COURT FILE NO.: 06-CV-315933PD3
DATE: 2007/10/30

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
State Farm Insurance Company	)	*Osborne Barnwell* and *Elsie Peters*, for the
	)	Defendant/Moving Party
Plaintiffs	)	
	)	
	)	
- and -	)	
	)	
	)	
	)	
	)	*Pamela Pengelley*, for the
Jean Tackfordai Brijlal	)	Plaintiff/Responding Party
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** September 14, 2007

HOILETT J.

[1] Apart from the routine request for costs, this is a motion brought by the defendant for an order setting aside the noting in default and the default judgment, including the order as to costs, arising from the judgment of Spence J., dated December 15, 2006.

[2] Although the facts are more elaborately canvassed in the material filed, and neatly chronicled in a "HISTORICAL TIMELINE" brief filed by the responding party, the essential highlights may be briefly summarized.

[3] The moving party commenced employment with the responding party in or about 1992 as Regional Office Claims Representative. In that capacity, she interacted with insurance claimants in respect to the settlement of their claims. In the period 1998-2001, the moving party, during the discharge of her duties as an employee of the responding party, fraudulently misappropriated $122,284.73 in funds from the responding party. The moving party accomplished the fraud by the making of false claims payments to active and closed claims file. Drafts drawn upon the

responding party's account were then credited to bank accounts of the moving party held by the Bank of Montreal.

[4] The result of the criminal investigation launched in consequence of the moving party's action was a guilty plea by her on or about October 31, 2002. A concomitant of the sentence imposed on the moving party on January 23, 2003, was a Restitution Order in favour of State Farm in the amount of $134,000.00 Neither the conviction nor the sentence has been the subject of an appeal nor has there been any complaint concerning the performance of the lawyer representing the moving party at the criminal proceedings.

[5] On or about June 2, 2006, Brett Rideout, counsel for State Farm, unaware of the Restitution Order for $134,000.00, delivered a demand letter to the moving party demanding the payment of the $122,284.72. The moving party was informed in the demand letter that failure to respond within 10 days would result in legal proceedings being taken by State Farm to recover the sum of which it had been defrauded. There was no response by the moving party within the 10 days contemplated by the demand letter.

[6] On June 19, 2006, the respondent left a voice-mail for Rideout's asking him to call her. Using the telephone number left him by the moving party, Rideout made several abortive attempts to contact the moving party between June 19, 2006 and June 26, 2006. On June 26, 2006, Rideout left a voice-mail informing the moving party that if there was no response by the end of the day on June 27, 2006 legal proceedings against her would be initiated. There was no response from the moving party to any of the voice-mail messages left on her telephone. Accordingly, State Farm commenced an action against the moving party on or about July 28, 2006; being action No. 06-CV-315933PD3.

[7] Although the moving party claims not to have been served with the statement of claim, there is an affidavit of service of one Hamaz Balata, sworn August 9, 2006 averring that there was service on the moving party on August 8, 2006, by leaving the statement of claim with an adult person, namely Chaundra Tackordai, identified as the moving party's sister.

[8] Tending to corroborate Balata's affidavit is the affidavit of Rideout, sworn May 8, 2007, in which he avers that on August 23, 2006 he received a call from the moving party in which she indicated that she had received the statement of claim and requested a meeting with Rideout to discuss the matter. Rideout further averred that in response to that request a meeting was arranged and the moving party met with him on August 25, 2006. The moving party informed him at that time that she did not intend to defend the action. Attached as Ex. "F" to Rideout's May 8, 2007 affidavit is a faxed communication he avers he received from the moving party on September 7, 2006. The communication is the moving party's Notice of Assessment for the 2005 taxation year. Handwritten on Ex. "F" is a note to the attention of Rideout, signed by "Jean Brijlal". Fairly summarized, the brief note sets out the moving party's budget and concludes with the following offer:

> I will pay State Farm $200/month until I can gain full time employment.

