COURT OF APPEAL FOR ONTARIO

CITATION: Trayanov v. Icetrading Inc., 2023 ONCA 322
DATE: 20230508
DOCKET: C70368

van Rensburg, Huscroft and George JJ.A.

BETWEEN

Vasil Trayanov and Olia Stantcheva

Plaintiffs/Responding Parties
(Respondents)

and

Icetrading Inc. and Daeja Bjork Kjartandottir for
the Estate of Volundur Thorbjornsson

Defendants/Moving Parties
(Appellants)

Taayo Simmonds, for the appellants

Joshua Vickery, for the respondents

Heard: March 20, 2023

On appeal from the order of Justice Sally A. Gomery of the Superior Court, dated January 26, 2022, with reasons reported at 2022 ONSC 583.

van Rensburg J.A.:

I. OVERVIEW

[1] This is an appeal from the dismissal of a motion to set aside a noting in default. For the reasons that follow, I would allow the appeal.

[2] Although the motion judge's decision to refuse the appellants relief at first instance was an exercise of discretion that is ordinarily entitled to deference, I have concluded that there were reversible errors that warrant intervention on appeal. The motion judge did not address factors that were relevant to whether the relief sought by the appellants should be granted. In particular, she erred in her consideration of the question of prejudice by failing to consider the balance of prejudice and the prejudice to the appellants in the full context and factual matrix of the dispute between the parties. It was relevant that there remained unresolved issues in the litigation that would continue to exist between the parties if the Action were not permitted to proceed on its merits, and that the appellants had an arguable defence to the Action. It is in the interests of justice to set aside the noting in default to permit the appellant to file its statement of defence and counterclaim so that the Action can proceed on its merits.

II. BACKGROUND

(1) The underlying dispute

[3] The litigation concerns the rights and responsibilities of the parties in connection with a commercial property in Carleton Place, Ontario. The property is owned by Icetrading Inc., the corporate appellant. Volundur Thorbjornsson was the

sole shareholder of the corporate appellant.[1] The respondents, Vasil Trayanov and Olia Stantcheva, operate a business in a free-standing building on Parcel 6 of the property.

[4] Icetrading purchased the Carleton Place property in 2016 for $425,000, with the intention of developing a condominium with a number of commercial units. In an agreement dated September 21, 2016 (the “Agreement”), Icetrading agreed to sell Parcel 6 with the existing building to the respondents for $275,000. The respondents paid an initial deposit of $75,000 that was used in Icetrading’s purchase of the property.

[5] The parties also agreed, among other things, that:

- Icetrading, at its own cost, would proceed expeditiously with an application to convert the property into a condominium comprising seven units and common elements. Upon registration of the condominium, the respondents would set a completion date for the purchase of their unit.

- The respondents would have the exclusive use and occupation of the land and building on Parcel 6 pending the declaration of the condominium and the transfer of their unit.

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[1] Mr. Thorbjornsson passed away after the motion to set aside the noting in default was brought, but before it was determined. Although his estate is an appellant in this court, these reasons, for ease of reference, refer to Icetrading Inc. and Thorbjornsson, the moving parties at first instance, as “the appellants”.

- The respondents would pay $1,333.33 per month for one year or until the property's conversion to a condominium and the transfer of their unit, whichever came first, which would be deemed rent, and not credited against the purchase price of the unit. Thereafter the respondents would continue to pay $1,333.33 per month, with such amounts credited to the purchase price of their unit. The respondents would be responsible for one third of the common expense charges in relation to the entire property.

- In the event that Icetrading failed to convert the property into a condominium by the end of the second year after its purchase or on the occurrence of any defaulting event, as defined in the Agreement, the respondents would be entitled to demand repayment of their deposit, which payment was personally guaranteed by Thorbjornsson.

- In the event of a demand for repayment, the respondents would receive no further compensation for any costs or improvements to Parcel 6 or refund of their payments made as rent, and would vacate Parcel 6 in 30 days.

