Federal Court  Cour fédérale

Date: 20170725

Docket: T-60-17

Citation: 2017 FC 720

Ottawa, Ontario, July 25, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

CHAI BENCHMUEL AND 9303-0484 QUEBEC INC. DBA CANADA ATHLETICS

Plaintiffs

And

GAGS N GIGGLES, FUNNTEES SPORTS AND GIFTS, SALEEM MALIK AND NINA MALIK

Defendants

ORDER AND REASONS

I. Overview

[1] By motion filed on May 30, 2017 [the Motion], pursuant to Rule 399(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules], the Defendants in this action, Gags N Giggles, FunNTees Sports and Gifts, Mr. Saleem Malik and Ms. Nina Malik [the Defendants], seek to set aside a default judgment issued against them by this Court on March 3, 2017 [the Judgment]. For the

reasons that follow, I find that the Defendants have not satisfied the applicable test, so as to entitle them to have the Judgment set aside. Consequently, the Motion will be dismissed.

II. Background

[2] The Plaintiff, Mr. Chai Benchmuel, owns copyright in the works "Canada Athletics-Souvenir Design" and "Niagara Falls Flash Design" [the Designs] and licensed its copyrights in the two Designs to the other Plaintiff, Canada Athletics. Canada Athletics manufactures a wide variety of garments bearing the Canada Athletics intellectual property for souvenir shops.

[3] The Defendants, Gags N Giggles and FunNTees Sports and Gifts are retail stores operating in the souvenir industry in Niagara Falls, Ontario. Mr. Malik and Ms. Malik are the owners of the two stores.

[4] On January 20, 2017, the Defendants were served with an Order issued *ex parte* by the Court on January 17, 2017 [the Order], along with the Plaintiffs' Statement of Claim. The Order was for an injunction restraining the Defendants from displaying, selling and destroying products bearing the Designs [the Infringing Products] and for the preservation of property. In the Statement of Claim, the Plaintiffs alleged that the Defendants had: 1) infringed the copyrights owned by Mr. Chai Benchmuel in the Designs and licensed to Canada Athletics; and 2) directed public attention to their goods, services or business in such a way as to cause or be likely to cause confusion in Canada with the goods, services or business of the Plaintiffs. In their action, the Plaintiffs were seeking an interim, interlocutory and permanent injunction restraining the

Defendants from displaying, selling and distributing the Infringing Products, as well as compensatory damages, punitive and exemplary damages, and legal costs.

[5] On January 20, 2017, a bailiff visited the stores Gags N Giggles and FunNTees to execute the Order. At each store, a copy of the Statement of Claim, the Order and a Notice of Motion for the continuation of the Order [the Notice of Motion] was left with a store employee. The Notice of Motion advised that a motion for the continuation of the Order would be held in Ottawa, Ontario, on February 3, 2017.

[6] On January 20, 2017, after Ms. Malik informed the bailiff by phone that she was coming to the Gags N Giggles store to take the Court documents, the bailiff waited for Ms. Malik to come to the premises so that he could go over the Order with her. As Ms. Malik did not show up, the bailiff decided to leave after waiting several hours. In the following days, the bailiff attempted to contact Ms. Malik and Mr. Malik but was unable to reach them. At no point in time did Ms. Malik or Mr. Malik try to call the bailiff after they took possession of the Court documents, despite numerous phone calls made by the bailiff and despite the bailiff having left his coordinates with the manager at the store.

[7] It is not disputed that the Defendants did receive the Court documents and were properly served with the Statement of Claim on January 20, 2017.

[8] The bailiff returned to the store premises on two occasions, on January 22 and January 31, 2017. On both occasions, the Defendants were still displaying and offering for sale the Infringing Products, in contravention of the Order which had been served upon them.

[9] The Defendants had until February 20, 2017 to file a Statement of Defence, but they did not do so.

