NOVA SCOTIA COURT OF APPEAL

Citation: *Staniszewski v. Taylor*, 2022 NSCA 72

Date: 20221201
Docket: CA 516927
Registry: Halifax

Between:

Katherine Staniszewski and Trevor Watson

Appellants

v.

Bruce Taylor and Nancy Davis-Taylor

Respondents

Judge: The Honourable Justice Bryson

Appeal Heard: November 24, 2022, in Halifax, Nova Scotia

Legislation Cited: *Civil Procedure Rules* 2, 5 and 8;

Subject: **Practice – Setting aside judgment under *Civil Procedure Rule* 5**

Summary: Appellants agreed to buy a house from respondents. After taking possession, they allegedly found latent structural defects. They commenced legal proceedings by way of "Notice of Application in Court". Following service of the Notice, the respondents did not file a "Notice of Contest" challenging the appellants' claims. They did not appear at the motion for directions contained in the Notice of Application in Court. The appellants applied for judgment on liability under *Rules* 5.23 and 5.24. Judgment for liability was granted with damages to be later assessed. The respondents then successfully applied in chambers to "set aside" the "default judgment". The chambers judge reasoned that *Rule* 5 was analogous to default judgment in an action because there had been no decision on the merits. Using *Rule* 2, the judge purported to set aside the judgement. The appellants contended on appeal that the chambers judge erred in fact and law by setting aside the judgment.

Issues: (1) Did the respondents have notice that a final judgment may be granted against them if they filed no Notice of Contest or failed to appear at the motion for directions?
(2) Did the judge err by invoking *Rule* 2 to set aside an order under *Rule* 5?

Result: Appeal allowed. The Notice of Application in Court clearly stated that judgment may be granted at the motion for directions if the respondents failed to appear. A *Rule* 5 judgment was not a "default judgment". *Rule* 8 on default judgments states that the *Rule* does not apply to Applications in Court. Applications in Court are intended to be a more speedy and flexible alternative to an action. *Rule* 5.23 allows a judgment on evidence if the respondents fail to appear. *Rule* 5.24 allows judgment if the respondents are in breach of a *Rule* or court order and have caused prejudice to an applicant. Unlike *Rule* 8 on default judgement, *Rule* 5 does not make provision to set aside any order so granted. Nothing in *Rule* 2 authorized setting aside a *Rule* 5 judgment. The remedy for challenging a *Rule* 5 order is an appeal.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 41 paragraphs.

NOVA SCOTIA COURT OF APPEAL

Citation: *Staniszewski v. Taylor*, 2022 NSCA 72

Date: 20221201
Docket: CA 516927
Registry: Halifax

Between:

Katherine Staniszewski and Trevor Watson

Appellants

v.

Bruce Taylor and Nancy Davis-Taylor

Respondents

Judges:	Bryson, Scanlan and Van den Eynden JJ.A.
Appeal Heard:	November 24, 2022, in Halifax, Nova Scotia
Held:	Leave granted and the appeal allowed with costs, per reasons for judgment of Bryson J.A.; Scanlan and Van den Eynden JJ.A. concurring
Counsel:	Richard Norman and Sarah Dobson, for the appellants Timothy Peacock, for the respondents

Reasons for judgment:

[1] Following oral submissions from counsel, the Court allowed this appeal with reasons to follow. These are they.

Introduction

[2] The appellants seek leave to appeal an oral decision of the Honourable Justice Gregory Warner setting aside an earlier decision by the Honourable Justice Glen McDougall granting judgment against the respondents for alleged deficiencies in a home purchased from the respondents.

[3] In November of 2021, the appellants filed an Application in Court under *Civil Procedure Rule* 5. The Application named January 18, 2022, for a motion for directions.

[4] The respondent Bruce Taylor was served personally with the Application and Nancy Davis-Taylor was served by substituted service.

[5] To challenge an Application in Court, respondents may file a "Notice of Contest". The respondents did not file a Notice of Contest.

[6] At the motion for directions, the respondents did not appear. Judgment for liability was granted against them, with damages to be later assessed.

[7] The respondents retained counsel and successfully applied to "set aside" the judgment. Justice Warner reasoned that no decision on the merits had been made and the Notice of Application served on the respondents would not have given them notice of a possible judgment against them if they did not defend or appear. He invoked *Civil Procedure Rule* 2 which provides the court with some discretion to relax the *Rules* in certain circumstances, finding it would be an "anomaly" that *Rule* 5 had no provision for setting aside what he found to be the equivalent of a "default judgment".

