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1. *Canadian Automation & Tool International Inc. v. 381922 Ontario Ltd. (c.o.b. North American Tool & Die)*
   Client/Matter: -None-

Canadian Automation & Tool International Inc. v. 381922 Ontario Ltd. (c.o.b. North American Tool & Die)

Ontario Judgments

Ontario Superior Court of Justice

M.D. Forestell J.

Heard: July 12, 2007.

Judgment: August 31, 2007.

Court File No. 06-CV-316587 PD2

[2007] O.J. No. 3299 | 160 A.C.W.S. (3d) 243

RE: Canadian Automation & Tool International Inc., Plaintiff, and 381922 Ontario Limited, operating as North American Tool & Die, Defendant

(29 paras.)

Counsel

David Rosenfeld, for the Plaintiff.

Luigi De Lisio, for the Defendant.

ENDORSEMENT

M.D. FORESTELL J.

1 The defendant brings this motion to set aside a default judgment obtained in November 2006 in the amount of $109,366.79.

Background

2 The defendant, 381922 Ontario Limited, operating as North American Tool & Die (hereinafter "NATD") is a corporation carrying on business as a manufacturer of automobile parts. The plaintiff, Canadian Automation and Tool International Inc. (hereinafter "CAT") is a corporation carrying on business as a manufacturer of machinery and automation equipment.

3 In September 2005, NATD contracted with CAT for CAT to manufacture a die for the use of NATD in making automobile hinges for NATD's customer Edscha. The contract provided that the die should be manufactured to accommodate "saw cut blanks". In December 2005 CAT delivered the die to NATD. NATD has used the die since December 2005 but has not paid any portion of the invoices totaling $108,364.79. NATD now alleges that the die was deficient and that it was necessary for NATD to make two saw cuts in each hinge prior to stamping in order to meet the standards of its customers. The additional costs claimed are estimated at $500,000.

The Claim and Default

4 On August 10, 2006 the plaintiff served a Statement of Claim at the offices of the defendant. The Record before me includes an affidavit of Anthony Preston. Mr. Preston states that he was employed as a part-time estimator for NATD after resigning from working for the business on a full time basis. He does not provide a date for his resignation from full time employment and commencement of part time employment. He does not state his role while employed full time by the business. Mr. Preston states that he was approached in the company's office on August 10, 2006 by a person looking for "Mr. Andrew Ferri" (the President) or "Mr. Anthony Preston". After Mr. Preston identified himself and said that he was the part time estimator, he was given the Statement of Claim. He took the Statement of Claim and left it on the desk of the Office Manager, Karen Chambers. Ms. Chambers advised Mr. Ferri of the service of the Claim. Ms. Chambers sent the Claim to Mr. Paul Leon, NATD's solicitor.

5 NATD did not respond to the Statement of Claim. Mr. Ferri's affidavit states that he received advice that the Statement of Claim had not been properly served as it appeared to have been sent by fax.

6 CAT obtained default judgment from the Registrar on October 24, 2006 in the sum of $109,366.79, plus $1,158 for costs. NATD became aware of the default judgment by November 16, 2006. Mr. Leon, solicitor for NATD, wrote a letter to CAT on November 22, 2006 advising that NATD wished to have the judgment set aside. On December 1, 2006, CAT replied to the letter advising that it would not consent to a motion to set aside default judgment.

7 Between December 7, 2006 and January 22, 2007, CAT issued and served five Notices of Garnishment on account of the judgment. Mr. Ferri, in his affidavit, states that he was ill with the flu from December 1, 2006 until December 11, 2006. Mr. Ferri had been diagnosed with leukemia in March 2006 and was susceptible to illness. He further explains that the company's solicitor, Mr. Leon, was not available to bring a motion to set aside the judgment. As a result, new counsel had to be retained. Mr. De Lisio confirmed that he was retained in an e-mail to CAT's counsel dated December 15, 2006. The e-mail stated that Mr. De Lisio would schedule the motion to set aside the default judgment for the week of January 8, 2007.

8 On December 8, 2006 Mr. Maxwell, General Manager for the company, wrote to Edscha, a customer of NATD that owed money to NATD. In that letter, Mr. Maxwell instructed Edscha to address all payments to "International Machining Inc." at "9 Berger Street, Suite 204, Welland, Ontario". Also on December 8, 2006, a Notice of Garnishment was served on the Edscha through its lawyer. The Garnishee's Statement from Edscha acknowledges that Edscha owes $113,394.95 to NATD.

