CITATION: Collard & Markus Construction Inc. v. Collard Properties Inc. and Collard Holdings Ltd., 2024 ONSC 356
COURT FILE NO.: CV-22-00001091-0000
DATE: 2024/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Collard & Markus Construction Inc. Plaintiff	Philip V. Hiebert, counsel to the Plaintiff, Collard & Markus Construction Inc.
– and –	
Collard Properties Inc. and Collard Holdings Ltd. Defendant	Fraser Dickson, counsel to the Defendants, Collard Properties Inc. and Collard Holdings Ltd.
	HEARD: December 13, 2023

THE HONOURABLE JUSTICE M. J. VALENTE

ENDORSEMENT ON MOTIONS

Overiew

[1] On October 5, 2022 the Plaintiff issued a statement of claim in this proceeding for, amongst other relief, the return of certain personal property owned by it and in the possession of one or both of the Defendants. On November 3, 2022 the Plaintiff noted the Defendants in default. By way of notice of motion, dated December 19, 2022, the Defendants moved to set aside the noting of default and for collateral relief. The Plaintiff opposes the Defendants' motion.

[2] In anticipation of the Defendants not being successful on their motion, the Plaintiff brings a motion for the recovery of the personal property in the Defendants' possession.

Factual Background to the Defendants' Motion

[3] The Defendants are related corporations and have the same shareholders, both owned equally by Jamie Collard and Leslie Collard. The Defendant, Collard Holdings Ltd. ('Holdings'), is the fifty percent owner of the Plaintiff. The other fifty percent owner of the Plaintiff is Jeffrey Markus. Mr. Markus and Leslie Collard are the sole directions of the Plaintiff.

[4] Until the Plaintiff ceased operations on or about September 20, 2022, it contracted with the Defendant, Collard Properties Inc. ('Properties'), to renovate properties owned by it.

[5] On September 13, 2022 Jeffrey Markus advised Properties that the Plaintiff was experiencing labour and material shortages that prevented it from meeting its obligations to Properties and within a week it stopped operating. With the closure of the Plaintiff, a financial dispute arose between the parties. This dispute included an allegation by the Defendants that Jeffrey Markus misappropriated $150,000 from the Plaintiff's bank account.

[6] As a result of the dispute, Properties took the position that the assets of the Plaintiff, including its personal property that is the subject of this litigation, had to be preserved until the disputed issues were resolved. To do so, Properties assumed possession and control of the Plaintiff's assets, thereby causing the Plaintiff to issue its statement of claim in this proceeding on October 5, 2022.

[7] Wayne Gray was at all material times corporate counsel to the Defendants. On October 7, 2022, Mr. Gray wrote to Plaintiff's counsel, Mr. Hiebert, advising him that he had instructions to accept service of the statement of claim on behalf of Properties subject to the caveat that his acceptance of service was no admission that Mr. Hiebert was authorized to act on behalf of the Plaintiff. The evidence of the Defendants is that at no time did Leslie Collard, as one of the two directors of the Plaintiff, authorize the issuance of the statement of claim and nor did she authorize Mr. Hiebert's retainer. In subsequent correspondence, Mr. Gray requested that should Mr. Hiebert appear in court on this matter, that he advise the court that counsel for the Defendants takes the

position that the Plaintiff's claim is a nullity because Mr. Hiebert did not have authority to act for the Plaintiff.

[8] The parties agree that on October 7, 2022, Mr. Gray accepted service of the statement of claim on behalf of Properties.

[9] The unchallenged evidence of Jamie Collard is that as a result of Mr. Gray's email correspondence of October 6, 2022, Mr. Hiebert knew that Mr. Gray was not litigation counsel to the Defendants and that the Defendants were in the process of retaining litigation counsel to defend the Plaintiff's statement of claim.

[10] On October 12, 2022, Mr. Hiebert wrote to Mr. Gray requesting an accounting to which no response was received. Indeed, there is no communication between the parties until November 17, 2022, when Vincent DeMarco of the Defendants' current law firm provided Mr. Hiebert with Properties' Application for a Bankruptcy Order as against the Plaintiff. That bankruptcy application was adjourned as a contested matter and is currently before me for adjudication.

