Federal Court  Cour fédérale

**Date: 20211108**

**Docket: T-898-20**

**Citation: 2021 FC 1193**

**Ottawa, Ontario, November 8, 2021**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**THE TORONTO REGIONAL REAL ESTATE BOARD**

**Plaintiff**

**and**

**R E STATS INC. operating as REDATUM, KENNETH DECENA and GABRIEL STEFANESCU**

**Defendants**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is a motion brought by the Defendants, R E Stats Inc. operating as ReDatum and Gabriel Stefanescu [the "Defendants"] to set aside the order granting the Plaintiff, the Toronto Regional Real Estate Board [TRREB], an *ex parte* motion for, *inter alia*, default judgment

against the Defendants dated July 12, 2021 [the "Default Judgment"]. No position has been taken or provided by the Defendant, Kenneth Decena.

[2] The Defendants are seeking an order:

a. Setting aside the Default Judgment;

b. Extending the deadline for service and filing of the Defendants' Statement of Defence or any motion by the Defendants respecting the Statement of Claim (e.g., to strike and/or for particulars) to thirty (30) days from the date on which the Court issues an order setting aside the Default Judgment;

c. Awarding the Defendants their costs of this motion on a full indemnity basis; and

d. Such further and other relief as this Honourable Court may deem just.

## II. Background

[3] The Plaintiff is the largest real estate board in Canada, whose members are comprised of more than 56,000 licensed real estate brokers and salespersons. It is a not-for-profit entity, incorporated under the laws of Ontario and is operated as a trade association.

[4] The Plaintiff developed and operates the TRREB MLS® System [the "System"], which:

a. Allows for exclusive access by real estate professional members and partner real estate boards to a curated online system;

b. Permits members to access information from several information partners pursuant to exclusive licence agreements; and

c. Offers more than 100 online services to its members under various proprietary links, including access to active real estate sales listings, detailed unique property descriptions, archival information, unique photography, detailed neighbourhood descriptions, listing schools and community features, and other curated information related to real property — including purchase prices for properties located in the Greater Toronto Area and other parts of Ontario.

[5] The corporate Defendant, R E Stats Inc., operates as ReDatum. It is a company based in Toronto, Ontario, providing services to parties in the real estate industry. It operates through an on-line portal, using the URL www.redatum.com, which has been in existence and operational since at least 2007. Gabriel Stefanescu and Kenneth Decena are allegedly directing the operations of ReDatum.

[6] The System is alleged to be a copyrightable work owned by the Plaintiff. The Plaintiff has registered its copyright interest with respect to its System for each successive year since 2015.

[7] In *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 at paragraphs 183 to 196 [*TREB v Commissioner of Competition*], the Federal Court of Appeal considered whether a claim of copyright existed in the System database. This was in the context of an appeal from two decisions of the Competition Tribunal. The Federal Court of Appeal concluded that the originality threshold was not established in the context of that proceeding.

## III. The Current Action

[8] The Plaintiff's Statement of Claim was issued on August 11, 2020. Counsel for the Defendants confirmed acceptance of service on October 28, 2020. They also confirmed their consent to electronic service of documents on November 16, 2020.

[9] The Defendant, Kenneth Decena, was served with the Statement of Claim on November 16, 2020.

### A. *The Plaintiff's Motion for Interlocutory Injunction*

[10] The Plaintiff sought an interlocutory injunction as against the Defendants, which was dismissed in the Order and Reasons of the Honourable Mr. Justice Southcott, dated January 8, 2021 [*Toronto Regional Real Estate Board v RE Stats Inc. (Redatum)*, 2021 FC 30]. The Plaintiff sought to restrain the Defendants, R E Stats Inc., operating as ReDatum and Gabriel Stefanescu, from certain activities, allegedly infringing the Plaintiff's copyright interests. Kenneth Decena did not appear and was not represented by counsel.

