Federal Court  Cour fédérale

Date: 20220406

Docket: T-771-21

Citation: 2022 FC 487

Ottawa, Ontario, April 6, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

UBS GROUP AG

Plaintiff

and

MOHAMAD HASSAN YONES, ABDULRHMAN ALAYA, AND UNIFIED BUSINESS SOLUTIONS GROUP INC.

Defendants

ORDER AND REASONS

I. Overview

[1] On February 3, 2022, I granted default judgment in this trademark infringement action: *UBS Group AG v Yones*, 2022 FC 132. A week later, the defendants filed a motion that effectively seeks to set aside that default judgment and to permit the personal defendants Abdulrhman Alaya and Mohamad Hassan Yones to represent the corporate defendant, Unified Business Solutions Group Inc [Unified]. These are my reasons for dismissing the defendants' motion.

II. Issues

[2] This motion was filed by Mr. Alaya on behalf of all defendants, including Unified. There is no issue in Mr. Alaya or Mr. Yones representing themselves: *Federal Courts Rules*, SOR/98-106, Rule 119. However, Rule 120 of the *Federal Courts Rules* requires a corporation to be represented by a solicitor unless the Court grants leave. I must therefore decide the request to permit Mr. Alaya and Mr. Yones to represent Unified in order to consider the remainder of the motion as it pertains to Unified. This represents the bulk of the motion, since the judgment at issue is largely against Unified given my finding that the officers bore no personal liability for the company's actions: *UBS Group AG* at paras 60–64. I note parenthetically that in my reasons for judgment, I used the spelling "Younes" for the first personal defendant, since it was spelled that way in his email address and email signature block: *UBS Group AG* at para 11. However, Mr. Alaya's affidavit filed on this motion names his business partner as "Yones," and I will therefore use that spelling in this decision.

[3] The second part of the defendants' motion is cast as a motion for "reconsideration" of my February 3, 2022 judgment. However, I agree with UBS Group AG that it is better characterized as a motion to set aside default judgment. The Court may reconsider an order, including a judgment, only in limited circumstances, namely where it does not accord with the reasons given for it, where a matter that should have been dealt with has been "overlooked or accidentally omitted," or to correct clerical mistakes or errors: *Federal Courts Rules*, Rules 2 ("order"), 397. None of these circumstances applies here.

[4] Rather, the defendants are looking to be relieved of the consequences of default and of the default judgment that was issued in their absence. Their motion is thus in essence a motion to set aside default judgment under Rule 399. UBS Group AG responded to it as such, and I am prepared to treat the motion as one to set aside default judgment despite the form in which it was brought, particularly since it was prepared without the assistance of counsel.

[5] As a result, the issues to be determined on this motion are:

A. Should the Court grant leave to permit Unified to be represented by Mr. Alaya and/or Mr. Yones?

B. Should the Court set aside the default judgment issued on February 3, 2022?

III. Analysis

A. *The defendants have not shown special circumstances to justify representation of the corporation by an officer*

(1) Legal framework for the order requested

[6] Representation of parties before the Federal Court is governed by Rules 119 to 126 of the *Federal Courts Rules*. Rule 120 governs the representation of corporations. It provides as follows:

Corporations or unincorporated associations	**Personne morale, société de personnes ou association**
120 A corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it	**120** Une personne morale, une société de personnes ou une association sans personnalité morale se fait représenter par un avocat dans toute instance, à moins que la Cour, à cause de

to be represented by an officer, partner or member, as the case may be.	circonstances particulières, ne l'autorise à se faire représenter par un de ses dirigeants, associés ou membres, selon le cas.
[Emphasis added.]	[Je souligne.]

[7] A party seeking to show there are "special circumstances" for the purposes of Rule 120 must generally demonstrate that (i) it cannot afford a lawyer; (ii) the proposed representative will not be required to be both advocate and witness; (iii) the issues are not so complex as to be beyond the proposed representative's capabilities; and (iv) the action can proceed in an expeditious manner: *El Mocambo Rocks Inc v Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2012 FCA 98 at paras 3–5; *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2005 FC 1582 at para 3; *Kobetek Systems Ltd v Canada*, 1998 CanLII 7265 (FC). Demonstrating that the company cannot afford a lawyer should usually be done "by submitting complete and clear financial information concerning the corporation, preferably by means of financial statements": *El Mocambo* at para 4. While the foregoing factors are not determinative or exhaustive, they must generally be met to establish special circumstances to justify an order permitting representation of a company by an officer.