(2) The litigation

[6] The property was not converted into a condominium by the required deadline. The respondents did not demand a return of their deposit. Instead, on September 19, 2018, they registered a Notice of Option to Purchase on title to the property, and on November 1, 2018, they commenced an action in the Superior

Court (the “Action”). The statement of claim, which was served on the appellants on November 9, 2018, claims an equitable lien over the property or in the alternative $300,000 for breach of contract or breach of trust, $100,000 in general damages, a certificate of pending litigation (“CPL”), and other relief.

[7] Settlement discussions began shortly after the Action was commenced and occurred in large part without the assistance of counsel. After 5:00 p.m. on September 26, 2019, counsel for the respondents advised the appellants that they would be noted in default the next day because they had not served their statement of defence. Counsel noted the appellants in default on September 27, 2019.

[8] The respondents then brought a motion for various forms of relief, on notice to the appellants. On October 29, 2019, in the presence of Thorbjornsson, and with his consent, Labrosse J. granted leave for the issuance of a CPL against the property, and he ordered the appellants to produce copies of various documents relating to the property conversion. The parties returned to court on February 10, 2020, at which time Labrosse J. directed that the respondents make their monthly payments into court effective March 1, 2020, and that, if the parties were unable to resolve the matter, the appellants would have until March 30, 2020 to file their statement of defence.

[9] The appellants did not deliver a statement of defence by the March 30, 2020 deadline. It was only at the end of June 2020 that they retained their current

counsel who contacted the respondents' counsel to discuss whether a motion to set aside the noting in default would be necessary. The respondents' counsel suggested that the deadline to file a defence may have been extended as a result of the pandemic.

[10] The appellants' counsel served a statement of defence and counterclaim on July 3, 2020. The statement of defence pleads and relies on the terms of the Agreement and denies that the respondents are entitled to compensation for Icetrading's failure to complete the condominium conversion. The appellants assert that there is no cause of action against Thorbjornsson, and they claim equitable set-off for the amounts the respondents ought to have been paying as commercial tenants. The appellants counterclaim for an order for the payment to them of the monies paid into court, an order discharging the registration of the Notice of Option to Purchase on title to the property, an order for the payment to them of unpaid rent, and other relief.

[11] In August 2020, the parties learned that the Ottawa court had refused to accept the statement of defence and counterclaim for filing without the respondents' consent, which was refused. On August 26, 2020, the appellants served a motion to set aside the noting in default, as well as for an order to vary the payment into court order, and for summary judgment. At a case conference presided over by the motion judge on September 30, 2020, the appellants were

directed to first bring their motion to set aside the noting in default, to be heard in writing, and the motion judge set a timetable for the parties' materials.

[12] All of the materials and the parties' written submissions were filed with the court by the end of November 2020. Unfortunately, as a result of an administrative error at the court, the motion was not considered until the parties wrote to the motion judge in early 2022. Although the motion judge was not seized with the matter, she promptly considered the motion, releasing her reasons for dismissing the motion on January 26, 2022.

(3) The motion judge's decision

[13] The motion judge set out the applicable test for determining whether to set aside the noting in default and identified several factors that were relevant to that determination: at paras. 33-34. She reviewed the conduct of both parties and the length of and explanation for the delay. The motion judge considered but rejected Thorbjornsson's explanations for the delay in retaining counsel and delivering a defence, and she concluded that he had disregarded his obligations as a defendant and had shown a casual disregard for the court's authority: at paras. 35-40, 56. She also considered the prejudice to the appellants should the motion be dismissed, finding that they would lose their ability to pursue their counterclaim for additional rent for the respondents' occupation of the property, which she found to carry some weight in favour of the requested relief: at para. 54. She found that,

because there was no evidence of prejudice to the respondents should the motion be allowed, it was “not a relevant factor”: at para. 53.

[14] The motion judge concluded that, having weighed all relevant factors, she would decline to exercise her discretion to give the appellants a further opportunity to file a statement of defence. She observed that the fact that the appellants had squandered the second chance they had been given when Labrosse J. set a deadline for the delivery of their defence weighed heavily against them: at para. 56. After stating that the only factor that supported granting the motion was the impact on the appellants’ ability to make a counterclaim, she did not find this “sole factor” determinative given all of the other factors arguing against the relief sought by the appellants: at para. 57.

