

**CITATION:** Carboline Canada Division of RPM Canada v. 11331841 Canada Corp.,  
2024 ONSC 4943  
**COURT FILE NO.:** CV-23-4137  
**DATE:** 20240912

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
CARBOLINE CANADA DIVISION OF ) Alexander Wilkes, for the Plaintiff  
RPM CANADA )  
)  
Plaintiff )  
)  
- and - )  
)  
11331841 CANADA CORP. formerly ) David Lee, for the Defendants  
known as TITAN FIREPROOFING )  
CORPORATION, 11331841 CANADA )  
CORP. operating as TITAN GROUP, )  
ALIREZA MOGHEI also known as ALI )  
MOGHEI and MEDHI MOWGHEI )  
Defendants )  
)  
)  
)  
) **HEARD:** August 28, 2024

2024 ONSC 4943 (CanLII)

**REASONS FOR DECISION**

**CHARNEY J.:**

- [1] The Defendants seek an Order setting aside the Default Judgment against them, setting aside the noting of default against them, terminating the garnishments against them, and returning any funds garnished.
- [2] This motion was originally scheduled for April 3, 2024, but was adjourned on consent. At a case conference on May 28, 2024, I ordered that the motion to set aside default judgment would proceed on August 28, 2024.
- [3] The Plaintiff has not filed any material in response to the motion and requested a further adjournment. The motion was scheduled 3 months ago. The Plaintiff could not articulate any valid reason for the adjournment request, and it was denied.

## Facts

- [4] The Statement of Claim claims \$85,941 for fourteen unpaid invoices relating to fireproofing materials for various projects. The total sum is based on outstanding invoices dating from June 7, 2021 to September 17, 2021.
- [5] The Statement of Claim was issued on September 8, 2021.
- [6] On September 16, 2023, the Plaintiff filed two Affidavits of Service stating that the Defendants were served with the Statement of Claim on September 13 and 14, 2023.
- [7] The Defendants take the position that they were not served with the Statement of Claim. For example, the Affidavit of Service states that Mehdi's wife was served with the Statement of Claim, but Mehdi states that it was never provided to him, and as such, never came to his attention.
- [8] On October 23, 2023, the Defendants were noted in default and Default Judgment was entered against them.
- [9] On October 26, 2023 the Notice of Garnishment was issued.
- [10] The Defendants were never served with the Notice of Default, nor any notice that the Plaintiff would be seeking Default Judgment against them. The Defendants were not notified that Default Judgment had been obtained against them or that the Plaintiff would be seeking to garnish their accounts.
- [11] The Defendants first learned of the claim against them after their bank accounts had been garnished on November 2, 8, 20 and 23, 2023.
- [12] The Defendant Mowghei states that he was out of the country when he learned that his bank account was garnished. He retained counsel on January 31, 2024 when he returned to Canada.
- [13] As of February 28, 2024, \$72,487.64 has been garnished from Titan's account and \$6,477.76 has been garnished from Mehdi's account.
- [14] The Notice of Motion to set aside the Default Judgment was filed on February 2, 2024, and served on March 6, 2024.

## Analysis

- [15] Rule 19.08 of the Rules of Civil Procedure provides:

Setting Aside Default Judgment

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.

[16] In *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, the Ontario Court of Appeal considered the principles that must be applied to the application of the court's discretion to set aside default judgment under Rule 19.08. The Court stated, at paras. 47 – 50:

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. The approach to be taken to this determination has been considered numerous times by this court. The following draws heavily on the summary of the principles in those cases by Perell J. in *Watkins v. Sosnowski*, 2012 ONSC 3836, at paras. 19-20 and 23-24.

The court must consider the following three factors:

- (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; and
- (c) whether the facts establish that the defendant has an arguable defence on the merits.

To this list, I would add the following two factors the court should have regard to, as set out in *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, 2007 ONCA 333, 87 O.R. (3d) 479 (C.A.), at para. 2:

- (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 court might make on the overall integrity of the administration of justice.

These factors are not to be treated as rigid rules; the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

- [17] I also note the various decisions of this Court that have affirmed that the better practice is to serve the defaulting defendant with the motion for default judgment. Otherwise, the Plaintiff risks exactly what happened here: the Defendants return to court with an argument that they were not properly served, and they did not know about the action. This oft-quoted principle is set out by Brown J. (as he then was) in *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, at para. 10:

Although once noted in default a party is not entitled to notice of a motion for default judgment, by far the better practice is to serve the default judgment motion materials on the defendant in any event. The main reason for this practice is a simple, but important, one. Often the materials filed on a Rule 19.05 motion for default judgment will raise questions about the adequacy of the service of the Statement of Claim. . . . Even where the Registrar has noted a defendant in default, a judge will want to satisfy himself or herself that the defendant was given proper notice of the claim. By serving the default judgment motion record on the responding party and filing proof of such service, a court can satisfy itself that the person against whom default judgment is sought knew about the claim, knew about the motion for default judgment yet, nevertheless, elected not to defend or respond.

