

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

J.S.L. MECHANICAL INSTALLATIONS LTD.

Plaintiff

- and -

**GEOFF JAMES, S.K. WONG, GARY DAHL and
GEOFF JAMES, S.K. WONG and GARY DAHL
carrying on business under the firm name and
style of THE RIGHT SPOT BAR GRILL and
892629 N.W.T. LTD.**

Respondents/Defendants

- and -

WONG'S ENTERPRISES LTD.

Applicant/Third Party

REASONS FOR JUDGMENT

1 The third party in these proceedings seeks to have the court set aside judgment entered against it upon default.

2 This debt action was commenced by the plaintiff, a mechanical contractor, in July 1991. At the centre of the *lis* is an unpaid invoice for services performed at certain business premises in Yellowknife in 1990. The defendants were tenants occupying those premises and the third party, their landlord.

3 In July 1991, the defendants filed a statement of defence in which they
alleged, *inter alia*, that payment of the invoice was the responsibility of the landlord. In
January 1992, the defendants filed a third party notice pursuant to Order 8 of the Rules
of Court, claiming that the third party is liable to the defendants for any successful claim
by the plaintiff against the defendants. The third party notice was served upon the third
party in February 1992 by registered mail to its registered office. An acknowledgement
of receipt of the registered document was signed by one Sheila Wong on February 20,
1992. Sheila Wong is the daughter of Cory Wong and Pauline Wong both directors and
officers of the corporate third party.

4 Service of pleadings in this manner is authorized by statute, *viz.*, *Companies*
Act, RSNWT 1988, ch. C-12:

186. A document may be served on a company by leaving it at or
sending it by registered post to the registered office of the company,
or by serving any director, manager or other officer of the company.

5 The third party failed to defend or demand notice. The defendants noted
the third party in default in June 1994 pursuant to the Rules of Court in that regard.

6 Examinations for discovery, as between plaintiff and defendants, were held
in 1993. In November 1995 the plaintiff obtained a court order setting the matter for trial
in January 1996. On the eve of trial, settlement was achieved between plaintiff and
defendants, resulting in judgment against the corporate defendant in the amount of
\$12,000 inclusive of interest and costs, on January 4, 1996. On the same date, default
judgment was entered against the third party in favour of the corporate defendant in the

amount of \$12,000 plus taxable costs.

7 The defendants have paid the \$12,000 judgment owed to the plaintiff.

8 The defendants attempted execution of its judgment in late January by, *inter alia*, serving garnishee documents on certain of the third party's debtors. In the affidavit of Cory Wong filed in support of the present application, he states that it was when these debtors brought the garnishee documents to his attention that he became aware of the judgment which had been entered against his company.

9 In paragraph 2 of his affidavit, Mr. Wong avers "that I was never personally served with or otherwise notified of the Third Party Notice which was filed with the court on January 29, 1992, nor was I formally notified or advised of any of the other pre-judgment proceedings in this matter". No explanation or detail is given concerning the qualifying word, "formally".

10 Mr. Wong further states:

- a) that it is he who has primary responsibility for the business affairs of the corporate third party;
- b) that he was out of the country on business from the fall of 1991 to the summer of 1992;
- c) that prior to leaving on that trip he left instructions with his wife and with company employees that he was to be contacted in the event of any problems with the company's business;
- d) that he was not told by Pauline Wong, Sheila Wong, or any company employee of the delivery of the Third Party Notice to the corporate third party;

e) that the judgment came to his attention in early February 1996.

11 The present application is made pursuant to Rule 143 and Rule 166 which provide:

143. (1) Where a third party fails to defend within the time limited, the party issuing the third party notice may, on *praecipe* and proof by affidavit of service of the third party notice and the failure to file or serve a statement of defence or a demand of notice, require the clerk to note in the procedure book that the third party is in default.

(2) Thereafter, the third party shall not, except by leave of the court, file or serve a statement of defence to the third party notice or a demand of notice.

...

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.

12 Whether or not to open up a default judgment is a matter of discretion. The principles governing an application to open up default judgment have been established in previous decisions of this court. See *Costa v. Sanavik Co-operative* (1979), 24 A.R. 417, *Cook v. Howling*, [1986] N.W.T.R. 108, *Inuvik Housing v. Cerny*, [1990] N.W.T.J. No. 87, *Evoy v. Evoy*, [1993] N.W.T.J. No. 72, *Currie v. Currie*, [1995] N.W.T.J. No. 1, and *Southwest Territorial Business Development Corporation v. Robertson*, [1995] N.W.T.J. No. 84.

13 One of those principles is that the application should be supported by a sworn affidavit which sets out the details and circumstances under which the default

arose, and which show a valid reason or excuse for allowing the default judgment to happen. In all of the circumstances, I am not satisfied that this particular requirement has been met by the applicant corporation.

14 The third party notice served upon the applicant corporation set out clearly the grounds upon which the defendants claimed indemnity from the applicant corporation. Equally clear in that document was a notice (as required by the Rules) to the effect that judgment may be entered against the applicant corporation unless it filed a defence or demand of notice within 30 days. There is no evidence as to what action, if any, was taken by the company in the face of such a notice. One can imply that it was simply ignored by those charged with the day-to-day conduct of the company's business at that time. No affidavits or other evidence are presented from Sheila Wong, Pauline Wong or any other person active on behalf of the company at the time. The irresistible conclusion is that during the period February 1992 - February 1996 the corporate third party ignored the third party notice duly served upon it. No excuse is advanced save a mere suggestion of a failure of communication, or negligence, within the ranks of the company's personnel. If there is misfeasance, mismanagement, or even a failure of communication internal a corporate entity, should problems flowing therefrom be visited externally upon an opposing litigant who has complied with the rules of court?

15 In my view, the explanation offered on behalf of the third party is not satisfactory.

16 In addition, consideration must be given to the prejudice suffered by the

defendant, 892629 N.W.T. Ltd. With the knowledge that the third party had been noted in default, allowing that defendant to recover from the third party, it permitted judgment to be entered against itself in a negotiated amount and paid out that judgment. The defendant, conducting itself throughout in accordance with the Rules, acted to its own detriment and was entitled to rely upon the notion that all adversaries in litigation must equally abide by the Rules.

17 For the foregoing reasons, the application is dismissed with costs.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
March 29, 1996

Counsel for Defendants: R.J. Peach

Counsel for Third Party: N. Sinclair