Doe v N.D., 2016 ONSC 4920 (CanLII)

Date: 2016-09-16
Docket: CV-12-464533
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COURT FILE NO.: CV-12-464533
DATE: 20160916
ADDENDUM: 2016ONSC 4920

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JANE DOE 464533	)	*Donna N. Wilson*, for the Plaintiff
	))	
Plaintiff	))	
	))	
– and –	)	
	))))))	
N.D.		
		Dhiren R. Chohan, for the Defendant
Defendant		
	)	
	)	
	)	**HEARD: July 26, 2016**

THE COURT HAS ORDERED THAT ANY REPORT OR PUBLICATION OF OR CONCERNING THIS MATTER OR THESE REASONS SHALL NOT CONTAIN ANY INFORMATION THAT WOULD IDENTIFY THE PLAINTIFF AND THAT IN ANY SUCH REPORT OR PUBLICATION THE DEFENDANT SHALL BE REFERRED TO ONLY BY HIS INITIALS.

G. DOW, J.

REASONS FOR JUDGMENT

[1] The defendant, N.D., seeks an order setting aside the default judgment of Justice Stinson January 21, 2016, the setting aside of being noted in default and 30 days to serve and file his Statement of Defence. The plaintiff opposes the motion.

[2] The cause of action arises out of the defendant, (the plaintiff's ex-boyfriend), posting an intimate video of her on a pornographic website without her knowledge, permission or consent in November, 2011. The action was commenced under *Simplified Procedure* for the maximum amount allowed, that is $100,000 plus interest and costs. The Statement of Claim alleges breach of confidence, intentional infliction of mental distress and invasion of privacy. The plaintiff sought damages, both general and exemplary, injunctive relief and procedural directions to protect her identity. Justice Stinson awarded $50,000 for general damages, $25,000 for aggravated damages and $25,000 for punitive damages. The Judgment included an order directing the defendant immediately destroy any and all images or recordings of the plaintiff in whatever form that may exist in his possession, power or control along with a permanent prohibition from publishing, posting, sharing or otherwise disclosing in any fashion any intimate images or recordings of the plaintiff. The defendant was also permanently prohibited from communicating with the plaintiff or members of her immediate family, directly or indirectly.

[3] A retroactive order was made anonymizing the proceeding, and a publication ban was put into place so as not to contain any information that would identify the plaintiff in furtherance of the objective of protecting the plaintiff's privacy. The defendant is to be referred to only by his initials and the court file sealed under Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and opened only upon an order of a Superior Court Judge to be sought on at least 21 days notice to the plaintiff.

[4] Interest was awarded in the amount of $5,500 and costs of the action fixed on a full indemnity basis in the amount of $36,228.73, for a total of $141,708.03.

[5] The defendant seeks only to set aside the findings on liability and the awards of damages, interest and costs.

Facts

[6] Briefly, the parties were boyfriend and girlfriend in secondary school in a small Ontario city. Both were 18 years old in September 2011, when the plaintiff began attending university. They had "broken up" in July of that year but continued to communicate regularly by internet, texting and phone and they would see each other when the plaintiff returned to visit her parents. In August, 2011, the defendant began asking the plaintiff to make a sexually explicit video of herself and the plaintiff refused. The defendant sent intimate photos and videos of himself and continued to request the plaintiff reciprocate. She ultimately did make a video in November, 2011. Her evidence is he reassured her no one else would see the video. As a result, she "caved" to the defendant's pressure and forwarded the video to him.

[7] In early December, 2011 the plaintiff learned from a third party, the defendant had posted the video on a pornographic website and that mutual friends were aware of its existence and availability. Understandably, the plaintiff was devastated, humiliated and distraught (to borrow the words of Justice Stinson). She called the defendant's mother and told her what had happened. The defendant's mother confirmed with her son he had posted the video and then to the plaintiff that it was immediately removed (after being available to review and presumably download for about three

weeks). These events took place before the 2014 amendment to the *Criminal Code* creating the new offence "publication of intimate images without consent". As a result, when the police were contacted, they declined to become involved.

