

CITATION: Dhillon v. Punia et. al., 2024 ONSC 6259
COURT FILE NO.: CV-23-00000069-00
DATE: 2024 11 12

SUPERIOR COURT OF JUSTICE – ONTARIO
10 Louisa St, Orangeville, Ontario, L9W 3P9

RE: Amritpal Dhillon, Plaintiff

AND:

Sukhjinder Punia, Meenu Prasad, Gurdeep Punia, Jaswinder Singh
and Simcoe Marina Towns Inc., Defendants

BEFORE: The Honourable Justice Fragomeni

COUNSEL: Ajay Duggal, for the Plaintiff
ajay@adlawyers.ca

Kristina Zilic, for the Defendants
kristina@corestone.ca

HEARD: October 28, 2024 at Orangeville

ENDORSEMENT

[1] The Defendants bring a Motion for the following relief:

- i. An Order pursuant to Rule 19.08(2) of the Rules of Civil Procedure, setting aside the Order of Justice Miller dated November 3, 2023 granting default judgment against the Defendants.

ii. An Order pursuant to Rule 19.08 (3) of the said Rules setting aside the noting of default of the Defendants.

iii. An Order that the Sheriff immediately lift or vacate any writs of seizure and sale filed by the Plaintiff with respect to this Default Judgement.

iv. An Order granting leave to the Defendants to serve and file their Statement of Defence.

v. Costs on a substantial indemnity basis.

[2] An uncontested trial was conducted on November 3, 2023 before Justice Miller. On November 3, 2023 Justice Miller made the following Order:

i. An order that the Plaintiff is a shareholder of a 15% interest in Defendant Simcoe Marina Towns Inc.

ii. An order that the Plaintiff had a 15% ownership interest in the property located at 436 Couchiching Point Road, Orillia, Ontario.

iii. An order that the Plaintiff is entitled to \$161,835.87 out of the net sale proceeds of \$1,078,905.64 equivalent to his 15% share in the Simcoe Marina Towns Inc.

iv. An order that the Defendants have breached the contract, and duty of honest performance of contractual obligations with regards to the contract between the Plaintiff and the Defendants Sukhjinder Punia, Gurdeep Punia, Jaswinder Singh, and Meenu Prasad.

v. A declaration of constructive trust, and unjust enrichment, on the part of the Defendants Sukhjinder Punia, Gurdeep Punia, Jaswinder Singh, and Meenu Prasad.

vi. An order tracing of the funds released to the Defendants in the amount of \$1,078,905.64.

vii. An order directing the Defendants Sukhjinder Punia, Gurdeep Punia, Jaswinder Singh, and Meenu Prasad to release the funds in the amount of \$161,835.87 out of the net sale proceeds representing the equivalent of the Plaintiff's 15% share.

viii. Restitution in the amount of \$161,835.87 plus interest in the amount of 5% in accordance with the *Courts of Justice Act*.

ix. Payment of any additional expenses, charges, and costs, incurred or to be incurred by the Plaintiff in respect of the said payment.

x. The Defendants shall pay pre-judgment and post-judgment interest in accordance with the provisions of *Courts of Justice Act* on the amount of \$161,835.87 in the amount of 5%.

xi. The Defendants shall pay the costs of this action in the amount of \$14,000 plus taxes and disbursements forthwith.

- [3] The Defendants submit that they were not properly served and as a result of not being aware of the action they did not defend the claim. The allegations in the Statement of Claim are serious in that the Plaintiff alleges that the Defendants made fraudulent misrepresentations and engaged in fraudulent and dishonest conduct.

TEST FOR SETTING ASIDE A DEFAULT JUDGMENT

- [4] In *Mountainview Farms Ltd. v. McQueen* 2014 ONCA 194 the Court set out the following factors to be considered by the Court when deciding to grant a motion to set aside a default judgement:

- 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.
- c) Whether the facts establish that the defendant has an arguable defence on the merits.
- d) The potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the Plaintiff should the motion be allowed and
- e) The effect of any order the motion judge may make on the overall integrity of the administration of justice.

SERVICE OF THE CLAIM

- [5] The onus is on the Plaintiff to establish that this claim was brought to the attention of each of the Defendants.
- [6] The Defendants set out an informative summary of their position as a starting point in the analysis on this issue, at para 6 of their Factum:

6. The integrity of the administration of justice is much better served by allowing this motion. Notably, at the time the within action was commenced, one of the Defendants-Sukhjinder Punia - was already being sued by the same Plaintiff (Mr. Dhillon), represented by the same lawyer (Mr. Duggal), in another matter for which Mr. Punia was represented by the same counsel which currently represents him (Corestone Law)². The Plaintiff's counsel could have easily informed Corestone Law of the existence of the Claim, as a matter of best practices and as matter of professional courtesy. But he did not do so. The

Plaintiff even has Sukhjinder Punia's email address³, but failed to list that email address on the Claim and did not email a copy of the Claim to Sukhjinder Punia which could have brought the Claim to his attention. Instead, the Plaintiff chose to rely on alternative service of the Claim into Mr. Punia's estranged sister at an address at which Mr. Punia did not live⁴.

