Federal Court  Cour fédérale

Date: 20100910

Docket: T-219-08

Citation: 2010 FC 905

Ottawa, Ontario, September 10, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Plaintiff

and

564163 ONTARIO LIMITED, c.o.b. as STUDIO 4 TAVERN, a.k.a. STUDIO 4

Defendant

T-221-08

AND BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Plaintiff

and

101511 ONTARIO LIMITED, c.o.b. as CLUB T-ZER'S

Defendant

REASONS FOR ORDER AND ORDER

[1] The defendants in these two actions seek to set aside default judgments granted by this Court on January 22, 2009. For the reasons that follow, I find that the defendants have not satisfied the applicable test so as to entitle them to have the judgments set aside. Consequently, the motions will be dismissed.

Background

[2] The Society of Composers, Authors and Music Publishers of Canada ("SOCAN") is a not-for-profit corporation which grants licences for the public performance of dramatico-musical and musical works. SOCAN commenced these actions in February of 2008 seeking the recovery of unpaid royalties for a period commencing in 2004 under Tariff 3C, or, alternatively, statutory damages pursuant to section 38.1(4) of the *Copyright Act* R.S.C. 1985, c. C-42.

[3] Action number T-219-08 was commenced against 564163 Ontario Limited, c.o.b. as Studio 4 Tavern, a.k.a. Studio 4. Action number T-221-08 was commenced against 1015111 Ontario Limited, c.o.b. as Club T-Zers. Both defendants carry on business as adult entertainment clubs, and Peter Barth is the President of both companies.

[4] These are not the first claims brought by SOCAN against the defendants. Actions for copyright infringement were brought against each of the corporate defendants and against Mr. Barth personally in the mid-1990's. These actions were based upon the defendants' alleged use of

SOCAN's musical works without the necessary licences. The actions were resolved when the defendants to those actions consented to judgments in favour of SOCAN.

[5] The statements of claim in the two current actions were served on the defendants on February 19, 2008. On March 19, 2008, the defendants endeavoured to file statements of defence with the Court. The Court refused to accept the documents for filing as they were signed by a paralegal and not by a solicitor representing the corporations, as is required by Rule 120 of the *Federal Courts Rules*.

[6] Counsel acting for the defendants made a further attempt to file statements of defence on December 23, 2008. On January 2, 2009, the case-management Prothonotary issued a direction advising counsel that the Statements of Defence were filed out of time, and that the defendants would either have to bring motions for an extension of time or obtain the consent of the plaintiff to the late filing. The case-management Prothonotary further directed that a case conference be convened at the earliest date convenient to both counsel.

[7] In the meantime, on December 18, 2008, the plaintiff had brought *ex parte* motions for default judgment in both actions. Default judgment was granted in each case on January 22, 2010.

[8] Motions to set aside these judgments were filed with the Court on July 12, 2010. SOCAN filed responding motion records on July 16, 2010. On July 27, 2010, the Court set these motions down to be heard on August 23, 2010. On Wednesday, August 18, 2010, the defendants served

supplementary motion records on the plaintiff including an additional affidavit. SOCAN objects to the admission of this additional material. Thus the first issue for the Court is to determine whether this document should be accepted.

Should the Court Allow the Filing of the Supplementary Motion Record?

[9] The parties agree that the test to be applied in these circumstances is that articulated by the Federal Court of Appeal in *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, [2002] F.C.J. No. 1782. That is, the Court may allow the filing of additional affidavit material if the following requirements are met:

> i) The evidence to be adduced will serve the interests of justice;
> ii) The evidence will assist the Court; and
> iii) The evidence will not cause substantial or serious prejudice to the other side: at para. 8.

[10] In addition, the party seeking leave to file additional material must show that the evidence sought to be adduced was not available prior to the cross-examination of the opponent's affidavits. Parties should not be allowed to split their case, and should instead be required to put their best foot forward at the first opportunity: *Atlantic Engraving* at para. 9.

[11] I note that *Atlantic Engraving* involved an application rather than a motion. However, in *Fibremann Inc. v. Rocky Mountain Spring (Icewater 02) Inc.*, [2005] F.C.J. No. 1238, the Court held that the same test should be applied on motions: see para. 12.

