CITATION: Bank of Montreal v. Saidani, 2023 ONSC 4216
COURT FILE NO.: CV-22-2099
DATE: 2023 07 18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bank of Montreal, Plaintiff

AND:

Ilyes Saidani and Peter Harvey, Defendants

BEFORE: M.T. Doi J.

COUNSEL: I. Klaiman, for the Plaintiff

J.D. Sobel, for the Moving Defendant, Peter Harvey

HEARD: July 10, 2023

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ENDORSEMENT

Overview

[1] The moving Defendant, Peter Harvey, seeks to set aside the noting in default and default judgment that the Plaintiff, Bank of Montreal ("BMO"), obtained against him.

[2] For the reasons that follow, the motion is granted.

Background

[3] BMO brought the underlying action to enforce guarantees on an overdraft credit facility for Sirius Power Corp. ("Sirius"). The Defendant Ilyes Saidani was Sirius' sole director and shareholder. The other Defendant, Mr. Harvey, was Vice-President and Chief Operating Officer for the company. Each gave a personal guarantee for the credit facility.

[4] On July 18, 2019, Sirius opened a BMO business bank account.

[5] In or around November 2021, Mr. Saidani and Mr. Harvey met with a BMO loan officer, Kevin Cao, to apply for an overdraft facility and a corporate credit card for Sirius. BMO approved

an overdraft loan for Sirius up to $350,000.00 and a credit card with a $25,000.00 principal limit. Both facilities were repayable on demand.

[6] To secure Sirius' overdraft loan and credit card, Mr. Saidani and Mr. Harvey guaranteed the facilities for up to $375,000.00. In giving BMO his guarantee, Mr. Harvey attested that he had obtained independent legal advice on the guarantee that was being provided freely, voluntarily, and without any threat, intimidation, or inducement.

[7] By December 31, 2021, Sirius had overdrawn its account beyond the $350,000.00 limit. Mr. Cao claims that Mr. Harvey did not ask how Sirius' overdrawn balance had accrued and promised to pay down the balance when asked several times to regularize the account.

[8] By August 8, 2022, Sirius was in default with an overdraft balance of $363,685.45 and a credit card balance of $135,325.97 as interest continued to accrue on both amounts.

[9] On August 15, 2022, BMO's counsel sent a demand letter to both guarantors for payment of $375,000.00 plus interest under the guarantees. Mr. Harvey did not respond.

[10] On October 24, 2022, BMO brought an action against the guarantors.

[11] On October 26 2022, BMO served a statement of claim on Mr. Harvey by leaving a copy in a sealed envelop with his mother at their home and by sending a copy by regular mail that day. Pursuant to Rule 16.03(5), service was effective on October 31, 2022. Mr. Harvey states that he learned of the claim in late October 2022 but did not defend at Mr. Saidani's request or suggestion after Mr. Saidani indicated that he and/or Sirius would be "taking care" of the claim by either paying down the debt or delivering a defence for both guarantors.

[12] Through inadvertence, BMO took steps on November 16, 2022 (i.e., five (5) days before the 20-day deadline to defend expired on November 21, 2022) to have Mr. Harvey noted in default by requisition.[1] Thereafter, on November 28, 2022, the Registrar issued default judgment against Mr. Harvey for $383,096.40 in damages and $1,592.17 in costs, plus interest.

[13] On November 30, 2022, BMO's counsel served Mr. Harvey with the default judgment and a post-judgment demand letter by regular and electronic mail. Mr. Harvey did not respond.

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[14] On December 20, 2022, BMO's counsel served Mr. Harvey with a notice of examination in aid of execution by regular and electronic mail.

[15] On December 28, 2022, Mr. Harvey responded to BMO's counsel by email, which included some settlement-privileged content.

[16] On January 18, 2023, Mr. Harvey asked BMO through counsel to set aside the default judgment, failing which a motion to set aside would be brought. Mr. Harvey also advised of his intention to prepare a defence and crossclaim.[2] On January 25, 2023, BMO declined to consent to set aside the default judgment until it had reviewed Mr. Harvey's materials for the motion.

[17] On February 27, 2023, Mr. Harvey moved to set aside the noting in default and the default judgment in this matter.