III. RELEVANT LEGAL PRINCIPLES

(1) Standard of review

[15] A decision to refuse or to order the setting aside of a noting in default is discretionary and will only be reversed on appeal if the court proceeded on a wrong principle, gave no or insufficient weight to relevant factors, or where the decision is so clearly wrong it amounts to an injustice: *Franchetti v. Huggins*, 2022 ONCA 111, at para. 5; *Intact Insurance Company v. Kisel*, 2015 ONCA 205, 125 O.R. (3d) 365, at para. 12; *Penner v. Niagara*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27.

(2) The test for setting aside a noting in default

[16] Rule 1.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that the rules are to be constructed liberally in order to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." Further, in regard to a failure to comply with the rules, r. 2.01(1)(a) provides that a court "may grant all necessary … relief, on such terms as are just, to secure the just determination of the real matters in dispute".

[17] Rule 18 obliges a defendant to deliver a statement of defence within a prescribed period of time (between 20 and 60 days, depending on where the defendant is served), from the date of service of the statement of claim. Under r. 19.01, the plaintiff may have the defendant noted in default if the defendant fails to respond within the applicable timeline.

[18] The consequences of a defendant being noted in default are significant. Rule 19.02(1)(a) of the *Rules of Civil Procedure* provides that a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim. Rule 19.02(1)(b) prohibits a defendant once noted in default from delivering a statement of defence or taking any other step in the action, other than a motion to set aside the noting in default or a default judgment, except with leave of the court or the consent of the plaintiff.

[19] Rule 19.03(1) provides that a noting in default may be set aside by the court "on such terms as are just." As this court stated in *Franchetti*, at para. 8, there are several guiding principles that are relevant to that determination, including "the strong preference for deciding civil actions on their merits, the desire to construe rules and procedural orders non-technically and in a way that gets the parties to the real merits, and whether there is non-compensable prejudice to either party." See also *H.B. Fuller Company v. Rogers*, 2015 ONCA 173, 386 D.L.R. (4th) 262, at paras. 25-29. And, as this court has stated, "the full context and factual matrix in which the court is requested to exercise its remedial discretion to set aside a noting in default are the controlling factors": *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 (C.A.), at pp. 284-285; see also *Nobosoft Corporation v. No Borders Inc*., 2007 ONCA 444, 225 O.A.C. 36, at para. 3.

[20] In particular, the following factors are relevant in considering whether a noting in default should be set aside: (1) the parties' behaviour; (2) the length of the defendant's delay; (3) the reasons for the defendant's delay; (4) the complexity and value of the claim; (5) whether setting aside the noting in default would prejudice a party relying on it; (6) the balance of prejudice as between the parties; and (7) whether the defendant has an arguable defence on the merits. These factors are not exhaustive and are not to be applied as rigid rules: *Franchetti*, at

paras. 8, 10; *Kisel*, at paras. 13-14; *Nobosoft*, at para. 3; *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 119 O.R. (3d) 561, at paras. 48-51.

IV. ISSUES AND ANALYSIS

[21] The appellants contend that the motion judge disregarded and misapprehended relevant evidence when she: (1) concluded that the appellants were responsible for most of the delay, and ignored the respondents' conduct, the parties' settlement discussions, and the circumstances of the pandemic; (2) failed to consider the fact that the appellants were actively defending the case when assessing the procedural history; and (3) concluded that Thorbjornsson had misled the court.

[22] I see no merit to this ground of appeal, which seeks to challenge the motion judge's findings of fact and her assessment of the evidence. The motion judge's characterization of Thorbjornsson's conduct, and his attitude toward the litigation, are fully supported by the evidence. She was critical of his failure to retain litigation counsel to defend the Action for over 18 months, which she described as strategic, or at the very least convenient. She was also entitled to find on the evidence that the appellants did not have a good excuse for failing to comply with the March 30, 2020 deadline for delivering their defence, and she fairly rejected the appellants' submission that the respondents were responsible for a good part of the delay. Although there may have been settlement discussions, the respondents made it

clear they required a defence; and, although the respondents' counsel appeared to accept the late delivery of a statement of defence and counterclaim, there was an evidentiary basis for the motion judge to conclude that they had not acquiesced in the delay and that the appellants should have sought an indulgence.

