COURT OF APPEAL FOR ONTARIO

CITATION: Zeifman Partners Inc. v. Aiello, 2020 ONCA 33
DATE: 20200121
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Juriansz, Trotter and Nordheimer JJ.A.

BETWEEN

Zeifman Partners Inc., in its capacity as receiver of the property known municipally as 40 Park Lane Circle

Plaintiff (Respondent)

and

David Aiello

Defendant (Appellant)

Brian Diamond, for the appellant

Margaret R. Sims and Stephanie De Caria, for the respondent

Heard: January 9, 2020

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated March 15, 2019, with reasons reported at 2019 ONSC 1321.

Nordheimer J.A.:

A. OVERVIEW

[1] The motion judge dismissed the appellant's motion to set aside the default judgment and the noting in default. For the following reasons, I conclude that the motion judge made reviewable errors in her assessment of whether the default

judgment should be set aside. In the circumstances of this case, the just result is to relieve the appellant from default. I would therefore allow the appeal.

B. BACKGROUND

(1) The Agreement of Purchase and Sale

[2] In November of 2013, the appellant entered into an agreement to purchase a residential property on Park Lane Circle in Toronto (the "property"). The previous owner had run out of funds in the midst of carrying out renovations. The first mortgagee appointed the respondent as receiver of the property, who had put the property up for sale by way of auction. The appellant was successful in that auction with a bid of $12.2 million. The agreement of purchase and sale (the "APS") provided, among other things, that:

a) The transaction would be completed on February 14, 2014, however the appellant could extend the closing date for a period not exceeding eight weeks. He was required to pay $100,000 to the respondent's lawyers for each one-week extension. Monies so paid were to be credited against the balance due on closing.

b) The property was sold on an "as is, where is" basis.

c) The property remained at the respondent's risk pending completion. In the event of substantial damage to the property pending completion, the purchaser could either terminate the agreement and have all deposit money

returned or take the proceeds of any insurance and complete the transaction.

d) If the transaction failed to close as a result of the purchaser's default, the deposit would be forfeited and the seller would have all of its rights and remedies against the buyer.

e) If the transaction was not completed for any reason other than default of the purchaser, the deposit would be returned to the purchaser forthwith without deduction.

[3] The appellant also agreed to pay a buyer's premium to the auctioneer. This amount was payable unless the transaction failed to close because the vendor defaulted in its obligations under the agreement of purchase and sale[1].

(2) Extension of Closing

[4] In January 2014, the appellant learned that there was water damage to the property as a result of two unrelated occurrences. One was a leak from the roof of the Property and another was from burst pipes in the pool area. The appellant learned of the damage and arranged for a home inspection on January 31, 2014, two weeks before the date fixed for closing. According to the inspector, a roof leak resulted in "extensive water damage to the second-floor finished space" and

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[1] Ultimately, because of the alleged breach of the APS, the respondent settled the auctioneer's claim and took an assignment of that claim.

"significant damage" to the engineered walnut floor on the second floor. In addition to this leak, several pipes froze and cracked in the pool/spa area, resulting in water damage to the basement apartment. The inspector recommended that the cause of the roof leak be determined to ensure it was properly repaired, and that the property be tested for mould.

[5] On February 7, 2014, one week before the date fixed for closing, the appellant's lawyer shared the inspector's report with the respondent's lawyer. The appellant's lawyer advised that there was concern over the extent of the damages and requested that there be a postponement of the closing date to April 15, 2014, without the requirement to pay any additional amounts.

[6] On February 10, 2014, the respondent's lawyer advised that the roof had been repaired and that the affected drywall had been repaired and painted. The respondent's lawyer also stated: "We are advised that there is no evidence of any mould issues with reference to the property. In fact, an inspection was conducted today by a qualified environmental engineer who confirmed the foregoing." The respondent's lawyer said that the respondent was prepared to permit the appellant to inspect the property to confirm all of this. He concluded by saying that the respondent expected the closing to occur as scheduled on February 14, unless the appellant availed himself of his rights under the APS to extend the closing.

[7] In light of the respondent's position, the appellant availed himself of his right under the APS to extend the closing. He paid a series of additional deposits to extend the closing date to April 4, 2014.

[8] On April 3, 2014, the appellant's lawyer requested a further extension to allow the parties to obtain a comprehensive report and properly assess the extent of the damages at the property. He pointed out that the appellant had advanced additional deposits after the damage had occurred. He advised that the appellant was concerned about warped doors, damage to drywall and flooring, and possible mould damage. He sought a four-week extension so that a comprehensive report could be prepared and "in order for the parties to be able to properly resolve the issues."

