Date: 1999 08 18
Docket: CV 07347

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GIORGIO'S LTD.

Plaintiff

- and -

KEN WONG

Defendant

MEMORANDUM OF JUDGMENT

[1] On this application the Court is asked to set aside its own judgment pronounced following a hearing for an assessment of damages. The defendant seeks this relief so that he might a) present evidence on the damages issue and b) cross-examine the plaintiff's officer on an affidavit which was used in the assessment hearing.

[2] The defendant has been less than diligent in his conduct of the within litigation. Accordingly, it is necessary to put the present application in full context by a brief review of pertinent chapters of the history of this action:

1. The statement of claim was issued October 16,1997. The plaintiff, a commercial landlord, says it entered into a five-year formal lease agreement with the defendant for commercial premises in Yellowknife. Plaintiff says defendant made only three lease payments and walked away from his contractual obligations. Plaintiff alleges breach of contract and sufferance of substantial damages.

2. The defendant filed a statement of defence in June 1998 by his then solicitor.

3. Examinations for discovery were held in September 1998.

4. In March 1999 the plaintiff made application for summary judgment in the form of a declaration that a valid commercial lease had existed, the terms of which had been breached by the defendant, and for an order setting the matter down for an assessment of damages.

5. The plaintiff's application was adjourned once on consent. On the next scheduled hearing date, March 12, 1999, the defendant sought another adjournment which was opposed. The Court granted the adjournment to March 26, 1999, peremptory on the defendant. The Court further ordered the defendant to pay the plaintiff's costs of the adjournment. Those costs were to be paid forthwith. Those costs have been taxed but remain unpaid by the defendant.

6. On March 26, 1999, the Court granted summary judgment as requested, after hearing submissions of counsel. The defendant did not file any affidavit material on the summary judgment application. In the same order of March 26, 1999, the Court directed that the plaintiff's damages be determined at an assessment hearing, unless resolved between the parties.

7. The parties could not come to an agreement on damages, nor on a date for an assessment hearing.

8. On June 25, 1999, the plaintiff applied before me in Chambers for a date to be set for the assessment hearing. On the application, the plaintiff, through the affidavit of its principal officer, stated reasons why the assessment hearing ought to be scheduled prior to July 9, 1999. The defendant appeared by counsel but did not file affidavit material. Defendant's counsel opposed the setting of an early date for the assessment hearing, citing his own busy schedule and his inability to obtain instructions from his client who was travelling. The Court granted the plaintiff's application and directed that the assessment hearing be held on or before July 9, 1999 on a specific date to be set by the Clerk of the Court upon the request of plaintiff's counsel. In making the order, the Court stated its anticipation that on the assessment

hearing date the defendant may well be making application to the assessment hearing judge for an adjournment prior to concluding the assessment hearing; i.e., an adjournment to allow the defendant to present evidence and/or cross-examine the plaintiff's officer at a still later date.

9. The assessment hearing was set for July 6, 1999. The plaintiff appeared before me at the formal assessment hearing with its principal officer prepared to give *viva voce* testimony, and also filed the sworn affidavit of its principal officer. The defendant appeared by his former solicitor (Mr. Rehn). Mr. Rehn, for his client, sought an adjournment of the assessment hearing on the grounds that the defendant had, the previous day, retained a new solicitor (Mr. Sowa). No notice of change of solicitor had yet been filed. No affidavit material was filed on behalf of the defendant, either on the substantive issue; i.e., quantum of damages, or on the merits of the adjournment sought. The adjournment request was denied. I proceeded to consider the plaintiff's tendered evidence and granted judgment in the amount sought by the plaintiff.

[3] The defendant by his new solicitor of record now seeks to vary or set aside the pronounced judgment of July 6, 1999 so as to permit the defendant to present evidence on the damages issue and to cross-examine the plaintiff's principal officer on his sworn affidavit filed on the assessment hearing. The defendant's formal application was filed July 29, 1999. As grounds for the requested relief, the defendant cites:

a) prejudice caused to the defendant by the short notice of the assessment hearing;
b) a denial of the defendant's right to cross-examine on the plaintiff's affidavit material and his right to present evidence;
c) the guilty plea by the plaintiff's principal officer on July 22, 1999 to a criminal charge of fraud.

[4] An initial issue, of course, is whether I have jurisdiction to entertain the present application.

[5] The judgment pronounced on July 6, 1999 has not yet been formally entered with the Clerk of the Court (though, in fairness, the reason for that is the pending present application).

[6] Defendant's counsel submits that the Court has a discretionary power to vary its pronounced judgment at any time before that judgment is formally entered. In support of this submission, counsel relies on *Barrie v. Diamond Coal Co.* (1914) 6 W.W.R. 651 (Alta.C.A.) and *Commissioner of the N.W.T. v. Simpson Air* [1994] N.W.T.J. No.27 (N.W.T.S.C.).

[7] Counsel also relies on Rules 397, 399(1) and 408.

