

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
CITE AS: Consumer Impact Marketing Ltd. v. Rzepus, 2003 NSSM 9

BETWEEN:

Name Consumer Impact Marketing Limited Applicant

Name Shelley Dawn Rzepus Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

DECISION

Appearances:

Joseph F. Burke on behalf of the Defendant/Applicant;
Stephen G. Zatzman, on behalf of the Claimant/Respondent.

- [1] This Application, made by the Defendant for an Order to set aside my Order dated July 15, 2003 came on before me on September 9, 2003.
- [2] On the Application I heard the submissions of Mr. Burke on behalf of the Defendant/Applicant. I also reviewed an Affidavit of Michèle Hodgkinson, sworn, at Toronto on September 9, 2003, (which was entered as Exhibit C-1) in support of the Application; and the submissions of Mr. Zatzman who opposed the Application.
- [3] For reasons set out below, I deny the Application.

THE BACKGROUND FACTS

- [4] The Claimant was dismissed from her employment with the Defendant on or about June 27, 2002.
- [5] On April 10, 2003 she commenced a claim in the Halifax Small Claims Court for \$10,000 against the Defendant for wrongful dismissal. The Court Clerk assigned a hearing date of July 8, 2003 and inserted that date on the Notice of Claim.
- [6] The Defendant is a company whose head office is located in Ontario. Its registered agent is Maurice Chiasson, a solicitor in Halifax.
- [7] Mr. Chiasson, as registered agent, was served with the Notice of Claim on April 11, 2003. Mr. Burke properly concedes that service on Mr. Chiasson was service on the Defendant.
- [8] Mr. Chiasson forwarded the Notice of Claim to the Defendant's Ontario counsel, the firm Waterous, Holden, Amey Hitchon; Exhibit C-1, para. 9.
- [9] In his covering letter Mr. Chiasson stated as follows:
- "I was served today in my capacity as recognized agent for Consumer Impact Marketing Limited [the Defendant] in the province of Nova Scotia with the attached Notice and Statement of Claim. I note the hearing has been scheduled for July 8, 2003. If I can be of any assistance in this matter please let me know."
- [10] There is no evidence that Mr. Chiasson did anything else. He does not appear to have diarized the date, nor to have followed up with the Ontario counsel to ensure that the matter was being dealt with, or had not gotten lost in the mix of business.
- [11] The Ontario solicitors received the Notice and forwarded it to Hesham Shafie, an employee of the Defendant, on April 14, 2003. The cover letter states as follows:
- "Please find attached herewith a letter from CIM's agent for service in the province of Nova Scotia and a Statement of Claim which was served upon them. Please contact the writer directly to discuss same."

[12] As in the case of Mr. Chiasson, there is no evidence that Ontario counsel diarized the date of the hearing; or took any follow-up steps to ensure that the matter was being dealt with.

[13] The matter appears to have ended up on the desk of Ms. Hodgkinson, the Director of Human Resources for the Defendant, on or about April 17, 2003 because on that date she says that she wrote to Kevin Davis of the Ontario firm, attaching the Notice of Claim. Her cover letter states in part as follows:

“Attached please find a Statement of Claim which we just received (April 14th) regarding a terminated employee, Shelley Rzepus...It looks like we need to respond to the Claim within 10 days. I am looking for your guidance on responding to this Claim and will ask you to handle this response directly...As usual, please contact me if you need additional information. I look forward to receiving your guidance.”

[14] Ms. Hodgkinson deposes that after she sent the letter she “felt no need to be directly involved in the process, and expected that Mr. Davis [Ontario counsel] would contact me if he required additional information. I accordingly did not follow up on the matter:” Exhibit C-1, para. 12.

[15] Ms. Hodgkinson goes on to depose that she had subsequently been advised by her Ontario counsel that they “have no record of receiving my fax of April 17, 2003 and accordingly did not act on the instructions contained therein. Unfortunately CIM can provide no explanation as to why our instructions were not received:” Exhibit C-1, para. 13.

[16] It is unclear from this evidence whether:

- a. Ms. Hodgkinson arranged for the fax but it did not, in fact, get out of her office; or
- b. it went to the wrong fax address; or
- c. it came into the Ontario counsel’s office, but was lost somewhere between the fax machine and the solicitor Ms. Hodgkinson wanted to handle the matter.