[10] On February 23, 2017, the Plaintiffs filed a Notice of Motion in writing and *ex parte*, as provided by the Rules, for a judgment by default against the Defendants. The Motion was for a judgment condemning the Defendants to the maximum statutory damages provided by the *Copyright Act*, RSC 1985, c C-42 [the Act], namely two counts of $20,000 each, punitive damages of $15,000 for their blatant disregard of the Plaintiffs' copyrights and the Order, a permanent injunction restraining the Defendants from selling and distributing the Infringing Products, and costs.

[11] In the Judgment, the Court ordered that "default judgment shall issue against the Defendants pursuant to the claims set out in the Statement of Claim" and further ordered that the Defendants pay to the Plaintiffs statutory damages in the amount of $40,000 pursuant to section 38.1 of the Act and punitive damages in the amount of $15,000.

[12] The only explanation offered by the Defendants for their failure to file a Statement of Defence or to respond to the Court documents, which were served upon them on January 20,

2017, is this: Ms. Malik was "under the impression" that, as of January 30, 2017, a settlement had been reached with the Plaintiffs to settle the action.

[13] In her affidavit filed in support of the Motion, Ms. Malik stated that, on January 30, 2017, she spoke with Mr. Mike Benchmuel [Mike] at the Canadian Gift and Tableware Annual trade show in Toronto, Ontario. Mike is a sales representative for Canada Athletics. Ms. Malik said that she had been introduced to Mike by a Mr. Ghader, a business acquaintance of hers who was also present at the trade show. Ms. Malik added that Mike initially introduced himself to her as a co-owner of Canada Athletics with his brother Mr. Jacob Benchmuel [Jacob]. Mike however informed her later (during the conversation) that he was not in fact an owner, that Canada Athletics was owned by Jacob, and that he acted as the "public face" for Canada Athletics.

[14] Although she had been informed by Mike that Jacob was the owner of Canada Athletics, and despite the fact that Jacob was also present at the trade show and that she saw him speak with Mike on several occasions, Ms. Malik did not talk to Jacob directly nor has she tried to speak with him at the trade show. Her only conversations were with Mike.

[15] Ms. Malik said that her understanding was that Mike was speaking to her on behalf of the Plaintiffs, Canada Athletics and Mr. Chai Benchmuel.

[16] Ms. Malik said in her affidavit that, in the conversations she had with Mike on January 30 and 31, Mike advised her that, if the Defendants agreed to stop selling the Infringing Products, to destroy all Infringing Products currently in their possession and to sign a formal letter confirming

that they would not sell any Infringing Products in the future [the Settlement Terms], the legal dispute would be over.

[17] Ms. Malik said she immediately agreed to these Settlement Terms allegedly offered by Mike. She added that she asked Mike how to formally put down the settlement agreement in writing, and that Mike apparently said that the agreement would be prepared by counsel for the Plaintiffs. At no point in time did Ms. Malik put the alleged Settlement Terms in writing, despite the fact that they were heavily favourable to the Defendants in light of the Statement of Claim since they did not include any form of financial compensation, nor did she take any steps to formalize the settlement agreement claimed to have been reached.

[18] Ms. Malik has not provided any letter, email, evidence of phone records or personal note regarding the alleged Settlement Terms.

[19] Ms. Malik further affirmed that, after she destroyed the Infringing Products in the early days of February 2017, she followed up with counsel for the Plaintiffs and with Mike "on several occasions to inquire about formalizing the agreement". No evidence of any such communications, or of any specific dates on which they had allegedly taken place, has been provided by Ms. Malik.

[20] Ms. Malik also stated that, during their conversation, Mike allegedly informed her that her presence at the Notice of Motion on February 3, 2017 was no longer necessary.

[21] On January 30, 2017, Ms. Malik contacted outside counsel but did not retain any counsel at that time since she believed the action was settled. On that day, a paralegal from the law firm she contacted informed Ms. Malik by email that, on the morning of January 30, the Federal Court Registry had informed the paralegal that no hearing was "set down" for February 3, 2017 in that file, as of that morning.