[8] As UBS Group AG points out, the Federal Court of Appeal has underscored on a number of occasions the need for a company to demonstrate that it cannot afford a lawyer through substantive evidence. In *Wang v Louis Vuitton*, Justice Locke concluded that since the corporation had failed to demonstrate that they could not afford a lawyer, it was unnecessary to discuss the other requirements of Rule 120: *Wang v Louis Vuitton Malletier SA*, 2019 FCA 199 at paras 5–8. Even though the company in that case had filed some bank statements and letters

from utility companies, it did not provide “complete and clear financial information” or financial statements, and therefore failed to meet the requirements of the rule: *Wang v Louis Vuitton* at para 7.

[9] Similarly, in *El Mocambo*, Justice Mainville noted that the company filed only a bank statement, a property tax notice, and a tax summary. This was insufficient to conclude that it did not have the capacity to retain a lawyer: *El Mocambo* at para 6. Justice Nadon likewise concluded in *1443900 Ontario* that there was “no basis” for an order under Rule 120 and he had “no choice but to dismiss” a company’s motion since it had filed no evidence to show it could not afford to pay for a lawyer: *1443900 Ontario Inc v Canada*, 2013 FCA 113 at paras 2–3.

[10] These requirements are not merely procedural hoops designed to make it difficult for companies to be represented before the Federal Court. They reflect a balance between important principles underlying regulation of the legal profession, the public interest in effective access to the Court through efficient and timely Court proceedings, and the need for access to justice.

(2) Application

[11] In the present case, the defendants’ motion is supported by Mr. Alaya’s affidavit, which states that Unified has no employees, has been relatively inactive during the COVID-19 pandemic, did not generate much income during this time, and has “neither liquid assets, nor significant retained earnings.” He also states the defendants “do not have the funds to be represented by counsel.” However, other than these statements, the defendants have not provided “complete and clear financial information” regarding the company, nor any financial statements.

As a result, and following the jurisprudence of the Federal Court of Appeal including *Wang v Louis Vuitton*, *El Mocambo*, and *1443900 Ontario*, I must conclude that the defendants have not satisfied the evidentiary requirements to demonstrate they cannot afford a lawyer.

[12] While the cases cited above suggest this is sufficient to dispose of this aspect of the motion, I also have some concern about the other factors relevant to an order under Rule 120. In particular, it appears that Mr. Alaya and/or Mr. Yones would likely be material witnesses for the defendants in the context of the proceedings, given their status as co-founders of the company. This may not automatically prevent them from representing the company, as such a hard-and-fast rule might unduly prejudice small or closely-held companies. However, it remains an adverse factor in considering whether the Court ought to exercise its discretion under Rule 120.

[13] Further, I note that trademark infringement litigation can raise complex issues pertaining to matters such as use and confusion under the *Trademarks Act*, RSC 1985, c T-13. Such issues may go "beyond the reasonable capabilities of the proposed representative": *El Mocambo* at para 3. This is not to question Mr. Alaya's capabilities or wherewithal generally, but simply to note that some of the more complex issues arising in intellectual property matters will be more difficult for the best-intentioned lay-representative to address. This, again, would be an adverse factor speaking against the granting of an order under Rule 120.

[14] As a result, I conclude the defendants have not established that special circumstances exist to justify permitting Unified to be represented by one or more of its officers.

[15] This would be sufficient to dispose of the entirety of the defendants' motion as it pertains to Unified. Since I have concluded that Unified's officers are not permitted to represent them, the motion filed by one of those officers to set aside the default judgment against Unified should not be entertained. However, I will nonetheless address the defendants' motion to set aside default judgment for two reasons. First, as stated, Mr. Alaya and Mr. Yones are entitled to represent themselves. While the default judgment imposes no personal liability on them, it does require them to take certain steps in respect of the company's domain name and they are affected by the general injunction against Unified as officers of the company. They therefore have standing to seek to set aside the default judgment, at least in respect of those aspects of the judgment that affect them directly. Second, given my conclusions on the motion to set aside default judgment, I consider it appropriate to make clear that the motion would be unsuccessful as presented, regardless of the issue of representation.