[8] In February, 2012, counsel for the plaintiff contacted the defendant with a settlement demand advising the alternative was issuance of a Small Claims Court action for damages. The defendant, although now a post-secondary student himself, with limited financial means, retained counsel on a limited scope retainer. Negotiations were not successful and a Statement of Claim in the Superior Court of Justice was issued and served in September, 2012. A waiver was given by the plaintiff to the defendant to serve and file a Statement of Defence while negotiations continued through the rest of 2012 and 2013. The defendant became self-represented at the beginning of 2014 and a January 6, 2014 letter from plaintiff's counsel demanded previously drafted Minutes of Settlement from March, 2013 be signed or a Statement of Defence delivered within the next 20 days. Neither occurred. The next activity in the action appears to be a June 19, 2014 letter from plaintiff's counsel which demanded a response by June 26, 2014 or the defendant would be noted in default. On July 4, 2014, the defendant sent a self drafted Notice of Intent to Act in Person by email and facsimile.

[9] The email is contradictory in its content. That is, while acknowledging "what I did was wrong" also suggested that the plaintiff "was wrong as well by sending the video". There is reference to "understanding the hurt that I have caused" but also "it has been all but forgotten and there is no hurt against her name what so ever". In my view, the intent was to continue negotiations which had already proceeded at this stage for 28 months (February, 2012 – June, 2014). I am reinforced in this impression by repeated reference to the defendant seeking a "fair settlement" and a "reasonable settlement" in this email. Negotiations did appear to continue for the remainder of 2014 and into 2015 without delivery of a Statement of Defence or the defendant being noted in default.

[10] The defendant's material contains an exchange of emails (not contested by the plaintiff) between he and the plaintiff's counsel in May and June, 2015 that infer an amount had been agreed to, partial payments were to be made, and the start date needed to be deferred. In the email of May 20, 2015, the defendant stated "Plain and simple I don't have the money". The plaintiff's counsel emailed the defendant July 27, 2015 advising his Statement of Defence was required by August 17, 2015. The Minutes of Settlement were not signed or returned. There was a follow up email on August 11, 2015 asking for a response. The defendant responded that he was "not signing a settlement nor am I filing a defence so you do what you need to". The defendant also deposed he sought Legal Aid as he had no funds but this was refused given it was a civil matter.

[11] The defendant was noted in default and served on November 4, 2015 with the plaintiff's motion for default judgment returnable November 20, 2015. That motion did not proceed. However, in response, the defendant drafted and served his own motion to set aside the noting in default returnable November 13, 2015 but did not file same. The defendant produced copies of his emails of December 7 and December 15, 2015 sent to plaintiff's counsel indicating he was aware the motion for default judgment had been adjourned to January, 2016 but he had not been advised of the new date and was requesting same from plaintiff's counsel. This did not occur. This evidence is not refuted by the plaintiff.

[12] The motion for default judgment proceeds on January 12 with reasons released January 21, 2016. The defendant admits he received the reasons from plaintiff's counsel by email on January 24, 2016.

[13] On February 22, 2016, the defendant retained his counsel who obtained "the earliest date available" from the Court to have this motion heard which was April 16, 2016. The materials relied

on and before me are dated March 28, 2016 and it was agreed by plaintiff's counsel they were served on or shortly after that date. On April 16, 2016, Justice Lederer granted the plaintiff's request for an adjournment to July 26, 2016 with a schedule for responding material to be served by May 13 (and cross-examinations to be completed by May 31, 2016) neither of which occurred. In fact, with courtesies extended by defendant's counsel, plaintiff's counsel did not serve her factum until July 20, 2016 and then, before me, sought leave of the Court to rely on the evidence before Justice Stinson. The defendant consented to this.

Analysis

[14] The legal test to be applied was summarized in March, 2014 by the Court of Appeal in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 (CanLII) a decision that sets out the following five factors to consider as part of determining whether the interests of justice favour granting the order:

1) whether the motion was brought promptly after the defendant learned of the default judgment;

2) whether there was a plausible excuse or explanation for the defendant's default in complying with the Rules;

3) whether the facts establish that the defendant has an arguable defence on the merits;

4) the potential prejudice to the moving party should the motion be dismissed and the potential prejudice to the responding party should the motion be allowed; and

5) the effect of any order the Court might make on the overall integrity of the administration of justice.

