

COURT FILE NO.: 06-CL-6797

DATE: 20090310

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

Yan David Payne, for the Plaintiff

- and -

HAYWOOD WELTON a.k.a.

HOWARD WELTON,

MABEL JOE WELTON a.k.a. MARY

JOE WELTON a.k.a. MABEL OY LING

JOE-WELTON, [REDACTED]

[REDACTED]

[REDACTED],

CHRISTINE REN, LESLIE TOTH,

MARY CHAPMAN,

ROBERT A. CHAPMAN,

DAVID MOLSON, ARNOLD KELLY,

[REDACTED],

HARDCORE TRUCKING INC.,

HARDCORE TRUCKING

MANAGEMENT, HARDCORE

PROPERTY MANAGEMENT,

KINGSLAND APPRAISAL SERVICES

INC., ALAN CHANG, CENTURY 21

PARKLAND LTD., PATRICIA

PALMIERI, PRUDENTIAL ELITE

REALTY T.W., GREGORY CRISP,

PEEK-A-BOO MANAGEMENT INC.,

MacDOUGALL, MacDOUGALL &

MacTIER INC., SOUTHWIND LIMITED,

NORTHWIND LIMITED,

YU SHU JIANG, KIM JOE,

[REDACTED], [REDACTED]

[REDACTED], NICOLA

PHILADELPHIA, [REDACTED]

Milton A. Davis, for the Defendants

[REDACTED] 1661843 ONTARIO
 LTD., BRIAN FITZSIMMONS,
 GONZALO VELEZ CORREA, SAUL
 ALBERTO VELEZ, [REDACTED]
 KIMBERLEY SHONIKER, WILLIAM
 HO, MIKE STRAIN, QIAN ZOU,
 WAYNE FOWLER, FRANK
 ROBERTSON, DARKO PERIC, SIK
 HUNG CHEE, ANSON CHAN, RAY
 WELSH, [REDACTED]
 [REDACTED]
 [REDACTED] MARVIN
 SZE CHUNG LOUIE, [REDACTED]
 [REDACTED] FRANCINE M. PAQUETTE,
 BRAD CHAPMAN, BRODERICK KING
 HIN CHAN, STEVEN F. MAY a.k.a.
 STEVEN OSMOKROUK,
 CHRISTOPHER McKINNON, HAO YU,
 ERICA SACRAFAMILIA, LINDA
 VELEZ, JAY WHITE, TONY BANWELL,
 [REDACTED]
 [REDACTED] HUGO SERVANDO
 ANTONIO, SANDRA SEGIO, ROBERT
 WEST, [REDACTED] MARIO FELIX,
 SEAN POTTER, DAVID CHAN, 1603662
 ONTARIO INC., JAMES PEARSON,
 PETER KALUS, JOHN WINTERS,
 JOYCE LEE, ROSALEE DOERING,
 MIN REN, RICHARD WILLIAMS,
 YUSHEN REN, MAHOGANY
 INTERNATIONAL HOLDINGS INC..
 YUN SHU JIANG. GULIETTA PARISE
 a.k.a. JULIETTE PARISE, BRUNO
 PAOLINI, MARK GOURLAY and YEN
 LING CHEN

Defendants

)
) HEARD: March 4, 2009

Hoy J.

REASONS FOR DECISION

[1] The Royal Bank of Canada ("RBC") obtained default judgment on May 1, 2008 against Mary Chapman, and certain other defendants, in the amount of \$5,596,756.86. Ms. Chapman now moves to set aside that judgment.

[2] In its Statement of Claim, RBC alleged that Ms. Chapman and the other named defendants were involved in a mortgage fraud, perpetrated against RBC, involving 33 separate properties. RBC pleaded that certain defendants, including Ms. Chapman, in exchange for fees, applied for mortgages for properties in which they did not have an interest, and that the mortgages were based on artificially inflated property values. In particular, RBC alleged that Ms. Chapman applied for a mortgage in the amount of \$139,500 with respect to the property municipally known as 44 Sherman Avenue N., Hamilton. RBC also alleged that Ms. Chapman received a portion of the proceeds of the mortgage funds advanced pursuant to the scheme, and that she, and the other defendants, conspired to defraud RBC by participating in the scheme.

