Federal Court  Cour fédérale

Date: 20110120

Docket: T-1394-09

Citation: 2011 FC 64

Ottawa, Ontario, January 20, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SETANTA SPORTS CANADA LIMITED

Plaintiff

and

GENTILE ENTERPRISES INC. carrying on business as ACETI PIZZERIA & PASTA, and MATTEO GENTILE, ROSEMARY GENTILE, and PETER GENTILE,
2033956 ONTARIO INC. carrying on business as BRIGADOON RESTAURANT AND BAR, JAMES WILLIAM SOMERVILLE (also known as BILL SOMMERVILLE),
1456161 ONTARIO INC. carrying on business as CRABBY JOE'S TAP & GRILL, KIRNDIP PARMAR, RAJINDERPAL RAKHRA and JATINDERJIT RAKHRA,
1382716 ONTARIO LIMITED carrying on business as MATT & JOE'S RESTAURANT & NIGHTCLUB, MATTHEW ALBERT LENTINI, and JOSEPH LENTINI,
1470325 ONTARIO INC. carrying on business as THE BARLEY MOW PUB (also known as THE BARLEY MOW PUB (BARRHAVEN)), SEAN BLACK, JASON CURRY, DOUG DUNCAN and STEVE EDGETT,
1740028 ONTARIO INC. carrying on business as J. WALTON HOUSE (also known as J. WALTON HOUSE TAPS & GRILL), and PAULDEEP SAWHNEY,
1557117 ONTARIO INC. carrying on business as THE GO GO CLUB, and DEMETROIS RINGAS,
1486046 ONTARIO LIMITED carrying on business as TWIG & BERRIES, and RICHARD A. KINGSLEY,

Defendants (Ontario)

and

1010818 ALBERTA LIMITED carrying on business as BOB THE FISH TAVERN, and ROBERT GOODWIN,
420854 ALBERTA LTD. carrying on business as CHESTERMERE LANDING, and ZORICA BURCEVSKI, TRAJCE BURCEVSKI, NICOLA BURCEVSKI, ZLATAN BURCEVSKI and VESA BURCEVSKI,

Defendants
(Alberta)

and

UNITED HOSTS LTD. carrying on business as LE VIEW POELE PUB, and BRUNO CYR, JAMES WHALEN and LAURA WHALEN carrying on business as ENDZONE SPORTS BAR

Defendants
(New Brunswick)

REASONS FOR ORDER AND ORDER

[1] The plaintiff in this action, Setanta Sports Canada Limited, is the exclusive distributor, along with its partners, of sporting events including Ultimate Fighting Championship (UFC) pay-per-view events broadcast in Canada, and it holds all copyrights associated therewith.

[2] The defendants, James Whalen and Laura Whalen, carrying on business as Endzone Sports Bar, seek an order, pursuant to Rule 399 of the *Federal Courts Rules*, SOR/98-106, setting aside the Order for Default Judgment obtained against them by the plaintiff.

[3] Prior to the Default Judgment issuing, these defendants never responded to or challenged any of the proceedings in this action; in fact, they never communicated with the plaintiff at all. The relevant facts leading up to the Order for Default Judgment, briefly, are the following:

a. UFC 96 was broadcast live via pay-for-view on March 7, 2009. Daniel Gallant, an investigator for the plaintiff, attended at the Endzone Sports Bar in Moncton, New Brunswick (Endzone), during the broadcast of UFC 96 and provided an affidavit in which he attests that he "noted that there was advertising for the event visible with a street sign, and that there were 25 to 30 people attending to view the event when I entered."

b. These defendants admit to having received correspondence from the plaintiff advising them that they were not authorized to show UFC events and inviting them to contact the plaintiff to resolve the issues surrounding its conduct. They were informed that if the issues were not resolved it would result in legal action being commenced. These defendants admit that they never responded to any of this correspondence.

c. UFC 100 was broadcast live via pay-for-view on July 11, 2009. Debbie Jefferson, an investigator for the plaintiff, attended at Endzone during the broadcast of UFC 100 and provided an affidavit in which she attests that she "could see two of the televisions, including a large screen T.V., showing the UFC 100 event with approximately 12 patrons in attendance."

