2019 ONSC 4887
Ontario Superior Court of Justice

Ali v. Gonzales

2019 CarswellOnt 13650, 2019 ONSC 4887, 309 A.C.W.S. (3d) 396

Fahad Ali, et al. (Plaintiffs) and Wilbur Gonzales, et al. (Defendants)

Master Abrams

Heard: June 12, 2019
Judgment: August 21, 2019
Docket: 18-CV-600633

Counsel: D. Balaban (agent), for I. McLaine for Plaintiffs
C. Cheung, for Defendants

***Master Abrams*:**

1 The personal plaintiff resides in Montreal. He is the president and majority shareholder of the corporate defendant--a company based in Montreal.

2 The personal defendant resides in Los Angeles. He is the president of the two corporate defendants. The defendant, Model Two Management Inc., is a global company--with its head office in Los Angeles. The defendant, Two Management Inc., is based in Toronto. Mr. Gonzalez's evidence is that he employs more than 10 people in Model Two Management Inc.'s Los Angeles office and that he travels, regularly, for work.

3 The within statement of claim was issued in late June 2018. The plaintiffs allege that the defendants defamed them, such that they have suffered damages. In September 2018, the defendants were noted in default for having failed to deliver even a notice of intent to defend. The defendants deny having received copies of the claim as early as the plaintiffs say that they did.

4 The affidavit of service of process server C. Smith, sworn July 24/18, states that a person named Wilbur Gonzales [*sic*] was served on July 24/18. The defendants point out that the personal defendant, Mr. Gonzalez, spells his surname with a 'z' at the end and not an 's'. They submit that there is an irregularity in the affidavit of service. That may be true, but it is also true that the statement of claim incorrectly identifies the personal defendant as Wilbur Gonzales (i.e. Gonzales with a 's' at the end). It is likely, indeed plausible, that the spelling in the affidavit of service derived from the spelling in the statement of claim.

5 The defendants point out, too, that the person who purportedly served Mr. Gonzalez in Los Angeles does not say how he was able to identify Mr. Gonzalez or whether he gave the statement of claim to someone he believed was authorized to accept service on Mr. Gonzalez's behalf (and, if so, who that person was). He says only that he "personally delivered [the statement of claim] to the party *or* [emphasis added] person authorized to receive service of process for the party". Mr. Gonzales deposes that he, personally, did not accept service of the statement of claim on July 24/18 and that those of his employees in Model Two Management Inc.'s Los Angeles office whom he questioned do not recall having received a copy of the statement of claim for either the corporate defendant or him.

6 Mr. Gonazelez indicates that the statement of claim was brought to his attention by Alan Thomas Smith, an employee at the Toronto office of Two Management Inc. shortly after service was effected in Toronto, in mid-August/18.

7 While it is true that the defendants did not respond to the claim immediately after it came to Mr. Gonzalez's attention, and I agree with the plaintiffs that they ought to have done so, it is also true that, on October 23/18, counsel wrote to plaintiffs' counsel on the defendants' behalf asking for more time to defend and enclosing a notice of intent to defend. This was only three months after the statement of claim was said to have been first served. Approximately one month later, plaintiffs' counsel advised that the defendants had already been noted in default (i.e. in September of 2018).

8 Some six days later, defendants' counsel pointed out that reliance on R. 17.02 had not been pled in the statement of claim (in the manner mandated by R. 17.04(1)), that the personal defendant's name had been misspelled in the statement of claim and that the personal defendant denied having been personally served. Several requests were made to have the plaintiffs set aside the noting in default — all to no avail. It was not until mid-to-late January/19 that the plaintiffs took the clear and unequivocal position that they would not agree to permit the defendants to deliver a statement of defence; and, shortly thereafter, this motion was brought.

