CITATION: AKHTAR v. TAHA DEVELOPMENT 2024 ONSC 746
COURT FILE NO.: CV-23-00082631-000
DATE: 20240206

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ali Syed Akhtar, Fatima Khan and Shamim Fatima,

Plaintiffs

AND:

Taha Development Group Inc., Omre Taha, April Taha also known as April McDonald-Taha, Iron Horse Contractors Inc. Emad Sharqiya,

Defendants

BEFORE: Justice L. Sheard

COUNSEL: Derek A. Schmuck for the Plaintiffs/Responding Parties
Alaa Noui for the Taha Defendants/Moving Parties

HEARD: January 11, 2024

ENDORSEMENT

[1] Taha Development Group Inc. ("TDG"), Omre Taha, and April McDonald-Taha, (collectively, the "Taha Defendants"), move to set aside the noting in default of the Taha Defendants and dismissing the plaintiffs' motion for default judgment.

[2] The materials before me on January 11, 2024, related only to the motion to set aside the noting in default.

[3] The plaintiffs' claim relates to work that was to have been performed on real property at 5225 Terry Fox Way, Mississauga, Ontario owned by two of the plaintiffs. The third plaintiff is a joint account holder of an account used to make payments that are in dispute.

[4] The claim was issued on August 25, 2023, and was served on the Taha Defendants on August 28, 2023. The defendants were noted in default and the plaintiffs brought a motion for default judgment, returnable November 14, 2023, seeking judgment in the amount of $187,982.68 as against all defendants. The motion was adjourned to November 30, 2023, to allow the Taha Defendants to bring a motion to set aside the noting in default. On November 30, 2023, the Taha Defendants' motion was adjourned, on consent, to January 11, 2023. Costs thrown away of that day were awarded to the plaintiffs fixed at $600.00.

[5] The parties agree that the Taha Defendants were in default for a period of 47 days before moving to set aside the noting in default. They have since retained counsel and submit that the

noting in default ought to be set aside on the basis that they have a valid defence, the delay in bringing this motion was relatively brief, and there is no prejudice to the plaintiffs.

[6] The plaintiffs acknowledge that under normal circumstances, this motion would likely be unopposed, but they do so here because, they allege, the evidence put forth by the Taha Defendants is hearsay without identifying the source of the information and ought not to be admitted. Alternatively, the plaintiffs submit that if the noting in default is set aside, it should be on terms: that the plaintiffs' costs of this motion are paid and that the Taha Defendants post security for the costs of the litigation in the amount of $77,000.00.

Issues raised:

(1) Have the Taha Defendants put forth admissible evidence on this motion?

(2) If so, does that admissible evidence satisfy the test that must be met by the Taha Defendants on this motion?

(3) If the noting in default should be set aside, should terms be imposed upon that order?

(4) If so, what terms?

The Law

Issue #1: Evidence on the motion

[7] Rule 39.01(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, (the "Rules") permits affidavit evidence on a motion that contains statements of the deponent's information and belief "if the source of the information and the fact of the belief are specified in the affidavit."

[8] The Taha Defendants rely on the affidavit of April McDonald-Taha. Her affidavit begins with: [W]here I appear to rely on the information of others, I believe that information to be true". She does not, however, explicitly identify the source of her information.

[9] The plaintiffs assert that, with few exceptions, Ms. McDonald Taha has no firsthand knowledge with respect to the evidence set forth in much of her affidavit.

[10] Ms. McDonald-Taha was cross-examined on her affidavit. The transcript of that examination reveals that she has virtually no knowledge of any of the facts that relate to the issues in this action and relies entirely upon what she has been told by her husband, Omre Taha.

[11] The plaintiffs submit that the Taha Defendants deliberately put forth Ms. McDonald-Taha so as to protect Mr. Taha from being cross-examined. While I accept that those submissions may be correct, I conclude that any assumed or presumed motive behind the Taha Defendants putting forth Ms. McDonald-Taha is not relevant to this motion.

