

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: McCabe, Filkin & Associates LLP v. Cynthia Ann Elder

BEFORE: Fragomeni J.

COUNSEL: Todd C. Hein, for the Plaintiff

Thomas J. Hanrahan, for the Defendant

ENDORSEMENT

[1] The plaintiff proceeded with a Summary Judgment motion and on consent that motion has been adjourned to be argued on a fixed date in April 2004. The issue I am asked to deal with at this hearing is whether the noting of default by the plaintiff should be set aside.

Facts

[2] The plaintiff has a liquidated claim against the defendant. The plaintiff provided legal services to the defendant in relation to a matrimonial matter and a General Security Agreement. The total accounts rendered to the defendant total \$29,389.70 of which \$28,845.90 remains outstanding. The defendant had provided to the plaintiff an undated cheque for \$12,000 which was to be held until

she had funds for it to be cashed. The cheque was never cashed as funds were not available.

[3] A Statement of Claim was issued on July 28, 2003. The Statement of Claim was served on the defendant on August 26, 2003. The defendant was noted in default on September 24, 2003. On October 21, 2003 the defendant attempted to serve and file a Notice of Intent to Defend. On October 24, 2003 the defendant received notice from the Superior Court of Justice in Brampton that the defendant had been noted in default as a result of the failure to file a defence within the time period prescribed by Rule 76.

Position of the Parties

[4] The Affidavit of Anne Wenchel, legal secretary at the offices of Zarek Taylor Grossman Hanrahan, solicitors for the defendant states at paragraph 4:

I do verily believe that the defendant's failure to file the above defence within the prescribed time period was the result of administrative oversight.

[5] The defendant argues that there is no prejudice to the plaintiff if the notice of default is set aside. The defendant argues that the delay is not lengthy. The defendant submits that the amount of the claim is not insignificant.

[6] The plaintiff argues that this action relates to a liquidated claim and it is not a complex matter. The reason put forward for not filing a statement of defence is

wholly inadequate. The plaintiff further argues that there is no evidence that the defence has merit.

Analysis

[7] The defendant filed in support of her position the case of *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.* (C.A.) 3 O.R. (3d) 278. At page 6 of the decision the Court stated:

However, I consider that it would only be in extreme situations that a trial judge would exercise his discretion to require an affidavit as to the merits of the defence on a motion to set aside a noting in default

[8] I am not persuaded by the plaintiff that this is an extreme situation. The merits of the defence can be properly addressed at the summary judgment motion scheduled to be heard in April.

[9] The length of the delay in this matter is not inordinate. That point was acknowledged by Mr. Hein on behalf of the plaintiff. The filing of the Notice of Intent to Defend demonstrated an intention to defend this matter.

[10] The next question to be considered is what impact does the explanation for the delay have on this issue. Again, at page 6 of the *Metropolitan* case, the Court stated as follows:

I am aware of no cases, and none were cited to us, where there was a refusal to set aside a noting in default or a noting of pleadings closed on the sole basis that the court

considered the reason given by the defendant for tardiness in pleading to be an inadequate one.

[11] I find that the reason given by the defendant of an “administrative oversight” is inadequate and could have been expanded to provide further particulars. However, I am not prepared on that basis to deny the motion. As I indicated, the delay was not inordinate. I also find that there is a significant amount of money involved and the defendant had demonstrated an intention to defend the action.

[12] In all the circumstances I am prepared to set aside the noting of default. I am not prepared to impose any terms.

ORDER

1. The motion for an order setting aside the noting of default is hereby granted.
2. The parties shall file written submissions on costs within 10 days (3 pages each).

Fragomeni J.

DATE: February 19, 2004

COURT FILE NO.: 03-BN-7626SR
DATE: 20040219

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