9 No motion was scheduled to set aside the default judgment for the week of January 8, 2007. Mr. Ferri's affidavit states that Mr. De Lisio was ill for 10 days in January 2007.

10 CAT scheduled a garnishment hearing for April 13, 2007. A notice of the garnishment hearing was served on counsel for NATD on February 19, 2007. On February 9, 2007 Mr. De Lisio advised that he would set a motion date for the motion to set aside the default judgment as early as possible. On March 8, 2007, Mr. De Lisio served a motion record for a motion returnable in Superior Court in St. Catharines on March 15, 2007.

11 As St. Catharines was not the proper jurisdiction, counsel agreed that the motion would be withdrawn and brought in Toronto. This was confirmed on March 13, 2007. However, no motion was scheduled. Counsel for CAT wrote to Mr. De Lisio on April 2, 2007 advising that CAT intended to proceed with the garnishment hearing on April 13, 2007 in light of the fact that NATD had not rescheduled the motion to set aside.

12 On April 12, 2007, Mr. Paul Leon wrote to Edscha as solicitor for "NBY Enterprises Inc.". In the April 12, 2007 letter, Mr. Leon gives notice to Edscha that all accounts owing to 381922 Ontario Limited and International Machining Corporation are to be made payable to NBY, a secured creditor. NBY, like International Machining Inc., is located at 9 Berger Street, Suite 204, Welland, Ontario.

13 On April 13, prior to the hearing of the garnishment motion, CAT and NATD reached an agreement incorporated into the Order of Jarvis J. which reads as follows:

(a) that Edscha shall pay CAT the full amount of the Notice of Garnishment, being $113,394.95;

(b) such payment being stayed pending a determination of NATD's motion to set aside CAT's judgment; said motion to be peremptory on NATD and to be heard on July 12, 2007;

(c) should NATD not succeed on its motion to set aside, Edscha shall pay CAT the monies referred to in paragraph (a)

(d) should NATD succeed on its motion to set aside, the monies referred to in paragraph (a) will be paid to NATD subject to any terms imposed by the Court;

(e) NATD shall pay CAT costs in the amount of $5,000.00 on or before May 13, 2007.

14 The motion to set aside was scheduled for July 12, 2007. That date was obtained on April 13, 2007.

15 The costs of April 13, 2007 remain unpaid.

Law and Analysis

Test

16 The factors to be considered on a motion to set aside default judgment are:

(1) Whether the motion to set aside was brought without delay;

(2) Whether the circumstances leading to the default are adequately explained;

(3) Whether there is an arguable defence on the merits (see *Colburn v. McKinnon*, *[2006] O.J. No. 492* (S.C.J.)).

17 In exercising discretion under Rule 19.08 of the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*, the factors set out above should not be applied as rigid rules. (See *Chitel v. Rothbart* *(1988), 29 C.P.C. (2d) 136* (Ont. C.A.).)

Did the defendant move without delay to set aside the default judgment?

18 In this case almost five months elapsed before the motion to set aside default judgment was scheduled. Portions of that period are explained in the affidavit material by the illness of Mr. Ferri for 10 days in December and the illness of Mr. De Lisio for 10 days in January. The affidavit also explains that the motion was brought in the wrong jurisdiction in March. A further factor is the change in counsel. However, Mr. Ferri's illness from December 1 to December 11, 2006 did not hamper the ability of the defendant company to send a formal request to Edscha asking Edscha to send payments of outstanding accounts to a new company, International Machining. This request was made on December 8, 2006 - the day the company received notice of the first garnishment.

19 The attempted redirection of payments on December 8, 2006 was followed by a further attempt to redirect payments on April 12, 2007, one day before the garnishment hearing. On both occasions the payments were directed to the same Berger Street address in Welland. On both occasions the directions came from representatives of 381922 Ontario Limited.

20 Had the evidence before me merely shown a four and one-half month delay explained by illness and error, I would have found that the defendant moved without delay to set aside the default judgment. However, the Record discloses that the defendant was able to take steps to avoid payment of the judgment and to make the "administrative changes" referred to in Mr. Maxwell's December 8, 2006 letter to Edscha. In these circumstances, I find that the explanation for delay in this case is not adequate.