[23] The resolution of this appeal turns on the appellants' main argument: that the motion judge erred in her approach to and assessment of prejudice. I agree with the appellants that the balance of prejudice between the parties was a key factor that was not addressed by the motion judge. By focusing largely on the circumstances of the appellants' default, she did not address the "full context and factual matrix", including the overall context of the parties' dispute, and the unsatisfactory state of affairs that existed and would continue if the appellants were prevented from defending the Action on its merits and asserting their counterclaim.

[24] First, the motion judge failed to consider the balance of prejudice, which looks to the potential prejudice to the moving party should the motion be dismissed and balances that against the potential prejudice to the respondent should the motion be allowed: see e.g., *Mountain View*, at para. 49; *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, 2007 ONCA 333, 87 O.R. (3d) 479, at paras. 2, 6. Contrary to the motion judge's assertion, the fact that the respondents would suffer no prejudice was a relevant factor that should have been balanced against the prejudice to the appellants.

[25] Second, the motion judge adopted too narrow a focus when she identified as the prejudice to the appellants their inability to bring a counterclaim for outstanding rent. In identifying this as the only consequence to the appellants, and the sole factor weighing in favour of setting aside the noting in default, the motion judge did not consider the full extent of the prejudice to the appellants, and the on-the-ground consequences to the parties of refusing the relief requested.

[26] By operation of r. 19.02, if the noting in default were not set aside, the appellants would be deemed to admit the facts alleged in the statement of claim, and would be exposed to a significant judgment – the equitable lien over the property that the respondents were seeking or an award of damages – that the respondents could obtain on default. There would be no ability to put before the court their defence that the respondents were not entitled to the relief they were seeking under the terms of the Agreement.

[27] As for the appellants' loss of their counterclaim, if the noting in default were not set aside, the appellants would have no ability to recover the monthly payments paid into court, or to pursue any of the other relief they were seeking in the counterclaim and the pending motions they had brought, for an order vacating the registrations against the property, for an order varying or vacating the payment into court order, and for summary judgment. There is unchallenged evidence in the record to suggest that the respondents are paying an amount well below market rent, and effective March 2020, all amounts have been paid into court. The

respondents continue to occupy and to operate their business from the property. The loss of the counterclaim arguably prevents the appellants from taking steps to remove the respondents from the property, and to recover compensation for their continued occupation.

[28] Third, the motion judge did not consider whether the appellants had an arguable defence on the merits. While on a motion to set aside a noting in default it is typically not required that a defendant demonstrate an arguable defence, where a defence is put forward, as in this case, it is a relevant factor that should be considered: *Nobosoft*, at para. 5; *Franchetti,* at paras. 8, 10, and 14. A review of the statement of claim, the statement of defence and counterclaim, and the parties' Agreement, as well as the evidence put forward on the motion, suggests that the appellants have not only an arguable defence to the Action, but also an arguable counterclaim.

[29] I am satisfied that, while accepting the motion judge's valid concerns about the procedural history of the Action and, in particular, the appellants' conduct in failing to take advantage of a "second chance" to file their defence, it is just and appropriate to set aside the noting in default to permit the Action and counterclaim to proceed. The absence of prejudice to the respondents, the significant prejudice to the appellants, and the unsatisfactory *status quo* that will continue if the matter does not proceed on the merits, are reasons for setting aside the noting in default.

V. DISPOSITION

[30] For these reasons I would allow the appeal, order that the noting of the appellants in default be set aside, and direct the appellants to file their statement of defence and counterclaim within ten days. The parties indicated that if the appeal were granted, they would be ready to proceed with a motion for summary judgment, and they are encouraged to do so without further delay.[2]

[31] I would award the appellants their costs of the appeal fixed at $10,000, all inclusive. I would not however set aside the costs in the court below, as the appellants sought and have now obtained an indulgence from the court, that permits them to defend the Action after a significant delay.

Released: May 8, 2023 “KMvR”

“K. van Rensburg J.A.”
“I agree. Grant Huscroft J.A.”
“I agree. J. George J.A.”

[2] In her endorsement from the October 2, 2020 case conference the motion judge determined that, if the noting in default were set aside, a motion for summary judgment would be appropriate, with no requirement to seek leave to bring the motion.