Federal Court  Cour fédérale

Date: 20130726

Docket: T-1329-12

Citation: 2013 FC 820

Ottawa, Ontario, July 26, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

KELLY SERVICES, INC. AND KELLY PROPERTIES, LLC

Plaintiffs

and

MOHAMED WAZIR AND 1405653 ONTARIO INC. CARRYING ON BUSINESS AS KSR PERSONNEL

Defendants

REASONS FOR ORDER AND ORDER

[1] On May 7, 2013, this Court granted the Plaintiffs' motion for default judgment against the Defendants. The Court found that the Defendants had infringed the registered Canadian trade-marks owned by the Plaintiffs, had directed public attention to their services and business in such a way as to cause or be likely to cause confusion in Canada between the Plaintiffs' services or business and those of the Defendants, and had used the Plaintiffs' KSR Registrations in a manner that has depreciated the value of the goodwill attaching thereto, contrary to sections 19 and 20, 7(b)

and 22 of the *Trade-marks Act*, RSC 1985, c T-13. The Plaintiffs were granted a permanent injunction, damages in the amount of $30,000 and costs in the amount of $10,000.

[2] The Defendants have now moved to set the judgment aside, pursuant to Rule 399(1) of the *Federal Courts Rules*. 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.

Background

[3] The Plaintiff, Kelly Services, Inc. ("Kelly Services"), provides personnel placement and recruitment services in Canada and has done so since 1968. The Plaintiff, Kelly Properties, LLC ("Kelly Properties"), is a wholly owned subsidiary of Kelly Services and the owner of numerous trade-mark registrations that are used under licence in Canada in association with personnel placement and recruitment services. Kelly has approximately 25 offices across Canada, with sales revenue for 2011, in association with its Canadian personnel placement and recruitment services, totalling nearly $250 million.

[4] Mohamed Wazir is the owner of 1405653 Ontario Inc. carrying on business as KSR Personnel; the latter was incorporated in 2000 and has been operating as KSR Personnel since June 21, 2001. KSR Personnel is a small personnel recruitment company employing approximately 35 recruiters. KSR Personnel operates almost exclusively in the pharmaceutical manufacturing and services sector in Ontario and Canada.

[5] On July 5, 2012, the Plaintiffs personally served their Statement of Claim on the Defendants, alleging trade-mark infringement, passing off and depreciation of goodwill associated with the Plaintiffs' registered trade-marks. No Statement of Defence has been filed by the Defendants in this proceeding, who have been in default since August 4, 2012. The evidence on record shows that the timeline of the Defendants' awareness of their default status can be summarized as follows:

- On August 9, 2012, counsel for the Defendants sent an e-mail to Plaintiffs' counsel noting that the deadline for filing a Defence had expired and requesting confirmation that his clients had not been noted in default;
- On August 20, 2012, Defendants' counsel requested permission from the Plaintiffs to file a Defence by "this Friday" (meaning August 24, 2012);
- The Plaintiffs responded the following day by offering not to contest a motion seeking leave to file a Defence out of time, so long as the Defendants moved promptly, however, no such motion was ever brought;
- On September 27, 2012, the Plaintiffs wrote to Defendants' counsel advising him that the Plaintiffs would seek judgment in default, if the Defendants did not move quickly to file a Statement of Defence;
- On October 23, 2012, Defendants' counsel sent an e-mail to counsel for the Plaintiffs noting that "preparation of the defence is taking quite a bit more time than expected", indicating a clear and ongoing awareness that the Defendants remained in default;
- Later that day, the Plaintiffs wrote to Defendants' counsel by facsimile, registered mail and e-mail, noting that if the Defendants failed to move promptly then the

Plaintiffs would move for an Order that the Defence be filed without delay and that failure to do so would entitle the Plaintiffs to move for default judgment on an *ex parte* basis;

