

COURT OF APPEAL FOR ONTARIO

CITATION: Mountain View Farms Ltd. v. McQueen, 2014 ONCA 194

DATE: 20140314

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Gillese, Rouleau and Tulloch JJ.A.

BETWEEN

Mountain View Farms Ltd.

Plaintiff (Appellant)

and

George Donald McQueen

Defendant (Respondent)

M.A. Cummings, for the appellant

V.L. Vandergust, for the respondent

Heard: February 13, 2014

On appeal from the judgment of Justice Alfred J. Stong of the Superior Court of Justice, dated March 7, 2013, with reasons reported at 2013 ONSC 1440.

Gillese J.A.:

[1] This appeal concerns the scope of a motion judge's power to vary a default judgment under rule 19.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

OVERVIEW

[2] Mountain View Farms Ltd. (the “appellant”) provided crop services to George Donald McQueen (the “respondent”) for a number of years. When the respondent failed to fully pay for the services, the appellant had him sign an invoice to acknowledge the outstanding amount of just under \$50,000. Pre-printed words on the bottom of the invoice stated that interest would be charged on overdue accounts at the rate of 24% per year.

[3] The appellant later sued the respondent for the unpaid amount plus interest at an annual rate of 24%. The respondent did not respond to the appellant’s suit and the appellant obtained default judgment against him.

[4] Six years later, the respondent moved to have the default judgment set aside. By that time, interest calculated at 24% per annum had accumulated to over \$75,000. The respondent acknowledged that he owed the principal amount but maintained that he had never agreed to pay the appellant interest at the rate of 24% per year.

[5] The appellant opposed the motion on a number of bases, including that the invoice with the respondent’s signature on it was an agreement to pay interest at the annual rate of 24%.

[6] The motion judge was unable to find, on the evidence before him, that the respondent had agreed to pay the 24% interest rate. Thus, he concluded, the respondent had an arguable defence on the merits of the applicable interest rate.

[7] The motion judge did not set aside the default judgment, however. Instead, by order dated March 7, 2013 (the “Order”), acting pursuant to rule 19.08, the motion judge varied the default judgment by substituting an annual interest rate of 5%.

[8] The appellant submits that the motion judge erred in a number of ways and asks this court to set aside the Order.

[9] As I explain below, in my view, the motion judge erred. Consequently, I would allow the appeal.

FACTS

[10] The respondent is a farmer in his late eighties. For two decades, he traded equipment and services with his neighbours, Roger and Bill McLeod. During the period relevant to these proceedings, the McLeods provided crop services to the respondent through their corporation, the appellant.

[11] In February 2002, the appellant issued an invoice to the respondent for \$28,273.68. The amounts shown on the invoice were for baling hay in 1999, 2000 and 2001. On the invoice, below the pre-printed heading “Work Performed”, the appellant had handwritten in the amounts owing and the years in

which the services had been performed. Although the services had been provided over a three-year period, the invoice showed no interest charges. However, the following pre-printed interest provision was in the bottom left hand corner of the invoice:

Please Pay By Invoice
No statements issued
Terms: Net 30 days
2% Service charge per month (24% per annum)
will be charged on overdue accounts.

[12] The respondent paid \$10,000 of the amount claimed in this invoice.

[13] In December 2003, the appellant sent the respondent an invoice for \$39,685.52. This amount reflected the outstanding balance from the prior invoice (for the period from 1999 to 2001) and new charges for hay baling, snow blowing, and swathings performed after 2001. Again, the invoice showed no charges for interest. And, again, the pre-printed interest provision was on this invoice.

[14] The McLeods acknowledged that they neither asked nor expected the respondent to pay interest on outstanding amounts. They testified that they trusted the respondent to pay what he owed.

[15] The McLeods did not, however, trust the respondent's son, who was taking an ever greater role in managing the respondent's affairs as the respondent's age advanced. They did not want to deal with the respondent's son with respect to the account. They wanted to close the account as soon as possible.

