CITATION: *Sutherland Law Professional Corp. v. Coccimiglio*, 2026 ONSC 602
COURT FILE NO.: DC-25-00000309-0000
DATE: 20260130

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	
SUTHERLAND LAW PROFESSIONAL CORPORATION o/a SUTHERLAND LAW *Applicant/Moving Party*	*P. Anand*, for the applicant/moving party
– and –	
CARMINE COCCIMIGLIO *Respondent/Responding Party*	*S. Grayson*, for the respondent/responding party
	HEARD: January 21, 2026

RULING ON MOTION

SCHRECK J.:

[1] This is a motion for a stay pending judicial review of an order of the Small Claims Court setting aside default judgment. The applicant, Sutherland Law Professional Corporation, obtained default judgment in a Small Claims Court action for the recovery of unpaid legal fees against the respondent. It intended to take steps to satisfy the judgment from the proceeds of the sale of the respondent's home, which were being held in trust by a real estate lawyer. Before that could occur, the respondent successfully moved to have the default judgment set aside. The applicant brings this motion to prevent the trust funds from being released to the respondent.

[2] After hearing submissions from the applicant, I dismissed the motion without calling on counsel for the respondent. There is no right of appeal from an interlocutory Small Claims Court

order and the applicant cannot attempt to enforce a judgment it has not yet obtained by circumventing the absence of an appeal route through the use of judicial review.

[3] The following reasons explain these conclusions.

I. FACTUAL BACKGROUND

A. The Default Judgment

[4] The respondent retained the applicant law firm in relation to a legal matter in 2020. After the respondent failed to pay a number of invoices, the applicant filed a Statement of Claim in the Small Claims Court on September 22, 2022 for recovery of unpaid fees of $17,449.79. On October 17, 2022, the respondent filed a Statement of Defence asserting, among other things, that the applicant had failed to follow instructions, performed work that the respondent had not authorized and failed to advise the respondent that the lawyer on his file was the subject of disciplinary proceedings before the Law Society of Ontario that could result in his suspension or the revocation of his licence.

[5] In 2023, the respondent failed to attend three Small Claims Court settlement conferences. After the third one on October 6, 2023, the presiding Deputy Judge ordered that that the respondent's defence be struck and he was noted in default on November 3, 2023. On January 16, 2024, Deputy Judge Mohan granted default judgment against the respondent for $21,618.95, which represented the initial claim as well as prejudgment interest and costs.

B. The Motion to Set Aside Default Judgment

[6] On February 20, 2025, the respondent filed a Notice of Motion to set aside the default judgment and a supporting affidavit stating that he had a longstanding history of mental illness and had missed the settlement conferences because he was experiencing a significant mental health challenge at the time. He stated that he had been unaware of the default judgment until recently, also because of his mental health issues. Attached to the respondent's affidavit was a letter from a psychiatrist, Dr. Wood Hill, stating that he had assessed the respondent, who suffered from persistent psychiatric illnesses, and that in his opinion the respondent was "eligible for any legal or social consideration available based on the above noted psychiatric report."

[7] The respondent's motion to set aside the default judgment was scheduled to be heard on March 24, 2025. On March 21, 2025, the applicant filed an affidavit sworn by a law clerk stating, among other things, that at the time the respondent filed his Statement of Defence, he "did not raise mention [*sic*] anything about his alleged mental illness . . . ."

[8] On March 24, 2025, just prior to the hearing of the motion, the respondent served and filed a second affidavit sworn by him in which he stated that the members of the applicant law firm had been aware of his mental health issues during their representation of him. Attached was a second letter from Dr. Hill in which he stated that given the respondent's history, "it was not surprising to hear he missed a pre-trial matter."

C. The Hearing of the Motion

[9] The motion hearing took place by videoconference before Deputy Judge Patel. A lawyer, Mr. Janmohamed, appeared and identified himself as counsel for the applicant and explained that he was "stepping in" for two other lawyers who had carriage of the file. The respondent was represented by his counsel, Kenneth Alexander.

[10] Mr. Alexander made his submissions on the motion on behalf of the respondent. When the Deputy Judge asked Mr. Janmohamed for his submissions, he responded that he had been instructed to seek an adjournment of the motion so that another lawyer, Mr. Frustaglio, could attend on a date on which he was available. No notice of a motion for an adjournment had been filed, Mr. Janmohamed had not advised the registrar prior to the hearing of his intention to seek an adjournment and he had not mentioned it when matters were vetted earlier in the day. The Deputy Judge refused the adjournment request.

[11] At some point during the hearing, another lawyer for the applicant, Mr. Anand, attended the hearing. Despite being requested to do so, the Deputy Judge refused to allow Mr. Anand to argue the motion and insisted that Mr. Janmohamed do so. Mr. Janmohamed then made submissions.

