CITATION: Gunggo Co. Ltd v. Tieu et al, 2016 ONSC 438
NEWMARKET COURT FILE NO.: CV-14-119213-00
DATE: 20160118

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Gunggo Co. Ltd., Plaintiff

and

Peter Tieu, Capitalized Digital Media LLC, Eric David and New Vista Enterprises Inc., Defendants

BEFORE: The Honourable Mr. Justice P.W. Sutherland

COUNSEL: A. Patrick Wymes, for the Plaintiff

Julia Webster, for the Defendants, Eric David and New Vista Enterprises Inc.

HEARD: January 12, 2016

ENDORSEMENT

[1] On January12, 2016, I heard the motion brought by the defendants, Eric David and New Vista Enterprises Inc. ("the Defendants") to set aside a default judgement and noting of default obtained by the Plaintiff.

[2] No one appeared for the other Defendants.

[3] In my endorsement on that day, the Plaintiff and the Defendants consented to an Order setting aside the noting in default and the default judgment dated October 5, 2015. The Plaintiff and the Defendants could not agree on costs. This endorsement deals with the issue of costs.

Brief Background

[4] The Plaintiff commenced its action on June 30 2014. The counsel for the Defendants served a notice of intent to defend on September 3, 2014. The Defendants also served a Demand for Particulars and Request to Inspect Documents on September 3, 2014. In the letter serving the notice of intent to defend, demand for particulars and request to inspect documents, the Defendants' counsel stated:

> Given that we require the requested particulars and documents to be able to plead, we do not expect to be in a position to serve a Statement of Defence by the deadline. Please take no further steps

against our clients without first providing ample prior written notice.

[5] On March 10, 2015, the Plaintiff sent a draft amended statement of claim along with consent and Order to the Defendants' counsel. Also on March 10, 2015, the Plaintiff served a motion for summary judgement requesting judgment against the defendant, New Vista Enterprises Inc. ("New Vista"). The notice of motion did not indicate a date for the return date but stated "to be heard on a date to be obtained".

[6] Correspondence were exchanged between counsel for the Defendants and the Plaintiff in March and April 2015, concerning dates for the summary judgment motion and whether the bringing of this motion was premature given that the Defendants have not served or filed its Statement of Defence. The Defendants also reminded the Plaintiff that the demand for particulars has not been answered.

[7] Further in a letter dated April 8, 2015, the Defendants indicated that it will not oppose the request for the amendment of the statement of claim as long as no costs are sought and the Defendants' motion to deal with the demand for particulars and request to inspect documents, be heard before the summary judgment motion. The Defendants provided dates for their motion in September, 2015. The Plaintiff's counsel indicates in his later of April 8, 2015 that any of the dates are agreeable to him and that he will have his summary judgment motion returnable on the same day.

[8] In response, the Defendants, in a letter dated May 14, 2015, advised that a long motion date be obtained and that the Defendants' counsel wanted to appear with the Plaintiff's counsel at scheduling court to schedule the summary judgment motion.

[9] From May 14, 2015 to September 5, 2015, it appears that no activity took place until September 4, 2015 when the Plaintiff's counsel sent a letter indicating he has instructions to have the Newmarket action and Toronto action heard together, and enclosed a notice of motion and affidavit to obtain the necessary order. In this letter, Plaintiff's counsel indicates that he intends to have this motion heard the same day of the Defendants' motion, being September 23, 2015.

[10] On September 8, 2015, the Defendants' counsel sent a letter to Plaintiff's counsel setting out the history of the action. The Plaintiff's counsel responded in a letter dated September 8, 2015 indicating the he was not aware that the September 23, 2015 date was cancelled and will follow up with respect to scheduling another date for his motion. In this letter, Plaintiff's counsel made no mention of the requirement of a pleading from the Defendants or any intention to note the Defendants in default or obtain default judgment.

[11] The next correspondence, are two letters from Plaintiff's counsel each dated October 8, 2015. In the first letter, the Plaintiff enclosed the default judgment against the Defendants dated October 5, 2015. In the second letter, the Plaintiff served a Notice of Examination in Aid of Execution.

[12] The Plaintiff's requisition for default judgment against the Defendants is dated September 29, 2015.

