

CITATION: Zeifman Partners Inc. v. Aiello, 2019 ONSC 1321
COURT FILE NO.: CV-15-11148-00CL
DATE: 20190315

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Zeifman Partners Inc., in its capacity as receiver of the property known municipally as 40 Park Lane Circle, Plaintiff/Responding Party

AND:

David Aiello, Defendant/Moving Party

BEFORE: Madam Justice Dietrich

COUNSEL: *Stephanie De Caria*, for the Plaintiff/Responding Party

Brian A. Diamond, for the Defendant/Moving Party

HEARD: February 22, 2019

ENDORSEMENT

Overview

[1] In the midst of substantial renovations to a luxury home on Park Lane Circle in the City of Toronto, the owner ran out of funds. On April 18, 2013 this court appointed the plaintiff, Zeifman Partners Inc., as receiver. The receiver held an auction to sell the property on an as-is, where-is basis.

[2] The Defendant, David Aiello, made the highest bid, at \$12.2 million. Mr. Aiello paid deposits totaling \$1,310,000 but was not able to close the transaction. The receiver held a second auction at which it sold the property for \$9.5 million.

[3] In October 2015 the receiver brought the within action against Mr. Aiello for damages of \$6,067,360. Mr. Aiello responded with a statement of defence. The receiver sought to strike Mr. Aiello's statement of defence four times based on his failure to comply with court-ordered deadlines to respond to undertakings and to retain counsel. His statement of defence was ultimately struck on September 18, 2018.

[4] On notice to Mr. Aiello, the receiver moved for default judgment. Its motion was adjourned on terms in October 2018. Mr. Aiello failed to comply with the terms. Default judgment was awarded to the receiver on December 14, 2018.

[5] Mr. Aiello brings this motion to set aside the default judgment and the striking of his defence.

[6] For the reasons that follow, Mr. Aiello's motion to set aside the default judgment and the striking of his defence is dismissed.

Setting Aside a Default Judgment

[7] Rule 19.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") provides that a judgment against a defendant that has been noted in default may be set aside or varied by the court on terms as are just.

[8] To determine whether the interests of justice favour setting aside a default judgment, the court must have regard to the following five factors as set out by the Court of Appeal in Ontario in *Mountain View Farms Ltd. v. McQueen*, [2014] O.J. No. 1197 (ONCA) ("*Mountain View Farms Ltd.*"), at paras. 47-49:

- i) whether the motion was brought promptly after the defendant learned of the default judgment;
- ii) whether there is a plausible excuse or explanation for the defendant's default in complying with the *Rules of Civil Procedure*;
- iii) whether the facts establish that there is an arguable defence on the merits;
- iv) the potential prejudice to the moving party should the motion be dismissed and the potential prejudice to the responding party should the motion be allowed; and
- v) the effect of any order the court might make on the overall integrity of the administration of justice.

[9] In the *Mountain View Farms Ltd.* case, at para. 50, the Court of Appeal held that these factors are not to be treated as rigid rules and the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

[10] The defendant moving party bears the onus, which is described by Justice Dunphy in *Marina Bay Sands Pte. Ltd. v. Jian Tu aka Tu Jian*, 2015 ONSC 5011 at para. 1 as "an important onus not dissimilar to the onus faced by a party facing a summary judgment motion ... the defendant must put its best foot forward."

Mr. Aiello's Position

[11] Mr. Aiello submits that notwithstanding that the action was commenced in October 2015, the relevant time period for the purposes of this motion is July 20, 2018 to December 14, 2018. Around July 20, 2018, Mr. Aiello's lawyer removed himself as lawyer of record. On that date, Justice McEwen made an order providing that if answers to undertakings were not provided and costs were not paid by September 17, 2018, the subject matter of any undertaking, question taken

under advisement, or refusal not then satisfied could not be raised at trial without leave of the court and that Mr. Aiello had 30 days to retain new counsel.

[12] Mr. Aiello submits that because he was late in retaining a new lawyer by one day, the receiver was successful in striking his statement of defence on September 18, 2018 and noting him in default on September 19, 2018.

