SUPREME COURT OF NOVA SCOTIA
Citation: Pogosyam v. Wilson Fuel Co. Limited, 2021 NSSC 326

Date: 20211130
Docket: Hfx No. 499231
Registry: Halifax

Between:

Maryana Pogosyam

Plaintiff

v.

Wilson Fuel Co. Limited, Fairview Fittings & Manufacturing Limited

Defendants

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	November 18, 2021, in Halifax, Nova Scotia
Counsel:	John Boyle, for the Plaintiff James MacNeil, for the Defendant Fairview Fittings and Manufacturing Limited Ben Johnson and Thomas McEwan for the Defendant Wilson Fuel Company Limited

By the Court:

Introduction

[1] Ms. Pogosyam had a serious oil leak in her home on November 2, 2018.

[2] On July 10, 2020, she filed a Notice of Action/Statement of Claim naming as Defendants:

1. Wilson Fuel Co. Limited ("Wilson") - which she says installed the oil tank in question in her home on October 24, 2011; and
2. Fairview Fittings & Manufacturing Limited ("Fairview") - which she says negligently manufactured and designed the valve in question.

[3] She served Fairview's recognized agent with the Notice of Action on **July 28, 2020**.

[4] Fairview did not file a Statement of Defence (or a demand for notice); or request a waiver of strict compliance from the Plaintiff (see Civil Procedure Rule "CPR" 31.12(5) - "…the parties agree…"), within the time limit for filing a Defence, namely within 15 days thereafter.

[5] Consequently, Fairview became disentitled to further notice regarding the action, and "is taken to have admitted, for the purposes of the action, the claims

made against the party, and the party making the claim may move for judgement under Rule 8 – Default Judgement." (CPR 31.12(1) and (4) and (5)).

[6] Ms. Pogosyam moved for default judgement, which order was granted on **August 26, 2020**.[1]

[7] Our Rules permit Fairview to make a motion to set aside the Default Judgement Order - CPR 8.09.

[8] When did Fairview make that motion? It was filed on **October 15, 2021**.

[9] In order to successfully argue that the Default Judgement Order should be set aside, in accordance with the criteria set out in our jurisprudence, Fairview must satisfy the court both that there is:

1. (a fairly arguable defence, or) a serious issue to be tried; and

2. a reasonable excuse for the delay in filing the Defence (and implicitly for the delay in bringing the motion to set aside the Default Judgement Order).[2]

[1] CPR 8.10 makes it an "abuse of process to obtain a default judgement without giving reasonable warning to a party who does any of the following [gives notice that the party will be defending the matter or is retained, or if the party making the claim is aware by clear implication from other pleadings that the claim will be defended against]".

[2] See paragraph 8 of Justice Robertson's reasons in *Ocean Construction Ltd. v Shoreline Paving Ltd*., 2007 NSSC 342.

[10] The Plaintiff conceded that the low threshold of "a fairly arguable defence, or a serious issue to be tried" has arguably been met in the circumstances.[3]

[11] However, the Plaintiff vigorously argues that Fairview has not shown that it has a reasonable excuse for its delay in filing its motion to set aside the Default Judgement Order, which would open the way for it to file its Defence.

