IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Muise v. MJM Energy Ltd*., 2019 NSSM 60

Claim: SCY No. 489596
Registry: Yarmouth

Between:

Shana Muise

CLAIMANT

-and-

MJM Energy Ltd.

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: November 21, 2019

Decision: November 26, 2019

Appearances: The Claimant, Nathan A. McLean
The Defendant, Alexander L. Pink

DECISION

Facts

This an application to set aside a Quick Judgment granted by me on September 12, 2019 pursuant to Section 23 (2) of the Small Claims Court Act.

The following is a summary of the facts that were agreed by Counsel as being accurate and adequate to form the factual basis of my ruling. No oral evidence was called.

1. The Claimant, Shana Muise, filed a Notice of Claim against the Defendant,

MJM Energy Ltd., on June 27, 2019.

2. The Notice of Claim was served on July 12, 2019.

3. The Notice of Claim set September 12th, 2019 at 5 p.m. at the Yarmouth Justice Centre as the appearance date.

4. On September 12th, 2019 at approximately 4 p.m. Gary Ferguson ("Ferguson"), an employee of the Defendant, traveled from Halifax, Nova Scotia and attended the law offices of Pink Star Barro in Yarmouth . Ferguson does not have an appointment but is able to briefly see Philip J. Star, Q.C.

5. After a brief consultation with Mr. Star, Q.C., on the same date, Ferguson attends the Yarmouth Justice Centre for what he believed would be the hearing. It was Ferguson's intention to seek an adjournment based on the advice of Mr. Star, Q.C., and to allow MJM to formally obtain legal counsel.

6. Ferguson is advised by me, sitting as the Adjudicator on September 12, 2019 that MJM would have to make an Application to Set Aside Quick Judgement as no defence had been filed and an Order dated September 11th, 2019 granting Quick Judgement was issued.

In oral argument, Mr. Pink acknowledged that the Defendant had not taken any steps to obtain counsel or to file a defence between the date of service and September 12, 2019.

Issues

The parties agree that I am the adjudicator who made the decision on the Quick Judgment, the Defendant brought this application without unreasonable delay, and there would have been an arguable defence. The issue I must decide is whether the Defendant has "a reasonable excuse for failing to file a defence within the time required".

Analysis

Counsel referred to my decision *Wilson Equipment Ltd. v. Simpson*, 2018 NSSM 16, [2018] N.S.J. No. 139**,** in the cases cited therein. I was also referred to *D 'Arcy v. McCarthy Roofing Ltd.*, 2015 NSSM 6, [2015] N.S.J. No. 104, *Wagner v. East Coast Paving Ltd.*, 2010 NSSM 63, [2010] N.S.J. No. 573, which are two decisions of my fellow adjudicator O'Hara which I had not considered in the Wilson ruling. Although I have some sympathy for Mr. Pink's position regarding the form of the Notice of Claim as I stated in Wilson, I also made it clear in my Wilson decision that I consider myself bound by the ruling of Justice LeBlanc in *George L. Mitchell Electrical v. Rouvalis*, 2010 NSSC 203.

Mr. Pink pointed out my comment in the Wilson case where I had expressed concerns about the form of the notice of claim and whether it adequately brought home to a defendant the necessity of filing a defence. In *Mitchell Electrical* Justice LeBlanc stated as follows:

> [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."

I still consider myself bound by this precedent.

This case is clearly distinguishable from *Wilson* on the facts. In *Wilson* definite steps were clearly taken to obtain counsel and to arrange for a defence to be filed. In this case I have no evidence that any consideration of the defence of this case was taken by the defendant. I have no evidence that any steps whatsoever were taken by the defendant until the day of first appearance.

I also consider that I am bound by the guidance given by Justice Van den Eynden in *Strait Excavating v. LeFrank*, 2013 NSSC 420 :

> [35) Although Small Claims Court Hearings are intended to be accessible to the parties and informal, parties need to be reasonably diligent, mindful and respectful of the process. Otherwise the integrity of and respect for the process is undermined. Justice does not require the Court to exercise its discretion and set aside the order and permit a new hearing in these circumstances.
>
> *[My emphasis]*

I do not find that the defendant was disrespectful of the process, but, given the fact that there is no evidence of any action whatsoever on the part of the defendant between the time of service and the date set for appearance, I can come to no other conclusion than the defendant was not "reasonably diligent or mindful" of the process.

The conclusion that I have reached is also consistent with the decisions of adjudicator O'Hara cited above. I acknowledge I am not bound by those decisions, but I do find them to have persuasive value.

Therefore, on the facts of this case, I conclude that the words of Section 23 (2) of the *Small Claims Court Act* and the precedents considering that section, the applicant cannot, in law, prevail. I therefore dismiss the application.

I thank counsel for their helpful briefs and presentation of their oral arguments.

Dated at Yarmouth, Nova Scotia, this 26th day of November, 2019.

Andrew S. Nickerson Q.C., Adjudicator