

DYSART, J.

SYNOPSIS

- [1] This is a motion by the Defendant, Mark Terence McCarthy, seeking to set aside a default judgment obtained by the Plaintiff, Toronto-Dominion Bank.
- [2] The Bank commenced an action against Mr. McCarthy on January 12, 2024, in which is sought liquidated damages in relation to unpaid debts arising from credit cards issued to Mr. McCarthy, as well as an overdraft protection loan.
- [3] Mr. McCarthy did not defend the action, and default judgment in the amount of \$48,598 was entered against Mr. McCarthy by the Clerk of the Court of King's Bench on April 16, 2024.
- [4] Mr. McCarthy now seeks to set aside that default judgment.
- [5] As more fully set out in these reasons, Mr. McCarthy has failed to lead any evidence to satisfy this Court that he has a prima facie defence on the merits. His position is based on so-called pseudo-legal commercial arguments which have no basis in law. He has failed to meet the test set out by our Court of Appeal in *Royal Bank of Canada v. Ruddock et al.*, 2009 NBCA 25 (CanLII).

[6] The motion is dismissed.

FACTS

[7] The Bank sent a demand letter to Mr. McCarthy on November 8, 2023, demanding payment of debts with respect to a TD “Travel” Credit Card (Account ending 311), a TD “Green” Credit Card (account ending 406), and overdraft protection. The total debt claimed at that time was \$43,124.70. Mr. McCarthy was given ten days to pay the outstanding debt.

[8] Not having received any payment, the Bank commenced an action in this Court on January 12, 2024, by filing a Notice of Action with Statement of Claim Attached.

[9] The Notice of Action with Statement of Claim Attached was personally served on the Defendant on February 26, 2024.

[10] On February 28, 2024, Mr. McCarthy filed with the Clerk of the Court a document titled “Private Trust Deposit.” The document, in which Mr. McCarthy refers to himself as the “Beneficiary of the Estate of Mark Terence McCarthy,” is what might be best described as pseudo-legal gibberish. As an example, its reads in part:

[Attention: Clerk]

Judicial District of Moncton

Please provide your written delegated authority to administer the Estate, Mark Terence Mc Carthy used when issuing the Case Bond No. MC-24-2024 issued on the 12th of January 2024.

I am the Beneficiary of the Estate, Mark Terence Mc Carthy. I have never abandoned my securities and I am in possession of the sole Power of Attorney to administer the Estate.

As Beneficiary of the Estate Mark Terence Mc Carthy, I instruct you, as Trustee for the Estate to exchange a dismissal order for the claims drawn on that account and complete a full sworn accounting and write a cheque to this Estate.

Regards,

Beneficiary

Mark of the family Mc Carthy

[11] And further:

Statement of the Benefactor

For the correction of the incorrect designations

To all to whom these presents shall come, greetings:

I, One, living, breathing, man, the undersigned, Exhibit A, son of and made in the image and the likeness of my father and mother, Terence and Johanna, given name Mark, having a sound mind, without prejudice to My God-given rights and duties, being one who was born of and walks on the soil of God (Genesis 1), who is unschooled in the law, is not trained in legalese, who has never had an attorney, is without an attorney, and does not waive counsel, knowingly and willingly Declares and duly Affirms, according to law, in time of peace and not in time of war or emergency, in good faith, with no intention to delay or obstruct, and with full intent to preserve and promote the public confidence in the integrity and impartiality of the judiciary, that the preceding and following statements and facts are of my own first-hand knowledge, except where such matters are stated to be based on information and belief, in which case I have identified the source and confirm my belief in the accuracy and truth of that information, God help me.

[12] And finally:

3. There are two beings with the same name, one real, the undersigned, the other a person, a fictional being.

4.It is not possible that man can be two beings, man, and a person, a fictional being.

5.I attorned unknowingly. I only appear for the person. I think for, speak for, and act for it.

6.I own the claim of ownership to the Estate, MC CARTHY, MARK TERENCE, Registration # 4071863.

7.The Estate is represented by the certification accepted in the custody of the office of the Registrar General, Exhibit B, which represents the security future pledge of future labor, the source of credit.

8.The Estate, my labour, unbeknownst to I, has been pledged as surety to underwrite the currency of Canada as well as a portion of the public debt; pay the bills, taxes, claims, assessed/levied against the person MARK T MC CARTHY, account # 588 200 394.

9.The Estate consents and agrees to cover all the persons debts and forgives the debtor of its indebtedness.

[...]