d. The Statement of Claim issued by the plaintiff against these defendants was filed in the Federal Court, in Toronto, on August 20, 2009. The plaintiff subsequently filed a Notice of Motion, returnable on Monday, August 31, 2009, for an interlocutory

injunction. Affidavits of Service were filed indicating that the Statement of Claim and Motion Record were served on James Whalen and Laura Whalen carrying on businesses as Endzone Sports Bar on August 25, 2009, at the address of Endzone.

e. Following the hearing of the motion, on September 1, 2009, Justice Kelen issued an Order enjoining these defendants from showing any UFC pay-per-view events without the consent of the plaintiff and further ordered them to, within five days, disclose the source, description, and means by which they accessed, showed, exhibited or downloaded UFC matches or events. Affidavits of Service were filed indicating that the Court Order was served on James Whalen and Laura Whalen, carrying on businesses as Endzone Sports Bar, on September 10, 2009, at the address of Endzone.

f. The plaintiff brought a motion for an Order for Default Judgment on June 21, 2010, which was granted by Justice Campbell on June 28, 2010. The Order granted the plaintiff a permanent injunction against these defendants from showing any UFC pay-per-view events up to and including December 31, 2011, and ordered these defendants to pay the plaintiff damages of $50,000.00 for infringement of copyright and breaches of the *Radiocommunication Act*, R.S.C, 1985, c. R-2, and costs of $1,500.00.

g. James Whalen admits that he was served with a copy of the Order for Default Judgment on July 6, 2010.

h. Upon receipt of the Order for Default Judgment, these defendants then sought legal advice and by Notice of Motion filed August 17, 2010, moved to set aside the Default Judgment.

[4] Rule 399 (1) of the *Federal Courts Rules* provides that "the Court may set aside or vary an order that was made (a) *ex parte* ... if the party against whom the order is made discloses a *prima facie* case why the order should not have been made." The test for setting aside a default judgment is established in a long line of authorities, including the following cited by the parties: *Taylor Made Golf Co. Inc. et al. v 1110314 Ontario Inc. (c.o.b. Selection Sales)* (1998), 148 F.T.R. 212; *Brilliant Trading Inc. v Wong*, 2005 FC 571; *Fibremann Inc. v Rocky Mountain Spring (Icewater 02) Inc.*, 2005 FC 977; *SEI Industries Ltd. v Terratank Environmental Group*, 2006 FC 218; *Louis Vuitton Malletier S.A. v Yang (c.o.b. K2 Fashions)*, 2008 FC 45; *Harley-Davidson Motor Co. v Bull Master Quebec Inc.*, 2008 FC 835; to which I add my recent decisions in *Calvin Klein Trademark Trust v Beauchamp*, 2010 FC 1107; *Harley-Davidson Motor Company Group, Inc. v Beauchamp*, 2010 FC 1108; and *Molson Canada 2005 v Beauchamp*, 2010 FC 1109 [*Beauchamp* decisions].

[5] The jurisprudence establishes that to be successful, these defendants must satisfy the Court that:

a. They have a "satisfactory excuse," a "reasonable explanation," or "substantial reasons" for their failure to file a defence;

b. They have a *prima facie* defence to the claim; and

c. They moved promptly to set aside the Default Judgment.

[6] The plaintiff concedes that the third part of this tripartite test has been met. However, it argues that these defendants have failed to provide a reasonable explanation for their failure to file a Statement of Defence and that they have failed to establish *a prima facie* defence to the claim.

Explanation for Failure to File a Statement of Defence

[7] These defendants admit to receiving cease and desist letters from the plaintiff, the plaintiff's Statement of Claim, the plaintiff's Motion Record seeking an interim injunction, and the Order of this Court granting that interim injunction and ordering these defendants to provide certain information; however, they took no action following receipt of any of these. It was only when served with the Order of this Court requiring them to pay to the plaintiff $50,000.00 in damages that the seriousness of the legal process and its significance was apparently brought home to them. They say that the plaintiff has sued the wrong party. They say that the premises from which Endzone operates is owned by 041441 N.B. Ltd., a company owned and operated by Laura Whalen, and that 041441 leases those premises to The Press Box Inc. The Press Box Inc. owns and operates Endzone.

