Date: 2010 08 11
Docket: S-1-CV-2010000093

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GREG MCMEEKIN

Plaintiff

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES
Department of Education, Culture and Employment

Defendant

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] This is an action for damages. The Statement of Claim was filed May 26, 2010 and served on May 27, 2010. The Defendant filed an Appearance on June 17, 2010, and filed its Statement of Defence on July 6, 2010.

[2] On July 7, 2010, the Plaintiff signed a Direction to the Clerk to note the Defendant in default and sent it for filing to the registry. It was not filed. On July 22nd, he filed a Notion of Motion seeking an Order noting the Defendant in default for failure to produce its Statement of Defence within the time limits set out under Rule 93 of the *Rules of Court*. He also seeks an Order pursuant to Rule 31(2), noting the Defendant in default, issuing final judgment, and assessing damages.

[3] For the reasons that follow, I have concluded that the motion should be dismissed.

B) ANALYSIS

1. Request to have the Defendant noted in default

[4] The Plaintiff argues that the Defendant should be noted in default because it filed its Statement of Defence outside the time limits set out in the *Rules*. The first question is whether the Defendant was indeed late in filing its Statement of Defence.

[5] The chronology of the procedural steps that are relevant to this motion is as follows:

- May 27: the Statement of Claim was served on the Defendant;
- June 3: the Defendant filed a Demand for Particulars;
- June 4: the Demand for Particulars was served on the Plaintiff;
- June 10: the Plaintiff filed a Reply to the Demand for Particulars;
- June 11: the Reply to Demand for Particulars was served on the Defendant;
- June 17: the Defendant filed an Appearance;
- July 6: the Defendant filed its Statement of Defence;
- July 7: the Statement of Defence was served on the Plaintiff;
- July 7: the Plaintiff signed the Direction to note the Defendant in default

[6] There are a number of provisions of the *Rules of Court* that impact the time limits that apply to the filing of pleadings.

[7] With respect to the filing of a Statement of Defence, the starting point is Rule 93. The portion of the Rule that is relevant to this motion reads as follows:

> 93. (1) A Defendant must deliver his or her appearance or statement of defence within the following periods of time commencing the day after the day on which the defendant is served with the statement of claim:
>
> (a) where the defendant is served within the jurisdiction, 25 days;
>
> (...)

[8] That starting point, however, is qualified by a number of other Rules.

[9] First, as the Plaintiff acknowledges, if the Defendant files an Appearance, Rule 93(2) provides that the time limit for the delivery of a statement of defence is extended by 10 days.

[10] The time limits are further impacted where, as in this case, a defendant files a Demand for Particulars. The Rule that deals with Demands for Particulars is Rule 119. It addresses in a very specific way how a Demand for Particulars affects a defendant's time line for filing his or her Statement of Defence:

> 119. (...)
>
> > (4) Where a party serving a notice under subrule (1) [subrule (1) refers to a Demand for Particulars] is a defendant who has not delivered a statement of defence to the plaintiff's claim or is a plaintiff who has not replied to the defendant's statement of defence or counterclaim, that party has the same length of time for pleading after the delivery of the particulars that he or she had left when the notice was delivered.

[11] This Rule impacts the time line for filing pleadings for

> (a) a defendant who has not yet delivered a statement of defence,
>
> or,
>
> (b) a plaintiff who has not replied to a defendant's statement of defence or counterclaim

It therefore applied to the Defendant when it served its Demand for Particulars on June 10.

[12] The effect of this Subrule is plain: if a party requests particulars, the "clock" stops as far as the time limit that this party has to file its pleading. Time starts to run again once the particulars are provided. The rationale behind this rule is simple: a party who seeks particulars does so in order to have more information to prepare its pleading. So it only makes sense that the time would start to run again only once those particulars have been provided.

[13] Because the Defendant filed an Appearance, it had a total of 35 days to file its Statement of Defence. That time started to run on May 28, the day after the Defendant was served with the Statement of Claim. The 35th day following May 28 was July 1. It is on that basis that the Plaintiff argues that the Defendant was 6 days late in filing its Statement of Defence.

[14] But the Plaintiff overlooks the operation of Subrule 119(4) in his calculations. The effect of that Subrule, as explained above, was to suspend the computation of time between the time when the Demand for Particulars was served (June 3) and when it was answered (June 10). If that 7 day period is factored in, the Defendant was not in fact late in filing its Statement of Defence.

[15] Moreover, the Plaintiff's application would fail even if there had been no Demand for Particulars, because Rule 159 forecloses the relief that he seeks. That Rule reads as follows:

> 159. Notwithstanding subrule 93(1) or (2), a defendant may, before he or she has been noted in default or judgment has been given against him or her, deliver a statement of defence or an appearance.

[16] The wording of this Rule makes it clear that it is intended to override Rule 93, as long as a defendant has not been noted in default. In this case, the Defendant had not been noted in default. Rule 159 entitled it to file its Statement of Defence irrespective of whether the time limit set out in Rule 93 had expired or not.

[17] For those reasons, the Plaintiff's claim that the Defendant should be noted in default for failure to comply with Rule 93 cannot succeed.

2. Noting in default based on Rule 31

[18] The second aspect of the Plaintiff's motion is a request to have the Defendant noted in default, and final judgment issued, based on Rule 31. That Rule reads as follows:

> 31. (1) Personal service of an originating document is not required when the opposite party, by his or her solicitor, accepts service and undertakes, by the solicitor's endorsement on the document, to appear or to file a statement of defence or appearance.

> (2) Where a solicitor fails to comply with an undertaking made under subrule (1), the Court may, on the application of the plaintiff, order that the opposite party be noted in default, issue final judgment or make an order for the assessment of damages or otherwise as the plaintiff may be entitled to.

