***Nagy v Northtech Drilling Ltd.,* 2020 NWTSC 38 S-1-CV-2019-000354**

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**ERNEST GRANT NAGY**

**Plaintiff**

**-and-**

**NORTHTECH DRILLING LTD.**

**Defendant**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Transcript of the Reasons for Decision held before the Honourable Justice S. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 18th day of September, 2020.**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**APPEARANCES:**

**C. Buchanan: Counsel for the Plaintiff,**

**appearing by teleconference**

**M. Turzansky: Counsel for the Defendant,**

**appearing by teleconference**

**I N D E X**

**PAGE**

**RULINGS, REASONS**

Reasons for Decision 1

THE COURT: This is an Application by the defendant, Northtech Drilling Ltd., for an order setting aside default judgment and the garnishee summons obtained by the plaintiff, Ernest Grant Nagy.

The plaintiff filed a Statement of Claim on September 23rd, 2019, in which he claimed damages of $119,000 for the purchase price of a drill, plus other damages, interest and costs against Northtech Drilling Ltd.

The plaintiff alleged that he sold a diamond drill to the defendant for $160,000 and that the defendant failed to comply with the agreed-upon payment plan. The plaintiff alleged that some payments were made but that $119,000 was the balance remaining to be paid by the defendant.

According to the Affidavit of Service, the Notice to the defendant and Statement of Claim was personally served on September 24th, 2019, on Stan Cochrane, who was described in the Affidavit of Service as the part owner of the defendant and that he was served at 104 Falcon Road in Yellowknife, Northwest Territories.

No Statement of Defence was filed and a direction to note the defendant in default for failing to deliver a Statement of Defence or Appearance was filed on October 22nd, 2019. Default judgment was also obtained on March 6th, 2020, for damages in the amount of $119,000 plus interest and the plaintiff's taxed costs.

Once the costs were taxed and the interest calculated, default judgment was entered on April 29th, 2020, in the amount of $ 131,436.42. The plaintiff obtained a garnishee summons on May 8th, 2020.

The Northwest Territories courts received $ 5,221.88 on June 3rd, 2020, from the Bank of Montreal in response to the garnishee summons. As there was no Affidavit of Service on file of the default judgment or garnishee summons being served, those funds were not disbursed to the plaintiff, but instead transferred to the Sheriff's trust account pending distribution.

An Affidavit of Service was filed on June 10th, 2020, indicating that the garnishee summons and default judgment had been served on May 21st, 2020, on Jack Williams, solicitor for the defendant. This sets out the procedural history with respect to the steps that the plaintiff took with respect to this litigation.

It is also relevant that prior to filing the Statement of Claim that legal counsel for the plaintiff sent a demand letter on March 19th, 2019, to Jack Williams at Field Law demanding payment of the claim. Mr. Williams replied to the demand letter by email on April 9th, 2019, confirming that he had been retained by the defendant in this matter and indicated that if the plaintiff wished to proceed with litigation that he would accept service at the Yellowknife office of Field Law. Mr. Williams was not served with a Statement of Claim.

The defendant filed a Notice of Motion on June 2, 2020, seeking to have the default judgment and the garnishee summons set aside. I heard the application on September 4, 2020, and adjourned to today's date for a decision.

The application to set aside the default judgment is brought pursuant to Rule 171 of the *Rules of the Supreme Court of the Northwest Territories*, which states:

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.

The Court also can set aside the garnishee summons pursuant to Rule 538.

The defendant claims that the default judgment was obtained through a procedural flaw where the Statement of Claim was not properly served on the defendant, and as such, that the defendant is entitled to open up the judgment as of right.

The plaintiff acknowledges that service was not done in accordance with the *Business Corporations Act*, but that the Court can modify the rules to achieve a fair and just result because service was made on the husband of the owner who was the only employee at the only business location of the company. The plaintiff argues that the Court has the discretion to find that the service was valid in the circumstances.

The facts with respect to service of the Statement of Claim are not controversial. As previously stated, an Affidavit of Service indicates that the Notice to defendant and Statement of Claim was personally served on September 24, 2019, on Stan Cochrane, who is described as the part owner of the defendant and it was served at 104 Falcon Road.