[8] Following Justice Warner's decision, the respondents filed a Notice of Contest.

[9] If leave is granted, the appellants challenge Justice Warner's decision, arguing that the judge erred by:

(a) Finding that Mr. Taylor did not have notice that a final order might be granted against him if he failed to file a Notice of Contest or attend the motion for directions;

(b) By making findings "in the absence of an appropriate evidentiary record";

(c) By relying on *Rule* 2 to set aside an order made in accordance with *Rule* 5.23/5.24 of the *Civil Procedure Rules*.

[10] For purposes of the appeal, it is only necessary to consider:

(a) Leave;

(b) Did the judge err by finding the respondents had no notice that a final judgment may be granted against them at the January 18, 2022, motion for directions;

(c) Did the judge err by setting aside the January 18, 2022, judgment.

[11] We determined leave should be granted and the appeal must be allowed.

Factual Summary

[12] In the summer of 2021, the appellants agreed to purchase a residential property from the respondents located in Tupper Lake, Kings County, Nova Scotia. After taking possession of the property, the appellants say they noticed a number of what they described as latent structural defects primarily relating to rot and water infiltration.

[13] On November 4, 2021, the appellants began a proceeding by way of Notice of Application in Court against the respondents. Mr. Taylor was personally served with the Notice of Application.

[14] Mr. Taylor replied by letter by making irrelevant arguments which included challenging the capacity in which he was sued: "So, was this invitation for me, the lawful living man? If so, you were in error because the invitation, names two of my legal persons … BRUCE TAYLOR, and Bruce Taylor … are 2 distinct legal persons".

[15] Mr. Taylor was evasive in his response to the Notice of Application.

[16] The appellants were unable to serve the respondent Nancy Davis-Taylor because she was apparently out of the country. They obtained an *Ex Parte* Order for substituted service on December 16, 2021, and effected service in accordance with the Order by posting notice of the application, the solicitor's affidavit, and the Order for Substituted Service on the door of the Taylor residence. It turns out the time for filing a Notice of Contest was mistakenly abridged. The appellants have since withdrawn their claims against Ms. Taylor-Davis.

[17] The Notice of Application in Court provided for a motion for directions at 11:00 a.m. on January 18, 2022. The appellants never heard from Nancy Davis-Taylor but Bruce Taylor wrote to the court advising that he required an "Adjournment of this proceeding, because I will be in Sosua, Dominican Republic, from [December] 27, 2021, until approximately April 15 to April 30, 2022". No motion for an adjournment was ever filed. The respondents did not file a Notice of Contest. No one appeared for them at the motion for directions held on January 18, 2022.

[18] Anticipating that the respondents would not appear, the appellants wrote to the court, copying the respondents, requesting that an order for liability be granted in accordance with *Civil Procedure Rules* 5.23 and 5.24, leaving damages to be decided at a later date.

[19] As the appellants expected, the respondents did not appear and Justice McDougall granted the liability order providing for a later assessment of damages. The order was immediately sent to the respondents. Mr. Taylor persisted in his evasive tactics. On February 22, 2022, the Prothonotary received a letter from "Bruce B of the family Taylor, a lawful living man, © All rights reserved" which began, "Since I first received a court notice via Cox Palmer in November 2021, I have assumed that the Supreme Court of Nova Scotia is a public common law court. Based on the documents I have received to date, the Supreme Court presents as some form of 'statutory' or 'private' court, that I am not familiar with. Is the Supreme Court of Nova Scotia a common law court, a statutory court, or some other form or [*sic*] court? Please provide a clear response to this critical question, as the type of court greatly impacts any assumed or actual jurisdiction".

[20] On March 23, 2022, having finally retained counsel, the respondents filed a Notice of Motion seeking "an order setting aside the default judgment dated January 18, 2022; extending the time to file a Notice of Contest and costs". As

earlier described, the respondents' motion was successful and the liability order was set aside.

Should leave to appeal be granted?

[21] The appellants need only establish "an arguable issue" with respect to the appeal. The respondents concede leave to appeal.

[22] As the ensuing analysis discloses, Justice Warner made clear and material errors of fact and law which merit appellate intervention.

Did the judge err by finding the respondents had no notice that a final judgment may be granted against them at the January 18, 2022 motion for directions?

