Court of King's Bench of Alberta

Citation: StraightVac Services Ltd v Sunshine Oilsands Ltd, 2023 ABKB 660

Date: 20231121
Docket: 2003 18173
Registry: Edmonton

Between:

StraightVac Services Ltd

Applicant

- and -

Sunshine Oilsands Ltd

Respondent

Reasons for Decision
of the
Honourable Justice G.R. Fraser

Appeal from the Decision by
S. Schlosser, The Honourable Applications Judge

Dated the 12th day of October, 2022

[1] This matter comes before me as an Appeal of Applications Judge Schlosser's decision to set aside a Default Judgment obtained by StraightVac Services Limited (StraightVac) against Sunshine Oilsands Limited (Sunshine). The decision was made on October 12, 2022 in morning chambers.

Background

[2] On June 10, 2021, StraightVac served a Statement of Claim on Sunshine by having a copy of the Statement of Claim delivered to Sunshine's registered office. Due to COVID, the office was closed, and no one was in the office at that time. An envelope containing the Statement of Claim was slipped under the door.

[3] On October 15, 2021, StraightVac filed a Noting in Default regarding Sunshine.

[4] On June 23, 2022, StraightVac made a without notice desk application seeking to validate service on Sunshine. It also sought default judgment against Sunshine. The application indicates it would rely upon two affidavits and indicates that the method of delivery would likely have brought the statement of claim to the attention of Sunshine.

[5] On July 7, 2022, Applications Judge Birkett granted StraightVac's application. Her Order validated service on Sunshine pursuant to r 11.27(1). It also granted a Default Judgment of $242,812.26 plus judgement interest of $4562.87 and costs of $2163.18.

[6] The Order was granted during COVID by way of a desk application. No counsel were present, and no submissions were made. Regarding service, the only information would have been the Affidavit of Larry Robson.

[7] On August 26, 2022, Sunshine received the Statement of Claim, Noting in Default, and the Default Judgment, all by registered mail.

[8] On September 6, 2022, Sunshine filed an application seeking to set aside the Birkett Order. That application was amended on October 4, 2022. One of the amendments sought to vacate the order validating service of the statement of claim.

[9] On October 12, 2022, Applications Judge Schlosser heard submissions from Counsel for both parties regarding the set-aside application. StraightVac applied for an adjournment to allow time for StraightVac to make an application to compel undertakings. The adjournment application was denied.

[10] After hearing submissions, Applications Judge Schlosser found that the Noting in Default was irregular because the method of service of the statement of claim on Sunshine was not one permitted by the *Rules*. He also found that the statement of claim was not brought to the attention of Sunshine. As a result he set-aside the Noting in Default and the Default Judgment. He then gave Sunshine 20 days to file its statement of defence. He declined to find that StraightVac was now time-barred as a result of late service of the statement of claim.

Issues

[11] On November 22, 2022 StraightVac filed its Notice of Appeal. Although not listed on the Notice, StraightVac now indicates that Applications Judge Schlosser erred in three ways:

1. He did not grant StraightVac's adjournment;
2. He looked behind the Birkett Order validating service; and
3. He failed to consider the Robson Affidavit.

[12] All parties agree that the standard of review in this matter is one of correctness, with no deference owed to the previous decision.

[13] StraightVac submits that Applications Judge Schlosser erred when he did not grant StraightVac's adjournment request. In his decision, Applications Judge Schlosser did not give any reasons for his denial of the adjournment request. His only comment was "Okay, I am going to give you a decision, counsel. I am not going to adjourn any further".

[14] StraightVac sought the adjournment because Sunshine refused some undertakings requested during questioning on the affidavits related to this matter. StraightVac had sent an application to compel undertakings for filing four days prior to the hearing, but at the time of the hearing there was no confirmation that the application had been filed. There was no Chambers date set for a hearing of the application.

[15] When the adjournment request was made, no timeline could have been given as to when the application might be heard. StraightVac had sent its application for filing, but still did not have a confirmed hearing date. The hearing may have been able to be scheduled in a few days, or it could have been weeks. Applications Judge Schlosser would not have known what sort of delay an adjournment might have caused.

[16] StraightVac believed that the undertakings would assist in determining whether or not Sunshine had a meritorious defence to the Statement of Claim. This can be a factor to consider when setting aside a noting in default or a default judgment. However, Applications Judge Schlosser based his decision on the irregularity in service. The result of the undertaking application likely would not have assisted him.

[17] Justice Greckol examined the issue of adjournments in ***Koopmans v Joseph***, 2014 ABQB 395. At paragraph 41 of her decision she wrote:

> Whether an adjournment is granted is generally considered discretionary and its appropriateness will depend on the situation: "Whether a refusal to grant an adjournment breaches procedural fairness and denies natural justice depends upon the circumstances of the case. The decision to adjourn is a discretionary one attracting a high standard of appellate review" **(*BP Canada Energy Co v Alberta (Energy & Utilities Board)***, 2004 ABCA 75 (Alta CA. [In Chambers]) at para 26, (2004), 30 Alta LR (4th) 248 (Alta CA [In Chambers]). See also ***Prassad v Canada (Minister of Employment & Immigration)***, [1989] 1 SCR 560 (SCC), at 569 [***Prassad***] and ***R v Barrette***, (1976), [1977] 2 SCR 121 (SCC), at 125 [***Barette***]).