[12] In my view, while she may not have said so explicitly, it is clear from the context of her affidavit that virtually everything in it is based on information provided to her by Mr. Taha. I find that to be a fact on this motion and, that the contents of Ms. McDonald Taha's affidavit, as well as the evidence she has given on cross-examination, to be binding upon the Taha Defendants.

Disposition of issue #1:

[13] I conclude that while portions of Ms. McDonald-Taha's evidence is hearsay, the evidence put forth by the Taha Defendants is, nonetheless, admissible on this motion.

Issue #2: Have the Taha Defendants satisfied the test to set aside the noting in default?

[14] Rule 19.03 (1) permits the court to set aside a noting in default on such terms as are just.

[15] In *Trayanov v. Icetrading Inc*., 2023 ONCA 322 the Court of Appeal sets out a detailed test for setting aside a noting in default. The Court begins its analysis with reference to rule 1.04(1), which requires that rules are to be construed liberally in order to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits". Next, the Court refers to r. 2.01(1)(a), which requires the court to grant all necessary relief, "on such terms as are just, to secure the just determination of the real matters in dispute" (at para. 16).

[16] The Court notes that the consequences under r.19.02 of being noted in default are significant in that the defendants are deemed to admit the truth of all allegations of fact made in the statement of claim and are prohibited from delivering a defence or taking any other step in the action except with leave of the court.

[17] In this case, having noted the Taha Defendants in default, the plaintiffs brought a motion for default judgment. The amount claimed is significant: $188,139.04, excluding costs and interest. The Taha Defendants asked the court to note that the amount claimed is more than double the total cost of the contract entered into with the plaintiffs. As such, the Taha Defendants' submit that they will suffer significant prejudice if they are not able to defend the claim and the respond to the plaintiffs' motion for default judgment.

[18] At para. 19 of *Trayanov*, the Court referenced its earlier decision of *Franchetti v. Huggins*, 2022 ONCA 111, stating:

> 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" [Citations omitted].

[19] The guiding factors were set out at paragraph 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 [*Intact Insurance Company v Kisel*, 2015 ONCA 205], *Nobosoft*, at para. 3 [*Nobosoft Corporation v. No Borders Inc*., 2007 ONCA 444, 225 O.A.C. 36]; *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 119 O.R. (3d) 561, at paras. 48-51.

[20] The above factors are addressed below.

(a) The parties' behaviour

[21] The plaintiffs submit that the parties' behaviour includes the manner in which the Taha Defendants conducted business with the plaintiffs. The plaintiffs assert that the Taha Defendants conducted business in an unscrupulous manner, intended to "confuse and deceive customers and creditors". Examples of this behaviour includes that the Taha Defendants asked the plaintiffs to make payments in cash; asked that payments be made to individuals, including Ms. McDonald-Taha; have changed the contract price after the contract was signed; now claim that the plaintiffs contracted with an entity not named in these pleadings, namely, 2385369 Ontario Inc., under the unregistered business name of Taha Multi Trade Group, neither of which was disclosed to or known by the plaintiffs, who made payments only to TDG and Ms. McDonald-Taha.

[22] The Taha Defendants' materials address the plaintiffs' allegations.

[23] On the record before me, I cannot make the finding that the Taha Defendants have acted in an unscrupulous or improper manner. Those are findings that may be available on a full record at trial, which is also the appropriate forum for determining the proper defendants. For that reason, I cannot and do not conclude that the behaviour of the Taha Defendants should deprive them of the relief they seek.

(b) The length of the Taha Defendants' delay

[24] The Taha Defendants delayed for a period of 47 days before retaining a lawyer in bringing a motion to set aside the noting in default. I find this to be a relatively short period of delay, which should be given very little weight on this motion.

(c) The reasons for the Taha Defendants' delay

[25] The Taha Defendants state that they delayed in delivering a statement of defence because they needed that time to cobble together sufficient finances to retain counsel to defend them and

bring the motion to set aside the noting in default. The evidence on this motion certainly supports a conclusion that the Taha Defendants are in a precarious financial position.