[15] Justice Gillese on behalf of the Court of Appeal goes on to indicate these factors are not to be treated as rigid rules which I infer to mean no one factor is more or less important than another and that, in considering the particular circumstances of each case, one factor can overwhelm the rest. I propose to consider each factor in turn.

Issue – Promptness

[16] This factor should focus on the time between the defendant learning of the default judgment and seeking to set it aside. In my view, that would be January 24, 2016 when reasons were emailed to the defendant until the end of March when his counsel served this Motion and notified the plaintiff of his intention to request that it be set aside. This is just over two months. On its own, this would favour the defendant given it is usually only when much longer periods are involved (such as in the *Mountain View Farms Ltd. v. McQueen* decision where it was almost two years) that it favours the relief sought not being granted. I did hear and consider a submission that the period of time can and should be expanded by the fact that the motion for default judgment was served on the defendant in November, 2015. This expands the time period to four months. I agree with this submission. In my view, it is a preferred or best practice to serve motions for default judgment on the opposite party despite Rule 19.02(3) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 not requiring same. This should be done for the very purpose of assisting the party in opposing a motion such as this one. However, in my view, the four month period remains acceptable as an amount of time particularly given the efforts made by the defendant during that time to indicate his intention to defend this matter. I am reinforced in this conclusion by the previous history in this action, that is, the amount of time from service of the Statement of Claim in September, 2012, when the discussions

regarding settlement, and waiver of the time requirement to file a Statement of Defence occurred until August, 2015 or almost three years. Overall, this factor is in favour of the defendant.

Issue - Plausible Excuse or Explanation

[17] It would appear that the defendant seeks to rely on his being self-represented and lacking the knowledge as to the procedure to follow given his drafting and service of a motion to set aside the noting in default in November, 2015 that was not filed. I do not accept this position. Self-represented litigants are not uncommon and they are increasing. It is not appropriate to accept that members of our society who choose (either through a financial reason or some other reason) to represent themselves may ignore or not be bound by the *Rules of Civil Procedure* and time limits stated on the face of a Superior Court of Justice issued document such as the Statement of Claim or an indulgence granted by the other side. In this case, the defendant has a post-secondary school education and his materials from November 2015 reflect the skill and ability to draft the necessary documents. It is a serious step to request the Superior Court of Justice to set aside one of its Judgments. The duration of the proceedings makes it clear the plaintiff, through counsel, was determined to proceed with either reaching an acceptable result by negotiation and settlement or seeking the assistance of the Superior Court of Justice to obtain an acceptable result. Were this the sole factor, I would not grant the relief sought.

Issue – Arguable Defence

[18] Plaintiff's counsel directed me to the Reasons of Justice Stinson and the requirements for the torts of breach of confidence and invasion of privacy. The intent was to negate any statement by the defendant that he and the plaintiff had no agreement that the video would be kept in confidence. There is merit to that submission. However, in my view, this evidence may be relevant in the awarding of aggravated and punitive damages which comprises 50 percent of the award. Further, the assessment of damages is based on only evidence from the plaintiff which included evidence about her adverse psychological reaction as well as descriptions of events where the plaintiff and the defendant had been at the same social gatherings subsequent to November, 2011 and until the evidence was tendered at the hearing of the motion on January 12, 2016. In this motion, the defendant tendered evidence of other events and incidents including a series of photographs of the plaintiff taken following November, 2011 which the defendant submits challenges the severity of the plaintiff's damages. Counsel for the defendant also raised the possibility of conducting a medical examination of the plaintiff under Rule 33 given the complaint of an adverse psychological reaction which would appear to be the very purpose of this Rule. As a result, this factor favours the defendant.

Issue – Prejudice

[19] The prejudice to both parties must be considered. It preferable to have matters heard on their merits. As Justice Gillese stated in *Mountain View Farms Ltd. v. McQueen* (at paragraph 63) a "just result presupposes that both sides had the opportunity to be fairly heard". To this end, in my view, an important factor to examine is whether the passage of time or conduct of the party seeking the relief has resulted in the case proceeding on evidence less reliable then what would have occurred in the first instance. This would include the unavailability of a witness or a document not being available. Neither appears to have occurred in considering the prejudice to the plaintiff. Her counsel raised information recently obtained that gives rise to whether the Judgment obtained was adequate. The facts as determined by Justice Stinson had no evidence of the video being seen or available after December, 2011. His judgment included (at paragraph 10) there being "no way to know how many times it was viewed or downloaded or if and how many times it may have been copied onto other media storage devices (where it may remain) or recirculated". Further, at

paragraphs 14 and 24 of the Judgment, Justice Stinson raised the plaintiff's concerns about the future and the possibility of the video resurfacing and its potential impact on the plaintiff's personal life and professional career. Setting aside the Judgment not only provides the defendant an opportunity to have the matter determined on its merits but the plaintiff to seek greater relief and submit additional evidence.