[3] In its Statement of Claim, RBC claimed damages for fraud or in the alternative conspiracy to defraud in the amount of \$4,000,000, plus punitive and exemplary damages in the sum of \$500,000. It plead that particulars of the damages were not available, and that particulars would be delivered prior to trial.

[4] Counsel for RBC advised at the hearing of this motion that judgment was obtained against Ms. Chapman based on the Statement of Claim, and that no additional affidavit evidence, as to damages or otherwise, was filed by RBC on the motion for default judgment against Ms. Chapman.

[5] Rule 19.08(2) provides:

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 obtained after trial may be set aside or varied by a judge on such terms as are just.

[6] On a motion to set aside default judgment, the motions judge should consider whether (i) the default was unintentional and there is a valid reason for the default, (ii) the motion to set aside the judgment was served forthwith after the judgment came to the moving party's attention, and (iii) an arguable defence on the merits exists. These principles governing the exercise of discretion to set aside a default judgment are not, however, rigid preconditions, such that the failure to satisfy any one of them necessitates the dismissal of a motion to set aside. The court must ultimately determine whether the interests of justice favour an order setting aside the default judgment. In doing so, it will have regard to the potential prejudice both to the moving party and respondent, and the effect of any order on the integrity of the administration of justice. It is open to the court to impose terms on the moving party in setting aside the default judgment. See: *Chitel v. Rothbart*, [1987] O.J. No. 661, overturned on appeal, [1988] O.J. No. 1197; *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, [2007] O.J. No. 1685.

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[7] In this case, it is conceded that the principle requiring the moving party to move promptly to set aside the default judgment is satisfied. Ms. Chapman, through counsel, communicated her intention to bring this motion as soon as she became aware of the default judgment. Delay in the actual bringing of the motion occurred as a result of settlement discussions, ultimately unfruitful, between the parties.

[8] RBC argues that Ms. Chapman has, however, failed to establish that she has a reasonable explanation for the default and an arguable defence on the merits, and that she misled the court in her affidavit by describing her marital status as "separated", and I should accordingly dismiss the motion.

[9] Having regard to the totality of the circumstances, I have concluded that the default judgment should be set aside, on terms.

[10] In my view, Ms. Chapman has an arguable defence on the merits to a judgment against her in the amount of \$5,596,756.86.

[11] Ms. Chapman's evidence is that her husband, Terry Chapman ("Mr. Chapman"), worked for Haywood Welton and David Molson, the two individuals painted as the authors of the fraudulent scheme, collecting rent and managing their properties. Mr. Chapman proposed to her that she apply for a mortgage for 44 Sherman Avenue, and that title would be put in her name. In exchange, she would be paid \$3000. The property would be rented, and the rent would cover the mortgage payments, or would be renovated and sold at a profit. She understood that Welton and Molson, who could not obtain a mortgage, would be the "real" owners. The property was in fact rented for about \$700 per month which was approximately the amount of the mortgage payment; deposits were put into her bank account to cover the mortgage payments, and the mortgage payments were deducted from her account. To obtain the mortgage, she provided details of her employment, which were true, and copies of her Social Insurance Card and other identification documents. Her evidence is that the proof that she had funds on deposit with a financial institution provided to RBC was false, and was not provided by her.

[12] While RBC did not appear to have filed an affidavit in connection with the default judgment motion against Ms. Chapman, it has filed an affidavit in response to this motion. The evidence of Sheila Wilson, an investigator with RBC, is that while Ms. Chapman signed for a \$139,000 mortgage on 44 Sherman, that property was acquired three weeks prior for only \$87,000. Ms. Wilson's further evidence is that banking records of Molson, a lawyer, show that Ms. Chapman received a total of seven cheques from Molson's trust account in the aggregate amount of \$27,000 between November 28, 2005 and October 6, 2006, and that Ms. Chapman received payments totaling \$37,000 from Molson's trust account between October 7, 2005 and October 6, 2006. Some appear to relate to the acquisition of the property at issue. Mr. Chapman's evidence was that since he did not have his own bank account, payments for his wages were made to Ms. Chapman. Ms. Chapman's evidence is that she thought the cheques were Terry's pay, and acknowledges that because he was unable to cash cheques because of his bad credit, payments to him were made to her and she turned the funds over to him. RBC will argue, based on these payments, that Ms. Chapman had a role in the scheme involving all 33 mortgages at issue.

