CITATION: [redacted] Limited v. The Royalton Retirement Residence Inc., 2011 ONSC 179
COURT FILE NO.: 09-CV-382567
DATE: January 10, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

[redacted] Planning Limited

Plaintiff

- and -

The Royalton Retirement Residence Inc., The Royalton Retirement Residences (Peterborough) Inc. and The Royalton Retirement Residences (St. Catherines) Inc.

Defendants

COUNSEL:

Paul Gemmink for the Plaintiff
Morris Cooper for the Defendants

HEARING DATE: January 6, 2011

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] This is a motion by the Defendants, The Royalton Retirement Residence Inc., ("Royalton"), The Royalton Retirement Residences (Peterborough) Inc., ("Royalton-Peterborough"), and The Royalton Retirement Residences (St. Catherines) Inc., (Royalton-St. Catherines"), to set aside the default judgment of Justice Frank dated March 11, 2010.

[2] Under Justice Frank's judgment: (a) Royalton and Royalton-Peterborough are jointly and severally liable for $34,142.23 plus interest at 24% per annum; (b) Royalton and Royalton-St. Catherines are jointly and severally liable for $13,813.60 plus interest at 24% per annum; and (c) Royalton, Royalton-Peterborough, and Royalton-St. Catherines are jointly and severally liable for costs of $7,205.78 plus interest at 2% per annum.

[3] The Defendants submit that the Plaintiff, MacNaughton Hermsen Britton Clarkson Planning Limited ("MacNaughton"), obtained the default judgment on the basis of misleading affidavit evidence. The Defendants submit that MacNaughton, which is an urban planner, obtained a judgment against corporations with whom it had no business dealings and to whom it never rendered invoices. They submit that the judgment should be set aside without terms and that they should be permitted to defend the action.

[4] MacNaughton resists the motion to set aside Justice Frank's judgment, and it submits that the judgment was properly obtained against all of the Defendants and that the Defendants Royalton-Peterborough and Royalton-St. Catherines are liable pursuant to the pre-incorporation contract provisions of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s.21, which explains how it is that these Defendants can be liable notwithstanding that MacNaughton did not submit any invoices to them and notwithstanding that MacNaughton did not have business dealings with them.

[5] Further, MacNaughton argues that the Defendants have not met the test for setting aside a default judgment. On a motion to set aside a default judgment, the court will consider: (a) whether the motion to set aside the judgment was brought promptly; (b) where there is a plausible excuse or explanation for the defendant's default in complying with the *Rules of Civil Procedure*; and (c) whether the facts establish at least an arguable defence: *Nelligan v. Lindsay*, [1945] O.W.N. 295 (H.C.J.); *Laredo Construction Inc. v. Sinnadurai* (2005), 78 O.R. (3d) 321 (C.A.); *Morgan v. Toronto (Municipality) Police Services Board*, [2003] O.J. No. 1106 at para. 19 (C.A.). The considerations, however, are just factors, and the motions judge or master ultimately must determine whether the interests of justice favour setting aside the default judgment: *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.* (2007), 87 O.R. (3d) 479 (C.A.).

[6] In resisting the motion, MacNaughton did not much contest that the Defendants have provided a plausible excuse for failing to defend and that they brought their motion promptly. MacNaughton focussed its attention on whether the Defendants have shown an arguable defence because to set aside a default judgment, the defendant should show that his or her defence has an air of reality and that there is a genuine issue requiring a trial: *Cherry Central Cooperative Inc. v. D'Angelo* (2001), 56 O.R. (3d) 655 (C.A.). MacNaughton argued that the Defendants had not met the onus of showing a defence and, therefore, the default judgment should not be set aside.

[7] For the Reasons that follow, I agree with the arguments of MacNaughton, and I dismiss the motion to set aside the default judgment.

B. Evidentiary Background

[8] The evidence for this motion was provided by:

- the affidavits of David McKay dated March 3, 2010 and December 15, 2010. Mr. McKay is a "partner" within the corporate firm structure of MacNaughton who works out of the MacNaughton's branch office in Vaughan, Ontario
- the affidavit of Rahim Bhaloo dated December 2, 2010. Mr. Bhaloo is a director of Royalton and of Royalton-St. Catherines and he is the managing director of Royalton-Peterborough

- excerpts from the examination of Mr. Bhaloo in aid of execution against Royalton.

C. ***Factual Background***

[9] MacNaughton carries on the business of a municipal planner for the public and private sector.

[10] The Defendants, Royalton, Royalton-Peterborough, and Royalton-St. Catherines are all separate corporations carrying on the similar but distinct business of developing retirement homes. They act as consultants to determine the feasibility of a retirement home project.

[11] Royalton-Peterborough is also the registered owner of the lands for a retirement residence in Peterborough.

[12] Beginning in 2007, Royalton retained [redacted] to provide consulting services with respect to proposed retirement residence projects in Peterborough, St. Catherines, Kanata, Oakville, Windsor, and Brantford, Ontario.