B. *The defendants have not established that the default judgment should be set aside*

(1) Legal framework for the order sought

[16] As noted above, a motion to set aside default judgment is brought under Rule 399(1), which gives the Court the discretion to set aside or vary an order in certain circumstances:

Setting aside or variance	**Annulation sur preuve *prima facie***
399 (1) On motion, the Court may set aside or vary an order that was made (a) *ex parte*; or (b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding, if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.	**399 (1)** La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue : a) toute ordonnance rendue sur requête *ex parte*; b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

[17] The Federal Court of Appeal has confirmed that to succeed on a motion to set aside default judgment, a defendant must show (i) they have a reasonable explanation for the failure to file a statement of defence; (ii) they have a *prima facie* defence on the merits of the claim; and (iii) they moved promptly or within a reasonable time to set aside the default judgment: *Babis (Domenic Pub) v Premium Sports Broadcasting Inc*, 2013 FCA 288 at paras 5–6. Each part of this test must be established: *Babis* at para 5; *Benchmuel v Gags N Giggles*, 2017 FC 720 at paras 31–33; *Moroccanoil Israel Ltd v Laboratoires parisiens Canada (1989) Inc*, 2012 FC 962 at paras 18–20.

(2) Application

[18] There is no dispute that the defendants moved promptly after the issuance of default judgment, filing their motion to set it aside a week after the date of the judgment. However, UBS Group AG argues the defendants have not met the other two parts of the test as they have not provided a reasonable explanation for not filing a statement of defence or shown they have a *prima facie* defence on the merits. I agree with UBS Group AG that the defendants have not met the requirements to set aside default judgment for the following reasons.

(a) *Explanation for the failure to file a statement of defence*

[19] In my reasons granting default judgment, I referred to UBS Group AG's pre-litigation steps, which included sending a demand letter to the defendants and making a follow-up telephone call: *UBS Group AG* at paras 19–20. In his affidavit, Mr. Alaya states that the defendants thought this was simply a scam, given their awareness of common scams claiming to be from the Canada Revenue Agency or a court demanding money. Be this as it may, it appears the defendants recognized that a proceeding had been commenced that they had to respond to when they were served with UBS Group AG's statement of claim.

[20] In their motion, the defendants state that they tried to file a statement of defence on June 14, 2021, but that due to a lack of legal knowledge they missed the filing. They referred in particular to a confirmation number that was sent by the Court on June 14, 2021 when they tried to file the statement of defence through the Court's electronic filing system.

[21] As I set out in a direction to the parties dated March 3, 2022, the information in the Court's record with respect to the confirmation number the defendants referred to is that:

- Mr. Alaya sought to file a simple statement of defence containing a blanket allegation of denial electronically on June 14, 2021;

- Mr. Alaya was contacted by telephone by a Registry Officer of the Federal Court on June 15, 2021 to determine whether the statement of defence was only on his own behalf or on behalf of all defendants, and to advise him of the need to file proof of service as no proof of service had been filed;

- Mr. Alaya indicated that the defence was intended to be for all defendants. The Registry Officer advised Mr. Alaya of the requirement in Rule 120 that a corporation be represented by a lawyer unless the Court grants leave to it to be represented by an officer. Mr. Alaya advised the Registry Officer that he would request an extension of time to file a defence and would file a motion to represent the company or seek legal counsel; and

- In consequence, the statement of defence was not accepted for filing.

[22] As noted in my direction, information regarding the June 15, 2021 telephone conversation with the registry was not referred to in Mr. Alaya's affidavit on this motion or in the defendants' written representations. My direction invited supplementary responding evidence and/or brief submissions from the parties. The defendants' brief supplementary written representations gave an apology for not mentioning the call due to having overlooked it. They referred to Mr. Alaya's attention deficit hyperactivity disorder (ADHD), his having pushed it off

until it was too late, and his difficulties in attempting to serve and file a statement of defence for the first time, particularly during the pandemic.

