

2009 CarswellOnt 3274
Ontario Superior Court of Justice

DiBattista*Gambin Developments Ltd. v. Legacy Staffing Services Inc.

2009 CarswellOnt 3274, [2009] O.J. No. 2372, 177 A.C.W.S. (3d) 927

**DIBATTISTA*GAMBIN DEVELOPMENTS LIMITED (Plaintiff)
and LEGACY STAFFING SERVICES INC., DAVID RICHARDS,
VANESSA RICHARDS and TEMPS PLUS (Defendants)**

Forestell J.

Heard: May 15, 27, 2009

Judgment: June 8, 2009

Docket: 07-CV-329635SR

Counsel: Charles C. Chang for Plaintiff

Shawn M. Philbert for Defendant, Vanessa Richards

Subject: Civil Practice and Procedure; Property

Table of Authorities

Cases considered by Forestell J.:

Belsar Corp. v. Simonin (2003), 2003 CarswellOnt 1566 (Ont. S.C.J.) — referred to

Don Bodkin Leasing Ltd. v. Rayzak (1993), 1993 CarswellOnt 4016 (Ont. Gen. Div.) — referred to

Goodwin v. Durham Condominium Corp. No. 54 (2004), 2004 CarswellOnt 4704 (Ont. S.C.J.) — referred to

Kandasamy v. 686234 Ontario Ltd. (2007), 2007 CarswellOnt 6696 (Ont. S.C.J.) — referred to

Miller v. Muthulingam (1998), 1998 CarswellOnt 4159 (Ont. Gen. Div.) — referred to

P.I.I.M. Canada Corp. v. Poetry in Motion (Canada) Inc. (2000), 1 C.P.C. (5th) 339, 2000 CarswellOnt 962 (Ont. S.C.J.) — referred to

Paterson v. Lafleche (2004), 2004 CarswellOnt 1972, 2 C.P.C. (6th) 150 (Ont. S.C.J.) — referred to

Royal Trust Corp. of Canada v. Dunn (1991), 86 D.L.R. (4th) 490, 6 C.P.C. (3d) 351, 6 O.R. (3d) 468, 1991 CarswellOnt 468 (Ont. Gen. Div.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 16.03(5) — referred to

R. 19.08(1) — referred to

R. 60.11(8) — referred to

Forestell J.:

Introduction

1 This is a motion by the defendant, Vanessa Richards, for an order:

- (1) setting aside a default judgment;
- (2) setting aside the noting of default; and
- (3) setting aside a contempt order made against her.

2 The motion first came before me on May 15, 2009. On that date the plaintiff sought an adjournment and an order for the trial of an issue. I denied the request for the adjournment and trial of an issue. However, the motion, for unrelated reasons, could not proceed on May 15, 2009. It was adjourned to May 27, 2009.

3 On May 27, 2009 I indicated that I was ordering that the noting in default, default judgment and contempt order be set aside and that I would issue detailed reasons later. These are those reasons.

Issues

4 There are two issues in this case:

1. Should the default judgment and noting in default of Vanessa Richards be set aside on the basis that she was not properly served?
2. Should the contempt order against Ms. Richards be set aside?

Background

5 The action in this case is brought under the Simplified Procedure. It is an action by the plaintiff, DiBattista*Gambin Developments Ltd. ("DiBattista") against Legacy Staffing Services Inc. ("LSSI"), David Richards, Vanessa Richards and Temps Plus.

6 In the statement of claim, DiBattista claims that LSSI was a tenant of a building at 130 Dundas Street East in Mississauga. DiBattista was the landlord of the building. DiBattista claims that David Richards was the controlling mind of LSSI and a guarantor of the lease. DiBattista further claims that Vanessa Richards was the wife of David Richards and an officer and director of LSSI.

7 The statement of claim asserts that LSSI breached the lease by failing to pay rent, removing its chattels and leaving the premises in a state of disrepair.

