CITATION.: Arapakota v. Makki, 2025 ONSC 904
COURT FILE NO.: CV-23-81840
DATE: February 10, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Damodar Arapakota, Plaintiff

-and-

Haji Makki, Defendant

BEFORE: MacNeil J.

COUNSEL: Damodar Arapakota – Self-represented for the Plaintiff (in person)
S. Pathmanathan – Lawyer for the Defendant (by Zoom)

HEARD: December 31, 2024

REASONS FOR DECISION

[1] The plaintiff makes this motion seeking to cure an administrative error made by the court, to note the defendant in default, and for leave to bring a motion for default judgment against the defendant.

[2] The defendant requests that the motion be dismissed.

[3] At the conclusion of the hearing of the within motion, the defendant's motion to dismiss the action that had been scheduled to proceed on January 14, 2025, was adjourned to February 11, 2025 to allow time for the release of this decision.

Background

[4] By his statement of claim, the plaintiff seeks damages, together with contribution and indemnity, from the defendant for his alleged role in the oppression of the plaintiff by several third parties who were the officers and shareholders of the company, Imex Systems Inc., in respect of which the plaintiff states he was the founder, CEO and Director.

[5] The claim was issued on May 31, 2023 and was served on the defendant personally on June 2, 2023.

[6] No notice of intent to defend was served by June 12, 2023. On June 14, 2023, the defendant requested and the plaintiff agreed to a time extension for service of a defence, and the time was extended to July 7, 2023.

[7] On June 19, 2023, a notice of intent to defend was filed in court by the defendant but it was not served on the plaintiff.

[8] The statement of defence was not served by the agreed-upon deadline of July 7, 2023.

[9] On August 14, 2023, the plaintiff attended at the courthouse and submitted a requisition to note the defendant in default. It was at that time that the plaintiff was advised that a notice of intent to defend had been filed in June 2023. The court staff accepted the plaintiff's requisition and stamped it as received and filed with the date of August 14, 2023.

[10] The statement of defence was served on the plaintiff personally on August 15, 2023 at 7:00 p.m. The affidavit of service of Gaurav Ahuja, sworn on August 16, 2023, indicating said service was filed.

[11] The plaintiff's evidence is that, on August 16, 2023, the defendant's lawyer contacted the plaintiff by email and introduced herself. She requested that the plaintiff withdraw the claim and advised that if he did not, the defendant intended on bringing a motion for dismissal.

[12] The plaintiff did not respond to the defendant's lawyer because he believed the defendant had already been noted in default.

[13] The defendant purportedly served a draft affidavit of documents on the plaintiff on July 17, 2024. That same day, the plaintiff responded by saying that there was no need for the affidavit of documents as the defendant had already been noted in default and that the defendant would need to have the noting in default set aside first; a copy of the noting in default requisition was provided to the defendant's lawyer.

[14] The plaintiff's evidence is that, on July 24, 2024, the defendant's lawyer advised the plaintiff that she had checked with the court and found that the noting in default was "not genuine" and that the defendant would be proceeding with a motion for dismissal of the action.

[15] The plaintiff's evidence is that, on July 25, 2024, he attended at the courthouse and was advised by the court staff that the noting in default had not been recorded in the court record. The court staff also confirmed that they had received the statement of defence after August 14, 2023 and so it should not have been filed. The court staff indicated that administrative errors sometimes happen and they can be cured through a motion to the judge; they offered to waive the motion filing fee.

[16] On July 29, 2024, the plaintiff made the within motion.

Issues

[17] The following issues are to be determined on this motion:

(a) Should the defendant be noted in default?
(b) If so, should the noting in default be set aside?

Position of the Plaintiff

[18] The plaintiff requests that the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, be enforced and that the defendant be noted in default. It was only due to an error made by court staff that the requisition to note the defendant in default was not recorded in the court record. The defendant has not defended his default; he has focused on his cross-motion to dismiss the action, which is not legitimate. The court staff should not have accepted the statement of defence since it was out of time, and the plaintiff had already filed the requisition for noting in default. The defendant is not complying with the rules of the court and that should not be permitted to continue. As held by the court in *Thamesville Community Credit Union Limited v. Harris*, 2009 CanLII 64184 (ONSC), at para. 4, timelines must be respected.