[13] Mr. Aiello further submits that on the receiver's motion for default judgment he succeeded in obtaining an adjournment on terms imposed by the receiver that allowed him to bring a motion seeking to set aside the noting in default. These terms were set out in an endorsement of Justice Hainey dated October 18, 2018. Pursuant to these terms, Mr. Aiello was required to: i) pay the costs relating to the September 18, 2018 motion to strike the statement of defence; ii) pay the costs of the pending default judgment motion; and iii) deliver motion materials on or before November 12, 2018.

[14] Mr. Aiello submits that the costs relating to the first motion were paid promptly, but the costs related to the second were paid one day late. He also submits that he was not able to deliver his motion materials by November 12, 2018 because he was seven time zones away (in Israel), suffering from severe health issues, and needed to care for his family. Consequently, on November 22, 2018, Justice Hainey determined that Mr. Aiello's motion to set aside the noting in default could not proceed.

[15] Mr. Aiello submits that rule 1.04 of the *Rules* provides that the rules must be construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits and that the court should make orders that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding.

[16] He further submits that in addition to rule 19.08 that deals with setting aside default judgment specifically, rule 2.10 of the *Rules* provides that the failure to comply with the *Rules* does not render the proceeding a nullity and the court may grant relief on such terms as are just to secure the just determination of the real matters in dispute or may set aside a proceeding or order.

[17] In his defence, Mr. Aiello asserts that he moved promptly and brought his motion to set aside the default judgment immediately following the default judgment. He further asserts that he has a plausible excuse for the default and an arguable defence on the merits.

[18] On the subject of potential prejudice, Mr. Aiello submits that he is an individual who supports a family with special needs and a judgment against him of nearly \$7 million is highly prejudicial as compared to the potential prejudice to the receiver, which recovered a substantial percentage of the original purchase price. He further submits that any prejudice to the plaintiff could be addressed by terms in an order setting aside the default judgment and the striking of the statement of defence.

[19] Finally, Mr. Aiello submits that the factors in setting aside a default judgment are not rigid rules and that the court must decide, whether in the particular circumstances of the case, it is just to relieve a defendant from the consequences of default.

The Receiver's Position

[20] The receiver submits that it is an officer of the court and is prosecuting this action to recover its damages and ultimately maximize recovery for the stakeholders in the receivership, including the principal creditor, HSBC Bank Canada, construction lien claimants and the Canada Revenue Agency.

[21] The receiver further submits that this is not a case in which Mr. Aiello missed a deadline and now faces default judgment. It submits that Mr. Aiello has a long history in this matter of uncooperative and irresponsible conduct, including breaching thirteen court orders in this proceeding, one of which was peremptory on him.

[22] The receiver also submits that Mr. Aiello has failed to establish any plausible excuse or explanation for repeatedly breaching the court orders and the *Rules* and he has failed to establish any facts to demonstrate an arguable defence on the merits, even though he has been given ample opportunity to advance his defence.

[23] The receiver acknowledges that there is prejudice to any defendant against whom a default judgment is issued, but asserts that there would be real prejudice to the creditors in the receivership if the default judgment were set aside. The amount of funds available for distributions with lower priority to HSBC Bank Canada are being diminished by additional interest accruing on claims, the receiver's fees associated with pursuing this action, and the portion of the costs awards not recovered.

[24] The receiver also submits that Mr. Aiello did not "put his best foot forward" and has failed to diligently and properly discharge his onus. He has not provided an adequate explanation for his failures to comply with orders or to keep the receiver apprised of his progress in retaining a lawyer.

Analysis

[25] I will now consider whether the interests of justice favour the setting aside of the default judgment by applying the factors set out in *Mountain View Farms Ltd.*

i) Did Mr. Aiello move promptly?

[26] Mr. Aiello did move promptly once the default judgment was entered against him. He brought this motion within a week's time. However, leading up to that point, his actions were far from prompt. The receiver's action was commenced more than three years ago in October of 2015. Mr. Aiello was particularly dilatory in responding to undertakings. Three separate timetables were ordered by this court imposing deadlines for his answers to undertakings, the third of which orders was made peremptory on Mr. Aiello. He breached the terms of all three orders. The receiver showed patience. On July 20, 2018, on the receiver's third motion to strike Mr. Aiello's statement of defence for his failure to comply with the third court-ordered deadline for responding to undertakings and his breach of the peremptory order, the receiver offered Mr. Aiello a final chance to deliver the outstanding answers to undertakings instead of striking his defence. The court made this order imposing a final deadline for undertakings. Mr. Aiello did not meet that deadline.