The Record

[18] I am not persuaded by Mr. Harvey's objection to the unredacted portion of his December 18, 2022 email which BMO seeks to rely upon on this motion.

[19] Mr. Harvey objects to BMO relying on a short excerpt from his email to BMO's counsel on December 28, 2022 which is otherwise redacted but for the first sentence in which he claims that he became aware of BMO's claim against him "*[i]n late OCT 2022 …*" He submits that his email, which was marked "without prejudice", is protected by settlement privilege and ought to be disregarded in its entirety. BMO concedes that the redacted portions of the email have settlement content that is privileged and inadmissible but submits that the first sentence is admissible to rebut Mr. Harvey's inconsistent evidence that he only learned of the claim in early November 2022.[3]

[20] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made during settlement negotiations are inadmissible: *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 at para 13. The doctrine of settlement privilege is intended to encourage meaningful negotiations on the understanding that parties are more likely to settle by having confidence from the outset that their settlement negotiations will not be disclosed and used to their prejudice in the proceedings: *Ibid,* citing *Cutts v. Head,* [1984] 1 All ER 597 at 605. Settlement privilege is a class privilege that *prima facie* raises a presumption

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of inadmissibility, but exceptions will be found when justice requires it: *Sable* at para 12*; Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All ER 737 (HL) at 740. The public interest in encouraging settlements may be outweighed by the countervailing public interest in addressing misrepresentations, fraud, undue influence, or a potential overcompensation, among other things: *Sable* at para 19.

[21] On the particular facts of this case, I find that the sentence from Mr. Harvey's email dated December 28, 2022 showing when he learned of BMO's claim should be admitted into evidence. Given his arguably conflicting evidence of when the claim came to his attention, I find that the public interest in determining any possible misrepresentation on this point, which is relevant to the analysis for setting aside the default judgment on this motion, outweighs the public interest in otherwise encouraging settlements: *Sable* at paras 12 and 19. Furthermore, I find that Mr. Harvey implicitly and voluntarily waived any privilege over the unredacted sentence in his email message by swearing an affidavit that BMO's claim came to his attention around early November 2022. In my view, fairness and consistency support a finding that any settlement privilege that may have attached to this impugned statement was waived: *Lepan v. Lofranco,* 2023 ONSC 1766 at para 33, citing *Browne (Litigation Guardian of) v. Lavery* (2002), 58 OR (3d) 49 (SCJ) at para 20.

[22] Accordingly, the objection is overruled.

Legal Principles

[23] The central issue on this motion is whether the default judgment against Mr. Harvey should be set aside, which subsumes the noting in default and related enforcement proceedings: *Brown v. Dhaliwal,* 2023 ONSC 947 at para 12.

[24] Rule 19.08 (*Setting Aside Default Judgment*), provides the authority for setting aside a default judgment as follows:

> **Setting Aside Default Judgment**
> **19.08** (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.
>
> (2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is

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> obtained after trial may be set aside or varied by a judge on such terms as are just.
>
> (3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

[25] The following factors are considered on a motion to set aside a default judgment:

a. Whether the motion was brought promptly after the defendant learned of the default judgment;

b. Whether the defendant has a plausible excuse or explanation for the default;

c. Whether the defendant has an arguable defence on the merits;

d. The potential prejudice to the defendant should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and

e. The effect of any order the court might make on the overall integrity of the administration of justice.

Mountain View Farms Ltd. v. McQueen, 2014 ONCA 194 at paras 48-50; see also *Brown* at para 15.

[26] The above-mentioned factors are not rigid rules but are pertinent considerations which are assessed in the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of their default: *Mountain View* at para 50; *Intact Insurance Co. v. Kisel*, 2015 ONCA 205 at para 14.

[27] If default judgment is irregularly obtained, a defendant may be entitled to have it set aside: *Redabe Holdings Inc. v. I.C.I. Construction Corporation*, 2017 ONCA 808 at para 7. However, in addressing instances of non-compliance with procedural rules, the court may grant all necessary relief on such terms as are just to secure the just determination of the real matters in dispute: Rules 2.01(1)(a) and 1.04(1): *Ilic v. Ducharme Fox LLP (Ducharme Weber LLP)*, 2022 ONCA 463 at paras 23-24, citing *Lawrence v. International Brotherhood of Electrical Workers (IBEW) Local 773*, 2017 ONCA 321 at para 21, affirmed 2018 SCC 11. No defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of

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justice is brought into disrepute: *Ilic* at para 24; *Lawrence* at para 21, citing *Bridgeland Riverside Community Assn. v. Calgary (City)*, 1982 ABCA 138 at paras 27-28.

