



Superior Court of Justice – East Region
161 Elgin Street
Ottawa, Ontario K2P 2K1

SHORT TITLE OF PROCEEDINGS: RFA Bank of Canada v. Weinkauf
COURT FILE NO.: CV-24-95101
BEFORE: Honourable Associate Justice K. Perron
HEARD ON: January 23, 2025
COUNSEL:

Plaintiff- RFA Bank of Canada (Not Present). Counsel- STAPLES, Christopher (Present)

Defendant- WEINKAUF, Lee Darvin (Not present). Counsel- HUNT, Christopher (Present)

Defendant- WEINKAUF, Merlie Otadora (Not present). Counsel- HUNT, Christopher (Present)

RELIEF REQUESTED: Order setting aside default judgment

ORDER SIGNED

ON CONSENT

UNOPPOSED

NO ONE APPEARED

ADJOURNED TO [Click here to enter a date.](#)

ENDORSEMENT:

1. This is a motion by the Defendants seeking an order setting aside their noting in default and the default judgment dated May 10, 2024, as well as ancillary and alternative relief including an order setting aside or vacating the Notice of Sale and Notice Demanding Possession issued by the Plaintiff. The Defendants move under Rules 19.03(1), 19.08, 37.14 and 60.08 of the *Rules of Civil Procedure*.

2. The only affidavit produced by the Defendants in support of this motion was an affidavit affirmed by Mr. Weinkauf. His affidavit includes one paragraph on information and belief from Ms. Weinkauf, and he makes assertions on behalf of him and Ms. Weinkauf throughout the affidavit by referencing “we”. I take it that Ms. Weinkauf either adopts the evidence of her husband or chose not to file an affidavit in support of this motion. In any event, I will refer to



both Defendants together in my reasons below.

3. The Defendants’ position is that in the process of renewing their mortgage towards the end of 2023, they were prevented from making their mortgage payment due to their bank account (held at another financial institution) being compromised or hacked (twice) but they notified the Plaintiff and made arrangements to remedy the default. The Defendants allege that without notice and contrary to previous discussions, the Plaintiff terminated the mortgage (or refused to renew the mortgage), demanded payment in full and refused the Defendants’ efforts to resolve the matter thereafter. The Defendants also allege that the Plaintiff commenced an action and obtained Default Judgment with complete disregard for the circumstances and without any notice to the Defendants. The Defendants further allege that because they are unsophisticated parties, it was incumbent on the Plaintiff to advise the Defendants to retain counsel and to warn of the consequences of failing to file a defence, including that the lender would seek to enforce the judgment and take possession of the Defendants’ property.

4. The Plaintiff’s position is that the lender was entitled to reject the renewal of the mortgage due to the Defendants’ default and that the lender only took steps to initiate the action after the Defendants failed to make the monthly payment due under the mortgage for January 2024. The Plaintiff denies that its conduct towards the Defendants was high-handed or otherwise inappropriate and takes the position that it provided the Defendants with sufficient opportunity to correct the defaults and/or reimburse the indebtedness prior to taking any enforcement steps.

5. The chronology of events can be summarized as follows:

- a. The mortgage was set to mature on December 20, 2023. The Plaintiff (“RFA”) issued a renewal letter on November 6, 2023 for a further one-year term.
- b. RFA received the renewal letter, as signed by the Defendants, on December 5, 2024. However, the mortgage was not up to date at that time because of the November default and the issue with the Defendants’ bank account. As such, RFA’s evidence is



- that it could not process the renewal.
- c. Correspondence ensued between the Defendants and RFA from November 2023 to January 2024 on the issues with the compromised/hacked bank accounts and the defaults occasioned by the missed/late payments and resulting arrears.
 - d. The Defendants made partial payments, with the last payment being made on or about January 23, 2024 in the amount of \$999.50. RFA’s position is that this payment corrected the Defendants’ November 2023 arrears but the January 2024 payment was never made.
 - e. RFA attempted to contact the Defendants by phone at the end of January and early February 2024 without success. Based on the evidence from RFA, it appears that the Defendants indicated they would make the January payment on January 24, 2024. The payment was not made. It appears that RFA subsequently attempted to contact the Defendants including by leaving voicemail messages. The Defendants’ affidavit does not challenge this evidence.
 - f. It is undisputed that no further payments were made by the Defendants after January 23rd.
 - g. RFA retained counsel and a demand letter was sent to the Defendants on February 15, 2024 (which the Defendants received on or about February 19th). The demand letter indicated that the mortgage had matured on December 20, 2023 and that the full balance of \$445,103.52 was owing, that partial payments would not be accepted and that if payment in full was not made by February 22, 2024, enforcement proceedings would be commenced without further notice and legal costs would be added to the arrears.
 - h. The Defendants contacted RFA’s counsel to, amongst other things, acknowledge receipt of the demand letter, inquire “what is going on”, express that they were very stressed about the situation, that they weren’t given time to react and had funds/income to sustain the payments for the year and inquiring why RFA had not notified them that they had not received an etransfer. The Defendants requested time “to get something in place” (the email also refers to refinancing and a chance to sell