[13] The evidence filed by RBC on this motion is that it sustained a deficiency of principal and interest on the 44 Sherman mortgage in the sum of \$117,442.06.

[14] Ms. Chapman submits that: applying for a mortgage when one is not the beneficial owner of the property is not fraudulent; if it is, the scope of the fraud she was involved in was restricted to the 44 Sherman property; and, in any event, there is no proof that RBC sustained damages in the amount of \$5,596,756.86.

[15] Given Ms. Chapman's evidence as to the limited scope of her involvement, and the absence of proof of damages in the amount of \$5,596,756.86, Ms. Chapman clearly has an arguable defence to default judgment against her in the amount of \$5,596,756.86.

[16] The absence of proof of damages in the amount of \$5,596,756.86 on the motion for default judgment is in my view, in and of itself, a basis for setting aside the default judgment.

[17] Given the very significant amount of the judgment in relation to the \$3000 amount paid to Ms. Chapman to be involved in the scheme, the amount of the mortgage on the 44 Sherman property, the amount of the deficiency RBC says it sustained on that property and the amounts paid to Ms. Chapman out of Molson's trust account, there is clearly very significant prejudice to Ms. Chapman if the default judgment is not set aside.

[18] Counsel for RBC explained that, with a great deal of difficulty, a six week trial in this matter has been scheduled to commence October 5, 2009. Prejudice resulting to RBC from setting aside the default judgment can be compensated for by appropriate terms, including terms imposed to ensure that the October 5, 2009 trial date will not be jeopardized.

[19] I will deal briefly with RBC's argument that Ms. Chapman has known since at least February, 2007 that she was a defendant in this fraud action, that she has not given a valid explanation of why she did not defend, and that this motion should accordingly be dismissed. Counsel for RBC points out that Ms. Chapman completed two years of university and it should therefore be assumed that she is reasonably intelligent.

[20] RBC issued its statement of claim on December 14, 2006. It obtained a *Mareva* order on December 18, 2006. Pursuant to the *Mareva* order, substitute service was effected on Ms. Chapman at what I understand to be Molson's premises and her evidence is that she did not actually receive a copy of the Statement of Claim until May 2008, after she learned of the default judgment from Mr. Chapman.

[21] Ms. Chapman admits that Mr. Chapman told her in December of 2006 that she was involved in a lawsuit. On February 2, 2007, Ms. Chapman attended in court on the return of a contempt motion, arising out of non-compliance with the *Mareva* order. Until this time, Mr. Chapman had appeared on her behalf, describing himself as her agent. It was clear that she was aware as of February 2, 2007 that she was a defendant in this action and that as of no later than that date Mr. Chapman had a copy of the statement of claim. While she was "separated" from Mr. Chapman, they live apart for medical reasons, they continue to speak daily, she sees him several times a week, she still considers him her husband and he acted as her agent in court appearances.

[22] At the February 2, 2007 attendance, Ms. Chapman provided a list of her assets, as required by the *Mareva* order, and signed an undertaking to cooperate with RBC in locating the monies it lost as a result of the mortgage frauds. On the basis of that undertaking, the motion was adjourned. Ms. Chapman understood that she was to be cross-examined, and followed up regarding the cross-examination. She was told the cross-examination was not proceeding. Thereafter, she took no steps to provide any information to RBC, and RBC did not contact her further.

[23] Pursuant to the *Mareva* order, leave was required to note defendants in default. Counsel for RBC advises that leave was obtained from the court in the summer of 2007, and that RBC thereafter proceeded to obtain default judgment.

[24] RBC did not notify Ms. Chapman that they were seeking leave to note her in default.

[25] Ms. Chapman did not file a statement of defence after her February 2007 court attendance. Her position on this motion is that she understood that all she had to do was to cooperate with RBC if and when they contacted her for information. Mr. Chapman admits that RBC's counsel did not tell him that Ms. Chapman would not have to file a statement of defence.