[9] The moving party, as of Thursday, September 14, 2006 failed to serve a Notice of Intent to Defend or a statement of defence and was noted in default. As earlier indicated, Spence J. gave judgment for State Farm on December 15, 2006; in the amount of $187,496.45. The judgment bears interest at a rate of 6% per annum. The affidavit of service of Hamza Balata, sworn January 18, 2007, swears to having served a copy of the judgment on the moving party on January 13, 2007 at 10:00 a.m. by leaving a copy with [Roy] Nancomor Brijlal, the moving party's husband, at the moving party's residence at 45 Irenemount Crescent, Markham, Ontario.

[10] A Phone Report from the offices of the responding party's solicitors reports a telephone message from the moving party on January 15, 2007 requesting a meeting to discuss the judgment. A meeting with Ms. Pengelley ensued on January 16, 2007 in which the moving party offered to settle the responding party's claim for $60,000.00. Ms. Pengelley advised the responding party that she had to obtain instructions from State Farm. A follow-up call by the moving party on February 5, 2000 yielded no change from the January 16, 2007 meeting except the expressed opinion of Ms. Pengelley that she rather doubted that the $60,000.00 offer would be acceptable. Suffice it to say that there was continued communication between Ms. Pengelley and the moving party culminating with a March 19, 2007 agreement to extend the time for a satisfactory proposal from the moving party to March 31, 2007, in order for the moving party to attend her sister's memorial outside of Canada.

[11] Instead of any agreement being reached by the parties, counsel for State Farm was advised on March 29, 2007 by Ms. Elsie Peters, acting on behalf of the moving party that a motion would be brought to set aside the judgment of Spence J., on the basis that she had not been served with the statement of claim.

[12] The moving party's affidavit sworn in support of this motion was sworn on May 3, 2007. In the interest of fidelity, I have reproduced following the full text of the moving party's affidavit, except for the five exhibits referenced therein:

> 2. On or about February 5, 2007, I received a letter from my husband that states that the Plaintiff State Farm Insurance have received judgement against me in the amount of $183,352.35 and $4,144.10 in legal costs.

The purported exhibits "A", "B", "C", "D" and "E" are presumably those exhibited at Tabs 4, 5, 6, 7 and 8 of the defendant's motion record. I have later in these reasons commented on the substance of the affidavit but the following technical, and arguably fatal, flaws are apparent on the face of the record.

(1) the moving party's affidavit was sworn on May 3, 2007 and each of the five exhibits refers to the affidavit of "Jean Brijlal sworn before me on the 4 day of May 2007";

(2) paragraph 2 of the affidavit avers to an unidentified letter received by the moving party from her husband on February 5, 2007. There is no reference in para. 2 to the letter being made an exhibit to the affidavit. It can only be speculated that the letter is the letter referenced in para. 4 of the affidavit;

(3) this point may seem technical but it is debatable as to whether the purported exhibits are "attached" to the affidavit, as they purport to be; particularly so when, interposed between the affidavit and the exhibits is an affidavit of the moving party's husband, sworn May 3, 2007 which is not referenced in the moving party's affidavit nor made an exhibit thereto.

[13] Ms. Brijlal was cross-examined on her May 3, 2007 affidavit and notwithstanding her averments that she was never served with a statement of claim or a copy of the judgment of Spence J., it became patently clear that Ms. Brijlal's assertions were unreliable, at best. During the course of her cross-examination, she baldly denied ever meeting with Mr. Rideout, then she allowed that it was "possible", later that it was "probable", and then "I guess", "…I don't remember your face" and finally "sort of", "yes"; confirming that she had met with someone at Mr. Rideout's office.

[14] The moving party, notwithstanding Ex. "F" to Rideout's May 8, 2007 affidavit, *supra*, denied that she had offered to settle the matter, but conceded that the handwritten note on Ex. "F", offering to pay $200.00 per month, was authored and sent by her.