[8] The explanation offered by these defendants for their failure to file a Statement of Defence or to respond to any of the plaintiff's letters, or Court documents with which they were served, comes to this: they thought they were frivolous.

[9] This explanation is set out in the affidavit of James Whalen, in the following paragraphs:

> Laura Whalen and James Whalen received several letters from the Plaintiff containing various frivolous allegations, namely that illegal viewing of UFC matches was taking place at THE PRESS BOX INC. bar. These were treated as frivolous, because the premises did not even have the technical infrastructure to obtain a pay-per-view feed. The bar contains only a basic cable feed. It does not have a functioning satellite or any other hardware that would allow for the

> alleged illegal viewings to even take place. To their knowledge there has never been an illegal showing of a pay-per-view match at the premises as alleged by the Plaintiff.
>
> Laura Whalen and James Whalen treated all other documents, Statement of Claim, Notice of Motion etc., as equally frivolous. They had been made aware of other similar frivolous cases in New Brunswick which resulted in very costly legal fees and were ultimately dropped. For example, the Grove Lounge, a bar in Saint John New Brunswick, had spent nearly $8,000.00 to fight the same frivolous lawsuit brought by the same Plaintiff.
>
> Given the above, James Whalen and Laura Whalen erroneously thought that the frivolousness of the lawsuit would not allow for it to result in an actual enforceable judgment with financial consequences. An injunction is of no consequence as they have never illegally shown the UFC matches and do not intend to in the future.

[10] Counsel for these defendants candidly acknowledged that he was unaware of any case where a party had sought to set aside Default Judgment, having been made aware of the action but failing to act, because it was thought to be frivolous. It was submitted that these defendants are not sophisticated business people, that they have a valid defence to the action, and that the interests of justice demand that the judgment be set aside in order that they may defend the claims.

[11] I seriously doubt that viewing a legal action as frivolous can ever be said to be a "satisfactory excuse," a "reasonable explanation," or "substantial reason" for failing to file a defence to it. I concur with the view of Justice Gibson in *Brilliant Trading*, above, that "while, at the level of principle, it is reasonable that this Court should extend every consideration and leniency rather than foreclose the right of a party to defend … that principle is qualified by the 'substantial reasons', 'satisfactory excuse' or 'reasonable explanation' element of the test." There are decisions where a defendant's inaction has been characterized by the Court as willful blindness (see, for example,

Brilliant Trading, above), or where the defendant's behaviour indicated a casual disregard for the importance of the legal process (see, for example, *SEI Industries*, above), and in those cases the relief sought was not granted. In those circumstances the explanation offered was found not to be reasonable.

[12] In my view, both descriptions accurately capture the actions of these defendants. Mr. Whalen says that Endzone does not have the equipment to provide the UFC pay-for-view satellite programming it is alleged to have shown and therefore he thought the action was frivolous and there would be no "actual enforceable judgment with financial consequences." I do not accept this explanation; it does not reasonably follow from the facts before me.

[13] First, the Statement of Claim contains the following paragraph which is both capitalized and bolded:

> **IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

These defendants offer no explanation why in the face of this warning they could think they would be immune from judgment. They do not suggest how the Court would come to know that Endzone did not have the necessary equipment to show the UFC events to its patrons given that they failed to take the time and effort to inform the Court or the plaintiff.

[14] Second, two affidavits have been filed by the plaintiff and served on these defendants; the affidavits are from different witnesses who at different times attended at Endzone and swore that UFC pay-per-view events were advertized at the bar and were shown. These defendants offer no

explanation as to how one could reasonably believe, in the face of uncontradicted evidence, that the Court would not grant judgment.

[15] Third, these defendants state that they formed the view that this action was frivolous, in part because they knew of a similar claim made by the plaintiff against the Grove Lounge in New Brunswick which had been discontinued after costing the bar's owners some $8,000.00 in legal fees. These defendants filed a copy of a story from the CBC News website (last updated March 31, 2010) that sets out the story.