Recipients shall have twenty one days from the date shown above to refute, in writing, any part or all the content of the Statement of the Benefactor, backed by evidence. For example, written delegated authority to administer the Estate, documentation that establishes a lien or equitable interest in the Estate, proof the undersigned is a person. If more time is required to respond, send notice of such.

[13] Of course, the Defendant did not file a Notice of Intent to Defend nor a Statement of Defence, as provided for under the Rules of Court. What Mr. McCarthy filed with the Clerk of the Court was not a pleading.

[14] As a result, and in accordance with Rule 21 of the Rules of Court, the Bank sought default judgment on April 11, 2024, because the Defendant had not filed any pleading within 20 days of being served with the Notice of Action with Statement of Claim Attached.

[15] Default judgment was granted by the Clerk of the Court on April 16, 2024 in the sum of \$48,598.72, inclusive of interest, costs and disbursements.

THE MOTION TO SET ASIDE DEFAULT JUDGMENT

[16] On August 2, 2024, Mr. McCarthy filed a Notice of Motion seeking to set aside the default judgment. His Notice of Motion reads:

The Defendant claims the Plaintiff has committed fraud and misconduct therefore, motions the court to set aside the judgement entered by the court on the 16th day of April 2024 The Defendant will rely upon the Securities Act, Transfer of Securities Act, Canadian Criminal Code 336 & 397 and other relevant statutes.

(1)The Defendant claims the Plaintiff may have breached the Criminal Code of Canada in its interaction with the defendant.

Criminal breach of trust 336 Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in contravention of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 296.

2) The Defendant claims the Plaintiff failed to provide the full double entry accounting records to identify the alleged debt, in accordance with Generally Accepted Accounting Principles (GAAP).

3) The Defendant claims that the Plaintiff failed to inform him that his financial asset (un-abandoned security) was used by the Plaintiff to enable the original issuing of the credit, breaching the *Truth in Lending Act* (TILA).

4) The Defendant claims the Plaintiff knowingly held the defendant's financial asset in the form of an un-abandoned security without identifying it as a secondary issue security breaching the Criminal Code of Canada:

Falsification of Books and Documents

397 (1) Every one who, with intent to defraud,

(a) destroys, mutilates, alters, falsifies or makes a false entry in, or

(b) omits a material particular from, or alters a material particular in, a book, paper, writing, valuable security or document is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Of course, the reference to the *Truth in Lending Act* is an American statute, with no relevance to this matter, and suggests that Mr. McCarthy was influenced by online posts rather than any legitimate legal position.

[17] His Affidavit in support of the motion reads as follows:

I, Mark Terence Mc Carthy, of 389 Albert Mines Road, In the County of Albert Mines (sic), and Province of New Brunswick, MAKE OATH AND SAY THAT:

- 1) I have received no double entry accounting records in accordance with Generally Accepted Accounting Principles (GAAP) from the Plaintiff to identify the source of the alleged debt.
- 2) I claim the Plaintiff may have breached the Criminal Code of Canada and the New Brunswick Securities Transfer Act.
- 3) I claim that on or around the dates 22rd of December 2011 and 26th of March 2012. Original issue Securities were received by the Plaintiff from Mark Terence Mc Carthy.

POSITIONS OF THE PARTIES AT THE HEARING

[18] At the start of the hearing, the Court confirmed that Mr. McCarthy understood the test to be met in order to set aside the default judgment – specifically, that he had to show a prima facie defence on the merits, for that is a “make-or-break” requirement. He understood.

[19] He was asked about the “Statement of the Benefactor” document that was filed on February 28, 2024. He acknowledged that he did not file a Statement of Defence or a Notice of Intent to Defend. He attributed that document to some “bad advice” he had received. He did not elaborate.

[20] During his submissions, Mr. McCarthy expanded somewhat on the bare assertions set out in the Notice of Motion and Affidavit with regards to his defence in this case. The theory of his defence is thus:

- When he signed the application form for the credit cards and the overdraft protection, he gave a promise to pay the debt;
- That promise to pay, or “promissory note” as he called it, was a financial asset which the Bank accepted from him as consideration for the extension of credit. Presumably this was the “original issue” security which TD Bank received from him;
- He believes (but has no evidence to show) the Bank then took that promissory note, a “financial asset”, registered it on its books as an asset, and then converted it to a financial instrument (a secondary issue security) which he believes would have been sold to an unknown investor, thus creating the money which was used to extend the credit;
- He maintains, therefore, that TD Bank received payment – in the form of his promissory note – for the credit which was extended to him, thereby relieving him of any debt obligations under the credit card loan arrangement.

