IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: EMCO Corporation v. Classic Hearth & Leisure Limited,
2007 NSSM 24

Date: 20070503
Claim: 279100
Registry: Halifax

Between:

EMCO Corporation

Claimant

v.

Classic Hearth & Leisure Limited

Defendant

Revised judgment: The text of the original judgment has been corrected according to the erratum dated June 15, 2007.

Adjudicator: J. Scott Barnett

Heard: April 30, 2007

Written Decision: May 3, 2007

Counsel: EMCO Corporation, Self-represented

Classic Hearth & Leisure Limited, Not Represented

By the Court:

[1] In this case, the Claimant seeks Quick Judgment. In the Claim, it is alleged that the Claimant sold and delivered goods to the Defendant for which payment has not been received.

[2] As stipulated in the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93, as amended, the Application for Quick Judgment was accompanied by an Affidavit in Proof of Application, sworn to by one Ed O'Keefe who identifies himself as the "Agent" of the Claimant.

[3] In turn, this Affidavit attaches an Affidavit of Service dated April 4, 2007 and an invoice from Elite Civil Enforcement (for the cost of service of the Claim) in the amount of $114.00. Also attached is a faxed copy of a Credit Application dated April 28, 2003 which on its face purports to have been completed by or on behalf of "Classic Hearth & Leisure Ltd." Finally, a printout with the name of the Claimant at the top and an additional heading stating "Accounts Receivable

Customer Aging" is attached.

[4] The total principal amount of the Claim is $5,247.06, plus pre-judgment interest and costs.

[5] For the various reasons explained below, I find that this Application for Quick Judgment fails, and this matter should proceed to a hearing.

[6] **DEFICIENT PROOF OF SERVICE**. The Defendant is described as "Classic Hearth & Leisure Limited". The use of the word "limited" in the name is obviously an indication that the liability of the Defendant's members (i.e. the Defendant's shareholders) is limited and that the entity is a body corporate.

[7] Incorporated companies are required, pursuant to the *Corporations Registration Act*, R.S.N.S. 1989, c. 101, to appoint a recognized agent, service upon whom "shall be deemed sufficient service upon the corporation….": s. 9(1) of

the *Corporations Registration Act*.

[8] In this case, the section in the Affidavit of Service pertaining to service upon an individual defendant was completed, not the section that specifically addresses situations in which the defendant is a corporation.

[9] The relationship between the person upon whom the Claim form was served (Steven Keeling) and the Defendant is not set out in the Affidavit of Service. If Mr. Keeling is the recognized agent of the Defendant, that information is not set out in the Affidavit of Service.

[10] As a general practice point, I suggest that it would be helpful for a Claimant seeking Quick Judgment to attach information from the Nova Scotia Registry of Joint Stock Companies concerning the Defendant and its proper name, the people associated with it (including the name of the recognized agent), date of incorporation, etc. With the benefit of such information, the Court can be more easily satisfied that service of the Claim has been proven.

[11] The requirement for personal service (or service in such other manner as directed by the Court) is not a mere technicality: see *North Hills Nursing Home Ltd. v. Roscoe Construction Ltd.*, [1994] N.S.J. No. 128 (S.C.) at para. 11 and *Maloney v. W. & W. Windows International Ltd.*, [1989] N.S.J. No. 541 (Co. Ct.). The *Small Claims Court Act*, R.S.N.S. 1989, c. 430, as amended, and the associated *Small Claims Court Forms and Procedures Regulations* are quite clear in setting out the requirements respecting service of pleadings: see Section 21 of the *Small Claims Court Act* and Sections 3 and 5 of the *Small Claims Court Forms and Procedures Regulations*.

[12] The purpose of service is to ensure that a proceeding has been brought to the attention of the party being sued: *Hope v. Hope* (1854), 43 E.R. 534 at 539; *Vidito v. Venoit*, 3 D.L.R. 179 (N.S.S.C.); and *Balla v. Fitch Research Corp.*, [2000] B.C.J. No. 1540 (C.A.).

[13] In this case, I am not satisfied that the Defendant has received notice of the Claim. It would be inappropriate to allow this Quick Judgment Application, even

if I were satisfied that the Application ought to be granted in accordance with Section 23(1) of the *Small Claims Court Act*. The relationship between Mr. Keeling (the person upon whom service was effected) and the corporate Defendant has not been explained.

