CITATION: Ampere Metal Finishing Inc. v. KenzoKai Metal Finishing Inc., 2025 ONSC 3888
COURT FILE NO.: CV-24-3579
DATE: 2025 06 30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ampere Metal Finishing Inc., Plaintiff

AND:

KenzoKai Metal Finishing Inc. and Cristian Bran a.k.a. Cristian Bran Mendez a.k.a. Christian Bran a.k.a. Christian Bran Mendez, Moving Defendants

BEFORE: M.T. Doi J.

COUNSEL: I. Jamie Arabi and Laura Cloutier, for the moving defendants

Jane Y. Zhao, for the plaintiff

HEARD: April 4, 2025

ENDORSEMENT

Overview

[1] On this motion brought under rule 19.08 of the *Rules of Civil Procedure*, RRO 1990 O.Reg. 194, the defendants seek to set aside the default judgment granted to the plaintiff by the registrar and stay related proceedings to enforce the judgment.

[2] For the reasons that follow, I find that the motion should be granted.

Background

[3] The corporate defendant KenzoKai Metal Finishing Inc. ("KenzoKai") is a metal finishing company that operates from a warehouse in Oakville. The personally-named defendant, Mr. Bran, is KenzoKai's principal. KenzoKai has a registered head office in Burlington at the same address where Mr. Bran has his place of residence.

[4] The plaintiff, Ampere Metal Finishing Inc. ("Ampere"), operates a similar metal finishing business through its principal, Tebebe Mulugeta. Mr. Mulugeta and Mr. Bran are former business partners. They jointly-owned Ampere until they went their separate ways around July 2021 when

Mr. Bran sold his Ampere shares back to the company. Mr. Bran and Mr. Mulugeta have known each other for a number of years.

[5] On August 7, 2024, Ampere started this action by notice of action to recover $374,981.31 in unpaid amounts allegedly owed for services provided to KenzoKai under a service agreement. Ampere's statement of claim was issued on September 6, 2024.

[6] On October 15, 2024, Ampere filed a requisition to have the defendants noted in default after purportedly serving its notice of action and statement of claim on September 6, 2024. Ampere purported to serve KenzoKai at its registered head office under rule 16.02(1)(c) and Mr. Brar by alternative service at his place of residence under rule 16.03(1) and (5).

[7] On November 12, 2024, Ampere filed a requisition for default judgment against KenzoKai and Mr. Brar for $418,963.85 in liquidated damages and prejudgment interest, plus costs and post-judgment interest. On November 19, 2024, the registrar signed the default judgment with costs of the action fixed at $2,468.69.

Legal Principles

[8] Rule 16.01(1) states that an originating process shall be served personally as provided in rule 16.02 or by an alternative to personal service as provided in rule 16.03.

[9] Rules 16.02(1)(a) and (c) provide as follows:

> **Personal Service**
>
> 16.02 (1) Where a document is to be served personally, the service shall be made,
>
> **Individual**
>
> (a) on an individual, other than a person under disability, by leaving a copy of the document with the individual;
>
> …
>
> **Corporation**
>
> (c) on any other 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

[10] Rules 16.03(1) and (5) provide as follows:

> **Where Available**
>
> 16.03 (1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule.
>
> …
>
> ***Service at Place of Residence***
>
> (5) 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,
>
> and service in this manner is effective on the fifth day after the document is mailed.

[11] A statement of defence shall be delivered within twenty days after service of the statement of claim, where the defendant is served in Ontario: rule 18.01. If the statement of claim is not served, the twenty-day period for delivering the statement of defence does not begin to run, even if the defendant knows of the action. It follows that the date of service of the claim is important as it begins the time for a defendant to deliver a statement of defence.

