Court of King's Bench of Alberta

Citation: Secure Energy Services Inc. v 1331616 Alberta Ltd. 2024 ABKB 604

Date: 20241011
Docket: 2101 04944
Registry: Calgary

Between:

Secure Energy Services Inc.

Appellant

- and -

1331616 Alberta Ltd. also known as Zerocor Tubulars, Lone Star Pipe & Supply, LLC, Petrosmith, LLC, Petrosmith Coating LP, Petrosmith Equipment, LP, and ABC Corp.

Respondents

Reasons for Decision
of the
Honourable Justice J.C. Kubik

INTRODUCTION

[1] On January 30, 2023, Lone Star Pipe & Supply LLC (Lone Star) was noted in default by Secure Energy Services Inc. (Secure). The noting in default was set aside by Order of the Applications Judge on November 29, 2023. Secure appeals that decision. The sole issue on appeal is whether Lone Star had a reasonable excuse for failing to defend the claim.

FACTS

[2] Secure commenced its action on April 15, 2021. On November 8, 2022, Secure obtained an Order authorizing the filing of an Amended Statement of Claim (Amended Claim) against Lone Star and authorizing service of the amended claim, *ex juris*, by recorded mail at Lone Star's registered agent address in Texas, United States of America (Texas). Secure effected service of the Amended Claim on Lone Star on November 21, 2022.

[3] In addition to serving Lone Star, Secure took additional steps to bring the matter to the attention of Lone Star's registered agent, Mark Threadgill (Threadgill), Lone Star's Manager, Charles Zhang (Zhang), and Lone Star's members, Mitchell Berry (Berry) and Retief Van Schalkwyck (Van Schalkwyck).

[4] In May 2023, Zhang learned that Secure was attempting to serve Lone Star with an Amended Amended Statement of Claim in the action. Service was ultimately accepted by Lone Star's Canadian legal counsel, and it was only then that it learned Lone Star had been noted in default.

[5] In setting aside the noting in default, the Applications Judge found that Lone Star moved promptly, had an arguable defence and had a reasonable excuse for failing to defend: specifically, that Lone Star had made a mistake in not monitoring the Texas registered office for mail.

STANDARD OF REVIEW

[6] The standard of review on appeal from an applications judge is correctness on all issues and no deference is owed to factual findings: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166. The appeal proceeded on the record before me and no fresh evidence was adduced.

REASONS FOR DECISION

[7] Rule 9.15(3)(b) of the ***Alberta Rules of Court***, Alta Reg 124/2010, provides that the court may, on terms it considers just, set aside a judgment granted against a defendant who was noted in default. In circumstances where there is no procedural irregularity, the test for setting aside a noting is default is well established. The moving party must demonstrate an arguable defence, have a reasonable excuse for failing to defend, and move quickly and reasonably to set aside the noting in default once they learn of it: ***Palin v Duxbury***, 2010 ABQB 833.

[8] The burden of proof rests on the moving party. They must prove all three elements of the test. The court retains its discretion to ensure fairness to the parties in the application of the test: ***Don Reid Upholstery Ltd v Patrie***, (1995), 173 AR 233 (QB).

[9] The parties agree that Lone Star has an arguable defence and moved promptly to set aside the noting in default. The only issue is whether it had a reasonable excuse for failing to defend.

[10] In this case, the Amended Claim was properly served on the registered address of Lone Star by way of a court order authorizing such service.

[11] Lone Star relies on the evidence of Zhang, who denies having personal knowledge of the Amended Claim. His Affidavit and the evidence given in his subsequent Questioning on that Affidavit provide no other excuse, whether by way of accident, mistake or inadvertence for Lone

Star's failure to defend. Despite the findings of the applications judge, there is no evidence on the record that Lone Star failed to monitor the address of the Texas registered office.