On March 19, 2019, the demand letter had been sent by the plaintiff through a lawyer at the McLennan Ross Edmonton office. Mr. Williams on behalf of the defendant replied on April 9, 2019, and indicated at the end of the email:

Should you still wish to proceed with the litigation of this matter, I would be pleased to accept service at my Yellowknife offices.

When the Statement of Claim was served, it was not served upon Mr. Williams. Counsel who filed the Statement of Claim was located in the Yellowknife office of McLennan Ross and was not aware of Mr. Williams' willingness to accept service on behalf of the defendant.

The process server who served the Statement of Claim provided a further affidavit explaining the process of serving the defendant. The process server searched Google to determine where the Statement of Claim should be served. She located the defendant's website which showed Stan Cochrane as the owner and a business address of 104 Falcon Road.

She also searched the Department of Industry, Tourism and Investment’s BIP Registry, which provides contact information for businesses operating in the north. The physical and mailing address of the defendant was identified as 104 Falcon Road. Using that information, she determined that she should serve Stan Cochrane at 104 Falcon Road.

The defendant, Northtech Drilling Ltd., is incorporated in the Northwest Territories. Its registered office is the Yellowknife office of Field Law. The process server did not search the corporate registries database to locate the registered office, nor did she apparently refer to the Statement of Claim which included the address of the defendant as the registered office, the address of the Field Law office in Yellowknife.

The requirements for service are set out in the *Rules of Court* and originating documents such as a Statement of Claim must be served personally. Where service must be effected on a corporation, Rule 30(3) is applicable. It states:

Personal service of a document is effected on a body corporate in the manner provided by statute or, where the manner of service is not provided by statute,

(a) in case of a body corporate other than a municipal corporation

(i) by leaving a true copy of the document with an officer or director of the body corporate or a person in charge of any office or place of business of the body corporate,

(ii) by leaving a true copy of the document at, or by sending it by registered mail addressed to, the registered or head office of the body corporate, or […]

And there is also a subsection (iii), which is not relevant as it is applicable to corporations registered or headquartered outside of the Northwest Territories.

In this case, personal service on a corporation is provided by statute. Section 257 of the *Business Corporations Act* requires a notice or document that is to be served on a corporation to be either delivered to its registered office or sent by registered mail to its registered office or the post office box designated as its address for service by mail.

The defendant was not served with the Statement of Claim in the manner in which it should have been, either through service at its registered office or by registered mail to the registered office or post office box designated as its address for service by mail. A similar situation arose in *Anstar Enterprises Ltd. v Transamerica Life Canada*, 2009 ABCA 196, where the Alberta Court of Appeal stated at paragraph 13:

Because a default judgment does not involve an adjudication on the merits of a claim, the plaintiff must act in ‘the utmost good faith and in strict compliance with the Rules.’ In other words, a party seeking to hold an opposing party in default must strictly comply with the procedural rules. Accordingly, where there is a flaw in the procedure leading up to default judgment, a defendant, proceeding promptly, is entitled to open up the default judgment as of right. [Citations omitted]

In *Amexon Property Management Inc. v Paramedical Rehabilitation Solutions Inc.*, 2011 ONSC 4783, that Court also held that where a default judgment was irregularly obtained, it may be set aside as of right. An irregularity can include failing to serve the Statement of Claim in the proper manner.

Where there is no procedural flaw, the defendant must rely on the Court's discretion in seeking to set aside a default judgment. In that situation, the law in the Northwest Territories with respect to setting aside a default judgment is as stated in *McDonald v Koe*, 2014 NWTSC 57 at paragraph 24:

The decision is a discretionary one, and the overarching aim of the Court must be to do what is fair and just. In exercising its discretion, however, the Court is guided by the following considerations:

a. whether the Defendant has demonstrated that there was an intention to defend the action;

b. the Defendant's excuse for allowing the matter to proceed by default;

c. whether the Defendant moved promptly to set aside the noting in default or default judgment; and

d. whether the Defendant has an arguable defence.

While the plaintiff acknowledges that service was not completed in the prescribed manner, they argue that the Court should exercise its discretion to find that the defendant was served, that the defendant had notice of the Statement of Claim.