[22] Ms. Malik stated that, in light of her discussions with Mike, the alleged Settlement Terms and the information from the Federal Court on the hearing of the Notice of Motion, she was "under the impression" that the Plaintiffs' action was settled and that there was no need for the Defendants to attend the February 3, 2017 hearing.

[23] On February 4, 2017, following the end of the trade show, Ms. Malik said she visited her stores and that, in accordance with her understanding of the alleged Settlement Terms, she personally removed all Infringing Products from both stores and the products were destroyed about one week later. At that time, she had received no confirmation from the Plaintiffs regarding the alleged Settlement Terms.

[24] Ms. Malik claims that, at all times, she was waiting for the Plaintiffs or their counsel to contact her about the settlement that, according to her impression, had been reached.

[25] Mr. Ghader, a third-party witness who was at the trade show, also signed an affidavit in support of the Motion. In his affidavit, he indicated that he witnessed the conversations between Ms. Malik and Mike on January 30 and 31, 2017 on the alleged settlement discussions and the alleged Settlement Terms. Mr. Ghader happens to be a competitor of Canada Athletics.

[26] Apart from her own statements in her affidavit and the affidavit of Mr. Ghader, Ms. Malik has not provided any evidence of communications (whether emails, letters, phone records or else) or attempted communications with Mike, with another representative of the Plaintiffs or with counsel for the Plaintiffs after January 31, 2017.

[27] Ms. Malik and the Defendants became aware of the Judgment on April 7, 2017, after which Ms. Malik contacted Mike, who put her in contact with counsel for the Plaintiffs. It was not until May 2, 2017 that Ms. Malik considered that it was unlikely the Judgment was issued in error or by mistake and that she retained outside counsel to represent her and the other Defendants in this matter.

[28] The Plaintiffs, in three separate affidavits filed in response to the Motion, deny having had any settlement discussions or having come to any Settlement Terms with Ms. Malik. In their respective affidavits, Mike and Jacob affirmed that they had no authority to represent the Plaintiffs Mr. Chai Benchmuel or Canada Athletics in reaching a settlement agreement with the Defendants as they are not the owners of Canada Athletics. Mike further said that he is only a sales representative of Canada Athletics, that he had no settlement discussions with Ms. Malik, that he never agreed to the Settlement Terms, and that he had no reason to discuss the action with Mr. Ghader, a competitor. Jacob stated that he is the Vice President of Sales of Canada Athletics, that he has no authority to make decisions on behalf of Canada Athletics, that he never had any discussions with Ms. Malik, and that neither him or Mike discussed a settlement with Ms. Malik.

[29] The sole shareholder and director of Canada Athletics is Ms. Antonia Varuzza, who submitted an affidavit indicating that she had never been contacted by any of the Defendants about a settlement and that she had not authorized anyone to discuss a settlement with the Defendants on her behalf.

[30] The Plaintiffs also filed an affidavit from the bailiff, subscribed on January 31, 2017 immediately after the execution of the Order, in which the bailiff recounted the steps he took to execute the Order, the presence of Infringing Products in the Defendants' stores, and his unsuccessful attempts to contact Ms. Malik and Mr. Malik.

III. Analysis

[31] Rule 399(1) provides that, on motion, the Court may set aside an order that was made *ex parte* if the party against whom the order was made discloses a *prima facie* case why the order should not have been made. This includes a default judgment.

[32] There is no dispute between the parties as to the test to be applied on a motion to set aside a default judgment. As stated by the Federal Court of Appeal in *Babis (Domenic Pub) v Premium Sports Broadcasting Inc*, 2013 FCA 288 at paras 5 and 6 and by this Court in cases such as *Setanta Sports Canada Ltd v Gentile Entreprises Inc*, 2011 FC 64 [*Setanta*] at paras 4 and 5; *Society of Composers, Authors & Music Publishers of Canada v 654163 Ontario Ltd*, 2010 FC 905 at para 19; *Louis Vuitton Malletier SA v Yang (cob K2 Fashions)*, 2008 FC 45 at para 4; *SEI Industries Ltd v Terratank Environmental Group*, 2006 FC 218 [*SEI*] at para 4; and *Brilliant Trading Inc v Wong*, 2005 FC 571 [*Brilliant*] at para 8, the following issues must be considered:

- Does the defendant have a reasonable explanation for its failure to file a statement of defence?