[16] The action against Grove Lounge and others (Court File T-38-09) was commenced by Statement of Claim filed January 9, 2009. Unlike these defendants, Grove Lounge and its owners filed a defence to the claim. The Court's record shows that a Statement of Defence was filed by Grove Lounge on February 17, 2009, and that the action as against it was discontinued by the plaintiff on March 19, 2010. No reason for the discontinuance is before the Court; however, even if one were to assume that the Grove Lounge action was "frivolous" as these defendants assert, that fact and the consequences to Grove Lounge could not have been know by these defendants prior to March 19, 2010 when the action was discontinued. By that date, seven months had elapsed since these defendants had been served with the Statement of Claim and Motion Record and they had been in default for six months in filing their defence. These defendants offer no explanation how something they could not have known when they decided to ignore the legal proceeding influenced that decision. This raises serious credibility concerns relating to the affidavits filed by these defendants on this motion.

[17] Even if one were inclined to accept that an unsophisticated person might foolishly form the view that demand letters, Statements of Claim, and motions for injunctive relief were frivolous because there was no factual basis for them, one cannot accept that explanation after the person has been served with a Court Order. If not before, then if ever there would be a time when a reasonable person would come to the view that he or she was wrong and the claim was not going to go away simply by ignoring it, it is when a formal Court Order in the action is served on him or her. I simply do not accept that any reasonable person could view an Order of this Court as frivolous.

[18] For these reasons, I am not satisfied that these defendants have offered the Court a reasonable explanation for their failure to file a Statement of Defence.

Prima Facie Defence

[19] The threshold for finding that these defendants have shown that they have a *prima facie* defence is very low: *Louis Vuitton Malletier*, above. They assert that no UFC pay-per-view programming was shown in the bar as they do not have the necessary infrastructure so to do. That is a claim that is worthy of investigation and I cannot find that it is without any merit.

[20] These defendants also assert that they are not properly named as defendants and that the proper defendant in this case is The Press Box Inc., the corporate entity that owns and runs the bar. The plaintiff filed evidence attesting to the difficulty it had in finding out who was behind Endzone, as Endzone Sports Bar is not registered as a business name in New Brunswick. It points out that in every case where it was aware of a corporate entity behind the establishment illegally showing UFC events, it named as a defendant the corporate entity as the party carrying on the business as well as

the individuals behind the corporation. There are decisions where this Court has recognized that it may be appropriate to pierce the corporate veil in cases involving alleged copyright infringement: see *Canadian Private Copying Collective v Fuzion Technology Corp*., 2006 FC 1284, aff'd 2007 FCA 335; *Canadian Private Copying Collective v J & E Media Inc*., 2010 FC 102. However, whether the facts at hand warrant the piercing of the corporate veil is an issue that is fact-dependant and accordingly appears to me to be worthy of further examination. Therefore, I cannot find that the defendants' defence is without any merit.

[21] Although these defendants have met two of the three parts of the tri-partite test, the jurisprudence requires that they must meet all parts if the Court is to set aside the Default Judgment. Having failed to meet this burden, this motion is dismissed, with costs payable to the plaintiff, which I fix at $2,500.00 inclusive of fees, disbursements, and taxes.

[22] I reiterate the comment I made in the *Beauchamp* decisions: "I concur with the observation of Justice Cullen in *UMACS of Canada v S.G.B. 2000 Inc*.**,** [1990] F.C.J. No. 1112, that '[p]eople in business in Canada should give legal documents significantly more attention' than the defendant did in these cases; indeed significantly more attention than the defendant gave was warranted over many months."

ORDER

THIS COURT'S JUDGMENT is that the motion by the defendants James Whalen and Laura Whalen, carrying on business as Endzone Sports Bar, for an Order, pursuant to Rule 399 of the *Federal Courts Rules*, setting aside the Order for Default Judgment obtained against them by the plaintiff is dismissed, with costs payable by them to the plaintiff fixed at $2,500.00 inclusive of fees, disbursements, and taxes.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1394-09
STYLE OF CAUSE:	SETANTA SPORTS CANADA LIMITED v. GENTILE ENTERPRISES INC. ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 18, 2011
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	January 20, 2011

APPEARANCES:

Kevin W. Fisher	FOR THE PLAINTIFF
René A. LeBlanc and Ed McGrath	FOR THE DEFENDANTS - JAMES WHALEN, LAURA WHALEN

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