[17] I pause here to note that, even though Ms. Hodgkinson knew that a defence was required within ten days, and that the hearing was scheduled for July 8, 2003, she appears to have made no effort to ensure that her faxed instructions got to counsel;

or to follow up to ensure that counsel were, in fact, going to be filing a defence or appearing to defend. In this she appears to have acted no differently than the registered agent or her Ontario counsel

- [18] The matter came on before me on July 8, 2003 in due course. Since the claim was for lack of notice following termination, I heard evidence as to the Claimant's years of employment with the company; her remuneration; her experience and work; and her efforts to mitigate by finding a new job. Following consideration of such evidence, I arrived at a figure of \$6,165.85. She was not awarded what she had asked for but rather what, on the evidence, was considered to be reasonable notice.
- [19] My Order was issued July 15, 2003, and shortly thereafter came to the attention of the Defendant, hence this application.

THE APPLICATION TO SET ASIDE

- [20] At the outset of the Application there was some issue as to which provision of the *Small Claim Court Act* applied: s. 23(2) or s. 23(3).
- [21] Section 23(2) applies in a case where a defendant has not filed a defence (which is the case here); s. 23(3) applies where the defendant has filed a defence but does not appear at the hearing.
- [22] On the face of it, s. 23(2) would appear to be the applicable section because there was no defence filed in this case.
- [23] Accepting that premise, Mr. Zatzman then argued that I had no jurisdiction to set aside the Default Order under s. 23(2) because it applied only where the adjudicator had made a decision "without a hearing."
- [24] I do not agree.
- [25] In my view, s. 23(1) of the *Act* merely permits applications for quick judgment in the absence of a defence. That is, where no defence is filed, an adjudicator "may, without a hearing, make an order against the defendant:" s. 23(1). That does not mean that an adjudicator may not make a similar order where he or she has elected to have a hearing in a case where a defendant has not filed a defence.

- [26] In my view, adjudicators are required to consider some evidence, especially in cases such as wrongful dismissal, in order to come to a fair and reasonable determination as to the claim.
- [27] I am accordingly satisfied that my jurisdiction to set aside my Order flows from s. 23 (2) of the *Act*, which provides an adjudicator with the discretion to set aside an order where 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 reasonable delay after learning of the order.”
- [28] I am satisfied that the Defendant did appear “without reasonable delay.” The issue here is whether the Defendant has a “reasonable excuse for failing to file a defence.”
- [29] Before proceeding, I should note that I do not believe that an adjudicator has the discretion to consider on such an Application whether or not the Defendant has a potential or arguable defence. The Small Claims Court is a statutory Court and the adjudicator draws his or her power and authority from the *Act* which must be construed strictly.
- [30] Accordingly, the only issue here is whether the Defendant has “a reasonable excuse” and, in my view, it does not.
- [31] In this regard I note that there was no evidence that any representative of the Defendant did anything but move the matter off their desk on to someone else’s. No one followed up; no one diarized the hearing. While service of the claim was effected on April 11, 2003 when it was served on Mr. Chiasson, neither he nor anyone else made any apparent effort to ensure that a defence was entered; or that anyone was actually dealing with the matter. All that the various people did was forward the Notice to someone else. No one “took ownership” of the need to respond in any meaningful way to the fact that a claim for \$10,000 had been filed against the Defendant.

- [32] In my view, the Defendant's basic "excuse" boils down to a statement that it "forgot" about the matter. However, to "forget" a claim is not a "reasonable excuse:" see *McLaughlin v. Boudreau Auto (1986) Limited* (1994), 150 N.B.R. (2d) 96; *Anwyll-Fogo Architects Ltd. v. Hage* (1992), 116 N.S.R. (2d) 371 at para 22.
- [33] The purpose of the Small Claims Court is to adjudicate claims "informally and inexpensively but in accordance with established principles of law and natural justice:" (s. 2 *Small Claims Court Act*). In my view that purpose is not served by permitting a defendant to act (or, in this case, fail to act) without any regard for the consequences of failing to make any effort to ensure that a claim is properly handled; and, in particular, that a defence is in fact filed and mounted.
- [34] The Claimant in this case attended with a lawyer. She took the time and incurred the expense (expense which is not recoverable in the Small Claims Court) of marshalling her evidence and presenting her claim. The Defendant did nothing other than pass the matter along. In my view, if I were to hold that such lack of action was a "reasonable excuse" it would encourage lax practices on the part of defendants; which in turn would add delay and expense to a claimant who had followed all of the rules expected of him or her.
- [35] Accordingly, I decline to exercise my discretion to set aside my Order and I accordingly dismiss the Application. My Order of July 15, 2003 accordingly stands.

Dated at Halifax, Nova Scotia this
24th day of September, 2003

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ADJUDICATOR

W. Augustus Richardson

Original Court File
Copy Claimant(s)
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