Has the defendant adequately explained the circumstances leading to the default?

21 The defendant makes two submissions to support its position that the circumstances of default have been explained:

(1) There was no proper service of the Statement of Claim; and

(2) CAT was aware that Mr. Leon was solicitor for NATD and did not give notice to Mr. Leon that CAT intended to note the defendant in default.

22 The Statement of Claim was served on Mr. Anthony Preston. Mr. Preston left the Statement of Claim on the desk of the office manager who brought it immediately to the attention of the President of the company and the solicitor for the company.

23 While Mr. Preston, in his affidavit, states that he left full time employment at NATD to be a part time estimator, he does not indicate when he left full time employment nor what position he occupied prior to August 2006.

24 Rule 16.02(1)(a) requires that service on a corporation be on "an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business". The affidavit of service identifies Mr. Preston as the person in charge at the time of service. Mr. Leon's letter of November 22, 2006 suggests that Mr. Preston's former position with the company was as a manager. More significant however, is the undisputed fact that the Statement of Claim came immediately to the attention of the President, Andrew Ferri, and the solicitor, Mr. Leon. Mr. Ferri chose to ignore the Statement of Claim. Mr. Ferri states in his affidavit, "We were uncertain as to whether or not a legal suit had been commenced or whether or not this was a play or tactic ..." In failing to enquire, either of counsel for CAT or of the Court as to the status of the action, the defendant made a conscious choice to ignore the action.

25 Mr. Leon, while not served with a copy of the Claim or Notice of Intent to Note in Default, was also aware of the action. I have considered the case of *Bank of Montreal v. D'Angelo*, *[2000] O.J. No. 5272* (S.C.J.) relied upon by the defendant. In that case, counsel for the defendant had communicated with counsel for the plaintiff and indicated that the Defence was forthcoming. Master Polika found that noting in default without notice to the defendant's counsel in those circumstances was unacceptable. In the case at bar, Mr. Leon had previously been copied on correspondence between plaintiff's counsel and NATD. He had not responded to the correspondence. Although he was aware of the Statement of Claim, he took no steps to identify himself as solicitor for the company and to request that he be copied on future correspondence or advised of any steps taken by CAT to collect the outstanding account. In these circumstances there was no obligation on CAT to advise Mr. Leon of the intention to note the company in default.

26 I find, therefore, that the defendant has not adequately explained the default.

Does the defendant have an arguable defence on the merits?

27 In considering whether the Defendant has established a valid defence on the merits on a motion to set aside a default judgment the Court should apply a test similar to that on a Rule 20 motion for summary judgment. (See *Hunt v. Brantford (City)* *(1994), 34 C.P.C. (3d) 379* (Ont. Gen. Div.).) The defendant alleges that the die provided by the plaintiff did not meet specifications because it was necessary to make saw cuts in the hinges. However, the contract provides for a die which will accommodate saw cut blanks. The drawings provided by the defendant to the plaintiff for use in the design of the die included the use of saw cut blanks. The plaintiff's quote also referred to accommodating saw cut blanks. The plaintiff on this motion filed an affidavit from the defendant's project manager at the time of the contract, which refutes the defendant's allegations. I therefore conclude that the affidavit of Andrew Ferri alleging that the die did not meet specifications is not sufficient to support the defence put forward. The further affidavit of Marcello Gruosso, Plant Manager for Edscha, merely confirms that saw cuts were necessary to meet the requirements of Edscha and Chrysler Canada and does not support the defence put forward.

Conclusion

28 Having considered the affidavits filed and the submissions of counsel, I find that the defendant has not met the test for setting aside default judgment. I recognize the discretionary nature of the decision and the need to consider all of the factors set out above and the interests of justice. The actions of the defendant in deliberately ignoring the Statement of Claim and in taking action calculated to avoid satisfying the judgment rather than moving expeditiously to set aside lead me to conclude that the default judgment should not be set aside. The motion is therefore dismissed.

29 The plaintiffs have not sought costs on this motion, costs still being outstanding with respect to the April 13, 2007 Order.

M.D. FORESTELL J.
