

CITATION: Fera v. Arista Homes Limited, et al, 2024 ONSC 7152
COURT FILE NO.: CV-13-00116820
DATE: 20241223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: VITTORIA FERA, Applicant

AND:

ARISTA HOMES LIMITED, ARISTA HOMES (WOODBIDGE) INC.,
ARISTA HOMES (WOODBIDGE) INC., ARISTA (WOODBIDGE I) INC.,
ARISTA (WOODBIDGE II) INC., ARISTA (WOODBIDGE III) INC., AND
JOSE RAMOS, Respondents

BEFORE: The Honourable Madam Justice S. J. Woodley

COUNSEL: SUNRA CHAUDHRI and TIANA PERRICONE Counsel, for the Applicant
DAN ROSMAN, Counsel, for the Respondents

HEARD: December 9, 2024

ENDORSEMENT

OVERVIEW

- [1] This motion, commenced by the Defendant Jose Ramos to set aside the Judgment of the Honourable Mr. Justice De Sa dated September 21, 2021, came before me for hearing on December 9, 2024.

FACTS

- [2] The facts related to the within motion are summarized in the respective factums of the parties, filed on the motion, and are otherwise found within the motion records filed by the parties.
- [3] The following is a summary of the key facts that I found assistive in determining this motion:

- a. The Plaintiff Vittoria Fera is a former employee of the Defendant Arista Homes.¹ The Plaintiff was terminated from her employment on September 27, 2012.
- b. The Defendant Jose Ramos is a former employee of the Defendant Arista Homes and, at the time of the Plaintiff's termination, was the Plaintiff's direct supervisor.
- c. On November 23, 2012, the Plaintiff commenced an application before the Human Rights Tribunal of Ontario (HRTO) pursuant to s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19 against Arista Homes and Jose Ramos (personally) alleging discrimination with respect to employment on the basis of sex and sexual solicitation.
- d. In the HRTO proceeding, the Plaintiff alleged that Ramos engaged in unwelcome sexual communication and physically touched her, including on September 13, 2012.
- e. All parties to the HRTO proceeding were represented by legal counsel throughout the entirety of the proceeding.
- f. On December 16, 2012, Ramos was criminally charged with sexual assault with a weapon relating to the September 13, 2012 incident.
- g. Ramos was represented by legal counsel throughout the criminal proceeding.
- h. On or about March 21, 2013, Adjudicator Eric Whist deferred the HRTO proceeding pending determination of the criminal proceeding, with the proviso that Ramos was to file his response to the HRTO proceeding within 35 days of the conclusion of the criminal proceeding.
- i. On or about June 27, 2013, legal counsel for Ramos advised the HRTO that the criminal charges were concluded. The charges had been withdrawn by the Crown.
- j. On July 18, 2013, Ramos filed his Response to the HRTO proceeding within the time limit set by the Adjudicator.
- k. On July 30, 2013, the HRTO reinstated the Plaintiff's proceeding.
- l. On November 14, 2013, the Plaintiff commenced the within action against the Defendants Ramos and Arista Homes alleging, among other things, wrongful dismissal, sexual harassment, and sexual battery.

¹ Arista Homes and its companies, namely: Arista Homes Limited, Arista Homes (Woodbridge) Inc., Arista Homes (Woodbridge I) Inc., Arista Homes (Woodbridge II) Inc., and Arista Homes (Woodbridge III) Inc., Arista Homes (Woodbridge) Inc., all referred to herein as "Arista Homes".

- m. On November 15, 2013, the parties attended mediation with respect to the HRTO proceeding. The mediation did not result in a settlement.
- n. On November 15, 2013, the Plaintiff's (then) counsel purported to serve the Defendants with the Statement of Claim by email (prior to the mediation) and provided a copy to counsel at mediation. However, service of the Claim was not accepted.
- o. On December 9, 2013, the HRTO directed that a teleconference be held to determine whether the HRTO proceeding was barred due to the commencement of the civil action.
- p. On June 5, 2014, HRTO Adjudicator Mark Hart heard submissions from counsel for the Plaintiff and Defendants, including Ramos' counsel, regarding dismissal of the HRTO proceeding.
- q. On August 29, 2014, HRTO Adjudicator Mark Hart determined that the HRTO proceeding was barred due to the commencement of the civil proceeding.
- r. On October 3, 2016, on consent of the Defendants, Justice Sutherland validated service of the Statement of Claim upon the Defendants.
- s. On January 12, 2017, the Defendant Ramos served and filed his Statement of Defence.
- t. In March 2017, the Defendant Ramos resigned from Arista Homes and joined a competitor company.
- u. On April 10, 2017, Ramos was involved in a serious motorcycle accident and was "bed-ridden" requiring full-time care for the next three months.
- v. On March 13, 2018, Ramos served a Notice of Intent to Act in Person prepared by his former lawyer John Lo Faso that noted thereon his address for service as 68 Finlay Avenue, King City and an email address of frizzo3307@hotmail.com. Ramos swore that Mr. Lo Faso advised him at that time that the case was stagnant as there had been no movement since he filed his statement of defence in January of 2017. Ramos also swore that he had no access to the email address which had been set up by Mr. Lo Faso and that he moved from 68 Findlay Avenue sometime in November of 2018.
- w. By his affidavit sworn in support of the motion, Ramos stated he does "not recall receiving any documents or this action being moved forward at all, after I served my statement of defence in January of 2017". More specifically, Ramos swore that he was not served with any notices of examinations, notice of motions, or other documents relevant to this matter and did not become aware of any steps taken in