[12] Moreover, in *Pfizer Canada Inc. v. Canada (Minister of Health*), [2006] F.C.J. No. 1243, the Court held that even if cross-examinations have not taken place, a party seeking to adduce additional evidence may still need to show that its evidence was not available at some other earlier date (such as at the time of filing its first affidavit evidence): at para. 20.

[13] In this case, the supplementary evidence sought to be adduced is an affidavit from a legal assistant in the office of counsel for the defendants. Attached as exhibits to this affidavit are monthly statements or invoices for royalty charges issued by SOCAN to "Arzac Tavern Limited - Jason's". According to the affidavit, "Jason's" is "a comparably sized establishment to that of the defendant[s] located in the City of Windsor".

[14] In my view, the evidence sought to be adduced will serve neither the interests of justice nor will it assist the Court. The invoices in question relate to a different establishment which, on the face of the documents, is subject to a different Tariff (Tariff 3B in the case of Jason's, rather than Tariff 3C in the case of the defendants). As such, the documents have little or no probative value in this case.

[15] Moreover, the defendants have not provided any evidence explaining why this information could not have been obtained earlier, with the exercise of reasonable diligence. I note that Mr. Barth's affidavits in support of the motions were sworn in February of 2010, although the motions to set aside the default judgments were not brought until July 12, 2010. The supplementary affidavits were not served until August 18, 2010.

[16] As a result, I am not prepared to exercise my discretion to allow for the filing of the additional affidavit material.

[17] Before leaving this issue, I would also note that nothing in the supplementary affidavits would have changed the outcome of the motions to set aside the default judgments. This is because the affidavits provide neither an explanation for the defendants' failure to file a statement of defence nor a reason why defendants have not brought these motions within a reasonable time.

Should the Default Judgments be set Aside?

[18] Rule 399(1) of the *Federal Courts Rules* provides that, on motion, the Court may set aside an order that was made *ex parte* if the party against whom the order was made discloses a *prima facie* case why the order should not have been made.

[19] The parties are also in agreement as to the test to be applied on a motion to set aside a default judgment. As stated in cases such as *SEI Industries Ltd. v. Terratank Environmental Group*, [2006] F.C.J. No. 271, *Taylor Made Golf Co. Inc. et al v. 1110314 Ontario Inc.* (1998), 148 F.T.R. 212 and *Brilliant Trading Inc. v. Tung Wai Wong and Zhen Hing Enterprise Ltd*., [2005] F.C.J. No. 706, 2005 FC 571, the following issues must be considered:

> 1. Does the defendant have a reasonable explanation for its failure to file a statement of defence?
> 2. Does the defendant have a *prima facie* defence on the merits to SOCAN's claim? and
> 3. Has the defendant brought this motion within a reasonable time?

[20] The three elements of the test are conjunctive. That is, the defendants must satisfy the Court that all three parts of the test have been met: see *Contour Optik Inc. v. E'lite Optik, Inc*., [2001] F.C.J. No. 1952 at para. 4.

[21] Dealing with the first element of the test, as was noted earlier, the statements of claim in the two actions were served on the defendants on February 19, 2008. The defendants endeavoured to file statements of defence with the Court within the time period contemplated by the *Federal Courts Rules*, but the documents were not accepted for filing as they were signed by a paralegal. Mr. Barth acknowledges that this occurred in his affidavit, and does not suggest that he was not made aware of this in March of 2008.

[22] On April 15, 2008, counsel for SOCAN wrote to Mr. Barth on behalf of the defendants asking him to inform SOCAN when the defendants had retained counsel, and when the defendants anticipated being in a position to deliver statements of defence. Mr. Barth does not deny receiving this letter.

[23] Correspondence to SOCAN from the paralegal dated May 5, 2008 advises that Mr. Barth was out of the country, and would be retaining counsel on his return to Canada on May 25, 2008. The correspondence makes it clear that the paralegal was not retained in these matters, and was writing to counsel for SOCAN as a courtesy to Mr. Barth.