- the house). Correspondence ensued.
- i. RFA, via its counsel, sent a further letter on February 23, 2024 to confirm that no renewal would be offered and that RFA required payment in full of the mortgage and had instructed to continue with legal action including issuing a Statement of Claim.
 - j. Subsequent correspondence indicates that the Defendants requested a payout statement and were pursuing efforts to try and refinance the indebtedness.
 - k. RFA issued the Statement of Claim on March 18, 2024.
 - l. Further correspondence ensued between RFA’s counsel and the Defendants including correspondence in respect of the Defendants’ attempts to refinance and an email from RFA’s counsel indicating that the legal action was not on hold at the time and that they could not “continue to hold this matter”.
 - m. The claim was served personally on Ms. Weinkauf on March 21, 2024 and on Mr. Weinkauf by an alternative to personal service the same day.
 - n. RFA sent on a Notice of Sale on or about March 28, 2024 which provided the Defendants until May 4, 2024 to pay the amounts owing and that notice was being given to those who appeared to have an interest in the mortgaged property and who may be entitled to redeem the same, including the Defendants.
 - o. Further correspondence ensued including a request by the Defendants for a payout statement. The payout was provided on April 9, 2024 and refers to a closing date of April 15, 2024.
 - p. The Defendants were also in correspondence with their bank (CIBC) to request evidence of the account hacking in order to deal with their creditors and fix the resulting issues. The record includes an email from CIBC dated April 12, 2024 indicating that the Defendants’ account were blocked (including pre-authorized transactions) on December 10, 2023 due to fraud and that a new account needed to be opened.
 - q. Ultimately, the Defendants did not deliver a Statement of Defence and RFA noted the Defendants in default and requisitioned for default judgment on May 6, 2024. The Default Judgment was issued on May 10, 2024.



- r. On or about May 15, 2024, RFA’s lawyers served a Notice Demanding Possession attaching a copy of the Default Judgment.
 - s. The Defendants subsequently retained counsel and notice of this motion was served on July 26, 2024. RFA has not taken further enforcement steps pending the outcome of this motion.
6. The parties agree that the applicable test or factors to be considered by the Court on a motion seeking to set aside a default judgment are as follows:
- 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 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.¹
7. While a defendant is not required to show that the defence will succeed on this motion, a defence must nonetheless show that the defence has an “air of reality”². It is not the Court’s role at this motion to make findings of fact and assess whether the defence will succeed³. However, the affidavit in support of the motion must show the “nature of the defence and set forth facts which will enable the court or Judge to decide whether or not there was matter which would afford a defence to the action”⁴.
8. Failure to satisfy one of the factors will not be fatal to the motion. The Court must

¹ [Zeifman Partners Inc. v Aiello, 2020 ONCA 33 \(CanLII\) at para 21.](#)

² [Zeifman at para 32.](#)

³ [Zeifman at para 34.](#)

⁴ [Mantia v Honour Oak Investments Ltd. et al. 50 O.R. \(2d\) 788 \(1985 canLII 2243\).](#)



ultimately determine if the interests of justice favour an order setting aside the default judgment.⁵

Whether the motion was brought promptly

9. RFA does not contest this factor. I am also satisfied that the Defendants moved promptly to bring this motion after they learned of the Default Judgment.

Whether there is a plausible explanation or excuse for the Defendants’ failure to comply with the Rules

10. The Defendants provide various explanations in support of their delay and/or failure to deliver a defence including: a) they didn’t understand that RFA had advanced a claim against them and that RFA would obtain judgment without providing them with an opportunity to defend the claim; b) the Defendants were uncertain of their options and/or didn’t understand the information provided by RFA; c) the Defendants were very stressed about the overall situation and were trying to work with RFA to remedy the situation and fulfill their mortgage obligations; d) RFA did not warn/advise them of the consequences of failing to defend the claim and that RFA noted them in default and obtained judgment without notice; and, e) RFA did not recommend that they should obtain legal counsel.

11. In my view, the explanations provided by the Defendants do not offer a plausible excuse for their failure to deliver a defence pursuant to the timelines set out in the *Rules*. By mid-February 2024, the communications from RFA – including the demand letter and letter dated February 23, 2024 – clearly indicated that RFA took the position that the mortgage had matured, would not be renewed and that payment in full was required failing which RFA would proceed with legal action including issuing a Statement of Claim. Following these

⁵ [Peterbilt of Ontario Inc. v 1565627 Ontario Ltd, 87 O.R. \(3d\) 479 \(ONCA\) at paras 1-2.,](#)



letters, the Defendants requested a payout statement and attempted to refinance the debt, which signalled that they fully understood RFA's position. Amidst the refinancing efforts, and shortly prior to serving the Statement of Claim, RFA also confirmed that legal action was not on hold.

