
BETWEEN:

DURAND AND CIE. .....PLAINTIFF;

AND

LA PATRIE PUBLISHING CO. LTD. ...DEFENDANT.

Practice—Motion to set aside a default judgment and for an order permitting the defendant to defend—Exchequer Court Rule 127—Affidavit of merits stating facts showing substantial ground of defence necessary.

Held: That where a judgment by default is regularly obtained an affidavit of merits stating facts showing a substantial ground of defence is necessary; and when merits are shown and a satisfactory excuse for neglect given, the judgment may be set aside on terms.

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MOTION to set aside a default judgment granted on an *ex parte* application and for an order permitting the defendant to defend.

The motion was heard before the Honourable Mr. Justice Cameron at Ottawa.

G. F. Henderson for the motion.

Redmond Quain, K.C. contra.

CAMERON J. now (August 28, 1951) delivered the following judgment:

This is a motion to set aside a default judgment granted on the *ex parte* application of the plaintiff on February 5, 1951, and for an order permitting the defendant to defend. On December 20, 1950, the plaintiff instituted infringement proceedings alleging that it was the owner of the copyright in the opera "Pelleas and Melisande" (by Debussy and Maeterlinck) and that the defendant, the owner of Radio Station CHLP, performed or caused to be broadcast over that station the said work in its entirety (or substantially so) by the playing of records, thereby infringing the rights of the plaintiff. The plaintiff claimed damages in the sum of $600 and costs.

The statement of claim was served on the defendant on January 4, 1951, by serving a copy thereof on O. L. Bourque, General Manager of the defendant corporation. The defendant not having filed any defence thereto, the plaintiff on February 5 noted the pleadings closed and on February 15 made an *ex parte* application for judgment under the provisions of Rule 124(*b*). The motion was granted with costs and with a reference to the Registrar to ascertain and report the amount of damages sustained by reason of said infringement.

The Registrar's appointment to proceed with the reference on March 12, 1951, was served upon the defendant, but on that date it was adjourned by consent to March 26 and then further adjourned to April 9. In the interval it appears that the defendant had retained a firm of solicitors and certain correspondence followed between that firm and the plaintiff's solicitors, all without prejudice. On April 5 the defendant's solicitors paid into Court the sum of $200, alleging that that sum was sufficient to satisfy

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the plaintiff's claim. The plaintiff refused to accept that amount in satisfaction. On April 9 the defendant moved to further adjourn the reference and the Registrar granted the motion, adjourning the hearing until April 23.

The defendant then changed its solicitors and served notice thereof on April 20. On April 17 the defendant's new solicitors filed (and presumably served) a notice of motion to set aside the default judgment. This motion did not then come on for hearing due, apparently, to the desire of plaintiff's counsel to cross-examine certain parties whose affidavits were filed in support of the motion. That has now been done.

The application is made under Rule 127 which is as follows:

> 127. Any party may be relieved against any default under any of these rules, by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

The motion is supported by the affidavits of (1) Samuel Rogers, dated May 31, Mr. Rogers being copyright counsel for the Canadian Association of Broadcasters, of which organization Station CHLP is a member; (2) Arthur Berthiaume, Manager of Station CHLP, dated April 13; (3) T. A. Evans, Secretary of the Canadian Association of Broadcasters, dated May 29; and (4) Roland Dubois, Chief Accountant of the defendant, dated April 13. The first three named have been cross-examined on their affidavits. No affidavits were filed in reply and for the purposes of this motion I shall accept the allegations in the affidavits as true.

Now it is well established that the failure to file a statement of defence within the time limited was unintentional and was occasioned solely by the sudden and protracted illness of Bourque, General Manager of the defendant company, upon whom the statement of claim was served. It appears from the affidavit of Berthiaume that on the very day when Bourque was so served, the latter advised him by telephone of such service, stating that he would attend to the matter; and that at Bourque's request Berthiaume at once forwarded to him his entire file in the matter. On the same day Bourque entered the hospital, it being understood that he was to undergo merely a "checkup" and would shortly return to his duties. As a

matter of fact, however, Bourque remained in the hospital until at least April 13. Berthiaume had left the matter entirely in Bourque's hands and it was not until February 22—when the defendant was served with the Registrar's notice to proceed with the reference—that Berthiaume had any knowledge that the matter had not been attended to. It was then found that Bourque, prior to going to the hospital, had placed the statement of claim and the entire file in connection therewith in a drawer in his desk. No other officer of the defendant corporation had any knowledge until February 22 that Bourque had been served with the statement of claim or that judgment had been signed. It should be noted that Berthiaume is an official of Station CHLP, that office being located in Montreal a very considerable distance from Bourque's office with the defendant corporation. Moreover, it is abundantly clear that the defendant at all times intended to resist any claim advanced by the plaintiff. Following the broadcast on March 12, 1950, there was considerable correspondence between the parties or their representatives and it clearly indicated that the defendant took the position that it had committed no infringement of the plaintiff's rights and would oppose any action which might be brought.