[28] On a motion to set aside, an innocent plaintiff should not ordinarily suffer irrevocable loss due to a third- party error, such as inadvertence by their counsel or administrative oversight by the court: *Marché D'Alimentation Denis Theriault Ltée et al. v. Giant Tiger Stores Ltd.,* 2007 ONCA 695 at para 28. However, the court must also consider whether the defendant would suffer any non-compensable prejudice: *Brown* at para 17.

[29] The court should strive to resolve issues between litigants on their merits whenever that can be done with fairness to the parties: *Nobosoft Corporation v. No Borders, Inc.,* 2007 ONCA 444 at para 7; *Hills v. Suitor,* 2022 ONSC 914 at para 22.

Analysis

[30] For the reasons that follow, I am satisfied that the default judgment, along with the noting in default, should be set aside.

a. Mr. Harvey brought this motion to set aside promptly.

[31] I am satisfied that Mr. Harvey brought this motion with sufficient promptness to satisfy this factor. Sometime after November 30, 2022, he learned of the default judgment, retained counsel who corresponded with BMO's counsel about the matter on January 18, 2023, and brought this motion on February 27, 2023 returnable on the first date suitable for the parties. Following a short adjournment at BMO's request to cross-examine Mr. Harvey, the motion returned on the next mutually-suitable date on June 28, 2023. Although BMO asserts that Mr. Harvey did not move with great alacrity, it fairly conceded that the delay should not be fatal to his motion.

b. Mr. Harvey has a plausible excuse or explanation for the default.

[32] I am prepared to accept, with some reservations, that Mr. Harvey has shown a plausible excuse or explanation for the default that led to default judgement being issued against him.

[33] Although Mr. Harvey's supporting affidavit states that BMO's claim against him came to his attention in or around early November 2022, his email of December 28, 2022 to BMO's counsel

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indicates that he learned of the claim in late October 2022. Thereafter, Mr. Harvey claims that the co-defendant, Mr. Saidani, advised him to not take any steps to defend the action as he and/or Sirius were "taking care of" the claim, either by satisfying the outstanding debt (i.e., which by that point was over $375,000.00) or by delivering a joint statement of defence for both defendants. As a result, Mr. Harvey claims that he took no action to defend the claim which caused his default and led to default judgment being issued on November 28, 2022. I am satisfied that Mr. Harvey's inaction caused his default, regardless of BMO's inadvertence by having him noted in default before the time to defend the action had expired. I shall return to BMO's inadvertence with the noting in default when I consider the potential prejudice to both parties later in these reasons.

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[34] BMO submits that Mr. Harvey's excuse is unlikely given Sirius' inability to repay the debt (i.e., due to its poor financial situation) and the lack of meaningful evidence to show that a defence was being prepared for him. BMO also submits that Mr. Harvey likely knew that Mr. Saidani had mismanaged Sirius into penurious circumstances which had left the company and its guarantors unable to pay off the debt. BMO further submits that Mr. Harvey likely knew that Mr. Saidani tricked him into guaranteeing the loan by promising shares in Sirius that he never intended to give, which is now the basis of his proposed crossclaim against Mr. Saidani. BMO's submissions are not unpersuasive. However, Mr. Harvey gave evidence under cross-examination that Sirius was collecting roughly $100,000.00 to $200,000.00 in monthly receivables around that time, which is not disputed. It follows that Sirius' ability to pay down the loan was not implausible. Moreover, the evidence does not clearly show that Mr. Harvey's work relationship with Mr. Saidani had been irreparably compromised by that point, as BMO is inviting me to infer. BMO did not cross-examine Mr. Harvey on his excuses for the default, including his claim that Mr. Saidani and/or Sirius would be "taking care" of BMO's claim against him on his behalf, despite examining him carefully on other matters related to his proposed defence on the merits.