[19] In the alternative, if the court decides to set aside the noting in default, the plaintiff requests an appropriate costs order and an order that the parties proceed forward "on mutual consent of the process steps and dates at every step".

Position of the Defendant

[20] The defendant has not brought a separate motion to set aside any noting in default but submits that, if the plaintiff's motion to note him in default is granted, the court should make a further order setting aside the noting in default since the defendant clearly intended to defend and has, in fact, served a statement of defence. The defendant sought an extension of time from the plaintiff by which to serve his statement of defence, which was granted, because he needed time to obtain further information and particulars to properly defend against the action. The defendant submits that restoring the noting in default will not be useful to the parties in the circumstances. The defendant would raise the same submissions on a motion to set aside the noting in default. The defendant has a valid defence as against the plaintiff's claim. He seeks a dismissal of the within motion.

Analysis

(a) Should the defendant be noted in default?

[21] Rules 18.01 and 18.02 of the *Rules of Civil Procedure* require a defendant to respond with a statement of defence within 20 to 30 days of the date they are served with the statement of claim.

[22] Rule 19.01(1) provides that, where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim require the registrar to note the defendant in default.

[23] I am satisfied that, as of August 14, 2023, the defendant was in default for failing to have served his statement of defence by July 7, 2023. I find that the plaintiff did what was required of him to note the defendant in default by filing the requisition for noting in default on August 14, 2023. Thus, but for the administrative error made by the court, the court record would have shown that the defendant was noted in default effective August 14, 2023.

[24] I conclude that the defendant should be noted in default.

[25] I find that it would not be an efficient use of court resources or the parties' time and effort to require the defendant to bring a separate motion to set aside the noting in default when the parties both made submissions on the issue, and it can be fairly determined at this juncture. So, I will now consider if the noting in default should be set aside.

(b) If so, should the noting in default be set aside?

[26] Where a defendant fails to deliver a statement of defence in time and is noted in default, there are certain consequences that can follow, including:

(a) by Rule 19.02(1)(a), a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim;

(b) by Rule 19.02(1)(b), a defendant who has been noted in default shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff; and

(c) by Rule 19.04, after noting a defendant in default, in certain circumstances, the plaintiff may bring a motion for default judgment.

[27] Rule 19.03(1) permits the court to set aside a noting of default "on such terms as are just".

[28] Whether to set aside a noting of default is a discretionary decision: *Intact Insurance Company v. Kisel*, 2015 ONCA 205, at para. 12.

[29] The relevant jurisprudence establishes that, generally, on a motion to set aside the noting of default, the court should consider the following factors:

(i) the parties' behaviour;
(ii) the length of the defendant's delay;
(iii) the reasons for the defendant's delay;
(iv) the complexity and value of the claim;
(v) whether setting aside the noting in default would prejudice a party relying on it;
(vi) the balance of prejudice as between the parties; and,
(vii) whether the defendant has an arguable defence on the merits: see *Franchetti v. Huggins*, 2022 ONCA 111, at para. 9; and *Trayanov v. Icetrading Inc.*, 2023 ONCA 322, at paras. 19-20.

[30] Rule 1.04(1) requires that the rules "be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

[31] Rule 2.01(1) provides that a failure to comply with the rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court: (a) may

grant all necessary relief "on such terms as are just, to secure the just determination of the real matters in dispute"; or (b) "only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part".

[32] There is a strong preference for deciding civil actions on their merits: *Franchetti*, at para. 8.

[33] Based on the record before me and the submissions of counsel, after considering the relevant factors, I am satisfied that the test for setting aside the noting in default is met.

