Architecture Unfolded Inc. v. Fortress Charlotte 2014 Inc.

2019 ONSC 6885, 2019 CarswellOnt 19621 | Ontario Superior Court of Justice (Divisional Court) | Ontario | November 27, 2019

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2019 ONSC 6885
Ontario Superior Court of Justice (Divisional Court)

Architecture Unfolded Inc. v. Fortress Charlotte 2014 Inc.

2019 CarswellOnt 19621, 2019 ONSC 6885

ARCHITECTURE UNFOLDED INC. (Plaintiff / Respondent) and FORTRESS CHARLOTTE 2014 INC.,VINCE PETROZZA, JAWAD RATHORE, JESSICA ULINSKI and JORGE CASTILLO (Defendants / Appellants)

F.L. Myers J.

Heard: November 27, 2019
Judgment: November 27, 2019
Docket: Toronto 402/19

Counsel: Frank Feldman, for Plaintiff / Respondent
Rocco A. Ruso, for Defendants / Appellants

Subject: Civil Practice and Procedure; Contracts
Headnote
Civil practice and procedure
Construction law

F.L. Myers J. **(Orally):**

1 This is an appeal from the final order of Master Josefo dated June 19, 2019 refusing to set aside the plaintiff's noting in default of the defendants.

2 The plaintiff claims $43,000 for the price of architecture services provided to the corporate defendant in its failed condominium development project.

3 The personal defendants are claimed to be liable under the trust provisions of the *Construction Act* among other causes of action.

4 There are two Court of Appeal decisions that govern the situation that was before the Master. In *Intact Insurance Co. v. Kisel*, 2015 ONCA 205, the Court said the following at paragraph 13:

> 13. When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Bardmore*, at p. 285. It should particularly consider

> such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. See *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444, 225 O.A.C. 36, at para. 3; *Flintoff v. von Anhalt*, 2010 ONCA 786, [2010] O.J. No. 4963, at para. 7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see e.g. *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005] O.J. No. 4327, at para. 8. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits: *Bardmore*, at p. 285.

5 I take from this decision, among other things, that the assessment of the merits is generally not a relevant consideration on a motion to set aside the noting in default of defendants.

6 The next case of importance on this point is *Nobosoft Corporation v. No Borders Inc.*, 2007 ONCA 444. In that case, the defendant made a deliberate decision not to defend because it feared attorning to the jurisdiction. The Court of Appeal ruled as follows at paragraphs 6 and 7:

> (6) There is no evidence here that No Borders sought to flout or abuse the *Rules of Civil Procedure*. It moved relatively promptly to set aside the noting in default. At the very least, its delay in seeking relief was not inordinate. Moreover, there is nothing on this record establishing prejudice to the respondent if the requested relief was granted.
>
> (7) We agree with the observations of Molloy J. of the Superior Court of Justice at para. 2 of *McNeill Electronics Ltd. v. American Sensors Electronics Inc.* (1996), 5 C.P.C. (4th) 266 (Ont. Gen. Div.), reversed on other grounds (1998), 108 O.A.C. 257 (C.A.):
>
> > Motions to extend the time for delivery of pleadings and to relieve against defaults are frequently made and are typically granted on an almost routine basis. Usually opposing counsel will consent to such relief as a matter of professional courtesy. Where there is opposition to a motion of this kind, it is usually related to additional terms which are sought as a condition to the indulgence being granted or to issues of costs . . . It is not in the interests of justice to strike pleadings or grant judgments based solely on technical defaults. Rather, the Court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties.

7 There is no question that the defendants delayed in responding in this case. The solicitor's affidavit purporting to explain the delay was given no weight by the Master. Rightly so.

8 The Master made the following findings of fact. At page 2 he found, "[t]hat none of the defendants, out of five of them, thought to defend, or saw fit to perhaps discuss this issue with their old or new lawyer, stretches credibility."

9 On page 3 of his decision, he found as follows:

> At the end of this analysis, I am left with an impression that the defendants just ignored this matter, for a fairly lengthy period of time, before only waking up when plaintiff's counsel pursued the matter.

10 I am required to give deference to those findings of fact and I agree with them.

11 The nub of the Master's decision however comes in the second last paragraph as follows:

> While a close call, in this case I find on the equities that the default should not be set aside. The defendants, having chosen to act in a certain fashion, must now accept the consequences which flow from their actions and choices. The motion is dismissed.

12 The Master made a discretionary decision. Discretionary decisions are entitled to deference on an appeal unless they are made based on a wrong principle, on insufficient weight being given to relevant factors, or if they are clearly wrong (see: *Friends of Oldman River Society v. Canada (Minister of Transportation)*, 1992 CanLII 110).

13 The Master did not consider the question of prejudice. The plaintiff points to delay if the noting in default is set aside. In my view, delay caused by the proof of the plaintiff's claim does not amount to prejudice *per se*. In addition, in this case, I agree with Sanfilippo J. who expressed concern with the plaintiff's ability to obtain default judgment even on deemed admissions under Rule 19.06 so that he ordered the defendants served with the default judgment motion.

14 A quick judgment is by no means assured to the plaintiff even if the default were to remain. I note that the corporate defendant does not appear to have much of a defence, if any. I expect that it is not the real target of the plaintiff's claim however in light of its failed development project and the multitude of lawsuits already outstanding against it.

15 The claims against the individuals will need to be proven. In addition, any prejudice by delay can be ameliorated as best as possible by a tight schedule which I intend to impose.

16 I agree with Molloy J., that consent should be given to set aside technical defaults. Litigation today is required to be efficient, economical, speedy, and proportionate in order to ensure a fair resolution on the merits. This $40,000 case should be at discovery or pre-trial by now; not on an appeal in the Divisional Court based on the use of technical rules to seek a leg up in proof of a very modest case.

17 In my respectful view, the Master erred in principle in exercising his discretion solely based on delay, even if deliberate, without considering: the speed of the action once the defendants were informed of Sanfilippo J.'s decision, the relative prejudice — none being suffered by the plaintiff

— and, most particularly, the policy espoused by Molloy J. and adopted by the Court of Appeal. I note that the Master referred to this policy early in his reasons. However, in the final paragraph in which he provided the basis for the exercise of his discretion and the balancing he performed, he failed to consider it or the issue of prejudice in arriving at his ultimate decision. Accordingly, the order cannot stand.

18 As a result, I order that the appeal is allowed. The decision of Master Josefo is set aside on the following conditions:

> (1) The plaintiff will deliver an amended statement of claim by December 31, 2019 adding any claims it wishes as result of learning of the sale of the property by the corporate defendant;
>
> (2) The defendants shall deliver their statements of defence by January 31, 2020;
>
> (3) The parties shall exchange sworn affidavits of documents by February 15, 2020 including, providing each other with copies of all documents referred to in Schedule "A" to the affidavit of documents on the other side's counsel undertaking to pay reasonable photcopying expenses;
>
> (4) Discoveries shall be held by April 15, 2020 and are limited two hours under the version of Rule 76 applicable to this case;
>
> (5) The parties' counsel shall hold the discussion required under Rule 76.08 by May 1, 2020;
>
> (6) The plaintiff shall set down the action by July 31, 2020.

19 The defendants were successful on the appeal. However, the order that they have obtained is an indulgence to them that arose from their own failure to obey the *Rules*. In addition, although the plaintiff has made a claim for costs as a result of the defendants' failure to comply with the *Rules*, its own failure to consent reasonably to setting aside the noting in default is a matter that in my view is relevant to costs as well. Accordingly, there will be no costs in this Court or below.

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