12. The Statement of Claim, on its face, indicates in bold letters, among other things, that:

- a. **A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the plaintiff.
- b. **IF YOU WISH TO DEFEND THIS PROCEEDING**, you or an Ontario lawyer acting for you must prepare a statement of defence [...] serve it on the plaintiff's lawyer [...] and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** [...]
- c. **IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

13. The Statement of Claim clearly sets out the steps that must be taken if the Defendants wished to defend the proceeding, as well as the consequences of failing to defend the action, in particular that judgment may be given without further notice. The claim itself clearly indicates that RFA would be seeking an order for possession of the premises. In view of RFA's communications and the wording of the Statement of Claim itself, it is difficult to believe the Defendant's explanation that they did not understand that they were being sued and/or that they did not understand the consequences of failing to respond to the claim.

14. In addition, there is no evidence to suggest that the Defendants requested more time to deliver a defence or to consult a lawyer. There is no evidence that the Defendants ever intended to defend the action prior to the Default Judgment being obtained.

15. Instead, the communications from the Defendants following service of the claim show that



they were focused on their refinancing efforts including issues affecting their credit rating. There was no protestation by the Defendants denying that the indebtedness was due. Based on their affidavit, the Defendants continued to be stressed and frustrated by RFA’s decision not to renew the mortgage but in my view, they were clearly on notice that if they sought to dispute RFA’s claim – whether because of an alleged improper refusal to renew the charge or any other grounds – it was incumbent on them to deliver a defence.

16. I also note that RFA did not rush to seek judgment on the 21st day following service of the claim. RFA waited approximately 45 days – seemingly to provide the Defendants with an opportunity to complete the refinancing - before noting the Defendants in default and requesting default judgment.

17. With respect to the failure to warn of the consequences of not defending the claim, the Defendants rely on *AJB v SJD et al*⁶. In that case, the Court set aside a noting in default where there was evidence of the Defendants’ intention to defend the claim, including ongoing and active communications between counsel expressing an intention to respond and defend the claim as well as reliance on an extension of time given to counsel to deliver a defence. In that context, the Court engaged in a discussion of the plaintiff’s counsel failure to warn the defendant’s counsel that further steps would be taken and refers to other caselaw supporting that lawyers should avoid sharp practice.

18. The *AJB* case is distinguishable from the facts of the present case. Although the Defendants now seek an opportunity to defend the action, there is no evidence in the present matter that the Defendants intended to defend the claim during the material time. In addition, the *AJB* case does not support that lenders have an obligation to recommend that borrowers seek legal advice. The Defendants have not provided any caselaw supporting such an obligation at large and in my view, to impose such a requirement on lenders would be to impose an unnecessary

⁶ [2013 ONSC 1127 \(CanLII\)](#)



burden.

19. The explanations offered by the Defendants for not responding to the claim in a timely fashion, including that they didn't understand they were being sued, are not plausible.

Is there an arguable defence on the merits

20. The Defendants advance various defences including: a) the mortgage was renewed and the Defendants sought to make the corresponding payments; b) RFA was not entitled to repudiate the mortgage, took advantage of the situation to pursue possession of the property and deprived the Defendants of an opportunity to defend the claim on its merits; c) there are equitable defences available to the Defendants such as the right to redeem the mortgage; d) RFA's actions have prejudiced and caused damages to the Defendants; and, e) RFA is not entitled to judgment or possession.

21. The Defendants have not put forward any evidence to challenge RFA's evidence that no further payments were made towards the mortgage after the payment of \$999.50 on or about January 23, 2024. It is therefore undisputed that the Defendants have been living at the property without making any payments on the mortgage for over one year.

22. The standard charge terms applicable to the mortgage provide that "if a default occurs, all mortgage money then owing to the lender will, if the lender chooses, become immediately due and payable" and the lender may thereafter, among other options, demand payment, take legal proceedings or sell the land. Irrespective of the renewal issue, it is difficult to understand how any of the defences advanced by the Defendants provides them with a meritorious defence to challenge RFA's right to accelerate payment under the mortgage in view of the Defendants' November 2023 default, the January 2024 default and/or the Defendants' ongoing default to make any payments. I also note that there was a previous missed/late payment in July 2023.