9 The court may set aside a noting in default on such terms as are just: R. 19.03(1). It is for me to "assess 'the context and factual situation' of the case . . . [and] consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reason for the delay; and the complexity and value of the claim. . . . 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" (*Intact Insurance Co. v. Kisel*, 2015 ONCA 205 (Ont. C.A.) , at para. 13).

10 Mr. Gonzalez says that that, once he became aware of the claim, he sought out counsel. His evidence is that he was not able to find an appropriate lawyer to represent the defendants. While he should have and likely could have responded to the claim, if only to ask for an indulgence, earlier than he did, his response to the claim — though delayed — was delayed only minimally. This motion was brought with reasonable dispatch once the plaintiffs made clear that the noting

in default would not be set aside consensually. I note, parenthetically, that the defendants were not given notice, by way of phone call or correspondence, that they would be noted in default when they were.

11 This action involves a not-insubstantial damages claim, being a claim for more than $400,000.00. It is not a claim that, in the normal course, ought to be determined on the basis of a technical breach — particularly given that there is no evidence of prejudice to the plaintiffs arising from the defendants' breach. The evidence of plaintiffs' counsel of record is that, for some time, the plaintiffs have been attempting to seek redress for those grievances that gave rise to this litigation--without success. That may be so and, if the grievances are borne out, unfortunate, but permitting the defendants an opportunity to respond to the claims against them is not, in and of itself, prejudicial. Further, there is no evidence before me of lost or destroyed documents or missing or deceased witnesses or of anything that could or would impair the ability of the plaintiffs to prosecute their claims.

12 Then too, and in any event, while "the onus of establishing service [is] on the plaintiff[s]" (*Helpfast Personnel Inc. v. Newcastle Logistics Corp.*, 2011 ONSC 4612 (Ont. S.C.J.) , at para. 22), there is no reply evidence from the process server as to whom he served *and how he was able to identify that person*.

13 And the "extreme circumstances" contemplated by the Court of Appeal in *Intact Insurance Co. v. Kisel* , *supra*, do not here apply (see: *Sualim v. Thomas*, 2019 ONSC 837 (Ont. S.C.J.) , at paras. 31 and 32).

14 Citing with approval the observations of Molloy, J. in *McNeill Electronics Ltd. v. American Sensors Electronics Inc.* (1996), 5 C.P.C. (4th) 266 (Ont. Gen. Div.), the Court of Appeal in *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444 (Ont. C.A.) , held: "Motions to . . . relieve against defaults are frequently made and are typically granted on an almost routine basis. . . . Where there is opposition to a motion of this kind, it is usually related to additional terms which are sought as a condition to the indulgence being granted or to issues of costs . . . It is not in the interests of justice to . . . grant judgments based solely on technical defaults. Rather, the court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties".

15 Assessing "the context and factual situation" of the case at bar, as I am to do, I am of the view that it is appropriate that the defendants be permitted to defend the claims against them, on their merits — with strict timelines imposed by the court and with the court considering, for recompense, the plaintiffs' costs in addressing the defendants' default and this motion.

16 The defendants say that they intend to deliver a demand for particulars in respect of, *inter alia*, paragraphs 22 and 23 of the statement of claim, given that defamation is pled [1] . Any such demand

for particulars is to be delivered by September 5/19. If the defendants decide against delivering a demand for particulars, their statement of defence is to be delivered by September 5/19.

17 The parties filed costs outlines with me. Unless, by September 30/19, counsel advise that the issue of costs has been settled or that they wish to supplement their costs outlines with brief written submissions of no more than three pages (plaintiffs) and three pages (defendants), I will decide the issue of costs on the basis of the costs outlines alone.

Motion granted.

Footnotes

1 Relying on *Swan v. Craig*, 2000 CarswellOnt 1330 (Ont. S.C.J.), at para. 11, they posit: "Pleadings in a defamation action are more important that in any other form of action. The defendant is entitled to particulars of where and when the slander was alleged to have been uttered . . . who allegedly uttered the slander, what was said and to whom".