Cassels

Ontario Court Confirms Low Threshold for Setting Aside Default Judgment

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April 4, 2019

In *2355305 Ontario Inc. v. Savannah Wells Holdings Inc.*, 2019 ONSC 1220, the Ontario Superior Court of Justice recently confirmed the relatively low threshold for the granting of a motion to set aside the noting in default of a defendant, and the cost consequences that can accrue to a defendant that waits to bring such a motion.

Procedural History

In September 2015, the plaintiffs commenced a claim against a franchisor and other parties relating to the purchase of an existing franchise and asserted remedial claims under the *Arthur Wishart Act (Franchise Disclosure), 2000*. Such claims included declarations affecting the personal liability of the officer and director of the franchisor corporation and a related corporation, and damages in excess of $600,000. The claim followed discussions of the dispute held amongst the parties' lawyers.

Despite these discussions, the plaintiffs' counsel served the claim on the franchisor defendants personally, but not on their lawyers. After the franchisor defendants did not defend the action, the plaintiffs noted them in default approximately one month later.

The franchisor defendants' lawyer learned of the claim in the spring of 2016 and served a Notice of Intend to Defend. The following month, the plaintiffs' lawyer advised that the franchisor defendants had already been noted in default and that their clients would not consent to setting aside the noting in default. No further steps were taken with respect to the noting of default by either set of parties until the fall of 2018, when the plaintiffs served their default judgment motion materials and the franchisor defendants brought this motion to set aside the noting in default.

Ontario Superior Court of Justice's Decision

The Court applied the test for the setting aside of a noting in default. In doing so, he considered the following:

- there had been some intention to defend the action;
- the plaintiffs had failed to notify the lawyer for the defendants of the claim as well as of the noting in default;

- the defendants had no explanation for their lengthy delay after learning of the claim;
- the case appeared relatively complex and was high in value;
- the defendants had shown an arguable defence on the merits; and
- the plaintiffs would not suffer any prejudice that would not be compensable in costs as a result of the setting aside.

While the Court determined that overall, the factors favoured the setting aside of the default judgment, he ordered $12,000 in costs payable by the franchisor defendants to the plaintiffs.

Key Takeaway Principle

This is a cautionary tale regarding a procedural challenge that can occur as a result of litigation between a franchisor and franchisee. While it may be tempting for a defendant to employ a “wait-and-see” approach to litigation, the more prudent course of action for defendants who are noted in default is to immediately move to set it aside, rather than waiting and incurring associated costs consequences associated with costs thrown away.

On the flip side, plaintiffs who have noted a defendant in default should be aware that there is a low threshold associated with setting a noting in default aside, and that the aggressive approach may not always be the reasonable or beneficial one.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.