[26] The plaintiffs assert that the Taha Defendants could and ought to have contacted the plaintiffs or their counsel to ask for an extension of time. Those assertions may have merit but the plaintiffs have not stated that, had that request been made, it would have been granted. In any event, in my view, given the relatively short period of delay, the failure of the Taha Defendants to ask for an extension of time to deliver a defence should be given very little weight on this motion.

(d) The complexity and value of the claim

[27] The Statement of Claim alleges that Taha Defendants were retained to complete work that had been only partially completed by a prior contractor, the defendants, Iron Horse Contractors Inc. and Emad Sharqiya. The plaintiffs allege that deficient and incomplete work was undertaken by one or more of the Taha Defendants and the other defendants and that the plaintiffs incurred costs to complete and/or remediate work to have been completed by one or more of the defendants.

[28] On its face, the Statement of Claim is relatively complex and, as noted, the plaintiffs seek judgment of over $187,000. To echo the observations of the trial judge in *Trayanov* – the amount claimed is not an insignificant amount, however, "neither is this a multi-million-dollar claim" (2022 ONSC 583, at para. 52).

(e) Whether setting aside the noting in default would prejudice a party relying on it

[29] The plaintiffs moved relatively quickly in noting the Taha Defendants in default and in moving for default judgment. They have incurred costs in taking those steps, which can be addressed in a costs order made on this motion.

[30] I accept the accuracy of the evidence put forth by the plaintiffs that the Taha Defendants have been sued and have judgements and writs of execution against one or more of them and that the Taha Defendants may not have assets from which the plaintiffs might recover payment of any judgment they obtain against the Taha Defendants. However, while it may be reasonable to infer that the financial situation of the Taha Defendants is deteriorating, at the time this motion was brought, the plaintiffs did not have judgment against the Taha Defendants and any prejudice that may be caused by delaying the plaintiffs in moving toward judgment, caused by setting aside the noting in default, is speculative.

(f) The balance of prejudice as between the parties

[31] Given the relatively short delay and recognizing that the litigation is at an early stage, when considering the relative prejudice as between the plaintiffs and the Taha Defendants, the balance weighs heavily in favour of the Taha Defendants.

[32] The Taha Defendants assert that the wrong parties have been named as defendants and that the amount claimed is excessive. As observed by the appellate court in *Trayanov* (at paras. 25, 26 and 27), if a noting in default is not set aside, the defendants are be deemed to admit the facts alleged in the statement of claim. In this case, the Taha Defendants would thereby be deprived of

the ability to put their defence before the court on this somewhat complex claim and would be exposed to a significant judgment, which the plaintiffs could obtain on default.

(g) Whether the defendant has an arguable defence on the merits

[33] On this motion, the defendants have put forth their draft statement of defence and have evidenced an intention to defend the action. Defences have been raised both in the statement of defence and in the affidavit of McDonald-Taha.

[34] Without ignoring the plaintiff's allegations concerning the manner in which the Taha Defendants have conducted business, on the record before me, and based on the statement of defence put forth, I am satisfied that the Taha Defendants may have an arguable defence on the merits.

Disposition of Issue #2

[35] For the reasons set out above, I conclude that the Taha Defendants have met their onus on this motion and that the noting in default ought to be set aside.

Issue #3: If the noting in default should be set aside, should terms be imposed?

[36] The plaintiffs submit that if the court determines that the noting in default should be set aside, the court should order that the Taha Defendants post security for costs in the amount of $77,000, for the privilege of being allowed to defend the claim. Briefly, the plaintiffs submit that alleged "unscrupulous" behaviour of the Taha Defendants is such that an order for security for costs ought to be imposed as a term of setting aside the noting in default.

[37] I conclude otherwise.

Disposition of Issue #3

[38] Based on the evidence put forth by the plaintiffs, and, also, by the Taha Defendants, I accept that the financial viability of the Taha Defendants is questionable. Likewise, the plaintiffs may be reasonable in being concerned that any judgment they might obtain will be uncollectible and that in the time it may take to get to judgment, the Taha Defendants will have rendered themselves judgment-proof.

