

Federal Court



Cour fédérale

Date: 20240619

Docket: T-1990-23

Citation: 2024 FC 939

Ottawa, Ontario, June 19, 2024

PRESENT: Associate Judge Catharine Moore

BETWEEN:

HARBOUR AUTHORITY OF OLD PERLICAN

Applicant

and

BOYD SQUIRES

Respondent

ORDER AND REASONS

UPON *EX PARTE* MOTION in writing dated June 11, 2024 on behalf of the Plaintiff, Harbour Authority of Old Perlican, pursuant to Rule 210(1) and 369 of the *Federal Courts Rules* for default judgment.

AND UPON reading the motion record filed on behalf of the Plaintiff;

On a motion for default judgment, the Court has two questions before it; first, is the defendant in default, and second, is there evidence to support the plaintiff's claim: *Chase Manhattan Corp v 3133559 Canada Inc*, 2001 FCT 895, *Voltage Holdings, LLC v. Doe #1*, 2023

FCA 194. Granting default judgement is not automatic; it is a discretionary order. As in all civil cases, and particularly where the matter is *ex parte*, the evidence must be scrutinized with care by the Court and that evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test: *Trimble Solutions Corporation v. Quantum Dynamics Inc.* 2021 FC 63.

On the first issue, while the Defendant has not filed a statement of defence, the Plaintiff has not established that the Defendant was personally served with the Statement of Claim. As best the Court can determine, the Affidavit of Bernard Fitzpatrick sworn October 10, 2023 states that:

1. On Oct. 4, 2023, at 10:25 AM by leaving it with Karen Clarke with Statement of Claim leaving a copy with that person at Sibley's Cove, NL. Mr. Squires away for 6 – 10 days request envelope be left in his shed for Ms. Clarke.
2. I was able to identify the person by means of (blank).

The *Federal Court Rules* are very clear that an originating process must be served personally, see *Rule 127(1)*. While personal service on an individual may be effected in a number of ways as set out in *Rule 128*, the process described in the Affidavit of Service included in the motion record is not among them and, accordingly, I find that the service of the Statement of Claim on the Defendant was improper. In the circumstances, I am not satisfied that the Defendant is in default.

While it is not necessary to consider the second issue, the Plaintiff has failed to include the Statement of Claim in its motion record as required by *Rule 364(2)(f)*. Without the Statement of Claim, it is not possible to determine if the proof tendered is sufficient to make out the claim. As set out in *Tehrankari v. Canada*, 2022 CanLII 109756 (FC) at paragraph 9:

It is neither the Court's nor the registry's duty or function to retrieve documents from the Court file as referred to in a party's motion materials for consideration as evidence or otherwise on a motion. This is plain from the Rules applicable to motions. Rule 359(d) of the Rules requires the moving party to list the documentary material to be used for the purposes of its motion in its Notice of Motion. Rule 364(2)(f) echoes the disclosure and description obligation contained in Rule 359(d) in concrete terms through its requirement that a party's Motion Record include "any other filed material that is necessary for the purposes of the motion". This "other filed material" should be consistent with and contain a copy of the documentary evidence described in the Notice of Motion to be used on the motion if the documentary evidence at issue consists of documents, including documents may have been filed in the Court file, that are not otherwise proven as exhibits to an affidavit in support of the motion.

Furthermore, the Affidavit of Korri Power sworn May 1, 2024 in support of the motion makes reference to a number of documents, including an invoice for the amount alleged to be owing and several demand letters, which are neither exhibited to the affidavit nor provided to the Court through other means. In the Court's view, these materials are most likely necessary evidence to the determination of the claim and their omission is troubling.

In the circumstances, I conclude that default judgment cannot be granted and the motion is dismissed.

THIS COURT ORDERS AND ADJUDGES that:

1. The Plaintiff's motion is dismissed without costs.

"Catharine Moore"
Associate Judge