[35] Taking all of the foregoing into account, and with some reservations, I am persuaded that Mr. Harvey's largely unchallenged explanation for his inaction that caused the default is plausible. Accordingly, I find that Mr. Harvey has satisfied this part of the analysis to set aside.

c. Mr. Harvey has an Arguable Defence on the Merits.

[36] I am satisfied that Mr. Harvey has an arguable defence to BMO's claim.

[37] In or around November 2021, Mr. Harvey and Mr. Saidani met with Mr. Cao and a BMO client services officer, Stacy Green, to obtain an overdraft credit facility for Sirius' operating funds account. Mr. Saidani and Mr. Harvey personally guaranteed the overdraft facility. Given Sirius' poor financial circumstances, Mr. Harvey claims that he would only guarantee the loan on terms that would allow him to monitor the overdraft account to ensure that funds were prudently used. He also claims that Mr. Cao and Ms. Green indicated that the loan agreement for the overdraft facility would require both guarantors to approve any advances over $5,000.00 before they could be drawn on the facility. Based on this, Mr. Harvey further claims that his prior signature and/or email authorization was needed before any overdrafts over $5,000.00 were made. He submits that these preconditions were consistent with paras 2 and 12 of Schedule C (*Conditions Precedent to Advances*) of the BMO loan agreement dated November 12, 2021 which required the following conditions precedent before any advances could be made on the overdraft facility:

> 2. Completion of all facility documentation and account agreement and authorities, as applicable.
>
> …
>
> 12. All other document or action which BMO may reasonably require.

[38] Under cross-examination, Mr. Harvey indicated that Mr. Saidani memorialized the above-noted approval conditions by email to BMO. Shortly thereafter, Mr. Harvey claims that Mr. Cao and Ms. Green arranged for him to obtain online access and login credentials to manage Sirius' overdraft account, as discussed. But technical issues delayed Mr. Harvey's access to the account. By the time Mr. Harvey could view the account, Sirius had already overdrawn the facility by about $360,000.00. Mr. Harvey claims that he immediately raised his concerns over the unauthorized draws on the overdraft account with Mr. Saidani, and later confronted Mr. Cao and Ms. Green who are said to have apologized for BMO's lapses, but that it was too late to restore the account as the overdrafts were already incurred.

[39] BMO flatly denies that Mr. Cao or Ms. Green verbally negotiated the alleged monitoring terms as conditions precedent to the loan agreement, and led evidence that the purported conditions would be operationally impossible to implement. According to Mr. Cao, these alleged terms were never discussed, and BMO submits that Mr. Harvey's evidence lacks an air of reality that leans

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away from finding an arguable defence: *Brown* at paras 45-46. However, the credibility issues arising from the conflicting evidence cannot be decided on the documentary record for this motion.

[40] Relying on the parole evidence rule and the entire agreement clause in the loan agreement, BMO submits that Mr. Harvey's extrinsic evidence cannot vary the written terms of its loan agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras 59-60; *Grandfield Homes (Kenton) LTD. v Chen*, 2023 ONSC 3058 at para 14; *Soboczynski v. Beauchamp*, 2015 ONCA 282 at paras 43-47, leave to appeal refused, [2015] SCCA No 243. However, it is well-established that the defence of misrepresentation, which Mr. Harvey seeks to assert to defend the claim, is not precluded or diminished by reason only of an entire agreement clause: *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98 at para 43; *10443204 Canada Inc. v. 2701835 Ontario Inc.*, 2022 ONCA 745 at para 26.

[41] Ultimately, I am persuaded that Mr. Harvey has established an arguable misrepresentation defence on the merits to meet the relatively low threshold of showing that his pleadings have an air of reality: *Royal Bank* at para 43; *Zeifman Partners v. Aiello*, 2020 ONCA 33 at paras 30-32; *Mountain View* at para 51. From the record on this motion, I am persuaded that Mr. Harvey has adequately shown that he intended to defend BMO's claim from the outset and that his proposed pleadings are not devoid of a factual or legal foundation.

d. Potential prejudice to the parties.