[23] I have no small concern with defendants who are requesting discretionary relief from the Court seeking to rely on an attempt to file a statement of defence without referring to the subsequent conversations with the Court registry that explained why the document was not filed and what needed to happen in order for it to be filed. The defendants appear to have realized in their motion, despite their lack of legal training, that it was necessary to explain why no defence was filed. They did so through reference to their attempt to file a statement of defence in June 2021. Doing so while omitting reference to the explanations provided by the registry regarding what was needed is no slight oversight, as it goes directly to the issue of whether the defendants have adequately explained their failure to file a defence.

[24] Even accepting this was an oversight, however, I conclude the defendants' materials do not provide a reasonable explanation for the failure after June 15, 2021 to serve and file a statement of defence.

[25] The record shows the defendants were advised on June 15, 2021 of the need to serve their defence before filing and, if it was to be taken as a defence on behalf of Unified, for the company to have a lawyer or seek leave to be represented by an officer. Mr. Alaya said the defendants would seek an extension of time and file a request for leave. After that date, the defendants did neither, and have filed no evidence of having taken any steps or efforts at all to this end. Nor did the personal defendants try to serve or file even the blanket defence on their own behalf. The

only explanation for this lack of action given is Mr. Alaya's asserted ADHD, his having pushed it off until it was too late, and the challenges of self-representation.

[26] While I appreciate the challenges faced by self-represented parties, I cannot accept that the broad statements made by the defendants for why no further efforts were made are sufficient to satisfy the first element of the test to set aside default judgment. Simply pushing a matter off until it is too late is not a reasonable explanation. I have no information regarding Mr. Alaya's condition beyond his description of it as a "bad case of ADHD" that would allow me to conclude that mental health issues were a material factor in his failing to file a defence. In any case, there is no evidence that Mr. Yones could not have taken steps if Mr. Alaya's condition made it difficult or impossible for him to do so.

[27] I note that the default continued for a lengthy period. UBS Group AG's motion for default judgment was filed on December 13, 2021, six months after a statement of defence was due and Mr. Alaya's conversation with the Court registry. The default judgment motion was heard on January 11, 2022 and my judgment was issued on February 3, 2022. There is no evidence the defendants took any steps during the seven and a half months between the attempted filing of the statement of defence and the issuance of default judgment. While being self-represented presents challenges that must be acknowledged and reasonably accommodated where it does not prejudice other parties, it does not constitute a basis to entirely avoid or disregard the *Federal Courts Rules* including the obligation to respond to a lawsuit.

[28] I therefore conclude the defendants have not met the first part of the test to set aside default judgment.

(b) Prima facie *defence on the merits*

[29] The foregoing is sufficient to dismiss the motion to set aside the default judgment. However, I also conclude the defendants have failed to establish a *prima facie* defence to the trademark infringement claims of UBS Group AG as required by Rule 399. Although this is not a high standard, the material put forward by the defendants does not meet it.

[30] In his affidavit, Mr. Alaya states that when setting up their company, the defendants were unaware of UBS Group AG and did not try to imitate them or their logo. Rather, he states that Unified's logo comes from four interlocking paper clips, representing the integration of business services. He attaches a copy of the paper clip motif that inspired their logo as seen in the default judgment: *UBS Group AG* at para 12.

[31] I cannot accept that this evidence establishes a *prima facie* defence to the claims of UBS Group AG for two reasons. First, the defendants' intent in creating its mark is of little relevance to the substantive infringement questions raised on UBS Group AG's motion for default judgment: *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 90. As the Supreme Court of Canada held at paragraph 90 of *Mattel*:

> […] the relevant perspective of s. 6(2) of the *Trade-marks Act* is not that of the respondent but rather the perception of the relevant mythical consumer. *Mens rea* is of little relevance to the issue of confusion. It has been established since [1863] that a trade-mark is a proprietary right. If, as the appellant says, the respondent's

> activities have trespassed on the marketing territory fenced off by its BARBIE trade-marks, it would be no defence for the respondent that it did not intend to trespass.
>
> [Emphasis added; citation omitted.]

[32] It is worth noting that I did not conclude on the motion for default judgment that the defendants intentionally adopted a confusing trademark, nor did I rely on the issue of intention in concluding that Unified's trademark was confusing with the registered trademarks of UBS Group AG: *UBS Group AG* at paras 31–48. Rather, the infringement analysis was based on the factors set out in subsection 6(5) of the *Trademarks Act*.