- On January 30, 2013, the Defendants were provided with the Plaintiffs' submissions in response to a status review, which included a draft Order that the Plaintiffs be entitled to move for default judgment on an *ex parte* basis if no Defence was filed within the prescribed deadline. Defendants' counsel acknowledged receipt of that correspondence by e-mail later that day;
- On February 18, 2013, the Defendants were provided with an Order of the Court requiring them to file a Statement of Defence within ten days. The Defendants acknowledged receipt of that Order by e-mail the following day;
- On February 25, 2013, Defendants' counsel served Plaintiffs' counsel with the Statement of Defence and counterclaim by way of e-mail. On the same day, Plaintiffs' counsel acknowledged receipt of that e-mail. Nevertheless, the Statement of Defence was never filed with the Court, and at the hearing, counsel for the Defendants acknowledged that, by inadvertence, he never provided that Statement of Defence to a process server for filing with the Court;
- On March 25, 2013, Plaintiffs' counsel sent to Defendants' counsel by e-mail a proposed timetable for the next steps in the litigation and resent it with a further e-mail on March 28, 2013. On that same day, Defendants' counsel responded and indicated his agreement to the proposed timetable with the exception of one date change, being the date on which the response to the Demand for Particulars of the Plaintiffs would be due, from April 2 to April 12, 2013. The timetable, as agreed to

by Defendants' counsel with the one requested date change, was sent to the Court by e-mail on April 2, 2013;

- On April 8, 2013, the Defendants were provided with a Direction of the Court, by facsimile and e-mail, indicating that no Statement of Defence had been filed. The Defendants acknowledged receipt of that Order by e-mail the following day;
- On April 12, 2013, correspondence enclosing a draft Order that directed the Plaintiffs to move for default judgment on an *ex parte* basis if a Statement of Defence was not filed within ten days of the date of that Order was sent to the Defendants by counsel for the Plaintiffs by way of e-mail, facsimile and mail. Defendants' counsel alleges, in his written submissions, that he did not see this e-mail and attached letter at the time, and found out after the Judgment had issued that the e-mail had in fact been delivered to his e-mail address but was quarantined by his computer safety software as potential unsafe or unwanted spam e-mail. At the hearing, he acknowledged that he received the letter but explained that he did not read the draft Order as he thought that it was just a scheduling matter and did not appreciate that his Statement of Defence had not been filed;
- On April 15, 2013, in response to the Direction of April 8, 2013, the Plaintiffs filed written submissions with the Court, together with the same draft Order that had been provided to the Defendants. A copy of that correspondence and its enclosure was sent to the Defendants by way of e-mail, facsimile and mail and the Defendants have not asserted that they did not receive that correspondence in any of the various formats it was sent by; and

- On April 22, 2013, the Court issued the draft Order submitted by the Plaintiffs. This Order was sent by the Court to the parties by e-mail and to the same e-mail address for Defendants' counsel, from which the Defendants had confirmed receipt of both the Court's Order dated February 15 and the Direction dated April 8, 2013.

[6] It is uncontested that the Judgment was personally served on the Defendants on May 9, 2013 and that a courtesy copy was provided to their counsel on May 10, 2013. Yet, the Defendants did not serve or file any materials seeking to set the Judgment aside until June 14, 2013. No explanation for this delay has been provided by the Defendants.

Issue

[7] The only issue to be decided on this motion is whether the default judgment should be set aside.

[8] That question shall be resolved without resorting to the affidavit evidence of Jordan Kofman, submitted on behalf of the Defendants. None of the statements made by Mr. Kofman with respect to providing a reasonable explanation for the Defendants' failure to file a Statement of Defence can be admitted or relied on. Mr. Kofman has no personal knowledge of any events in this proceeding which took place prior to the Judgment being issued, as he started to work for Defendants' counsel on May 8, 2013. His evidence on those matters therefore consists almost entirely of hearsay.

Analysis

[9] Rule 399(1) of the *Federal Courts Rules* provides that the Court may, on motion, 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 why the order should not have been made. There is no dispute between the parties as to the test to be applied for setting aside a default judgment. The defaulting party must satisfy the Court that it:

a) Has a reasonable explanation for the failure to file a Statement of Defence;

b) Has a *prima facie* defence on the merits to the Plaintiffs' claim; and

c) Moved promptly to set aside the default judgment.