this proceeding until December 23, 2023, when he received a letter by courier dated December 22, 2023 from the Plaintiff's (current) counsel enclosing the Judgment of Justice de Sa dated September 21, 2021. Ramos claims that upon receipt of the letter he acted immediately but (due to the holidays) was not able to retain counsel until January 2, 2024. Counsel then moved immediately, contacting Plaintiff's counsel on January 5, 2024 to advise that he would be bringing a motion to set aside the Order. Ramos' counsel then contacted the court and booked the first available motion date. Ramos' counsel has acted expeditiously since the Order (Judgment) has come to his attention.

- x. The affidavits of service contained in the Plaintiff's Responding Motion Record note as follows:
 - i. a Notice of Examination for June 8, 2018, was served on May 8, 2018, by ordinary mail to the 68 Findlay address, and by email to the frizzo3307 address.
 - ii. a Notice of Examination for September 28, 2018, was served on September 12, 2018, by ordinary mail to the 68 Findlay address and by email to the frizzo3307 address.
 - iii. A Notice of Motion returnable October 4, 2018, seeking leave to amend the Statement of Claim, to establish a timetable, and to strike Ramos' Statement of Defence was served on September 18, 2018, by regular mail to the 68 Findlay Avenue address and by regular mail to a Covebank Crescent, Brampton address, which was Ramos' former 2017 address.
- y. On October 4, 2018, the Plaintiff's motion to, among other things, strike Ramos' Statement of Defence, was heard by Associate Justice Brott. Associate Justice Brott granted the following relief:
 - i. Leave to Amend the Plaintiff's Statement of Claim to be served within 90 days;
 - ii. Establishment of a timetable with a "drop dead" date for Ramos to attend at examination for discovery; and
 - iii. A provision that Ramos' Statement of Defence would be struck if he failed to comply with the timetable and failed to attend at examination for discovery on or before January 28, 2019.
- z. On October 19, 2018, the Amended Statement of Claim and Brott's Order were served on Ramos "by leaving a copy with an adult male at 68 Findlay Avenue" who "refused to identify himself" and by email to the frizzo3307 address on October 20, 2018.

- aa. Ramos moved away from the 68 Findlay address “sometime in November 2018”.
- bb. A Notice of Examination was served on Ramos on November 21, 2018, by ordinary mail to the 68 Findlay address and to Ramos’ former 2017 address at Covebank. The Notice required Ramos to attend examinations on January 7, 2019. Ramos claims he did not receive the Notice and did not attend the Examination.
- cc. On February 15, 2019, a Notice of Motion was served by regular mail on the 68 Findlay Avenue address and the 2017 Covebank address. The Notice of Motion was also sent by overnight express on February 19, 2019 to the same two residential addresses. Ramos had moved from both addresses and did not receive the Notice of Motion.
- dd. On March 6, 2019, the Notice of Motion came before Associate Justice Sugunasiri who ordered Ramos’ Statement of Defence to be struck. This Order was sent via regular mail to Ramos’ 2017 Covebank address (and not to 68 Findlay) and *was never* properly served.
- ee. On April 10, 2019, the Plaintiff filed a Requisition to note Ramos in default.
- ff. On April 25, 2019, the Defendant Ramos was noted in default.
- gg. On May 27, 2021, an *ex parte* Motion for Judgment was heard by Justice de Sa.
- hh. On September 21, 2021, Justice de Sa granted Judgment and released his Reasons for Decision regarding the Motion for Judgment.
- ii. On December 23, 2023, Ramos was served with a Notice of Change of Lawyers and the Judgment of Justice de Sa dated September 21, 2021.
- jj. On January 2, 2024, Ramos retained his current lawyer who wrote to counsel for the Plaintiff on January 5, 2014, and commenced the within motion on January 9, 2024, one week later.