[13] In a letter dated October 14, 2015, the Defendants' counsel indicates that the Plaintiff should not have taken steps to obtain default judgment, given the history and the fact the Plaintiff knew the Defendants had counsel and requested the Plaintiff's consent to set aside the default judgment.

[14] On October 19, 2015, the Defendants' counsel sent to the Plaintiff's counsel, a consent and draft order staying the enforcement of the default judgment until the motion to set aside the default judgment is heard.

[15] On October 26, 2015, a futher letter is sent by the Defendants' counsel enclosing the notice of motion, consent and order to stay the execution of the default judgment

[16] The counsel for the Defendant Peter Tieu consented to an order staying the execution of the default judgement on October 26, 2015.

[17] There was a further exchange of correspondence between the Plaintiff's counsel and the Defendants' counsel in the month of October 2015. The Plaintiff provided its consent to the order to stay the execution of the default judgment on November 5, 2015.

[18] On the morning of the January 12, 2015, the Plaintiff consented to an order to set aside the noting in default and the default judgment.

Position of the Defendants

[19] The Defendants take the position that they are entitled to costs on a substantial indemnity basis. The action of Plaintiff's counsel is "sharp practice". The Plaintiff's counsel was well aware that the Defendants had counsel. The Plaintiff's counsel was aware that the Defendants were not providing a statement of defence as set out in the Defendants' counsel's letter dated September 3, 2014. No notice was given to the Defendants' counsel of the Plaintiff's intention to note the Defendants in default and obtain default judgment.

[20] Further, the Defendants argue that the requisition for default judgement submitted by the Plaintiff indicated that the claim is a liquidated damage claim against both of the Defendants when, in fact, the claim against the Defendant, Eric David, is to pierce the corporate veil. Accordingly, it is the Defendants' submission that the Plaintiff misrepresented to the court the substance of the claim against Eric David.

[21] Consequently, based on the actions of the Plaintiff, the Defendants submit that they are entitled to costs in the amount of $11,413.15. The Defendants submit that the costs should be paid by Plaintiff's counsel pursuant to Rule 57.07 of the *Rules of Civil*

Procedure[1] due to the "sharp practice" of Plaintiff's counsel in obtaining default judgment and the misrepresentation to the court on the requisition for default judgment.

Position of the Plaintiff

[22] The Plaintiff disagrees that there was sharp practice. The Plaintiff submits that there is no "legal obligation" pursuant to the *Rules of Civil Procedure* to provide notice to the Defendants of the Plaintiff's intention to take steps to obtain default judgment. The Plaintiff further submits that the Defendants' counsel was not "actively" involved in defending the Defendants and thus, the Plaintiff had no obligation to provide notice to the Defendants' counsel.

[23] The Plaintiff further submits that the Defendants have taken no steps to inspect the documents, or bring their motion to obtain the particulars requested as set out in the Defendants' demand for particulars. In effect, the Plaintiff submits that the Defendants are simply delaying this action, and have not been "actively" involved in defending the action.

[24] The Plaintiff submits that there is no basis for an order that Plaintiff's counsel pay any costs award pursuant to Rule 57.07 of the *Rules of Civil Procedure*.

[25] There should be no order for costs and if the court is considering awarding costs, those costs should be in the cause.

Should Costs be Awarded?

[26] Both the Plaintiff and the Defendants rely on the Ontario Court of Appeal decision of *Stephen Male v. The Business Solutions Group et al*[2]. The Defendants takes the position that the Plaintiff acted unreasonably by noting the Defendants in default and obtaining default judgment when the Plaintiff was well aware that the Defendants were defending this action, and more so, given the contents of the Defendants' counsel's letter dated September 3, 2014.

[27] The Plaintiff takes the position that the Court Appeal decision only applies when the Defendants were "actively defending the case at the time that the noting in default occurred and at the time the default judgement was taken out"[3]. It is the submission of the Plaintiff that the Defendants were not actively defending the action when the Defendants were noted in default and the default judgment was taken out, in that the Defendants did not bring a motion to deal with the issues of the demand for particulars; nor, did the Defendants take any steps to inspect the documents requested in the request to inspect documents.