- [21] In essence, Mr. McCarthy's defence is that, in promising to repay the debt to TD Bank, he gave the Bank a "financial asset" which relieves him from paying the debt.
- [22] Not surprisingly, Mr. McCarthy could not point to any statute, regulation or jurisprudence to support his position. It seems clear to the Court that Mr. McCarthy has read this theory online, where one can easily find a plethora of these pseudo-legal commercial arguments.
- [23] Nor could he point to any admissible evidence in support of his position. He maintains that he should have access to TD Bank's financial records to determine how the "financial asset" was registered and whether there was a "double entry" in accordance with Generally Accepted Accounting Principles – that is, to show that the "promissory note" was both listed as an asset and as a debt, thereby somehow breaching the Criminal Code (fraudulent breach of trust). That is, he suspects, but does not have any evidence, that TD Bank somehow sold his "financial asset" as a secondary security.
- [24] When it became clear that Mr. McCarthy's position was not resonating with the Court, he asked for an adjournment so that he could collect additional evidence. Yet he could not say what that additional evidence

might be, nor how it might affect the grounds he was advancing. He implied that he would look for new defences.

[25] The Court acknowledges the words of former Chief Justice Drapeau at paragraph 28 of the leading case of ***Royal Bank of Canada v. Ruddock and Horvath***, supra, that:

Where it appears there is a defence on the merits, but the evidence in support is lacking or deficient, the motion judge ought to consider adjourning the hearing to afford the defendant an opportunity to rectify the situation

[emphasis added]

[26] Here, there does not appear to be any defence on the merits, and so the request for an adjournment was denied.

THE LAW

[27] As indicated, the leading case with respect to the setting aside of a default judgment remains ***Royal Bank of Canada v. Ruddock and Horvath***, supra, where then-Chief Justice Drapeau set out the factors to be considered by the Court:

[33] Judicial intervention under Rules 21.03 and 21.08 is discretionary. Rule 21.03 provides that the court “may” set aside a noting of default “on such terms as may be just” and Rule 21.08 is to the same effect in relation to a follow-up default judgment. The test for the exercise of judicial discretion under those Rules consists of four elements which, except for the first, come into play without presumptive make-or-break status: (1) a valid prima facie defence to the action; (2) a continuing intention to defend; (3) a reasonable explanation for the failure to file and serve a Statement of Defence before the noting of default; and (4) an application for relief within a reasonable period of time. In the run-of-the-mill case, a motion for set-aside relief should succeed, on such terms as the court considers just (in respect of costs and the protection of the plaintiff’s legitimate interests) where the evidence establishes, on a prima

facie basis, a valid defence to the action and the plaintiff does not show irreparable injury attributable to the defendant's default or delay.

[emphasis added]

[28] In the present case, the Defendant has provided no explanation whatsoever for his failure to file a Statement of Defence within the time prescribed by the Rules of Court, other than that he got “bad advice.”

[29] As for his continuing intention to defend the matter, one might suppose that his filing of the “Statement of the Benefactor” on April 28, 2024, was an attempt to defend – or at least object in some way – to the action filed by TD Bank. We shall, for the purposes of this motion, give Mr. McCarthy the benefit of the doubt in that regard.

[30] But as noted by the Court of Appeal in **Ruddock**, supra, the only factor which has “make-or-break” status is the first – that the Defendant has demonstrated a prima facie defence to the action. That is the most important factor for the Court to consider, and the one which Mr. McCarthy must show if he is to be successful on this motion.

[31] The test for what amounts to a *prima facie* defence was also explained by the Court of Appeal in **Ruddock**, supra, at page 28: “... does the evidential record give rise to a triable defence on the merits?”

[32] Here, there is no discernible defence to the action. Mr. McCarthy does not deny that he used the credits cards to purchase goods or services in the amounts claimed by TD Bank. His defence is based on a theory – one which appears to be based on pseudo-legal commercial arguments – that his promise to pay the debts incurred on the credit cards is itself an asset of equivalent value, such that the promise to pay effectively extinguishes the requirement to repay the debt. The defence is nonsensical.

[33] The Defendant has not demonstrated a triable issue. There is no prima facie defence on the merits.

[34] As such, the Defendant’s motion to set aside the default judgment is dismissed.

[35] In the circumstances, and contrary to the usual practice, the Court exercises its discretion and does not award costs.

DATED at Moncton, New Brunswick this 21st day of January 2025.

Robert M. Dysart,
Judge of the Court of King’s Bench
of New Brunswick