IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Woods v. Smeltzer*, 2020 NSSM 21

Claim: SCY No. 491940

Registry: Yarmouth

Between:

GARY WOODS and WENDY WOODS

CLAIMANT (RESPONDENT)

-and-

BRENDA A. SMELTZER

DEFENDANT (APPLICANT)

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: October 15, 2020

Decision: October 19, 2020

Appearances: The Claimants, self-represented
Solange Boudreau, for the Defendant,

DECISION

(on application to set aside judgment)

Facts

[1] This is an application to set aside a judgement granted by me in open court on October 17, 2019. No defence had been filed. On that date I heard the Claimant, Gary Woods, by way of viva voce evidence. On that date I did note that the affidavit of service did not appear to be complete and so I took viva voce evidence from Mr. Gary Woods with as to that. Although my questioning in that regard was not extensive, he did verify under oath that he had presented the claim to the Defendant and advised her that it was a claim in the Small Claims Court. He testified at that time that the Defendant had refused to accept the papers in her hand. Mr. Woods did offer to show me a video, but I was satisfied on the basis of his viva voce evidence service had occurred and I did not review it.

[2] At the hearing of this motion the Defendant testified that around September 20, 2019, she had received messages from someone wishing to see a house. She did arrive and entered into the house with the gentleman but sensed that something was amiss, as the gentleman did not appear particularly interested in looking at the house in detail. Mr. Woods then appeared in the house. She says that she felt panicked and trapped and "had to get out of there". She denies that she saw any documents or papers. She went outside and called the RCMP who apparently eventually arrived, but when they did Mr. Woods was not there.

[3] She says that the first notice of this proceeding she had was when funds were taken out of a bank account that she held jointly with her son. She was not clear as to the date of this but suggested it was after when the Covid restrictions were imposed in March 2020.

[4] Mr. Gary Woods testified that he had messaged Ms. Smeltzer via Facebook messenger prior to September 20, 2019 indicating to her that he was intending to proceed with Small Claims Court action against her. He says that he could see from the Facebook messenger program that Ms. Smeltzer had read that text message. He states that he then did arrange for a person to contact Ms. Smeltzer to view the house as a pretext to get Ms. Smeltzer to the house so that he could serve her. He says on September 20, 2019 he attended at the house when Ms. Smeltzer was there. He says that he approached her with

the Small Claims Court claim in his hand and attempted to pass it to her, saying “this is for you”. She refused. He says he held the papers out to her and told her that it was a Small Claims Court claim. When she still declined to take the documents, he then dropped the papers in front of her feet and left. Mr. Woods testified that he had video of the service event and had offered that to me at the initial hearing.

[5] Clarence Butler testified on behalf of the Claimant. He stated that he had been contacted by Mr. Woods for the purpose of arranging to meet Ms. Smeltzer at the house so that the Small Claims Court claim could be served. He made those arrangements. On September 20, 2019 he and Ms. Smeltzer entered the house and then Gary Woods came in. He says that he saw Mr. Woods offer documents to Ms. Smeltzer and state “these are for you”. He states that Mr. Woods left the papers on the floor about 5 or 8 feet in front of Ms. Smeltzer.

[6] Anne Dugas, Leo Leroy and Gerald Comeau testified that they had seen the video referred to by Mr. Woods. I was not impressed with the quality of the evidence given by those witnesses and I decline to place much in the way of reliance on their evidence.

[7] Wendy Woods testified she was not there when service took place. She stated that earlier in 2019 she had had several conversations with the lawyer, who had previously represented the Defendant, with a view to negotiating a settlement, but that he reported to her that had been unable to contact the Defendant after many attempts. Her evidence was that in January or February of 2020 money had been taken out of some account belonging to the Defendant by the Sheriff's Office as a result of an execution order. She also testified that there was a second amount taken out of some account. She testified that they had received two partial payments through the Sheriff's prior to any indication that this application would be made.

Analysis

[8] In order to set aside this judgement, I have concluded I must be satisfied that the Defendant has a reasonable excuse for not filing a defence or attending the initial hearing, and that she has an arguable defence. I conclude this even though Section 23 of the *Small Claims Court Act* does not specifically cover this situation, as subsection 2 deals with when no defence has been filed and a judgment granted without a hearing (quick judgement), and subsection 3 deals with where a defence has been filed but the

Defendant does not appear at trial. I come to this conclusion because, in my view, the law must be consistent with the situations set out in the *Small Claims Court Act* and consistent with the general law applied by superior courts with respect to default judgements.

[9] This decision will focus on the first branch of that test. Essentially, I must first decide whether or not proper service was effected in the first place. If she was in fact served on September 20, 2019, it would be impossible for me to conclude that she had a reasonable excuse for not responding to the claim.

[10] This requires me to determine what actually constitutes "personal service".

[11] In ***Re Avery,* [1952] O.R. 192,** the Ontario Court of Appeal adopted these passages:

> In *Thomson v. Pheney* (1832), 1 Dowl. 441 , the matter of personal service upon a defendant was in issue. It was said that whether the party touches him or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be where you see a person and bring the process to his notice.
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> In *Rose v. Kempthorne* (1910), 103 L.T. 730, Lord Alverstone C.J. considered the question of how personal service might properly be made . The appellant, in attempting to serve an order for discovery personally, endeavored to place the document in the fold of the respondent's coat. The Chief Justice said: "It was equivalent to doing that which Mr. Dodson admitted would be good -- namely placing the document on the respondent's shoulder." The object of personal service is to afford the defendant notice of the writ or process.