[12] Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or proof of deemed service under rule 16.01(2), requisition the registrar to note the defendant in default. A defendant who has been noted in default is subject to the consequences prescribed in rule 19.02 that are significant.[1]

[13] Rule 19.08 provides the authority for setting aside a default judgment as follows:

> 19.08 (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.
>
> (2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

> (3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

[14] The court's ultimate task on a motion to set aside a default judgment is to determine whether the interests of justice favour granting the order: *Mountain View Farms Ltd. v. McQueen,* 2014 ONCA 194 at para 47. In undertaking this analysis, the court is required to consider the following five (5) factors:

a. whether the defendant moved promptly to set aside the default judgment after learning of it;

b. whether there is a plausible excuse or explanation for the defendants' default;

c. whether the facts establish that the defendants have an arguable defence on the merits;

d. the potential prejudice to the moving defendants should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and

e. the effect of any order on the overall integrity of the administration of justice.

Mountain View at paras 48-49; *Intact Insurance Co. v. Kisel*, 2015 ONCA 205 at para 14; *Storoszko & Associates v. 1489767 Ontario Limited*, 2024 ONCA 147 at para 3.

[15] The above-mentioned factors are not rigid rules but are pertinent considerations that are assessed in the particular circumstances of each case to determine whether it is just to relieve the defendant from the consequences of their default: *Mountain View* at paras 48-50; *Kisel* at paras 13-14; *Trayanov v. Icetrading Inc.*, 2023 ONCA 322 at para 20. Setting aside a default judgment subsumes the noting in default and related enforcement proceedings: *Brown v. Dhaliwal*, 2023 ONSC 947 at para 12.

[16] If default judgment is irregularly obtained, a defendant is entitled to have it set aside as of right without having to establish a defence to the plaintiff's claim: *Redabe Holdings Inc. v. I.C.I. Construction Corporation*, 2017 ONCA 808 at para 7; *Royal Trust Corp of Canada v. Dunn* (1991)

6 OR (3d) 468 (Gen Div) at para 19. Irregularities that may result in a default judgment being set aside include failing to serve the statement of claim in the proper manner: *Anson Advisors Inc. v. Doxtator*, 2024 ONSC 437 at paras 18 and 40; *Dunn* at para 19; *Amexon Property Management Inc. v. Paramedical Rehabilitation Solutions Inc.*, 2011 ONSC 4783 at paras 21-23; *Graf v. Periyathamby*, 2018 ONSC 1757 at para 4.

[17] The court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties: *Nobosoft Corporation v. No Borders, Inc.*, 2007 ONCA 444 at para 7; *Hills v. Suitor*, 2022 ONSC 914 at para 22.

Analysis

[18] As explained below, I find that Ampere improperly served the notice of action and the statement of claim on KenzoKai and Mr. Bran, respectively.

[19] Serving notice of a claim is crucial to a fair and just legal process: *Graf* at para 18. The onus to prove service is on the party that purported to have served: *Rajasekaram v. Naagularajah*, 2010 ONSC 533 at para 13; *Ali v. Ali*, 2016 ONSC 4736 at para 35.

[20] In my view, Ampere's service on KenzoKai was defective. Ampere submits that it served KenzoKai under rule 16.02(1)(c) by leaving a copy of the pleadings with Jose Hernandez who appeared to be in control or management of KenzoKai's place of business. There are several concerns with this submission. In his affidavit of service sworn September 8, 2024, the plaintiff's process server, Stephen Wong, states that he attended KenzoKai's registered head office in Burlington at 3:47 pm on September 6, 2024 where he found Mr. Hernandez and left him a copy as he, "*appeared to be in control or management of the place of business*." However, as noted earlier, KenzoKai's head office is registered to a home address where Mr. Bran resides. In a further affidavit sworn March 29, 2025, Mr. Wong states that Mr. Hernandez identified himself as KenzoKai's receptionist on September 6, 2024. Mr. Hernandez states in a reply affidavit sworn April 2, 2025 that he did not recall meeting Mr. Wong but, in any event, would not have identified himself on September 6, 2024 as someone working at KenzoKai as he was unemployed at the time and never worked for the company. Mr. Wong's affidavits do not give any meaningful particulars to explain what, if anything, he did to ascertain whether Mr. Hernandez had a role with KenzoKai or was authorized to accept service on its behalf. Mr. Wong and Mr. Hernandez swore affidavits

with conflicting accounts of what occurred on September 6, 2024. Neither was cross-examined on their affidavits. Given the record as filed, I cannot reconcile this conflicting evidence. As a result, I find that Ampere has not satisfied its onus to prove service under rule 16.02(1)(c): *Rajasekaram* at para 13; *Ali* at para 35.

