Federal Court of Appeal

Cour d'appel fédérale

Date: 20241004

Docket: A-252-23

Citation: 2024 FCA 161

CORAM: **WEBB J.A.**
MONAGHAN J.A.
GOYETTE J.A.

BETWEEN:

2474234 ONTARIO INC. AND THE ESTATE OF THE LATE MOISHE SMITH

Appellants

and

DUNN'S FAMOUS INTERNATIONAL HOLDINGS INC.

Respondent

Heard at Ottawa, Ontario, on October 2, 2024.

Judgment delivered at Ottawa, Ontario, on October 4, 2024.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: WEBB J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The Estate of the Late Moishe Smith and 2474234 Ontario Inc. (247) appeal the decision of the Federal Court (2023 FC 908, *per* Southcott J) dismissing their motion brought under Rule 399 of the *Federal Courts Rules*, S.O.R./98-106. That motion sought to set aside a January 21,

2021 default judgment issued against Mr. Smith and 247 in favour of the respondent, Dunn's Famous International Holdings Inc.

[2] To summarize the background to this appeal, in 2016 the respondent commenced a trademark infringement action against certain individuals and corporations (the Devine parties). In late January 2017, the respondent joined other defendants, including Mr. Smith and 247, in that action. The respondent served the resulting amended statement of claim on Mr. Smith and 247 shortly thereafter. At the end of February 2020, following settlement of the action against the Devine parties and certain other defendants, the respondent served a second amended statement of claim on Mr. Smith and 247.

[3] On November 6, 2020, the respondent brought an *ex parte* motion for default judgment, under Rule 210 of the *Federal Courts Rules*, based on the failure of Mr. Smith and 247 to file a statement of defence. The Federal Court granted default judgment and found Mr. Smith and 247 jointly liable, ordering them to pay damages and pre- and post-judgment interest.

[4] The appellants brought the motion to set aside the default judgment early in 2023. The Federal Court said that, to succeed on their motion, the appellants had to demonstrate that Mr. Smith and 247 (i) had a reasonable explanation for their failure to file a statement of defence, (ii) had a *prima facie* defence on the merits of the claim, and (iii) moved promptly or within a reasonable time to set aside the default judgment. The failure to establish any of the three would be fatal to their motion: reasons at paras. 16-17, citing *Babis (Domenic Pub) v. Premium Sports Broadcasting Inc.*, 2013 FCA 288 at paras. 5-6; *UBS Group AG v. Yones*, 2022

FC 487 at para. 17; *Moroccanoil Israel Ltd. v. Laboratoires parisiens Canada (1989) Inc.*, 2012 FC 962 at para. 20.

[5] The Federal Court concluded that Mr. Smith and 247 did not have a reasonable explanation for not filing a statement of defence. Because the test is conjunctive, the Court saw no need to address the other two conditions and dismissed the appellants' motion.

[6] Before us, the appellants do not allege the Federal Court erred in identifying the test for setting aside a default judgment. Moreover, they concede that its finding there was no reasonable explanation for the failure to file a statement of defence is one of mixed fact and law, if not fact. They also accept that, under the appellate standard of review, we cannot interfere with that finding absent a palpable and overriding error or an extricable error of law: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

[7] The appellants do not suggest the Federal Court erred in law. Rather, they say the Federal Court made a palpable and overriding error in failing to interpret the combined evidence of the appellants and the respondent as establishing that Mr. Smith and 247 reasonably believed the matter was resolved so they had no need to file a statement of defence. Because of this error, they say, the Federal Court erred in failing to address the remaining two conditions to set aside a default judgment.

[8] I disagree.

[9] Over more than six pages in its reasons, the Federal Court considered the history of the matter and the explanations the appellants offered for the failures by Mr. Smith and 247 to file a statement of defence: paras. 18-38. It reviewed and analyzed the evidence from both the appellants and the respondent said to support those explanations and concluded that evidence fell short of establishing a reasonable explanation for these failures.

