SC CV 95 045

CV 05101

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SOUTHWEST TERRITORIAL BUSINESS DEVELOPMENT CORPORATION LTD.

Plaintiff

- and -

EDWARD R. ROBERTSON

Defendant

Application by defendant seeking variation of default judgment pursuant to Supreme Court Rule 166. Dismissed with costs.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on November 1, 1995

Reasons filed: December 13, 1995

Counsel for the Plaintiff: Karan M. Shaner

Counsel for the Defendant: Gerald D. McLaren

CV 05101

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SOUTHWEST TERRITORIAL BUSINESS DEVELOPMENT CORPORATION LTD.

Plaintiff

- and -

EDWARD R. ROBERTSON

Defendant

REASONS FOR JUDGMENT

The plaintiff has obtained a default judgment against the defendant. The defendant now seeks to vary that judgment pursuant to Rule 166 of the Supreme Court Rules:

> 166. The court may, upon such terms as it thinks just, set aside or vary any judgment entered upon default of defence or in pursuance of an order obtained *ex parte* or may permit a defence to be filed by a party who has been noted in default.

The applicable principles, whether one is seeking to set aside or vary a default judgment, are those set forth in Cook v. Howling, [1986] N.W.T.R. 108 (S.C.), at pages 109 - 110:

> 1. The application should be made as soon as possible after the judgment has come to the knowledge of the defendant.
>
> 2. However, mere delay will not bar the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful.
>
> 3. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits.

> 4. It is not sufficient to merely state that the defendant has a good defence on the merits. The affidavits must show the nature of the defence and set forth facts which will enable the court or judge to decide whether or not there was matter which would afford a defence to the action.
>
> 5. If the application is not made immediately after the defendant has become aware of the judgment, the affidavits should explain the delay in making the application. And if the delay is of long standing, the defence on the merits must be clearly established.

3 Counsel agree, however, that the sole issue before me is whether the defendant has made out a defence on the merits, or to put it more accurately, whether there is a triable issue.

Facts:

4 The plaintiff is a government-funded agency established to promote and finance economic development projects. In 1990, the defendant borrowed $61,352.30 repayable with interest at 19¼% per year. The loan went into default and demand for payment was made by the plaintiff.

5 The defendant claims that in March of 1993 he made a settlement with the plaintiff. He says that he met with Mr. Jack Rowe, a member of the plaintiff's board of directors at the time, and came to a verbal agreement to repay the principal amount owing without interest. Rowe agrees that such a proposal was made by the defendant but says that it was conditional on the approval of the plaintiff's board. Rowe says that he had no authority to accept the offer on behalf of the board. He agreed only to present the proposal to the board which he says he did. It was rejected by the board of directors,

according to Rowe, although there is no record of any discussion concerning such an offer in the board's minutes for 1993.

6 On March 7, 1994, the plaintiff filed its Statement of Claim. It was served on the defendant on March 17. The defendant then contacted the plaintiff's solicitor. He says that he told the solicitor about his arrangement with Rowe and that the solicitor told him to put it in a letter to the plaintiff making the same offer. There is no evidence from the solicitor. On April 7, 1994, the defendant sent a letter to the plaintiff informing them of his plans to sell some property and making the offer to repay the principal debt only. The board minutes indicate that the proposal was considered at a meeting on April 28, 1994. This is the first reference in the minutes to any offer from the defendant. The offer was rejected by the board whose general manager wrote back to the defendant on May 9, 1994:

> The Southwest Territorial Business Development Corporation's Board of Director's has reviewed your letter of April 7, 1994. As stated in your letter "With the sale completed, we are offering you the full payment of the original loan of $61,357.30 and asking you to write off the remaining costs." The Board of Directors would be prepared for negotiation when a firm offer on the Enterprise Service Station is in place. Until such time the outstanding balance of your loan and interest remains due.

7 The defendant did not file a Statement of Defence and judgment was entered by default on August 8, 1994. The total amount of the judgment, inclusive of principal, interest and costs, is $107,313.71.

On August 15, 1994, the defendant wrote again to the plaintiff and again put the offer to settle for the principal of the loan amount only. His letter starts: "I would like

to ask that you (the general manager) pass onto the board my offer to settle the outstanding loan with your organization for the amount of $61,352.30." The defendant had sold some property at a reduced price so as to be able to repay the loan as well as to clear some personal tax liabilities. This offer was considered and again rejected at a board meeting held on August 16, 1994.

9 On May 4, 1995, the defendant launched this application. He seeks to vary the default judgment by reducing the amount to $61,352.30. He also seeks a trial of the issue of his liability for interest. His position is that he had an agreement as a result of his discussions with Rowe in 1993.

10 When this application first came on for a hearing before me, I directed that counsel file submissions on the question of Rowe's authority, real or ostensible, to make the alleged agreement with the defendant. Those submissions have now been filed.

Discussion:

11 The defendant submits that the question of whether a settlement was effected in 1993 is a real issue that should be tried. He also submits that the plaintiff should be estopped from denying Rowe's authority to make the alleged settlement agreement.

12 The defendant relies on the principle of "estoppel by acquiescence" as discussed in Voyager Petroleums Ltd. v. Vanguard Petroleums Ltd. et al, [1982] 2 W.W.R. 36 (Alta. Q.B.). An estoppel arises when silence or inaction on the part of one party induces another party to incur some expense or do some act on the basis of a mistaken belief as

to their legal rights. The first party, however, must have knowledge of the other party's mistake. The "acquiescence" therefore amounts to a fraud perpetrated on the other party.