[12] Rather, the evidence demonstrates that the documents served to the registered address of Lone Star were also delivered to the corporate agent, Threadgill, and members Berry and Van Schalkwyck. Van Schalkwyck swore an Affidavit in the proceedings. His evidence was that after receiving the Amended Claim and Order he had a telephone conversation with Zhang about the claim, and forwarded the Amended Claim, Order and subsequent documents in the proceedings to Zhang by email and courier. Van Schalkwyck was not questioned on his Affidavit, however during his Questioning, Zhang admitted to having a telephone call with Van Schalkwyck about a lawsuit involving Secure. And, while he acknowledged awareness of the email address and residential street address where Van Schalkwyck forwarded the documents, he denied ever having received any documents. The courier package sent by Van Schalkwyk was noted as having been delivered to Zhang on December 6, 2022, and coincidentally the residential street address to which Van Schalkwyck swears he sent the package is the same address where attempts to serve the Amended Amended Statement of Claim ultimately came to Zhang's attention.

[13] Alberta courts have held that where service is made on an address for service, failing to pick up the mail is an inadequate excuse to justify setting aside a noting in default. In the case of ***Wilson v Bobbie***, 2006 ABQB 22, Slatter J stated the following:

> "I am not however satisfied that the Defendant has explained his non-appearance. He was properly served at his address for service, and simply neglected to pick up the certified mail. Every litigant is required to place on the court record an address for service. The other parties are then at liberty to serve court documents at that address under Rule 24. Every litigant has an obligation to ensure that court documents sent to the address for service are retrieved .... Counsel for the Defendant argued that since the Defendant was a self-represented party, the Plaintiff should have arranged to serve him personally. There is however only one set of Rules, and it applies to both represented and self-represented parties. The Defendant's explanation that he simply failed to make arrangements to pick up his mail is inadequate, and he is not in a position to open up the default judgment."
>
> See also: ***Joray v King***, 2013 ABPC 110.

[14] In ***Hammond v Hammond***, 2019 ABQB 522, an application to set aside a child support order granted in the absence of one party, Lema J discussed the concepts of accident and mistake and ultimately the obligation of diligence. He noted that a key feature of a non-appearance by accident or mistake is inadvertence, which can give rise to a reasonable excuse. A lack of diligence, on the other hand, is not inadvertent, and therefore does not give rise to a reasonable excuse.

[15] Based on the reasoning in these cases, a bare denial of notice is insufficient to establish a reasonable excuse.

[16] Lone Star relies on the case of ***BCI Bulk Carriers Inc. v Aujla Trucking Ltd.*** 2015 BCCA 411, (***BCI***), where the British Columbia Court of Appeal opened up a noting in default despite the fact that the Notice of Civil Claim was served on the registered office of the defendant corporation. I find this case to be distinguishable as the defendant in ***BCI*** provided

evidence of inadvertence; specifically, that by the time of service, their counsel had withdrawn and was neither notified of nor served with the claim. In addition, the defendant in ***BCI*** provided evidence that mail forwarded by its accountant (the registered office address) was mailed to an old residential address and as a result, notice was not received. There is no such evidence before the court in this case. In addition, Zhang's questioning testimony was materially inconsistent regarding his relationship to the residential street address in Calgary, Alberta despite the fact that the Amended Amended Statement of Claim ultimately came to his attention there. In the context of Van Schalkwyck's evidence, this gives rise to questions of credibility about Zhang's assertion that he (and therefore Lone Star) did not have knowledge of the Amended Claim.

[17] In this case, fairness considerations align with the need for certainty in litigation process. Rules and provisions for service exist to allow parties to move forward expeditiously with litigation. Parties are entitled to rely on a registered address for service, and in this case Secure served the Amended Claim in accordance with an order issued by the court. In the absence of proof of inadvertence or other evidence demonstrating an accident or mistake giving rise to the failure to defend the noting in default should not be set aside and Secure should be entitled to proceed based on the admissions that arise from a failure to defend.

[18] Accordingly, the appeal is allowed. Secure is entitled to retain the thrown away costs awarded to it in the application below and are entitled to costs of this appeal on Column 5 of Schedule C of the Rules.

Heard on the 04th day of September, 2024.
Dated at the City of Calgary, Alberta this 11th day of October, 2024.

J.C. Kubik
J.C.K.B.A.

Appearances:

David Tupper and Randell Trombley
for the Appellant, Secure Energy Services Inc.

Brendan Miller
for the Respondent, Lone Star Pipe & Supply, LLC