

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Stewart v. MacAloney*, 2019 NSSM 46

Date: 20190925

Claim: No. SCP 330331

Registry: Pictou

Between:

Jason Stewart

CLAIMANT

And

Kenneth MacAloney

DEFENDANT

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: September 25, 2019, in Pictou, Nova Scotia

Counsel: none

Balmanoukian, Adjudicator:

[1] This is an *ex parte* application to renew an execution order, originally issued May 18, 2011. These orders are valid for six years from judgment, pursuant to Form 11 under the Small Claims Court Forms and Procedures Regulations. It thus expired on May 18, 2017. The application was made on or about August 26, 2019.

[2] There is no provision in either the Small Claims Court Act, or the aforementioned regulations, for renewing an execution order. I am advised that, on *ex parte* application, this Court has done so because “that’s how it’s been done.”

[3] If that stasis permeated the law, this decision would be written in cuneiform.

[4] Instead, I am guided by the wisdom of the late Justice John Murphy, who in *Malloy v. Atton*, 2004 NSSC 110 stated (at para. 14) that the Civil Procedure Rules, “although not directly applicable in Small Claims Court, may be consulted for guidance in the absence of an applicable Small Claims Rule.”

[5] Justice MacDougall similarly stated, in *Brown v. Newton*, 2009 NSSC 388 at Para. 27:

Unless there is an express provision in the Act or the Regulations to the contrary the Civil Procedure Rules, although adopted for use in the Supreme Court of Nova Scotia, may be used for guidance or even direction on

procedural issues which is in keeping with the stated purpose of the Act referred to earlier.

[6] So what is that “guidance or even direction?”

[7] Civil Procedure Rule 79.05 requires leave of the Court, by motion, for an execution order that is more than five years after the judgment. That motion for permission may be made *ex parte* (Rule 79.05(4)).

[8] In my view, the motion to this Court should thus not be a motion for renewal by the Court, but a motion for permission to seek a new execution order from the Clerk of the Court.

[9] This is particularly so when the existing execution order is expired.

[10] A better practice, in my opinion, would be for an unpaid creditor to seek an execution order before the expiry of the five year period, notwithstanding that the execution order in this Court is valid for six years. However, if it does go beyond the five year mark, the litigant’s request of the Court should not be a renewal or new execution order, but instead should be a request for leave to obtain such an order from the Clerk.

[11] I therefore treat this “application to renew” as a motion for leave; although the application as framed is wanting in its nuances, it is a primary function of this Court to look to substance over form.

[12] To reiterate and summarize, in my view the proper procedure is not to ask an Adjudicator to renew the execution order, which is a matter of enforcement rather than of disposition on the merits; the proper procedure is to ask the Adjudicator, *ex parte*, for leave (if the execution order sought is more than five years post-judgment); and if granted, the Clerk of the Court should be the person who issues the new, renewed, or re-issued Order.

[13] I grant that leave, and direct the Clerk to issue an execution order in this matter in Form 11.

Balmanoukian, Adj.