[16] In June 2005, the McLeods decided to take a different approach. The appellant prepared another invoice for services rendered to the respondent. The total amount claimed was \$49,862.82 (the "Invoice"). Like the previous invoices, the Invoice did not claim an amount for interest but the pre-printed interest provision was on it.

[17] Roger McLeod walked up to the respondent, who was sitting in his truck, and handed him the Invoice. He asked the respondent to sign a copy of the Invoice, explaining that "we want a bill signed so if something happens [to you] we know we have a bill signed because right now it's just between you and us that the work was done." The respondent replied, "Yeah, I'll sign the damn thing."

[18] Roger McLeod says he asked the respondent to sign "down by the [pre-printed interest provision]". However, the respondent actually signed below the amounts shown as owing, and not next to the pre-printed interest provision.

[19] The respondent has a Grade 3 education. His ability to read and write is poor.

[20] The Invoice was not paid and later in the summer of 2005, the appellant issued and served a statement of claim for the amount of the Invoice plus interest at the rate of 24% per annum.

[21] The respondent did not file a statement of defence or notice of intent to defend. He was noted in default and default judgment was signed against him in August 2005 for the principal amount plus interest at the rate of 24% per annum.

[22] In November 2005, the appellant registered a writ of seizure and sale against lands the respondent owned. The writ was to expire six years later, in November 2011.

[23] The appellant took no further steps to enforce the default judgment.

[24] In 2010, the respondent transferred three of his four properties to his son. All three properties were subject to the writ of seizure and sale. The transfers were each stamped as being subject to the writ.

[25] In May 2011, the respondent's son wanted to refinance his properties. To do so, because he and his father have the same name, he needed to confirm that he was not the same person as his father.

[26] In November 2011, the appellant renewed the writ.

[27] In April 2012, the respondent brought a motion seeking, among other things, to have the default judgment set aside, leave to file a Statement of Defence, and "such further relief" as the court deemed just.

[28] By the time the motion was argued, the respondent had accepted that he owed the principal amount set out in the default judgment and, in fact, had paid it

plus assessed costs. He continued to maintain that he had never agreed to pay interest at the rate of 24% per year.

[29] The appellant opposed the motion on a number of bases. It contended that it was the respondent's son and not the respondent who had brought the motion. As a non-party, the respondent's son lacked standing to bring the motion. Moreover, it submitted that the respondent failed to meet the test for setting aside a default judgment and that he came to the court without clean hands. It also argued that the respondent's affidavit evidence should be struck for lack of reliability.

THE DECISION BELOW

[30] The motion judge set out the three-part test for determining whether to set aside the default judgment. (The test is set out later in these reasons.)

[31] He found that there had been "inexplicable delay" in the respondent's bringing of the motion to set aside the default judgment. The respondent must have been aware of the writ (and, therefore, the default judgment) no later than June 2010, when he transferred his properties to his son. No reasonable explanation had been given for the delay between then and when he brought the motion in 2012.

[32] The motion judge noted that while it had been argued that the respondent was growing more forgetful over time owing to his advanced age, no evidence of

medical incapacity had been presented on the motion. He added that the respondent was still driving in 2010 and had managed to transfer his properties to his son that year without requiring a power of attorney.

[33] The motion judge acknowledged that the appellant would suffer prejudice from the respondent's delay in seeking to set aside the default judgment. The prejudice consisted of the following: the process server who served the statement of claim on the respondent had died; many of the original invoices had been destroyed; the respondent's mental competence was now in issue; and, at least three of the respondent's properties had been conveyed since the default judgment was obtained. But, in the motion judge's view, the prejudice could be addressed in costs.

[34] The motion judge then considered whether the respondent had an arguable defence with respect to the matter of interest. He noted that there was no evidence of any agreement to pay interest at 24% per year except for the respondent's signature on the Invoice – evidence that, in his view, was not determinative. He also noted that Bill McLeod had testified that he, his brother and the appellant had not charged the respondent interest in their dealings with him prior to the lawsuit.

[35] The motion judge found that the respondent had an arguable defence on the merits of the claimed interest rate, saying that he was not satisfied that the

respondent had even impliedly agreed to pay interest at the rate of 24% per annum.