[33] Second, the paper clip motif (which I described as the "hexagonal woven motif") and its similarities and differences to UBS Group AG's three-key motif was only relevant to the confusion analysis as it pertained to allegations of infringement of UBS Group AG's trademarks by the Unified UBS Design Mark. It was not relevant to the confusion analysis between the Unified UBS Word Marks (*i.e.*, Unified's trademark UBS GROUP and its trade names UBS Group and UBS Group Inc): *UBS Group AG* at paras 33–38. The evidence pertaining to the development of the design motif therefore cannot raise a *prima facie* defence on the merits to those aspects of the claim, which constitute independent grounds for an infringement finding.

[34] The foregoing statements about intention might also be relevant to the question of punitive damages. However, as I reached the conclusion that no punitive damages award should be made even in the absence of such evidence, I cannot conclude that the statements regarding intention raise a *prima facie* defence that would justify setting aside the default judgment: *UBS Group AG* at paras 55–59.

[35] The defendants' evidence does provide some limited information that might go to aspects of the confusion analysis, notably the nature of their services and business. In particular, Mr. Alaya states that Unified mostly targets their community of Syrian refugees who are trying to start businesses, and that it was relatively inactive during the pandemic. While these matters might be considered in the confusion analysis, I cannot conclude they are sufficiently relevant that they would constitute a *prima facie* defence to the claims of infringement.

[36] The relative inactivity of the business and its apparent financial health is also information that might be relevant to the assessment of damages for trademark infringement. As noted in my reasons for judgment, the damages award of $12,000 granted was made in the absence of evidence from the defendants and as a best estimate based on available evidence: *UBS Group AG* at paras 52–54. Evidence regarding the extent of Unified's business might therefore be relevant to a defence or partial defence to UBS Group AG's claim for damages. Again, however, the lack of information presented by the defendants on this motion about its business, including matters such as its revenues to date, means that the Court is in largely the same place regarding evidence of damages as it was in rendering default judgment. I cannot conclude the information presented in the defendants' motion raises a *prima facie* defence on the issue of damages.

[37] I therefore conclude that in addition to not adequately explaining the failure to file a statement of defence, the defendants have not established they have a *prima facie* defence on the merits of the claim, as required to obtain an order setting aside default judgment.

IV. Conclusion

[38] The defendants have not satisfied me that special circumstances exist to justify permitting Unified's officers to represent the company. Nor have they satisfied me that the requirements for setting aside a default judgment have been met. The defendants' motion will therefore be dismissed.

[39] I appreciate that, as underscored by Mr. Alaya, the default judgment may cause significant consequences to Unified, and indirectly to the personal defendants. However, these consequences ultimately arise from Unified's adoption of an infringing trademark, its failure to respond to demands pertaining to that trademark made by UBS Group AG, and its further failure to respond to a lawsuit that it apparently knew it had to respond to.

[40] UBS Group AG seeks its costs of the motion, in the lump sum of $3,000. It quite rightly argues it was required to respond to the motion, which was initiated by the defendants and was caused by the defendants' failure to participate in the proceeding from the outset. That said, in the circumstances, I do not consider this to be a case that would take the matter of costs outside the amounts provided for in the Tariff, which is what UBS Group AG's request for costs represents. Considering the nature and context of the motion and the factors set out in Rule 400 of the *Federal Courts Rules*, I conclude a costs award approximating that for the middle of Column III for a contested motion is appropriate, and award the plaintiff the sum of $750.00.

ORDER IN T-771-21

THIS COURT ORDERS that

1. The defendants' motion is dismissed.

2. The defendants shall pay the plaintiff the cost of the motion in the all-inclusive sum of $750.00, forthwith.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-771-21
STYLE OF CAUSE:	UBS GROUP AG v MOHAMAD HASSAN YONES ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCHAFFIE J.
DATED:	APRIL 6, 2022

WRITTEN REPRESENTATIONS BY:

R. Nelson Godfrey Sebastien Gardere Nicholas James	FOR THE PLAINTIFF
Abdulrhman Alaya	FOR THE DEFENDANTS

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