[12] At the conclusion of the hearing, Deputy Judge Patel granted the motion on the basis that he was satisfied that the requirements set out in r. 11.06 of the *Rules of the Small Claims Court*, O.Reg. 258/98 had been met.

D. Events Following the Motion

[13] The respondent sold his home in February 2025 and the proceeds of the sale were held in trust by his real estate lawyers, the firm of Levy Zavet. Prior to the hearing of the motion to set aside the default judgment, Mr. Alexander proposed that the amount of the judgment be transferred to his trust account pending the outcome of the motion. Mr. Frustaglio, counsel for the applicant, demanded that Levy Zavet transfer the funds to his firm in accordance with a writ of execution that had been issued pursuant to the default judgment. Levy Zavet advised both parties that they intended to hold back the funds pending the outcome of the motion.

[14] On March 25, 2025, a day after the motion to set aside the default judgment was granted, Mr. Janmohamed sent an e-mail to Levy Zavet advising that the applicant intended to apply for judicial review of the decision and bring a motion to stay the order. He stated that Levy Zavet was "obligated to withhold the funds in Levy Zavet PC's trust account until final determination of the application for judicial review and/or the motion to stay the order" and that Levy Zavet would be "held liable for any funds disbursed prior to the final disposition" of the proceedings. Counsel for the respondent took the position that once the writ of execution was set aside, Levy Zavet was obligated to release the funds to the respondent. The funds remained in Levy Zavet's trust account.

II. ANALYSIS

A. The Legal Test

[15] The test for a discretionary stay of an order pending judicial review is well established and mirrors the test for granting an interlocutory injunction in that the party seeking the stay must establish that (1) there is a serious issue to be determined on the application for judicial review; (2) the moving party would suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting a stay: *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, at p. 334; *Louie v. Han,* 2026 ONCA 25, at para. 30; *Miner-Tremblay v. Rintoul,* 2025 ONCA 784, at para. 7. The three prongs of this test are not prerequisites and weakness in one may be compensated for by strengths in the others: *Miner-Tremblay,* at para. 8; *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at p. 677. Ultimately, the question the court must answer is whether granting a stay is in the interests of justice: *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134, 51 C.P.C. (8th) 253, at para 42.

B. Serious Issue to be Determined

(i) Overview

[16] Determining whether there is a serious issue to be determined on the application for judicial review requires the court to make a preliminary assessment of the merits of the case. The threshold to be met is low and usually requires no more than establishing that the application is neither frivolous nor vexatious: *RJR-MacDonald,* at p. 337.

[17] The applicant's Notice of Application alleges that the Deputy Judge committed over 30 distinct errors of fact or law in setting aside that the default judgment. While I do not intend to consider each of them individually, they essentially amount to allegations that the Deputy Judge (1) failed to consider or give sufficient weight to various factors and apply correct legal principles; and (2) denied the applicant procedural fairness. I will consider each category in turn.

(ii) Alleged Legal Errors

[18] This is an application for judicial review, not an appeal. Section 31 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, clearly limits rights of appeal from decisions of the Small Claims Court to those from final orders. While this court has the jurisdiction to judicially review interim orders of the Small Claims Court pursuant to s. 2 of the *Judicial Review Procedure Act,* R.S.O. 1990, c. C.43, that Act "was not intended to provide a surrogate right to appeal where the legislature has expressly restricted those appeal rights": *1439957 Ontario Inc. (c.o.b. 409 Collision Centre) v. Benkoe,* 2017 ONSC 4984 (Div. Ct.), at para. 4; *Millard v. DiCarlo,* 2014 ONSC 1218 (Div. Ct.), at para. 5. Because of this, "this Court will not exercise its jurisdiction to judicially review interlocutory orders where the judicial review application is, in its essence, an appeal by a different name": *Peck v. Residential Property Management Inc.,* [2009] O.J. No. 3064 (Div. Ct.), at para. 5.

[19] Judicial review of an interlocutory Small Claims Court order will generally be appropriate only in narrow circumstances, such as where the Small Claims Court acted in excess of jurisdiction

or denied the parties procedural fairness: *Madhour v. Whitten & Lublin Professional Corp.* 2024 ONSC 2927 (Div. Ct.), at para. 5.

[20] The applicant alleges that the Deputy Judge failed to consider various factors, such as the extent of notice the respondent had been given of the settlement conferences and the fact that he did not mention his mental illness in his Notice of Defence. The applicant also alleges that the Deputy Judge committed various errors of law, such as relying on the hearsay evidence of Dr. Hill (which a Small Claims Court is entitled to do: *Courts of Justice Act,* s. 27(2); *Meaghan v. Bolahood,* 2021 ONSC 449 (Div. Ct.), at para. 21; *Tobey v. Loranger (c.o.b. Dan's Auto Sales),* 2020 ONSC 4669 (Div. Ct.), at para.16).