- Does the defendant have a *prima facie* defence on the merits to the plaintiff's claim?

- Has the defendant brought its motion within a reasonable time?

[33] The three elements of the test are conjunctive. That is, in order to be successful on their Motion, the Defendants must satisfy me that all three parts of the test have been met (*Contour Optik Inc v E'lite Optik, Inc*, 2001 FCT 1431 [*Optik*] at para 4). If one element of the test is not met, it is sufficient to dismiss the Motion.

[34] For the following reasons, I am not convinced, on the record before me, that the Defendants have met the first element of the test and demonstrated the existence of a "reasonable explanation" for their failure to file a Statement of Defence. In the case at bar, I am not satisfied that the Defendants have met their burden and provided an explanation that can be qualified as reasonable. At the oral hearing, counsel for the Defendants ably tried to convince me that the Defendants were acting in good faith and failed to abide by the Court's Rules as a result of Ms. Malik's "impression" that an out-of-court settlement had been agreed upon with the Plaintiffs. Unfortunately, I find that the evidence before me does not support that this amounts to a "reasonable explanation" in this case.

[35] In reviewing the evidence before me on this Motion and determining whether the Defendants have met their burden, I remain guided by the principles established in *FH v McDougall*, 2008 SCC 53 [*McDougall*], where the Supreme Court held that there is only one civil standard of proof in Canada, a balance of probabilities. Speaking for a unanimous Court, Justice Rothstein stated in his reasons that the only legal rule in all civil cases is that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45 and 46).

[36] I accept that settlement discussions or even being under the impression that a settlement has been reached could, in certain circumstances and with the required evidence, provide a reasonable explanation for not having filed a Statement of Defence. However, I am not convinced that, in the circumstances of this case and with the evidence provided by the Defendants, Ms. Malik's impression that a settlement has been reached can be said to be a "satisfactory excuse", a "reasonable explanation", or "substantial reasons" for failing to file a defence to the Plaintiffs' action (*Optik* at para 4). To echo what Justice Zinn said in *Setanta*, I concur with the view of Justice Gibson in *Brilliant* that "[w]hile, at the level of principle, it is reasonable that this Court should extend every consideration and leniency rather than foreclose the right of a party to defend […] that principle is qualified by the 'substantial reasons', 'satisfactory excuse' or 'reasonable explanation' element of the test" (*Brilliant* at para 13; *Setanta* at para 11). As noted by Justice Zinn, there are decisions where a defendant's inaction has been characterized by the Court as "willful blindness" (such as *Brilliant* at para 12), or where the defendant's behaviour indicated a "casual disregard for the importance of the legal process"

(such as *SEI* at para 11). In those cases, the relief sought was not granted as the explanation offered was found not to be reasonable.

[37] This is the situation here. In my view, in light of the record before me, the actions of Ms. Malik and of the Defendants reflect both a willful blindness on their part and a serious disregard for the legal process.

[38] Ms. Malik took the view, at her own peril, that, because she was "under the impression" that the matter had been settled, and despite the absence of confirmation from the Plaintiffs, the action was not serious enough to justify the expense and trouble of seeking legal representation and retaining counsel. Such behaviour, in my view, was clearly untenable and unreasonable in the circumstances.

[39] Tellingly, while Ms. Malik asserts that a settlement had been reached and that specific Settlement Terms (eminently favourable to the Defendants) had been agreed upon, she has not produced documentary evidence on the existence of the alleged Settlement Terms or on the acquiescence of an authorized representative of the Plaintiffs. Nor has she provided evidence that she had taken steps of her own to confirm and finalize the settlement.