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[3] While I accept the Plaintiff's concession, I am mindful of Justice Chipman's comments in *Vaughan v Green*, 2019 NSSC 331 at para. 24, where he accepts Justice Warner's reasoning in *Logic Alliance Inc. v Jentree Canada Inc*., 2005 NSSC 2 that the two jurisprudential criteria associated with CPR 8.09 (a serious issue to be tried and a reasonable excuse for the delay) need not be given equal weight, although they must both be considered. I observe that the Fairview requisitioned the Stantec Consulting Ltd. report (Section -2.0 Valve Manufacturer) which referenced a letter from Contrast Engineering Ltd. dated March 30, 2019, which Stantec says "suggested the fitting was a Fairview Fittings model number BV 1122 – DC ¼ turn ball valve (1/2 to 3/8 inch male pipe to male pipe)" [notably the Contrast Engineering report stated: "the valve was identified as a Fairview Fittings and Manufacturing Limited model number BV 1122 – DC…"]. Thereafter, Stantec purchased a "Fairview Fittings BV 1122 – DC valve… from a local supplier for comparison… and [it] has the following differences: … [Additional markings]; handle nut is regular versus nylon locking; dimensions do not match; quality of casting and inner diameter surface finish is better". It is likely that the incident valve was manufactured prior to the installation of the oil tank, which installation is alleged in the pleadings to have been on October 24, 2011 (though not evidence herein), which is consistent with the photo of the stamp of the date of manufacture of the oil tank as "July 2011", and a photograph of a BV 1122-DC valve taken from the 2011 Fairview Fittings catalogue [see page 3 of 4 of the Contrast Engineering Limited report Exhibit "A" to John Boyle's affidavit]. Fairview Fittings and Manufacturing Limited, which changed its name to Fairview Ltd., appears to have at some point outsourced its manufacturing of its valves to the United States – see photos labelled figures 1 and 2 showing the fittings as imported at Exhibit "A" of the Michael Gumbs affidavit. In his affidavit, he does not say for how long he has worked for Fairview. However, he states at paragraph 10 and 11 that "I know that the valve in issue… has limited markings on it, and the types of valves that Fairview manufacturers [sic] that are similar to the valve at issue have the letters "FF" marked on them to indicate that the pattern is a Fairview pattern. Additionally, Fairview changed the valves they supplied in or around 2011/2012 from red handles to yellow handle products to match their logo. The last shipment to Fairview of the red handle BV 1122 [2] – DC product (similar to the valve at issue) from its vendor was on July 29, 2011. I know that the red handle BV 1122 – DC vendor [who oddly is unnamed – though clearly such reference would have been particularly helpful to the Stantec consultants who unsuccessfully sought to discover in the Fall of 2019, who was the manufacturer of the incident valve] also sold these red handle valves to other customers that would not have had the FF markings." In summary, we have Stantec concluding they do not know who the manufacturer of the incident valve is; and that they apparently compared a 2019 purchased valve with one that is likely from 2011, in coming to their conclusion that "…it is unlikely the valve was manufactured by Fairview Fittings." Mr. Gumbs statement that "the last shipment to Fairview of the red handle… product similar to the valve at issue from its vendor was on July 29, 2011", suggests that Fairview was not manufacturing valves in 2011. Nevertheless, if the valve was designed or manufactured by Fairview, Fairview would know best about the incident valve's origins. Mr. Gumbs does not expressly say that the incident valve *did not* come from a Fairview design or manufacture.

[12] I conclude that Fairview has sufficiently established a reasonable excuse, and consequently set aside the Default Judgement Order.

The chronology of the delay between July 29, 2020 and October 15, 2021

[13] Fairview made its insurer (Zürich Canada) aware of the potential claim for the oil leak in **January 2019.**

[14] In September 2019 Zürich (requested by Ilana Khmurov) arranged for Stantec Consulting Ltd. to inspect the valve in the oil tank. Their report is dated October 18, 2019. Stantec concluded that: "it is unlikely the valve was manufactured by Fairview Fittings. The manufacturer is unknown currently… It is my opinion that the poor quality of the valve body contributed to the failure."

[15] I infer that, not long thereafter, Zürich denied the third-party subrogation claim that was made by the Plaintiff's insurer.

[16] Fairview was served with the Notice of Action on **July 28, 2020**.

[17] A lack of diligence is evident in Mr. Gumbs' affidavit at paras. 12-15:

> "*I am further advised* [by whom?] *Fairview sent a copy* [when?] *of these pleadings to Ilana Khmurov at Zürich* and received no response. I only recently learned [i.e. in the last few months] that Ms. Khmurov was *on maternity leave* when the claim was sent to her attention *last summer*.

> I was advised by Ryan Babb, and verily believe it to be true, that in or around February 2021, it came to his attention that an Order for Default Judgement was issued in favour of the Plaintiff on August 26, 2020… [he] called me in mid-February 2021 to ask if I was aware of whether Fairview was served with the Statement of Claim, and if so, then what occurred. I was able to explain that the claim was originally sent to Ms. Khmurov; and *they checked and confirmed that we never received a response*. I also confirmed that Fairview did not receive an automated email from Ms. Khmurov's email. *Ryan Babb* advised me, and I verily believe it to be true, that he *too tried to send an email to Ms. Khmurov and he also did not get an out of office response*."

