

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ANH NGOC LUU, HUONG NGOC LUU v. BING THAI, IVANNE (NGO) THAI, MINGO CONSTRUCTION RENOVATION COMPANY LTD., 1420465 ONTARIO INC., RAYMOND KELLY, and RAYMOND BRICK LAYER ONTARIO INC.

**BEFORE:** MADAM JUSTICE HARVISON YOUNG

**COUNSEL:** CHRISTOPHER J. THIESENHAUSEN, for the Plaintiffs

TINA LEE, for the Defendants Bing Thai, Ivanne (Ngo) Thai, Mingo Construction Renovation Company Ltd. and 1420465 Ontario Inc.

**DATE HEARD:** November 4, 2008

**ENDORSEMENT**

[1] The Defendants have brought this motion to set aside the default judgment dated January 22, 2007 and the writ of seizure and sale dated February 13, 2008 issued against them. The Plaintiffs bring a cross motion to correct the misnomer of Ivanne (Ngo) Thai to Ivanne Ngo.

[2] The individual Defendants, Bing Thai ("Bing") and Ivanne Ngo Thai ("Ivanne") are common-law partners. The action arose out of renovations that the Plaintiff alleged were improperly performed on their home by Bing through his companies, Mingo Construction Renovations Company Ltd. ("Mingo") and 1420465 Ontario Inc. ("142 Inc.").

**The Background**

[3] This action arose out of renovations which the Plaintiffs allege were inadequately performed to the foundation and to the structural, electrical, plumbing and heating systems of the Plaintiffs' home. The statement of claim was issued in 2002. The positions taken by Bing and Ivanne in this motion are somewhat different from each other. Ivanne alleges that when she was served with the statement of claim in September 2002, she discussed it with Bing, who assured her that he would deal with it, and that she did not need to do anything. She stated both in her affidavit and upon cross-examination that she relied on these assurances and had no subsequent involvement with the lawsuit. Bing confirmed that he had given her this advice and that he, alone, had been dealing with the lawsuit until approximately July 2008.

[4] The Defendants were noted in default when they failed to deliver a defence to the 2002 statement of claim, but agreed to settle the action in a case conference conducted by Master Polika in December 2003. One of the terms involved in the settlement was that the actions would be reinstated in the event that the terms of the settlement were not honoured. On June 13, 2005, Master Polika set aside the settlement and reinstated the action, pursuant to the terms of his previous order. He provided an additional two months for the individual Defendants to file a defence. When they did not, they were noted in default again. The issue is whether I may set aside this default judgment and/or the writ of seizure and sale, with respect to one or more of the Defendants, under rule 19.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

### The Legal Issues

[5] The basic test to determine whether rule 19.08 is satisfied is well established. This test requires the Defendants to satisfy the Court that:

- (i) the default was unintentional and they are able to provide a valid reason for it;
  - (ii) the Defendants brought the motion without undue delay;
  - (iii) the Defendants have established that they have valid defences on the merits.
- (See *e.g.*, *Chitel v. Rothbart* (1988), 29 C.P.C. (2d) 136, [1988] O.J. No. 1197 (Ont. C.A.))

[6] Having read the materials filed and heard the submissions of counsel, I conclude that the judgment and writ should be set aside as against Ivanne, but not as against Bing. My reasons follow.

- (i) *Have the Defendants shown that their default was unintentional and that they have a valid reason for their default?*

[7] As indicated above, the circumstances differ between Ivanne and Bing. According to Ivanne, she had no knowledge of the action during the time after Bing had told her that he would handle it and that she need not retain a lawyer or do anything until Bing informed her in early July 2008 that a writ of seizure and sale had been issued. At that time she was told that she would lose all her personal and real property. She indicated that she was shocked because, as far as she knew, the matter had been resolved a long time ago. Although she acknowledges that she was served by mail with the motion relating to the reinstatement of the action in 2005, she stated that she was not aware of such mail and did not see any documentation advising her that the action had been reinstated. When the writ of seizure and sale was brought to her attention, she immediately sought legal representation and shortly thereafter this motion was brought. In my view, she has established that her default was unintentional and that she has a valid reason for her default.

