

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2018/CLE/gen/00899

BETWEEN

SCOTIABANK (BAHAMAS) LIMITED

Plaintiff

AND

CHARLES SAWYER

(In his personal capacity and/or trading as CKS LA PARFUMERIE)

First Defendant

AND

SHARON SAWYER

(In her personal capacity and/or trading as CKS LA PARFUMERIE)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Miss Wynsome D. Carey of Alexiou, Knowles & Co for the Plaintiff
Mrs. Romona Farquharson and Mr. Quentin Percentie of R.A. Farquharson & Co. for the 1st Defendant
No appearance for the Second Defendant

Hearing Date: 19 December 2019

Civil – Final Judgment – No appearance entered by Defendants until date of hearing of Final Judgment –First Defendant raises objections with respect to service on First Defendant and Notice of Intention to proceed – Defendant taking step after irregularity - Rules of the Supreme Court, 1978 Order 73 rule 3 – Order 3, rules 5, Ord. 2 rules 1 and 2

The Plaintiff is a banking corporation carrying on the business of banking and money lending. The Defendants were customers of the Plaintiff. The Plaintiff agreed to make advances to the Defendants to assist with the working capital requirements of the Defendants' business. The Defendants defaulted and notwithstanding a formal demand, failed and/or refused to pay the

Plaintiff. The Plaintiff instituted the present action. No appearance having been entered, the Plaintiff applied for final judgment.

On the day of the hearing, the First Defendant entered an appearance and subsequently challenged the application of two grounds namely that (i) he was not served with the Writ of Summons and (ii) the Plaintiff had not filed a Notice of Intention to proceed in accordance with RSC Ord, 3 r. 5.

HELD: Granting judgment to the Plaintiff in the amount stated in its Statement of Claim with costs.

1. The allegation that the First Defendant was not served with the Writ of Summons is fabricated as documentary evidence proved otherwise.
2. Ord. 3 r. 5, read in conjunction with Ord. 2 rr. 1 and 2, demonstrates that the First Defendant's submission is without merit. Ord. 2 r. 1 would reduce the issue, if relevant, to an irregularity and the failure to comply with Ord. 3 r.5 is not a ground for nullifying these proceedings. In any event, the Plaintiff has previously complied with every order or direction of the Court unlike the First Defendant who challenges the application at the eleventh hour.

RULING

Charles J:

Introduction

[1] Before me is an application by Summons for Final Judgment filed on 26 September 2019 by the Plaintiff, Scotiabank (Bahamas) Limited ("the Bank") for the recovery of monies lent to the First Defendant ("Mr. Sawyer") and the Second Defendant ("Mrs. Sawyer") (collectively "the Sawyers") by the Bank. The application is made pursuant to Order 73 Rule 3 of the Rules of the Supreme Court ("R.S.C.") and is supported by two affidavits of Ms. Edda Armbrister. The first affidavit was filed on 26 September 2019 ("the First Affidavit") and the second on 18 December 2019 ("the Second Affidavit").

[2] I heard the application on 19 December 2019. On the same day, I rendered a short oral ruling. I entered Final Judgment for the Bank against the Sawyers in the sum of \$12,461.19 being the total principal sum of \$9,661.83; interest of \$2,799.36 from 16 December 2019 and continuing at the contractual rate of 8% per annum to 18 December 2019 and thereafter at the statutory rate of 6.25 % in accordance with

the Civil Procedure (Award of Interest) Act 1992. I also awarded reasonable costs to the Plaintiff in the sum of \$4,000.

- [3] I now reduce those brief oral reasons to writing since Counsel for Mr. Sawyer had intimated that Mr. Sawyer wishes to appeal the Ruling.

Background and factual chronology

- [4] The Plaintiff (“Scotiabank”) is a banking corporation licensed under the laws of the Commonwealth of The Bahamas to carry on the business of banking and money lending. It carries on that business at its Main Branch, Bay Street in the City of Nassau, in the Island of New Providence and at several other branches in the Commonwealth.

- [5] The Sawyers, trading as CKS La Parfumerie, were at all material times customers of Scotiabank. They had a credit facility (“the facility”) with Scotiabank whereby it was agreed that Scotiabank would provide direct advances up to the amount of \$10,000.00 to assist with the working capital requirements for CKS La Parfumerie.

- [6] The terms and conditions for the facility are embodied in a commitment letter dated 11 February 2013 (“the Commitment Letter”). The Sawyers counter-signed the Commitment Letter and returned it to the Bank indicating their acceptance and commitment to those terms.

- [7] Pursuant to the terms of the Commitment Letter and in reliance upon the promises of repayment by the Sawyers, Scotiabank advanced the credit facility in the sum of \$10,000.00 to the Sawyers for which they were obliged to make full and prompt repayment in accordance with the terms thereof.

- [8] The particulars of the facility are outlined in the Writ of Summons and the First Affidavit of Edda Armbrister in accordance with Order 73 Rule 2 the Rules of Supreme Court 1978 (‘RSC’). RSC Ord. 73 r. 2 provides that every statement of claim in a money-lender’s action must state the following:

- (a) The date on which the loan was made;

- (b) The amount actually lent to the borrower;
- (c) The rate per cent, per annum of interest charged;
- (d) The date when the contract for repayment was made;
- (e) The fact that a note or memorandum of the contract was made and was signed by the borrower;
- (f) The date when a copy of the note or memorandum was delivered or sent to the borrower;
- (g) The amount repaid;
- (h) The amount due but unpaid;
- (i) The date upon which such unpaid sum or sums became due, and
- (j) The amount of interest accrued due and unpaid on every such sum.

[9] Scotiabank alleges that the Sawyers have defaulted with respect to their obligations under the terms of the Commitment Letter and that the default is continuing.