[9] In his response on April 4, the respondent's lawyer advised that the respondent was taking the position that the appellant was in breach of the APS, that the deposits were forfeited, and that an action would be commenced for damages.

(3) Remediation and Second Sale

[10] The respondent then brought a motion for an order authorizing it to retain the deposits. While that motion was pending, two orders were made. One directed that any interested party be given access to the property for the purpose of

inspecting it. The other directed the respondent to engage a mould detection and remediation expert to undertake testing at the property.

[11] The appellant retained his own environmental expert to do an inspection. That expert found that there was "visible mould growth" at the property as well as mould growth and settled mould spores in six locations.

[12] The respondent's expert also conducted an inspection. He identified "moderate" mould growth in the attic, and "heavy mould growth" in the staff quarters in the basement. He also identified mould in the basement laundry room and one of the cold storage rooms. The respondent eventually had mould remediation work undertaken at the property at a cost of $26,781. The respondent had earlier advised the appellant that it was prepared to allow a credit of $32,000 against the purchase price for the cost of having to replace the walnut flooring on the second floor.

[13] On May 25, 2015, the respondent sold the property to another purchaser for $9.5 million.

(4) The Action

[14] This action was commenced on October 20, 2015. The statement of claim was subsequently amended on January 20, 2016. It claims $6,067,360 in damages. A statement of defence was delivered on March 2, 2016.

[15] The action proceeded in what can only be described as a less than satisfactory manner. There were a number of defaults by the appellant and a number of orders made against him as a consequence. At one point, the appellant's first counsel was removed from the record. Later, the appellant's second counsel was also removed from the record. There were problems arranging the examinations for discovery and there were problems in obtaining answers to undertakings from the appellant arising from those discoveries. There were also problems in obtaining expert reports. These issues led to a number of orders being made against the appellant. The appellant also failed to comply with timetables that the court set for the progress of the action.

[16] Of more significance for the purpose of this motion is the fact that the appellant's third lawyer was also removed from the record. It was this event that ultimately led to the default judgment being obtained. However, in this instance, the triggering event that led to the lawyer being removed resulted from the fact that the lawyer may have missed a court imposed deadline. The Lawyers' Professional Indemnity Company ("LawPro") became involved as a consequence, and LawPro insisted that the lawyer had to remove himself from the case.

[17] It was this occurrence that led to an order being made against the appellant, on July 20, 2018, that required him either to retain new counsel within 30 days or serve a notice of intention to act in person. The appellant failed to do either. As a

result, on September 18, 2018, on motion by the respondent, the appellant's statement of defence was struck out.

[18] On December 14, 2018, the respondent's motion for default judgment was granted. The judgment ordered the appellant to pay $5,313,377, plus costs of $145,351, and declared that the deposits paid by the appellant totaling $1,310,000 were forfeited to the respondent.

[19] The appellant had retained a new lawyer just a few days before the motion for default judgment was heard. On December 24, 2018, that lawyer served materials for the motion below to set aside the default judgment. The motion was argued on February 22, 2019 and was dismissed on March 15, 2019.

[20] It is of some importance to the issues in this motion to add certain additional facts. One is that, in 2016, the appellant moved to Israel with his wife and the couple's five children. Another is that the appellant suffers from certain health problems that affect him physically. Yet another is that three of the appellant's children require special medical care and supervision. Indeed, two were hospitalized, while this litigation was ongoing, for various surgeries and other health related issues.

C. DECISION BELOW

[21] In her reasons, the motion judge correctly identified the factors that a court must take into account in deciding whether to set aside a default judgment. Those

factors are set out in this court's decision in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 119 O.R. (3d) 561, at paras. 48, 49. They are:

1. whether the motion was brought promptly after the defendant learned of the default judgment;
2. whether there is a plausible excuse or explanation for the defendant's default in complying with the *Rules*;
3. whether the facts establish that the defendant has an arguable defence on the merits;
4. 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
5. the effect of any order the court might make on the overall integrity of the administration of justice.

[22] Beginning with the first factor, the motion judge found that the appellant had moved promptly once the default judgment was granted. On the second factor, the motion judge found that the appellant had no excuse or plausible explanation for what she described as the appellant's breach of 13 court orders. The motion judge found, on the third factor, that the appellant did not have an arguable defence on the merits and that the allegations made in his statement of defence did not have "an air of reality to them."

