COURT OF APPEAL FOR ONTARIO

CITATION: Activa Trading Co. Ltd. v. Birchland Plywood-Veneer Limited, 2020 ONCA 93
DATE: 20200207
DOCKET: C67346

Feldman, Brown and Zarnett JJ.A.

BETWEEN

Activa Trading Co. Ltd., MLS Machinery Incorporated, Peter Sommer and Robin Sommer

Plaintiff (Appellants)

and

Birchland Plywood-Veneer Limited, Birchland Plywood Limited, Wishart Law Firm LLP, J. Paul R. Cassan, McRoberts Legal Services Inc.

Defendants (Respondents)

Peter Sommer, acting in person for himself and for the corporate appellants (with the permission of the court and on consent)

Adam C. Pantel, for Wishart Law Firm LLP and J. Paul R. Cassan

James H. Grout, for McRoberts Legal Services Inc.

Heard: January 22, 2020

On appeal from the order of Justice Benjamin T. Glustein of the Superior Court of Justice, dated July 10, 2019, with reasons reported at 2019 ONSC 4133.

REASONS FOR DECISION

[1] The appellants appeal from an order striking out their action under Rule 2.1 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, as an abuse of process.

[2] The history in brief is that the corporate respondent, Birchland Plywood-Veneer Limited, obtained default judgment against the corporate appellants on

February 22, 2011 in the amount of $222,300.09 plus $1,254.48 in costs, in respect of the supply of allegedly faulty woodworking equipment.

[3] The corporate appellants moved to set aside the default judgment, primarily on the basis that they were not properly served with the claim. The motion to set aside was dismissed for a number of reasons including: proper service was effected; there was considerable delay in bringing the motion to set aside; and the plaintiffs would be prejudiced because of the delay.

[4] An appeal from the denial of the motion to set aside was dismissed for failure to perfect. Subsequently, a motion was made to set aside that dismissal. That motion was rejected and an appeal from that decision was dismissed by this court in October 2018.

[5] Following those appeal decisions, the appellants, now including Mr. Peter Sommer and Mrs. Robin Sommer personally as principals of the corporate appellants, according to their statement of claim, brought a new action against the corporate respondents as well as the law firm and lawyer for one of them and the process server, claiming damages for obtaining the default judgment and alleging fraud in the claim that proper service of the original statement of claim had been effected.

[6] In response, the respondents filed a written request under rule 2.1.01 to dismiss the new action as an abuse of process.

[7] The motion judge struck out the new action, finding it to be frivolous, vexatious and an abuse of the process of the court. In his reasons, the motion judge summarized the appellants' submissions in ten points as follows:

> (i) The plaintiffs seek to add, as personal defendants, (a) the general manager of Birchland, (b) the assistant of the defendants' lawyer Cassan, and (c) an employee of McRoberts;
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> (ii) The plaintiffs reiterate their position as set out in the pleadings that the initial case against them had no merit;
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> (iii) The plaintiffs reiterate their position as set out in the pleadings that the defendants perpetrated a fraud against them and the court in obtaining default judgment;
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> (iv) The plaintiffs submit that "[t]his new case is now based on the damages caused by malicious acts of the Defendants because they knew or ought to have known that their ongoing behaviour would cause serious damages to the Plaintiffs if they continued misleading the Court with their case that had no basis in law";
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> (v) The plaintiffs rely on case law in which judgments can be set aside when obtained by fraud;
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> (vi) The plaintiffs submit that the defendants' attempts at garnishment after judgment constitute "extortion";
>
> (vii) The plaintiffs submit that the quantum of damages awarded on default judgment was excessive;
>
> (viii) The plaintiffs submit that the initial decision of Varpio J. in 2014 to not set aside the default judgment was wrong and that Varpio J. made "negative assertions about my credibility, did horrendous damage to my reputation and in turn tainted any subsequent hearings";

(ix) The plaintiffs submit that the bringing of the Birchland claim in Sault Ste. Marie constitutes "bias" since it provided "a home town advantage [since] it would not be a case of what he knew but who he knew", with alleged "improper conduct by Court staff"; and

(x) The plaintiffs submit that the claim is proper despite the decision of the Court of Appeal in October 2018 to refuse leave to bring the appeal from the decision of Justice Varpio.

[8] The motion judge then concluded that based on the pleadings and the listed submissions, the new action amounts to an abuse of process:

> The plaintiffs cannot bring a civil action to re-litigate either the decision of Justice Varpio to not set aside default judgment or the decision of the Court of Appeal to refuse leave to bring the appeal. These findings to enforce the default judgment have already been made by the courts, and the present civil action, based on the same factual and legal allegations, is an abuse of process.
>
> To the extent any fresh evidence of fraud or any other matter relevant to setting aside the default judgment has arisen *after* the decisions of Varpio J. *and* the Court of Appeal, the plaintiffs may be entitled to seek to set aside the earlier orders, although I make no finding on the merits of any such argument.

[9] We see no error in the reasoning or in the conclusion reached by the motion judge. The purpose of Rule 2.1.01 is to allow the court to deal at the earliest stage with actions that amount to an abuse of process. In this case, the appellants are seeking to relitigate the issues surrounding the service of the respondent's original statement of claim and the obtaining of default judgment, a classic example of abuse of process.

[10] The appellant Mr. Sommer submitted a brief which he explained contained the results of investigations and document examinations of the original court file that he undertook in aid of his effort to set aside the default judgment. There is a suggestion that some of the original court documents contain irregularities. This documentation is the basis for the claim of fraud, and the allegations formed part of the appellant's response to the Rule 2.1 motion.

[11] As is clear from the dates on the documents, almost all this evidence would not meet the timing requirement of the test from *Palmer v. The Queen,* [1980] 1 S.C.R. 759, for the admission of "fresh evidence" on the motion under appeal, as the appellant obtained it before the original proceedings were completed. That is why the motion judge mentioned that if there were to be any new evidence of an alleged fraud discovered after the Court of Appeal decision in October 2018, the appellants might possibly be able to use that evidence to seek to set aside the dismissal orders.

[12] The appellants' brief contains one affidavit dated December 2019 from the private investigator who conducted the earlier investigation that may have been obtained in response to the motion judge's comment. The affidavit contains extracts of an interview with the original process server. The contents are incomplete and are hearsay and therefore the affidavit would not be admissible; in any event it would not have changed the finding by the motion judge under Rule 2.1 that this action is an abuse of process.

[13] The appeal is dismissed with costs fixed at $2,500 inclusive of disbursements and HST.

"K. Feldman J.A."

"David Brown J.A."

"B. Zarnett J.A."