[11] The Court considered the Defendants' reliance on *TREB v Commissioner of Competition*, but nonetheless found that the threshold for satisfying the first element of the interlocutory injunction test – that there is a serious issue to be tried – was met. However, irreparable harm was not established and the injunction application was dismissed.

B. *The Plaintiff's Motion for Default Judgment*

[12] On March 18, 2021, the Court issued a Notice of Status Review to the parties, confirming that more than 180 days had passed since the filing of the Statement of Claim and no Statement of Defence or Motion for Default Judgment had been filed.

[13] In response, the Plaintiff proceeded with an *ex parte* motion for default judgment as directed by the Court on April 16, 2021. The Plaintiff did not notify the Defendants, and the Court did not send its correspondence to the Defendants, in line with the Court's direction and as a result of the Defendants being in default.

[14] On April 7, 2021, counsel for the Defendants emailed counsel for the Plaintiff requesting an update following the issuance of the Notice of Status Review [the "April 7 Email"]. Counsel for the Plaintiff did not respond to this email.

[15] On June 23, 2021, the Plaintiff brought an *ex parte* motion for default judgment. I granted the Default Judgment on July 12, 2021 [*Toronto Regional Real Estate Board v R E Stats Inc. (Redatum)*, 2021 FC 753]. The Default Judgment granted a permanent injunction restraining

the Defendants from (a) copying or otherwise infringing copyright in the System, (b) circumventing the TPMs protecting the System, and (c) having any involvement whatsoever in providing access to the System or assisting in the collection, display, and distribution of any information from the System.

[16] The Default Judgment also awarded damages of $50,000 against R E Stats and ordered the Defendants to disclose all methods and means used to access or obtain content from the System and to destroy or deliver up all System content in their control.

C. *The Current Motion of the Defendants to Set Aside the Default Judgment*

[17] Counsel for the Defendants received a copy of the Default Judgment on July 12, 2021. On July 13, 2021, the Defendants emailed counsel for the Plaintiff requesting the Plaintiff's motion record, any correspondence between the Plaintiff and the Court, and copies of any directions or orders of the Court that had not been sent to the Defendants. The Defendants also sought the Plaintiff's consent to an order setting aside the Default Judgment but did not receive a response.

[18] On July 14 and 15, 2021, the Defendants informed the Court that they intended to bring a motion to set aside the Default Judgment and that the Plaintiff had not provided its consent, respectively.

[19] The Defendants filed this Notice of Motion and supporting Record on July 27, 2021.

## IV. Issues

[20] The sole issue is whether the Default Judgment should be set aside.

## V. Analysis

[21] Pursuant to *Rule* 399(1) of the *Federal Court Rules*, SOR/98-106 [the "*Rules*"], on a motion, the Court may set aside or vary an order that was made *ex parte* if the party against whom the order is made discloses a *prima facie* case for why the order should not have been made.

[22] The test for setting aside default judgment obtained *ex parte* is well established [see for example *Benchmuel v Gags N Giggles*, 2017 FC 720 at paragraph 32, citing *Babis v Premium Sports Broadcasting Inc.*, 2013 FCA 288]. The moving party must satisfy the Court that it has: (1) a reasonable explanation for failing to file a Statement of Defence; (2) a *prima facie* defence on the merits to the Plaintiff's claim; and (3) moved promptly to set aside the default judgment.

[23] The three elements of the test are conjunctive – in order to be successful on their motion, the Defendants must satisfy all three parts of the test [*Contour Optik Inc. v E'Lite Optik Inc.*, 2001 FCT 1431 at paragraph 4]. If one element of the test is not met, it is sufficient to dismiss the motion.

