Duval v. Pickering, 2002 NWTSC 40

Date: 20020514
Docket: CV 08955

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DANIEL DUVAL, carrying on business as INNOVATORS

Plaintiff

- and -

JAY PICKERING AND KAREN PICKERING,
carrying on business as JOIE DE VIVRE

Defendants

Application to set aside a direction to note in default and for leave to file a statement of defence.

Heard at Yellowknife, NT on March 18, 2002

Reasons filed: May 14, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Plaintiff: Austin Marshall
Counsel for the Defendants: Michael Himmelman

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REASONS FOR JUDGMENT

[1] This is an application by the Defendants to set aside a direction to note in default and for leave to file a statement of defence. An application for summary judgment by the Plaintiff was adjourned *sine die* pending decision on the Defendants' application.

[2] The statement of claim was filed on August 2, 2000, claiming money owed for the supply and installation of cabinets and other material in a salon and spa business. The amount claimed as owing is $34,282.85.

[3] The Defendants' solicitors were served with the statement of claim on August 2, 2000. On August 30, 2000, they filed an appearance.

[4] The direction to note in default was filed on November 2, 2000 and a copy served on the solicitor for the Defendants on November 7. The Plaintiff applied for judgment by a notice of motion filed February 9, 2001 and set down for February 23. The Defendants cross-applied to set aside the direction to note in default and on February 23, both applications were adjourned *sine die*. They were not brought back before the Court until January 18, 2002, and thereafter were adjourned on consent until they were heard

on March 18. The year long delay from February 23, 2001 to March 18, 2002 is unexplained save for the fact that cross-examination on the affidavits of the Plaintiff and Jay Pickering took place during that interval, in April 2001.

[5] Rule 171 of the Rules of Court provides, *inter alia*, that the Court may, on such terms as it considers just, permit a defence to be filed by a party who has been noted in default. The Rule is clearly discretionary.

[6] The applicable principles have been set out in a number of cases by this Court and are as follows:

> 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.
>
> *Cook v. Howling*, [1986] N.W.T.R. 108 (S.C.)
>
> *Southwest Territorial Business Development Corp. v. Robertson*, [1995] N.W.T.J. No. 84 (S.C.)

[7] A defendant seeking to come within the rule need not show that his defence would succeed, but that there is a triable issue.

[8] In this case, the Plaintiff says that the Defendants delayed unduly in applying to have the noting in default set aside and that they have not shown that they have a defence on the merits. The Defendants say that there was no undue delay, the delay that

occurred has been explained and they point out that judgment has not yet been entered. They also say that they have raised a legitimate triable issue as to whether the contract was with them as individuals or with a company in which they were involved.

[9] On the issue of delay, as indicated above, an appearance was filed on behalf of the Defendants by their then counsel on August 30, 2000. The direction to note in default was filed on November 2, 2000 and served on the Defendants on November 7. The affidavit of the Defendant Jay Pickering indicates that there was correspondence back and forth between his counsel and counsel for the Plaintiff during the month of October 2000 with requests that the Defendants not be noted in default and counsel for the Plaintiff giving deadlines for filing a statement of defence. Mr. Pickering states in his affidavit that it was never his intention to concede the Plaintiff's claims. During the summer and fall of 2000, he encountered a number of significant difficulties in his personal life, as detailed in the cross-examination on his affidavit. At the same time, his company was having financial problems. He acknowledges that in the last week of October 2000, his lawyer sought his instructions as to the Plaintiff's latest deadline of October 27, 2000. He did not provide any instructions. His evidence on cross-examination was that he went into a depression at about that time. It appears from his affidavit that his counsel did, on November 8, 2000, contact the Plaintiff's lawyer's office and request that he contact him before doing anything further. It seems that the next contact was not until February 14, 2001, when the Plaintiff's notice of motion for judgment was delivered. The Defendants' cross-application to set aside the noting in default was filed on February 22, 2001.

[10] The time from the Defendants being noted in default to when they applied to have the noting in default set aside is therefore a little more than three and a half months. The application was not, therefore, brought as soon as possible, although the delay is not what I would call lengthy, when considered in context of the usual course of litigation.

