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1. *Bank of Montreal v. D'Angelo*
   Client/Matter: -None-

Bank of Montreal v. D'Angelo

Ontario Judgments

Ontario Superior Court of Justice

Master Polika

Heard: June 14, 2000.

Judgment: October 30, 2000.

Court File No. 99-CV-175783CM

[2000] O.J. No. 5272 | 103 A.C.W.S. (3d) 488

Between Bank of Montreal, plaintiff, and Frank D'Angelo, The New York Food Company Ltd. and 783234 Ontario Ltd., defendants

(30 paras.)

Case Summary

Practice — Judgments and orders — Default judgments — Setting aside judgments — Default judgments, grounds — Unacceptable practice.

Motion by D'Angelo and the numbered company of which he was principal to set aside the noting in default against them as well as the writs of seizure and sale. The Bank of Montreal's claim against them was for over $1 million representing the outstanding amount on a demand loan and an unauthorized overdraft plus interest. After service of the Bank's statement of claim D'Angelo and his company served their notice of intent to defend and filed it. A notice to mediate was sent by the court and documents were requested of the Bank's counsel. Subsequently, the statement of defence and counterclaim were served at which point the Bank advised D'Angelo that the defendants were noted in default. The Bank failed to give prior notice to them of its intention, despite being aware of their intention to defend.

HELD: Motion allowed.

The Bank's conduct by its counsel fell short of accepted practice. Counsel should have known of D'Angelo and his company's intention to defend and that the statement of defence was forthcoming. By obtaining default judgment, the Bank was attempting to place them at a disadvantage in circumstances which were unacceptable and it was therefore appropriate to set aside the default judgment. In any event, D'Angelo moved to set it aside as soon as it came to his attention, and a triable issue was raised in the statement of defence which would justify setting the default judgment aside. D'Angelo claimed that the Bank took steps to enforce the indebtedness when it had represented to him that he would be able to complete the construction being financed.

Statutes, Regulations and Rules Cited:

Courts of Justice Act.

Ontario Rules of Civil Procedure, Rule 19.04(1)(a).

Counsel

L. Mitchell, for the plaintiff. G.N. Hemsworth, for the defendants Frank D'Angelo and 783234 Ontario Ltd.

MASTER POLIKA

1 The defendants by notice of motion dated November 17, 1999 seek an order setting aside the noting of the defendants in default, the default judgment against them and all writs of seizure and sale filed in respect of the default judgment. The defendant, The New York Food Company Ltd. was petitioned into bankruptcy in the first week of March, 2000 and as a consequence the motion was advanced only on behalf of the remaining defendants.

Nature of the Action as Pleaded By The Plaintiff

2 The plaintiff's claim as set out in the statement of claim dated September 1, 1999 is for $1,020,385.40 plus interest computed at the contractual rate of 21% or the contractual rate of the Bank of Montreal's prime lending rate, determined from time to time plus 2% or pursuant to the Courts of Justice Act and costs on a solicitor and client basis. No particulars are pleaded how interest is to be calculated, which rate on which sums and from when it commences.

3 The individual defendant, Mr. D'Angelo, is an officer and director of and the alleged directing mind of both corporate defendants.

4 The claim on the demand loan in the amount of $145,000, as pleaded, is based on a written agreement between the plaintiff and the defendant, Mr. D'Angelo dated January 28, 1999 which demand loan was guaranteed in writing by written agreements dated January 28, 1999 by each of the corporate defendants. Interest is alleged to accrue on the demand loan at the Bank of Montreal's prime lending rate as determined from time to time plus 2%. It was alleged that the demand loan was due and owing after making demand for the same. Although the making of the demand and the fact that payment was not made is pleaded the date of demand is not, nor how and from when interest is to be calculated.

5 The unauthorized overdraft claim in the amount of $799,000, as pleaded, is based on an overdraft on Mr. D'Angelo's chequing account. It is alleged that Mr. D'angelo "wrongfully and fraudulently" obtained the funds on his own behalf and on behalf of the two corporate defendants by "means of a complex series of cheque transactions". Interest es claimed in accordance with the account provisions and the settlement agreement accruing at a rate of 21% but the pleading is silent as how the interest is calculated and from what dates and on what amounts.

