Date: 2013 09 27
Docket: S-1-CV-2013000090

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGES INC.

Plaintiff

-and-

ALEX MICHAEL NITSIZA JUNIOR and SALLY MARIE MAVIS NITSIZA

Defendants

MEMORANDUM OF JUDGMENT

[1] The Plaintiff brings an application *ex parte* for an order allowing it to serve a Statement of Claim and Notice to Defendants by "Xpress Post Courier" rather than personally. For the following reasons, the application is dismissed.

[2] In support of the application, the Plaintiff relies on affidavits from Mansley King, a process server, and Kristen Wiens, a legal assistant employed by the Plaintiff's solicitor.

[3] Mr. King deposes that his agent attempted to serve the Statement of Claim and Notice to Defendants upon the two Defendants in the community of Wha Ti, Northwest Territories, but she was unsuccessful. Mr. King says the agent advised him that the Defendants were now living in Yellowknife.

[4] Ms. Wiens deposes that she believes prompt personal service "is impractical and expensive at this time". She proposes that the Defendants be served by "registered courier" at their former residence in Wha Ti and to a post office box in Wha Ti "in hopes that their mail is being forwarded".

[5] Neither deponent provides information about efforts to locate the Defendants in Yellowknife.

[6] In the case of originating documents, personal service is the rule. Substitutional service is the exception.

[7] It is a fundamental to our system of civil litigation that a defendant has the right to have notice of a claim and the right to a reasonable opportunity to answer it. *Nay v. Nay,*1981 CarswellAlta 125, [1982] 2 W.W.R. 481 (C.A.) This is reflected, among other places, in Rule 29 of the *Rules of the Supreme Court of the Northwest Territories,* which requires that originating documents, such as statements of claim, be served personally. Under Rule 30(1), "personal service" is effected on an individual by leaving a copy with the individual.

[8] There are, however, cases where service on an individual is impractical or entirely infeasible and so the Rules permit the Court in such circumstances to dispense with service or to order service by substitutional means. This is set out in Rule 38:

> 38.(1) Where personal service of a document is required by these rules and it appears to the Court that it is impractical for any reason to effect prompt personal service of the document, the Court may make an order
>
> (a) for substitutional service of it; or
>
> (b) dispensing with service.
>
> (2) An application for an order for substitutional service must be supported by an affidavit setting out why prompt personal service is impractical and proposing an alternative mode of service which, in the opinion of the deponent, will or is likely to be effective.

[9] The point of an order for substitutional service is to ensure that a party upon whom personal service is shown to be impractical will nevertheless learn about the proceeding and have an opportunity to attend court and answer it. By its nature, however, substitutional service lacks the definitiveness of personal service and there is always a risk that despite whatever alternative mode of service is taken, the matter will not come to the party's attention. Accordingly, an order for substitutional service should be granted only where it is shown to be necessary and where the proposed mode of service is likely to bring the matter to the party's attention. The applicant bears the burden of satisfying the court of both of these things.

[10] To demonstrate that an order for substitutional service is necessary, an applicant must adduce evidence that prompt personal service is impractical. In this context, "impractical" does not equate to "inconvenient". It is, rather, akin to there

being a "practical impossibility" of effecting prompt personal service. That necessarily entails producing evidence to explain *why* it is impractical which, in turn, requires the applicant to demonstrate that it has made reasonable efforts to locate the party and effect personal service. (See: *Apples v. Commissioner of the NWT et al.*, 2009 NWTSC 03 at paragraphs 7 and 8).

[11] What constitutes "reasonable" steps to locate and serve a party personally in any given case will, of course, depend on a variety of factors, including, but not limited to, the nature of the suit, the relief sought, the location of the party to be served, the size of the community where the party might be located and whether it the party may be evading service. (*Apples, supra*).

[12] In this case, the Plaintiff has not shown that prompt personal service on the Defendants is impractical. At best, it has shown that effecting personal service upon them may be inconvenient. Moreover, it has not demonstrated that the method of service proposed is likely to bring the proceedings to the Defendants' attention.

[13] The Plaintiff has been advised that the Defendants no longer reside at the property in Wha Ti. It knows that the Defendants have relocated to Yellowknife. It has taken no steps and made no inquiries whatsoever to determine where the Defendants live or work in Yellowknife. This does not in any way support a conclusion that prompt personal service is impractical.

[14] Similarly, the Plaintiff's bald assertion that serving the Defendants personally is expensive cannot found an order for substitutional service. Whether efforts to find and serve a party are "expensive" to the point where it would make prompt personal service impractical is a question that must be decided within the context of the suit. None is provided. There is no indication of what it would cost to make inquiries to determine the Defendants' whereabouts and serve them with notice, nor what money the Plaintiff has spent to this point in trying to effect service.

[15] The method of service proposed by the Plaintiff is puzzling. The Plaintiff has been advised that the Defendants no longer live in Wha Ti, yet it suggests that the proceedings would come to the Defendants' attention if served at an address in a community that the Plaintiff knows they have left and at a house where they no longer reside. The fact that Ms. Wiens "hopes" the Defendants' mail is being forwarded suggests that it is far from certain that this method of serving the Defendants would achieve the goal of providing them with notice of the proceedings.

[16] The Plaintiff has not shown that prompt personal service upon the Defendant is impractical. Accordingly, this application is dismissed.

[17] The Plaintiff shall bear its own costs of this application.

DATED the 27th day of September, 2013

K. Shaner
J.S.C.

Counsel for the Plaintiffs: Denise M. Hendrix
No one contra.

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MEMORANDUM OF JUDGMENT OF
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