

1993

S.D. No. 0754

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

BRYANT CLARKE

APPELLANT

- and -

P. F. COLLIER & SON LIMITED

RESPONDENT

HEARD: At Digby, Nova Scotia, on the 8th day of December,
A.D. 1993

BEFORE: The Honourable Justice Charles E. Haliburton

SUBJECT: Small Claims Court Appeal

DECISION: The 21st day of December, A.D. 1993

COUNSEL: Bryant Clarke, the Appellant, for himself
Respondent was unrepresented

D E C I S I O N O N A P P E A L

HALIBURTON, J.

This appeal was dismissed in a brief oral decision at the time of the hearing. These reasons are supplementary. The appeal was against a Default Judgment entered in the Small Claims Court. As a result of recent changes in the Small Claims Court Act and the Regulations approved under that Act, it is now possible to obtain a Default Judgment where the Defendant fails to file a defence within 10 days. Before the recent amendments, the Adjudicator was obliged to hold a hearing on the date appointed in the "claim" and no Order could be made against the Defendant except after such a hearing was held.

The misunderstanding and/or misinterpretation of the applicable law and procedure by the Appellant/Defendant requires some comment.

The Appellant had had previous experience with the Small Claims Court and was familiar with the former procedure which required a hearing. When this claim was made against him, he anticipated appearing on the date fixed for the purpose of defending the claim. He was surprised when, before that date arrived, the Sheriff arrived with an Execution Order issued under the judgment which had already been entered.

APPEAL NOT PERFECTED

Upon an examination of the file, I determined that there was no Affidavit of Service in relation to the Notice of Appeal. Upon an inquiry, the Appellant advised that the Notice of Appeal had been served by facsimile machine and he produced a

receipt indicating service within the 30 day period prescribed. A facsimile transmission is not one of the methods authorized for service under the Act and the Regulations. A reference to Section 21(3) and Regulation 17(4) makes this clear. Even if such a method of service were acceptable, the Appellant would be obliged to file an Affidavit in Proof of Service within seven days of the appeal period. Regulation 17(3) provides as follows:

17(3) The appellant shall file proof of service on the respondent with the prothonotary not later than seven days after the last day for filing of the notice of appeal.

The Appellant failed to comply with this requirement.

The appeal, not having been perfected, it might have been dismissed without further comment. In the circumstances, however, I have concluded that this Court was without jurisdiction in any event.

APPEAL WAS PREMATURE

The Small Claims Court is now an autonomous, statutory court. Section 3 of the Small Claims Court Act establishes it as a separate "court of law and of record". As such, it has an inherent right to control its own processes. The Court and its Adjudicators must comply with the spirit and/or the law governing its operation. If they do so, then no superior court may interfere, except in accordance with the appeal process established by the Legislature. The Appellant here did not exhaust all the remedies available to him in the Small Claims Court. Before doing so, he clearly has no right of appeal.

The provision which deals with the granting of default judgments by the Small Claims Court is Section 23. After providing the authority to enter default judgments, Section 23(2) provides as follows:

23(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.

The words of this section provide a full answer to Mr. Clarke on this appeal. The jurisdiction of the Small Claims Court will not have been exhausted **until he has made an application in that Court** to have the Default Judgment set aside. To that extent, a Default Judgment is not final until an application under Section 23(2) has been dismissed. This, then, is a substantive reason for dismissing the appeal.

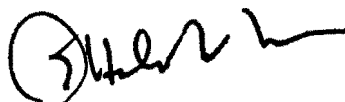
FORMS 1 & 2

By way of further comment, I would add that the Appellant would not have misunderstood the process if Forms #1 and #2 had been more precise. In spite of the care that has been taken in the drafting the two-colour notice, "TO THE DEFENDANT(S)", some obvious ambiguities remain. While it says,

"To dispute the claim you **must** file a Defence within 10 days", it fails to emphasize that there will be no hearing when it continues, "If you do not appear at the hearing on the date shown to defend the claim..the Court may make an Order against you".

The proof of the effectiveness of the wording will be proven if Mr. Clarke's problem turns out to be unique. Perhaps because he was already familiar with the former procedure, he either failed to read the Notice with sufficient care, or misunderstood it. My own suggestion of the words which might be used to give the Defendant effective notice of the default process would be:

If you fail to file a defence within 10 days, an Order may be made against you **before the hearing date**. Even if you do file a defence **but do not appear at the hearing** on the date shown to defend the claim (or make your counter-claim), the Court may make an Order against you.

A handwritten signature in black ink, appearing to be 'J. J. J.', written in a cursive style.

J.

Digby, Nova Scotia
December 21st, 1993

TO: Mrs. Cyndi Gennette
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BRYANT CLARKE

APPELLANT

- and -

P. F. COLLIER & SON LIMITED

RESPONDENT


TO: The Prothonotary

Summary report of findings by James L. Outhouse, Q.C., an
Adjudicator of the Small Claims Court of Nova Scotia.

1. On the 13th day of October, 19 93 I adjudicated a claim between
the above named parties, a copy of which is attached hereto.

2. On the attached pages, I set out for the consideration of this Honourable
Court a summary report of the findings of law and fact made in the case on appeal including
the basis of any findings raised in the Notice of Appeal and any interpretation of documents
made by me, and a copy of the written reasons for my decision, if any.

DATED at Digby, this 19th day of November,
19 93.



Adjudicator

SUPREME COURT of N.S.
NOV 24 1993
DIGBY, N. S.