Under these circumstances the failure to defend was an unfortunate slip from the consequences of which the defendant, in my opinion, should be relieved. The only officer of the defendant who had knowledge of the proceedings and who had intended to attend to the matter was prevented by a protracted illness from doing so. The judgment itself was regularly obtained and in such a case it is an almost inflexible rule that an affidavit of merits stating facts showing a substantial ground of defence will be necessary (*Farden* v. *Richter* (1)); and when merits are shown and a satisfactory excuse for neglect given, the judgment may be set aside on terms (*Smiley* v. *Nault & Lawson* (2)). I am of the opinion that the affidavits filed by the defendant are sufficient to show a substantial ground of defence.

As I have said, Station CHLP is a member of the Canadian Association of Broadcasters and has a licence from the Composers, Authors and Publishers Association of

(1) (1889) 23 Q.B.D. 124. (2) (1924) 56 O.L.R. 240.

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Canada (C.A.P.A.C.). Rogers' affidavit states that he has been advised by the managers of C.A.P.A.C. that the licence granted to Station CHLP includes the right to broadcast selections from the opera in question. C.A.P.A.C. has entered into certain arrangements (the exact nature of which has not been clearly established) with S.A.C.E.M., a performing rights society in France, somewhat similar to C.A.P.A.C.

This contract or arrangement between S.A.C.E.M. and C.A.P.A.C. is not before me, but I understand that S.A.C.E.M. thereby gave to C.A.P.A.C. certain rights to grant licences to reproduce in Canada those productions in which copyright was vested in S.A.C.E.M. It is the contention of the defendant that S.A.C.E.M., having copyright in the production in question, has assigned that right to C.A.P.A.C. and that the latter in turn has licensed Station CHLP to reproduce the same. As I have said above, Rogers states that he has been advised by the manager of C.A.P.A.C., and believes it to be true, that the licence so granted to Station CHLP includes the right to broadcast *selections* from the opera. If these allegations, therefore, are established, the defendant would appear to have a good defence on the merits. In the argument it was suggested that the broadcast on March 12, 1950, consisted of something more than "selections" from the opera. The material shows that three acts of the opera were omitted, but in the absence of any evidence as to the length of the opera itself I am unable to form any conclusion as to whether what was broadcast was more than "selections."

Counsel for the defendant also intimated that certain other defences would be raised, including the question as to whether any copyright in the opera now existed in Canada and the further question as to whether the plaintiff company had any title derived from the authors. The statement of claim merely states that the plaintiff is the owner of the copyright without indicating the source of its title. I do not think it is necessary at this stage to consider these matters. It is sufficient to say that in my opinion the defendant has satisfied me that in good faith it desires to defend the action, that this application is not for the purpose of delaying the plaintiff, and that the defences which it proposes to raise have merit and that there is a substantial case which the defendant desires to try.

In *Watt* v. *Barnett et al.* (1), Cockburn, C.J. said at p. 185:

> Before letting the defendant in to defend we must consider whether he has given us any grounds for thinking that he has a substantial case which he desires to try.

In that case Cockburn, C.J., while of the opinion that the case made by the defendant was not free from doubt, exercised the discretion conferred on him under the Rule and allowed the defendant to defend on terms. The Court of Appeal refused to set aside that order and although Jessel, M.R. was not himself satisfied that there was any defence on the merits, he declined to interfere with the opinion of the Court below which had taken a more favourable view of the matter (2).

Counsel for the plaintiff submitted that when the defendant had paid the sum of $200 into Court it had thereby taken a fresh step in the proceedings with knowledge that judgment had been signed against it, thereby "approbating" the judgment. As I have noted above, the plaintiff refused to accept that amount for settlement and, under the circumstances, I do not think that what took place was more than an offer of settlement which was rejected.

In the case of *Bartlam* v. *Evans* (3) a defendant, having had judgment entered against him in default of appearance, obtained from the plaintiff time in which to pay. He afterwards sought to have the judgment set aside on the ground that he had a defence to the claim. It was held that the Judge in Chambers had a discretion to set the judgment aside, and, in the circumstances, was right in doing so.

The discretion conferred on the Court or a Judge under Rule 127 is very broad and in all of the circumstances I propose to exercise that discretion in favour of the defendant notwithstanding the payment into Court by its former solicitors.

The motion to set aside the judgment and for leave to defend will therefore be granted, subject to the following terms:

(1) The defendant shall pay to the plaintiff within ten days after taxation all party and party costs of the plaintiff

(1) (1877-8) 3 Q.B.D. 183. (2) (1877-8) 3 Q.B.D. 366.
(3) (1937) 52 T.L.R. 689 H.L.

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after the date of service of the statement of claim and up to and including the entry of the order to be made on this motion, including the motion for judgment and entry thereof, all costs occasioned by the reference including any adjournments thereof, the cross-examinations held on the defendant's affidavits used on the motion, and the costs of this motion. If not so paid the motion will be dismissed with costs.

(2) Upon payment of the said taxed costs as hereinbefore provided, the motion will be granted and the defendant within twenty-one days of such payment will have leave to file and serve its defence.

(3) The plaintiff is not to be required to furnish security for costs.

(4) The defendant may move for an order for payment out of the sum of $200 paid into Court at any time after the taxed costs of the plaintiff have been paid.

Judgment accordingly.