CITATION: Oz Merchandising Inc. v. Canadian Professional Soccer League Inc., 2016 ONSC 352
COURT FILE NO.: 04-CV-026293
DATE: 2016/01/14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Oz Merchandising Inc., Ottawa Wizards, Oz Dome Soccer Club and Omur Sezerman, Plaintiffs

AND

Canadian Professional Soccer League Inc., Eastern Ontario District Soccer Association, The Ontario Soccer Association, Canadian Soccer Association, Canadian Soccer League Inc., Ira Greenspoon, Vincent Ursini, Cary Kaplan and Stan Adamson, Defendants

BEFORE: Justice Charles T. Hackland

COUNSEL: Haiyan Zhang and Andrew Ferguson, for the Plaintiffs

Rocco Russo and Colin Holland, for the Defendants Canadian Professional Soccer Inc., League Canadian Soccer League Inc., Ira Greenspoon, Vincent Ursini, Cary Kaplan and Stan Adamson

Karen Perron, for the Defendants Eastern Ontario District Soccer Association and the Ontario Soccer Association

HEARD: January 6, 2016 (Ottawa)

ENDORSEMENT

[1] The defendants Canadian Professional Soccer League Inc. ("CPSL"), Canadian Soccer League Inc. ("CSL") and certain individual defendants seek an order setting aside the noting of pleadings closed against CPSL that occurred in November of 2011. The plaintiffs oppose this relief. Further on the basis of the deemed admissions inherent in the noting of pleadings closed the plaintiffs seek, by way of cross-motion, to strike out significant portions of the Statement of Defence of the CSL and the individual defendants. CSL formally admitted in May 2015 in response to a Notice to Admit delivered by the plaintiffs, that it is a successor corporation to CPSL and is responsible for CPSL's liabilities in this proceeding, if any.

[2] For the reasons set out below, I exercise my discretion to allow the setting aside of the noting of pleadings closed against CPSL with the result that the successor corporation CSL may defend the plaintiffs' allegations in the action without restrictions arising from deemed admissions made by

CPSL. It also follows that the plaintiffs' motion to strike portions of CSL's Statement of Defence is dismissed because that relief is based on the Statement of Defence being in conflict with CPSL's deemed admissions which arose when pleadings were noted closed against CPSL.

[3] By way of background this 12 year old lawsuit, which has proceeded at a leisurely pace is currently scheduled for a fixed date jury trial of 8 weeks duration beginning October 17, 2017. This is a complex civil action in which the plaintiff claims damages of $2.0 million as an oppression remedy and other tortious damages. The matters in dispute arise from the plaintiffs operation of a professional soccer team in a league formerly run by the defendant, CPSL.

[4] This action is being case managed. Discoveries are not yet complete. Counsel advise that a pending matter of significance is that the plaintiffs have been ordered to produce their experts' report establishing their claimed damages by the end of May 2016. The respondents' financial experts' reports will then follow and presumably further discoveries may be held.

[5] A consideration arises as to the effect of maintaining the noting of pleadings closed against CPSL (and thereby binding CSL as its admitted successor corporation) on the trial itself. The noting of pleadings closed and the resulting deemed admissions of the facts pleaded would apply only against CPSL and not against any of the individual defendants or against the defendants the Ontario Soccer Association and the Canadian Soccer Association. Moreover, damages have never been assessed against CPSL and that will be a major contested issue at trial i.e, the nature, quantum and causation of the alleged damages.

[6] I therefore conclude, notwithstanding the deemed admission affecting CPSL (and CSL as the successor corporation), that the entire complex history of events will need to be canvassed in evidence at trial. This scenario also creates the possibility of the facts deemed admitted being in conflict with the facts as found by the jury. Further, the deemed admissions apply to some defendants (the CPSL and CSL) and not to the other defendants. I view this as creating undue complexity and the possibility of trial unfairness, particularly in a jury trial. Maintaining the deemed admissions would not shorten the trial in any way, but would add potential confusion to the fact finding aspect of the trial. In the circumstances, I see no prejudice to the plaintiffs, from a trial fairness perspective, in setting aside the deemed admissions.

[7] In their opposition to setting aside the noting of pleadings closed, the plaintiffs rely heavily on the doctrine of abuse of process as explained by the Supreme Court of Canada in *Toronto (City) v.*

CUPE, Local 79, [2003] SCR 77. In my view the doctrine of abuse of process has no real application to deemed admissions in a default proceeding such as we have in the present case. The abuse of process doctrine is designed to prevent the re-litigation of matters determined or their merits. Deemed admissions, once properly set aside, do not engage the abuse of process doctrine.