The issue of deemed service arose in both *Anstar* and *Amexon*, as while service had not been properly completed, there was some evidence that the defendant in each case had, or should have had, knowledge of the Statement of Claim.

The Alberta Court of Appeal in *Anstar* endorsed the proposition that defective service can be deemed to be good and sufficient in circumstances where the document came to the attention of the party being served and that party gained knowledge of the general nature of the claim against them. The challenge is that the plaintiff cannot know whether or when a defendant acquires actual knowledge of the claim. Paragraph 16 and 17.

That is the challenge here. The Statement of Claim was served upon Stan Cochrane, who is the husband of Karen Cochrane who is the sole director, shareholder and officer of the defendant. Ms. Cochrane stated that Mr. Cochrane is not and has never been a part owner of the corporation, which was stated in the original Affidavit of Service, and she also says that she has always been the sole director, shareholder and officer. Service was completed at the only office of the defendant. There is no reason to doubt that Mr. Cochrane was served with the documents. The affidavit of the process server has not been challenged. There is no explanation regarding what Mr. Cochrane might have done with the documents, although Ms. Cochrane's evidence, albeit hearsay, is that he had no memory of being served.

Ms. Cochrane's evidence is that she had no knowledge of the Statement of Claim until the corporation's bank account was garnished and that she did not see the Statement of Claim until after this occurred. While Mr. Cochrane is the husband of Ms. Cochrane and an employee of the corporation, I have some hesitation in concluding that this necessarily means that the corporation had knowledge of the Statement of Claim.

While it may be reasonable to assume that Mr. Cochrane would bring the Statement of Claim to his wife's attention, I am not prepared to conclude that service of the Statement of Claim on one spouse necessarily means that the other spouse can be imputed with knowledge of that claim. It will depend on the circumstances of each case.

I am troubled that there is no explanation provided by Mr. Cochrane about what happened with the Statement of Claim. There is no evidence regarding whether he acknowledges receiving it, and if so, what he might have done with it. What I am left with is that Ms. Cochrane is the sole director, shareholder and officer of the defendant and her uncontroverted evidence is that she had no knowledge of the Statement of Claim until after default judgment had been entered.

In these circumstances, I am not prepared to conclude that Ms. Cochrane should be saddled with the failure of Mr. Cochrane to bring the Statement of Claim to her attention. As well, after Ms. Cochrane learned of the default judgment and garnishee summons, the corporation acted swiftly to have the default judgment and garnishee summons set aside. A Notice of Motion was filed with the court and an affidavit within a couple of weeks.

For these reasons, I conclude that service on the corporation was not validly made, and as such, the corporation is entitled as of right to have the default judgment and garnishee summons set aside. Given this conclusion, it is not necessary for me to consider whether the Court should exercise its discretion to set aside the default judgment.

The parties also made submissions on costs. The plaintiff seeks to have their throw-away costs for the steps taken after the Statement of Claim was served on the defendant. Given that I have found that service was not properly made and any resulting costs stem from the improper service, I am not prepared to award the plaintiff throw-away costs. I will award the defendant their costs for this application in the amount of $500.

For these reasons I order that the default judgment of Justice Mahar is set aside. The garnishee summons is set aside. The defendant shall have 30 days to file and serve a Statement of Defence. The funds that were garnished that are currently held in the Sheriff's trust account arising from the garnishment of funds of the defendant's bank account shall be retained pending the conclusion of this matter, and the defendant shall have their costs in the amount of $500.

Right. Counsel, is there anything else that needs to be addressed?

C. BUCHANAN: I don't think so, Your Honour.

M. TURZANSKY: One matter would be -- and I think it flows from the decision that was already given, but there's also a writ of execution that was entered in connection with the default judgment. I would just ask for clarification, just that that should be specifically mentioned in the order as well that that be set aside.

THE COURT: Okay, that will also be addressed. The writ of execution will be set aside. Is there anything else then, counsel?

M. TURZANSKY: No, Your Honour.

C. BUCHANAN: No, no, thank you.

THE COURT: All right. Thank you, counsel. We will adjourn.

**(PROCEEDINGS ADJOURNED)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 7th day of October, 2020.



\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kim Neeson

Principal