[11] The Plaintiff argued that the delay was wilful, but in my view the circumstances show that the Defendant Jay Pickering was not intentionally trying to delay matters but rather was impeded in his ability to deal with them promptly by his personal circumstances, which were unusually difficult.

[12] No irreparable injury was alleged by the Plaintiff as a result of the delay. In my view, the three and a half month delay in moving to set aside the noting in default is really negligible. It is the delay from February of 2001, when the application was made, until March 2002, when it was heard, that is more striking and if there is any prejudice to the Plaintiff I would expect that delay to have been, if not the only cause, then at least the

main cause. However, as no submissions were made to me about that period of delay or who was responsible for it, I do not take it into account.

[13] For the above reasons, I find that the delay is not a bar to the Defendants' application.

[14] The next, and more significant, issue is whether the Defendants have shown that they have a defence on the merits. The defence raised by the Defendants is that the Plaintiff has sued the wrong entity. They say that the debt is actually that of a company which was incorporated by Jay Pickering and in which Karen Pickering, his spouse, was employed.

[15] The Plaintiff's affidavit does not address what he knew at the time the contract for the supply and installation of the materials was made, but since he was cross-examined and the onus is on the Defendants on this application, I do not consider that to be a major problem. The Plaintiff's position is that the evidence shows that as far as he knew he was contracting with individuals, not a company and that the Defendants only raised this defence late in the day, after the noting in default.

[16] The Defendants named in the statement of claim are "Jay Pickering and Karen Pickering, carrying on business as Joie de Vivre". The evidence is that in April of 1999, Jay and Karen Pickering filed a declaration with Legal Registries indicating that they were carrying on business in partnership under the name "Color Works Salon & Spa". On September 22, 1999, a declaration was filed indicating that the partnership was dissolved on September 17, 1999. On September 21, 1999, a company called "Color Works Salon & Health Spa Ltd." was incorporated with Jay Pickering as its sole director and the only voting shareholder. The company used the trade name "Joie de Vivre" but did not register it with Legal Registries.

[17] There was no single written contract between the parties for the supply and installation of the materials. The paperwork which reflects the contract starts with a proposal dated January 17, 2000 and made by the Plaintiff, which says on its face that it is submitted to Karen Pickering. The job location is described in the proposal as "Color Works Salon & Spa". On the copy of the proposal which is before me, the portion for acceptance of the proposal is blank. The Plaintiff's evidence is that this document was submitted to Karen Pickering. He had not had contact with Mr. Pickering at that point. Presumably Karen Pickering did or said something to indicate that the proposal was accepted, but there is no evidence before me about that.

[18] The next document is an invoice dated April 5, 2000. It seems to be a summary of earlier invoices and monies owing for the supply of cabinet materials and labour. It describes the purchaser as "Joie de Vivre, formerly Color Works" and says that the goods are to be shipped to Karen and Jay Pickering.

[19] Also on April 5, 2000, Jay Pickering swore a statutory declaration before his lawyer. That declaration, which was prepared by the Plaintiff, starts off with the phrase "In the matter of the project, Joie de Vivre, formerly Color Works". Mr. Pickering then solemnly declares that he is the owner, in whole or in part, of that business. He also solemnly declares in that document that receiving and freight costs are the responsibility of the owner.

[20] The next document of significance is a memorandum dated April 27, 2000 from the Plaintiff to Jay and Karen Pickering. It was prepared by the Plaintiff. This memorandum describes them as the owners of "Joie de Vivre, formerly Color Works". In the first paragraph of the memorandum, the Plaintiff acknowledges his obligations as the cabinet supplier "for the business known as Joie de Vivre, owned and operated by Jay and Karen Pickering". At the bottom of the memorandum Mr. Pickering signed his approval and is described as "owner, Joie de Vivre".

[21] By cheque dated April 27, 2000, partial payment was made on the invoice of April 5. That cheque was drawn on the account of Color Works Salon & Health Spa Ltd.

[22] For purposes of determining who the contracting parties were, the crucial time is the time when the contract was entered into: *Leland Brown Electric Ltd. v. Hansen*, [1988] A.J. No. 529 (C.A.). What is important is the state of knowledge of the Plaintiff when the contract was made. The Plaintiff's position is that he contracted with Jay and Karen Pickering carrying on business as Joie de Vivre. The Defendants on this application must establish that there is a triable issue about that, in other words, that there is a basis upon which it might be found that the Plaintiff knew that his contract was with the company.