[24] To satisfy the first part of the test, the Defendants rely on the following reasons to explain their failing to file a Statement of Defence:

a. The Plaintiff's simultaneous filing of the Statement of Claim and motion for interlocutory injunction forced them to prioritize defending the motion, which did not require filing and serving a statement of defence.

b. Though the Statement of Claim was issued on August 11, 2020, the Defendants were not served with the Statement of Claim until October 27, 2020 – outside the sixty (60) day period established by *Rule* 203. This led the Defendants to believe that the Plaintiff did not intend to pursue the action expeditiously and would not expect a Statement of Defence as set out in *Rule* 204. The Defendants allege that this is supported by the Plaintiff not following up with them regarding the filing of a defence.

c. Following the motion for interlocutory injunction, the Plaintiff went "silent." After open and regular communication, this led the Defendants to believe that the Plaintiff did not intend to pursue the action expeditiously and they "reasonably assumed that the Plaintiff would communicate its intention to move the action forward and demand a defence."

d. The Plaintiff did not serve them with written submissions following the issuance of the Notice of Status Review as required under *Rule* 382(1), thus, leading the Defendants to believe the action would be dismissed for delay.

[25] To satisfy the second part of the test, the Defendants claim to have a strong *prima facie* defence to the Plaintiff's claim. The Defendants rely on the findings of this Court and the Federal Court of Appeal, in which the matter of the Plaintiff's copyright in the System has already been decided and found wanting for originality [*TREB v Commissioner of Competition*; *Toronto Regional Real Estate Board v IMS Incorporated et al.*, (7 April 2021), Toronto, FC T-900-20 [the "Strike Motion"]].

[26] The Defendants also claim that the Plaintiff has not provided material facts and cannot establish that Gabriel Stefanescu has acted in a manner that attracts personal liability.

[27] To satisfy the third part of the test, the Defendants provide evidence of their immediate steps to address the Default Judgment.

[28] In addition to claiming they have met all three parts of the test required to set aside the Default Judgment, the Defendants also claim that the Plaintiff failed in its duty of full and frank disclosure when it made its *ex parte* motion. The Defendants state that in failing to provide the Notice of Status Review and notify the Court that it had not served the Defendants with written submissions in its Record as required by the *Rule* 382(1), the Plaintiff did not meet the high duty of disclosure required in an *ex parte* motion.

[29] The Defendants also state that the Plaintiff's conduct in failing to reply to the April 7 Email or request for consent to this motion, the Plaintiff is deliberately remaining silent and

covertly communicating with the Court – constituting a clear and willful breach of the Plaintiff's duty of full and frank disclosure.

[30] At the hearing, the Defendants also raised, for the first time, Ontario jurisprudence in further support of their arguments. Ontario case law adds an additional step to the test on a motion to set aside default judgment where the Court should consider the effect of any order it might make on the overall integrity of the administration of justice [*2437021 Ontario Inc. v Axim Centre Inc. and Ahmed Abou-Gabal*, 2017 ONSC 7054 [*Axim*], citing *Intact Insurance Company v Kisel*, 2015 ONCA 205]. The Defendants also read from the Ontario *Principles of Civility for Advocates* and pointed to the *Rules of Professional Conduct* to demonstrate that "advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known" [*Axim* at paragraph 24].

[31] While Ontario jurisprudence is in many cases relevant to the Court, this specific factor on setting aside default judgment is not one of the factors usually considered by this Court. I find that it should nevertheless be considered as it presents itself in this Court's *Rule* 3, which obligates the interpretation and application of the *Rules* so as to secure the just, most expeditious, and least expensive determination of every proceeding on its merits.

[32] With respect to the first part of the test, the Plaintiff asserts that the Defendants have not adduced any evidence of a reasonable explanation for their failure to file a defence – they rely on bald assertions with no accompanying sworn affidavit.

[33] Even if there were evidence, the Plaintiff submits that the explanation is unreasonable. The Defendants were served the Statement of Claim and motion for interlocutory injunction on October 28, 2020. The Defendants retained counsel and defended the injunction motion. While the injunction motion was pending, they allowed the time prescribed by the *Rules* to file a defence to expire. It is unreasonable for them to argue prioritizing the interlocutory motion as a reason for the delay. The Defendants have never indicated an intention to file a defence until this current motion and have still not included a draft defence in their record. Instead, the Defendants rely on assumptions made about the Plaintiff's action and did not take minimum steps to verify them.

