KOSKIE MINSKY

JUSTICE MATTERS

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Court Corrects Breach of Natural Justice

In *2289878 Ontario v Gourmet Gringos*, Justice Kristjanson set aside Master Haberman's January 12, 2016 Order striking the defendants (the "Defendants") statements of defence[1] and dismissing the counterclaim as a result of several breaches of procedural orders. The procedural breaches included the Defendants' failure to prepare an affidavit of documents in compliance with the *Rules of Civil Procedure* (the "*Rules*") and non-compliance with a Court ordered discovery plan. The Defendants also failed to pay cost awards in a timely manner.

On January 12, 2016, the Defendants' lawyer arrived approximately 45 minutes late to the motion due to poor weather conditions. Nevertheless, Master Haberman refused to hear submissions ruling that she had already made her decision striking the defences and dismissing the counterclaim (the "Order").

Shortly thereafter, the Defendants canvassed dates with Plaintiff's counsel for a motion to set aside the Order on the grounds that the Defendants' lawyer failed to appear on the motion through "accident" and by "mistake" in accordance with Rule 37.14(2) of the *Rules*. Pursuant to Rule 37.14(2), the Court has broad discretion to set aside or vary the Order on such terms as are just.

While a hearing date was being scheduled between counsel, the Plaintiff's lawyer, without notice, requisitioned default judgment, obtained default judgment and filed writs of seizure and sale against the Defendants. The Defendants discovered the default proceedings by searching the court file during the course of preparing motion materials and promptly moved to set aside the Order and all default proceedings.

Following the Court of Appeal's decision in *Male*,[2] Justice Kristjanson set aside the noting in default, default judgment, and writs of seizure and sale "without inquiry into the merits" of the litigation. In analogous circumstances to *Male*, it was "unreasonable for counsel for the respondent (Plaintiff) to have noted the appellants in default and to have pursued default judgement without notice to appellants' counsel, with whom he was actively engaged and knew the appellants were defending the litigation. The

Court found that Plaintiff counsel's conduct was "unacceptable" and breached the Rules of Civility.

In this case, the Court set aside the Order on the grounds that the Defendants' lawyer had filed uncontested evidence that he arrived late at the motion because of an accident or mistake due to poor weather, and because it was a breach of natural justice to strike the defences and dismiss the counterclaim without the opportunity to be heard. The Court also found that there was no prejudice to the Plaintiff to set aside the Order and the Defendants would be irrevocably prejudiced if the Order was not set aside. Lastly, there was an air of reality to the defence which militated in favour of the Court exercising its discretion to set aside the Order.

The Court found the Defendants should not suffer the irrevocable loss of the right to proceed with the lawsuit by reason of their lawyer's inadvertence and noted that, where possible, the Court strives to resolve litigation on its merits.

In light of the Plaintiff's inappropriate conduct initiating default proceedings without notifying the Defendants while they were actively defending the lawsuit, the Court ordered the Plaintiff to pay costs of the motion in the amount of $15,000.00.

2289878 Ontario v Gourmet Gringos, 2016 ONSC 6204 (CanLII)

[1] The defined term Defendants does not include the defendant, Leonidas Karabelas

[2] *Male v. Business Solutions Group*, 2013 ONCA 382 (CanLII)

Cost consequences of offers to settle – When is the commencement of trial?

Offers to settle are ubiquitous in litigation. Nearly all cases settle before trial, but not all offers to settle attract the cost consequences of *Rule* 49.

Rule 49 offers have the potential to be more advantageous for the plaintiff than the defendant. Specifically, if the plaintiff makes an offer that is rejected and obtains judgment as favourable or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs up to the date of the offer and substantial indemnity costs after the date of the offer. Absent an offer (or a clear finding of reprehensible conduct by the defendant), a successful plaintiff would likely only receive partial indemnity costs throughout.

In contrast, if a defendant makes an offer to settle that is rejected and the plaintiff obtains judgment less favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs to the date the

offer was served and the defendant is entitled to partial indemnity costs from that date onward. Absent these precise circumstances, there are no cost consequences to a defendant's offer to settle.