[18] There is a paucity of specificity in his (and that of Ryan Babb) affidavit. For example:

1. "*Fairview* [who?] *sent* a copy of these pleadings to Ilana Khmurov"… [she] was on maternity leave, [Ryan Babb does not give evidence in relation to this, and Mr. Gumbs stated: "I only recently learned [i.e. in the last few months] that Ms. Khmurov was on maternity leave when the claim was sent to her attention last summer". No one from Zürich gave evidence that she was on maternity leave or for what time interval] when the claim was sent to her attention *last summer* [precisely when, and what did the email say?];

2. "and received no response [from Ms. Khmurov]"; yet from the "summer" time interval post- July 28, 2020 until mid February 2021, Fairview made no inquiries; and Zürich also appears to have lost track of that file.

3. "I was advised by Ryan Babb, and verily believe it to be true, that in or around February 2021, it came to his attention that an Order for Default Judgement was issued in favour of the Plaintiff on August 26, 2020…"; which can be interestingly compared with Ryan Babb's affidavit at paragraphs 4 and 5: "I am a Senior Casualty Claims Specialist with Zürich. I was assigned to this particular matter in February 2021. I have reviewed Michael Gumbs' affidavit that was prepared and filed in this matter and agree with the factual contents of that affidavit." [Why, and how did it come to their attention, and why not sooner? I noted in the court file that an Affidavit of Service of the Wilson Notice of Defence and Counterclaim against Fairview was served on Fairview on January 21, 2021. I infer that, but for that service on Fairview, Fairview and Zürich would likely have remained unaware of the Default Judgement Order until an even later point in time.]

> 4. "Ryan Babb called me in mid-February 2021 to ask if I was aware of whether Fairview was served with the Statement of Claim, and if so, then what occurred. I was able to explain that the claim was originally sent to Ms. Khmurov… Ryan Babb advised me, and I verily believe it to be true, that he too tried to send an email to Ms. Khmurov and he also did not get an out of office response." [Why is there no affidavit from Ms. Khmurov?]

[19] In the circumstances, I am prepared to draw adverse inferences as against Zürich.

[20] I infer that Fairview sent the pleadings to Zürich shortly after their receipt on July 28, 2020. Effectively Fairview and Zürich were both then aware of the pleadings. Nothing was done by either of them in follow-up to the sending and receiving of those pleadings until February 2021.

[21] That was **a delay of at least 6 months**.

[22] And what did Zürich do thereafter? No motion to set aside the default judgement was filed until October 15, 2021.

[23] In relation to the second period of delay Ryan Babb states in his affidavit:

> "Boyne Clark LLP was approved by Zürich and given instructions to proceed with this motion. I am aware our solicitor made attempts over an approximate period of a few months to try and have the Plaintiff agree to set aside their default judgement [which is on liability only] but they would not agree."

[24] Again, no specificity – when was counsel retained by Zürich, and given instructions to proceed with the motion?

[25] Mr. Boyles' affidavit recites facts which I accept, (and specifically which I prefer when they are inconsistent with those contained in the Defendant's affidavits) indicates that:

> [a further two months later] " **on April 22, 2021**, **Mr. MacNeil counsel for the Defendant Fairview Fittings and Manufacturing Limited contacted me for the first time.** Mr. MacNeil asked whether the Plaintiff would agree to set aside the default order or whether his client should bring a motion to lift the Default Judgement.…
>
> **On May 13, 2021, I advised Mr. MacNeil that the Plaintiff was not prepared to set aside the default order**.
>
> **On May 13, 2021 Mr. MacNeil advised that his instructions were to make a court motion without delay seeking to lift the default order and he would have the motion materials to me at the first of next week**…
>
> On May 18, 2021, Mr. MacNeil confirmed that his instructions were to proceed with the motion, and that he would provide the materials ASAP.
>
> On July 8, 2021 I followed up with Mr. MacNeil as I had not received any materials related to the motion.
>
> On July 11, 2021 Mr. MacNeil responded that the materials were prepared and that he was waiting to hear back from his client.
>
> On September 3, 2021, and again wrote to Mr. MacNeil requesting the motion materials and advising that my client was eager to move the matter long as there had already been a significant delay.
>
> On September 5, 2021, Mr. MacNeil advised that he would definitely have all the materials to me that coming week.
>
> I did not receive any motion materials that following week.…
>
> On October 15, 2021 Mr. MacNeil provided the motion materials for the first time."

