IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Wagner v. East Coast Paving Ltd., 2010 NSSM 63

2010 Claim No. 332612

BETWEEN:

Name: **Troy and Tracy Wagner** **Claimants**

- and -

Name: **East Coast Paving Limited** **Defendant**

Appearances:
Troy and Tracy Wagner -Claimant/Respondent
James MacNeil, Barrister and Solicitor - Defendant/Applicant

DECISION

[1] This is an application pursuant to Section 23(2) of the Nova Scotia *Small Claims Court Act* - an application to set aside a quick judgment.

[2] The matter was heard on September 7, 2010. Kris Martin, the President, gave evidence for the Defendant. Submissions were made at that time on behalf of both parties. As, well, further written submissions were made to consider the potential application of the recent case of ***George L. Mitchell Electrical v. Rouvalis***, 2010 NSSC 203, issued May 26, 2010.

Background

[3] The background facts relevant to this application are as follows.

[4] The Notice of Claim was filed on July 20, 2010, and served on July 27, 2010. On the Notice of Claim it is indicated that the hearing of the claim was set for August 31st, 2010.

[5] About halfway down on the first page of the Notice of Claim form there is a box containing the following:

> ***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 file a Defence/Counterclaim by filling in the lower half of this form and returning it to the court. You are also required to serve the Defence/Counterclaim upon the Claimant*
> *2.* ***If you do not file your Defence/Counterclaim by returning this form to court within 10 days after you receive this claim, the court may make an order against you without hearing from you.***
> *Read the "Additional information for defendant" with this form*

[6] The reference to 10 days on the form is in fact incorrect. The Regulation (Section 5) was revised in 2006 to extend that time period to 20 days. In all events, no defence was filed with the requisite 20 day period which would have expired on August 16, 2010. An Application for Quick Judgment (Form 6) was filed on August 17 and on August 18th, a quick judgment was granted on the basis of the written material filed with the application.

[7] This application to set aside the quick judgment was filed on August 24, 2010, and came before me on September 7th, 2010.

Legislative Provisions

[8] The applicable provisions in the *Small Claims Court Act* are Section 23(1) and (2) which read as follows:

> ***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.*

Positions of Parties

[9] Counsel for applicant submits that there clearly was an intention to defend this claim as demonstrated by Ms. Martin's evidence and the running file from the Better Business Bureau which shows that the Defendant disputed the claim and has maintained its own position throughout. It is asserted that the representative of the Defendant had some confusion as to whether she was required to file a defence but, most importantly testified that she always intended on attending the scheduled August 31st hearing date to defend the matter.

[10] It is further stated that the evidence of the ongoing communications through the Better Business Bureau clearly show that the Defendant was disputing the claim and that there were numerous disputed facts in issue.

[11] The Defendant also argues that the evidence shows that the Defendant was a self-represented litigant who simply did not understand that she was required to file a document defending the matter. Her clear evidence was that she intended to defend and to be present on August 31st. It is said that unlike the *Mitchell* case, in this case the Defendant does provide ancillary reasons for not filing a defence.

[12] The Defendant says that this case is distinguishable from the *Mitchell* case and in summarizing its position says:

> -That they were confused as to whether a written Defence was required.
> -There was always an intention to defend and there are numerous arguable facts.
> -The Better Business Bureau evidence supports East Coast Paving Limited's position.
> -They acted extremely quickly and without any delay whatsoever in applying to set aside the Quick Judgement (a fact specifically not found in the *Mitchell* case).

[13] The Defendant says the *Mitchell* case indicates that there must be a <u>reasonable</u> excuse for failure to file a defence, not just any excuse, and it is said that the present application is based on a reasonable excuse.

[14] In response the Claimants state the test of the *Mitchell* case is that of a "reasonable excuse" and that if the excuse here is that the Defendant did not know that she had to file a defence in the face of the information on the claim form, then it would seem that any excuse will do.

Analysis

[15] In *Mitchell,* Justice LeBlanc stated:

> *[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.*
>
> [Emphasis supplied]

[16] As noted, Justice LeBlanc makes it clear that in order to avail itself of s. 23, a Defendant must provide some evidence showing it had a reasonable excuse for not filing a defence. Not any excuse but a reasonable excuse.

[17] It is true and I so find that in this present case that the evidence is more compelling than in the *Mitchell* case in showing that there was an intention to defend, which I take to mean to show up at the originally scheduled hearing date and defend the claim. As well, the Defendant here acted extremely quickly in coming forward to make this application.

[18] However, the intention to defend is not, in and of itself, the issue. Rather, the issue is whether there is shown to be a reasonable excuse for not filing a defence. Here, the excuse being offered is that the Defendant representative was "confused " or did not know that she was required to file a written defence. There is no "ancillary" or other independent reason offered for why the instructions on the form were not followed.

[19] With respect, I cannot find that the evidence here satisfies the requirement that there be a reasonable excuse for failing to file a defence.

[20] There are in fact really just the two statutory factors that must be met in order to set aside a quick judgment - *(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*. Both factors must be met.

[21] There is no question but that the second test has been met.

[22] But as I have said, I do not see that the evidence here - that she was confused or didn't know that she was required to file defence - is any different than what was the case in the *Mitchell* case. As I read that case, Justice LeBlanc is saying that there must be something more than mere confusion, or failure to read further to get it up to the level of "reasonable" excuse. He seems to suggest that there must be something in addition to, or to use his word, "ancillary" to, the form itself and the defendant merely saying "I didn't know I had to file a defence". The evidence here does not take it to the level of being a "reasonable excuse"

[23] The analogy from the Supreme Court would be applications to set aside default orders where the test has been, first, that the applicant must show there is a fairly arguable defence or a serious issue to be tried and second, that there is a reasonable excuse for not filing a defence (***Dunham-Thompson v. Mahone Bay (Town of) et al*** (1996), 154 N.S.R. (2d) 108).

[24] In ***Scandsea Canada Ltd. v. Emberley's Transport Ltd.***, 1999 NSSC, 178 N.S.R. (2d) 134 the Court accepted the Defendant's contention - that it was

preparing an application to strike and did not want to be seen as having attorned to the jurisdiction of the Nova Scotia Court - and found it to be a reasonable or satisfactory excuse for not filing a defence.

[25] In ***Credit Union Atlantic Ltd. v. McAvoy***, 2002 NSCA, 145, 210 N.S.R. (2d) 207,the Court of Appeal found that the default order should have set aside and refers to these facts (para 7):

> *In my opinion, 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***.**

[26] These are but two cases which provide examples of what might be seen as a reasonable excuse for failure to file a defence. There are many other conceivable circumstances that will constitute a reasonable excuse.

[27] For the above reasons, I dismiss the application pursuant to Section 23 and confirm my original order of August 18, 2010.

DATED at Halifax, Nova Scotia, this 28th day of October, 2010.

Michael J. O'Hara
Adjudicator