[12] In ***Sayazie v Bigeye*, 2011 SKQB 145,** Justice Rothery stated:

> [10] The law is clear that the defendant need not know the general nature of the claim advanced against him for personal service on him to be valid. As stated in *Re Avery,* quoted with approval in both *Bradbrooke, supra,* and *La Coste, supra,* personal service is effected by delivering the document into the defendant's hands, which is what happened to Bigeye. Bigeye's statement that he would not accept the envelope unless Tanya Nilghe (the chief electoral officer) explained the contents to him and returned the unopened envelope to Donny Robillard does not change matters. Bigeye was given the opportunity to determine what was in the envelope; he chose not to. Refusal to enquire as to what the documents may be is not a basis to invalidate what

> otherwise constitutes valid personal service. The application to set aside the interlocutory injunction on the basis of invalid personal service is dismissed.

[13] I therefore conclude that it is not necessary that the Defendant accept or receive the actual document, nor is it necessary that the Defendant actually read the document, or even know the exact nature of the claim. The logical corollary, is that a Defendant cannot claim that personal service was not effected merely by refusal of the Defendant to take documents passed to her or left at her feet. If every Defendant could evade service simply by that kind of action, then it would be virtually impossible to serve anyone.

[14] The evidence given is conflicting. I adopt the analysis of Justice Stewart in **Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253** as a correct statement of the law that I must apply:

> **[20]** ***Credibility.*** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, that "[a]ssessing credibility is not a science" and that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" *(Gagnon* at para. 20, cited in *R.E.M* at para . 28). The Chief Justice went on to say, at para. 49:
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> > While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization
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> [21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para. 11:
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> > The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and

> informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.
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> For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

> [21] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all" : *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel's submissions and the relevant law.

[15] I am not completely sure that either side presented evidence that sets out an exact narrative of the events that occurred. It is well known law that, as a trier of fact, I can accept all, none or parts of what any witness says. My task is to determine the facts on the basis of what I determine to be most logically probable. This is not always an easy task and it is not so in this particular case. Therefore, my findings of fact are the conclusions I have reached are based on my assessment of the evidence, considering what is logically probable, and keeping in mind the guidance provided by Justice Stewart. I have kept in mind that I must assess the whole of the evidence taken together.

[16] Mr. Woods gave a fairly detailed description of what he says occurred. Although I cannot remember the exact details of his evidence at the initial hearing, my recollection is that his present evidence is consistent with what he told me at the initial hearing regarding service. Clarence Butler corroborated Mr. Woods' evidence in the material particulars. I acknowledge that there is some danger that Mr. Woods' discussions with Mr. Butler prior to his evidence may have coloured Mr. Butler's evidence, and that he may well have a personal relationship with Mr. Woods that would bias him in Mr. Woods favour. However as to the essential elements that the Claimant and Defendant were together and that papers were presented and then left on the floor, I accept the essence of his evidence. Applying the balance of probabilities, I am satisfied of those essential elements. As indicated above, I will not rely on the other evidence as to the events presented by the Claimant.

[17] Even the Defendant acknowledged she was present with Mr. Gary Woods at the same time on the same occasion. That is not contested. There was no evidence to suggest that Mr. Woods would have been at that location for any purpose other than to deliver the claim. The Defendant's evidence that the person she was showing the house to didn't seem to show much interest in the house, is consistent with Mr. Woods evidence that he arranged for the showing of the house so that he would be able to serve the Defendant. I do not find that the evidence reveals any conduct that would indicate that the Defendant was threatened or intimidated in any way by Mr. Woods. I find that the Defendant's evidence that she panicked, may well cloud her recollection of the events in regards to not seeing papers. On the other hand, it may well be that she was being wilfully blind.

[18] Thus, on the balance of probabilities, I conclude that the Defendant was personally served on September 20, 2019. To paraphrase **Avery,** Mr. Woods saw her and brought the fact that there was a claim to her attention. In accordance with **Sayazie v Bigeye,** whether she knew the exact nature of the claim, or whether she chose to look at it, does not invalidate personal service.

[19] Based on those findings, the Defendant had from September of 2019 to respond to the claim or at least inquire of the Claimant or the Court about it. I am unable to conclude that she has a "reasonable excuse" for not filing a Defence or appearing at court on the scheduled hearing date.

[20] In addition, even if I had accepted the Defendant's position, there is the question of when the judgement and execution order first came to the attention of the Defendant and whether or not she acted expeditiously thereafter. I will not address this issue as it is not essential to my decision due to the findings that I have made with respect to the service issue.

[21] Likewise, I will not address the question of an arguable defence , for the same reason; namely that my prior findings are dispositive of the case.

[22] In general, I favour allowing a hearing on the merits *(see my decision in* ***Wilson Equipment Limited v. Simpson, 2018 NSSM 16),*** but I am bound to apply the law, balance the competing interests of parties, and be ever mindful of the precedents that the Supreme Court has provided. In **Strait Excavating v. LeFrank, 2013 NSSC 420,** Justice Van den Eynden gave the following guidance to litigants and adjudicators:

> [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.

[23] In the result, the application is dismissed.

Dated at Yarmouth this 19th day of October.

Andrew S. Nickerson Q.C., Adjudicator