# COURT OF APPEAL FOR ONTARIO

CITATION: Norman Towing (7344508 Canada Inc.) v. Riordan Leasing Inc., 2024 ONCA 518
DATE: 20240702
DOCKET: COA-23-CV-0066

Pepall, van Rensburg and Monahan JJ.A.

BETWEEN

Norman Towing o/a 7344508 Canada Inc.

Plaintiff/Defendant by Counterclaim

and

Riordan Leasing Inc.

Defendant/Plaintiff by Counterclaim
(Respondent)

and

Narman Abri also known as Norman Abbry

Defendant by Counterclaim
(Appellant)

Andrew J. Kania, for the appellant

K. Daniel Reason, for the respondent

Heard: September 28, 2023

On appeal from the judgment of Justice William M. LeMay of the Superior Court of Justice, dated December 20, 2022, with reasons reported at 2022 ONSC 7167.

**Pepall J.A.:**

[1] The issue to be determined on this appeal is whether it was open to the motion judge to grant a *nunc pro tunc* order in circumstances where a statement of defence and counterclaim was filed and served on an added party but not issued before the expiration of the limitation period. For the reasons that follow, I am of the view that it was open to the motion judge to make that order and therefore I would dismiss the appeal.



**Background Facts**

[2] The appellant, Narman Abri (also known as Norman Abbry), is the principal of Norman Towing, o/a 7344508 Canada Inc. (“Norman Towing”). The respondent, Riordan Leasing Inc., an equipment financing company, leased five vehicles to the appellant and Norman Towing in 2017 pursuant to five leases. Default on the leases occurred during the COVID pandemic and the respondent seized the vehicles on August 10, 2020. By September 14, 2020, the vehicles were sold but there was an alleged deficiency still owing to the respondent. The respondent advised the appellant of the deficiency owing pursuant to the leases in early November of 2020.

[3] On February 11, 2021, Norman Towing issued a statement of claim against the respondent for $200,000 in damages arising from the allegedly improper

seizure and sale of the five vehicles. On April 28, 2021, Norman Towing's counsel[1] emailed the issued statement of claim to the respondent's counsel asking that service be accepted on behalf of the respondent as, due to COVID, a process server had not been sent to attempt service.

[4] The respondent's counsel advised that service would be accepted. He also advised that there would be a statement of defence and counterclaim. This was acknowledged by the appellant's counsel on April 30, 2021, who wrote: "We will of course mutually cooperate in terms of procedural matters, so there is no need to worry about the 20 days."

[5] Following further communications between counsel, on May 31, 2021, the respondent's counsel emailed the respondent's statement of defence and counterclaim claiming the deficiency owing under the lease from Norman Towing and adding Mr. Abri as a new party. The respondent's counsel also asked that service be accepted.

[6] On June 1, 2021, according to an affidavit of service of a process server, the statement of defence and counterclaim was served. The process server attempted to serve the appellant personally but was unsuccessful. She subsequently left a copy of the pleading with an adult person who identified herself as Masi and who

[1] Counsel confirmed in oral submissions that he was acting for both Norman Towing and the appellant at all material times.

appeared to the process server to be a member of the same household in which the appellant was residing. The motion judge noted that the name of the appellant's wife is Masoumeh. As required by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), governing alternatives to personal service, the process server also sent a copy of the pleading to the appellant by mail at the same address. Although the appellant denied receipt of the statement of defence and counterclaim, the motion judge found that the pleading was left in the right place.

[7] On June 18, 2021, the respondent's counsel filed the statement of defence and counterclaim with proof of service with the Brampton courthouse by way of the Civil Claims Online Portal. The court sent written confirmation of the filing and the payment of a $183 fee. Though the pleading was filed, the counterclaim was not issued. As the counterclaim added the appellant as a party, it ought to have been issued as well as filed.

[8] On June 21, 2021, counsel for the respondent again emailed its statement of defence and counterclaim to opposing counsel and again asked whether service would be accepted. He heard nothing in response.

[9] On July 21, 2021, the respondent noted the appellant in default. On October 13, 2021, a motion for default judgment was scheduled for January 6, 2022, being the earliest motion date available. On November 30, 2021, the respondent's counsel served the appellant with the motion record by sending

him a copy by mail at his last known address. No copy was provided to the appellant's counsel.

[10] On January 6, 2022, Harris J. granted default judgment pursuant to the counterclaim in the amount of $63,513.12 plus interest and $2,500 in costs in favour of the respondent.

[11] On May 11 and 19, 2022, counsel for the appellant and Norman Towing wrote to the respondent's counsel complaining of the lack of notice and advising that he was seeking to set aside the default judgment. In the circumstances, he asked that it be on consent. He also sought available dates for the hearing of the set aside motion. Ultimately, for a variety of factors, including illness of counsel for the appellant and Norman Towing, the set aside motion was scheduled to be heard on November 18, 2022. Meanwhile, the limitation period for the deficiency claim that was the subject matter of the counterclaim expired on September 14, 2022.

