Bungay v. *Bungay*, 2008 NWTSC 19

Date: 2008 03 12
Docket: S-0001-DV2007-103826

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CAROLYN GRACE BUNGAY

Petitioner

- and -

GEOFFREY CRAIG BUNGAY

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application to set aside a noting in default. For the reasons that follow, the application is granted but with terms.

[2] The petitioner filed her Petition for Divorce on July 11, 2007. In it she seeks a divorce, orders for custody of the two children of the marriage and child support, and an equal division of family property. The Petition was served on the respondent, in Yellowknife, on July 22, 2007. The respondent had 25 days from the date of service within which to file an Answer or Counter-Petition if he wanted to oppose any item of relief sought by the petitioner. On December 3, 2007, the respondent was noted in default for failure to file an Answer or Counter-Petition. The respondent then applied, on February 1, 2008, to set aside the noting in default.

[3] By virtue of s.3(2) of the *Northwest Territories Divorce Rules*, the general rules of procedure of the Supreme Court apply unless otherwise provided. Rule 171 of the Rules of Court addresses the setting aside of a noting in default:

> 171. The Court may, on such terms as it considers just, set aside or vary a judgment entered on default of defence or pursuant to an order

> obtained *ex parte* or permit a defence to be filed by a party who has been noted in default.

[4] The applicable principles have been set out in numerous cases of this court, including matrimonial cases: *Evoy* v. *Evoy*, [1993] N.W.T.J. No. 72 (S.C.), at para. 20; *Currie* v. *Currie*, [1995] N.W.T.J. No. 1 (S.C.), at paras. 22-23. The applicant has to demonstrate that he had an intention to defend the action; provide an excuse for the default; move promptly to set it aside; and, show an arguable defence. This last criterion does not mean that he must show that his defence will succeed, merely that there is a triable issue: *Duval* v. *Pickering*, [2002] N.W.T.J. No. 40 (S.C.), at para. 7.

[5] Rule 171 speaks to both setting aside a noting in default and setting aside a judgment entered on default. Generally speaking, the same principles apply to both applications. But I think it can be fairly said that the application of those principles is more lenient when it comes to setting aside a noting in default as opposed to a default judgment. The noting in default is an automaticadministrativeact whereas there is still an exercise of discretion, whether by the clerk of the court or a judge, in signing judgment. Entering default judgment is a far more significant step than the mere noting in default, thereby justifying a more robust application of the principles in that instance.

[6] In this case, the respondent says that after he was served with the divorcepapers he returned to his family home in Newfoundland in order to cope with the emotional distress at the break-up of his marriage. He consulted a lawyer in Newfoundland and there was correspondence with the Petitioner's counsel in Yellowknife. He was aware that steps had to be taken but there was only so much his Newfoundland lawyer could do for him. Petitioner's counsel gave him a deadline to defend. He returned to Yellowknife and tried to retain a local lawyer. He eventually retained his current lawyer in December who immediately initiated contact with the Petitioner's counsel. But by then he had been noted in default.

[7] Petitioner's counsel opposed the request to set aside the default on the basis that there were no real issues still to be resolved. The children are in the petitioner's care and the respondent has been paying support. Any corollary relief order that the petitioner may obtain will be subject to appeal or variation so there is no prejudice, according to petitioner's counsel. The former matrimonial home has been sold and proceeds divided. The petitioner is willing to withdraw her family property claim.

[8] Respondent's counsel submitted, however, that there are triable issues, in particular the question of the quantum of child support, a support retroactivity claim advanced by the petitioner, and pension entitlement. Counsel argued that it is not enough to be able to move to vary any order since the issuance of an order by default will itself be prejudicial. Furthermore, there is no certainty as to the impact a divorce may have on the ability of the parties to deal with their respective pension entitlement claims.

[9] In my opinion the respondent has met the test. He had an intention to defend some of the issues raised in the Petition for Divorce; he consulted a lawyer and there were communications before the noting in default;he took steps promptlyto secure the services of a lawyer who could act in these proceedings; he moved promptly to set aside the noting in default; and, there are some triable issues. Therefore, the noting in default will be set aside.

[10] It is customary, however, to impose terms as to the setting aside of default. Those terms usually address time limits for the filing of pleadings and costs thrown away. I will impose such terms but first I want to emphasize some points that have often been made on these types of applications.

[11] Motions to extend the time for delivery of pleadings or to relieve against noting in default are frequently made and routinely granted. Usually opposing counsel will consent to such relief as a matter of professional courtesy. It is not in the interests of expeditious and cost-effective litigation to argue about strictly technical grounds such as default for failure to file a defence. Rather, the courts would much rather see effort and resources expended on resolving issues on their merits. So these types of applications should ordinarily be resolved by counsel without the need for a formal application.

[12] These are general comments that apply in every case. But they also apply here. In my view, this is a situation that could have, and maybe should have, been resolved without the need for a formal hearing. Hence my disposition as to costs is not what it might have been had there been a stronger rationale for having a hearing. The costs award reflects nevertheless the fact that the respondent had been put on a deadline and he failed to meet it. So some thrown away costs are still appropriate.

[13] The noting in default is set aside conditional upon (a) the respondent filing and serving an Answer or Counter-Petition within 25 days of this Memorandum of Judgment; and (b) payment of costs by the respondent to the petitioner also within the same 25 days. Those costs are fixed in the lump sum of $300.00. Should the respondent fail to comply with either term, the petitioner may proceed on a default basis.

J.Z. Vertes
J.S.C.

Dated this 12th day of March 2008.

Counsel for the Petitioner: Elaine Keenan Bengts

Counsel for the Respondent: D. Jane Olson

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