

Federal Court



Cour fédérale

Date: 20240328

Docket: T-1419-23

Citation: 2024 FC 499

Toronto, Ontario, March 28, 2024

PRESENT: Associate Judge John C. Cotter

BETWEEN:

S. M. TAUHID ALAM

Plaintiff

and

JUSTIN DREW BIEBER

Defendant

JUDGMENT AND REASONS

[1] The plaintiff has made a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (“*Rules*”) for default judgement.

[2] The plaintiff commenced this action by filing a statement of claim on July 7, 2023 (“*Claim*”). Although the relief sought in the Claim includes damages and an injunction, the specific relief sought in the notice of motion is for a monetary judgement:

THE RELIEF SOUGHT:

1. Granting the plaintiff default judgment against the defendant, jointly and severally for \$8,000,000.00

[3] The following materials were filed on this motion:

- a) the plaintiff's motion record filed October 2, 2023 ("Plaintiff's Motion Record");
- b) the defendant's responding motion record filed October 10, 2023;
- c) the plaintiff's document titled "APPLICANT'S REPLY TO RESPONDENT'S WRITTEN REPRESENTATIONS (Applicants Motion for Default judgment)" dated October 13, 2023 ("Plaintiff's Reply"); and
- d) a letter to the Court dated October 16, 2023, submitted by defendant's counsel in connection with the Plaintiff's Reply. However, Rule 369 does not provide for the filing of such a document, and further, leave was not sought to permit the filing of same and, as a result, this document is not being considered.

[4] A statement of defence has not been filed on behalf of the defendant, nor has a notice of intention to respond, or any motions.

[5] The only documents filed on behalf of the defendant in this action are those relating to this motion by the plaintiff. In responding to this motion the defendant raises various arguments, including relying on Rule 210(4)(b), arguing that the action should be dismissed.

[6] As a result, there are three main issues to be considered:

- a) Is the defendant in default?

- b) If the defendant is in default, should default judgment be granted?
- c) Should the action be dismissed?

[7] As explained below, the defendant was not served with the statement of claim in accordance with the *Rules*. As a result, the defendant is not in default. However, even if the defendant was in default, there is no basis upon which to grant default judgment. Further, the action should be dismissed pursuant to Rule 210(4)(b).

I. The Claim

[8] It is difficult to describe the Claim in any detail as it lacks material facts, and is poorly drafted. The Claim alleges infringement of “intellectual property rights” and in paragraph (b) alleges that:

The acts of infringement include, but are not limited to specify taking Plaintiff song as his and acts of infringement as unauthorized use, reproduction, distribution, or modification of Plaintiff’s intellectual property;

[9] The intellectual property rights appear to relate to “copyright in the song and in the lyrics” called “STAY” (collectively, the “Song”) (Claim, paragraph (c); see also paragraphs 1 to 4). The Claim refers to the *Patent Act*, *Copyright Act*, *Trademarks Act*, as well as trade secrets (Claim, paragraphs (e) and the first of the two paragraphs numbered 15). It also asserts that “The Defendants' representation was false to the public, acted negligently in making same, and the Plaintiff’s works was stolen by Defendant” (Claim, paragraph 11).

II. Plaintiff’s Motion Materials

[10] In light of the issues on a motion for default judgment, it is useful to set out the evidence and other materials included in the Plaintiff's Motion Record. The Plaintiff's Motion Record consists of a table of contents, notice of motion, three affidavits of service, written representations, and several items that are not exhibits to an affidavit. Those items are described as follows in the "Table of Contents" (collectively "Plaintiff's Other Documents"):

- a) "Seth Weinstein Registered mail Delivery confirmation, July_12_2023" (listed as being found at page 9);
- b) "Express Post to Aaron Rosenberg In USA" (listed as being found at page 13);
- c) "Advertisement on Bluffs monitor Newspaper" (listed as being found at page 17);
- d) "Haywood Hunt Invoice (Fully Refunded)" (listed as being found at page 19); and
- e) "Stay- Spotify plays (2.746 Billion x 0.003= \$ 8 Million approx.) as of 09/16/2023" (listed as being found at page 20).

[11] The Plaintiff's Other Documents also include certain documents not identified in the Table of Contents, specifically the documents found at pages 12, 15 and 16 of the Plaintiff's Motion Record.

[12] The Plaintiff's Other Documents are not evidence. They are not part of, or an exhibit to, any affidavit. Rule 80(3) sets out the requirements for an exhibit to an affidavit, none of which are met for any of the Plaintiff's Other Documents. Rule 80(3) provides that:

Exhibits

(3) Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an

Pièces à l'appui de l'affidavit

(3) Lorsqu'un affidavit fait mention d'une pièce, la désignation précise de celle-ci

endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.	est inscrite sur la pièce même ou sur un certificat joint à celle-ci, suivie de la signature de la personne qui reçoit le serment.
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[13] In addition, some of the Plaintiff's Other Documents are unintelligible, specifically pages 17 and 18 of the Plaintiff's Motion Record. Further, in many instances it is not apparent from the content of the document what it relates to. By way of example, the document found at page 12 of the Plaintiff's Motion Record which says that this "is a proof of delivery / statement of final status for the shipment with waybill number 1755665015" does not show who the "shipment" was sent to, or the address, or what the "shipment" was. As a result, it is not possible to link that document to what was supposedly delivered, or to who, or to what address.