[27] Mr. Aiello also breached the third court order requiring him to appoint a new lawyer or deliver a notice of intention to act in person within the prescribed time. Following the breaches of these two orders, and nearly two months after the third removal of lawyer order was served on Mr. Aiello, the receiver scheduled its fourth motion to strike Mr. Aiello's statement of defence.

[28] In granting the order striking Mr. Aiello's statement of defence, Justice McEwen considered not only the most recent breach of a court order by Mr. Aiello, but his history and conduct throughout the action. In his September 18, 2018 endorsement, Justice McEwen states:

The plaintiff, once again, seeks an order striking the defendant's statement of defence. This action has been before this court on a number of occasions given the defendant's failure to answer undertakings and the fact that he has had three counsel represent him – all of whom have removed themselves as solicitor of record ...

Mr. Aiello has also failed to comply with the other order I granted on July 20, 2108 (prior to the above order removing counsel), which compelled Mr. Aiello to answer undertakings and pay costs by September 17, 2018 ...

Given the above and Mr. Aiello's violation of three timetables, the last of which was peremptory, it is appropriate to strike his defence. The pl. has patiently and diligently tried to engage Mr. Aiello to little or no avail. It continues to incur legal costs. Striking the defence is a reasonable sanction.

[29] Though not required by the *Rules*, the receiver nevertheless served Mr. Aiello with its motion record in support of its motion for default judgment. However, it was only three days before the motion that the receiver heard from Mr. Aiello's new counsel (nearly two months after the order requiring Mr. Aiello to appoint a lawyer had been served on him).

[30] Mr. Aiello was given yet another chance on October 18, 2018, when Justice Hainey adjourned the default judgment motion on terms that permitted Mr. Aiello to bring a motion to set aside the noting in default. Mr. Aiello breached the terms of Justice Hainey's endorsement without any explanation to the receiver or the court. Consequently, on December 14, 2018, Justice Wilton-Siegel awarded default judgment and, on costs, noted in his endorsement: "a substantial indemnity award is appropriate to reflect the defendant's actions in delaying and failing to comply with numerous orders issued in this proceeding."

ii) Does Mr. Aiello have a plausible excuse or explanation for the breaches?

[31] The motion record filed by Mr. Aiello contains an articling student's affidavit attached to which is an affidavit of Mr. Aiello, but the exhibits referred to in the latter affidavit are not attached. Mr. Aiello's affidavit contains details of health issues relating to himself and his family between May 30, 2018 and July 12, 2018, but provides no proof of debilitating health issues at the time the orders relating to the final deadline for undertakings and to the third removal of lawyer were made on July 20, 2018, or when Justice Hainey's endorsement was made on October 18, 2018.

[32] There is no evidence of any attempt by Mr. Aiello to retain counsel within the prescribed timeline other than his own statement that he attempted to do so, unsuccessfully. Three separate orders had been issued to Mr. Aiello relating to the removal of counsel of record over the course of this proceeding. It is not plausible that he was unaware of the process or the timelines prescribed by the *Rules* for appointing a new lawyer.

[33] This is not a case of Mr. Aiello being caught unawares and therefore failing to comply with a court order or two in a timely manner. In this case, Mr. Aiello has breached thirteen court orders. Mr. Aiello has no good excuse or plausible explanation for this course of conduct. The court is left to conclude that he chooses to disregard court orders and to disrespect the court's processes.

iii) Has Mr. Aiello established an arguable defence on the merits?

[34] To succeed on this ground, Mr. Aiello must put forward facts to establish an arguable defence on the merits or justify his failure to close his purchase of the property on the closing date, which was extended for his benefit.

[35] In this regard, Mr. Aiello points to his statement of defence filed on March 2, 2016 and, in particular, statements relating to the receiver's denial of access to the property to permit a further inspection; inadequate maintenance of the property by the receiver; his offer to complete the purchase if given an abatement; and the allegation that the receiver allowed the property to fall into further disrepair, which resulted in a reduced sale price. These defences, he submits, have an air of reality and a chance of success at trial.

[36] In his pleading, he also claims that there were issues of mold at the property. He pleads that the Agreement of Purchase and Sale provides that in the event of substantial damage, the buyer may terminate the agreement.

