

## IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Pike v. Simms, 2014 NSSM 55

Claim No: SCCH 426059

### BETWEEN:

Name      Paul Pike      **Claimant**

Name      Myles Simms      **Defendant**

Editorial Notice: Addresses and phone numbers have been removed from this electronic version of the judgment.

Paul Pike – Self Represented

Myles Simms – Self Represented

### DECISION

This is an application by the Defendant, Myles Simms, to set aside an order of this Court dated May 23, 2014, where I entered judgment for the Claimant, Paul Pike. The Defendant did not appear at that hearing. Both parties appeared for the hearing of this application.

#### **Documentation on File**

I have summarized below the salient points, much of which can be gleaned from the court file.

- The Claimant filed a Notice of Claim dated April 7, 2014 for \$1600 plus interest and costs. A hearing was scheduled in the Halifax Provincial Court building on May 22, 2014 at 6:00 pm.
- An Affidavit of Service sworn by Sara Nordquist was filed April 30, 2014, swearing that she served Mr. Simms personally and left a true copy of the Notice of Claim with him on

April 27, 2014.

- No Defence has ever been filed by Myles Simms.

## **Order for Judgment and Application**

The Claimant, Paul Pike, appeared in Court before me on May 22, 2014. Mr. Simms was called by the Sheriff and court staff but he did not appear. The matter was held in his absence. Mr. Pike was sworn and gave evidence. I found Mr. Pike had proven his claim for drafting work for Mr. Simms and he was not paid for his services. Based on the evidence presented, I found he had proven his case for a breach of contract on the balance of probabilities and entered judgment. The judgment was for \$1819.80, consisting of \$1600 for the original claim, \$48.00 prejudgment interest and \$171.80 in costs. An order under Form 7(a) of the Regulations dated May 23, 2014 was signed and filed with the Court.

The following documents have been filed since the Order:

- A document entitled "Enforcement of Small Claims Court Order", a form created by Small Claims Court staff for the general use of litigants. It was completed by Mr. Pike and dated June 18, 2014 where he indicated he was seeking an Execution Order;
- An execution order issued June 25, 2014;
- An Application to Set Aside dated September 30, 2014. This is another form created by Court staff. It was completed by Mr. Simms.

## **The Evidence**

The evidence given related to the application was scant. I have summarized it below.

Mr. Simms testified that he has suffered from gout and arthritis for several years. He takes approximately 5 or 6 pills per day. He summarized it as "the older I get, the worse I get", and due to his illness was unable to appear in Court on May 22, 2014. He did not provide a reason for failing to file a Defence or notifying the Court of his absence. He sought to explain the defence on its merits but I explained to him that the matter would be heard on its merits only if I allowed the application. That hearing would be heard on a separate date. He testified that he decided to pursue his defence once he realized his CPP payments were being garnished.

Mr. Pike testified to delivering the Execution Order to the Sheriff's Office at the Dartmouth Provincial Court. He had not heard from Mr. Simms until the Application to Set Aside was served on him.

## **The Law**

An application to set aside an Order made in the absence of a Defendant is governed by s. 23 of the *Small Claims Court Act*. It states as follows:

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.

(3) Where a defendant has filed a defence but does not appear at the hearing and the adjudicator is satisfied that the defendant has been served with notice of the time and place of the hearing, the adjudicator, if satisfied on the evidence as to the case of the claimant, may, in the absence of the defendant, make an order against the defendant.

(4) Where a defendant against whom an order has been made pursuant to subsection (3) 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 not appearing at the hearing; 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.

It is to be noted that neither subsections (1) nor (3) apply. Subsection (1) applies to “Quick Judgments” which require a review of the documentary evidence. Subsection (3) does not apply as no defence has been filed.

In the case of *Leighton v. Stewiacke Home Hardware Building Center*, 2012 NSSC 184, Justice Peter Rosinski stated:

“...an adjudicator may, at a scheduled hearing date, where no Defence is filed and the Defendant does not appear, make an order against the Defendant, if satisfied that: the Defendant had proper notice; and he/she is satisfied on a balance of probabilities that the claim and amounts/remedy sought (presuming also that the rules of natural justice have been respected) are meritorious.”

Later in that decision, Justice Rosinski commented that once an Adjudicator heard a matter in default, the Small Claims Court had no jurisdiction to rehear it. The Court referred to the Latin expression *functus officio*. That phrase means simply that once a court has done everything necessary to enter its judgment, namely holding a proper hearing according to the principles of natural justice, hearing and weighing the evidence, rendering a decision and issuing an order, it is barred from revisiting the litigation. The concept ensures finality of the proceedings. In other words, the only option available to a litigant is to appeal the decision, provided the appeal is launched in accordance with the procedure established under the *Small Claims Court Act*.

## Decision

As a result, this Court does not have the authority to overturn this matter as it has been finally determined. Even if I found that section 23 applied, I would not have been satisfied that Mr. Simms proceeded “without unreasonable delay” in making this application. He did nothing to

defend the Claim or proceed with this motion until he was notified of the garnishment of his CPP.

The application is denied. An order shall issue accordingly.

Dated at Halifax, NS,  
on November 3, 2014.

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**Gregg W. Knudsen, Adjudicator**

Original: Court File  
Copy: Claimant(s)  
Copy: Defendant(s)