[8] The Court of Appeal has recently discussed the tests for setting aside the noting of pleadings closed and for setting aside default judgments in *Intact Insurance Company v. Kisel* 2015 ONCA 205. The Court stated at paragraphs [12] - [14]:

> [12] Rules 19.03(1) and 19.08(1) provide the basis for setting aside a noting of default and a default judgment, respectively. Both rules give the court discretion to set aside the default "on such terms as are just." This court has held that the tests to be met under these rules are not identical. See *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 (Ont. C.A.), at 284-85.
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> [13] When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Bardmore*, at p. 285. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. See *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444, 225 O.A.C. 36 (Ont. C.A.), at para. 3; *Flintoff v. von Anhalt*, 2010 ONCA 786, [2010] O.J. No. 4963 (Ont. S.C.J.), at para. 7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see e.g. *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005 O.J. No. 4327 (Ont. S.C.J.), at para. 8.. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits. *Bardmore*, at p.285.
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> [14] On a motion to set aside a default judgment, on the other hand, the court considers five major factors, one of which is whether the defendant has an arguable defence on the merits. The five factors are:
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> > (a) whether the motion was brought promptly after the defendant learned of the default judgment;
> >
> > (b) whether the defendant has a plausible excuse or explanation for the default;
> >
> > (c) whether the defendant has an arguable defence on the merits;
> >
> > (d) the potential prejudice to the defendant should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and
> >
> > (e) the effect of any order the court might make on the overall integrity of the administration of justice.

[9] I would note that there is no real dispute that the defendants have an arguable defence on the merits; even though as *Intact Insurance* points out that is not, strictly speaking, a requirement for setting aside the noting of pleadings closed.

[10] I acknowledge that, as Ms. Zhang for the plaintiff forcefully points out, the defendant CSL's recent (May 2015) admission of responsibility as a successor company for CPSL's conduct, cannot excuse an inordinate delay on CSL's part in admitting this responsibility and on CPSL's part for ignoring their responsibility to respond to the plaintiffs' proceedings. There is a long history to these legal proceedings, as set out in the affidavit of Melanie Maia sworn August 21, 2013, and the affidavit of Daniel Taylor sworn June 12, 2015, which accurately identify the key events. For a period of years senior management at CSL, maintained the view that CSL was not a successor corporation of CPSL; that CPSL was defunct; and CSL was not a party to this action, so they (CSL management) chose to ignore the action (including default proceedings) taken against CPSL.

[11] On November 4, 2010, Master MacLeod ordered the Statement of Defence of CPSL struck. On November 3, 2011, CPSL was noted in default by the plaintiffs. On December 13, 2012, a consent order was made by Master Roger permitting the plaintiffs to further amend their Statement of Claim and allowing the CSL and certain individuals to be added as parties to the action. This order specifically permitted CSL and the individual defendants to plead any defence they wished. The CSL then filed a Statement of Defence relying in part on the same defence contained in the CPSL statement of defence that had previously been struck.

[12] Eight months later, on August 22, 2013, the plaintiffs filed the present motion to strike portions of CSL's Statement of Defence to the extent it conflicted with the noting of pleadings closed against CPSL (which default proceedings are binding on CSL as the admitted successor corporation to CPSL).

[13] Still later, in September of 2013, CSL's current counsel came on record. They filed materials maintaining CSL's denial that they were a successor corporation to CPSL. A trial of the successor corporation issue was ordered by McLean J. on December 3, 2013. This did not proceed due to interlocutory wrangling between the parties' and the plaintiffs' conflicts with their own counsel. Finally on May 5, 2015, CSL served the plaintiffs with a Response to a Request to Admit in which they finally admitted that CSL was a successor corporation to CPSL and were thus responsible for CPSL's acts and omissions including the default orders made against CPSL. Shortly thereafter, at a

case conference, Master Roger scheduled the present motion and cross-motion to be heard January 6, 2016.

[14] I would agree that CSL's ongoing failure to acknowledge its responsability as a successor corporation to CPSL counts against them and they stand in CPSL's shoes in terms of responsibility for allowing CPSL's pleading to be noted closed and for the delay in seeking to have this set aside. At a minimum, these delays have doubtless resulted in costs thrown away on the plaintiffs' part for which they are entitled to reimbursement.

[15] As noted by the Court of Appeal in *Intact Insurance*, the court's discretion to set aside a noting of default must be based on "the context and factual situation of the case". In this case, which involves many parties in a complex legal claim for $2.0 million in damages, and which has dragged on at a snail's pace for over 12 years, I cannot identify any clear prejudice to the plaintiffs if I set aside the noting of pleadings closed so that CSL can defend on the full merits of its defence. The contested damages issues, among others, will require a full evidentiary record for resolution. The deemed admissions, if they are maintained, will introduce unnecessary complexity to the trial, as discussed previously.

[16] In all the circumstances, I exercise my discretion to order that the noting in default of the defendant CPSL by the plaintiffs and by its co-defendants by way of cross-claim, be set aside. The time for CPSL to file a Statement of Defence and defence to the cross-claim is extended to 20 days from the release of this endorsement.

[17] There will be no costs awarded in respect of this motion. The plaintiffs are entitled, as a condition of this order, to be compensated for their costs thrown away in respect of their efforts in pursuit of default proceedings against CPSL and against CSL until the date of CSL's admission of responsibility as a successor corporation to CPSL. The plaintiffs may provide a costs submission in this regard to the court within 30 days of the release of this endorsement and CPSL/CSL may respond within 30 days of receiving the plaintiffs' cost submission.

Justice Charles T. Hackland

Date: January 14, 2016

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Hackland J.

Released: January 14, 2016