

CANADA / JUDGMENT

# Ebco Industries Ltd. v. Rebrovsky

2020 BCSC 1058

## COURT

Supreme Court of British Columbia

## DECIDED

16 July 2020

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2020 BCSC 1058 Ebco Industries Ltd. v. Rebrovsky IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ebco Industries Ltd. v. Rebrovsky, 2020 BCSC 1058 Date: 20200716 Docket: S192787 Registry: New Westminster Between: Ebco Industries Ltd. and Advanced Cyclotron Systems Inc. Plaintiffs And Andrew Rebrovsky a.k.a. Andrey Rebrovsky, Julia Rebrovsky a.k.a. Yuliya Rebrovsky and NCIX Business Solutions Co. Defendants Before: The Honourable Mr. Justice Ball Reasons for Judgment In Chambers Counsel for the Plaintiffs: H. Parsons Counsel for the Defendants: W.D. MacLeod Place and Date of Hearing: New Westminster, B.C. July 7, 2020 Place and Date of Judgment: New Westminster, B.C. July 16, 2020

## Introduction

- [1] The plaintiffs have applied for a default judgement against the defendants in the amount of \$268,005.77, an equitable tracing of all monies obtained by the defendants, punitive damages in the amount of \$100,000, and other orders to assist in enforcing the sought after judgement. The defendants have not filed a response to the plaintiffs' Notice of Civil Claim ("NoCC") and submit they are not required to do so because the NoCC has expired, as it was not served within one year from the date the NoCC was originally filed and the NoCC has not been renewed. Issue
- [2] The issue raised in this application is whether a NoCC, which has expired, can be enforced without first obtaining an order to renew the NoCC, pursuant to Rule 3-2 of the Supreme Court Civil Rules.
- [3] Rule 3-2 states: Renewal of original notice of civil claim
- (1) An original notice of civil claim does not remain in force for more than 12 months, but if a defendant named in a notice of civil claim has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original notice of civil claim be renewed for a period of not more than 12 months. Further renewal of notice of civil claim

- (2) If a renewed notice of civil claim has not been served on a defendant named in the notice of civil claim, the court, on the application of the plaintiff made during the currency of the renewed notice of civil claim, may order the renewal of the notice of civil claim for a further period of not more than 12 months. When renewal period begins
  - (3) Unless the court otherwise orders, a renewal period ordered under subrule (1) or (2) begins on the date of the order. After renewal of notice of civil claim
  - (4) Unless the court otherwise orders, a copy of each order granting renewal of a notice of civil claim must be served with the renewed notice of civil claim, and the renewed notice of civil claim remains in force and is available to prevent the operation of any statutory limitation and for all other purposes.
- [4] The first subsection of Rule 3-2 is clear that a NoCC does not remain in force for more than 12 months, and if the NoCC is not served on the defendant(s), the plaintiff may apply either before or after the expiry of the NoCC, and the court has a discretion to allow the NoCC to be renewed for a further period of not more than 12 months.
- [5] To understand this file, a chronology is helpful:
- (a) The NoCC was filed on July 25, 2017.
  - (b) The NoCC was not served on any of the defendants and expired on July 26, 2018.
  - (c) The NoCC was served on the defendants, Andrew Rebrovsky and NCIX Business Solutions Co., on February 8, 2019.
  - (d) The NoCC was served on the defendant, Julia Rebrovsky, on February 21, 2019.
  - (e) A Notice to Change of Solicitor was filed on September 6, 2019.
  - (f) A Notice of Application for Default Judgement was filed January 8, 2020.
  - (g) The defendants notified the plaintiffs that they were relying on service of an expired NoCC on January 29, 2020.
- [6] The plaintiffs made no application at any time to renew the NoCC, which has expired. The present application does not include any attempt to renew the NoCC, nor evidence or other factual assertions which would allow the Court to consider an application under Rule 3-2.
- Discussion
- [7] In the case at bar, there was a period of more than 18 months from July 25, 2017, until the defendants were served in February 2019. There was no evidence presented on this application that the defendants were aware of the filing of the NoCC in July 2017 or thereafter until the dates of alleged service.

- [8] A simple statement/restatement of Rule 3-2 is found in *Swetlishnoff v. Swetlishnoff*, 2011 BCSC 1257 at para. 18, which reads "Rule 3-2 of the Supreme Court Civil Rules states that an original notice civil claim does not remain in force for more than a 12-month period if a defendant has not been served."
- [9] An application for renewal of a NoCC is required to correct an irregularity: *Stuart v. Patterson*, 2010 BCSC 1236. The decision to renew a NoCC requires an exercise of discretion by the Court. There are five factors which govern the discretion of the court to renew a NoCC, listed in *Imperial Oil Ltd. v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 at para. 9 and *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 at para. 7, leave to appeal ref'd 2005 S.C.C.A. No. 134:
- (a) was the application to renew was made promptly;
  - (b) whether the defendant(s) had notice of the claim before the NoCC expired;
  - (c) whether the defendant was (or defendants were) prejudiced, which can be assumed from the passage of time;
  - (d) whether the failure to effect service was attributable to the defendant(s); and,
  - (e) whether the plaintiff, as opposed to a solicitor, was at fault.
- [10] *Imperial Oil Ltd.* also states at para. 16 that the relevant time to determine whether a plaintiff has acted promptly is the time elapsed from the date that the plaintiff learned that the NoCC had not been served to the date of the application to renew the NoCC. There is not "carte blanche" renewal for those who neglect or decide not to serve the NoCC: *Mountain-West Resources Ltd.* at para. 7, citing *Reid v. Mutual Life Assurance Co.*, [1999] B.C.J. No. 388 (S.C.).
- [11] While the plaintiffs in the case at bar have not applied to renew the NoCC, the foregoing review of Rule 3-2 demonstrates that a plaintiff cannot continue with an action after the NoCC has expired without successfully applying to have a renewal granted. A feature of that review, which is conclusive in this matter, is that the Court has a discretion to refuse to renew the NoCC, in which case the action would come to an end.
- [12] In the recent case of *Aulakh v. McBoyle*, 2020 BCSC 849, Riley J. helpfully noted at para. 4 that "Renewal of a notice of civil claim is a discretionary matter. The objective of the court is to see that "justice is done", having regard to the particular facts of the case." These comments apply in the case at bar. Without an application to renew the NoCC, the court cannot see that justice is done, and there can be no further steps taken in this action by the plaintiffs against the defendants based on an expired NoCC which does not remain in force because of the effluxion of time.

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## Conclusion

- [13] On this application, the plaintiffs are seeking to obtain a default judgment where the NoCC upon which the plaintiffs rely has been expired for almost two years, and is therefore not in force. There has been no attempt to renew the NoCC. In addition, the defendants have raised issues such as the expiry of the applicable limitation period.
- [14] Based on Rule 3-2 of the Supreme Court Civil Rules and the case law cited above, this Court refuses to grant default judgement based on an expired NoCC which is not in force. The application by the plaintiffs is therefore dismissed.
- [15] While the defendants sought special costs in their application response, conduct must rise to the level of "reprehensible" to award special costs, and the fact that an action has little merit does not give rise to special costs: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242. I do not find the conduct of the plaintiffs here rises to the level of reprehensible, and therefore decline to award special costs.
- [16] However, as the defendants were successful in this application, the defendants are awarded costs of this application, in any event of the cause, payable by the plaintiffs to the defendants forthwith after assessment thereof, pursuant to Appendix B as a matter of ordinary difficulty. "Ball J."

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