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[1] O. Reg., 114/99
[2] 2013 CarswellOnt 7657, 2013 ONCA 382 (CA)
[3] *Supra*, para. 17

[28] In reviewing the circumstances of this case, I disagree with the Plaintiff's submission. At the time of the noting in default and the requisition for default judgment, the Plaintiff's counsel and the Defendants' counsel were corresponding with each other concerning this action. Letters where exchanged between the Plaintiff's counsel and the Defendants' counsel dated September 4, and 8, 2015, respectively. The Defendants, I find, were actively defending the action. The contents of the letters dated September 4 and 8, 2015, clearly indicate that the Defendants' counsel was defending the Defendants in this action and were taking steps to protect the Defendants' interests.

[29] The Plaintiff's counsel knew the content of the Defendants' counsel's letter dated September 3, 2014 which contained the statement that, if the Plaintiff intended to take any steps against the Defendants, "ample notice" was to be provided. I find it extraordinary that Plaintiff's counsel would take the steps against the Defendants without first providing the Defendants with notice of his intention to do so.

[30] Moreover, paragraph 19 of The Advocates' Society publication entitled, *The Principles of Civility for Advocates*[4], has been endorsed by the Court of Appeal in *Moore v. Getahun.*[5] Paragraph 19 reads:

> **Conduct That Undermines Cooperation *among* Advocates**
>
> ...
>
> 19. Subject to the Rules of Practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

[31] Even with the failure of notification, the Plaintiff did not consent to the setting aside of the default judgement or noting in default until after the motion materials of the Defendants were drafted and served. I find the actions of the Plaintiff to be less than civil and not to be condoned.

[32] I therefore find that costs should be awarded.

Costs

[33] Pursuant to the *Rules of Civil Procedure*, namely Rule 57.01, a presumption exists that costs should be awarded to the successful party. The Court of Appeal in the decision of *Serra v. Serra*[6] confirmed that the modern costs rules are designed to encourage and foster three fundamental purposes, namely, to partial indemnify successful litigants for

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[4] The Advocates' Society's 2009 publication "Principles of Professionalism for Advocates and Principles of Civility for Advocates", page 12, para. 19
[5] 2015 ONCA 55 (CanLII)
[6] [2009] O.J. 1905 (C.A.)

the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants bearing in mind that the award should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party.

[34] Further, the Court of Appeal also indicated in the decision of *Boucher et al. v. Public Accountants Council for the Province of Ontario*[7] and *Delellis v. Delellis*[8], that when assessing costs it is not simply a mechanical exercise. It is not simply a calculation of hours' spent and hourly rates but the court is to take a proportional methodology. The overall objective is to fix an amount of costs that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case.

[35] Rule 57.03 of the *Rules of Civil Procedure* states that on the hearing of a contested motion, the court shall fix the costs of the motion to be paid within thirty days, unless the court is satisfied that a different order would be just.

[36] I find that the Plaintiff was the successful party. I further find that due to the conduct of the Plaintiff in noting the Defendants in default and obtaining default judgment, as outlined above, warrants that the Defendants should be awarded costs.

The Amount of Costs and Who Should Pay

[37] The Defendants are requesting the sum of $11,413.15 in costs on a substantial indemnity basis. The Defendants submit that costs on a substantial indemnity basis are 90% of the actual rates and costs on a partial indemnity basis are 60% of the actual rate.[9]

[38] Both parties served the other with offers to settle.

[39] The Plaintiff's offer to settle is set out in a letter from Plaintiff's counsel dated December 16, 2015. This offer to settle was not withdrawn.

[40] The Defendants' offer to settle is set out in the Defendants' counsel's letter dated December 18, 2015. This offer to settle was also not withdrawn.

[41] The Plaintiff's offer to settle offered:

(a) Consent to set aside the noting in default and the default judgment on a without costs basis.

(b) Withdraw of the Plaintiff's cross motion.

(c) The setting of a timetable for this action including delivery of the statement of defence.

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[7] [2004] No. 2634 (C.A.)
[8] [2005] O.J. No. 4345
[9] *Stetson Oil & Gas Ltd v. Stifel Nicolaus Canada Inc.*, 2013 ONSC 5213 (SCJ)

(d) Consent of the Defendants to the amended statement of claim.

[42] The Defendants' offer to settle offered:

(a) The setting aside of the noting in default and the default judgment.

