CITATION: Welch LLP v. iHealthOx Inc., 2025 ONSC 2128
COURT FILE NO.: CV-24-00096043-0000 (Ottawa)
DATE: 20250404

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
WELCH LLP Plaintiff/Responding Party	*Victoria Boddy*, for the plaintiff/responding party
– and –	
IHEALTHOX INC. and TERRI STOREY Defendants/Moving Parties	*Alex Ferguson*, for the defendants/moving parties
	HEARD: 1 April 2025, at Ottawa (by video conference)

REASONS FOR DECISION
(Motion to Set Aside Default Judgment)

MEW J.:

[1] The plaintiff is a firm of Chartered Professional Accountants. It obtained a default judgment against the corporate defendant, iHealthOx Inc. and its CEO, Terri Storey.

[2] The defendants now move to have default judgment set aside on the grounds that they were never personally served with the statement of claim or with notice of the motion for default judgment.

[3] The statement of claim was issued on 6 June 2024. The plaintiff claimed $87,944.71, inclusive of H.S.T. plus contractual interest at the rate of 12% for accounting and tax advisory services alleged to have been provided to the defendants.

[4] The statement of claim alleges that Ms. Storey personally guaranteed the liabilities of iHealthOx in relation to the services provided by the plaintiff.

[5] According to the affidavit of service of Christopher Warrender, a process server, the statement of claim was served on both defendants on10 June 2024 by leaving copies in sealed envelopes addressed to each defendant with Rick Moncriff [*sic*], described as "a person who appeared to be in control or management of the place of business at the time of service" and as "a person who appeared to be an adult member of the household", at 130 Ironstone Ct., Ottawa, Ontario K2S 0L4.

[6] Mr. Warrender states that he previously attempted to serve Terri Storey personally at 6.34 p.m. on 10th June 2024 "but although she was in the house she refused to come to the door". He does not elaborate on how he knew she was in the house.

[7] A copy of the statement of claim was also mailed to Terri Storey, via regular mail to the 130 Ironstone Court address on 11th June 2024.

[8] Richard Moncrieff is the husband of Terri Storey. In his affidavit he acknowledges that it was normal for documents to be mailed, couriered or process served to the address at 130 Ironstone Court as it relates to both his spouse and iHealthOx Inc.

[9] Mr. Moncrieff has no specific recollection of being served with the statement of claim or any other legal documents concerning this matter. He is not an employee, officer or director of iHealthOx.

[10] The defendants were noted in default on 8 July 2024.

[11] On 18 July 2024, the Local Registrar at Ottawa signed default judgment against the defendants for $91,067.35 plus $750 for costs. Post judgment interest was ordered at the rate of 12%.

[12] The plaintiff's solicitors wrote to the defendants on 26 August 2024 via process server, providing copies of the default judgment and writs of execution.

[13] According to the affidavit of Damon Koop Bangma, process server, on 9 September 2024, the plaintiff's solicitors sent a letter via process server to iHealthOx and Ms. Storey, at the Ironstone Court address, enclosing writs of execution and a notice of examination in aid of execution. Ms. Storey was "unavailable to accept service". Mr. Bangma says that documents were personally served on Mr. Moncriff [*sic*] at approximately 2:15 p.m. on 9 September, and that copies of these documents were also sent via regular mail to Terry Storey at 130 Ironstone Court on 10 September.

[14] Mr. Moncrieff challenges the evidence that he received service of the Writs of Execution and Notice of Examination in Aid of Execution at 2:15 p.m. on 9 September, saying that he was in Alfred, Ontario at the time helping his wife to pack up the Cedar Shade Campground there.

[15] The defendants claim that they were unaware of the judgment until 2 October 2024, when Ms. Storey's mortgage broker informed her that a writ of execution and a judgment had been registered against her. She then found copies of various court documents, including the statement of claim, in unopened mail.

[16] The defendants' motion to set aside default judgment was served on 28 November 2024.

[17] The defendants appear not to challenge the allegation that they are liable to pay for professional services that they have received. However, a substantial portion of the fees charged - $66,753.62 - relates to a Scientific Research and Experimental Development tax credit claim that the plaintiff assisted with. The plaintiff's fee was contingent on the amount of the tax credit achieved, as per the notice of assessment from the Canada Revenue Agency. The notice of assessment for iHealthOx was received on 18 April 2023. The plaintiff invoiced iHealthOx on 27 April 2023.

[18] The plaintiff's "SR & ED Engagement Proposal", which was accepted by Ms. Storey on behalf of iHealthOx on 26 October 2022, expressly provides that:

> Upon receipt of the Notices of Assessment or refund we will issue our invoice.
> Our invoice is payable upon receipt.

[19] All of the plaintiff's invoices were rendered to iHealthOx.

[20] Ms. Storey denies having personally guaranteed iHealthOx's obligations to the plaintiff.