[12] On November 18, 2022, counsel for the appellant and Norman Towing advised the respondent's counsel that its statement of defence and counterclaim had never been issued. As a result, the motion was adjourned. The respondent then brought a motion asking the court to make a *nunc pro tunc* order that the statement of defence and counterclaim be deemed issued on the date of filing, namely June 18, 2021. Ultimately, both the appellant's set aside motion and the respondent's *nunc pro tunc* motion proceeded on December 16, 2022. The

respondent did not oppose the set aside motion, but the appellant opposed the *nunc pro tunc* motion.

**Reasons of Motion Judge**

[13] On the return of the motions, the motion judge set aside the default judgment. He noted that the set aside motion was unopposed, and that the relief had to be granted because the counterclaim added the appellant as a new party, but it had not been issued as required under r. 27.03 of the *Rules*. In any event, he was satisfied that the test for setting aside a default judgment would otherwise have been met.

[14] The motion judge also granted a *nunc pro tunc* order that the statement of defence and counterclaim were issued by the court on June 18, 2021, and addressed service of the pleading. The motion judge stated that there was no real dispute that the respondent's counterclaim for a deficiency crystallized on September 14, 2020, and that if he did not grant the order the claim would be statute barred due to the passage of the applicable limitation period. He canvassed the case law on *nunc pro tunc* orders and observed that no leave was required to commence the counterclaim. The motion judge noted that the respondent had attended at court but instead of asking that the action be issued, the respondent asked that it be filed. The motion judge found that this was an administrative step that would have been granted as a matter of course and that the respondent was

ready to commence the action on June 18, 2021. At para. 49 of his reasons, the motion judge stated:

> In this case, the [appellant and Norman Towing] seek to rely on a "gotcha" type of argument. They had notice of the Counterclaim within the limitations period. Indeed, part of their motion record includes their proposed defence to the counterclaim. It is difficult to argue that any of the purposes of limitations periods are triggered by [the respondent's] failure to have the claim issued.



[15] He therefore granted an order *nunc pro tunc* confirming that the statement of defence and counterclaim was issued effective June 18, 2021.

**Positions of Parties**

[16] The appellant appeals from the *nunc pro tunc* order. He submits that as the limitation period had expired, it was not open to the motion judge to grant the *nunc pro tunc* order. He particularly relies on *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, *Thistle v. Schumilas*, 2020 ONCA 88, 442 D.L.R. (4th) 339, and *Douglas v. Stan Fergusson Fuels Ltd.*, 2018 ONCA 192, 139 O.R. (3d) 721, in support of his position.

[17] The respondent takes the position that the motion judge made no error in granting the *nunc pro tunc* order. The respondent argues that the cases relied upon by the appellant are distinguishable as, unlike in this situation, leave of the court was required to commence the proceeding in each case. This case, the respondent argues, simply engaged a procedural irregularity. Among other cases,

the respondent particularly relies on *Patkaciunas v. Economical Mutual Insurance Company*, 2021 ONSC 5945, 77 C.P.C. (8th) 421. There, the plaintiffs' process server attended at court on June 25, 2019, the last day of the limitation period, and asked that a statement of claim be issued. The court clerk declined to do so as it was at the end of the working day. As a result, the claim was issued on June 26, 2019, after the limitation period had expired. The irregularity was not intentional, and the motion judge was critical of the court clerk. He concluded that the plaintiffs did not fail to commence a proceeding within the time limit and noted that the plaintiffs had done all that was necessary to commence a proceeding within the time prescribed by the applicable statute. The legislative purpose underlying the statutory limitation period was not undermined. The motion judge accordingly declared that the claim was issued on June 25, 2019. The motion judge did not view *Green* as establishing a "red line" that is applicable in all cases and found *Thistle* was of little aid as it involved a claim brought in the bankrupt's name that did not belong to him.

**Issue**

[18] As mentioned, the issue to be determined is whether it was open to the motion judge to grant a *nunc pro tunc* order in this case.

**Analysis**

[19] The *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"), provides that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which it was discovered: s. 4. Accordingly, commencement of the proceeding engages the calculation of the applicable time limit. In this case, the proceeding commenced would be the counterclaim adding the appellant as a party.

[20] Under r. 14.01 of the *Rules*, a proceeding is commenced by the issuing of an originating process. With some exceptions, an originating process is a statement of claim. One such exception is a statement of defence and counterclaim against a person not already a party to the main action.