The Voyager case outlined the five requisites of a sound case of estoppel by acquiescence. I will review each in specific reference to the parties in this case.

1. Did the defendant make a mistake as to his legal rights?

The defendant says that he was under the impression back in 1993 that he had negotiated a settlement with the plaintiff as a result of his discussions with Rowe. This is directly contradicted by Rowe who says that any agreement was subject to Board approval. Even if I leave aside for the moment this conflict in the evidence, I find that the defendant could not have been mistaken about his legal position once the action was commenced and after his offer of April 7, 1994, was rejected by the letter dated May 9, 1994. He still had time to file a defence then but chose not to do so even though he was expressly told that the full amount of the loan and interest was sought.

2. Did the defendant expend some money or take some action on the basis of his mistaken belief?

The defendant proceeded to reduce the sale price of some property so as to make a sale. He did so in the hope of negotiating a settlement of this claim but not on the basis of a settlement already having been effected. Furthermore, the defendant, in effecting a quick sale, appears to have wanted to clear his tax liabilities just as much as his debt to the plaintiff. In his letter of August 15, 1994, the defendant said that "if it turns out

that I cannot honour my commitment to Revenue Canada then I will have to stop the sale and ask for an increase in the price to compensate what the board wants for a settlement." I therefore find that he, even in August, was not acting on the basis of some mistaken belief as to a settlement but merely in the hope of one.

16 3. Did the plaintiff know of the existence of its own rights which are inconsistent with the rights claimed by the defendant?

The plaintiff certainly knew of and acted on their rights by bringing an action to recover the debt.

17 4. Did the plaintiff know of the defendant's mistaken belief?

There is no evidence that the plaintiff, prior to entering judgment or even right after it, knew of the defendant's mistaken belief. The first time an offer was considered by the plaintiff's board was, according to the minutes, only after the action was commenced. After judgment was entered the defendant still wrote in terms of seeking the board's agreement to his settlement proposal.

18 5. Did the plaintiff encourage the defendant in his actions?

There is no evidence that the plaintiff took any steps to encourage or induce the defendant to take any step. The board kept open the possibility of negotiating a settlement but at no time did it acknowledge one or commit itself to one.

19 For these reasons I conclude that there is no "estoppel by acquiescence" on the facts of this case. I further conclude, as submitted on behalf of the plaintiff, that there

was no actual or ostensible authority on the part of Rowe to make a binding settlement agreement with the defendant. Rowe's evidence confirms that fact. There is as well no evidence of representations being made to the defendant, by anyone, as to Rowe's authority to settle the claim.

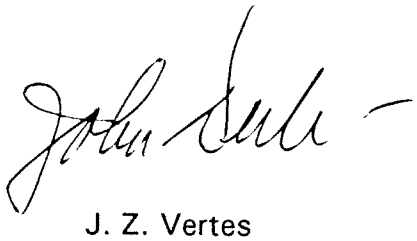
20 As I noted previously, the only issue I am called on to decide within the context of this application is whether there is a genuine issue for trial. There is no doubt that a judgment should only be entered after a careful consideration of the merits. But this principle does not automatically call for a trial in the absence of evidence on issues that may determine the case in the defendant's favour. In this regard I adopt the comments of Wilson J. of the Ontario Court (General Division) in Bank of Montreal v. Chu et al (1994), 17 O.R. (3d) 691, at page 697:

> The principle of a right to a full hearing must be balanced with the emerging belief that if there is no genuine issue for trial, all litigants should be spared the cost and disruption of litigation. I echo the words of Morden A.C.J.O., in *Irving Ungerman Ltd.* v. *Galanis* (1991), 4 O.R. (3d) 545 at pp. 550-51, 83 D.L.R. (4th) 734 (C.A.):
>
> > A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense.
>
> Consistent with the policy of balancing the applicant's right to a trial with the respondent's rights to a speedy resolution is one in which the defence itself is examined. In order to give full and fair consideration to the issue of whether the application has a defence on the merits, the principles applicable in a motion for summary judgment should be considered in assessing whether a default judgment ought to be set aside. Does the defence on the merits raise a genuine issue for trial? Does the defence have an air of reality about it in light of the evidence brought forward in the motion? Are there real credibility issues relating to important facts?

21 I have concluded that the defendant has failed to put forth a meritorious defence. Indeed the evidence points directly to conclusions opposite to those sought by the defendant: that he did not have a settlement; that he kept trying to negotiate a settlement; and, that he ignored the law suit in the hope of eventually negotiating a settlement. There is no evidentiary or legal basis to suggest that his discussions with Rowe amounted to a binding agreement. Hence I conclude that there is no triable issue.

Conclusion:

22 The defendant's application is dismissed with costs to be taxed on the basis of double column 4 of the tariff of costs.



J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 13th day of December, 1995

Counsel for the Plaintiff: Karan M. Shaner

Counsel for the Defendant: Gerald D. McLaren

CV 05101

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SOUTHWEST TERRITORIAL BUSINESS DEVELOPMENT CORPORATION LTD.

Plaintiff

- and -

EDWARD R. ROBERTSON

Defendant

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

---