[23] For the Defendants to establish a basis upon which that finding could be made, it seems to me that, absent an admission by the Plaintiff that he knew he was contracting with the company, they must be able to point to some representation made on their part to the Plaintiff that it was the company that was entering into the contract and would be liable and not them personally.

[24] There is no admission by the Plaintiff that he knew he was contracting with a limited company. The only relevant question put to him during cross-examination on his affidavit was whether, when the April 27, 2000 memorandum was signed, Mr. Pickering attempted to explain that it was not his personal debt, but rather that of the company. The Plaintiff responded that there was never any mention of that at all.

[25] In his affidavit, Jay Pickering denies entering into any contract with the Plaintiff. He also says that to the best of his information, knowledge and belief, Karen Pickering did not enter into any contract with the Plaintiff.

[26] Jay Pickering's evidence on his cross-examination was that the Plaintiff's dealings were primarily with Karen Pickering as the employee who had responsibility for the project. He did not have contact with the Plaintiff until invoices were submitted. His only evidence as to what transpired when the contract was made is as follows, referring to what Karen Pickering had told him:

> I was told that she cannot remember. I was told she could not remember what she did and that she does not believe that she, you know, personally said that she was liable or that she had contracted this work, that she was doing it for the company.
>
> ... And it's apparent that I am after the fact doing - - like there was a lot of information here that I was not privy to and that's where I am with this. So it's to the best of my knowledge that she did not do it.

[27] There is no evidence from Jay Pickering that he ever told the Plaintiff that it was the limited company that was operating the business for which the work was done and the materials supplied. There is no evidence at all from Karen Pickering and the excerpt above indicates that she does not remember what she told the Plaintiff. Therefore, I am left with the documents described above. The only one which clearly refers to the limited company is the cheque. But who made the payments on the invoices is not determinative of who made the contract and does not indicate anything about what the Plaintiff knew when he entered into the contract.

[28] The Defendants seem to be relying on what their intention was, rather than any expression of that intention to the Plaintiff. In my view, it is not enough for purposes of showing that there is a defence, for the Defendants to say simply that they did not contract personally with the Plaintiff, when all of the documentation refers to them, and not the limited company, as the owners of the business. So although Jay Pickering was not present when the agreement was struck between Karen Pickering and the Plaintiff,

the fact that the statutory declaration he later swore describes him as the owner of the business is evidence that he did not bring to the Plaintiff's attention that there was a limited company involved. The memorandum of April 27, 2000 is also evidence of that. The significant point is that Mr. Pickering signed the documents without clarifying the situation. It was up to the Defendants, not the Plaintiff, to clarify whether they were acting on their own behalf or that of a company. There is no evidence that they ever did so.

[29] This is not a matter of "lifting the corporate veil" to find personal liability, as counsel for the Defendants suggested, but of determining who was held out to the Plaintiff as the contracting party.

[30] The evidence suggests to me that the Defendants were probably not aware that they should make it known to the Plaintiff from the outset that it was the company that was entering into the contract, if they did not intend to be held personally liable. Whatever they knew or may have intended, without any evidence that they raised the issue with the Plaintiff, there is no basis upon which I can find that a triable issue exists. It may be that the Defendants themselves have a claim against the company for the materials supplied and work done, but that is not the issue on this application.

[31] The fact that the Defendants did not raise this issue either before or at the time they were served with the statement of claim suggests to me that they did not draw a clear line between the company and themselves and that the defence is one of form rather than substance.

[32] For the above reasons, I find that the Defendants have not shown that they have a defence on the merits. Accordingly, their application is dismissed. The Plaintiff may bring his application for judgment back on with notice before any Judge of this Court.

[33] Costs normally follow the event. As they were not addressed, if counsel cannot agree on them, they may bring that issue back on before me by contacting the registry to arrange a date within 30 days of the date these reasons are filed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
14th day of May 2002

Counsel for the Plaintiff: Austin Marshall
Counsel for the Defendants: Michael Himmelman

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