[13] It was [redacted]'s evidence that it was its understanding that it was providing services for corporations to be incorporated. Mr. [redacted] in his affidavit deposed as follows:

> As I understood it, the work [redacted] was doing on behalf of and for the benefit of each specific project and that the only reason we were generally billing [Royalton] was that the corporations that would be incorporated for each project had not been incorporated yet.

[14] [redacted]'s retainer for the Peterborough project was arranged before the July 9, 2008 incorporation of Royalton-Peterborough. [redacted] rendered its invoices to Royalton. In turn, Royalton did not render any invoices to Royalton-Peterborough for the consulting services provided for the Peterborough project.

[15] [redacted]'s retainer for the St. Catherines project was arranged before the March 25, 2008 incorporation of Royalton-St. Catherines, [redacted] rendered its invoices to Royalton. In turn, Royalton did not render any invoices to Royalton-St. Catherines for the consulting services provided for the St. Catherines project.

[16] Royalton did not pay for all the services rendered by [redacted] on some of the retirement home projects.

[17] On July 8, 2009, [redacted] brought this action under the rules for a simplified procedure against Royalton, Royalton-Peterborough, and Royalton-St. Catherines. In its statement of claim, [redacted] advanced two claims. The first was against Royalton and Royalton-Peterborough. The second claim was against Royalton and Royalton-St. Catherines.

[18] With respect to its first claim, [redacted] alleges in its statement of claim that there was an agreement between [redacted] and Royalton under which [redacted] was retained to provide services for Royalton and Royalton-Peterborough for a proposed new retirement

residence to be built in Peterborough and that invoices for these services were rendered to Royalton. The invoices stipulate interest at the rate of 24% per annum.

[19] [redacted] alleges that the services it provided for the project in Peterborough were for the benefit of Royalton-Peterborough. [redacted] claims $24,464.08 for unpaid invoices plus interest. Relying on the pre-incorporation contract provisions of the *Business Corporations Act,* R.S.O. 1990, c. B.16, [redacted] seeks to impose liability on Royalton-Peterborough pursuant to s. 21 (3) of the Act.

[20] With respect to its second claim, [redacted] alleges that there was an agreement between [redacted] and Royalton under which [redacted] was retained to provide services for Royalton and Royalton-St. Catherines for a proposed new retirement residence to be built in St. Catherines and that invoices for these services were rendered to Royalton. The invoices stipulate interest at the rate of 24% per year. [redacted] claims $9,897.56 for unpaid invoices plus interest.

[21] [redacted] alleges that the services it provided for the project in St. Catherines were for the benefit of Royalton-St. Catherines. Relying on the pre-incorporation contract provisions of the *Business Corporations Act,* R.S.O. 1990, c. B.16, [redacted] seeks to impose liability on Royalton-St. Catherines pursuant to s. 21 (3) of the Act.

[22] Also on July 8, 2009, [redacted] brought another action just against Royalton with respect to consulting services for retirement home projects in Windsor and Brantford, which eventually did not proceed.

[23] None of the Defendants defended either action. The explanations offered for the default were inadvertence and the suggestion that the Defendants were confused by [redacted] bringing more than one action against Royalton.

[24] In the action now before the court, on August 25, 2009, [redacted] obtained a default judgment from the registrar only against Royalton in the aggregate amount of $46,369.91 plus $1,150.00 for costs. A registrar's default judgment was also taken out against Royalton in the other action with respect to the Windsor and Brantford claims.

[25] The explanation for [redacted]'s not immediately seeking a default judgment against Royalton-Peterborough and Royalton St-Catherines is that such a judgment would not have been available from a registrar who has no authority to make an order under the pre-incorporation provisions of the Ontario *Business Corporations Act.*

[26] [redacted] took steps to enforce the judgment in this action against Royalton and recovered only $1,565.91.

[27] Subsequent proceedings for examinations in aid of execution brought the default judgments to the attention of the Defendants, and they brought this motion to set aside Justice Frank's judgment.

[28] In his affidavit in support of the Defendants' motion to set aside the default judgment, Mr. Bhaloo provides the Defendants' submission as to why the default judgment should be set aside. The explanation is found in paragraphs 14 to 17 of his affidavit, where he states:

> 14. Our dealings with [redacted] had nothing to do with pre-incorporation contracts. There was never any contract nor engagement or services by [Royalton-St. Catherines] or [Royalton-Peterborough], and no work was ever done for the benefit of these two corporations.
>
> 15. All of the work done by [redacted] was invoiced directly and exclusively to [Royalton]. These corporations are not interchangeable. They have different directors, participants, shareholders, and secured lenders.
>
> 16. What [redacted] has done is to obtain several judgments against two corporations to which no invoices were ever rendered. However, [redacted] has included those corporations as co-Defendants merely on the basis of corporate searches, and an attempt to show these corporations are related by having similar directors.
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> 17. It is false for Mr. McKay to assert as he has done that he "understood" the reasons for directing invoices to [Royalton] and to falsely claim that these were pre-incorporation contracts later adopted by these companies. All pre-incorporation project development works done in St. Catherines and in Peterborough, was solely the legal and financial responsibility of [Royalton].