[23] On the fourth factor, the motion judge found that there would be prejudice to any person against whom a default judgment is granted but, at the same time, found that the appellant was "the author of his own misfortune." The motion judge also found that the respondent had suffered prejudice arising from "the delays and costs to the creditors in the receivership proceeding". Finally, on the fifth factor, the motion judge said that the appellant showed "a blatant disregard for the court process" and that it was "the just result" to allow the default judgment to stand.

D. ANALYSIS

[24] The decision to set aside a default judgment is discretionary and entitled to deference: *Mountain View*, at para. 55. This court may interfere to correct an error in law, principle or a palpable and overriding error of fact, or if the decision is so clearly wrong as to amount to an injustice. In this case the motion judge made a number of errors in her analysis, both errors in principle and palpable and overriding errors of fact, such that her conclusion is not entitled to deference. In the particular circumstances of this case, I conclude the default judgment and the noting in default should be set aside and I therefore would allow the appeal.

(1) The Errors of the Motion Judge

(a) The Motion Judge Erred in Her Consideration of the History of the Proceeding

[25] The motion judge erred in principle in considering the entire history of the proceeding under both the first and second factors of the *Mountain View* analysis.

[26] The history of the proceeding clearly has nothing to do with the first factor, which relates only to delay after the default judgment has been granted, not before.

[27] It is also not properly considered under the second factor, which is focused on the default that led to the default judgment being granted. In this case, that was the failure of the appellant to appoint new counsel within the 30-day requirement established by the July 20, 2018 order.

[28] Any consideration of the history of the appellant's conduct during the proceeding properly falls only under the fifth factor. In misinterpreting the first and second factors in this way, the motion judge overemphasized the appellant's earlier failures and thereby erred in principle.

(b) The Motion Judge Ignored Facts Relevant to the Appellant's Default

[29] Another error is that the motion judge appears to have ignored the fact that the appellant's loss of his counsel that led to the order that in turn led to the default, was not the result of anything that the appellant did. In other words, it was not the

conduct of the appellant that led to the problem. Further, the motion judge also appears to have ignored, in considering this factor, the reality that the appellant was living in Israel with the obvious attendant difficulties that the distance and time changes would cause in speaking to prospective lawyers. Still further, the motion judge was dismissive of the appellant's efforts to retain new counsel by saying that the only evidence of those efforts was from the appellant. It is difficult to see from whom else the motion judge would have expected that evidence to come. The appellant explained what he had done, including contacting three lawyers, one of whom eventually came to his assistance.

(c) The Motion Judge Erred in Finding No Arguable Defence on the Merits

[30] The motion judge erred in concluding that there was no air of reality to the appellant's defence, under the third *Mountain View* factor.

[31] First, the motion judge erred in principle by applying too high a standard in her analysis. She quoted with approval the following statement by Dunphy J. in *Marina Bay Sands Pte. Ltd. v. Jian Tu aka Tu Jian*, 2015 ONSC 5011, 48 B.L.R. (5th) 48, at para. 1:

> When bringing a motion to set aside default judgment, the moving party bears 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.

[32] With respect, that statement does not find any support in the existing authorities. Indeed, it is contrary to what this court said in *Mountain View* and in other subsequent cases. For example, in *Mountain View*, Gillese J.A. said, at para. 51:

> In showing a defence on the merits, the defendant need not show that the defence will inevitably succeed. The defendant must show that his or her defence has an air of reality.

[33] That approach is not comparable to the approach taken to summary judgment. Frankly, it is unhelpful to the analysis established for setting aside a default judgment to add such a gloss to it. It only serves to confuse the proper approach to two entirely different types of motions.

[34] In determining whether a defence has an air of reality, it is not the role of the motion judge to make findings of fact and assess whether the defence will succeed. Yet this is what the motion judge appears to have done here. She appeared to conclude on some of the central controversies between the parties, for example by concluding that the damage to the property was minor, rather than "substantial", and that the mould found at the property was there from the time the receiver was appointed.

[35] There is no evidence in the record that would sustain this latter conclusion. At most, there is some speculation offered by one expert as to when the mould was created and an unsubstantiated belief by the respondent that that is the case.

is the case. Of more importance is the fact that the motion judge's conclusion on this point is directly contrary to the statement made by the respondent's lawyer, in his February 10, 2014, letter, that "there [was] no evidence of any mould issues with reference to the property" following an inspection conducted by an environmental engineer. I note that this statement is not qualified or limited in any way. And, significantly, we know that mould was found on the property as a result of the subsequent inspections – all of which were conducted after the respondent had taken the position that the appellant had breached the APS. The motion judge's conclusion on this point is a palpable and overriding error.

