IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *A. Brown Forest Products Limited v. Fraser*, 2017 NSSM 92

Claim No: SCCH 460360

Between:

A. Brown Forest Products Limited

Claimant

— and —

Paul Barry Fraser

Defendant

Joseph MacDonnell appeared for the Claimant.

Paul Barry Fraser appeared on his own behalf.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

[1] This is an application by the Defendant, Paul Barry Fraser, to set aside an order of this Court dated March 30, 2017, where I entered judgment for the Claimant, A. Brown Forest Products Limited. The Claimant was represented by its owner, Ainslie Brown. The Defendant did not appear at that hearing.

[2] Both parties appeared for the hearing of this application. In addition to Mr. Brown, the Claimant was represented by a solicitor, Joseph MacDonnell.

Documentation on File

[3] I have summarized below the salient points, much of which can be gleaned from the court file.

- Notice of Claim dated February 15, 2017 – The Claimant seeks $7600 plus interest and costs. A hearing was scheduled in the Halifax Provincial Court building on March 30, 2017 at 6:00 pm.

- An Affidavit of Service sworn by Ainslie Brown and filed on February 23, 2017 – Mr. Brown swears that he served Mr. Fraser personally and left a true copy of the Notice of Claim with him on February 15, 2017.

- No Defence has ever been filed by Paul Barry Fraser.

- The Claimant made an application for a Quick Judgment pursuant to s. 23(1) of the Small Claims Court Act. The Application (Form 6) was accompanied by a statement signed by Mr. Brown outlining the details of the claim, along with a draft order. The Quick Judgment application was considered by Adjudicator Stephen Johnston who denied the application. Adjudicator Johnston's basis for denying the Quick Judgment is in the form of a file note, namely, the issues are too complex for a Quick Judgment application.

Summary of Initial Hearing

[4] Ainslie Brown appeared for the Claimant at the scheduled time of 6:00 pm on March 30, 2017. Mr. Fraser was called by the Sheriff and court staff but he did not appear. The matter was held in his absence.

[5] Mr. Brown was sworn and gave evidence. His evidence was extensive and well presented. His evidence consisted of his recollection of events with the assistance of the statement he had originally prepared for the Quick Judgment. According to Mr. Brown, the Claimant and the Defendant, Paul Barry Fraser, were parties to an aborted real estate transaction where the Claimant intended to purchase property from the Defendant. The sale did not proceed due to a title issue.

[6] By agreement, the Claimant would have a survey of the lot prepared prior to the closing and Mr. Fraser would reimburse him through a credit adjusted at closing. The cost of the survey was $1265.00. In its pleadings, the Claimant sought the return of the deposit plus the costs of the survey. This was confirmed through correspondence with the parties' solicitors which were tendered as an exhibit. I found, on the balance of probabilities, the Claimant had proven its case in breach of contract and unjust enrichment. The Claim was less than the total expended, $7600 plus costs of $199.35. Mr. Brown confirmed at the hearing he was not claiming any more. I entered judgment in the amount of $7799.35. An order under Form 7(a) of the Regulations dated March 31, 2017 was prepared by me, signed and filed.

[7] An "Application to Set Aside", a form created by Small Claims Court staff for the general use of Small Claims litigants was completed by Mr. Fraser and filed April 19, 2017. It contains several grounds for a defence which can be summarized, in essence, as the facts and sequence of events were different than pleaded by the Claimant.

The Grounds

[8] At the beginning of the hearing, I explained to Mr. Fraser the purpose of the hearing was to determine if the matter should be set aside. Once set aside, the matter would be rescheduled and heard on a different day. I was prepared to set aside the hearing if he had a reasonable excuse. The reason Mr. Fraser gave was he forgot about

the hearing until Mr. Brown gave him a copy of the Order. No further explanation was given.

The Law

[9] An application to set aside an Order made in the absence of a Defendant is governed by s. 23 of the Small Claims Court Act. It states as follows:

> 23 (1) Where a defendant has not filed a defence to a claim within the time required by the regulations and the adjudicator is satisfied that
> (a) each defendant was served with the claim and the form of defence and with notice of the time and place of adjudication; and
> (b) based on the adjudicator's assessment of the documentary evidence accompanying the claim, the merits of the claim would result in judgment for the claimant,
> the adjudicator may, without a hearing, make an order against the defendant.
> (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.
> (3) Where a defendant has filed a defence but does not appear at the hearing and the adjudicator is satisfied that the defendant has been served with notice of the time and place of the hearing, the adjudicator, if satisfied on the evidence as to the case of the claimant, may, in the absence of the defendant, make an order against the defendant.
> (4) Where a defendant against whom an order has been made pursuant to subsection (3) 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 not appearing at the hearing; 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.

Neither subsections (1) nor (3) apply. Subsection (1) applies to “Quick Judgments” which require a review of the documentary evidence. Subsection (3) requires a defence to have been filed.

[10] Justice Gregory Warner stated the following in *Kemp v Precesky*, 2006 NSSC 122:

> In my view, it is a breach of the requirements of natural justice not to have a mechanism in Small Claims Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable

> defence that should be heard on its merits, and he or she has a reasonable excuse for defaulting and is not just stalling, and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside. In light of the increase in the monetary jurisdiction of the court, it is as relevant to natural justice in the Small Claims Court as it is in the Supreme Court. There is still a requirement that the applicant show sufficient bases for the court to exercise discretion to avoid abuse.

[11] In the recent case of *CIBC Life Insurance Company v. Hupman*, 2016 NSSC 120, Justice Suzanne Hood reviewed the case law including the comments of Justice Warner and the recent decision of Adjudicator Scott Barnett, *Lelacheur v. Densmore,* 2012 NSSM 58, and his approach to allow Adjudicators to consider an excuse for failure to appear in matters other than Quick Judgments. Justice Hood concluded with the following:

> There is, therefore, in my view, the ability for adjudicators to fill gaps in the legislation to ensure there is natural justice in the proceedings before the Small Claims Court. This is a broad and purposive approach to the Small Claims Court Act.

[12] An extensive review of the reasoning in these cases and the case of *Leighton v. Stewiacke Home Hardware Building Center*, 2012 NSSC 184, was recently considered by my colleague, Augustus Richardson, QC, in *Hosseini v. Armour Transport Inc.*, 2017 NSSM 2, with which I am in full agreement:

> I am accordingly satisfied that an Adjudicator who issues an order against a defendant where
>
> a. The defendant was served,
>
> b. No defence was filed, and
>
> c. A hearing took place where the defendant did not appear,
>
> does have jurisdiction under the Act to hear an application by that defendant to set aside the order. That jurisdiction may be found in s. 23(2) or, if I am incorrect in that, in s.2 (as noted by the Supreme Court in CIBC at para.21).

[13] In applying the law, I am satisfied that Mr. Fraser proceeded without undue delay. I am prepared to give him the benefit of the doubt that, if the grounds are proven, his defence may have merit. The common question posed in each of the cases cited and s. 23(2) is the reasonableness of the excuse.

[14] Forgetting a hearing is simply not a reasonable or sufficient excuse. There is ample support in the case law for that position, including those authorities cited in Hosseini above. It is not difficult to imagine the impact on the dockets of the courts if a claim of forgetfulness were sufficient to set aside a judgment or reschedule a matter.

Mr. Fraser's credibility is further discredited by his remembering only once he received the Order entering judgment in favour of the Claimant.

[15] The application by Paul Barry Fraser to set aside the Order dated March 30, 2017 is denied.

[16] An order shall issue accordingly.

Dated at Halifax, NS
On May 12, 2017

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Gregg W. Knudsen, Adjudicator
Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)