23. Even if the Defendants were successful in arguing that the mortgage ought to have been renewed by RFA, there is no evidence that the Defendants attempted to make further payments in furtherance of the renewal (notwithstanding RFA’s position that it would not accept partial payments). There is also no evidence that the Defendants have the ability to pay the arrears that have now accumulated over the last year.

24. Furthermore, even if the mortgage was renewed, the term of the charge would only have been for one year. RFA is therefore quite correct when it submits that even if the mortgage had been renewed, the full outstanding amount would have been due by December 2024. There is no evidence that the Defendants are able to payout the mortgage, whether by refinancing or other means. To the contrary, there is evidence that suggests the Defendants attempted to refinance the mortgage but were not successful in doing so. The same analysis applies with respect to any right of redemption. The Defendants have had months to try and redeem the mortgage and avoid further enforcement steps. There is no evidence that the Defendants would be in any position to exercise the right of redemption if they had more time to try and do so.

25. In terms of the quantum of the Default Judgment (or the amount owed under the mortgage), the Defendants allege that the amounts claimed in the demand letter were “incomprehensible” and they assert that they “do not think we owe RFA the \$446,660.10 claimed in the Statement of claim”. However, the Defendants have not produced any evidence to contradict the payout figures set out in RFA’s affidavit or the quantum of the Default Judgment.

26. With respect to allegations of potential damages or other prejudice, the Defendants allege that RFA’s actions have caused financial ruin for them and their family. There is no evidence or particulars in the record to support this bald assertion, whether these allegations would be advanced by way of a potential counterclaim or as a set off defence to the main action. In their factum, the Defendants allege that the property is somehow unique, but there is no evidence in the record to support this assertion. Furthermore, based on my review of the communications



between RFA and the Defendants, I am not satisfied that the Defendants would have a viable defence based on any alleged improper conduct on behalf of the lender.

27. In the circumstances, I do not find that the Defendants have established that they have any arguable defences on the merits.

Potential prejudice to the defendants should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed

28. I recognize that the Defendants occupy the mortgaged property with their children and that this is the family's home, and that the enforcement of the sale of the property will necessarily cause disruption to the family and require them to relocate. However, in the absence of any arguable defences on the merits, there is nothing to be gained by delaying the inevitable. Holding the Defendants to their contractual obligation to pay the money that they owe, including giving up possession of the property if they cannot do so, does not constitute prejudice.

29. Conversely, I do find that RFA would be prejudiced by further delay. The lender has simply exercised its contractual rights upon default in payment. It would be prejudicial to RFA to reset the clock to March 2024 and allow the Defendants with an opportunity to deliver a defence, which in the circumstances, would lead to further costs being incurred and likely trigger the Plaintiff to amend its claim to reflect the ongoing default in payment (or failure to repay the full indebtedness by December 2024) and/or result in RFA bringing a motion for summary judgment. RFA incurring further costs in this matter, which costs would simply be added to the outstanding mortgage, would therefore also be prejudicial to the Defendants.

The effect on the overall integrity of the administration of justice

30. Similar to my conclusions on prejudice, in my view, the integrity of the administration of



justice is favoured by exercising my discretion not to set aside the Default Judgment in the circumstances of this case. Parties who commence court actions and take appropriate steps to obtain default judgment pursuant to the Rules should be able to reasonably rely on that judgment being upheld in the absence of the Defendants meeting their burden on this motion.

31. For the reasons set out above, the Defendants' motion seeking to set aside the noting in default and the Default Judgment is dismissed. With respect to the ancillary and alternative relief sought by the Defendants, although they did not establish in their factum any grounds that would allow me to set aside or stay the enforcement steps taken by RFA to date, I would not have exercised any available discretion to me to do in the circumstances. The balance of the relief sought by the Defendants on this motion is therefore also dismissed.

32. In respect of costs of this motion, RFA seeks costs on a substantial indemnity basis of \$7,232. RFA submits that these costs are not substantial indemnity rates in reality given that the usual actual rate charged by counsel is much higher (\$815/835 for 2024/2025), but is limited to \$300 an hour pursuant to the retainer agreement with the client. Counsel was called to the bar in 1990 and approximately 18 hours was spent on the motion according to the Costs Outline.

33. Although the total time spent on the motion is reasonable, all time was spent by senior counsel. This was not a complex motion, and notwithstanding the heavily discounted actual rate, I query whether work could have been allocated to a more junior counsel.

34. In the overall circumstances of this case, and exercising my discretion pursuant to Rule 57 and section 131 of the *Courts of Justice Act*, I find that costs in the amount of \$6,000 all inclusive are reasonable.



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35. The motion is dismissed with costs payable by the Defendants to the Plaintiff in the amount of \$6,000 within 30 days.

Date: February 7, 2025

A handwritten signature in cursive script, appearing to read 'Kagen Perron'.

Associate Justice Perron