6 The plaintiff also alleges in the statement of claim that Mr. D'Angelo entered into a settlement agreement dated February 25, 1999 whereby it is alleged that Mr. D'Angelo would pay the total amount of the indebtedness being the total of the demand loan, unauthorized overdraft plus interest as well as $5,000 for reasonable legal costs by minimum weekly payments of $45,000 commencing February 26, 1999. Pursuant to the settlement agreement in the event of default the Bank of Montreal would be entitled to issue and enter judgment pursuant to consents for any and all amounts owing thereunder at the time of the default.

7 It is alleged that default occurred under the settlement agreement as of March 19, 1999. On March 24, 1999 and August 25, 1999 the plaintiff issued notice of default.

8 The claim of $1,020,385.50 is pleaded as being comprised of the demand loan, interest on the demand loan, the unauthorized overdraft, interest on the unauthorized overdraft and the reasonable legal costs. No particulars are given of how the interest is calculated, at what rate, on what amounts and from what date.

Conduct of the Action Leading to the Default Judgment

9 The statement of claim was issued on September 1, 1999 and served on Mr. D'Angelo on September 13, 1999. The corporate defendants were served during the first week of September 1999. A settlement meeting was held between the parties and counsel on September 13, 1999.

10 On September 23, 1999 the defendants notice of intent to defend and notice of defence was served on the plaintiff's solicitors. The notice of intent to defend was filed on September 27, 1999. The court notice of requirement to mediate was sent to the parties on September 28, 1999.

11 By letter dated October 1, 1999 defendants' counsel requested copies of documentation referred to in the statement of claim. The copies were provided on October 7, 1999.

12 By letter dated October 29, 1999 defendants' counsel served the plaintiff's counsel with a copy of the defendant's statement of defence and counterclaim.

13 By letter dated November 1, 1999 plaintiff's counsel advised as follows:

> As you may by now be aware, the Bank requisitioned the registrar last week to note your clients, the defendants in this matter in default. We further advise that the Bank also filed a requisition last week for default judgment against those same parties.
>
> - Please contact me if you would like to discuss this matter.

14 The defendants were noted in default on October 26, 1999 and a default judgment was issued against them on that same day.

15 There is no dispute between the parties and it is agreed that plaintiff s counsel did not give any prior notice whatsoever to defendants' counsel of their intention to note the defendants in default. The noting in default occurred 13 days after the time for serving and filing the statement of defence had expired at a time when plaintiff's counsel was aware that the defendants were defending the action.

16 Plaintiff's explanation for the inaction, as set out in paragraph 33 of the affidavit of Brian West sworn December 7, 1999, does not explain in these circumstances why no prior notice of the intention to note the defendants in default was not given to defendant's counsel. Plaintiff's counsel had no indication whatsoever from the defendant's counsel or the defendant that a statement of defence was not forthcoming.

Default Judgment

17 The default judgment was granted by a deputy registrar in the sum of $1,048,107.86 plus $455.00 for costs. It is patent that the deputy registrar signing the judgment proceeded on the basis that the claim amounted to a debt or liquidated demand in money including, interest. The condition precedent to the deputy registrar signing default judgment is that the interest must be claimed in the statement of claim.

18 Given the way the claim for interest was pleaded in the statement of claim, and in particular that interest accrued at different rates with one rate not specified save as being variable and that no commencement dates from which interest accrued were specified it appears to me that the claim for interest does not amount to a debt or liquidated demand. As such default judgment in respect of the claim for interest pursuant to Rule 19.04(1)(a) was not available. The plaintiff should have proceeded by way of motion for judgment. Unfortunately both parties failed to include in their materials the requisition for default judgment in Form 19D, which was tendered to the deputy registrar, wherein the claim as to interest should have been set out. On the material before me it appears the default judgment was not regular oh its face.

Rule 14 of the Rules of Professional Conduct

19 Rule 14 of the Law Society of Upper Canada's Rules of Professional Conduct states:

> The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith.

Commentary number 4 under Rule 14 states:

> The lawyer should avoid sharp practice, and should not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of the client's rights.