[10] I see no palpable and overriding error in this finding; it was open to the Federal Court on the evidence before it on the appellants' motion. On appeal, we cannot reweigh that evidence and draw different inferences from it, nor substitute our view of the facts for that of the Federal Court: *Housen v. Nikolaisen* at paras. 23-25.

[11] While the appellants also assert the Federal Court erred in not addressing the second and third conditions for setting aside a default judgment, they do so on the assumption the Federal Court made a palpable and overriding error on the first condition. They have failed to establish such an error and thus I would dismiss the appeal.

[12] That said, the record before us leaves many troubling and unanswered questions. The responding motion record in the appellants' motion to set aside the default judgment contained affidavits of Leonard Seidman and Michael Chevalier, co-counsel to the respondent, albeit with different law firms. The objective of the affidavits appears to have been to respond to the appellants' assertion that Mr. Smith and 247 were working towards a settlement of the claim.

[13] Mr. Seidman's affidavit describes a telephone conversation with Mr. Smith in which Mr. Smith offered to settle the respondent's claim. Mr. Seidman affirms he "told [Mr. Smith] that in order to settle [the respondent's] claim against him, he would have to provide his HST remittance forms for sales [at the restaurant] for the period from 2016 to 2018": Appeal Book at 1473. Mr. Seidman affirms receipt of "the HST remittance forms from …Mr. Smith in April 2020 showing gross sales of $974,331.07 for the period from 2016 to 2018" which he then forwarded to Mr. Chevalier: Appeal Book at 1473.

[14] However, it is clear that those remittance forms were not before the Federal Court on the respondent's motion for default judgment. Rather, financial statements for 247 for the 2015-2018 period were entered in the record through an affidavit of Elisa Kligman. Mr. Chevalier's affidavit on the appellants' motion to set aside the default judgment says nothing about receiving the HST remittance forms from Mr. Seidman, nor about those financial statements or how they were obtained. While he affirms he had telephone calls with Mr. Smith, both before and after the default judgment, he says nothing about what they discussed during those calls.

[15] Neither Ms. Kligman's affidavit nor the financial statements are in the record before us. Counsel for both parties confirmed the affidavit was not in the appellants' motion record before the Federal Court. Yet, it is clear the Federal Court's $163,894.22 damages award, comprising a $50,000 franchise fee plus a royalty of 5% of net revenues, reflects *net* revenues of $2,277,886—more than double the *gross* revenues reported on the HST remittance forms described in Mr. Seidman's affidavit.

[16] While, regrettably, we have no explanation for the source of the financial statements nor the significant difference in revenue numbers, this is not an appeal of the default judgment. Rather, it is an appeal of the Federal Court's decision not to set that judgment aside. To allow that appeal we must find a reviewable error in that decision. The appellants have not identified a reviewable error in that decision and I see none.

[17] Both parties seek costs of this appeal. The respondent alleges the appellants' motion was, and this appeal is, "frivolous, vexatious, [and] clearly unfounded and amounts to an abuse of process". It seeks a declaration to that effect, as well as costs of this appeal on the highest scale. I see nothing in the record that supports that characterization of the motion or the appeal. The appellants suggest that, regardless of outcome, the respondent has not always acted appropriately in the proceedings before the Federal Court. As an example, they point to material that, on its face, is subject to settlement privilege but was put before the Federal Court.

[18] I would dismiss the appeal, but in the circumstances and in my discretion, would award no costs.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-252-23
STYLE OF CAUSE:	2474234 ONTARIO INC. AND THE ESTATE OF THE LATE MOISHE SMITH v. DUNN'S FAMOUS INTERNATIONAL HOLDINGS INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2024
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	WEBB J.A. GOYETTE J.A.
DATED:	OCTOBER 4, 2024

APPEARANCES:

Ashley Burk	FOR THE APPELLANTS
Michael Chevalier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Pinto Legal	FOR THE RESPONDENT