,
>
> 30 After August 14, 2019, when no Defence was filed, I instructed my Solicitor to pursue the Default Judgment.

This evidence was not disturbed on cross-examination.

[20] Counsel were not cross-examined on their affidavits so the Court is left with their uncontested sworn evidence, inclusive of the exhibits. Mr. Charles' August 8, 2019 letter is clear about the ramifications of Ms. Naas failing to file a Defence; it reads:

> **Re: Victoria Vaughan v. Dwayne Green, Jamaica Vibes Restaurant and Lelah Naas**
> **Your Client: Lelah Naas; Your File No. 24/76,970**
> **Hfx No. 488957**
> **Notice of Default Judgment**
>
> Unfortunately, your client has not made payment upon the above noted debt, after our numerous demands for full payment.
>
> Our client is simply looking to be repaid the outstanding amount under the debt.
>
> Your client's deadline for file a Defence of July 12, 2019, has long since expired.
>
> Our client has provided us with instructions to proceed against yours with Default Judgment proceedings.
>
> If we do not receive your client's filed Defence or payment of the outstanding debt in full by 5:00 pm Wednesday, August 14, 2019 we will file for Default Judgment.
>
> We trust our client's position is clear.

[21] Mr. Arsenault acknowledges receiving this letter in para. 8 of his affidavit, which reads:

> Shortly after the aforementioned phone call, I received a letter, via email at 11:33 a.m. from Mr. Charles which stated the Plaintiff would be commencing Default

> Judgment proceedings if a Defence was not filed on or before August 14, 2019.
> …

[22] The remainder of the lawyers' affidavits review their sides of their ongoing contact in the late summer and fall of this year. Further correspondence and emails are appended to their affidavits.

[23] I have carefully reviewed the affidavits and attachments in the wake of Mr. Charles' August 8, 2019 letter. Unfortunately, Mr. Arsenault did not abide by the warning as he should have. Having said this, his failure to file the defence within the deadline is somewhat mitigated by what he says in paras. 7 and 9 of his affidavit:

> 7. On the morning of August 8, 2019, I was contacted via telephone by Mr. Charles during which he courteously explained that he was about to send me a strongly worded letter, as requested by his client. At that time I advised Mr. Charles that I appreciated the courtesy and advised that I did have instructions to file a Defence. We also discussed providing copies of Mr. Naas' banking records.
>
> …
>
> 9. Between August 9th, 2019 and October 17th, 2019, I had multiple phone calls and exchanged various emails with Mr. Charles concerning a separate matter we were working on, but not once was it mentioned that he was or had initiated Default judgment proceedings. In particular, I received emails on the aforementioned separate matter from Mr. Charles on September 3, 2019, September 6, 2019, September 12, 2019, September 20, 2019, September 24, 2019 and October 9, 2019.

[24] In response to the Court's question as to what prompted him to attempt to file the Defence on October 15, Mr. Arsenault responded that he was going to bill Ms. Naas and this led to the realization that he should file the Defence. In any case, I am satisfied that Mr. Arsenault's excuse – in light of what I have characterized as a very strong defence of his client, is satisfactory. In this regard, I am mindful of Justice Warner's comments in *Logic Alliance Inc. v. Jentree Canada Inc.*, 2005 NSSC 2 at paras. 22 – 24 and 33:

> 22 The decisions of the Nova Scotia Court of Appeal in *Temple* and *McAvoy* were both decided on the basis of the second *Ives'* requirement.
>
> 23 In *McAvoy*, the trial judge refused to set aside a default judgment. In setting aside the default judgment, Cromwell J.A., for the Court of Appeal, said at paragraph 7:
>
> > ... the evidence in the record makes out a reasonable excuse. The uncontradicted evidence was that the appellant did not defend because she

> thought she lacked the means to do so and that she formed this view after having received legal advice. Moreover, the allegations in the statement of claim have been consistently denied by the appellant throughout, the delay between entry of the judgment and communication by the appellant to respondent's counsel that she had new counsel and wished to set aside the judgment and defend was only a matter of two months, and there is no evidence of any prejudice to the respondent that cannot be compensated by costs.
>
> 24 In *Temple*, the Court of Appeal overturned the refusal of a Chambers judge to set aside a default judgment. The insurer for the defendant had by inadvertence failed to defend the claim even though it had an intent throughout to do so.
>
> …
>
> 33 In *Temple*, Saunders, J.A., flirted with - but eventually rejected - the defendant's argument that, where a fairly arguable defence exists, the Court ought not waste time weighing the degree of blame of the respective parties (that is, the reasonableness of the excuse). He did state that the two Ives' requirements need not be given equal weight. I interpret that to mean that if in a particular case the defence is very strong, that a lesser but still reasonable excuse might suffice to justify setting aside a default judgment.

[25] To the above I would insert my observations regarding the questionableness of the issuance of the Default Judgment in the first place. Finally, I am mindful of our Court of Appeal's comments in *Royal Canadian Legion v. Norman*, 1996 NSCA 224 and Justice Bateman's words at paras. 5 and 6:

> 5 In dismissing the application the Chambers judge stated that, while there was a substantial issue to be tried, he was not satisfied that a reasonable excuse had been shown for the delay. He found that the adjuster "knew about the importance of time limits and . . . was careless in not contacting [counsel] earlier".
>
> 6 Taking into account the gravity of the consequences of the order of the Chambers judge, in that it finally disposed of the rights of the parties, we are satisfied that he failed to give proper weight to the evidence that the adjuster had made a genuine, albeit unsuccessful, effort to have a defence filed. The appellant's counsel acted promptly in contacting the respondent, resulting in a very minor delay. In the circumstances, we are satisfied that the appellant did present a reasonable excuse for the failure to file the defence.

[26] In all of the circumstances I am of the view that Ms. Naas must not be denied her right to defend this matter on the basis of a two month delay in the attempted filing of her Defence. Accordingly, the default judgment entered by the Prothonotary is hereby set aside. Within ten days from the date of this decision,

Ms. Naas shall enter a Defence. In this situation I decline to award costs on the motion.

Chipman, J.