[21] No draft statement of defence has been provided by the defendants.

[22] Ms. Storey states that iHealthOx has not received the tax refund reflected in the notice of assessment. She argues that she should not be required to pay the plaintiff's invoices until the tax rebates/credits are received. It is also argued on her behalf that she did not, but should have, received independent legal advice before entering into the contingency based retainer with the plaintiff.

[23] Rule 19.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that the court may set aside a default judgment or vary the default judgment on such terms as are just.

[24] In *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, the Court of Appeal set out the following five factors to be considered when determining whether the interests of justice favour granting an order to set aside a default judgment:

a. Whether the motion was brought promptly after the defendant learned of the default judgment;

b. Whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules;

c. Whether the facts establish that the defendant has an arguable defence on the merits;

d. The potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed; and

e. The effect of any order the motion judge may make on the overall integrity of the administration of justice.

[25] These factors are not to be prescriptive; each case must be evaluated based on its unique circumstances.

Motion Brought Promptly

[26] There is no issue that the defendants' motion has been brought promptly.

Explanation for Default

[27] The defendants' excuse for not having responded to the statement of claim is weak.

[28] Rule 16.03(5) of the Rules provides that a statement of claim may be served by an alternative to personal service where an attempt is made to effect personal service at a person's place of residence and, for any reason personal service cannot be effected, the document may be served by:

a. leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and

b. on the same day or the following day mailing another copy of the document to the person at the place of residence.

[29] Under Rule 16.02(1)(c), service of an originating process may be effected on a corporation "by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business".

[30] I am satisfied that the defendants were validly served. As Mr. Moncrieff stated in his affidavit, Ms. Storey regularly worked remotely from home and business documents were routinely delivered to the address at Ironstone Court.

[31] The fact that Mr. Moncrieff was served, rather than Ms. Storey, does not affect the validity of the service on either Ms. Storey (who acknowledges that she lives with Mr. Moncrieff at the Ironstone Court address) or on the company (in appropriate circumstances, service on a director's spouse can be valid service on the corporation: *Taillefer Plumbing and Heating Inc. v. 232298 Canada Inc.*, 2023 ONSC 5437.

[32] Furthermore, a copy of the statement of claim was also mailed to the company at its registered address at 260 Terence Matthews Crescent, Unit 201, Kanata, Ontario, K2M 2C7.

[33] According to Ms. Storey, she did not open mail or envelopes containing court documents in this matter until after she learned about the default judgment.

[34] Failure to open one's mail is not a valid or plausible excuse or explanation for the delay in responding to a claim.

Arguable Defence on the Merits?

[35] Ms. Storey admitted at her cross-examination that iHealthOx is not denying that it is liable for the debts owed to the plaintiff. Rather, she claimed that iHealthOx has not paid these debts because it does not have the funds to do so.

[36] Inability to pay is not a valid defence.

[37] Furthermore, as already noted, the SR & ED Proposal expressly provided that the plaintiff would issue its invoice upon receipt of the notice of assessment, and that the invoice was payable upon receipt.

[38] In respect of the liability of Ms. Storey personally, the plaintiff argues that the SR & ED agreement is between Ms. Storey, iHealthOx and the plaintiff and, further, that on 24 October 2024, Ms. Storey sent an email to the plaintiff specifically acknowledging her debt and advising that she would pay it, stating: "I will pay my debt, owed".

[39] While Ms. Storey did sign two agreements with the plaintiff that are relevant to this proceeding, on the face of these documents she did so on behalf of iHealthOx. Absent more specific language, there is in my view a genuine arguable defence that the agreements cannot be construed as giving rise to either a personal guarantee, or as rendering Ms. Storey in her personal capacity as a party to those agreements. There would also seem to be a sound basis to argue that an email sent by Ms. Storey after she had become aware of the default judgment, saying that she would pay, would not amount to an *ex post facto* acknowledgment of personal liability on her part for the debts of iHealthOx.

[40] The plaintiff argues that even if I find that Ms. Storey is not a guarantor of iHealthOx and was not a party to the services agreements with the plaintiff, she has failed to advance arguable defences to the plaintiff's claims of unjust enrichment and quantum meruit beyond bald denials of liability on her part.

[41] In *Manotick Concrete Ltd. v. Boissonneault*, 2019 ONSC 4827, a construction case involving a claim by a contractor, the contractor had pleaded that by providing services and materials, it enhanced the value of the defendants' property and that the defendants (including the moving party) received this benefit and were unjustly enriched at the expense of and to the detriment of the contractor. Williams J. found that although the moving party, who was one of the defendant owners of the property that the contractor had worked on, had an arguable defence to the contractor's claim in contract, he had raised no arguable defence to the contractor's claims under the doctrines of *quantum meruit* and unjust enrichment. She declined to set aside default judgment.