[24] On June 30, 2008, counsel for SOCAN wrote to Mr. Barth in his capacity as President of the two defendants, reminding him that the companies were in default of filing statements of defence and cautioning him that SOCAN may take default proceedings against the companies. Once again, Mr. Barth has not denied receiving this letter in his affidavit.

[25] A further letter was received by counsel for SOCAN from the paralegal later that same day. The paralegal reiterates that he was not retained by the defendants, and states that Mr. Barth was again out of the country, and would be returning on July 21, 2008.

[26] It appears from the record that the defendants did not retain counsel until December of 2008, the same month in which SOCAN brought its motions for default judgment. While it appears that problems were subsequently encountered with the defendants' counsel, who was very ill at the time, these problems do not explain or excuse the defendants' inaction between March and December of 2008.

[27] The only explanation provided by the defendants for their failure to file statements of defence at any time between March of 2008 and December of 2008 is the statement in Mr. Barth's affidavit that "The defendant[s'] agent … thereafter repeatedly communicated with the Plaintiff's solicitor between April and October, 2008 in an effort to reach an amicable settlement without need for further litigation …".

[28] The affidavit of Sakina Virjee filed by SOCAN in opposition to the motion denies that any such settlement discussions took place.

[29] I prefer the evidence of Ms. Virjee to that of Mr. Barth, as it is more consistent with the contemporaneous documentary record. It is clear from the correspondence to and from SOCAN's counsel that Mr. Barth was aware of the fact that the defendants' statements of defence had not been accepted for filing by the Court, and that the companies needed to retain legal counsel in this regard. It is equally clear that the paralegal was not retained to represent the defendants in this matter. Moreover, SOCAN was pressing the defendants to file their statements of defence.

[30] Tellingly, while Mr. Barth asserts that settlement discussions were ongoing between the defendants' paralegal and SOCAN between April and October of 2008, he has not produced a single letter or email to support this position. Even more importantly, the defendants have not provided an affidavit from the paralegal to this effect.

[31] Consequently, I find that the defendants in these actions have not provided a reasonable explanation for their failure to file statements of defence in a timely manner.

[32] I am also not persuaded that the defendants brought these motions within a reasonable time. It is clear from the documentary record that the defendants were made aware of the fact that default judgments had been obtained against them by October 7, 2009, at the latest, in the case of Studio 4, and by November 24, 2009 in the case of Club T-Zers.

[33] By November 24, 2009, the defendants had retained counsel and there were some settlement discussions between the parties. A settlement proposal was provided to the defendants by SOCAN on December 3, 2009. Despite repeated requests for a response, the defendants never provided a substantive response to this proposal.

[34] Mr. Barth deposes that upon it becoming clear that settlement was not possible, which he says occurred in January of 2010, the defendants took immediate steps to retain their current counsel to bring motions to have the default judgments set aside.

[35] By February of 2010, the defendants had retained litigation counsel to bring these motions. As was noted earlier, Mr. Barth's supporting affidavits were sworn on February 27, 2010. There is no evidence before me as to why the motions were not brought on for hearing at that time. Indeed, the motions to set aside the default judgment were not filed with the Court until July 12, 2010. Clearly, the defendants have not brought these motions within a reasonable time.

[36] Having failed to satisfy either the first or third elements of the test, the defendants' motions are dismissed, with costs of both motions fixed in the total amount of $1,500. A copy of these reasons should be placed on each Court file.

ORDER

THIS COURT ORDERS that the motions are dismissed, with costs fixed in the amount of $1,500.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-219-08 and T-221-08
STYLE OF CAUSE:	SOCAN v. 564163 ONTARIO LIMITED et al; and, SOCAN v. 101511 ONTARIO LIMITED et al
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 23, 2010
REASONS FOR ORDER AND ORDER:	Mactavish J.
DATED:	September 10, 2010

APPEARANCES:

Daniel B. Pollack	FOR THE PLAINTIFF
Gregory Wrigglesworth	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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KIRWIN PARTNERS LLP Barristers & Solicitors Toronto, Ontario	FOR THE DEFENDANT