2005 CanLII 21090 (ON CA)

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COURT OF APPEAL FOR ONTARIO

RE: **JAGJIT SINGH HANS (Plaintiff (Respondent)) – and – MOHAMMAD MOHAMMADI, MARYAM JAMILI, NIMA MOHAMMADI and KHAYAM INVESTMENT GROUP LTD. (Defendants (Appellants))**

BEFORE: **CRONK, GILLESE and ARMSTRONG JJ.A.**

COUNSEL: **Martine M. Morin**
for the appellants

Patti Shedden
for the respondent

HEARD: **May 17, 2005**

On appeal from the order of Justice R. W. Pitt of the Superior Court of Justice dated November 17, 2003.

ENDORSEMENT

[1] This is an appeal by the defendants from the order of Justice Pitt of the Superior Court of Justice (the "motions judge") dated November 17, 2003. The motions judge resurrected the action which had been dismissed, noted the defendants in default and granted default judgment against the defendants in the amount of $172,000 plus pre-judgment interest and costs.

[2] The action arises from a loan of $150,000, alleged to have been made by the plaintiff, to the defendant, Mohammad Mohammadi, in respect of a real estate investment in Ajax, Ontario. The plaintiff alleges that the funds were not used to purchase property in Ajax and that the defendant Mohammadi has defaulted on the repayment of the loan. The plaintiff also alleges that Mohammadi's wife and son are liable for the repayment of the loan, together with Khayam Investment Group Ltd.

[3] The statement of claim was issued on January 15, 2003. The plaintiff brought a motion before Justice Colin Campbell of the Superior Court of Justice on September 2, 2003 for a Certificate of Pending Litigation. On consent, Campbell J. adjourned the

motion to November 17, 2003 and ordered the statement of defence and responding material to be served by October 3, 2003.

[4] No statement of defence and responding material were filed by October 3, 2003. On November 11, 2003, the plaintiff served an amended notice of motion returnable on November 17, 2003 in which he sought an order resurrecting the action which had been dismissed in accordance with the case management guidelines. He also sought an order noting the defendants in default and default judgment in the amount of $172,000 plus interest and costs. The plaintiff also renewed his request for a Certificate of Pending Litigation.

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[5] The motions judge granted the relief referred to in paragraph 1 above.

[6] On the argument of this appeal, we raised the issue of whether this court had jurisdiction to hear the appeal. The court was concerned whether the proper procedure was to move before a Superior Court judge to set aside the default judgment under rule 19.08. Counsel for the parties were of the view that the default judgment was a final judgment and that this court has jurisdiction to hear the appeal. After hearing argument on all issues, we reserved judgment on this matter.

[7] After the oral argument, we brought to the attention of counsel for the parties the judgment of this court in *National Bank of Canada v. Royal Bank of Canada* (1999), 44 O.R. (3d) 533 (Ont. C.A.). In that case, this court said at page 534:

> The remedy provided by rule 19.08 is available to a defendant against whom a default judgment has been granted *by the registrar, by the court on a motion under rule 19.04*, *by the court on a* motion *under rule 19.05 or that has been obtained after trial.* The remedy is a motion to a judge of the Superior Court to set aside or vary the default judgment. As such, the remedy is not an appeal within the meaning of s. 6(1)(b) of the *Courts of Justice Act*. It follows that the appellants' remedy at this stage of the proceedings is a motion to set aside or vary the judgment of Rutherford J.
>
> It is our view, therefore, that a default judgment granted under Rule 19 is not a final judgment for the purposes of an appeal to the Court of Appeal within the meaning of s. 6(1)(b) and does not become a final judgment, if at all, until the remedy provided by rule 19.08 has been sought and refused.
>
> In our view, the policy that underlies rule 19.08 is to preclude appeals to the Court of Appeal from the multitude of default

> judgments which are granted throughout the province. Absent rule 19.08, a default judgment would be a final judgment under s. 6(1)(b) of the *Courts of Justice Act*, which would result in a multitude of appeals to the Court of Appeal. Accordingly, the Civil Rules Committee has provided through rule 19.08 an expeditious remedy to set aside or vary default judgments without the need to institute an appeal to this court.

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[8] We invited counsel for both sides to make brief written submissions as to the impact, if any, of this decision on the appeal herein. We have now received the written submissions.

[9] Counsel for the appellants distinguishes *National Bank of Canada* on the basis that, in this case, the statement of defence was not struck out and the default judgment was not signed by the Registrar or granted by a judge on an *ex parte* basis.

[10] Counsel for the appellants also submits that, from a policy perspective, this matter should proceed by way of appeal to the Court of Appeal. This submission is premised, to a large extent, on the ground that the proceeding before the motions judge was on notice to and argued in the presence of the appellants, whereas in the usual default judgment proceedings the motion is *ex parte*.

[11] We are not persuaded. This case may be an oddity – the record is not clear under what authority the motions judge made his order. One of the problems that exists here is that the motions judge, rather than the Registrar as is contemplated under rule 19.01(1), made the order noting the appellants in default. However, we are satisfied that the motions judge was entitled to make the order noting the appellants in default. Although the respondent purported to move under rule 19.01 and rule 19.02, it seems apparent that the motions judge derived his authority for granting default judgment under rule 19.05(1) which provides:

> Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.

This court held in *National Bank* that a default judgment under Rule 19 is an interlocutory order and an appeal therefrom does not lie to the Court of Appeal. We see no basis to hold otherwise in this case. As in *National Bank*, the proper way to proceed is by way of a motion to set aside or vary the default judgment under rule 19.08.

[12] Counsel for the respondent also sought to distinguish the *National Bank* case. Counsel contended that the order of the motions judge was made under the authority of both rule 19.05 and rule 60.12(c). The latter rule provides that where a party fails to comply with an interlocutory order, the court may, *inter alia*, make such order as is just. The respondent argues that the appellants breached the order of Campbell J. when they failed to deliver their statement of defence and that the default judgment was obtained both under rule 19.05 and rule 60.12(c). They further submit that the order made under rule 60.12(c) is a final order and an appeal therefrom is to the Court of Appeal. We disagree. There is nothing in the endorsement of the motions judge or anywhere else in the record to suggest that the order was made under rule 60.12(c).

[13] In the result, this appeal is quashed without prejudice to the right of the appellants to bring a motion in Superior Court to set aside or vary the default judgment pursuant to rule 19.08.

[14] In view of the fact that the appellants and the respondent each took the same position and we have decided against that position we make no award as to costs.

"E.A. Cronk J.A."
"E.E. Gillese J.A."
"Robert P. Armstrong J.A."

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