[19] The Affidavit of Service sworn by the Plaintiff on May 27, 2010 states that he served the Statement of Claim and Notice to the Defendant by leaving the documents with Martha Lenoir at the offices of the Department of Culture, Education and Employment in Hay River. This is not a situation where the Defendant's solicitor accepted service or made any undertakings. In any event, the Defendants did file a Statement of Defence. Rule 31 has no application in these proceedings.

[20] For these reasons, the Plaintiff's application, as set out in the Notice of Motion filed on July 22, 2010, is dismissed.

C) SECOND MOTION FILED BY THE PLAINTIFF

[21] I must address briefly issues arising from a second motion filed by the Plaintiff. That motion, filed and served on July 30, was placed on the August 4 docket so it could be spoken to. In it the Plaintiff seeks an assessment of damages pursuant to Rule 167 and a summary judgment pursuant to Rule 174.

[22] The Plaintiff wished to proceed to the hearing of this motion on August 4. He argued that the second motion flowed from the first, sought the same relief, and that the two should be heard together. The Defendant opposed this on the grounds that it required time to file the affidavit material in response to the application for summary judgment, and to properly respond to the motion.

[23] Rule 177 of the *Rules of Court* states that the rules respecting special chambers applications apply to an application for summary judgment. Rule 391 provides that pre-hearing briefs must be prepared for a special chambers application. This requirement was not complied with.

[24] Perhaps even more importantly, an application for summary judgment has potentially significant consequences, and the respondent to such an application is

entitled to a reasonable amount of time to file affidavits in response and to prepare for the hearing. It was for those reasons that I decided that the second motion would not proceed on August 4. I indicated, however, that I would provide directions and filing deadlines to the parties with a view of scheduling a hearing date for that second motion.

[25] The Defendant indicated during submissions that it intended to file its own motion for summary judgment dismissing the claim. If both parties are seeking summary judgments, it would make sense to have the two matters dealt with at the same time. However, the hearing of the Plaintiff's motion should not be unduly delayed if the Defendant does not file its motion in a timely fashion.

[26] I have also taken into account, in setting the deadlines that follow, that the Plaintiff indicated that he may wish to file additional evidence in support of his motion.

[27] Accordingly, I set the following time lines:

1. Any further affidavit material that the Plaintiff wishes to rely on in support of his application for summary judgment shall be filed and served by August 20;

2. Any affidavit material that the Defendant wishes to rely on in response to the Plaintiff's application for summary judgment shall be filed and served by September 3.

3. If the Defendant intends on filing an application for summary judgment, that application and its supporting materials shall also be filed and served by September 3.

4. If the Defendant files an application for summary judgment, the Plaintiff will have until September 17 to file affidavit materials in response to that application.

5. If the Defendants file an application for summary judgment, each party shall file one Special Chambers brief, dealing with its own motion and

responding to the other party's motion. These briefs shall be filed no later than September 24.

6. The parties shall send their available dates for a hearing of the Plaintiff's application (which will also be the hearing date for the hearing of the Defendant's application, if one is filed), for the months of October and November, no later than August 20.

[28] Once the Registry has the information about the parties' availabilities, it will set a hearing date and advise the parties in due course.

D) COSTS

[29] The Plaintiff has asked for an order reimbursing his travel costs to Yellowknife for the August 4 hearing. He pointed out that his Statement of Claim requests that this action be tried in Hay River.

[30] As I said during the hearing, there is a distinction between the place where an action is to be tried and the place where interlocutory proceedings are heard. It is not uncommon, in this jurisdiction, for interlocutory matters in cases arising outside of Yellowknife to be heard in Yellowknife. At the same time, I recognize that interlocutory hearings sometimes do proceed in locations outside of Yellowknife. I also recognize that there would have been considerable costs if the Court had held this hearing in Hay River, because the whole Court party and the Defendant's counsel would have had to travel to that community. The Plaintiff says he should be reimbursed for his travel costs because his coming to Yellowknife reduced the overall costs of the hearing.

[31] In considering whether the Plaintiff should be compensated for any of his costs on this matter, however, regard must be had to the nature of the proceedings and the outcome of the motion.

[32] This was the Plaintiff's motion, and it was unsuccessful. With all due respect to the Plaintiff, this motion was completely without merit. On a plain reading of the *Rules of Court*, the Defendant was entitled to file a Statement of Defence on the date that it did. The second part of the motion, based on Rule 31,

was also clearly without merit, as the basic prerequisites for that Rule to apply were not met.

[33] The Plaintiff is representing himself and that has to be taken into account. At the same time, if he incurs costs to litigate matters on the basis of an incorrect understanding or an incomplete reading of the *Rules of Court*, he cannot expect to be compensated for those costs.

[34] In fact, as the unsuccessful party on the motion, the Plaintiff could well have costs ordered against him on this motion. Rule 649 provides that unless otherwise ordered, the costs of an interlocutory proceeding are costs in the cause. But the Court does have the discretion to make a cost order at the conclusion of an interlocutory proceeding. One of the situations where that discretion is exercised is when the Court finds that an application was completely without merit.

[35] I might have been inclined to make a costs order payable forthwith against the Plaintiff for this motion. But taking into account the costs that he has incurred to travel to Yellowknife to argue it, I have decided not to make an additional costs order against him. Each party shall bear its own costs for the proceeding held on August 4.

[36] I make no comment as to how the Plaintiff's travel costs, or costs generally, may be dealt with for future hearings of proceedings on this mater. Those issues will have to be dealt with by the Judge who will preside over those proceedings.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
11th day of August, 2010

The Plaintiff was self-represented.
Counsel for the Defendant: William M. Rouse

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