[23] Justice Warner said the Notice of Application gave no indication of a risk of judgment if no response was made:

> The second problem is that the notice served on the Defendants, laypersons, clearly says that an Order is being sought to set down a date, time and place for a Hearing of the claim of the Applicants. There is no hint that, in default of filing a document, like a Notice of Contest, that there's going to be a shortcut, a Summary Judgment applied for and sought at the Motion for Directions.

[24] The judge was simply mistaken. The Notice clearly says on the last page:

> **Possible final order against you**
>
> The court may grant a final order on the application without further notice to you if you fail to file a notice of contest, or ***if you or your counsel fails to appear at the time, date, and place for the motion for directions***.
>
> [Emphasis added]

[25] The respondents concede this point but argue this was not the only basis for the decision and the judge's misapprehension, while supporting leave to appeal, is not determinative of the appeal itself. They adopt the judge's reasoning that the absence in *Rule* 5 of provision to set aside a "default judgment" is an anomaly which can be remedied by resort to *Rule* 2.

Did the judge err by using *Rule* 2 to set aside an order made pursuant to *Rule* 5.23 or 5.24?

[26] The appellant's motion to Justice McDougall on January 18 was pursuant to *Rules* 5.23 and 5.24. *Rule* 5.01(4) notes that an application is a "… flexible and speedy alternative to an action". A Notice of Application in Court and a Notice of Contest do more than pleadings in an action. They involve a motion for directions and affidavits providing evidentiary and procedural information, not required by or contained in pleadings to an action.

[27] There is no provision in *Rule* 5 for setting aside "default judgment" because *Rule* 5 does not provide for the granting of a default judgment.

[28] *Rule* 5.23 does allow a summary disposition on the merits when a party fails to appear:

> **5.23 Failure to appear**
>
> (1) If no parties appear at the hearing of an application, or on a motion for directions, the judge may dismiss the application without costs unless the parties provide a joint submission for another disposition and the judge accepts the submission.
>
> (2) ***A judge who is satisfied on all of the following*** may grant an order summarily disposing of an application against a respondent:
>
> (a) ***the respondent is notified*** of the application under Rule 31 - Notice;
>
> (b) ***the respondent*** either files no notice of contest or ***fails to appear*** at the hearing of the application or ***on the motion for directions***;
>
> (c) the applicant discloses to the judge all communications between the applicant and the respondent about the application;
>
> (d) ***the evidence supports the granting of the order***.
>
> [Emphasis added]

[29] The language in *Rule* 5.23(2)(d) plainly says a judge on a motion for directions can grant a summary order on evidence. There is no record of exactly what Justice McDougall said at the hearing on January 18, 2022, but the order he granted refers to *Rule* 5.24, not *Rule* 5.23:

> **WHEREAS** the Applicants filed a Notice of Application on November 4, 2021 and proceeded to have the Respondent Bruce Taylor personally served and the Respondent Nancy Davis-Taylor served pursuant to an Order for Substituted Service dated December 16, 2021 (the "Order for Substituted Service");

> **AND WHEREAS** a motion for directions was heard on January 18, 2022;
>
> **AND WHEREAS** the Respondents did not file a Notice of Contest and did not appear at the motion for directions;
>
> **AND UPON REVIEW** of written submissions by the Applicants and the Affidavit of Trevor Watson sworn on January 13, 2022;
>
> **AND UPON HEARING** from counsel for the Applicants;
>
> **IT IS ORDERED THAT:**
>
> 1. **Pursuant to *Civil Procedure Rule* 5.24**, the Applicants' application is granted and judgment is hereby entered against the Respondents;
> 2. The quantum of the Applicants' damages, pre-judgment interest, and costs are to be assessed at a later date upon motion (the "Motion"); […]
>
> [Emphasis added.]

[30] From the language of the Order, it appears the judge relied upon *Rule* 5.24, not 5.23, to grant partial judgment. To grant relief on an application under *Rule* 5.24, a party must have caused "prejudice" by failing to do something required by a judge or a *Rule*:

> **5.24 Failure to comply**
>
> A judge may provide each of the following remedies, ***if a party causes prejudice to another party by failing to do anything required by a judge or this Rule***:
>
> (a) dismiss the application, if the applicant causes the prejudice;
>
> (b) grant the application, if the respondent causes the prejudice;
>
> (c) order the party who causes the prejudice to indemnify another party for expenses caused by the failure;
>
> (d) make any other order to restore the other party to the position the party would have been in had the failure not occurred.
>
> [Emphasis added.]