20 The decision in Hunt v. Brantford (City) *(1994) 34 C.P.C. (3d) 379* (Gen. Div.) illustrates the course of conduct which the plaintiff's solicitor should have followed to give effect to his obligations under Rule 14. There the plaintiff s solicitor bent over backwards in an effort to have defendant's solicitor respond. In the case at bar plaintiff s counsel did nothing in the face of a notice of intent to defend but take advantage of the situation.

21 The conduct herein by plaintiff's counsel left much to be desired and fell short of the accepted practice. Plaintiff's counsel knew or ought to have known in these circumstances that a defence was coming and if he was unsure should have inquired. By obtaining default judgment plaintiff's counsel knew or ought to have known that he would gain an advantage by putting the defendants in the position of meeting the test for setting aside a default judgement. To allow the judgment to stand and to require the defendant to meet the test for setting aside a default judgment in these circumstances would be to reward this unacceptable practice by plaintiff's counsel and put the Court into disrepute. On this basis alone the default judgement is set aside.

Response of the Defendants

22 In response to the plaintiff's solicitor's letter of November 1, 1999, the defendants responded by bringing this motion dated November 17, 1999. Delivered in support was the affidavit of Frank D'Angelo sworn November 16, 1999.

Normal Test To Be Met To Set Aide A Default Judgment

23 There is no dispute that in the usual case a party seeking to set aside a default judgment must move as soon as possible after the judgment comes to the parties attention, explain the default and show that a valid defence on the merits exists.

24 On the facts before me I find that the defendants did move as soon as possible after the judgment came to their attention.

25 I also find on the facts before me that the defendants have explained their default.

26 The defence as pleaded puts forward a far different picture than a simple claim upon a demand loan, overdraft and settlement agreement with interest. The defendants position is that the nature of the transaction was the plaintiff bank agreed to provide credit facilities for the financing of construction at a property on Greenbrook Drive where Mr. D'Angelo was building a home.

27 Mr. D'Angelo claims he was required to sign the documentation on which the plaintiff's claim is based at the offices of the plaintiff bank's solicitors and did so without legal advice on the understanding that the plaintiff bank agreed to provide the financing to permit the completion of construction. Consequentially, on the basis of that understanding he took certain steps, in particular he arranged for appraisals and arranged for second collateral mortgage financing. The plaintiff it is alleged notwithstanding the alleged agreement pulled the plug. On this basis the defence was mounted and the counterclaim was advanced.

28 I heard much argument dealing with the facts as set out in the competing affidavits and based on the cross-examination of Mr. D'Angelo. However, the most important of the documents is the internal plaintiff bank's document of July 5, 1999 from Ian E. Mole. The recommendations set out therein are consistent with the defendants' defence and the alleged agreement reached with the plaintiff bank's representatives - and the steps taken by Mr. D'Angelo respecting appraisals and collateral financing. The fact that the recommendations set out therein were rejected internally does not take away from its corroborative effect of the defendants' position. I find on that basis that there are material facts in issue giving rise to a triable issue amounting to a valid defence on the merits and a real basis for the counterclaim. On that basis, as well, the default judgment is set aside.

Costs

29 In the usual case when a motion such is this is successful the costs thrown away are the responsibility of the moving defendant. Herein, given the conduct of the plaintiff's solicitor, the costs thrown away respecting the default judgment and the steps taken in relation thereto shall not be payable by any party to the action. As to costs of the motion, it is clear the defendant was successful and in the usual case costs would have followed the event. However, the motion would not have been needed had the statement of defence and counterclaim been delivered on time. In those circumstances there shall be no costs of the motion including those of the cross-examination of Mr. D'Angelo to any party.

Summary

30 In summary order to go as follows:

(1) The noting of the defendants in default, the default judgment against them and all writs of seizure and sale filed in respect of the default judgment be and the same are hereby set aside;

(2) Leave granted to defendants to forthwith file statement of defence and counterclaim;

(3) Statement of defence to counterclaim to be delivered within 20 days of October 30, 2000; and

(4) No costs of the default judgment and the step's taken in relation thereto or of this motion including the cross-examination of Mr. D'Angelo to any party.

MASTER POLIKA