THE LAW AND ANALYSIS

- [4] Rule 19.08(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “*Rules*”) allows a judge to set aside a judgment against a defendant who has been noted in default that is obtained on a motion for judgment “on such terms as are just”.
- [5] The test to set aside a default judgment is set out in the Court of Appeal decision *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 119 O.R. (3d) 561:

- 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.
- [6] The potential prejudice to each of the parties must be considered as well as the effect of any order made on the overall integrity of the administration of justice.
- [7] Similar to r. 19.08(2), r. 37.14(1) of the *Rules* allows a party who is affected by an order obtained on a motion without notice or who fails to appear on a motion through accident, mistake, or insufficient notice; or is affected by an order of a registrar to move to set aside the order, by notice of motion served forthwith after the order comes to the person's attention and names the first available date that is at least three (3) days after service of the notice of motion. Similar to r. 19.08(2), the court may set aside or vary an order on such terms as are just.
- [8] The test to set aside an order under r. 37.14(1) is set out in *Ontario (Attorney General) v. 15 Johnswood Crescent*, 2009 CanLII 50751 (On. Sup. Ct.). The rule's purpose is focused on fairness and the understanding that civil proceedings should be determined on their merits.
- [9] The court should strive to resolve issues between litigants on the merits whenever this can be done with fairness to the parties: see *Bank of Montreal v. Saidani*, 2023 ONSC 4216.
- [10] Further, as noted by the Ontario Court of Appeal in *Zeifman Partners Inc. v. Aiello*, 2020 ONCA 33, the overarching principle of the Rules is to seek to ensure the "just, most expeditious and least expensive determination of every civil proceeding on its merits...Determining the result of civil proceedings on technical failings is, and must remain, the exception to the general principle reflected in Rule 1.04(1)".
- [11] In the present case, the Defendant Ramos claims that he did *not* receive any documents served upon him following service of his Notice of Intent to Act in Person served on March 13, 2018.
- [12] Having reviewed the evidence filed, including the numerous affidavits of service, I find as follows:
 - a. From March 13, 2018, to October 31, 2018, it is likely that all documents served at Ramos' 68 Findlay Avenue address were received by him.
 - b. For the month of November 2018, it is likely that some of the documents served at Ramos' 68 address were received by him.

- c. For the period December 1, 2018, and following, it is unlikely that any of the documents served at Ramos' 68 Findlay Avenue address were received by him.

- [13] I find it most likely that Ramos did not receive a copy of the Notice of Motion to strike his Statement of Defence served at the 68 Findlay Avenue in February of 2019, and as such Ramos was not provided with actual notice of the motion.
- [14] I also find that although it was Ramos' responsibility to update his address for service – which he did not do – the Plaintiff bears some responsibility for repeatedly serving Ramos by ordinary mail at an address that elicited no response.
- [15] In my view, it is contrary to the administration of justice and the integrity of the judicial system to allow the extremely serious allegations against Ramos to be determined by default, and not upon the merits of the case.

Was the Motion Commenced Promptly After Ramos Learned of the Default?

- [16] I accept Ramos' evidence that he moved promptly when he learned that the Plaintiff had obtained default judgment against him. I also accept that Ramos' (new) counsel moved expeditiously to bring the motion to set aside the default judgment.

Is there a Plausible Excuse or Explanation for the Default in Complying with the *Rules*?

- [17] Ramos claims that he did not attend the examinations and timetable motion because he did not receive notice of the events.
- [18] As noted, I have difficulty accepting Ramos' explanation that he did not receive notice of *any* proceedings. In my view, it appears probable that on March 13, 2018, when he filed his Notice of Intent to Act in Person, he believed (as he stated) that the litigation was stagnant. It had been almost six (6) years since the incident that forms the basis of the Claim occurred (Sept. 13, 2012) and no further steps had been taken by the Plaintiff.
- [19] Despite Ramos' statements to the contrary, it appears that, following March 13, 2018, Ramos ignored the litigation with the expectation that the claim would be dismissed. This, however, is not what occurred.
- [20] Ramos' explanation for the default is that he did not receive notice of the proceedings, was self-represented, and did not know his responsibilities.
- [21] As noted above, I do not accept that he did not receive notice of the proceedings prior to November 1, 2019. I also accept that he did *not* receive any notice of the motion to strike his pleadings as he had moved by the date of service of the motion. Further, while Ramos is responsible for his failure to update his address, the Plaintiff must have been alert to the

probability that there was an issue with service upon Ramos by this date and bears partial responsibility for proceeding to judgment without having verified Ramos' current address and without ensuring that Ramos had *actual notice* of the default proceedings.

