COURT OF APPEAL FOR ONTARIO

CITATION: Alderton v. Haylor Properties Niagara Inc., 2018 ONCA 483
DATE: 20180524
DOCKET: C64725

Pepall, van Rensburg and Paciocco JJ.A.

BETWEEN

David Alderton

Plaintiff/Respondent

and

Haylor Properties Niagara Inc. and Andrea Wood

Defendants/Appellants

Aaron Rousseau, for the appellants

Barry W. Adams, for the respondent

Heard and released orally: May 22, 2018

On appeal from the order of Justice J.A. Ramsay of the Superior Court of Justice, dated November 23, 2017.

REASONS FOR DECISION

[1] This is an appeal of an order dismissing a motion to set aside a default judgment.

[2] The respondent sued the appellants Haylor Properties Niagara Ltd. and its principal Andrea Wood for wrongful dismissal in an action commenced in 2011. A

trial record was filed in November 2013 and, to accommodate the availability of the appellants' counsel, a trial date was fixed for the sittings commencing September 7, 2015. In the interim, the appellants' counsel was removed from the record, which prompted an adjournment of the trial. This pattern continued, with trial dates being fixed and adjournments sought so the appellants could retain new counsel. The trial was marked peremptory for a date in 2016, but adjourned on consent on condition that Ms. Wood attend for examination for discovery. Ultimately, the trial was marked peremptory for the trial sittings commencing November 7, 2016.

[3] In September 2016, the respondent brought a motion to strike the appellants' statement of defence after the appellants failed to deliver a notice of intent to act in person, and to appoint counsel for the corporate defendant. The motion was adjourned at the appellants' request to October 5, 2016, after the appellants asserted they had new counsel. However no one attended at the return date of the motion and the statement of defence and counterclaim was struck.

[4] The appellants were noted in default and the matter proceeded to an uncontested trial. Sweeny J. granted judgment and costs against the corporate appellant only, dismissing the action against Ms. Wood without costs.

[5] The appellants' motion under r. 19.08 to set aside the default judgment was dismissed by the motion judge, Ramsay J.

[6] The motion judge referred to the factors set out in *Mountainview Farms Ltd. v. McQueen*, 2014 ONCA 194, as applicable to a motion to set aside a default judgment. He accepted that the motion had been brought promptly and that the appellants had an arguable defence. He concluded however that the circumstances leading to the default had not been adequately explained, and that, if the order were made, the respondent would be prejudiced and the integrity of the system of justice would be impaired.

[7] The appellants say the motion judge erred because (1) he failed to consider that they had a plausible explanation for their failure to attend at the uncontested trial; and (2) he made palpable and overriding errors of fact in concluding that the appellants had been intentionally delaying the matter.

[8] We do not give effect to either ground of appeal.

[9] First, as the motion judge observed, the issue was not whether the appellants were able to explain their failure to attend the uncontested trial. Their defence had been struck without leave to deliver another defence, and they had been noted in default. Pursuant to r. 19.02(3), in the absence of any direction to the contrary, they were not entitled to notice of the uncontested trial, or, without leave of the court, to participate further in the action. The appellants knew the matter had been scheduled to proceed in the sittings on a peremptory basis, had not attended to oppose the motion to strike their defence, and cannot therefore

rely on any asserted failure to receive notice from the court that the uncontested trial was proceeding. As the motion judge observed, any explanation for why the appellants did not attend the uncontested trial was “beside the point”.

[10] The second ground of appeal is that the motion judge made palpable and overriding errors of fact. First, the appellants argue that the motion judge erred in saying that the appellants had not paid certain costs ordered against them in September 2015. After being interrupted in his oral reasons by the respondent’s counsel, the motion judge acknowledged this error, and it cannot reasonably be concluded that this played any role in his decision, let alone that it was an overriding factor.

[11] Second, the appellants assert that the motion judge erred in saying that they were never examined for discovery, when Ms. Wood was in fact examined. This was an error, however nothing turns on it. Ms. Wood was only discovered after repeated adjournments and cancellations as a condition of the court adjourning a trial date that had been marked peremptory. The motion to set aside the default judgment was not refused because the appellants failed to attend for discovery, but because of their pattern of delay, which led to a decision by the court to strike their pleading. In all the circumstances the conclusion of the motion judge here was reasonable. A motion judge’s decision on a motion to set aside a default judgment is discretionary and attracts deference on appeal: *Mountainview*, at para. 55.

[12] Finally, we decline to address the appellants' argument, which was raised for the first time today, that the motion judge failed to consider prejudice to the appellants in refusing to set aside the default judgment.

[13] The appeal is therefore dismissed. Costs to the respondent in the amount agreed between counsel, $3,500, inclusive of disbursements and applicable taxes.

"S.E. Pepall J.A."
"K. van Rensburg J.A."
"David M. Paciocco J.A."