[20] The plaintiff sought, as a condition of granting the defendant's motion, not only the legal costs thrown away be paid to her but the entire amount of the costs be paid and the total of the Judgment paid into Court. The defendant acknowledged payment of costs thrown away is a proper term and suggested a figure of $7,500. The Costs Outline provided by plaintiff's counsel clearly documents substantial portions of legal work that will not need to be duplicated. Further, the defendant does not seek to set aside all aspects of the Judgment but only the finding of liability and the assessment of damages.

[21] Overall, I conclude this factor favours the defendant, on condition payment of appropriate costs thrown away be made.

Issue – Effect of Order

[22] The absence of a series of previous defaults or indulgences granted to the defendant by the Court is ordinarily a factor in favour of the moving party. I am concerned about the defendant's email of August 11, 2015 stating "nor am I filing a defence so you can do what you need to". This shows an unacceptable disregard for the Court and its process. It is reduced by the defendant drafting and serving a motion to set aside the noting of default. There is a need for compliance with the Court process and respect for the administration of justice and to that end, I conclude this factor favours the plaintiff.

Conclusion

[23] Guided by the factors detailed above, the overall interest of justice favours the granting of the order with terms. That is, the finding of liability on the defendant and the assessment of damages are to be set aside upon the defendant paying to the plaintiff her costs thrown away within 90 days which I award in the amount of $10,000 inclusive of fees, HST and disbursements. Given submissions made by the parties on this issue, the plaintiff is at liberty to extend this time limit. The balance of the Judgment and Orders made by Justice Stinson remain in place.

[24] During submissions, counsel for the parties requested a publication ban on consent. There were media representatives present in the Court. I agreed to the publication ban based on information presented to me during the hearing of the motion. I endorsed the Court record that the publication ban shall continue until further order by me. The media did request and the parties agreed the publication ban did not include the facta of the parties put before me. Should the media wish to set aside the publication ban, it must do so with notice to the parties as well as to the Court.

Costs

[25] The moving party did not seek the costs of this motion and I agree there should be no costs awarded in the circumstances.

Mr. Justice G. Dow

Date: September 16, 2016

ADDENDUM

[26] On September 20, 2016, counsel for the plaintiff appeared before me with a Motion Record that I endorsed:

> "This matter was directed to me by Justice McEwen given it arises from my reasons of September 16, 2016. Counsel for the plaintiff appears before me seeking *ex parte* relief on unsworn evidence. Given the circumstances (which includes an email received yesterday from defence counsel), I contacted and spoke to defence counsel by telephone who was not aware of this motion. Currently, my decision has only been circulated to counsel for the parties who are in agreement it not be disclosed to anyone (other than their clients).
>
> I am not prepared to grant the relief sought aside from ordering my decision of September 16, 2016 be withheld from the public until the issues raised are argued before the Court on proper materials and with notice to the effected parties".

[27] Following release of the Divisional Court reasons of January 9, 2017 dismissing the motion for leave to appeal my decision, the court began to receive inquiries about the status of my reasons.

[28] As a result, I convened a teleconference on January 25, 2017 under Rule 50.13 with counsel for the defendant and new counsel for the plaintiff who advise me this motion has neither been served nor proceeded. The parties and I agreed my order of September 20, 2016 should be set aside. In this regard, I had received a letter from defence counsel dated January 13, 2017 advising me of the consent of both parties to release my reasons with the same restriction regarding identification of the parties to be noted on the reasons (and are now contained) at the outset of my original reasons dated September 16, 2016.

Mr. Justice G. Dow

Released: January 26, 2017

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JANE DOE 464533

Plaintiff

– and –

N.D.

Defendant

REASONS FOR JUDGMENT

MR. JUSTICE G. DOW

Released: January 26, 2017