Behaviour of the parties

[34] I do not find that the defendant has behaved in an inappropriate or unscrupulous manner. He was served with the claim on June 2, 2023 and on June 14, 2023 – before the 20-day deadline for delivery of a statement of defence – he contacted the plaintiff and requested an extension to file his defence, which was granted until July 7, 2023. He served a notice of intent to defend on June 19, 2023. It is unfortunate that the communication between the parties appeared to then break down and the defendant failed to request a further extension or to inform the plaintiff that he would be late in serving his defence. The statement of defence was not served on the plaintiff until the evening of August 15, 2023.

[35] I have no concerns with the plaintiff's behaviour. While he is relying on a strict reading of the *Rules of Civil Procedure*, he is self-represented and his expectation that the *Rules* will be complied with is not an unreasonable one. He was very fair in granting the first extension of time requested by the defendant and then he waited more than a month after the missed deadline of July 7, 2023 before moving to note the defendant in default.

Length of and reason for the defendant's delay

[36] In the circumstances, I do not find the 1½ month delay in the defendant serving his defence to be unreasonable or excessive. I accept the defendant's submission that he needed time to obtain documents and information in order to consider his position and to prepare his statement of defence, and I find that the reason for the defendant's delay was reasonable. In my view, there is no evidence to support that he was purposefully stalling or delaying the proceeding.

Complexity and value of the claim

[37] I find that the claim is relatively complex and involves a significant sum of money.

Prejudice

[38] I am satisfied that the balance of prejudice as between the parties favours the defendant.

[39] I find that there is no evidence of any non-compensable prejudice to the plaintiff if the noting in default is set aside. The plaintiff has incurred costs in bringing this motion, but costs are compensable. There was a relatively short delay in serving the statement of defence. The litigation

is still in its early stages. There is no evidence of lost documents or witnesses. At the time this motion was brought, the plaintiff did not have judgment against the defendant. Since the statement of defence has already been delivered, there will be no further delay in that regard. The action can continue in the ordinary course. Accordingly, I find there is no non-compensable prejudice that may be caused to the plaintiff by permitting the proceeding to continue to resolution on its merits.

[40] If the notice in default is not set aside, the defendant will be deemed to have admitted the facts alleged in the statement of claim. He would be deprived of the ability to put forward his defence before the court in the action and would be potentially exposed to a significant judgment by way of a default judgment.

Arguable defence

[41] The defendant has already served and filed a statement of defence. In it, he pleads that the statement of claim is barred due to the principle of *res judicata* and that he is not responsible for any damages or losses allegedly suffered by the plaintiff, among other defences. I am satisfied that the defendant has an arguable defence on the merits.

Conclusion

[42] Having weighed the relevant factors, I conclude that the defendant has met his onus and exercise my discretion to set aside the noting in default. In my view, this matter should be determined on its merits and not be defeated by a technical default.

Disposition

[43] The plaintiff's motion to note the defendant in default is granted. However, the noting of default is hereby set aside.

[44] Since the noting of default has been set aside, the defendant is permitted to file a statement of defence and take other steps in the proceeding. Accordingly, I decline to grant the plaintiff's request to proceed with a default judgment motion.

[45] A statement of defence has already been served and filed by the defendant. By application of Rule 2.01(1), I find that that service and filing was an irregularity, and not a nullity, since it was done after the plaintiff had filed a requisition to note the defendant in default. In my view, it makes no sense to require the defendant to serve and file a new statement of defence in the circumstances. Accordingly, I hereby validate the delivery of the statement of defence that has already been served and filed by the defendant.

[46] I will leave it to the motion judge hearing the attendance on February 11, 2025 to decide whether the defendant's motion to dismiss the plaintiff's action is ready to proceed.

Costs

[47] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

(a) By February 21st, 2025, the plaintiff shall serve and file his written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

(b) The defendant shall serve and file his responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by February 28th, 2025.

(c) If no submissions are received by February 28th, 2025, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

[48] If the parties are able to settle the question of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

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MacNEIL J.

Released: February 10, 2025

*** Self-represented parties may receive information at:**
www.ontariocourtforms.on.ca
www.canlii.org
www.ontario.ca/page/civil-claims-suing-and-being-sued
https://www.ontariocourts.ca/scj/casecenter/