(b) Costs to be paid by the Plaintiff in the amount of $4,500.

(c) The Plaintiff shall provide the requested particulars and documents within twenty days of the order.

[43] Neither of the parties' offer to settle was as favourable or more favourable than their consent. The consent only dealt with setting aside of the noting in default and the default judgment. Accordingly, Rule 49.10 of the *Rules of Civil Procedure* does not apply.

[44] After reviewing the bill of costs of the Defendants, I find that the Defendants should obtain its costs for this its motion including the full day attendance on January 12, 2016. I fix the amount for costs at $9,500, inclusive of disbursements and HST. I find this amount to a fair and reasonable amount to be paid by the Plaintiff, given the conduct of the Plaintiff.

[45] The Defendants are seeking that the Plaintiff's counsel pays the costs awarded. The Defendants' submit that the conduct of the Plaintiff's counsel, as outlined herein, warrants the triggering of Rule 57.07 of the *Rules of Civil Procedure.*

[46] Rule 57.07 of the *Rules of Civil Procedure* states:

LIABILITY OF LAWYER FOR COSTS

(1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) Disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;

(b) Directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) Requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.

(2) An order under sub rule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable

> opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.
>
> (3) The court may direct that notice of an order against a lawyer under sub rule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 (3); O. Reg. 575/07, s. 1.

[47] In the decision of *Standard Life Assurance Co. v. Elliot*[10], Justice Molloy reviews several cases dealing with Rule 57.07. In reviewing these cases Justice Molloy refers to the decision of Granger J. in *Marchand (Litigation Guardian of) v. Public Hospital Society of Chatham,* at paragraph 115, where Granger J. states:

> (a) ...Although "bad faith" is not a requirement to invoking the cost sanctions of Rule 57.07 against a solicitor, such an order should only be made in rare circumstance and such orders should not discourage lawyers from pursuing unpopular or difficult cases. It is only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court that resort should be had to R.57.07.[11]

[48] More than mere responsibility is required by a lawyer to attract the consequences of Rule 57.07. The Divisional Court stated in *Ben-Lolo v. Wang*[12]:

> In interpreting Rule 57.07(1), the Divisional Court set out a two part test in *Carleton v. Beaverton Hotel* (2009), 96 O.R. (3d) 391 (Ont. Div. Ct.) at para. 21:
>
> The first inquiry is whether the lawyer's conduct falls within Rule 57.07(1) in the sense of causing costs to be incurred unnecessarily and then the second step is to consider, as a matter of discretion (and applying the extreme caution principle) whether in the circumstances of the particular case the imposition of costs against the lawyer personally is warranted.
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> The Divisional Court referred to *Marchand*, above, where the judge stated that an order should be made against the lawyer personally only if the lawyer "pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court"... .

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[10] 2007 CarswellOnt 3236 (SCJ)
[11] *Supra*, para. 25
[12] [2012] O.J. No 519

> ... Moreover, as this Court said in *Carleton*, above, the court must go on to the second step and, applying the extreme caution principle, ask whether costs against the lawyer personally are warranted in the circumstances.

[49] I am not satisfied, on the material before me that I can find that Plaintiff's counsel's conduct caused costs to be incurred unnecessarily. I agree and repeat the caution put forth by Granger J. in *Marchand.*

[50] Furthermore, I am not satisfied that I should exercise my discretion applying the extreme caution principle. I am not satisfied that costs are warranted against counsel in the circumstances of this case. I cannot find and do not find that in the circumstances of this case that conduct of Plaintiff's counsel was clearly derelict in his duties as an officer of the court.

[51] I am satisfied, nonetheless, that the Plaintiff should pay costs on the basis of ignoring the contents of the letter of the Defendants' counsel dated September 3, 2014, and, by not providing notice to the Defendants that the Plaintiff intended to take steps against the Defendants in noting the Defendants in default and obtaining default judgment.

Disposition

[52] I order that the Plaintiff, Gunggo Co. Ltd., shall pay costs to the Defendants, Eric David and New Vista Enterprises Inc., the sum of $9,500, inclusive of disbursements and HST, payable in thirty days.

Justice P.W. Sutherland

Released: January 18, 2016