[8] In my view, Bing has not shown such a valid reason. He admits to having received the motion record in mid 2005 relating to the reinstatement of the action. He admits that he knew he had defaulted on the payment but states that he did not know what to do and did not consult a

lawyer because he could not afford to do so. He assumed that "the matter would continue much like before and that at some point [he] would get a notice from the court telling [him] to go to trial." Bing was shocked when he received the judgment and the writ, and finally realized that he had to tell Ivanne. She was, not surprisingly, "extremely shocked and angry."

[9] Unlike Ivanne, Bing knew about the default relating to the settlement and the reinstatement of the action. In my view, Bing's conduct shows a pattern of prevarication, and his ill-advised failure to do anything following the reinstatement of the action does not constitute a valid reason for this default. This was a conscious decision not to participate in the action as in *Schill & Beninger Plumbing & Heating Ltd. v Gallagher Estate* (2001), 140 O.A.C. 353, 6 C.P.C. (5<sup>th</sup>) 80 (Ont.C.A.), and as such, absent exceptional circumstances, operates in itself as a complete bar to this motion; see also *Luciano v Spadafora* (2004), 1 C.P.C. (6<sup>th</sup>) 345, [2004] O.J. No. 4311 at para. 13 (S.C.J.), Wilton-Siegel J.

(ii) *Have the Defendants moved promptly to set aside the default judgment?*

[10] Again, there is a difference between the individual Defendants. Bing received letters advising him of the default judgment dated January 2007 as of April 2007 but he did nothing. It was apparently not until he received notice of the writ of seizure and sale that he realized that the matter was not going to go away. Ms Lee submitted on behalf of Bing that he was unsophisticated and did not understand the process and the consequences. While Bing may be unsophisticated, he was also a businessman who had incorporated his renovation business and I cannot accept that he did not know that there could be serious consequences to failing to respond. Indeed, the fact that he had agreed to settle the matter in 2003 and, at least initially, tried to respect its terms, suggests that he knew that this was not something that one could simply ignore.

[11] Ivanne, however, retained counsel very promptly upon learning about the judgment and the writ from Bing. I find that she has met this limb of the test while Bing has not.

(iii) *Have the Defendants shown that they have an arguable case on the merits?*

[12] As far as Ivanne is concerned, the evidence indicates that she had no involvement with the Plaintiffs or with the events relating to their claim. She maintains (and Bing does not dispute) that she was "dragged into" the action simply because of her connection with Bing, who registered 142 Inc. under Ivanne's name, entered into arrangements with the Plaintiffs using 142 Inc, and even directed the Plaintiffs to issue cheques payable to her without her express knowledge or consent. In my view, she has an arguable case that she should not be liable for the damages claimed by the Plaintiffs.

[13] In my view, Bing has failed to meet this standard. He has simply made bald allegations of quality workmanship and appropriate permits along with denials of improper work and defects, but none of this is supported by any documentary evidence or third party confirmation. On the other hand, there was much more detailed evidence of the engineers and municipal building inspectors that were filed on behalf of the Plaintiffs. Particularly when seen in the context of the six year history of this matter which has included two defaults, a 2003 settlement,

and the subsequent reinstatement of the action, and which fails to reveal any defence on his part, there is no basis for concluding in this motion that he has shown an arguable case on the merits.

[14] In conclusion, the motion to set aside the default judgment and the writ of seizure and sale shall be allowed with respect to Ivanne Ngo but dismissed as against Bing Thai.

**The Cross Motion**

[15] The Plaintiffs' motion to correct the misnomer of Ivanne (Ngo) Thai to Ivanne Ngo is allowed. There is no prejudice to her as she is the person described in the Statement of Claim which was personally served upon her at the beginning of these proceedings. There is no suggestion that there has, in fact, been any confusion over this. The motion is simply brought to regularize the name so that it is, in fact, her legal name; see *Lloyd v. Clark*, 2008 ONCA 343, [2008] O.J. No. 1682.

[16] Orders shall issue accordingly. If the parties are unable to agree as to the costs of this motion, they may make brief submissions to me in writing no later than January 15, 2009.

Harvison Young J.  
Harvison Young J.

DATE: December 11, 2008