See: *Louis Vuitton Malletier S.A. v Yang (c.o.b. K2 Fashions)*, 2008 FC 45, at para 4; *Society of Composers, Authors & Music Publishers of Can v 654163 Ontario Ltd*, 2010 FC 905, at para 19; *Brilliant Trading v Wong*, 2005 FC 571, at para 8.

[10] In the case at bar, the Defendants utterly fail the first part of the test. Indeed, their evidence and submissions as to their failure to file a Statement of Defence only speak to events in or around February 2013. However, the Defendants remained in default for a period of nine months. No attempt has been made to explain why no Statement of Defence was filed prior to February 2013, despite the Defendants acknowledging as early as August 2012, more than five months previously, that they were in default. Such an approach cannot possibly meet the requirement of satisfying the Court that a reasonable explanation for the Defendants' failure has been provided.

[11] At the hearing, counsel for the Defendants argued that the Defendants are not to blame for his honest and inadvertent mistake, that they did not ignore the legal proceedings launched by the

Plaintiffs, and that he had been in touch throughout with counsel for the Plaintiffs. In my view, this is far from sufficient to set aside the Default Judgment. Even if one were prepared to accept that the failure to file the Statement of Defence with the Court was somehow the result of a *bona fide* mistake, it would still not explain the long delay from early August to late February. The Defendants were clearly aware that they were in default immediately after the initial deadline for filing a Statement of Defence had passed, yet they did nothing to cure that default for six months. It is also clear that they remained fully aware of their continuing default until at least April 9, 2013, when they confirmed receipt of the Court's Direction noting that no Defence had been filed. Thereafter, on each of April 12, 15 and 22, 2013, the Defendants were provided with correspondence and draft or issued Orders by the Plaintiffs and the Court, via multiple delivery formats, all of which made it expressly clear that no Defence had been filed and that unless the Defendants moved to file a Defence in a timely manner, the Plaintiffs would be directed to move for default on an *ex parte* basis. Acknowledging receipt of some of these documents is clearly insufficient to explain why the Statement of Defence could not be filed for nine months. Even if counsel mistakenly believed that he had filed it shortly after serving counsel for the Plaintiffs, he should have realized no later than April 8, 2013 that it had not, in fact, been filed when he received the Direction of the Court.

[12] As for Mr. Wazir, it is hard to believe that he has not been involved in the litigation or that he did not speak to his lawyer during all these months. If, as he claims in his affidavit, his personal family life has been affected by the stress associated by this litigation, he must (or should) have made some enquiries as to its progress. Indeed, it is quite telling that Mr. Wazir makes no reference

in his affidavit as to why the Defendants failed to file a Statement of Defence or why that failure continued for more than nine months.

[13] In light of the foregoing, I have not been persuaded that the Defendants have a reasonable explanation for their failure to file a Statement of Defence.

[14] Moreover, the Defendants have not moved promptly to set aside the Judgment. There is no explanation whatsoever as to why the Defendants waited for five weeks before serving or filing any materials seeking to set the Judgment aside.

[15] Having failed to satisfy either the first or third elements of the test, there is no need to assess the defence on the merits. The Defendants' motion is therefore dismissed, with costs in the amount of $5,000. It follows that the Defendants will not be granted leave to file a Statement of Defence.

ORDER

THIS COURT ORDERS that this motion is dismissed, with costs fixed in the amount of $5,000.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1329-12
STYLE OF CAUSE:	KELLY SERVICES, INC. ET AL v MOHAMED WAZIR ET AL
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	July 23, 2013
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	July 26, 2013

APPEARANCES:

Simon Hitchens	FOR THE PLAINTIFFS
Ari Kulidjian	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP Toronto, ON	FOR THE PLAINTIFFS
Kulidjian & Associates Toronto, ON	FOR THE DEFENDANTS