[42] In my view, *Manotick Concrete* is distinguishable. Although the plaintiff has advanced claims of *quantum meruit* and unjust enrichment against Ms. Storey, she has asserted that she has received no financial benefit from the work done by the plaintiff for iHealthOx. By contrast, in *Manotick Concrete* it was clear that the defendants' property had been the beneficiary of work done by the plaintiff, regardless of the lack of a contractual relationship between the plaintiff and the moving party.

[43] That having been said, the absence of a draft statement of defence detracts from the defendants' claim that they have an arguable defence on the merits: *Watkins v. Sosnowski*, 2012 ONSC 3836, at paras. 23-34.

[44] Ultimately, I am not persuaded that iHealthOx has an arguable defence on the merits. On the other hand, despite the absence of a draft statement of defence setting out the basis for Ms. Storey's defence, the statement of claim does not articulate (beyond a bald allegation) grounds for personal liability on the part of Ms. Storey. Further, the evidence does not provide a sufficiently compelling case for the existence of a guarantee or other basis to pierce the corporate veil to conclude that Ms. Storey would not have an arguable defence on the merits.

Prejudice

[45] The prejudice against the defendants by not setting aside the default judgment is clear in that they both would be subject to judgments without an opportunity to be heard.

[46] On the other hand, if the default judgment is set aside, the plaintiff posits that it is possible that iHealthOx and/or Ms. Storey personally will file for bankruptcy, thereby staying this action and resulting in the plaintiff having an accounts receivable of approximately $100,000, inclusive of the interest and legal fees it has incurred. Having the default judgment set aside would prejudice them by adding another layer of delay and expense in this matter.

The Interests of Justice

[47] The plaintiff argues that it would be contrary to the interest of justice to set aside this default judgment given the defendants' lack of reasonable explanation or excuse for failing to respond to the litigation, blatant ignoring of legal proceedings, and the defendants' lack of an arguable defence to the plaintiff's claims.

[48] Reliance is placed on J. Speyer J.'s decision in *Saand Inc. v. Cando Aluminum MFG Systems Inc.*, 2023 ONSC 2149. There, the defendants (a corporation and two directors of the corporation) sought to set aside default judgment against them, following their non-payment of a construction related contract. While the defendants acted promptly after learning of the default judgment, their motion to set aside was dismissed because:

a. Their claim that the corporation was not properly served was not supported by the evidence, as the statement of claim was served pursuant to the Rules;

b. Their affidavit evidence regarding the alleged lack of service of the claim on them personally was not credible and even misleading;

c. The materials filed by the defendants did not address the plaintiff's claim of breach of contract, such that there was no arguable defence available to them on the materials filed in support of their motion to set aside default judgment; and,

d. The plaintiff would be prejudiced by default judgment being set aside, and the interests of justice did not favour setting aside the default judgment because the materials filed in support of the motion were "incomplete, misleading, and in some respects, false".

[49] While I would agree that the circumstances in *Saand Inc.* resemble those in the instant case, there is one important difference: the two directors did not deny that they had executed personal and unconditional guarantees for the full payment of all monies due and owing by the corporate defendant to the plaintiff.

Decision

[50] I am not persuaded that the default judgment against iHealthOx should be set aside.

[51] I come to a different conclusion in respect of Ms. Storey's claim.

[52] Despite the failure to deliver a draft statement of defence, the evidence is sufficient to establish that she has arguable defences on the merits to the claims advanced by the plaintiff.

[53] In *Mountain View*, the Court of Appeal observed, at para. 51:

> … the presence of an arguable defence on the merits may justify the court exercising its discretion to set aside the default judgment, even if the other factors are unsatisfied in whole or in part.

[54] It is appropriate in my view to give greater weight to the existence of a defence that has more than an air of reality to it, notwithstanding Ms. Storey's other failings.

[55] I would therefore grant Ms. Storey's motion to set aside default judgment. She must file her statement of defence within 30 days of the release of these reasons.

Costs

[56] The plaintiff's costs summaries outline costs of the action thrown away between the date of default judgment and now of $1,857.56 (partial indemnity), and of the motion of $7,532.60 (partial indemnity) and $11,271.10.

[57] In my view the conduct of the defendants, which amounts to gross, if not wilful, neglect of the court's process, merits awarding costs of the motion to the plaintiff payable by the defendants jointly and severally within 30 days in any event of the cause. The defendants do not challenge the reasonableness of the plaintiff's costs summaries. I therefore fix the costs payable by the defendants to the plaintiff in the amount of $9,300 inclusive of disbursements and taxes.

[58] The costs are to be paid as a precondition of Ms. Storey being able to file a statement of defence in the action. Should a statement of defence not be filed by Ms. Storey within 30 days, the plaintiff is at liberty to move without notice for default judgment against her.

Mew J.

Released: 4 April 2025

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