8 The statement of claim is dated March 16, 2007.

9 On or about May 8, 2007, DiBattista filed an affidavit of service stating that Ms. Vanessa Richards had been served with the statement of claim on April 9, 2007 at her residence at 1100 Queens Avenue, Unit 9, Oakville, Ontario. The affidavit states that the process server was unsuccessful in an attempt to serve Vanessa Richards personally, but left the statement of claim in a sealed envelope with David Richards. No details are provided of the unsuccessful attempt at personal service or the contact with David Richards.

10 Default judgment was granted against the defendants LSSI, David Richards and Vanessa Richards on August 7, 2007.

11 After judgment was obtained, DiBattista scheduled examinations in aid of execution against the judgment debtors. The first was scheduled for March 11, 2008.

12 The affidavit of service of the notice of judgment debtor examination states that it was served by the process server at the Queens Avenue address by leaving a copy with "Alice Richards", an adult member of the household. Again the process server states that he was unsuccessful in personally serving Vanessa Richards. He gives no further details of the attempt at personal service or his contact with the person identified as "Alice Richards". He states that he also sent a copy by mail to Vanessa Richards at the same address.

13 Ms. Vanessa Richards did not attend the examination.

14 The second examination was scheduled for May 27, 2008. The same process server provided an affidavit of service of notice of the May 29, 2008 examination. He stated in that affidavit that he left a copy at the Queens address with "Alice Marchant", an adult member of the household and mailed a copy to Vanessa Richards at the Queens Avenue address.

15 Ms. Vanessa Richards did not attend the examination.

16 DiBattista then brought a motion returnable on July 25, 2008 before Master Dash. The precise relief sought by the plaintiff in the matter is not clear from the record before me. However, the motion resulted in an order that the defendants, including Vanessa Richards, attend an examination in aid of execution and pay costs of \$2,500.00 to the plaintiff.

17 There are two affidavits of attempted service of the motion record for the July 25, 2008 motion. One is appended as an exhibit to Vanessa Richards' affidavit and one is included in the DiBattista material. Both are sworn July 24, 2008 by the process server, Jose Costa. One affidavit sets out the fact that Mr. Costa made three attempts to serve Ms. Richards on July 18, 19 and 21st, respectively. On the 18th, no one was home. On the 19th, Mr. Costa states that "her daughter" advised that Vanessa Richards was not at home and that she did not know when she would be home. On the 21st, Mr. Costa states that he was advised by David Richards that Vanessa Richards did not live at that address.

18 The second affidavit of Mr. Costa sworn on July 24, 2008 does not refer to the earlier attempts at service, but states that he left a copy with an adult female, "Jana", who had told him that Vanessa Richards was "not there".

19 The examination in accordance with Master Dash's order was scheduled for August 11, 2008. Ms. Stopka, a legal assistant, provided an affidavit of service of the notice of examination. The notice was sent by regular mail to Vanessa Richards at the Queens Avenue address.

20 Vanessa Richards did not attend the examination.

21 On November 10, 2008, DiBattista made a motion for a contempt order against LSSI, David Richards and Vanessa Richards.

22 The process server provided an affidavit of service of the motion record. He attests to serving Ms. Richards personally at the Queens Avenue address on October 21, 2008.

23 Ms. Richards did not respond to the motion, nor did she attend.

24 Vanessa Richards, LSSI and David Richards were all found in contempt on November 10, 2008 by Trotter J. The order of Trotter J. provided that the contempt could be purged by attendance at an examination. The order of Trotter J. required that the notice of examination, accompanied by the contempt order, be served personally on the defendants.

The penalty phase of the contempt hearing was adjourned to January 7, 2009. The further examination was scheduled for December 11, 2008.

25 Mr. DeLuca, a process server, provided an affidavit of attempted service of the notice of examination and the order of Trotter J. In his affidavit, Mr. DeLuca states that he attended the Queens Avenue address and asked if Vanessa Richards was home. He was advised by a young girl that she was not home. He asked if she would be home later that day. The young girl replied that she would. David Richards then came to the door. He told Mr. DeLuca that Vanessa Richards did not live at that address. He refused to provide Mr. DeLuca with the address of Vanessa Richards.