[37] In his affidavit, Mr. Aiello raises the fact that the receiver has not brought a motion for summary judgment as support for his claim that his defence has merit. He also deposed that because of the "high sum of money involved" and what he believes to be a valid defence, he should have his day in court and that his "right to justice and [his] right to a fair trial" should be respected. He deposed that the receiver has already made a substantial recovery on the sale of the property and that the balance of the claim is "relatively modest" and, further, that the "excessive interest and charges do not represent actual expenditures."

[38] I am not persuaded that Mr. Aiello has an arguable defence on the merits or that the allegations made in his statement of defence have an air of reality to them.

[39] Schedule C of the Agreement of Purchase and Sale clearly states that the property was offered for sale on an "as-is, where-is" basis with no representations or warranties regarding its fitness, suitability or intended use, and the sale required all prospective buyers to rely on their own inspections and investigations. The evidence is that Mr. Aiello not only agreed to this term, but he also obtained an inspection report, prior to entering into the Agreement of Purchase and Sale, which stated that "\$530,000+" worth of repairs would be required at the property at that time.

[40] The evidence is that between the date Mr. Aiello entered into the Agreement of Purchase and Sale and the extended closing date, there were two incidents of minor damage to the property. A roof leak led to damage to a small area of flooring and Mr. Aiello's contractor estimated the cost to replace the entire floor to be \$32,000. The receiver agreed to adjust the purchase price to account for this cost. The receiver also obtained a report confirming that the roof was in good condition. There was also a leak from a water pipe which the property manager repaired. The manager later reported that there were no further problems with the pipe. Mr. Aiello was apprised of the repair.

[41] With regard to the mold found at the property, the evidence is that it was there at the time the receiver was appointed. The receiver nevertheless arranged for mold remediation at a cost of \$26,781.

[42] It is doubtful that the costs to replace the floor, to repair the water pipe and to remediate for mold could ground a claim that there had been "substantial damage" to the property such that Mr. Aiello could terminate the Agreement of Purchase and Sale. This is especially so in light of Mr. Aiello's own inspection report that stated that more than \$530,000 worth of repairs would be required at the property.

iv) What is the potential prejudice to Mr. Aiello should the motion be dismissed and the potential prejudice to the receiver should the motion be allowed?

[43] There is potential prejudice to any party whose motion to set aside default judgment is dismissed. For Mr. Aiello, the dismissal results in a judgment of nearly \$7 million. However, Mr. Aiello is, in many ways, the author of his own misfortune. His conduct was reckless in the face of court orders and the *Rules*. He showed little regard for either.

[44] The potential prejudice to the receiver is not insignificant. The conduct of Mr. Aiello has resulted in delays and costs to the creditors in the receivership proceeding for more than three years. The funds available for the unsecured creditors are being diminished by additional interest accruing on the claim of the secured creditor HSBC, the receiver's fees associated with prosecuting this action, and the legal fees not recovered in cost awards.

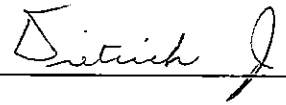
v) How would an order setting aside the default judgment and the striking of Mr. Aiello's defence affect the overall integrity of the administration of justice?

[45] Mr. Aiello would like his day in court and the opportunity to defend the claim. He has paid the costs awarded against him and he did move promptly to set aside the default judgment. However, this compliance with the *Rules* must be weighed against his significant non-compliance evidenced by the fact that he did not move promptly to comply with several court-imposed deadlines and, in fact, breached several of them, one of which was peremptory on him. Notwithstanding numerous indulgences granted by the court and the receiver, Mr. Aiello continued to show a blatant disregard for the court process. Mr. Aiello does not have a plausible explanation for his delays and non-compliance. Allowing the receiver's motion for default judgment is the just result in the circumstances of this case.

Disposition and Costs

[46] The defendant Mr. Aiello's motion to set aside the default judgment and the striking of his statement of defence is dismissed. The plaintiff receiver is entitled to its costs.

[47] Having reviewed the plaintiff's Costs Outline, I find that the time spent by the receiver's counsel on the motion is high at 85.7 hours. I therefore reduce the overall award of costs by approximately \$7,000. The defendant shall pay costs, on a partial indemnity basis, to the plaintiff of \$20,000.



Dietrich J.

Date: March 15, 2019