[40] In this case, the evidence put before me reveals that:

- Ms. Malik does not have a single document (emails, letters, phone records, internal notes or else) as evidence of any settlement discussions with the Plaintiffs;

- The settlement discussions that Ms. Malik claims to have had with Mike are only supported by her own statement and the affidavit of Mr. Ghader, but they are flatly denied by the affidavits sworn by Mike, by Jacob and by the only authorized representative of Canada Athletics;

- Ms. Malik offers no evidence, apart from her affidavit and the corroborating statement of Mr. Ghader, a competitor with whom the Plaintiffs had no reason whatsoever to discuss the settlement of their action, to support her claim that a settlement had been reached or that the alleged Settlement Terms had been agreed to;

- The authorized representative of Canada Athletics, Ms. Antonia Varuzza, denies having had any settlement discussions, or having authorized any person on her behalf to have any settlement discussions with Ms. Malik;

- At no point in time did Ms. Malik ever try to verify who was the authorized representative of the Plaintiffs and whether the persons she was discussing the alleged settlement with had the authority to settle the matter;

- Neither Ms. Malik nor Mr. Malik ever contacted the bailiff, an officer of the Court, after the Defendants were served with the Order and became aware of the Statement of Claim, despite several attempts by the bailiff to contact them, and they never returned the phone calls made by the bailiff;

- Apart from Ms. Malik's own unsupported statement, there is no evidence whatsoever (in terms of emails, letters, phone records, internal notes or else) of

any attempts on her part to contact a representative of the Plaintiffs or counsel for the Plaintiffs after January 31, 2017 regarding the alleged settlement and the alleged Settlement Terms. I note that the contact information for counsel for the Plaintiffs was in the Court documents received by the Defendants on January 20, 2017, and that the details on Canada Athletics and its representative could easily be obtained through public records;

- Ms. Malik never tried to talk directly to Jacob about the settlement and the Settlement Terms even though he was present at the trade show on both days where she says she spoke to Mike and even though she had been informed that he, and not Mike, was an owner of Canada Athletics;

- The alleged Settlement Terms defy logic and any rational explanation. They are totally silent on three core elements and conclusions sought by the Plaintiffs in the Statement of Claim, namely the compensatory damages, the punitive and exemplary damages, and the legal costs. The alleged Settlement Terms thus imply that the Plaintiffs would have abandoned all their claims for damages and were no longer seeking any form of financial compensation for the damages suffered and the costs incurred in launching their Court proceedings and in obtaining and executing the Order. In addition, the alleged Settlement Terms also include a provision, the destruction of the Infringing Products, which is in direct violation of the Order and the preservation obligations of the Defendants, and would imply that the Plaintiffs had agreed to a violation of the Order sought by them and issued by the Court to protect their copyrights;

- What Ms. Malik refers to as the alleged Settlement Terms amount in fact to the Defendants partially complying with the Order almost two weeks after they were served with the Court documents on January 20, 2017 and had disregarded the Order;

- Given the Order in place since January 20, 2017, there was no need for the Plaintiffs, around January 30 or 31, 2017, to obtain a letter from Ms. Malik to stop using the Designs and selling the Infringing Products as the Order already required the Defendants to do so.

[41] I give limited weight to the affidavit of Mr. Ghader, as I hardly find plausible that a competitor of the Plaintiffs happens to have served as a conduit for initiating settlement discussions between Ms. Malik and the Plaintiffs, in a matter which does not concern him at all. Mike indeed denied in his affidavit having had any reason to entertain this type of discussions with Mr. Ghader.

[42] I find that no reasonable businessperson would be under the impression that a settlement has been reached with a person who is not a confirmed authorized representative of the settling party and that no reasonable businessperson would not care to verify whether the person with whom settlement discussions are apparently taking place is authorized to speak on behalf of the Plaintiffs.

[43] No reasonable businessperson who is a named defendant in a Court proceeding and who was served with the Order and the Statement of Claim would be under the impression that a

settlement has been reached with the Plaintiffs when there is no written evidence whatsoever of such settlement, contemporaneous with the settlement discussions, not even a personal note confirming the contents of the alleged Settlement Terms.