[36] In considering the issue of the viability of the appellant's defence, the motion judge also erred in principle by not addressing the issue of the damages claimed. In addition to defending the merits of the claim, the appellant is, of course, entitled to challenge the amount of damages claimed and this can constitute an arguable defence on the merits. The motion judge was clearly aware of the appellant's arguments concerning the quantum of damages as she summarizes these submissions in her reasons. Yet, her analysis evidences no consideration of whether these arguments could constitute an arguable defence on the merits.

[37] In this case, one component of the damages was $2.7 million relating to the reduced sale price for the home. I believe it would come as surprise to just about anyone that in 2014/2015, when the price of homes were steadily increasing in Toronto, a home of this type would have dropped more than 20 percent in value. I

also note, on this point, that the appellant expressly pleaded in his statement of defence that the drop in value was the result of the respondent's failure to maintain the property during the relevant time.

[38] Another component of the damages is a claim by the respondent that the additional costs of administering the estate amounted to over $2.1 million over the time period between the failed sale to the appellant and the actual sale to the new purchaser, a period of a little more than a year. I note that, at the time of the default judgment, the respondent sought under $1 million under this heading of damages. In any event, on the surface, it is not immediately apparent how the failure to sell this property could, on its own, give rise to such a significant expense.

[39] The motion judge's assessment of the merits of the defence was afflicted by these errors and it led her to the wrong conclusion. There is an arguable defence on the merits here.

(2) The Appellant Should be Relieved From Default

[40] Given that the motion judge's conclusion is tainted by reviewable error, I turn to consider whether, in light of the factors in *Mountain View*, the appellant should be relieved of his default.

[41] First, I note that there is no dispute that the appellant moved promptly to set aside the default judgment.

[42] Second, I note that the default which resulted in the default judgment occurred because the involvement of LawPro led to the removal of the appellant's third counsel. This triggered the deadline to retain new counsel, the breach of which constituted the relevant default. The appellant was living in Israel which would present some difficulty in retaining a new lawyer to defend this action. The appellant's evidence is that he reached out to three lawyers, and one of these lawyers eventually came to his assistance.

[43] Third, as I have discussed above, the appellant has an arguable defence on the merits, at least when it comes to the quantum of damages.

[44] Fourth, the prejudice to the appellant is significant. He is facing a multi-million dollar judgment. This must be weighed against the prejudice to a receivership facing some potential increased interest accumulation through delay. I note, on that point, that if the respondent is ultimately successful in its claim, there would normally be an amount for interest added to the judgment amount.

[45] On the fifth factor, I do not quarrel with the motion judge's evident concern regarding the conduct of the appellant during the course of this litigation. As I have already said, it is under this factor that that conduct falls to be considered. The appellant's conduct did not evidence the type of diligence to the proper progress of the proceeding that the court has the right to expect from all parties. However, I am mindful that there are some mitigating factors regarding the appellant's

conduct. For one, the presumptively negative reference to 13 breaches of court orders is somewhat misleading. Some of those asserted breaches are overlapping or duplicative. Further, at least two of the defaults involved missing deadlines by only a single day. More importantly, however, is the acknowledged fact that the appellant has paid all of the costs awards that were made against him arising from his defaults and he is not, at this point, in breach of any court orders.

[46] As this court said in *Mountain View*, these factors "are not to be treated as rigid rules; 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": at para. 50.

[47] One of the overarching principles in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, is reflected in r. 1.04(1) which provides that the objective of our civil process is to ensure "the just, most expeditious and least expensive determination of every civil proceeding on its merits" (emphasis added). Determining the result of civil proceedings on technical failings is, and must remain, the exception to the general principle reflected in r. 1.04(1).

[48] In my view, it would be unjust in these circumstances to prevent the appellant from having his "day in court". I note on that final point that this action is ready for trial. It can be brought to its proper conclusion in short order.

E. CONCLUSION

[49] I would allow the appeal, set aside the order below, set aside the default judgment, set aside the noting in default, and restore the statement of defence. I would also order the parties to immediately proceed to obtain a new trial date at the earliest opportunity that the Superior Court of Justice can accommodate.

[50] The appellant is entitled to his costs of the appeal fixed in the amount of $10,000 inclusive of disbursements and HST. I would not make any order of costs for the underlying motion.

Released: JAN 21 2020

I agree R.G.P. Roberts J.A.

I agree K.K. Trotter J.A.