[36] The motion judge then explained that he would impose a different annual interest rate, saying:

In these circumstances, it would be inappropriate to have interest accrue at the rate claimed by the [appellant]. Certainly however, reasonable parties to a commercial transaction would expect that monies left unpaid would attract interest at some rate. In the absence of any evidence before me to establish the credit costs of the [appellant] or the rate of return it might reasonably have expected for investment of the amount of the unpaid accounts, interest on the unpaid accounts, including prejudgment interest, should properly be charged at the [postjudgment interest] rate prescribed by the *Courts of Justice Act*, plus the 1% submitted by concession of the [respondent], from August 25, 2005.

[37] He ordered that the default judgment be varied only in respect of the rate of interest, with an annual rate of 5% being substituted for 24%.

THE ISSUES

[38] The appellant submits that the motion judge erred in:

1. allowing the respondent's son to bring the motion, when he had no standing;
2. admitting the respondent's affidavit evidence;
3. his application of the test for setting aside a default judgment; and
4. varying the interest rate in the default judgment, pursuant to rule 19.08.

ANALYSIS

1. Standing to bring the motion

[39] The appellant submits that the motion judge should not have heard the motion. It says that the motion to set aside the default judgment was brought and argued by the respondent's son and because the respondent's son was not a party to the default judgment, he had no standing to contest the default judgment.

[40] Mr. Vandergust is the lawyer who brought and argued the motion. He told the motion judge that he represented the respondent. Furthermore, the materials filed in support of the motion describe Mr. Vandergust as solicitor for the respondent.

[41] Mr. Vandergust is also the respondent's son's lawyer.

[42] While the motion judge did not expressly deal with the issue of standing, it is implicit that he accepted that the respondent brought the motion and that Mr. Vandergust was acting on behalf of the respondent. This is evident from the motion judge's reasons in which he lists Mr. Vandergust as counsel for the respondent.

[43] I see no basis for interfering with the motion judge's implicit determination that it was the respondent who brought the motion, and not the respondent's son. Accordingly, I would dismiss this ground of appeal.

2. The respondent's affidavit evidence

[44] The appellant submits that the motion judge erred in admitting into evidence an affidavit signed by the respondent. It submits that the affidavit was not reliable because on cross-examination the respondent could not recall having signed it and because his memory is unreliable.

[45] I see no error in the motion judge's admission of the affidavit. The problems identified by the appellant go to weight rather than admissibility. Furthermore, the motion judge's reasons show that he gave the affidavit little to no weight. He found that the respondent had an arguable defence on the question of the interest rate based on other evidence, particularly that of Bill McLeod who testified that the appellant had a history of not charging the respondent interest on overdue accounts.

[46] I would dismiss this ground of appeal.

3. Application of the test for setting aside default judgment

[47] The court's ultimate task on a motion to set aside a default judgment is to determine whether the interests of justice favour granting the order. The approach to be taken to this determination has been considered numerous times by this court. The following draws heavily on the summary of the principles in those cases by Perell J. in *Watkins v. Sosnowski*, 2012 ONSC 3836, at paras. 19-20 and 23-24.

[48] The court must consider the following three factors:

- (a) whether the motion was brought promptly after the defendant learned of the default judgment;
- (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules; and
- (c) whether the facts establish that the defendant has an arguable defence on the merits.

[49] To this list, I would add the following two factors the court should have regard to, as set out in *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.* 2007 ONCA 333, 87 O.R. (3d) 479 (C.A.), at para. 2:

- (d) 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
- (e) the effect of any order the court might make on the overall integrity of the administration of justice.

[50] 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.

[51] For instance, the presence of an arguable defence on the merits may justify the court exercising its discretion to set aside the default judgment, even if the other factors are unsatisfied in whole or in part. 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.

[52] The motion judge considered the relevant factors. In respect of the first and second factors, he found “inexplicable delay” on the part of the respondent. He also found that the delay had caused prejudice to the appellant.