Rule 397 states:

> A party who has failed to appear on an application through accident or mistake or because of insufficient notice may move to rescind or vary an order made on the application within 10 days after the day the order comes to his or her notice or within such further time as the Court may allow, whether the order has been acted on by the party to whom it was granted or not.

Rule 399(1) states:

> An order may be set aside, varied or discharged on notice by the judge who granted it.

[8] It must be noted that Rule 397 and Rule 399 are contained within Part 31 - Motions and Applications, and not within Part 32 - Judgments. The Court's pronouncement of July 6, 1999 was a judgment granted following a trial or hearing of the issue of damages. This was not a Chambers motion or a Chambers application.

[9] Rule 408, contained within Part 32 - Judgments, states:

> It is not necessary in a judgment or an order to reserve liberty to apply to the Court in respect of any matter dealt with in the judgment or order and a party may apply to the Court from time to time as the party considers appropriate.

[10] In my respectful view Rule 408 does not empower the Court to do anything contrary to the original judgment but only to clarify the judgment.

[11] Assuming for the moment that I do have jurisdiction to "open up" the judgment, I am not satisfied that grounds exist for doing so.

[12] I shall consider grounds (a) and (b) above together. In his submissions regarding short notice of the July 6 hearing counsel refers to Rules 383(2) and 383(5):

> 383(2) The notice of motion and any affidavit to be relied on in support of an application that has not already been served shall be served no less than five clear days before the return date of the application.
>
> . . .
>
> 383(5) A notice of motion and any supporting affidavit that has not already been filed shall be filed not less than two clear days before the return date of the application.

[13] Once again, I note that the cited rule applies to Part 31 - Motions and Applications. The July 6, 1999 hearing was not an application or motion in Chambers, it was a trial of an issue.

[14] The defendant complains that his then solicitor only learned of the July 6 hearing on the day previous. This plaint ignores the fact that notion of an imminent assessment hearing was under active discussion in Chambers on June 25, and indeed was directed to be held prior to July 9; i.e., within 14 days. The defendant can hardly be heard to complain of surprise or prejudice caused by the actual date chosen.

[15] Similarly, the late disclosure of the actual Meraglia affidavit used on the assessment hearing is of faint significance. There is uncontested evidence before the Court that the information and documents contained within the Meraglia affidavit were disclosed, in other forms, to the defendant between February and June of this year.

[16] It is noteworthy, in my view, that the defendant did not, on the June 25 date, nor on the July 6 date, nor on the present application provide the Court with any affidavit material regarding:

a) what evidence he wishes to present on the damages issue, or
b) the reasons for his delay or default in instructing counsel and preparing for the assessment hearing since it was ordered by the Court on March 26, 1999.

[17] In these circumstances it has not been demonstrated that the defendant has been denied a reasonable opportunity to present his own evidence to the Court.

[18] Turning briefly to ground (c) in support of the request to "open up" the judgment, defendant's counsel in his submissions refers to the fact that on July 22, 1999 (16 days after the assessment hearing) Mr. Meraglia, the deponent of the affidavit used by the plaintiff in putting forward its case on the assessment hearing, pleaded guilty in Territorial Court to a charge of fraud. The circumstances of the fraud charge, counsel advise, are unrelated to the within litigation. Absent a *nexus*, it cannot be said to be fresh evidence. I fail to see its relevance to the present application, an application to revisit a judicial determination which flowed from the defendant's own lack of attention to his lawsuit.

[19] In summary, I see no merit in the application.

[20] In any event of the merits, however, in my view I am clearly *functus officio* and therefore unable to assist the defendant on this application. On July 6, following submissions on the point, I made a decision on the short notice issue, and denied the defendant's request for an adjournment, finding on the material before me that the defendant had had adequate notice of the assessment hearing. Having done so, it is not open for me to revisit that very point.

[21] The general rule that a final decision of a Court cannot be reopened has, as a policy objective, the bringing of litigation to finality. The principle of *functus officio* simply holds that a judicial decision-maker does not have the authority to reopen a decision once made.

[22] In the circumstances of the relief being sought on this application, I assign no significance to the fact that the formal judgment has not yet been entered. On the two issues which the defendant wishes to revisit; i.e., the denied adjournment request and the judgment itself, I am *functus officio* with or without formal entry of the judgment. If the *Diamond Coal* case on which counsel relies purports to state an unequivocal rule that <u>any</u> reconsideration is possible before formal entry, then I am in respectful disagreement.

[23] There are exceptions to the *functus officio* rule, as indicated in *Simpson Air*. None of those exceptions apply here. The circumstances in *Simpson Air* are distinguishable from the circumstances of the within proceeding.

[24] If the aggrieved defendant has a remedy, it lies with the Court of Appeal.

[25] For these reasons the defendant's application is denied. The plaintiff shall have its party and party costs.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
18th day of August 1999

Counsel for the Plaintiff: Katherine Peterson, Q.C.
Counsel for the Defendant: William S. Sowa, Q.C.

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