

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Malik v. Islam, 2004 NSCA 148

**Date:** 20041209

**Docket:** C.A. 225873

**Registry:** Halifax

**Between:**

Qamar Malik

Appellant

v.

Rafiqul Islam

Respondent

**Judge(s):**

Glube, C.J.N.S., Roscoe, and Bateman, J.J.A.

**Appeal Heard:**

December 7, 2004, in Halifax, Nova Scotia

**Held:**

Leave to appeal is granted, but the appeal is dismissed with costs fixed at \$1000 including disbursements, to be costs in the cause of the main action.

**Counsel:**

Brian J. Hebert, for the appellant  
Ronald Pizzo, for the respondent

Reasons for judgment:

- [1] This is an appeal from a decision of Justice Robert W. Wright setting aside a default judgment obtained by the appellant against the respondent in the amount of \$240,000.
- [2] The appellant sued both the respondent and Dalhousie University alleging breaches of his employment contract. Default judgment was entered against the respondent on the 21st day after he was served with the statement of claim. In his affidavit filed on the application to set aside the default judgment, the respondent set out in detail the attempts he made to obtain counsel, swore that “I believe I have a good and arguable defence in this matter” and attached a copy of his intended defence. In his defence he denies that he contracted in his personal capacity to employ the appellant and states that the appellant was employed by the university.
- [3] Justice Wright in brief oral reasons indicated that he was satisfied that there was “a defence worthy to be tried on its merits” and that the respondent had provided an explanation as to why he did not file his defence on time.
- [4] On an application to set aside a default judgment the applicant must satisfy the court by admissible affidavit evidence that (i) there is an arguable issue between the parties; and (ii) there is a reasonable excuse for failure to file a defence. (**Ives v. Dewar** (1948), 23 M.P.R. 218, (1949), 2 D.L.R. 204). There was no issue before the Chambers judge or in this Court that the respondent satisfied the requirement to show that he had a reasonable excuse for failure to file a defence.
- [5] The appellant submits that since the respondent did not set out within his affidavit the facts upon which he bases his defence, that his application to set aside the default judgment should have been dismissed, and the Chambers judge erred in allowing the application. In effect, the appellant says that since the allegations of fact contained in the defence were not contained within the body of the affidavit, that the application was defective.
- [6] This Court consistently applies a very deferential standard of review on appeals from interlocutory orders involving the exercise of a discretion by a Chambers judge. The Court will not interfere unless wrong principles of law were applied or a patent injustice resulted from the order. (**Exco Corporation v. Nova Scotia Savings and Loan et al** (1983), 59 N.S.R. (2d) 331).
- [7] There is no merit to the appellant’s submission. It is one based on form rather than substance. The appellant does not argue that the defence fails to raise a fairly arguable issue. When the respondent swore that he believed he

had a good defence as set out in the attached exhibit, he was incorporating by reference the specifics of the defence into his affidavit. While it would have been preferable to set out more detailed facts within the affidavit, the affidavit does satisfy the minimal requirement of showing “by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits.” (**Ives v. Dewar**, at p. 206) This affidavit is similar to that in **Lloyd v. Manufacturers Life Insurance Co.** [1989] N.S.J. No. 125.

[8] In our view Justice Wright did not apply wrong principles of law. The appellant has not satisfied us that a patent injustice would result. We would grant leave to appeal, but dismiss the appeal with costs fixed at \$1000 including disbursements, to be costs in the cause of the main action.

Roscoe, J.A.

Concurred by:

Glube, C.J.N.S.

Bateman, J.A.