[34] The Plaintiff asserts that they do not need to "follow up" with the Defendants and under *Rule* 210(2) are permitted to bring a motion for default judgment without notice, and are not required to serve the Defendants with such documents as per *Rule* 145. Additionally, the Defendants cannot rely on the April 7 Email as a reasonable explanation – the Notice of Status Review put them on notice of their default. The Plaintiff claims that the Defendants have a demonstrated a willful blindness and disregard for the legal process by not filing a Statement of Defence.

[35] In regards to the second part of the test, the Plaintiff submits that the Defendants do not have a *prima facie* defence. They claim that the Defendants have not adduced evidence to rebut the Plaintiff's allegations and have seemingly acknowledged their access of the System. Instead of presenting evidence, the Defendants rely on *TREB v Commissioner of Competition* and the Strike Motion (which, also, relies on *TREB v Commissioner of Competition*). The Plaintiff argues

that *TREB v Commissioner of Competition* arose from an application brought by the Commissioner of Competition in 2011, under different circumstances, and is not applicable here.

[36] Furthermore, the Plaintiff submits that it did not breach its duty of full and frank disclosure. The items pointed to as missing by the Defendants either formed part of the Court file, were not relevant/material, or both. Their inclusion would not have changed the result, and, accordingly, even if it is found they should have been included, their inadvertent and *bona fide* omission did not prejudice the Defendants.

[37] The Plaintiff also provides evidence of the Defendants' breach of the orders issued pursuant to the Default Judgment, which it alleges amount to abuse of the Court's process.

A. *Should the Default Judgment be set aside?*

(1) Do the Defendants have a reasonable explanation for their failure to file a Statement of Defence?

[38] The Defendants state that they always intended to defend the action. However, for no reasonable explanation, they have yet to file a Statement of Defence and have not submitted a draft defence with this motion.

[39] The Defendants rely on the Plaintiff's delay in filing the Statement of Claim, simultaneously with a motion for interlocutory injunction, as a reason for their failure. There is

no rational basis for the Defendants' position that they intended to file a defence, but by prioritizing the defence of the interlocutory motion, they failed to do so.

[40] As well, upon the conclusion of the motion for interlocutory injunction, the Defendants then point to the Plaintiff's silence as a reason for their failure to file a defence. It is not logical or reasonable for the Defendants to claim lack of time on one hand, and then too much time on the other, for their failure.

[41] It also makes no sense for the Defendants to allegedly rely on the Plaintiff to "follow up" with them on their legal practice. Regardless of the actions of the Plaintiff, the Defendants are aware of the Court rules and deadlines.

[42] The Court issued a Notice of Status Review on March 18, 2021. The Defendants did not file a defence, did not move for an extension to file a defence, and have not provided any evidence that they intended to do so.

[43] Nevertheless, the failed injunction application, the findings of both the Federal Court of Appeal and this Court that the System does not have valid copyright protection, and the lack of any reply by the Plaintiff to the April 7 Email, provided a reasonable basis for the Defendants to have assumed the Plaintiff was not actively pursuing this action and provides some basis for the delay in not filing a Statement of Defence, albeit a weak basis.

[44] The Defendants have satisfied the first part of the test for setting aside an order for default judgment.

(2) Do the Defendants have a *prima facie* defence on the merits?

[45] The Defendants rely on *TREB v Commissioner of Competition*. This decision of the Federal Court of Appeal arose out of a 2011 decision of the Competition Tribunal. The Strike Motion also relies on this decision. However, it is questionable whether the facts and decision in *TREB v Commissioner of Competition* do not apply in this action, based on the current facts before the Court.

[46] Though the Plaintiff's motion for interlocutory injunction was not successful, as stated above, the Court did find that there was a serious issue to be tried. In addition, I am also satisfied that the Plaintiff has, *prima facie*, established subsistence of copyright in the System and ownership of that copyright as stated in my Order and Reasons for the Default Judgment [at paragraph 13].