[7] At no time did Plaintiff's counsel contact Coreston Law that this claim had been commenced. Had he done so Coreston Law could have obtained instructions from Sukhjinder Punia about accepting service of the Statement of Claim and he could have advised the other Defendants that this Claim had been commenced.

[8] Further on this issue of service at no time did the Plaintiff's Process Server attempt to effect personal service before proceeding to effect service by alternative means.

[9] Rule 16.01(1) states:

(1) 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. R.R.O. 1990, Reg. 194, r. 16.01 (1); O. Reg. 131/04, s. 8.

[10] Rule 16.03 (5) states:

(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. R.R.O. 1990, Reg. 194, r. 16.03 (5).

- [11] The Affidavits of the Plaintiffs Process Server clearly demonstrates that no attempts were made to effect personal service. Had the process server at least tried on one or more occasions to serve the Defendants personally his actual alternative service could be seen as a reasonable alternative to personal service. However, there is no evidence that any attempts were made to effect personal service.
- [12] The Affidavit evidence filed by the Defendants calls into serious question whether the method of service employed by the Plaintiff did in fact bring this claim to the attention of the Defendants.
- [13] I am not satisfied on the evidentiary record before me on this issue that the Plaintiff has met his onus.
- [14] The issue of service would end the analysis on this Motion, however, I will deal with the other issues raised at the hearing.

NOTICE TO DEFENDANTS OF NOTING IN DEFAULT AND PROCEEDING WITH UNCONTESTED TRIAL

- [15] In *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, M. Brown, J. (as he then was) set out the following at para 10:

[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. Some motion records do not include the affidavit of service of the originating process; that is not good practice. 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.[1] 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.

[16] In *Casa Manila v. Iannuccilli*, 2018 ONSC 7083 Sanfilippo J. stated the following at para 11:

[11] In *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 at para. 10, D.M. Brown J., as he then was, directed a plaintiff to provide notice to a defaulting defendant, under Rule 19.02(3), on the basis that this allows the judge hearing the undefended trial, or motion for judgment, to be satisfied that the defaulting defendant was provided with proper notice of the claim and of the motion or hearing pending for judgment:

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. [Emphasis added].

[17] In *Roberts v. Santilli*, 2019 ONSC 64 (CanLII) Madam Justice Kristjanson, set out the following at para 4:

[4] After attempting to communicate with the respondent, if the applicant intends to seek an undefended trial, then the best practice is to serve the motion materials on the respondent. As stated by Sanfilippo, J. in *Casa Manila Inc. v. Iannuccilli*, 2018 ONSC 7083 (SCJ) at para. 13, “Proof of the defaulting defendant’s knowledge of the claim is critical to two elements: the legitimacy of the court’s rendering of the judgment, and the ability of the judgment to withstand challenge on the basis of lack of notice.” Sanfilippo, J. states at para.14-16 in the context of a civil case, which I find equally applicable in a family case:

[14] In serving the default judgment motion materials, or the Trial Record in the case of an uncontested trial, the plaintiff is re-affirming the service of the Statement of Claim to leave no doubt that the court is in a position to render judgment in the absence of the defendant. That is not to say that this is necessary in all cases. There are undoubtedly some cases where the service is so clearly established, where the election by the defendant not to respond to the proceeding is so evident, so purposeful that it would be unnecessary to require that the defendant had notice of the motion for default judgment or hearing of an uncontested trial. In such a case, Rule 19.02(3) operates to relieve the plaintiff from the requirement to provide any further notice and denies the defaulting defendant the opportunity of further participation.

[15] However, Rule 19.02(3) provides the judge with discretion to order that the defendant in default knows something more: not only that a claim has been advanced but also that the claim is about to be considered by a court for the purpose of issuing judgment. By providing notice that the claim is about to be considered by a court, the plaintiff satisfies the court of both the validity of the service of the Statement of Claim, which is effectively replicated through service of the motion materials or trial record filed to obtain default judgment, and that the defendant has made a purposeful decision not to contest judgment.

[16] This is why “by far the better practice” is to provide the defaulting defendant with the material necessary to understand, without doubt, that the claim for judgment against the defaulting defendant is about to be determined. Where the plaintiff has not followed this practice, the court must consider whether the interests of justice, and of procedural and trial fairness, demand that the court’s discretion be exercised in favour of requiring notice to the defaulting defendant. The court must balance the plaintiff’s entitlement to proceed without participation of the defendant who has elected to abstain against the defendant’s entitlement to have sufficient notice on which to make this election.

[18] At no time were the Defendants notified that they had been noted in default.

- [19] At no time were the Defendants served with the Uncontested Trial Material nor were they advised of the date of the Uncontested Trial.
- [20] All of these factors point in the direction of granting the relief requested by the Defendants.
- [21] Again, this should end the analysis, however I will deal with the Plaintiff's main position at the Motion and that is that the Defendants do not have an arguable case and therefore the Uncontested Order should stand.