- [18] See also the cases cited by Sanfilippo J. in *Casa Manila Inc. v. Iannuccilli*, 2018 ONSC 7083, at para. 12.
- [19] In the present case, the Defendants have met all the criteria set out in *Mountain View*.
- [20] The motion was brought promptly after the Defendants learned of the Default Judgment and the Defendants have provided a plausible excuse for their failure to comply with the Rules. The Defendants received no advance warning of the Plaintiff's intention to bring a motion for default judgment.
- [21] The Defendants argue that 13 of the 14 allegedly unpaid invoices were more than two years old when the Statement of Claim was issued, giving the Defendants a plausible defence under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. In showing an arguable defence on the merits, the Defendants need not show that the defence will inevitably succeed, "the defendant must show that his or her defence has an air of reality": *Mountain View*, at para. 51.
- [22] Finally, I do not see any prejudice to the Plaintiff if the Default Judgment is set aside and the Defendants are given an opportunity to defend the claim.

[23] Given that the Default Judgment is to be set aside, it follows that the Notices of Garnishment must be set aside: *7321201 Canada Ltd. v. Intact Insurance Company*, 2017 ONSC 6480, at para. 66.

[24] The final question is whether I should order that the funds that have been garnished from the Defendants be returned to the Defendants. The Defendants rely on a number of cases where courts have held that funds garnished before default judgment was set aside should be returned to the Defendant unless “exceptional circumstances” justify a freezing order.

[25] In *Foremost Cranberry Mews Limited Partnership v. Ferreri*, 2015 ONSC 2827, Faieta J. stated, at para. 38:

The defendants ask that the Notice of Garnishment be stayed and the funds be returned to the defendant by the garnishee. The plaintiff submits that the funds should be held by the Sheriff pending the final disposition of this action. In my view, the relief sought by the defendants is appropriate given that default judgment has been set aside and given that where a plaintiff seeks to freeze the defendant’s assets before obtaining judgment it must do so on a proper legal foundation. The general rule is that a court has no jurisdiction to protect a creditor before it gets judgment, however a freezing order is available in exceptional circumstances. See *Chitel v. Rothbart* (1982), 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513 (C.A.). In my view, there are no exceptional circumstances in this case to warrant a freezing order.

[26] In *Maxwell v. 8580162 Canada Corp.*, 2018 ONSC 5504, C.J. Brown J. stated, at para. 24:

Where default judgment is set aside, any garnished funds are to be returned to the defendant unless “exceptional circumstances” justify a freezing order: see *Foremost Cranberry Mews Limited Partnership v. Ferreri* [2015] O.J. No. 2193. A freezing order is only warranted where there is evidence that there is a “real risk” of the defendant removing or dissipating its assets to avoid judgment or to render them untraceable.

[27] See also: *Quadform Ltd. v. Rock Con Forming Ltd.*, 2020 ONSC 7903, at para. 78, and *Education Invention Centre of Canada v. Algoma University*, 2015 ONSC 1200, at para. 22.

[28] In the present case, the Defendants have put forward a defence to 13 of 14 unpaid invoices. They have not advanced a defence to the 14<sup>th</sup> invoice for \$3,051.

[29] The Plaintiff has provided no evidence that there is a real risk of the Defendants removing or dissipating their assets to avoid judgment.

## Conclusion

[30] The Defendants have satisfied me that the test for setting aside default judgment and noting in default have been met. As such the Plaintiff is no longer entitled to the continuation of the garnishment of the Defendants' bank accounts, and save for the \$3,051 for which no defence is advanced, the garnished monies should be returned to the Defendants.

[31] This Court Orders:

- a. that the Default Judgment entered on October 23, 2023, in favour of the Plaintiff against the Defendants be hereby set aside;
- b. that the noting of default of the Defendants be hereby set aside;
- c. that all Notices of Garnishment, Writs of Seizure and Sale, or Writs of Possession issued in respect to the aforesaid Default Judgment be immediately terminated;
- d. that all funds that have been garnished from the Defendants save for the \$3,051 are to be returned to the Defendants within 30 days of this Order; and
- e. that the Defendants are granted leave to serve and file a Statement of Defence within 20 days of the date of this Order.

[32] If the parties are not able to agree on costs, the Defendants may serve and file their costs submissions, maximum 3 pages plus costs outline and any offers to settle, within 20 days of the release of this decision, and the Plaintiff may serve and file their responding submissions on the same terms within a further 15 days.

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Justice R.E. Charney

**Released:** September 12, 2024

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2024 ONSC 4943

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

CARBOLINE CANADA DIVISION OF RPM  
CANADA

Plaintiff

– and –

11331841 CANADA CORP. formerly known as TITAN  
FIREPROOFING CORPORATION, 11331841  
CANADA CORP. operating as TITAN GROUP,  
ALIREZA MOGHEI also known as ALI MOGHEI and  
MEDHI MOWGHEI

Defendants

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**REASONS FOR DECISION**

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Justice R.E. Charney

**Released:** September 12, 2024