D. Analysis

[29] The analysis may begin with the point that Royalton provides nothing to suggest that it has a defence to the action and scarcely an explanation for its failure to defend. Royalton admits that it contracted for the planning services and does not suggest that it paid the invoices rendered to it. There is, therefore, no reason to set aside the default judgment against Royalton.

[30] Turning to the situation of Royalton-Peterborough and Royalton-St. Catherines, but for the fact that [redacted] did not make much of an issue of it, I would have found that they had not offered an adequate explanation for their failure to defend.

[31] However, because [redacted] did not press the point, I will assume that this criterion for setting aside a default judgment has been satisfied, and I will focus my attention, as did MacNaughton, on the criterion of whether these Defendants had shown the prospect of a defence to the claim under the pre-incorporation contract provisions of s. 21 of the Ontario *Business Corporations Act*, which state:

> *Contract prior to corporate existence*
>
> 21 (1) Except as provided in this section, a person who enters into an oral or written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof.

Adoption of contract by corporation

(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,

> (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
>
> (b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

Non-adoption of contract

(3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit.

Exception to subs. (1)

(4) If expressly so provided in the oral or written contract referred to in subsection (1), a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof

[32] Insofar as Royalton-Peterborough and Royalton-St. Catherines are concerned, the only possibly applicable provision of s. 21 of the Ontario *Business Corporations Act* is subsection (3).

[33] In this last regard, subsections (1) and (4) of s. 21 concern the liability of Royalton. Notwithstanding Mr. Bhaloo's affidavit evidence, MacNaughton never asserted that Royalton-Peterborough and Royalton-St. Catherines had adopted any pre-incorporation contracts, and, thus, subsection (2) is not applicable. That just leaves the question of the application of subsection (3) and whether Royalton-Peterborough and Royalton-St. Catherines have shown a viable defence to MacNaughton's reliance on this subsection.

[34] To be more precise, the issue is whether these Defendants have shown a defence to MacNaughton's claim that: (1) MacNaughton was a party to a contract made before the coming into existence of Royalton-Peterborough or Royalton-St. Catherines; and (2) in making the contract, Royalton purported to act on behalf of Royalton-Peterborough or Royalton-St. Catherines, in which case the court may fix the obligations under the contract as joint or joint and

several or apportion liability between Royalton and Royalton-Peterborough or Royalton and Royalton-St. Catherines, respectively.

[35] On the elements of [redacted]'s claim, the parties concede that [redacted] was a party to a contract made before Royalton-Peterborough and Royalton-St. Catherines came into existence, and, thus, the defence advanced for these Defendant corporations is the bald assertion by Mr. Bhaloo that "no work was ever done for the benefit of these two corporations."

[36] On the motion for a default judgment, Justice Frank was satisfied from the evidence that s. 21(3) was applicable and work had been done for the benefit of Royalton-Peterborough and Royalton-St. Catherines. With one exception, the evidence on this motion to set aside the judgment is the same as it was before Justice Frank. The exception is that Royalton-Peterborough and Royalton-St. Catherines baldly assert that [redacted]'s work was exclusively done for the benefit of Royalton.

[37] That bald assertion does not demonstrate a defence with any air of reality. Royalton-St. Catherines and, in particular, Royalton-Peterborough, which became the owner of the retirement home property in Peterborough, do not provide evidence to distance themselves from the benefits received by Royalton. For instance, they do not provide any evidence that they paid Royalton for the contribution to the development of the projects made by [redacted]. They do not provide any evidence to suggest that they are being asked to pay a second time for development work that was provided to advance the projects in Peterborough and St. Catherines. They do not provide any evidence to negate the strong inference from the evidence that Royalton was the promoter of the retirement home projects and was purporting to act on their behalf before their incorporation.

[38] In contrast, [redacted]'s evidence shows that there was a sufficient connection between Royalton as promoter and Royalton-Peterborough and Royalton-St. Catherines as corporations and there would be no unfairness in applying the provisions of s.21 (3) to these corporations that were incorporated after the agreement between [redacted] and Royalton.

[39] It is notable that s. 21 of the Ontario *Business Corporations Act* envisions that a pre-incorporation contract may be an oral contract on behalf of a corporation before it comes into existence and that s. 21 (3) envisions that the court may impose liability on the corporation even if it does not adopt the contract. [redacted] provided evidence that established that there was an oral pre-incorporation contract that was not adopted by Royalton-Peterborough and Royalton-St. Catherines. The Defendants provided no evidence to the contrary other than its self-serving assertion that there was no pre-incorporation contracting. The evidence supports the application of s. 20 (3) of the Act.

[40] On a motion to set aside a default judgment, the court is entitled and required to take a good hard look at the merits to assess whether the moving parties have established an arguable defence, and I conclude that they have not. See *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corporation*, 2008 ONCA 894.

E. ***Conclusion***

[41] For the above Reasons, I dismiss the motion.

[42] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with [redacted]'s submissions within 20 days from the release of these Reasons for Decision to be followed by the Defendants' submissions within a further 20 days.

Perell, J.

Released: January 10, 2011