[21] I find that Ampere's service on Mr. Bran was defective. As noted earlier, rule 16.01(1) requires an originating process to be personally served under rule 16.02 or by an alternative to personal service as permitted under rule 16.03. When service is at a place of residence, the first step in the process is set out in rule 16.02(1) that requires service on a person by leaving a copy of the document with the person at their residence: *Graf* at para 20. Only after a failed attempt at personal service at the place of residence can an alternative means of service be used, such as under rule 16.03(5): *Ibid; Rajasekaram* at para 15. The Rules expressly require an attempt at personal service *before* using an alternate means of service: *Rajasekaram* at para 17; *Graf* at para 21.

[22] In this case, Mr. Wong asserts in his affidavit of service sworn September 8, 2024 that he unsuccessfully attempted to serve Mr. Bran personally at the Burlington address on September 6, 2024. In his second affidavit sworn March 29, 2025, Mr. Wong states that he asked for Mr. Bran when Mr. Hernandez came to the door at 11:24 am on September 6, 2024 but that Mr. Bran was not present. Mr. Wong gave no evidence to explain how he learned that Mr. Bran was not present, or what other steps were taken to serve Mr. Bran personally. Where an affidavit of service does not stipulate when or how personal service was attempted, the usefulness of the evidence is reduced to the point where the court may find there was no attempt at personal service at all and that the requirements of rule 16.03(5) were not met: *Toronto Dominion Bank v. Machards,* [1998] OJ No 4954 (Master) at para 19. From the record as filed, I find that the only reasonable inference to draw is that Mr. Wong only tried to serve Mr. Bran personally on the same visit when he left a copy of the pleadings with Mr. Hernandez that morning. Where the only attempt to serve a defendant personally with originating service is made at the same time and place that service is attempted with an adult member of the same household under rule 16.03(5), service will be defective and inadequate: *Ridings Financial Service Inc. v. Singh,* [1998] OJ No 3797 (Master) at para 17; *Machards* at para 17; *Drindak v. Bachiski Estate,* [2006] OJ No 4117 (SCJ) at paras 5-6 and 9; *Graf* at paras 10-14. As no attempt to effect personal service was made before recourse to an alternative method of service under rule 16.03(5), I find that service was defective from the outset.

In any event, there is no evidence that Mr. Wong took any meaningful steps to ascertain whether Mr. Hernandez is a member of the same household as Mr. Bran to permit alternative service under rule 16.03(5). Mr. Wong stated that Mr. Hernandez identified himself as Mr. Bran's uncle (i.e., in addition to being KenzoKai's receptionist). Mr. Hernandez states that he is a friend of Mr. Bran. Regardless of whether Mr. Hernandez is a friend or relative of Mr. Bran, none of this indicates whether both are members of the same household. Mr. Bran states that Mr. Hernandez does not reside with him. I accept that Mr. Wong could have asked Mr. Hernandez any number of questions to establish his place or apparent place of residence, but apparently chose not to do this. Taking this all into account, I find that Ampere's service under rule 16.03(5) was defective.

[23] Based on the foregoing, I am satisfied that Ampere has not met its onus to prove service of the statement of claim on KenzoKai and Mr. Bran: *Rajasekaram* at para 13; *Ali* at para 35. As a result, I find that Ampere irregularly obtained default judgment that should be set aside as of right: *Redabe Holdings* at para 7; *Dunn* at paras 19-21; *Darlind Construction, Inc. v. Rooflifters, LLC*, 2009 CanLII 13617 (ON SC) at paras 40-41; *Amexon* at paras 21-23; *Graf* at para 4. On this basis, I find that the noting in default, the default judgment, and any writs of execution issued pursuant to the default judgment should be set aside.