[14] **DEFICIENT AFFIDAVIT IN PROOF OF APPLICATION**: Generally speaking, the *Civil Procedure Rules* of Nova Scotia only apply to proceedings in the Court of Appeal and the Supreme Court: *Civil Procedure Rules*, Rule 1.02.

[15] *Civil Procedure Rule* 38 addresses various matters pertaining to Affidavits. There is also helpful authority dealing with the contents of affidavits generally in terms of what is appropriate and what is not: *Waverly (Village) v. Nova Scotia (Minister of Municipal Affairs)*, [1993] N.S.J. No. 151 (S.C.).

[16] There is nothing in the *Evidence Act*, R.S.N.S. 1989, c. 154, of which I am aware that deals with the use of affidavits in the Small Claims Court.

[17] Although there are notable exceptions, the *Civil Procedure Rules* require that an affiant confine himself or herself to recounting facts in respect of which that affiant has personal knowledge.

[18] While the *Civil Procedure Rules* are not directly applicable in proceedings in the Small Claims Court, I recognize that there is precedent suggesting that the *Civil Procedure Rules* can be referred to for guidance in Small Claims Court proceedings: see, e.g., *Atton (c.o.b. Millennium Mowing & Property Care) v. Malloy*, [2004] N.S.J. No. 217 (S.C.).

[19] As a general practice point, I suggest than an affiant of an Affidavit in Proof of Application for Quick Judgment supporting a Claim made by a body corporate should be an employee of the Claimant who, by reason of their employment (which should be identified in the Affidavit), has direct knowledge of the Claim.

[20] In cases of collections matters, which constitute the bulk of those cases where Applications for Quick Judgment are placed before the Court, an obvious

example of a good choice for an affiant is the person responsible for accounts receivable in the company.

[21] There have been many Applications for Quick Judgment before this Court supported solely by an Affidavit of Service and an Affidavit in Proof of Application sworn to by the Claimant's solicitor. It is generally not appropriate for lawyers to execute affidavits dealing with substantive matters (see *Veinot v. Dohaney*, [2000] N.S.J. no. 400 (S.C.)) and the very essence of the Affidavit in Proof of Application is substantive in nature.

[22] Similarly, I do not believe that it is particularly helpful when collections or other agents execute such Affidavits on behalf of Claimants. In essence, the agent is simply presenting hearsay evidence that may or may not be admissible. The Court always has the right to discount such evidence, or even refuse it entirely.

[23] In any event, I am concerned that the filing of an Affidavit in Proof of Application has become somewhat *pro forma* without taking into account the

serious nature of and the reason for the requirement that sworn evidence be adduced to prove that the merits of the Claim would result in judgment for the Claimant: Section 23(1) of the *Small Claims Court Act*.

[24] The Affidavit in Proof of Application serves as a proxy for oral evidence that would otherwise be required to prove a Claim. I have seen too many Applications for Quick Judgment where an affiant's lack of knowledge of the circumstances surrounding a Claim would have easily been exposed had the matter proceeded to an oral hearing. The affiant of an Affidavit in Proof of Application should be the same person that a Claimant would call as a witness in order to present persuasive oral evidence in support of the Claim.

[25] In this case, I am not satisfied that the Affidavit in Proof of Application is sufficient. I have no real basis for ascertaining whether or not the affiant has any direct knowledge of any of the relevant facts by reason of the affiant's simple self-identification as the "agent" of the Claimant.

[26] **POSSIBLE LACK OF JURISDICTION**: (A) Interpretation of Section 19(1)(a) of the *Small Claims Court Act*: Section 19(1) of the *Small Claims Court Act* provides that a claim before the Court "shall be commenced in the county in which (a) the cause of action arose; or (b) the defendant or one of several defendants resides or carries on business."

[27] As has repeatedly been noted, the Small Claims Court is a statutory court and it does not have inherent jurisdiction as does the Supreme Court of Nova Scotia: see, e.g., *Howard E. Little Excavating Ltd. v. Blair's Custom Metals*, [2006] N.S.J. No. 359 (S.C.). Proceedings taken in the Small Claims Court that are outside of its delimited jurisdiction are nullities: *John Balcom Sales Inc. v. Poirier*, [1991] N.S.J. No. 617 (Co. Ct.).

[28] In this case, there is information on the Claim form clearly indicating that the Defendant does not reside or carry on business in the Halifax Regional Municipality. As a result, in order to determine whether or not I have jurisdiction pursuant to Section 19, I must determine if the Claim was commenced where "the cause of action arose."