[11] On November 24, 2022, counsel to the Plaintiff advised Mr. DeMarco that the Defendants had been noted in default.

[12] On November 25, 2022, Sara Erskine of the same Defendants' law firm, advised Plaintiff's counsel that the firm had been retained to defend the within litigation on behalf of both Defendants and requested that the Plaintiff consent to a setting aside of the noting of default.

[13] On November 28, 2022, Mr. Hiebert advised that the noting of the Defendants in default was justified, and the Plaintiff was not prepared to accede to the Defendants' request.

[14] On December 19, 2022, the Defendants served their motion to set aside the noting of default against them.

Position of the Parties

[15] The Defendants submit that the Plaintiff is attempting to obtain judgment via technicality-based "gotcha-ism" that is foreign to the proportionality with which disputes in this jurisdiction are to be adjudicated. They submit that the Plaintiff knew that the Defendants had a defence,

intended to defend the action, and would have filed a defence if the Properties' bankruptcy application had not been adjourned to be argued at a later date. The Defendants point to their draft statement of defence as evidence of their intention to defend the Plaintiff's claim on its merits.

[16] The Plaintiff submits that Mr. Gray made it very clear that the Defendants had no intention of defending the action by asking Plaintiff's counsel to make submissions on behalf of the Defendants were he to appear in court on the matter. Additionally, the Plaintiff submits that there is no explanation for the failure to file a statement of defence, and the Defendants' delay in moving to set aside the noting of default is inordinate. The Plaintiff also submits that the Defendants have no defence.

Guiding Principles

[17] Rule 19.03 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 (the '*Rules*') provides that "the noting of default may be set aside by the court on such terms as are just". In interpreting the *Rules*, the Court of Appeal has stated that courts should attempt to ensure that proceedings are determined on their merits, rather than on a failure to comply with technical requirements or time limits (see: *Mountain View Farm Ltd. v. McQueen*, 2014 ONCA 194 at para. 50). In relieving against defaults, the Court of Appeal has reminded litigants of the need to have a broad view, and to not fall prey to a rigid application of specific detailed Rules (see: *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Limited*, [1991] O.J. No. 717 (Ont. C.A.) at para. 18).

[18] The Ontario Court of Appeal has also provided clear direction to courts asked to set aside a noting in default. In *Intact Insurance Company v. Kisel*, 2015 ONCA 205 ('*Intact*'), the Court stated at para. 13:

> When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case… It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive… Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it… Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits… [citations omitted]

Analysis

[19] There is no evidence before me to suggest that Mr. Gray accepted service of the statement of claim on behalf of Holdings. Therefore, I have no hesitation in setting aside the noting of default against this Defendant.

[20] In the event that Mr. Gray had accepted service on behalf of Holdings, my decision would been the same.

[21] I am also of the opinion that the noting of default is to be set aside as against Properties and that the Plaintiff ought to have consented to the Defendants' request to do so.

[22] The uncontroverted evidence is that as of October 6, 2022, Plaintiff's counsel knew that Mr. Gray was not to act as litigation counsel to the Defendants and that the Defendants were seeking litigation counsel to defend their interests in the Plaintiff's lawsuit. I reject the Plaintiff's position that Mr. Gray's email of October 12, 2022 to Plaintiff's counsel signals the unequivocal intention of the Defendants not to defend the action. In that email, Mr. Gray asks Mr. Hiebert that in the event he should appear in court that he advise the presiding justice that the Defendants' position is that the action is a nullity because it was not properly authorized by the Plaintiff's board of directors. In my opinion, Mr. Gray's request of counsel is not reflective of the Defendants' decided intention not to defend the proceeding. Rather, Mr. Gray's request is that of a prudent lawyer who is protecting his clients' interests on an interim basis pending the appointment of litigation counsel.