[44] No reasonable businessperson would be under the impression that a settlement has been reached when he or she is informed that a person who is portrayed as an owner of the Plaintiffs is present and no attempt is even made to try to talk to that person.

[45] No reasonable businessperson who claim to be under the impression that a settlement has been reached would not make any attempt to rapidly confirm the terms of such settlement in writing, especially when the terms of the settlement are heavily favourable to that person, leave aside major portions of the claims made by the Plaintiffs against the person, and result in a total absence of financial compensation for the damages and costs sought in the action. Contrary to what Ms. Malik did, a reasonable business person being offered to settle the Statement of Claim at no financial cost whatsoever would instead rapidly take steps to finalize and cement such settlement. In order for her explanation that the Plaintiffs had agreed to a settlement so contrary to the contents of their Statement of Claim and so ignorant of their fundamental claim of damages to be "reasonable", it would have required more than the simple statement of Ms. Malik to that effect.

[46] No reasonable business person would be under the impression that a settlement has been reached when the terms of settlement allegedly agreed upon imply that the Plaintiffs would be agreeing to a direct contravention and violation of the Order they had obtained less than two

weeks before and when there is no written confirmation of the Plaintiffs' agreement to such violation of an order.

[47] No reasonable businessperson would be under the impression that a settlement has been reached and not even try to confirm such a settlement and its terms with counsel for the Plaintiffs when the Order has already been obtained by the Plaintiffs and issued by the Court, and the name and coordinates of such counsel appear on the Court documents.

[48] The subjective belief of Ms. Malik that there was a settlement agreement, unsupported by any documentary evidence, contradicted by the Plaintiffs and on alleged Settlement Terms which defy logic and a rational behavior on the part of the Plaintiffs, does not amount, in my view, to a "reasonable explanation". The actions of Ms. Malik were not those that one might reasonably expect from businesspersons served with the Statement of Claim and the Order, such that they could reasonably believe that they did not have to file a defence because a settlement has been reached.

[49] On the record before me, the actions and behaviour of the Defendants in response to the lawsuit of the Plaintiffs are not indicators of a "reasonable explanation" for their failure to file a Statement of Defence. Their behaviour is more of the nature of being willfully blind or reflective of a failure to give proper attention to legal documents (*SEI* at para 15). They showed a casual disregard for the importance of legal documents and for the Court process, and they are not, in my view, circumstances which may attract the leniency of the Court.

[50] A "reasonable" explanation carries with it the idea that the explanation is rational, logical, based on good judgment and therefore fair and practical. I find that the explanation offered by Ms. Malik has none of these attributes. I do not accept that an impression that a settlement has been achieved which is so lightly founded and remains unsupported by any tangible action and documentation can constitute a reasonable explanation for being relieved of a default judgment.

[51] I acknowledge that the Defendants find themselves in an unfortunate position today but, in my view, they have no one to blame but themselves. They have made no reasonable move in this matter until they received the Judgment.

[52] Counsel for the Defendants relied heavily on *Ross v Dickson*, 1981 CarswellAlta 365 (ABQB) in her oral submissions, but I note that the decision does not provide all the factual background and evidence that was before the Court in that case. I am of the view that the particular circumstances and unusual factual context of the present case are sufficient to distinguish it. In the current case, Ms. Malik's recollection of the settlement discussions is flatly denied and directly contradicted by three affidavits filed on behalf of the Plaintiffs. In addition, there is no documentary evidence to support her claims about the alleged Settlement Terms, the record indicates that at no time did Ms. Malik have discussions with an authorized representative of the Plaintiffs (or that she even took care to verify this point), Mike was not a duly authorized spokesperson for the Plaintiffs, and the alleged Settlement Terms ignore core elements of the Statement of Claim without any logical explanation.

[53] For an impression that a settlement has been reached to constitute a "reasonable explanation" for a failure to file a Statement of Defence, a Defendant must, in my view, at least offer evidence that the settlement discussions have been conducted with the right representatives of the Plaintiffs, that at least some minimal efforts have been made to confirm that, and that the Defendants have taken steps to materialize and crystallize the settlement when the terms are eminently favourable to them. This is especially true when the Defendants have all the information about counsel acting for the Plaintiffs and an Order has already been issued.