[26] Sadly, it is not entirely implausible that Ms. Chapman mistakenly assumed that she did have to take any further steps until notified by RBC. She unfortunately appears to have relied to a great extent on Mr. Chapman. However, assuming her mistaken understanding does not amount to a reasonable explanation for her default, I would, nonetheless, in all of the circumstances, set aside the default judgment.

[27] As to RBC's counsel's submission that this motion should be dismissed because Ms. Chapman misled the court in her affidavit by emphasizing that she was "separated" from Mr. Chapman, Mr. Chapman was clearly fully aware of the proceeding from December of 2006. Ms. Chapman presumably emphasized her separation to bolster her argument that she has a reasonable explanation for the default in filing a statement of defence. On cross-examination, it was clear that she maintains a much closer relationship with Mr. Chapman than the use of the term "separated" suggests. Nonetheless, having regard to all of the circumstances, I am of the view, as indicated above, that the interests of justice favour an order setting aside the default judgment, on terms.

[28] Save as hereinafter provided, Ms. Chapman shall be required to file and serve her statement of defence, and cross-claim, if any, within 14 days. If this timetable is not feasible in light of the pending school holidays, counsel shall promptly schedule a 9:30 attendance before me to discuss a short extension. All cross-examinations shall be promptly completed, and all other necessary steps taken, so that the October 5, 2009 trial date in this matter is not jeopardized.

[29] My inclination is that this is not a matter for costs. If the parties wish to make submissions on the issues of costs, Ms. Chapman shall provide brief written submissions within 14 days, and RBC shall provide its written submissions in response within 10 days thereafter. No reply submissions shall be provided without leave.


Hoy J.

Released: March 10, 2009

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Plaintiff

- and -

HAYWOOD WELTON a.k.a.
HOWARD WELTON,
MABEL JOE WELTON a.k.a. MARY JOE
WELTON a.k.a. MABEL OY LING JOE-
WELTON, [REDACTED]

[REDACTED]
CHRISTINE REN, LESLIE TOTH, MARY
CHAPMAN,
ROBERT A. CHAPMAN,
DAVID MOLSON, ARNOLD KELLY, [REDACTED]
[REDACTED] HARDCORE
TRUCKING INC., HARDCORE TRUCKING
MANAGEMENT, HARDCORE PROPERTY
MANAGEMENT, KINGSLAND APPRAISAL
SERVICES INC., ALAN CHANG, CENTURY
21 PARKLAND LTD., PATRICIA PALMIERI,
PRUDENTIAL ELITE REALTY T.W.,
GREGORY CRISP, PEEK-A-BOO
MANAGEMENT INC., MACDOUGALL,
MACDOUGALL & MACTIER INC.,
SOUTHWIND LIMITED, NORTHWIND
LIMITED,
YU SHU JIANG, KIM JOE,

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PHILADELPHIA, [REDACTED]

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 CORREA, SAUL ALBERTO VELEZ, [REDACTED]
 [REDACTED], KIMBERLEY SHONIKER,
 WILLIAM HO, MIKE STRAIN, QIAN ZOU,
 WAYNE FOWLER, FRANK ROBERTSON,
 DARKO PERIC, SIK HUNG CHEE, ANSON
 CHAN, RAY WELSH, [REDACTED]
 [REDACTED], MARVIN SZE
 CHUNG LOUIE, [REDACTED]
 FRANCINE M. PAQUETTE, BRAD
 CHAPMAN, BRODERICK KING HIN CHAN,
 STEVEN F. MAY a.k.a. STEVEN
 OSMOKROUK, CHRISTOPHER McKINNON,
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 VELEZ, JAY WHITE, TONY BANWELL,
 [REDACTED]
 HUGO SERVANDO ANTONIO, SANDRA
 SEGIO, ROBERT WEST, [REDACTED]
 MARIO FELIX, SEAN POTTER, DAVID
 CHAN, 1603662 ONTARIO INC., JAMES
 PEARSON, PETER KALUS, JOHN WINTERS,
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 REN, MAHOGANY INTERNATIONAL
 HOLDINGS INC.. YUN SHU JIANG.
 GULIETTA PARISE a.k.a. JULIETTE
 PARISE, BRUNO PAOLINI, MARK
 GOURLAY and YEN LING CHEN

Defendants

REASONS FOR DECISION

Hoy J.

Released: March 10, 2009