[47] However, the findings of the Federal Court of Appeal and this Court referred to above, finding copyright does not subsist in the TREB System then before these Courts, raises a serious concern about the merits of the Plaintiff's claim in this action. For this reason, I find that a *prima facie* defence has been raised.

[48] The Defendants have satisfied the second part of the test.

(3) Have the Defendants brought their motion within a reasonable time?

[49] This third part of the test is not at issue in this matter. Based on the evidence there is no question that the Defendants acted expediently in bringing this motion.

(4) Did the Plaintiff fail in its duty of full and frank disclosure?

[50] In making a motion *ex parte*, the Plaintiff accepted the exceptional duty of full and frank disclosure. This level of disclosure is required to mitigate the risk of injustice inherent in a matter where a judge may grant an order having heard from only one party [*TMR Energy Ltd. v State Property Fund of Ukraine*, 2005 FCA 28 at paragraph 64, citing *United States v Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.)].

[51] The Defendants claim that the Plaintiff failed in their duty by not disclosing the Notice of Status Review, or the status of their written submissions in response to the Notice of Status Review, in their motion materials for the Default Judgment. In addition, the Plaintiff did not respond to the Defendants' April 7 Email.

[52] While the Plaintiff was entitled to bring the motion for default judgment *ex parte*, I did state in the Order and Reasons for the Default Judgment, that it would have been more prudent to provide notice to the Defendants [at paragraph 15]. This is even more true when provided further evidence of the April 7 Email from the Defendants' counsel.

[53] Moreover, under *Rule* 382(1), if a Notice of Status Review is issued in respect of an action, the Plaintiff, within 15 days of the date of the notice of status review, must serve and file representations stating the reasons why the proceeding should not be dismissed for delay.

[54] The Plaintiff did not serve such representations. In addition, as stated above, they did not answer the April 7 Email from the Defendants requesting their intentions in regards to the Notice of Status Review.

[55] Notwithstanding I have determined that the Default Judgment should be set aside, this decision in no way condones or accepts the failure of the Defendants to file a defence in a timely manner, pursuant to the *Rules* of this Court. Both parties point fingers at the failed conduct of counsel in proceeding appropriately in this matter. I am not persuaded that either party's representations are warranted on the level argued, but in any event, there is, as I stated at the hearing, little viable excuse for the Defendants' failure to have filed the defence pursuant to the *Rules* of Court.

[56] While the Default Judgment is hereby set aside, each of the Defendants shall file and serve their defence by Monday, November 15, 2021.

[57] The parties submitted oral requests for costs, the Defendants seeking full indemnity in the amount for $20,000 and the Plaintiff seeking $5,000 in any event of the decision based on the Tariff amount. Costs are awarded against the Defendants in the amount of $5,000.

**JUDGMENT in T-898-20**

**THIS COURT'S JUDGMENT is that**

1. The motion to set aside the Default Judgment is granted.
2. Each of the Defendants shall file and serve their defence by Monday, November 15, 2021, no extensions to be granted.
3. Costs to the Plaintiff in the amount of $5,000.

"Michael D. Manson"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-898-20 |
| **STYLE OF CAUSE:** | THE TORONTO REGIONAL REAL ESTATE BOARD v R E STATS INC. operating as REDATUM KENNETH DECENA and GABRIEL STEFANESCU |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MANSON J. |
| **DATED:** | NOVEMBER 8, 2021 |

**APPEARANCES:**

| | |
|---|---|
| MELANIE BAIRD<br>SANJIT RAJAYER | FOR THE PLAINTIFF |
| JOHN SIMPSON<br>STEPHEN COOLEY | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| BLAKE, CASSELS & RAYDON LLP<br>TORONTO, ONTARIO | FOR THE PLAINTIFF |
| SHIFT LAW P.C.<br>TORONTO, ONTARIO | FOR THE DEFENDANTS |