[29] This issue has been the subject of a number of different decisions, but I will only refer to two cases, beginning with a decision of O'Hearn, Co. Ct. J., in *Saulnier Pumping Ltd. v. Inter Supply Ltd.*, [1982] N.S.J. No. 40 (Co. Ct.). In that decision, Justice O'Hearn noted at paras. 3 to 5 how the expression "county [or district or judicial district etc.] in which the cause of action arose" has been interpreted in two different ways, depending upon the context.

[30] On the one hand, the phrase has been interpreted such that unless the whole transaction upon which the proceeding is based takes place in the county in which the court is located, the court does not have jurisdiction unless the defendant resides in that same place. In other words, a "cause of action" can only be said to arise within a certain local area when all material facts necessary to be proved as part of the cause of action arise out of events that take place in that area. Typically, this interpretation was historically applied in the case of inferior Courts, within which category the Small Claims Court of Nova Scotia falls.

[31] On the other hand, the phrase has been interpreted to mean that a plaintiff /

claimant may commence action in the area where the alleged act or failure to act giving rise to the cause of action takes place. In other words, a case may be commenced in the judicial district in which the actionable breach of contract or breach of obligation takes place. This interpretation has typically been applied with respect to the jurisdiction of the superior Courts.

[32] Justice O'Hearn held at paras. 5 and 6 that one interpretation, namely the interpretation generally applied in the context of proceedings in superior Courts, ought to be applied, no matter whether the jurisdiction in question is that of an inferior Court or a superior Court:

> The interpretation concerning inferior Courts is well established and long doubted, but is in conflict with the meaning ascribed to the expression with respect to superior Courts. In the present era when most of the reasons for the common law rule requiring the jurisdiction of inferior Courts to appear upon the face of the proceedings have been eliminated by reasonably well staffed professional Courts throughout the province and Canada, it is not reasonable to give the expression in question two distinct meanings depending upon the Court involved. Indeed, it might become a matter of scandal to the public because of the hidden technical trap involved.
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> The purpose of the legislation is sufficiently served by the single meaning attributed to the phrase in the case of superior Courts. ….

[33] In the result, Justice O'Hearn agreed with the Small Claims Court Adjudicator's conclusion that the Small Claims Court in Dartmouth, Nova Scotia had jurisdiction to hear a case involving a cause of action for a contractual breach that occurred in Dartmouth, Nova Scotia.

[34] In *Stokes v. Murray*, [1996] N.S.J. No. 435 (S.C.), Justice MacLellan also considered an appeal from the decision of an adjudicator of the Small Claims Court. In that case, a contract for the sale of a horse was entered into by the parties in Antigonish, Antigonish County, Nova Scotia. The horse died shortly after it was taken to Baddeck, Victoria County, Nova Scotia by the purchaser. The purchaser commenced a Small Claims Court Claim against the vendor in Victoria County.

[35] The vendor resided in Antigonish and, on appeal, the vendor challenged the jurisdiction of the Small Claims Court and argued that the case ought to have been commenced in Antigonish County and not in Victoria County.

[36] Justice MacLellan held, at para. 8, that the cause of action arose in Victoria County "because that is where the horse died which resulted in the claim by the [purchaser] for the return of the purchase price."

[37] It is not clear that the point was extensively argued but Justice MacLellan's decision accords with Justice O'Hearn's reasoning in *Saulnier Pumping Ltd. v. Inter Supply Limited*.

[38] I not only consider myself bound to approach the matter before me in the same fashion as both Justice O'Hearn and Justice MacLellan did in the cases before them, I agree with the approach that they took.

[39] (B) Application of Section (19)(1)(a) of the *Small Claims Court Act*: In this case, the Claimant sues for the unpaid price of goods sold and delivered. In essence, it is a Claim for breach of contract. The question then becomes where the cause of action arose; i.e. where the breach of contract occurred.