[53] However, the motion judge was satisfied that the respondent had raised an arguable defence in respect of the interest rate that applied to the principal debt. There was evidence before him, including evidence led by the appellant, which called into question whether the respondent had agreed to pay interest at the rate of 24% per annum.

[54] Having found that there was an arguable defence, it was open to the motion judge to find that the interests of justice favoured setting aside the default judgment. It is not, as the appellant would have it, that the motion judge failed to give adequate weight to the unexplained delay and prejudice to the appellant. Rather, in the exercise of his discretion, after duly considering the factors, the motion judge concluded that the respondent’s arguable defence on the matter of the applicable interest rate weighed most heavily and caused the interests of justice to favour setting aside.

[55] A motion judge’s decision to set aside a default judgment is a discretionary one that will attract deference on appeal. It should not be interfered with absent an error in law or principle, a palpable and overriding error of fact, or unless the decision is so clearly wrong as to amount to an injustice: *HSBC Securities*

(Canada) Inc. v. Firestar Capital Management Corporation, 2008 ONCA 894, 245 O.A.C. 47, at para. 22.

[56] I see no such error and the decision is not clearly wrong. Accordingly, I would dismiss this ground of appeal.

4. Rule 19.08 – setting aside or varying a default judgment

[57] Rule 19.08 gives the court the power to set aside or vary a default judgment “on such terms as are just”. It reads as follows:

19.08 (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

[58] The appellant says that the motion judge erred when he used his power under rule 19.08 to substitute an annual interest rate of 5% for the 24% rate in the default judgment.

[59] The respondent contends that the Order was a valid exercise of the power under rule 19.08 to vary a default judgment “on such terms as are just”. He says that the parties were aware that the motion would focus on the issue of the interest rate, and that the motion judge had sufficient evidence before him to decide that issue on the merits. A rule 19.08 motion, in his submission, is akin to

a summary judgment motion, where the motion judge is entitled to reach a fair and just adjudication of substantive issues in the interests of minimizing unnecessary process.

[60] I would accept the appellant's submission on this issue.

[61] In my view, the motion judge erred in making a final determination of the merits of the respondent's defence. The respondent's motion sought to set aside the default judgment. Therefore, the court's task was to determine whether the interests of justice favoured setting aside the default judgment. As we have seen, one factor in that determination is whether there is an *arguable* defence on the merits. The materials filed on the motion did not seek a determination of whether, if there were an arguable defence, that defence should succeed.

[62] Yet, that is precisely what the motion judge did in the present case. The effect of the Order is to find in favour of the respondent, that is, to find that the respondent is not bound to pay interest at the annual rate of 24%. Indeed, the motion judge went further and established the rate of interest that was payable, despite his own observation that he lacked the requisite evidence.

[63] To move from finding an arguable defence to a final determination is not, as the respondent contends, a just result. A just result presupposes that both sides had the opportunity to be fairly heard on the two issues of (1) whether the respondent was bound to pay interest at an annual rate of 24%; and (2) if not,

what the appropriate rate of interest was. That did not occur in the motion. This is not surprising, given that the motion was to set aside a default judgment. Although both parties knew that the interest rate issue was to be a central focus on the motion, the appellant was responding to a motion in which the question was whether the respondent had an arguable defence in respect of the 24% rate of interest contained in the default judgment. The appellant was not responding to a motion for summary judgment on the matter of the applicable interest rate.

[64] In conclusion, the appropriate course was to set aside the default judgment in part, and order that the matter proceed on the interest issue.

DISPOSITION

[65] Accordingly, I would allow the appeal, set aside para. 1 of the Order (which varies the rate of interest in the default judgment), order that the 24% interest provision in the default judgment be set aside, permit the respondent to file a defence, and allow the matter to proceed on the rate of interest.

[66] I would order costs of the appeal in favour of the appellant fixed at \$12,000, all inclusive. In light of the result on appeal, costs of the motion must be revisited. If the parties are unable to agree on that matter, they shall return to the motion judge to have those costs decided.

Released: March 14, 2014 ("E.E.G.")

"E.E. Gillese J.A."

"I agree. Paul Rouleau J.A."

"I agree. M. Tulloch J.A."