Does Ramos Have an Arguable Defence on the Merits?

- [22] There are two issues to be determined in the action: liability and damages.
- [23] To show a defence on the merits, a defendant must only show that his defence has an air of reality, which is a low threshold.
- [24] Ramos has denied the allegations against him and filed a Statement of Defence. In separate but related proceedings, Ramos hired a criminal defence lawyer and the charges were withdrawn by the Crown. Ramos also hired a lawyer to defend the HRTO application, which proceeding was determined to be barred due to the commencement of the civil proceeding.
- [25] As would be apparent to the Plaintiff in both the criminal and the civil proceeding, Ramos, by word and deed, sought to defend the action on its merits. Given the seriousness of the allegations and the social, quasi-criminal, and family stigma that is attached to any finding of guilt with respect to the allegations, it is only just that Ramos be provided with an opportunity to defend the action on its merits.
- [26] With respect to the quantum of damages awarded, a defendant is entitled to challenge damages claimed, which can constitute a defence on the merits. This is especially true in situations such as the present, where the plaintiff has sought and obtained damages relating to the same or similar fact pattern from the Criminal Compensation Board and/or the Arista Home Defendants. These settlements and information *may* be material to any damages payable by Ramos.

Potential Prejudice to the Moving Party and Prejudice to the Responding Party

- [27] As noted, Ramos has been ordered to pay approximately \$500,000.00 (including interest) to the Plaintiff on account of damages.
- [28] The direct financial prejudice that would be suffered if the judgment is not set aside is great. However, financial prejudice represents only a portion of the actual prejudice that would be visited upon Ramos as the judgment is based upon an underlying finding of fact that Ramos committed sexual assault and battery. The prejudice that could or would be suffered by Ramos on account of this underlying finding of fact will remain tied to Ramos for his lifetime with potentially devastating prejudice.
- [29] With respect to any prejudice suffered by the Plaintiff, while it is true that she will be required to undergo cross-examination and/or a trial, such hardships are necessary to ensure

the integrity of the administration of justice. Any other prejudice may be compensated financially.

CONCLUSION AND DETERMINATION

[30] The administration of justice must not be silenced to ease the burden of civil litigation.

[31] For the foregoing reasons, Ramos' motion is granted and determined as follows:

- a. The Order of Master Sugunasiri (now Associate Justice Sugunasiri) dated March 6, 2019, striking the Statement of Defence of the Defendant Jose P. Ramos, be and is hereby set aside.
- b. The Registrar's noting the Defendant Jose P. Ramos in default dated April 25, 2019, be and is hereby set aside.
- c. The Judgment of the Honourable Justice de Sa dated September 21, 2021, be and is hereby set aside.
- d. The lawsuit be and is hereby revived and reinstated.
- e. The parties shall agree upon the terms of a litigation timetable. If the parties are unable to agree upon any or all terms for a litigation timetable, they may obtain an appointment from my assistant to appear before me on a date to be set at 9:30 a.m. by Zoom to settle the terms of any proposed timetable.
- f. The Defendant shall pay to the Plaintiff an amount on account of costs thrown away as may be agreed upon between the Plaintiff and Defendant acting reasonably. Failing agreement, the amount shall be determined by this Court, said sum to be paid to the lawyers for the Plaintiff within 30 days of the date that the amount payable is agreed upon or determined by this Court. If the parties are unable to agree upon the amount of costs thrown away, they may obtain an appointment from my assistant to appear before me on a date to be set at 9:30 a.m. by Zoom to determine the amount payable.²
- g. Subject to any offer to settle that may affect costs, as the Defendant Ramos was the successful party, he shall be entitled to his costs. If the parties cannot agree upon an amount for the costs of the motion (to be set-off from the costs thrown away), the Defendant may serve and file costs submissions with my assistant limited to three pages with a Bill of Costs and any relevant Offer to Settle attached, within 30 days of today's date. The Plaintiff may serve and file with my assistant a Response

² At the hearing of the motion, I opined that the plaintiff would be required to obtain new medical opinions which would increase the cost of the proceeding. Having reviewed the medical documents, I am of the view that such opinions will only need to be updated, thus limiting the costs thrown away.

limited to three pages with a Bill of Costs and any relevant Offers to Settle attached, within 45 days of today's date. Reply, if any, is limited to one page, to be served and filed within 50 days of today's date.

Justice S. J. Woodley

Date: December 23rd, 2024