In order for an offer to fall within the ambit of *Rule* 49, the offer must be made at least seven days before commencement of the hearing and must not be withdrawn or expire before the commencement of the hearing.

The *Rule* 49 requirement that an offer must stay open until after the commencement of trial was at issue in the recent Court of Appeal decision of *Fonseca v. Hansen.* The defendant in a motor vehicle accident case served an offer on the plaintiff for $1 million that was open until one minute after the commencement of trial. The plaintiff did not accept the offer and the trial commenced. However, a mistrial was declared after several days of evidence. At the second trial, the plaintiff recovered less than half a million dollars. In determining costs, the trial judge declined to consider the defendant's offer in deciding the issue of costs because it did not remain open until the commencement of the second trial from which the less favourable judgment resulted. The Court of Appeal upheld the trial judge's decision that "the fact that what was a trial when it started turned out to be no trial at all, does not revitalize or extend the offer because the circumstances intended for the duration of its availability had passed".

Although this interpretation technically complies with *Rule* 49, it does seem somewhat unfair to the defendant, as the Court does not suggest what the defendant could have done to avoid this result. Certainly, they would not have expected at the time the offer expired that a mistrial was to result. The lesson from this case appears to be that counsel should be aware *Rule* 49 may work an injustice in circumstances outside the normal progression of an action.

***Fonseca v. Hansen*, 2016 ONCA 299**

Section 5(1)(a)(iv) of the Limitations Act, 2002: When Alternate Means of Recovery Delays the Running of the Clock

In the recent decision of *Presidential MSH Corporation v Marr Foster & Co LLP*, 2017 ONCA 325, the Ontario Court of Appeal further clarified the discoverability principle pursuant to section 5 of the *Limitations Act, 2002* with respect to the "appropriate means" element. Specifically, a proceeding may not be "legally appropriate" as required under section 5(1)(a)(iv) to commence the limitation period until after an alternate means of recovery has been exhausted.

In this case, Presidential MSH Corporation ("Presidential") appealed the Order of Justice Dunphy dated July 6, 2016 granting the respondents summary judgment on the ground the action was statute-barred. The respondents, Presidential's former accountant and his firm, filed the appellant's corporate tax

returns past their deadline. As such, the Canada Revenue Agency ("CRA") denied the appellant available tax credits by Notice of Assessment in April, 2010, causing the appellant to suffer damages of approximately $550,000 in unpaid taxes, interest and penalties. Presidential retained a tax lawyer to appeal the CRA assessment who was assisted in that endeavour by the respondents.

During the CRA appeal process, Presidential did not commence a claim against the respondents for professional negligence. The CRA confirmed the assessments disallowing the tax credits in July, 2011, being approximately 15 months after Presidential received its Notice of Assessment. Ultimately the appellant issued its statement of claim against the respondents on August 1, 2012, which claim was declared statute-barred on the respondents' motion for summary judgment.

The Ontario Court of Appeal overturned the lower court's summary judgment decision on the basis the appellant did not and ought not to have known that its proceeding against the respondents was "legally appropriate" in April, 2010 when it first received the CRA assessments. Rather, Justice Pardu of the Court of Appeal held the limitation period began when the CRA advised the appellant in May, 2011 that it intended to confirm its initial assessments. The Court of Appeal also found the motion judge erred in his reasons by "equating knowledge that the defendants had caused a loss with a conclusion that a proceeding would be an appropriate means to seek a remedy for the loss."

In determining when a proceeding would be "legally appropriate", the Court of Appeal relied on a series of its prior decisions involving delays in commencing the limitation period in the following circumstances:

- When alternate dispute resolution processes dictated by statute have not been fully exhausted: *407 ETR Concession Company v Day*, 2016 ONCA 709
- When professional advisors or experts attempt to ameliorate the loss caused by their professional negligence: *Brown v Baum*, 2016 ONCA 325; *Chelli-Greco v Rizk*, 2016 ONCA 489

Therefore, it would appear the limitation clock may be suspended while some alternate means of recovery is pursued, although not indefinitely as the Court of Appeal reaffirmed that the date on which "that alternative process has run its course or is exhausted must be reasonably certain or ascertainable by a court."

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