THE DEFENDANTS POSITION ON THE MERITS

- [22] In *Carreiro v. Skrzeczkowska*, 2021 ONSC 3614 the Court noted the following at para 9:

[9] In oral submissions, counsel for the Plaintiff took issue with factor number three – that there is an arguable defence on the merits. I respectfully disagree with Plaintiff's counsel. This is not a high threshold for the moving parties to meet. This Court need only be persuaded on balance that there is an air of reality to the defence. I think that there is, and the evidence is contained in the supplementary affidavit of Mr. Malik dated February 24, 2021. Contrary to what is being argued on behalf of the Plaintiff, the defence is not limited to an alleged \$5000.00 discrepancy in favour of the Defendants.

- [23] The issue is whether on balance there is an "air of reality" to the defence not whether the defence will succeed.

- [24] At para. 53 of their Factum the Defendants point to the following in support of their position:

53. The Defendants are entitled to challenge the amount of damages claimed and this can constitute an arguable defence on the merits.⁴⁵

- (a) The main issue in this litigation is the entitlement of the Plaintiff to the new sale proceeds of a real estate transaction. The Defendants directly challenge the Plaintiff's allegation that it is sustained any damages or losses for which the Defendants are liable.
- (b) The Defendants state that the Plaintiff did not pay to the Corporation as promised the commission that he earned on the transaction.
- (c) The Defendants state that the Plaintiff did not contribute to any mortgage payments in proportion to his shares.
- (d) The Defendants state that the Plaintiff did not contribute to the development costs related to the Property.

[25] In reviewing the proposed Statement of Defence, I am satisfied that the Defendants have established an "air of reality" to their defence.

PREJUDICE

[26] The prejudice to the Defendants is such that if the Motion is not granted the case will not be heard on its merits. The allegations of fraud are serious and this case warrants a trial on its merits.

[27] The prejudice to the Plaintiff is minimal in that the Plaintiff can still proceed with the claim on its merits. The prejudice to the Defendants far outweighs any prejudice to the Plaintiff.

THE INTEGRITY OF THE ADMINISTRATION OF JUSTICE

[28] I agree with the Defendants position as articulated at para 63 of their Factum:

63. The Plaintiff's counsel was acutely aware that Sukhjinder Punia had counsel (i.e., Corestone Law) and chose not ask Corestone Law if it would accept the

Claim on behalf of Mr. Punia. It was improper for the Plaintiff's counsel to commence default proceedings when the identity of Mr. Punia's lawyer was known. In *The Bank of Nova Scotia v. Black River Logging Inc.*, Justice Fitzpatrick stated:

[23] While not abiding upon the Court, notice is taken of a pamphlet entitled *Principles of Professionalism for Advocates* published in 2009 by the Advocates' Society. In the overview section at the beginning of the pamphlet Associate Chief Justice Dennis R. O'Connor notes "I commenced the Advocates' Society for producing the Principles of Professionalism for Advocates. The guidelines contained in this booklet reflect the experience and good judgment of the senior members of the litigation bar and the judiciary and should be mandatory reading for all those who practice as advocates". Among other things, these principles suggest that subject to the rules of practice, **advocates should not cause any defaults or dismissals to be entered without first notifying opposing counsel assuming the identity of the opposing counsel is known.**⁵⁰

- [29] In this case the following factors support the granting of the Motion as it relates to the integrity of the Administration of Justice:
- i. The Plaintiff has not met his onus of establishing that this claim was properly served.
 - ii. The Defendants were not notified in advance that they would be noted in default.
 - iii. The Defendants were never served with the Uncontested Trial material nor were they advised of the Uncontested Trial date.
 - iv. The Defendants moved promptly after they became aware of the default judgment.

- v. The Statement of Defence establish an “air of reality” to their defence.
- vi. The prejudice to the Defendants significantly outweighs any prejudice to the Plaintiff.

[30] The integrity in the Administration of Justice in these circumstances can only be protected by granting the relief requested by the Defendants.

[31] Order to issue as follows:

1. An Order pursuant to Rule 19.08(2) of the Rules of Civil Procedure, setting aside the Order of Justice Miller dated November 3, 2023 granting default judgment against the Defendants.
2. An Order pursuant to Rule 19.08 (3) of the said Rules setting aside the noting of default of the Defendants.
3. An Order that the Sheriff immediately lift or vacate any writs of seizure and sale filed by the Plaintiff with respect to this Default Judgement.
4. An Order granting leave to the Defendants to serve and file their Statement of Defence.

[32] In the event that the parties are unable to resolve the issue of costs the following timeline applies:

1. The Defendants shall serve and file their written costs submissions within 20 days (3 pages)

2. The Plaintiff shall serve and file his responding costs submissions within 20 days thereafter (3 pages)

3. The Defendant shall serve and file any reply with 10 days thereafter (one page).

Fragomeni J.

RELEASED: November 12, 2024

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BEFORE: Justice Fragomeni

COUNSEL: Ajay Duggal, for the Plaintiff

Kristina Zilic, for the
Defendants

HEARD: October 28, 2024 at
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ENDORSEMENT

Fragomeni J.

Release: November 12, 2024