[18] I agree with her analysis on the test for an adjournment. I find that Applications Judge Schlosser's denial of the adjournment did not breach procedural fairness or deny natural justice. StraightVac would still have the opportunity to pursue its application to compel undertakings. Applications Judge Schlosser's decision did not turn on the meritorious defence aspect. Instead, his decision was based on the irregular procedure involved in service.

[19] Applications Judge Schlosser was correct to deny the adjournment.

[20] StraightVac's other grounds of appeal relate to Applications Judge Schlosser "looking behind" the Birkett Order validating service and Applications Judge Schlosser not properly considering the Robson affidavit of service.

[21] The Birkett Order validated service based on a r 11.27(1) which reads:

> Except in respect of a document that must be served in accordance with Division 8 [Service in a Contracting State under the Hague Convention], the Court may, on application, make an order validating the service of a document served inside or outside Alberta in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served.

[22] Applications Judge Birkett did not have the benefit of hearing from Counsel as the matter came before her as a desk application. The only information available to her regarding service of the documents was the affidavit of Larry Robson. It is very brief, simply stating:

> I did on Thursday the 10th day of June 2021 at 10:40 AM, served the registered office of Sunshine Oilsands Limited with a Statement of Claim filed on November 24, 2020 in this action, by delivering the said copy to and as the office was locked due to the Covid 19 pandemic by sliding the same under the main entry door at the registered office located at 1100, 700 6 Avenue S.W., Calgary, Alberta.

[23] It states nothing about why this method of service was likely to have brought the document to the attention of the company. It did not indicate whether it appeared the office was still in active use. There is nothing in the affidavit indicating the open hours of the office during COVID, or whether there were any instructions regarding policies during COVID. No other evidence was provided to support the inference that a method used would likely have brought the document to the attention of Sunshine.

[24] Applications Judge Schlosser's decision was based on r 9.15(1) and 9.15(3) which read:

> 9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made (a) without notice to one or more affected persons, or (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.
>
> (3) The Court may, on any terms the Court considers just, (a) permit a defence to be filed by a party who has been noted in default, (b) set aside, vary or discharge a judgment granted upon application against a defendant who was noted in default, or whose statement of defence was struck out under rule 3.37, or (c) set aside, vary or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39.

[25] Based on the Affidavit of Mr. Ng, Applications Judge Schlosser found that the Statement of Claim in this matter never came to the attention of Sunshine. He heard submissions regarding Mr. Robson's affidavit, and noted that sliding an envelope under the door of the registered office is not a permitted method of service under r 11.9.

[26] In ***Anstar Enterprises Ltd v Transamerica Life Canada***, 2009 ABCA 196, the Court wrote at paragraph 13:

> 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.

[27] The strict compliance test was cited with approval in **Y*ehya v Thomas***, 2019 ABCA 164 at para 11.

[28] Applications Judge Schlosser was correct to find that StraightVac did not strictly comply with the procedural rules. Sliding an envelope under a door is not an accepted method of service. Although the Birkett Order validated service, I find Applications Judge Schlosser proceeded correctly when he reviewed the method of service of the statement of claim.

[29] Sunshine was bringing an application to set aside a Default Judgment. Pursuant to ***Anstar***, Applications Judge Schlosser needed to know whether there were any procedural irregularities in order to apply the proper test. He accepted the evidence of Mr. Ng that Sunshine did not become aware of any of the proceedings until August 26, 2022. He also accepted the evidence of Mr. Robson that the Statement of Claim was slid under the door of Sunshine's registered address and never left with a person.

[30] In June 2021, COVID had a major effect on most businesses in the province. Because of COVID, Sunshine's office was closed, with people only coming in occasionally. Leaving important papers in an envelope that was slid under the door is not something that is likely to bring them quickly to the attention of a responsible person. There is no evidence indicating why this method of service would likely bring the documents to the attention of the company.

[31] Applications Judge Schlosser was correct to find that there had been a procedural irregularity regarding service. This meant that Sunshine was entitled to open up the default judgement as of right, provided it acted promptly. Sunshine acted promptly, filing its set-aside application within 11 days.

[32] Applications Judge Schlosser's decision to set aside the noting in default and the default judgment was correct. He was also correct to permit Sunshine to file a statement of defence within 20 days of his decision.

[33] I also find that he was correct in deciding not to strike the Statement of Claim. He properly raised r 3.27 with counsel for Sunshine. Counsel agreed that the rule should be applied. No error was made.

[34] I confirm Applications Judge Schlosser's decision. The Noting in Default and the Default Judgment are set aside. Sunshine has 20 days from the date of this decision to file a statement of defence, unless it has already done so.

[35] Applications Judge Schlosser ordered costs to be in the cause. I agree with that decision, and make the same order regarding this Appeal.

Heard on the 21st day of July, 2023.
Dated at the City of Edmonton, Alberta this 21st day of November, 2023.

G.R. Fraser
J.C.K.B.A.

Appearances:

Morgan M. Deacon,
McAllister LLP
for the Applicant

Andrew McLeod,
Peak Legal Counsel
for the Respondent