

Case Name:

**Shaw Satellite Services Inc. (c.o.b. Shaw Tracking) v.
Christian Schenk Inc.**

Between

**Shaw Satellite Services Inc. dba Shaw Tracking, Plaintiff, and
Christian Schenk Inc., Christian Schenk and Hans Schenk,
Defendants**

[2012] O.J. No. 6473

Court File No. CV-10-401431

Ontario Superior Court of Justice

J. Macdonald J.

April 11, 2012.

(8 paras.)

Counsel:

Demetrios Yiokaris for the Defendant, Christian Schenk.

Brendan Bissell for the Plaintiff.

1 J. MACDONALD J.:-- The default judgment granted by the Court is premised on the applicants being noted in default by the Registrar. That in turn is premised on the Registrar's determination that the Applicants (Defendants) were properly served with the Statement of Claim. In my view, that conclusion that service was properly effected was in error, for the following reasons.

2 The process server's affidavit (Tb 2B, p. 55) states that service was effected on an adult female identified as Schenk's wife, who was a member of the same household as Schenk, being a household at the address where purported service was effected.

3 The affidavit is defective, in part. The affiant does not swear that he believe (1) the neighbour who stated that Schenk resided at the aforesaid address or (2) the boy who said Schenk, his father, was "at work". Consequently, neither assertion is properly evidenced in support of the affiant's assertions that Schenk was part of the household, located at the address where purported service was effected, along with the woman who was served.

4 In my view, the process server deems inferences to the above effect which are unreasonable inferences and further on the whole of the evidence, these inferences and assertions in his affidavit were and are factually incorrect. The woman served was Schenk's estranged wife. He had occasional access to his children there, but was not a member of that household due to the fact that he and his were separated.

5 I am satisfied that the Statement of Claim as served on the estranged wife did not come to Schenk's attention. He concedes (para 23 of his Affidavit p. 7) that he became aware of an attempt to serve him by serving his estranged wife, but he does not admit that he received a copy of the Statement of Claim. He was aware through his father that he was a defendant in a lawsuit, but again, he was not aware of the Statement of Claim and its allegations.

6 There was some delay in moving to set aside. Looking at all factors including the seriousness of the allegations, it is in the interest of the justice to set aside the default judgment and so order.

7 I would timetable further proceedings but there is a BIA stay in place, due to Schenk's bankruptcy. I fix the costs of the Applicant Schenk and his costs as a respondent in the Shaw motion in the amount of \$9,750.00 inclusive of H.S.T. which I regard as proportionate to the seriousness of the issues raised, which include an underlying allegation of fraud.

8 Costs payable forthwith.

J. MACDONALD J.

qp/s/qlrxg/qlrdp