26 Vanessa Richards did not attend the examination.

27 The penalty phase of the contempt motion came before Belobaba J. on January 7, 2009. It was adjourned to January 9, 2009 and then to January 15, 2009.

28 The affidavit material relied upon by the plaintiff on January 15, 2009 was left by the process server at the Queens Avenue address for Vanessa Richards. Mr. Costa, the process server, states in his affidavit of service that he left the material with "Alice Marchand", an adult member of the same household.

29 On January 15, 2009, Ms. Richards did not attend before Belobaba J. Belobaba J. ordered that David Richards and Vanessa Richards attend before him on January 20, 2009 for the penalty phase of the contempt motion. Belobaba J. further ordered that David Richards and Vanessa Richards could be served by e-mail at "their e-mail address".

30 On January 20, 2009 David Richards was fined \$2,500.00 for contempt. Belobaba J. ordered that Mr. Richards need not pay the fine if he provided counsel for the plaintiff with the undertakings and documents that were outstanding from Mr. Richards' December 2008 examination. Belobaba J. adjourned the penalty phase of the contempt motion with respect to Vanessa Richards, noting that she had retained counsel. The penalty phase with respect to Vanessa Richards was adjourned to March 4, 2009.

31 During the period of time between January 19, 2009 and March 4, 2009 counsel for the plaintiff, Mr. Chang, and counsel for Ms. Richards, Mr. Philbert, exchanged correspondence.

32 By January 23, 2009, Mr. Philbert had served Mr. Chang with a notice of representation.

33 By February 19, 2009, counsel for DiBattista had received the affidavit of Vanessa Richards, sworn February 18, 2009. In that affidavit, Ms. Richards attests to the following:

1. Ms. Vanessa Richards was an officer and director of LSSI until a date in 2007. She was not removed officially as an officer and director until January 14, 2008.
2. Ms. Vanessa Richards is the daughter of David Richards (not his wife).
3. LSSI did not enter a lease with DiBattista. A company known as "Legacy Staffing Inc." was the tenant of the leased premises.
4. Legacy Staffing Inc. was owned by David Richards' wife, Alice Marchant.
5. Ms. Vanessa Richards had no involvement with Legacy Staffing Inc.
6. Ms. Vanessa Richards does not reside at 1100 Queens Avenue and has never resided at that address. She lives with her mother at 28 Poynter Drive, Toronto and has lived there for about 10 years. (Ms. Richards provided a copy of her driver's licence with the Poynter Drive address.)
7. Ms. Richards was not served with the statement of claim or any subsequent material. She first became aware of the proceeding when her father, David Richards, informed her of the proceedings on January 19, 2009.

34 DiBattista does not challenge the evidence of Ms. Richards that she resided at an address other than 1100 Queens Avenue. The plaintiff does dispute her evidence that she did not receive the motion record for the contempt which Mr. Costa swore was served personally on Ms. Richards on October 21, 2008. DiBattista sought a trial of the issue of whether or not Ms. Richards was served with the statement of claim and subsequent material, DiBattista pointed to further differences between the parties with respect to what was told to the process servers on attending at 1100 Queens Avenue and argued that these issues required cross-examination and rulings on credibility.

Should the Noting in Default and Default Judgment be Set Aside?

35 Regardless of the information given to the process servers by the residents of 1100 Queens Avenue, it is clear that there was no proper service of the statement of claim.

36 An originating process, notice of examination in aid of execution and a notice of motion for a contempt order must all be served personally or by an alternative to personal service, in accordance with the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

37 Where an attempt at personal service has failed, Rule 16.03(5) permits a party to serve a person by leaving a copy with an adult member of the same household at the place of residence of the person to be served and by mailing the document to the person.

38 In order for service under Rule 16.03(5) to be valid, the residence at which the document is left, and to which the document is mailed, must be the residence of the person to be served.¹

39 In light of the undisputed fact that 1100 Queens Avenue was not the residence of Ms. Richards, she was not properly served with the statement of claim.