[26] It would appear that the parties were only discussing the matter between April 22, 2021, and May 13, 2021- for approximately three weeks. Thereafter, the

Defendants were clearly on notice that they must file their motion to set aside the Default Judgement Order.

[27] The remaining period, namely from mid February 2021 to April 22, 2021, and May 13 until October 15, 2021, aggregates to **7 more months of delay**.

[28] On its face, the total delay is 13 months.

[29] Considered temporally, such delay is arguably far beyond reasonable.

[30] However, I must ask myself whether Fairview has persuaded me that it has a "reasonable excuse" for the delay in filing its Defence?

[31] Let me briefly examine a number of cases regarding these issues.

1. *JW Bird and Company Limited v Allcrete Restoration Limited*, 2019 NSSC 311 per Brothers J.

   A notice of action for personal guarantee of the debts of two corporate defendants were at issue. The action was commenced, and notice served on February 11, 2019. A default order was issued on March 6, 2019. On March 21, 2019, the individual defendant filed his motion to set aside the default judgement. Justice Brothers concluded that "JW Bird did everything the Rules required. What else could JW Bird have done, short of meet [Mr. Wheaton] and read the document to him?… The type of excuse offered in this case, that Wheaton failed to read a document served upon him and made assumptions about what the document said, has been rejected by other courts… Doing nothing but making unreasonable assumptions does not a reasonable excuse make. The second part of the applicable test on this motion is not satisfied and therefore is fatal to the Defendant's motion."

2. *Ocean Contractors Limited v. Shoreline Paving Ltd.*, 2007 NSSC 342 per Robertson J.

   An individual who sought to set aside a default judgement [August 30, 2006], claimed to be unaware of his potential personal liability versus his liability as a director of the corporate defendant. He was found to have failed to seek legal advice and file a defence and had wilfully been avoiding service of court documents. "Once served [July 29, 2006] he chose to ignore the reality of the lawsuit against him for more than a year [until he filed his application to set aside the default judgement in August 2007]. He has not proffered any reasonable excuse for this delay."

3. *Cat Lumber Inc. v East Coast Kilns Inc*., [1997] NSJ no. 126 (SC) per Cacchione J.

   Goods were delivered by the plaintiff to the defendant in August 1995. A dispute about the quality of the product ensued and the defendant failed to pay the invoiced amounts. Discussions to resolve the matter ended in November 1995. In June 1996 the plaintiff commenced the action which was served on the defendant on June 9, 1996. On June 17 the agent and principal of the corporate defendant attended his solicitor's office but was unable to see him. He left instructions to have the counsel contact him. An uncontested application to amend the plaintiff's pleadings was granted on September 10, 1996. The defendant's counsel had received those by October 6, 1996. While the defendant swore an affidavit on October 3, 1996 in support of his application to set aside default judgement, the actual notice therefor was not filed until January 20, 1997. Approximately seven months elapsed between the original default judgement being entered in the filing of the application to set it aside. Only four months elapsed from the date the amended documents including the amended default judgement were served on the defendant. Justice Cacchione concluded that the motion to set aside default judgement was created on October 3, 1996 but not filed until 3 ½ months later, noting "there is no evidence on file as to the reason for this inordinate delay. It is safe to conclude from this that the applicant wilfully delayed bringing this application. The applicant's actions do not lend credence to his sworn words that he intended to have the default judgement set aside and defend this matter… Although the applicant may have had a reasonable excuse for the delay in filing a defence, he has not demonstrated any reasonable excuse for

not making application to have the default judgement set aside as soon as possible. His actions from September 12, 1996, until January 20, 1997, demonstrate a wilful delay in bringing this application. On this basis alone I am prepared to dismiss his application, however; it must also be pointed out that the respondent has been prejudiced as a result of the applicant's wilful delay in bringing this application… it has not been paid for goods which it delivered in August 1995."