[10] Through their attorneys, Scotiabank notified the Sawyers of their default and demanded was made for payment of all the sums due and owing under the Loan Facility.

[11] Scotiabank also alleges that the Sawyers have failed and/or refused to pay the sums of any part thereof and the default continues.

[12] On 3 August 2018, Scotiabank instituted the present action against the Sawyers seeking, among other things, payment of all sums due under the Facility being \$10, 837.95 inclusive of the amount of principal due and owing as of 2 August 2018 of \$9,661.83; interest in the amount of \$1,176.12 as of 2 August 2018 and continuing at a rate of \$3.38 per diem.

- [13] Mr. Sawyer entered an appearance on 16 December 2019; more than a year after service of the Writ of Summons with no reasonable explanation given to the Court for the inordinate delay. To date, Mrs. Sawyer has not filed an appearance.
- [14] To date, the Sawyers have failed to enter a Defence in the instant action. They have made no application for leave to enter a Defence out of time and have filed no evidence to indicate that they have a bona fide Defence to the claim or that they are able to raise an issue against the claim which ought to be tried.
- [15] On the other hand, Scotiabank has verified its claim in the Affidavits of Edda Armbrister.
- [16] On 16 December 2019, the Court proceeded to hear the Application for Final Judgment. Learned Counsel Mr. Percentie holding brief for Mrs. Farquharson appeared and stated that she was ill. The Court then adjourned the application to 19 December 2019 and gave directions for both parties to email submissions to the Court and exchange between them by noon on Wednesday 18 December 2019.
- [17] On 18 December 2019, Mr. Sawyer filed an Affidavit. In paragraphs 1 to 3, he acknowledges the debt and then, at paragraph 6, he states that “I wish to defend this matter, particularly, as it relates to quantum.”

Application for Final Judgment

- [18] The application for Final Judgment was heard on 19 December 2019. Learned Counsel Mrs. Farquharson appeared and challenged the application on two grounds namely:
1. Mr. Sawyer was not served with the Writ of Summons and;
 2. A Notice of Intention to proceed ought to have been filed in accordance with RSC Ord. 3 r. 5.

Service on Mr. Sawyer

[19] In his Affidavit, Mr. Sawyer alleges that he was not served with the Writ of Summons.

[20] By an Affidavit of Service filed on 17 September 2018, R/Sgt. 15 Stan Davis confirmed service of the Writ of Summons on the Defendants on 5 September 2018. Attached to his Affidavit of Service are Exhibit SD1 (personal service of Writ of Summons on Charles Sawyer at 8: 30 p.m. on 5 September 2018) and Exhibit SD2 (personal service of Writ of Summons on Sharon Sawyer on 5 September 2018 at 7:29 p.m.). Both Defendants signed a Service Receipt exhibited to the said Affidavit of Mr. Davis in which they acknowledged receipt on the said date.

[21] I find as a fact that Mr. Sawyer was properly served with the Writ of Summons.

Notice of intention to proceed

[22] Learned Counsel Mrs. Farquharson argues that a Notice of Intention to proceed in accordance with RSC Ord. 3 r. 5 ought to have been filed and served at least one month prior to the hearing of Scotiabank's Summons before the expiration of a year following the service of the Specially Indorsed Writ of Summons on Mr. Sawyer.

[23] RSC Ord. 3 r.5 which is headed "Notice of intention to proceed after year's delay", is in these terms:

"Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule."

[24] RSC Ord. 2 r. 1 would reduce this issue, if relevant, to an irregularity and the failure to comply with Ord. 3 r. 5 is not a ground for nullifying these proceedings, or any step taken in these proceedings. Ord. 2 r. 1 states:

"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein."

- [25] Furthermore, under Ord. 2 r. 2, an application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein **shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.**
- [26] Ord. 2 r. 2(1) provides that "[A]n application under this rule **may** be made by summons or motion and the grounds of objection **must** be stated in the summons or notice of motion. Mr. Sawyer has made no such application.
- [27] In my opinion, the submissions advanced by Mr. Sawyer with respect to Scotiabank's failure to file a notice of intention to proceed is without merit because, at the first hearing on 16 December 2019, Mr. Sawyer's Counsel appeared after entering an Appearance to the action and did not raise this as a preliminary objection. In fact, directions were given for the hearing of the Scotiabank's application for Final Judgment.
- [28] I am also satisfied that the failure to comply was not intentional. In the past, Scotiabank had generally complied with all other practice directions and orders with respect to this matter. Notwithstanding service of the Writ of Summons on the Sawyers in September 2018, some 18 months ago and the Summons for Final Judgment on 2 November 2019, they failed to enter an appearance. At the eleventh hour, i.e. on the day set for the hearing of the Summons for Final Judgment did Mr. Sawyer filed an Appearance. I find that the reasons advanced by Mr. Sawyer for that inordinate delay is a fabrication and without merit.

[29] In the circumstances, I will make the following order:

1. Pursuant to RSC Ord. 73 r. 3, leave be and is hereby granted to the Plaintiff (Scotiabank (Bahamas) Limited) to enter judgment against the Defendants (Charles Sawyer and Sharon Sawyer) in the sum of \$12,461.19 being the total principal sum of \$9,661.83, \$2,799.36 for interest thereon as of 16 December 2019 and continuing to accrue at the contractual rate of 8% per annum to 18 December 2019 and thereafter at the statutory rate of interest pursuant to the Civil Procedure (Award of Interest) Act 1992, currently at the rate of 6.25 % per annum.
2. The Defendants will be costs to the Plaintiff in the sum of \$4,000 which represents reasonable costs.

Dated this 3rd day of February, A.D., 2020

**Indra H. Charles
Justice**