[15] I am acutely mindful of the required caution in any attempt to resolve credibility issues in the absence of *viva voce* evidence but it is patently clear from the record that the moving party's averments are singularly unreliable, and in the wake of the record, including Mr. Rideout's affidavit, on which there was no cross-examination, there is no doubt in my mind that both the statement of claim and the judgment of Spence J. came to the attention of the moving party on a timely basis.

[16] The central question, therefore, is whether or not the moving party has satisfied the test to have a default judgment set aside. Rules 19.03 and 19.08 are the governing rules.

[17] It is well established that a party seeking to set aside a default judgment must satisfy the court that there has been:

1) a reasonable explanation for the default;

2) a reasonable explanation for the delay where there has been unreasonable delay, and

3) there are reasonable facts constituting an arguable defence on the merits.

[18] It is my view that the moving party has failed to satisfy any of the three criteria cited above. As I have indicated, the record shows that he moving party was served with both the statement of claim and the judgment of Spence J. and, by any measure, there has been no reasonable or credible explanation for the default. Even if one accepts that it was in early

February 2007 that the judgment came to the moving party's attention, such steps as were taken by her in an attempt to settle the mater were singularly lacking in diligence. Probably most fatal to the moving party's motion, is the absence of any facts constituting a reasonable, or even plausible, defence on the merits. There is absolutely nothing in the supporting affidavit which even addresses the issue. It cannot be forgotten that this is a case in which the moving party pled guilty to a fraud, predicated on the same set of facts as those constituting the basis for the default judgment. The conviction resulting from that guilty plea has never been appealed, and the representation of the moving party in those criminal proceedings has never been impugned. Indeed, the moving party on the cross-examination upon her affidavit as much as admitted liability in respect to at least a portion of sum of money defrauded. That finding flows from the series of questions and answers starting at question 176 and concluding in the following exchange at question 179:

176. Q. So there is no real defence to the action that was issued against you?

MS. PETERS: Well, we are not talking about that now, are we?

MR. RIDEOUT: Well ---

MS. PETERS: Don't go there.

MR. RIDEOUT: Let's talk about this.

MS. PETERS. We're not talking about defence to this action.

MR. RIDEOUT: Well, let's talk about this.

MS. PETERS: What about real defence or no defence or – we're not dealing with the defence. We're dealing with the question on this affidavit.

MR. RIDEOUT: Well, Ms. Brijlal has just admitted she said she took – said she's accused of she took 60,000. She admits she took 60,000. Let's not go there. It's ---

BY MR. RIDEOUT:

177. Q. Your statement is that the default judgment is wrongful---

MS. PETERS: Right.

BY MR. RIDEOUT:

178. Q. …and then in paragraph 8 of your affidavit you say you are asking the judge to set aside the default judgment and grant you a consent to file your defence.

MS. PETERS: Right.

MR. RIDEOUT: Okay.

MS. PETERS: That's what she says.

BY MR. RIDEOUT:

179. Q. So you've admitted you took money from State Farm.

MS. PETERS: Sixty thousand.

MR. RIDEOUT: Okay. And so what then is the basis of your defence?

MS. PETERS: She did not take the amount that she --- that you're implying.

MR. RIDEOUT: So it's the quantum issue as opposed to liability?

MS. PETERS: That's right.

MR. RIDEOUT: That's your position anyway.

MR. PETERS: That's her position, not mine.

[19] Upon a review of the record and the submissions of counsel, I am of the view that there is no merit in the motion. For all the foregoing reasons, therefore, the motion is dismissed with costs.

[20] If the parties are unable to agree on the issue of costs, I shall entertain brief written submissions, once exchanged, within 30 days of the date of these reasons. The submissions shall be directed to my attention in one joint package.

Hoilett J.

Released: October 30, 2007

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DATE: 2007/10/30

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

State Farm Insurance Company

Plaintiffs

- and -

Jean Tackfordai Brijlal

Defendant

REASONS FOR JUDGMENT

Hoilett J.

Released: October 30, 2007