[24] The foregoing should fully dispose of the motion. However, should it not and if service were properly completed, I would find that this is a case where the court's discretion should be exercised to set aside the default judgment under the *Mountain View* criteria.

[25] I am satisfied that the defendants took prompt steps to address the default judgment as soon as they learned of the judgement. From the record, I accept that the defendants did not have actual notice of Ampere's claim until March 21, 2025 when in-house counsel for KenzoKai's largest client emailed Mr. Bran a notice of garnishment that named Ampere as the creditor and KenzoKai as the debtor. Shortly thereafter, the defendants discovered that Ampere had sued them. On March 24, 2025 (i.e., the next business day), the defendants retained counsel to act for them in this matter. On March 25, 2025, defendants' counsel obtained a copy of the court file that disclosed Ampere's steps in this proceeding including its November 12, 2024 requisition for default judgment that the registrar signed on November 19, 2024. Later on March 25, 2025, the defendants advised Ampere of their intention to rectify their default and asked for its consent to set aside the default judgment or to refrain from taking enforcement action until a motion to set aside could be heard. On March

26, 2025, the defendants wrote to the court to request an urgent motion to set aside the default judgment and temporarily stay garnishment proceedings. In view of this, I find that the defendants moved to set aside the default judgment in timely fashion.

[26] I accept that KenzoKai and Mr. Bran have given a plausible excuse or explanation for their default in this proceeding due to Ampere's defective service of its pleadings. Relying on evidence from its principal, Mr. Mulugeta, Ampere submits that the defendants never raised concerns about the charges on the invoices underlying its claim, gave repeated assurances that the invoices would be paid but did not follow, made excuses to avoid paying the debt, and knew of Ampere's intention to pursue legal recourse after Mr. Mulugeta texted Mr. Bran about this. But as noted earlier, I am satisfied that the defendants were not properly served with Ampere's pleadings and, therefore, did not deliver a statement of defence that caused their default in this litigation. Ampere also provided no advance warning of its intention to note KenzoKai and Mr. Bran in default and seek default judgment.[2] In the circumstances, I find that the defendants have a plausible explanation for their initial failure to defend the action.

[27] I am satisfied that KenzoKai and Mr. Bran have an arguable defence on the merits. In showing an arguable defence on the merits, the defendants need not show that the defence will inevitably succeed but only that their defence has an air of reality: *Mountain View* at para 51. The first line of defence involves an argument that certain claims are statute-barred by the *Limitations Act, 2002*, SO 2002, c. 24, Sched. "B". As certain aspects of Ampere's claim apparently relate to invoices from October to December 2021, I accept that the defendants have an arguable defence that at least a portion of the claimed amounts may be statute-barred. The second line of defence is that some of the charges on the invoices are excessive or unsupported. On this point, Mr. Bran states that Ampere overcharged KenzoKai by invoicing inflated amounts that are inconsistent with his years of experience working in the metal finishing industry. With some reservations given the limited evidence led on this point, I am prepared to accept that KenzoKai and Mr. Bran have shown an air of reality for this defence that sets out an arguable case for defending the amounts properly recoverable on the subject invoices. Based on all of this, I find that the arguable defence factor leans heavily in favour of setting aside the default judgment to permit the defendants to defend the claim against them on its merits.

[28] In my view, there would be fairly significant prejudice to KenzoKai and Mr. Bran if the default judgment (i.e., that granted $418,963.85 in damages, $2,468.69 in costs, and post-judgment interest) were not set aside given their arguable defences to Ampere's claims. Conversely, I see no real prejudice to Ampere if the default judgment were set aside to allow the defendants an opportunity to defend the claim.

[29] Taking everything into account, I am satisfied that the default judgment should be set aside to support the integrity of the administration of justice.