[54] For all these reasons, I am not satisfied that the Defendants have offered the Court a reasonable explanation for their failure to file a Statement of Defence and that there is any ground to exercise my discretion in their favour. It was the Defendants' burden to demonstrate a "satisfactory excuse", "reasonable explanation" or "substantial reasons" for their failure to file a Statement of Defence, but they have not met it.

[55] It was suggested that the Defendants are not sophisticated business people, that they have a valid defence to the action, and that the interests of justice demand that the Judgment be set aside in order that they may defend the claims. Even if one were inclined to accept that an unsophisticated person might naively form the view that a Court Order, a Statement of Claim and calls left by an officer of the Court such as the bailiff need not be answered and taken seriously, I do not find that a reasonable explanation has been offered by the Defendants in the circumstances of this case.

[56] I would add that the law is the same for all litigants and does not vary because a litigant chooses to represent himself or herself and not to seek the assistance of legal counsel (*Cotirta v Missinnipi Airways*, 2012 FC 1262 at para 13, aff'd 2013 FCA 280). Being self-represented does not insulate a litigant from the application of the law. Not having the benefit of professional legal advice does not excuse a failure to comply with the Rules.

[57] Exercising my discretion in favour of the Defendants in the circumstances of this case would require me to ignore the test articulated by the Federal Court of Appeal and this Court for setting aside a default judgment, and to remain blind to the lack of sufficient clear, convincing and cogent evidence supporting a "reasonable explanation" for the failure of the Defendants to file a Statement of Defence. This, I cannot do. The rule of law rests upon the cardinal principles of certainty and predictability. An exercise of discretion must find its source in the law and the underlying facts, and it cannot be a proper or judicious one if it becomes a licence for non-compliance with the applicable law.

[58] The Defendants have shown a disregard for the Court procedures filed and served upon them and have continued to ignore the Order until at least the date where Ms. Malik decided to destroy the Infringing Products, allegedly in compliance with the alleged Settlement Terms reached with the Plaintiffs but in direct violation of the Order. I agree with counsel for the Plaintiffs that, given their complete disregard for the Order up to at least the early days of February 2017, the Plaintiffs had no reason to discuss or reach a settlement agreement with Ms. Malik on January 30 or 31, 2017.

[59] I acknowledge that the Plaintiffs proceeded extremely rapidly to obtain the Judgment, leaving little time for the Defendants to file their Statement of Defence. But they acted within the boundaries of the law and in accordance with what the Rules authorize. They cannot be faulted for that. I observe that the Defendants had shown no willingness to cooperate, did not bother to respond to the bailiff or to contact him about the Order, and failed to comply with the Order at least until the early days of February 2017. In those circumstances, I find it understandable that the Plaintiffs quickly exercised their right to obtain a default judgment.

IV. Conclusion

[60] The failure to satisfy the first element of the test is fatal to the Defendants' Motion, as the three elements of the test are conjunctive. There is therefore no need to assess the defence on the merits or whether the Defendants moved within a reasonable time to bring their Motion. For the reasons detailed above, the Defendants' Motion is dismissed, with costs payable to the Plaintiffs, which I fix at $1,800 inclusive of fees, disbursements and taxes.

ORDER in T-60-17

THIS COURT ORDERS that the motion made by the Defendants for an order setting aside the default judgment obtained against them by the Plaintiffs on March 3, 2017 is dismissed, with costs payable by the Defendants to the Plaintiffs fixed at $1,800 inclusive of fees, disbursements and taxes.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-60-17
STYLE OF CAUSE:	CHAI BENCHMUEL AND 9303-0484 QUEBEC INC. DBA CANADA ATHLETICS v GAGS N GIGGLES, FUNNTEES SPORTS AND GIFTS, SALEEM MALIK AND NINA MALIK
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DATED:	JULY 25, 2017

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