40 Rule 19.08(1) of the *Rules of Civil Procedure* provides that a court may set aside an order or vary an order on such terms as are just against a defendant who has been noted in default. The moving party must move as soon as possible after becoming aware of the judgment, the moving party's affidavit must set out the circumstances under which the default arose and give a plausible explanation for the default. The moving party must also set forth facts to support the conclusion that here is an arguable case on the merits.

41 Where a defendant is not properly served in accordance with the *Rules*, the judgment may be set aside as of right, without the requirement that the defendant establish a defence to the claim.²

42 In this case, counsel for DiBattista argued that the default judgment and noting in default should not be set aside in spite of the fact that there was no proper service. He argued that the Court should infer that Ms. Richards had notice of the action because her father was aware of it. He further argues that the motion to set aside default judgment and noting in default could be denied on this basis. Mr. Chang could point to no authority for this argument.

43 Mr. Chang could not point to such authority, in my view, because the proposition argued is simply wrong.

44 It is clear that where there has been no proper service of the statement of claim, the notice of default and default judgment should be set aside.

45 Accordingly, in this case, I order that they be set aside.

Should the Contempt Order be Set Aside?

46 Rule 60.11(8) provides that on motion a judge may set aside a contempt order. A person who fails to appear at a motion through insufficient notice may move to set aside the order.³

47 Because of the nature of contempt proceedings and the potential for the deprivation of liberty, our courts have consistently held that there must be strict adherence to the *Rules* and scrupulous attention paid to all safeguards.

48 In this case, there is a conflict in the evidence of Ms. Richards, who states that she was not ever served with any motion material and Mr. Costa who claims that he served Vanessa Richards personally at 1100 Queens Avenue.

49 I indicated in my reasons denying an adjournment on May 15, 2009, that the plaintiffs bore the onus of proving service⁴ and that the plaintiffs had taken no steps from February 2009 until May 2009 to obtain any details of the purported service from Mr. Costa. The plaintiffs took no steps to clarify the identification of the individuals to whom the process server spoke. (I note that Mr. Richards' wife was identified as one of the individuals to whom the process server spoke. She was identified variously as "Alice Richards", "Alice Marchant" and "Alice Marchand".

50 The plaintiffs took no steps to address the deficiencies in the affidavits even after the motion was adjourned for almost two weeks.

51 The history of the deficient service in this case and the fact that the plaintiff bears the onus of proving service leads me to the conclusion that I cannot be satisfied that Ms. Richards was personally served with the contempt motion. The order must therefore be set aside.

52 Even if I had concluded that there was service of the motion, I would nevertheless have set it aside in light of the fact that the finding of contempt was based on the allegation that Ms. Richards had failed to comply with the order of Master Dash, an order that was never properly served upon her.

Order

53 As I ordered on May 27, 2009, the default judgment, noting in default and contempt order are set aside.

54 Counsel may make written submissions on costs if costs are not agreed. Counsel for Ms. Richards should provide cost submissions within 7 days of the release of these reasons. Counsel for the plaintiff should provide submissions within 14 days of the release of these reasons.

Footnotes

1 *P.I.I.M. Canada Corp. v. Poetry in Motion (Canada) Inc.* (2000), 1 C.P.C. (5th) 339 (Ont. S.C.J.); *Paterson v. Lafleche* (2004), 2 C.P.C. (6th) 150 (Ont. S.C.J.); *Belsar Corp. v. Simonin*, [2003] O.J. No. 1601 (Ont. S.C.J.)

2 *Royal Trust Corp. of Canada v. Dunn* (1991), 6 O.R. (3d) 468 (Ont. Gen. Div.); *Kandasamy v. 686234 Ontario Ltd.*, [2007] O.J. No. 3997 (Ont. S.C.J.); *Miller v. Muthulingam*, [1998] O.J. No. 4467 (Ont. Gen. Div.)

3 *Goodwin v. Durham Condominium Corp. No. 54*, [2004] O.J. No. 5831 (Ont. S.C.J.)

4 *Don Bodkin Leasing Ltd. v. Rayzak* (1993), 4 W.D.C.P. (2d) 135 (Ont. Gen. Div.) [1993 CarswellOnt 4016 (Ont. Gen. Div.)]