Outcome

[30] Based on all of the foregoing, I find that the default judgment should be set aside. It follows that the notices of garnishment in this matter should be set aside: *7321201 Canada Ltd. v. Intact Insurance Company*, 2017 ONSC 6480 at para 66; *Carboline Canada Division of RPM Canada v. 11331841 Canada Corp.*, 2024 ONSC 4943 at para 23. Given that Ampere is no longer entitled to a continuation of garnishment activities, and absent any compelling evidence that the defendants would remove or dissipate assets to avoid judgment, I am satisfied that any garnished funds should be returned to the defendants: *Foremost Cranberry Mews Limited Partnership v. Ferreri*, 2015 ONSC 2827 at para 3; *Maxwell v. 8580162 Canada Corp.*, 2018 ONSC 5504 at para 24; *Quadform Ltd. v. Rock Con Forming Ltd.*, 2020 ONSC 7903 at para 7; *Carboline* at paras 24-30.

[31] Accordingly, I make the following orders:

a. the default judgment dated November 12, 2024 is set aside;

b. the noting in default of the defendants is set aside;

c. all notices of garnishment or writs issued in respect of the above-noted default judgment are set aside, and all funds garnished shall be returned to the defendants; and

d. the defendants have leave to serve and file a statement of defence within 30 days from the release of this order.

[32] If the parties are unable resolve the issue of costs for this motion, the defendants may deliver costs submissions of up to 2 pages (excluding any costs outline or offer to settle) within 15

days, and the plaintiff may deliver responding costs submissions on the same terms within a further 15 days. Reply submissions shall not be delivered without leave.

Date: June 30, 2025

M.T. Doi J.

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RE: Ampere Metal Finishing Inc., Plaintiff

AND:

KenzoKai Metal Finishing Inc. and Cristian Bran a.k.a. Cristian Bran Mendez a.k.a. Christian Bran a.k.a. Christian Bran Mendez, Moving Defendants

BEFORE: M.T. Doi J.

COUNSEL: I. Jamie Arabi and Laura Cloutier, for the Moving Defendants

Jane Y. Zhao, for the Plaintiff

ENDORSEMENT

M.T. Doi J.

DATE: June 30, 2025

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[1] Rule 19.02 (Consequences of Noting Default) provides as follows:

19.02 (1) A defendant who has been noted in default,

(a) is deemed to admit the truth of all allegations of fact made in the statement of claim; and

(b) shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff.

(2) Despite any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken without the consent of the defendant in default.

(3) Despite any other rule, a defendant who has been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise or where a party requires the personal attendance of the defendant, and except as provided in,

(a) subrule 26.04 (3) (amended pleading);
(b) subrule 27.04 (3) (counterclaim);
(c) subrule 28.04 (2) (crossclaim);
(d) subrule 29.11 (2) (fourth or subsequent party claim);
(e) subrule 54.08 (1) (motion for confirmation of report on reference);
(f) subrule 54.09 (1) (report on reference);
(g) subrule 54.09 (3) (motion to oppose confirmation of report on reference);
(h) subrule 55.02 (2) (notice of hearing for directions on reference);
(i) clause 64.03 (8) (a) (notice of taking of account in foreclosure action);
(j) subrule 64.03 (24) (notice of reference in action converted from foreclosure to sale);
(k) subrule 64.04 (7) (notice of taking of account in sale action);
(l) subrule 64.06 (8) (notice of reference in mortgage action);
(m) subrule 64.06 (17) (report on reference in mortgage action); and
(n) subrule 64.06 (21) (notice of change of account);
(o), (p) REVOKED:

[2] In this regard, D.M. Brown J. (as he then was) aptly noted in *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 at para 10 that the far better practice is to serve a defaulting defendant with notice before seeking default judgment to avoid the risks associated with improper service. On this point, see also *Casa Manila Inc. v. Iannuccilli*, 2018 ONSC 7083 at para 12 and *Carboline Canada Division of RPM Canada v. 11331841 Canada Corp.*, 2024 ONSC 4943 at para 17.