[40] The decision of the Saskatchewan Court of Appeal in *Saskatchewan Crop Insurance Board v. Court*, [1981] S.J. No. 1241 is helpful. The following was stated by Bayda, C.J.S., for the Court, at paragraph 6:

> In the present case the act or omission to act that gives the plaintiff its cause of complaint is the breach sued upon, is the failure by the defendants to make payment under the contract. To establish the place for payment is to establish the place of the omission to act and thus the place where the cause of action arose. The second subsidiary question then is: Where is the place for payment? The rules applicable to establishing the place for payment are summarized in 8 Halsbury's Laws of England (3rd ed.), paras. 285 - 288, pages 167 - 169. For the present purposes only three of those rules are relevant.
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> 1. Where a place for payment is specified, the promisor must tender payment at that place in order to discharge himself unless the place so specified is varied by mutual consent.
> 2. The place for payment, if not specified in express terms, depends upon the intention of the parties as indicated by the nature and terms of the contract and the other circumstances of the particular case.
> 3. Where no place for payment is specified either expressly or by implication from the nature and the terms of the contract and the surrounding circumstances, the general rule is that the promisor must seek out the promisee and perform the contract (i.e. make payment) wherever he may happen to be.

[41] Thus, where a contract is silent on the issue of where payment is to be made, and the Court cannot ascertain an implied term with respect to the place where

payment is to be made, the debtor must seek out his creditor: see also *Diesel Power & Accessories Ltd. v. Keeley Lake Lodge Ltd.*, [1979] S.J. No. 10 (Q.B.).

[42] Given that under current consideration is an Application for Quick Judgment, I have very little in the way of evidence at my disposal to permit me to make a determination as to the Court's jurisdiction in this case.

[43] The Claim form indicates that the Claimant is EMCO Corporation but the address provided is "care of Credifax Atlantic Limited, 21 Williams Avenue, Dartmouth, NS." In other words, the address provided is for a company different than the Claimant.

[44] Even if I were to assume, in the absence of any other information as to the terms of the alleged contract between the Claimant and the Defendant, that the Defendant must seek out the Claimant in order to make payment, there is no evidence provided to me that the Defendant dealt with any office that EMCO Corporation might have in the Halifax Regional Municipality or that EMCO

Corporation even has an office in the HRM. In fact, there is reference at one place on the previously mentioned Credit Application to an "Emco - Kentville." The Court takes judicial notice of the fact that Kentville, Nova Scotia, is in King's County and not in the Halifax Regional Municipality.

[45] It is interesting to note that Wilmot, Nova Scotia, is the stated address for the Defendant and Wilmot is located just outside of King's County in Annapolis County, Nova Scotia.

[46] The stated reason for the Claim itself is: "Goods sold and delivered to but not paid for by the defendant." If any invoices were issued by the Claimant to the Defendant, those invoices were not attached to the Claim form in the first instance, something which I suggest would generally be appropriate to ensure that the Defendant is aware of the exact nature of the Claim.

[47] In any event, none of the documentation attached to the Affidavit in Proof of Application sheds any more light on the possible terms of the alleged contract

pertaining to payment. The documentation also does not provide the Court with much information surrounding the circumstances of the alleged contractual dealings which might otherwise have permitted a finding as to an implied term regarding place of payment.

[48] In the circumstances, I simply do not have sufficient information to be satisfied that this Claim was properly brought in the correct county. Irrespective of the other problems that I have identified with this Application for Quick Judgment, I cannot grant myself permission to take jurisdiction where none may exist.

[49] I note that the question of jurisdiction is not something in the nature of a defence that a Defendant may have an obligation to raise if the Defendant wishes to contest a Claim. Questions of jurisdiction do not address the merits of a Claim; they are matters of primary importance striking at the very heart of the Court's ability to adjudicate a Claim in the first place.

[50] **CONCLUSION**: While I am aware of some debate over the issue, I believe

that the decision in *Surrette Battery Co. v. McNutt (c.o.b. TNT New & Used ATV's, Parts and Accessories)*, [2003] N.S.J. No. 20 (S.C.) stands for the basic and correct proposition that if the documentation attached to an Affidavit in Proof of Application *prima facie* establishes a Claim, then Quick Judgment ought to be granted.

[51] In this case, I am not satisfied that the documentation presented on behalf of the Claimant meets the requisite standard for the granting of a Quick Judgment. Moreover, and even more fundamentally, the evidence is lacking with respect to the jurisdiction of the Court in this case and proof of service of the Claim is inadequate.

[52] Accordingly, the Application for Quick Judgment is denied. I order that this matter proceed to the scheduled hearing date of June 12, 2007 at 6 p.m. at the Provincial Courthouse on Spring Garden Road in Halifax, Nova Scotia.

Small Claims Court Adjudicator