[31] Whether the behaviour of the respondents in this case satisfied the conditions of *Rule* 5.24 is not before this Court but the *Rule* does not contemplate review or appeal before another judge of the Supreme Court if a respondent wishes to challenge an order made under that *Rule*. While Justice Warner may have been correct that Justice McDougall's order was not "on the merits", that does not make it reviewable by a judge of first instance jurisdiction.

[32] The respondent moved before Justice Warner to set aside the "default judgment" under *Civil Procedure Rule* 8.

[33] *Civil Procedure Rule* 8 deals with default judgment. It is available where a defendant in an action fails to file a defence. In such a case, a motion for default judgment may be made by the plaintiff. *Rule* 8.01(2) explicitly says it does not apply to applications:

> This Rule does not apply to an application, and an applicant may make a motion for summary disposal of an application in accordance with Rule 5 - Application.

[34] While acknowledging that *Rule* 8 did not apply in the circumstances, Justice Warner clearly thought it had some analogous value because it permitted a judge to set aside a judgment in a case where a hearing on the merits had not occurred:

> If this matter had proceeded as an Action, depending upon how long after the default of the Defendants, under the rules to file a Defence or other pleadings had occurred […] if the defaulting party can show on its face, an arguable case, and not a frivolous case, and if they can provide a reasonable excuse for why they defaulted, and we're not talking a matter of days or even weeks in many cases, but much longer than that, that there is a remedy that our Rule 8 provides for.
>
> […] It would be an anomaly of the justice system if, in a piece of litigation involving the liability in a not limited quantum of potential damages, that there is a process for setting aside a Judgment entered by default not based upon the merits or hearing an adjudication of the merits, in an Action somehow can't apply in some other format, even if Rule 8 says it does apply to Applications that there wasn't another remedy to provide a similar, fair process in the civil context.

[35] The judge repeated his concern that the Notice of Application would not have given notice that a judgment could be entered if an appearance was not made (addressed above), that the liability judgment granted was without a merits assessment, and the respondents had been seeking an adjournment. He went on to invoke *Rule* 2 to supply the perceived deficiency in *Rule* 5:

> And, in my view, it is the factual matrix which should lead this Court to make an Order under Rule 2.02 and 2.03 to set aside what I'll call the Default Judgment, even though I recognize it wasn't a Judgment in an Action.

[36] Justice Warner did not identify any particular section in either *Rule* 2.02 or 2.03 which would accord him the authority to reconsider Justice McDougall's decision.

[37] In particular, Justice Warner did not describe what provisions in *Rule* 2 would allow him to overlook *Rule* 8.01(2) and amend *Rule* 5 by "reading in" power to set aside a *Rule* 5 judgment.

[38] *Rules* 2.02 and 2.03 say:

> **2.02 Irregularity or mistake**
>
> (1) A failure to comply with these Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.
>
> (2) A judge may do any of the following in response to an irregularity:
>
> (a) excuse compliance under Rule 2.03;
>
> (b) permit an amendment or grant other relief to correct the irregularity;
>
> (c) set aside all or part of a proceeding, step, document, or order, if it is necessary to do so in the interest of justice.
>
> (3) It is not in the interest of justice to set aside a proceeding, step, document, or order on a motion made after an undue delay by the party who makes the motion or after that party takes a fresh step in the proceeding knowing about the irregularity.
>
> **2.03 General judicial discretions**
>
> (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> (a) give directions for the conduct of a proceeding before the trial or hearing;
>
> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.
>
> (2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:
>
> (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
>
> (b) require an excused person to do anything in substitution for compliance;

(c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

[39] The consequences for non-compliance with the *Rules* (if any) in this case are set out in *Rule* 5.24 and presumably were considered by Justice McDougall. Nothing in *Rule* 2.02 or 2.03 gives another judge of the Supreme Court jurisdiction to revisit the exercise of discretion available to a judge under *Rule* 5. During oral argument, counsel for Mr. Taylor acknowledged that appealing Justice McDougall's order was an option which he chose not to pursue.

[40] The proper process to challenge Justice McDougall's liability judgment was to appeal that order and not apply to "set it aside" before another judge of the same court. Justice Warner had no jurisdiction to set aside the order of Justice McDougall.

[41] Leave to appeal is granted, the appeal is allowed, Justice Warner's order is set aside, and the respondents' Notice of Contest, filed after Justice Warner's decision, is struck out. The appellants shall have costs of $2,000.00, inclusive of disbursements.

Bryson J.A.

Concurred in:

Scanlan J.A.

Van den Eynden J.A.