[21] In my view, these grounds clearly amount to "an appeal by a different name" and do not fall within the narrow circumstances in which this court would exercise its jurisdiction to review an interlocutory order of the Small Claims Court. Even if the applicant had a right of appeal, a decision to set aside default judgment is discretionary and deserving of deference: *McIlwain v. Len's Cove Marina Ltd.,* 2025 ONCA 434, at para. 12. Insofar as the application for judicial review is based on these grounds, it does not meet even the low "serious issue" threshold described in *RJR-MacDonald.*

(iii) Alleged Denial of Procedural Fairness

[22] The second category of grounds advanced by the applicant relate to an alleged denial of procedural fairness. This appears to be based on the Deputy Judge's failure to afford the applicant the opportunity to cross-examine Dr. Hill, his denial of the applicant's counsel's mid-hearing adjournment request, and his refusal to let Mr. Anand make submissions. In conducting a preliminary assessment of the merits of this claim of procedural unfairness, I must have regard for the mandate of the Small Claims Court as set out in in s. 25 of the *Courts of Justice Act,* which is to "hear and determine in a summary way all questions of law and fact": *Maple Ridge Community Management Ltd. v. Peel Condominium Corporation No. 221,* 2015 ONCA 520, 389 D.L.R. (4th 711, at para. 35; *Girgis v. Fine Touch Painting Co.*, 2025 ONSC 6832 (Div. Ct.), at para. 10; *Madhour,* at para. 5. The Deputy Judge clearly intended to deal with the motion expeditiously.

[23] As he was entitled to do, the Deputy Judge in this case appears to have approached the issue "lean[ing] in favour of an affirmative answer simply because *prima facie* no one should suffer a judgment against him except after a full hearing and after careful determination on the merits": *DCR Strategies Inc. v. Vector Card Services LLC,* 2013 ONSC 5881, at para. 23.

[24] There is no merit to the applicant's complaint that counsel was denied an opportunity to cross-examine Dr. Hill as he made no request to do so. Similarly, the Deputy Judge's discretionary decision to deny an adjournment request that was made in the middle of the hearing with no notice does not support a conclusion that there was a denial of natural justice. However, the Deputy Judge's refusal to let Mr. Anand make submissions is difficult to understand. In all the circumstances, I am prepared to conclude that the merits of the applicant's claim of procedural unfairness passes the "frivolous or vexatious" threshold, although only barely so.

C. Irreparable Harm

[25] "Irreparable harm" is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald*, at p. 341. In its factum, the applicant submits that "there is no monetary amount that can remedy and/or undo the effect of the Respondent being unable to pay his debts and judgments if the Applicant succeeds withs its Application for Judicial Review." I confess to having some difficulty understanding this submission, as one would think that a "monetary amount" is exactly what would undo the effect of the respondent not being able to pay his debts.

[26] It appears that the applicant has conflated the two types of irreparable harm described in *RJR-MacDonald* and its real concern is that the respondent will be judgment-proof if the applicant succeeds. This motion is essentially a request for execution before judgment, something which the law permits only in exceptional circumstances: *Chokar Law Office v. Nelson*, 2020 ONSC 2607; *Egredzija v. Gullett (c.o.b. Prestige Steel Buildings)*, 2019 ONSC 6475, 54 C.P.C. (8th) 175, at paras. 33-35 *Xpress View Inc. v. Daco Manufacturing* (2002), 36 C.C.E.L. (3d) 78, at para. 13. The only basis the applicant has provided for the extraordinary remedy it seeks is evidence that the respondent had mentioned having financial difficulties. This is clearly insufficient. As a result, the applicant has failed to establish irreparable harm.

D. Balance of Convenience

[27] The balance of convenience between providing the applicant with security for a judgment it has not yet obtained and allowing the respondent to access funds to which he is lawfully entitled clearly favours the respondent.

III. DISPOSITION

[28] The motion is dismissed.

[29] The respondent has requested that I make an order that Levy Zavet release the funds in its trust account to him. I am not prepared to make an order against Levy Zavet in proceedings to which it is not a party. That said, counsel for the applicant acknowledged in oral argument that if this motion is dismissed, Levy Zavet would have no legal authority to retain the funds in trust.

[30] The respondent is entitled to his costs. The applicant filed a 720-page record on this motion, which it pursued aggressively. While I have concluded that the application for judicial review barely exceeds the frivolous or vexatious threshold, the same cannot be said for this motion. It was "devoid of merit or with little prospect of success" and therefore frivolous, if not vexatious: *Heidari v. Naghshbandi*, 2020 ONCA 757, 153 O.R. (3d) 756, at para. 10. In all the circumstances, I fix costs at $9,000.00, all inclusive, to be paid by the applicant to the respondent within 30 days.

Justice P.A. Schreck

Released: January 30, 2026

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