[42] In this case, there is no dispute that BMO obtained default judgment against Mr. Harvey by inadvertently having him noted in default before the period to defend the claim actually expired. However, as discussed earlier, I find on Mr. Harvey's unchallenged evidence that his default arose from his apparent decision to not defend the action after Mr. Saidani advised that he and/or Sirius would be 'taking care" of BMO's claim by paying down the loan or delivering a joint defence for both guarantors. Given these rather unique circumstances, I accept that BMO's inadvertence did not impact Mr. Harvey's default. By his own admission, Mr. Harvey would have continued to follow Mr. Saidani's guidance by not delivering a defence before the time to defend had expired, regardless of BMO's efforts to note him in default and obtain default judgment. Accordingly, I am satisfied that Mr. Harvey would not have suffered any real prejudice from BMO's inadvertent non-compliance with the timeframes under the Rules for default proceedings. Absent any such

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prejudice, I m satisfied that BMO's failure to comply with the rules was an irregularity that should not cause the default judgment, or the prior noting in default, to be annulled: Rules 1.04(1) and 2.01(1)(a); *Ilic* at paras 23-24; *Lawrence* at para 21.

[43] I am satisfied that Mr. Harvey will suffer significant prejudice if he cannot advance his intended defences and pursue his interests in this proceeding. Default judgment against him was issued for $383,096.40 plus costs and interest, which is not an insubstantial amount. In contrast, I see no prejudice to BMO's right to a fair trial arising from the relatively modest delay that arose in this case, other than some inconvenience related to the delay. As a result, I find that Mr. Harvey should receive an indulgence and a fair opportunity to have his day in court to obtain a decision on the merits: *Graham v. Vandersloot,* 2012 ONCA 60 at para 12.

e. The integrity of the administration of justice favours setting aside the default judgment.

[44] In my view, the integrity of the administration of justice favours setting aside the default judgment.

[45] The default judgment against Mr. Harvey was for a fairly significant amount. Allowing a substantial default judgment to stand due to oversights or missteps is not in the interests of justice: *Zeifman* at paras 47-48; *2545890 Ontario Ltd. v. Cambium Inc.,* 2021 ONSC 4813 at para 22.

[46] In assessing the integrity of the administration of justice, I find that professional best practices should inform my review of this factor. BMO did not notify Mr. Harvey of its intention to have him noted in default before taking default steps. A far better practice would have been for BMO to contact Mr. Harvey to demand a defence and to timetable a discovery plan: *Elli-Fin Construction Ltd. v. ARCA Canada Inc.,* 2021 ONSC 2130 at paras 23-25.

Outcome

[47] Accordingly, the motion is granted.

[48] There is no general rule that a party seeking an indulgence is not entitled to costs, as the court may award costs is its discretion: *Rai v. Sahanan*, 2023 ONSC 4029 at para 17; *Atlantic Construction Group Inc. v. 2567616 Ontario Inc.*, 2021 ONSC 4118 at paras 10-11. On a motion to set aside a default judgment, the respondent is usually awarded costs where the moving party

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failed to defend after originating process was served, but this is not the usual disposition where default judgment was irregularly obtained: *Bouzari v. Bahramani*, 2013 ONSC 6007 at para 4.

[49] On this motion, both sides sought indulgences. Mr. Harvey sought an indulgence to set aside the default judgment occasioned by his prior inaction. In turn, BMO sought an indulgence to relieve its inadvertence in having him noted in default before the time to defend had expired. Although Mr. Harvey's motion to set aside was allowed, it was not entirely unreasonable for BMO to oppose the motion given the limited nature of his initial explanation for the default. Under cross-examination, Mr. Harvey gave further and important evidence that was not previously set out in his supporting affidavit. BMO's inadvertence in taking default steps added complexity to the motion. Taking this all into account, I conclude that this is not a case for costs.

[50] An order shall issue setting aside the default judgment against Mr. Harvey, and leave is granted for him to deliver a statement of defence and crossclaim within ten (10) days after the order setting aside the default judgment is entered and issued.

M.T. Doi J.

Date: July 18, 2022

[1] See Rules 16.03(5), 18.01(a) and 19.01(1) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194.

[2] The proposed crossclaim by Mr. Harvey raises negligence and misrepresentation claims against Mr. Saidani for inducing him into guaranteeing the loan agreement with false or reckless representations. and for any actions or omissions that caused BMO to incur any damages.

[3] See para 4 of Mr. Harvey's affidavit sworn February 27, 2023.

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ENDORSEMENT

Doi J.

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