[39] Certainly, if this court were to order the Taha Defendants pay $77,000 into court to the credit of this action as a term of setting aside the noting in default, the plaintiffs would be immunized, in part, from any potential risk that any judgment they obtained will be uncollectible. However, the Rules do not contemplate the making of such an order as against defendants, nor, in my view, would such an order be in keeping with the objectives of the Rules.

[40] Given the evidence concerning the Taha Defendants' poor financial situation, I also find that if an order for security for costs were to be made, in all likelihood, that order would operate as a complete bar to the Taha Defendants, who would be unlikely to be able to raise sufficient funds.

[41] Also, if the Taha Defendants were ordered to post security and, succeeded in doing so, that relief could, in effect, put the plaintiff's claim ahead of claims already proven and for which judgment has been granted to other plaintiffs. In my view, that would unjustly prefer the interests of the plaintiffs to those of the existing judgment creditors.

[42] For all the reasons set out, I conclude that I ought not to exercise my discretion to make an order for security for costs.

Issue #4: What terms should be imposed?

[43] I return to the guidance offered by the appellate court in *Trayanov* with respect to the appropriate terms to be ordered. At paragraphs 30 and 31, the Court directed the defendants to file their statement of defence within 10 days and upheld the motion judge's award of costs as against the defendants who had sought an indulgence from the court.

[44] Applying that reasoning to the facts in this case, in the exercise of my discretion on this motion, I am of the view that an award of costs to the plaintiffs, and a strict timeline for service of the Taha Defendants' statement of defence, are appropriate terms to be ordered.

Disposition of Issue #4

[45] I fix the plaintiffs' costs of the Taha Defendants' motion at $12,400 inclusive of fees, disbursements and HST. This amount is somewhat above partial indemnity and somewhat less than substantial indemnity costs to reflect the time spent by the plaintiffs on this motion, including cross-examination of Ms. McDonald-Taha, necessitated, at least in part, because she had virtually no firsthand knowledge of the facts.

[46] In fixing the plaintiffs' costs of this motion, and so that there is concern of a double award, the $12,400 awarded has taken into account time identified in the plaintiffs' Costs Outline for preparing for and attending the November 30, 2023 motion, in respect of which $600 in costs were awarded on that day.

[47] Payment by the Taha Defendants of the costs awarded is a term of the order setting aside the noting in default. The costs are to be paid within 30 days of the date of this decision.

[48] In addition, the Taha Defendants' statement of defence is to be served within 10 days of the date of the date of this Endorsement and must be filed within 30 days of that date, together with proof of payment of the total costs awarded to the plaintiffs: today's costs of $12,400 and the $600 awarded on November 30, 2023 (a total of $13,000) within 30 days of the date of this endorsement.

Orders

[49] For the reasons set out above, I order as follows:

1. The Taha Defendants are to pay the plaintiffs' costs of this motion in the amount of $12,400 inclusive of fees, disbursements and HST.

2. The Taha Defendants are to serve their statement of defence within 10 days of the date of the date of this Endorsement.

3. Provided that by **March 7, 2024**, the Taha Defendants have filed proof of payment of the $13,000 costs awarded to the plaintiffs respecting this motion, ($12,400 awarded on February 6, 2024, and $600 awarded on November 30, 2023) the noting in default of the Taha Defendants is set aside and the Taha Defendants may then file their statement of defence.

Justice L. Sheard

Date: February 6, 2024

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ali Syed Akhtar, Fatima Khan and Shamim Fatima,

Plaintiffs

AND:

Taha Development Group Inc., Omre Taha, April Taha also known as April McDonald-Taha, Iron Horse Contractors Inc. Emad Sharqiya,

Defendants

BEFORE: Justice L. Sheard

COUNSEL: Derek A. Schmuck for the Plaintiffs/Responding Parties
Alaa Noui for the Taha Defendants/Moving Parties

ENDORSEMENT

L. Sheard J.

DATE: February 6, 2024