[21] Specifically, r. 27.03 of the *Rules* states:

> Where a person who is not already a party to the main action is made a defendant to the counterclaim, the statement of defence and counterclaim,
>
> (a) shall be issued,
>
> (i) within the time prescribed by rule 18.01 for delivery of the statement of defence in the main action or at any time before the defendant is noted in default, or
>
> (ii) subsequently with leave of the court.

[22] Rule 2.01 provides that a failure to comply with the *Rules* is an irregularity and does not render a proceeding a nullity. Furthermore, it provides that a court may grant relief to secure the just determination of the real matters in dispute.

[23] *Nunc pro tunc* orders were addressed by the Supreme Court in *Green*. This was in the context of the leave requirement contained in s. 138.3 of the *Securities Act*, R.S.O. 1990, c. S.5. Under that section, leave of the court must be obtained to commence a statutory action. In each of the three cases under appeal in *Green*, leave to commence the statutory claim had not been obtained from the court within the applicable limitation period. The majority held that courts have inherent jurisdiction to issue orders *nunc pro tunc* for leave to proceed with an action where leave is sought prior to the expiration of the limitation period: at paras. 85, 93. The majority did not require that leave actually be granted prior to the expiry of a limitation period, only that it be sought: at paras. 92-93. However, the majority noted that a court should not exercise its inherent jurisdiction where this "would undermine the purpose of the limitation period or the legislation at issue": at para. 93.

[24] The majority in *Green* described the purposes of limitation periods. At para. 57, Côté J. wrote that the Supreme Court has generally recognized these purposes as the certainty, evidentiary, and diligence rationales. She stated:

> Limitation periods serve "(1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion": P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123.

[25] The cases relied upon by the appellant, namely *Thistle*, *Douglas*, *Sax v. Rick Aurora*, 2019 ONSC 3573, and *Carillion Canada Holdings Inc. et al. (Re)*, 2022 ONSC 66, 98 C.B.R. (6th) 138, all required leave of the court to proceed with an action. In essence, in each case, leave was required to bring the proposed action. As such, each case fell within the parameters of the *dicta* expressed in *Green*. Alternatively, they involved lack of capacity.

[26] In my view, the case under appeal is distinguishable from *Green* and the other cases raised by the appellant. This is because, unlike this case, in *Green* the *Securities Act* required leave to commence an action. The leave requirement served as a screening mechanism. It did not involve, as here, an administrative misstep.[2]

[27] Although a different context, *Green* does hold that leave need not be granted but just sought prior to the expiry of a limitation period. Even in that context, it follows that a *nunc pro tunc* order may be granted in the face of the expiry of a limitation period. Rule 2.01 contemplates a failure to comply with the *Rules* and that this amounts to an irregularity and does not render a proceeding a nullity. This makes sense as the law and justice should run in parallel, not in opposition.

[2] Although not argued, I do note that r. 27.03(a)(ii) speaks of issuance of a statement of defence and counterclaim with leave of the court, but I see this as being in the nature of a procedural step designed to impose a timing discipline on plaintiffs by counterclaim.

Reflective of that reality, r. 2.01 goes on to say that a court may grant relief to secure the just determination of the real matters in dispute.

[28] In the case under appeal, the lack of issuance was an irregularity. On June 18, 2021, when the statement of defence and counterclaim in this case was filed, as mentioned, it was not issued as required by r. 27.03. However, unquestionably, the appellant and his counsel were aware of the counterclaim well before the expiry of the limitation period. In April 2021, counsel for the appellant was advised that there would be a counterclaim and it was sent to him on May 31, 2021. The motion judge acknowledged the affidavit of service on the appellant and that the statement of defence and counterclaim were “left in the right place”. On June 21, 2021, the respondent again wrote asking whether service of the statement of defence and counterclaim would be accepted. A date for hearing of the motion for default judgment was given on October 13, 2021, and default judgment on the counterclaim was granted, all with no reference to its lack of issuance. In May 2022, counsel for the appellant sought dates for the hearing of the set aside motion. Although there is no evidence that the appellant’s counsel raised the fact that the counterclaim had only been filed and not issued, this issue was implicitly engaged at that time and well before the expiry of the limitation period on September 14, 2022.

[29] In these circumstances, it is clear that under r. 2.01, the motion judge could grant relief to secure the just determination of the real matters in dispute. It was

therefore open to him to grant an order that treated the date of filing as the date of issuance. Having done so, the limitation period had not expired. Moreover, the certainty, evidentiary, and diligence purposes that animate the limitation period prescribed by the *Limitations Act* would not be undermined.

[30] For these reasons, I would dismiss the appeal and order the appellant to pay the respondent partial indemnity costs in the amount of $2,500 inclusive of disbursements and applicable tax.

Released: July 2, 2024 “S.E.P.”

“S.E. Pepall J.A.”
“I agree. K. van Rensburg J.A.”
“I agree. P.J. Monahan J.A.”