4. *Royal Canadian Legion v Norman*, 1996 NSCA 224.

   The chambers judge had set aside a default judgement and ordered the filing of a defence within 10 days. The plaintiff tripped and fell on December 13, 1994. As soon as the defendant became aware of a legal claim it notified its liability insurer. They assigned an adjuster to the claim, who directly communicated with the plaintiff's solicitor. Liability was denied as of May 30, 1995. 10 months later the plaintiff commenced an action in negligence. Service thereof was effected on April 2, 1996. The plaintiff agreed to a waiver of strict compliance with the time limit for filing a defence on April 10, 1996, until May 10, 1996. The time was adjusted the next day to only May 3, 1996. The adjuster diarized the matter for May 2,1996 but did not get to his list for that day until May 3 at which time he called to retain counsel for the defendant. The counsel received the message on May 6, 1996, and immediately called plaintiff's counsel and advised that a default judgement had been entered that same morning. On May 28, 1996, the chambers judge dismissed the defendant's application to set aside the default judgement, because he was not satisfied that a reasonable excuse had been shown for the delay. He concluded that the adjuster "knew about the importance of time limits and… was careless and not contacting [counsel] earlier".

   The Court of Appeal allowed the appeal by the defendant.

[32] It is apparent from these sample cases how fact-sensitive is the determination of whether there is a reasonable excuse for the delay.

[33] In concluding whether there is “a reasonable excuse for the failure to file a defence”, courts are necessarily required to take into account the context surrounding those delay periods, in addition to the simple length of delays.

[34] I also bear in mind “the gravity of the consequences” of not setting aside a Default Judgment – see Justice Bateman’s reasons in *Royal Canadian Legion v Norman*, 1996 NSCA 224. There ought to be a proportionality between the level and nature of unreasonableness of the excuse(s) for the delay(s), and the judicial response.

Conclusion

[35] Fairview likely provided Zürich with the pleadings which had been served upon it on July 28, 2020, in a reasonably timely manner thereafter. Zürich was not diligent in its handling of the matter.

[36] It was reasonable for Fairview to rely on Zürich to diligently represent its interests.

[37] While there was some unsatisfactorily explained associated delay in Fairview arranging counsel and facilitating counsel’s filing of a motion to set aside the default judgement, the Plaintiff was aware after April 22, 2021, that Fairview had counsel, and that that counsel had stated that Fairview was committed to

making a motion to set aside the default judgement, and defending the claims against it.

[38] While the litigation process has been suspended as a result of the Default Judgement Order, there is no direct evidence of material prejudice to the Plaintiff.[4]

[39] If I concluded that the Default Judgement Order should *not* be set aside, the Plaintiff will *not* likely obtain an assessment of its damages until the determinations of liability and damages of Wilson are made at trial[5] – and Wilson has filed a counterclaim against Fairview, such that consideration of an apportionment of damages between the two, if required, is best addressed in the trial context where both are parties.

[40] The Plaintiff is justifiably frustrated by the slowness of this litigation process.

[41] Bearing in mind Justice Bateman's words in *Norman*: "taking into account the gravity of the consequences of the [default judgement order]… in that it finally disposed of the rights of the parties"; and that there is a serious issue to be tried

[4] Wilson took a "watching brief" only position in relation to the motion to set aside the Default Judgement Order.

[5] See Justice Moir's comments in *Murphy v. Brooke*, 2014 NSSC 359 regarding CPR 8.06 and when pleaded claims are suitable for assessment of damages by the Prothonotary, rather than by referral to a Justice.

here vis-à-vis Fairview, I am satisfied that the motion to set aside the Default Judgement Order should be granted.

[42] I direct that Fairview file its Defence within 30 calendar days after the release of this decision.

[43] If the parties are unable to agree on costs of this motion, I will receive their briefs within no later than 20 days after the release of this decision.

Rosinski, J.