[23] In these circumstances, I find that it was unreasonable for Plaintiff's counsel to have noted the Defendants in default without notice to Mr. Gray when he knew based on his communications with Mr. Gray that the Defendants were seeking to retain counsel to defend the proceedings. Although Mr. Gray was acting only on the basis of a limited retainer, I nonetheless am of the view that section 19 of *The Principles of Civility for Advocates* (Toronto: Advocates Society, 2009), as endorsed by the Court of Appeal in *Male v. The Business Solutions Group*, 2013 ONCA 382, at para. 18, is very instructive in the circumstances of this case. Section 19 provides:

> Subject to the Rules of Practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

[24] I also find that the Defendants' delay in responding to the noting of default against them to be reasonable. Within a day of learning of the Plaintiff's default proceedings, defence counsel notified Plaintiff's counsel of her retainer and requested the Plaintiff's consent to setting aside the noting in default. Following the exchange of a series of correspondence and discussions between counsel, in less than one month the Defendants' motion to set aside the noting in default was served.

[25] Furthermore, although the Court of Appeal makes it clear in *Intact* that only in extreme circumstances (which these are not) should the court require the defendant noted in default to demonstrate an arguable defence, I find, based on the draft statement of defence filed in support of the Defendants' motion, that these Defendants have an arguable defence.

[26] During the court of the Defendants' motion, defence counsel proposed that should I set aside the noting in default, I exercise my discretion to stay the within action pending my adjudication of the bankruptcy application. Counsel for the Plaintiff opposes the stay on the basis that the Plaintiff's action was commenced prior to the bankruptcy application and an accounting of the debits and credits as between the parties needs to be resolved as quickly as possible.

[27] In my opinion, the most efficient way to settle the accounting issues is by way of the bankruptcy proceeding that is currently before me and well underway. Furthermore, in the event that a bankruptcy order is made as against the Plaintiff, the disposition of the personal property that is the subject of this litigation will be moot and it will be at the discretion of the Plaintiff's trustee or creditors as to whether the balance of the relief sought in this action is pursued. In short, I am persuaded to exercise my discretion to stay this action pending disposition of the bankruptcy application.

Costs

[28] As the Defendants have been successful on their motion, they seek their substantial indemnity costs in the amount of $16,390.19 inclusive of disbursements and HST. Although

Plaintiff's counsel has not filed a Cost Outline, Mr. Hiebert advises the Plaintiff's substantial indemnity costs inclusive of disbursements and HST are approximately $25,000.

[29] The Defendants seek their substantial indemnity costs because the Plaintiff was put on notice as early as November 25, 2022 that they would be seeking their costs on this elevated scale should they be forced to bring the within motion. The Defendants also submit that in any event the motion was a waste of everyone's time and money.

[30] In the exercise of my discretion with respect to the issue of costs, I am guided by the factors set forth in Rule 57.01(1) and the purposes of the modern cost rules as stated by this court in 394 *Lakeshore Oakville Holdings Inc. v. Misek*, [2010] O.J. No. 5692. I am also reminded that the expectations of the parties concerning the quantum of costs is also a relevant factor to consider. The court is required to consider what is fair and reasonable having regard to what the losing party could have expected the costs to be (see: *Coldmatic of Canada Ltd. v. Leveltek Processing LLC*, 2005 CanLII 1042 (Ont. C.A.)).

[31] Having found that the Plaintiff ought to have agreed to the setting aside of the noting of default based on the circumstances of this case and having considered the above noted factors, I find that an award of costs in favour of the Defendants on a substantial indemnity basis is appropriate. Based on the principle of proportionality alone, the Plaintiff's conduct in refusing to set aside their noting in default is not to be encouraged.

[32] I also find that the quantum of the Defendants' proposed substantial indemnity costs to be fair and reasonable given the experience of counsel and the allocation of work. Accordingly, I fix the Defendants' costs in the amount claimed of $16,390.19.

Disposition

[33] For all of the above noted reasons, the following Order will issue:

1. The Plaintiff's noting of the Defendants in default is set aside.
2. The Defendants shall deliver their statement of defence within 10 days of the date of this Order.

3. The Plaintiff's action is stayed pending the adjudication of the bankruptcy application against the Plaintiff in court file no.: BK-22-05-TP32, commenced at Hamilton.

4. The Plaintiff shall pay the Defendants' costs of this motion fixed in the amount of $16,390.19, all inclusive, within 45 days of the date of this Order.

M. J. Valente, J.

Released: January 16, 2024

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– and –

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Defendant

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M. J. Valente, J.

Released: January 16, 2024

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