[14] However, even if the Plaintiff's Other Documents were properly in evidence, they would have no impact on the outcome of this motion. This is because there is nothing to indicate that the Claim has been served on the defendant in accordance with the *Rules*. This is discussed in detail below.

[15] It is also necessary to address the plaintiff's Reply. It includes another affidavit of service, as well as additional documents. It should first be noted that Rule 369(3) permits a moving party to serve and file written representations in reply within the time specified in that rule. That rule does not provide for the filing of additional evidence. To file additional evidence after the responding record has been served and filed, a moving party must seek and obtain leave of the Court (*Amgen Canada Inc v Apotex Inc*, 2016 FCA 121, at paragraph 7). No such leave

was sought or obtained by the plaintiff. In any event, the following documents that were included with the Reply are of no assistance to the plaintiff for the reasons set out below:

- a) The affidavit of service of S M Tauhid Alam sworn October 12, 2023 (“October 12 Affidavit”) deals with purported service of a letter on a lawyer to file the statement of claim. The facts in that affidavit have nothing to do with the service of the statement of claim in this action or the merits of claim.
- b) A letter dated May 25, 2023 from an individual identified as a “Paralegal & Sr. Consultant” at “Think Tank Legal Services Corp.” to the lawyer referred to in the October 12 Affidavit. That letter is not an exhibit to any affidavit. Further, purported facts recited in a letter such as this are not proof of those facts.
- c) What appear to be written representations signed by the plaintiff asserting certain facts. There is no affidavit evidence of any of those facts (leaving aside any other issues with the supposed facts).

III. Is the Defendant in Default?

[16] A useful starting point in the analysis of whether the defendant is in default are Rules 204 and 210(1), which provide:

Defence

204 (1) A defendant shall defend an action by serving and filing a statement of defence within

(a) 30 days after the day on which of the statement of claim is served, if the

Défense

204 (1) Le défendeur conteste l’action en signifiant et en déposant sa défense :

a) dans les trente jours après avoir reçu signification de la déclaration, si cette signification a été faite au Canada ou aux États-Unis;

defendant is served in Canada or the United States; and

(b) 60 days after the day on which of the statement of claim is served, if the defendant is served outside Canada and the United States.

Extension of time

(2) However, if the defendant serves and files a notice of intention to respond in accordance with rule 204.1, the time for serving and filing the statement of defence is extended by 10 days.

[...]

Default Proceedings

Motion for default judgment

210 (1) Where a defendant fails to serve and file a statement of defence within the time set out in rule 204 or any other time fixed by an order of the Court, the plaintiff may bring a motion for judgment against the defendant on the statement of claim.

b) dans les soixante jours après avoir reçu signification de la déclaration, si cette signification a été faite à l'extérieur du Canada et des États-Unis.

Prolongation

(2) Toutefois, le délai pour la signification et le dépôt de la défense est prolongé de dix jours lorsque le défendeur signifie et dépose un avis d'intention de répondre conformément à la règle 204.1.

[...]

Procédure par défaut

Cas d'ouverture

210 (1) Lorsqu'un défendeur ne signifie ni ne dépose sa défense dans le délai prévu à la règle 204 ou dans tout autre délai fixé par ordonnance de la Cour, le demandeur peut, par voie de requête, demander un jugement contre le défendeur à l'égard de sa déclaration.

[17] Importantly, the clock does not start to run on the deadline to serve and file a statement of defence until the statement of claim is served in a manner provided by the *Rules*. As a result, it is important to determine if the defendant has been properly served with the statement of claim. As stated in *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, at paragraph 4: “A plaintiff must

first establish that the defendant was served with the Statement of Claim and has not filed a defence within the deadline specified in Rule 204”.

[18] A statement of claim is an originating document under the *Rules* (see Rule 61(1)(a)). The applicable rules regarding service of an originating document, such as a statement of claim, depend on whether or not service is effected in Canada. If served outside Canada, it will depend on whether the jurisdiction where service is effected is a contracting state to the Hague Convention (which is defined in Rule 2 as “the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* signed at The Hague on November 15, 1965”). As the defendant is an individual, and there is no order pursuant to Rule 136 for substitutional service or dispensing with service, and no order under Rule 147 validating service, the potentially applicable rules regarding service on a motion for default judgment are Rules 127, 128, 134, 137 and 212, which provide:

Personal Service	Signification à personne
<p>Service of originating documents</p> <p>127 (1) An originating document that has been issued, other than in an appeal from the Federal Court to the Federal Court of Appeal or an <i>ex parte</i> application under rule 327, shall be served personally.</p>	<p>Signification de l’acte introductif d’instance</p> <p>127 (1) L’acte introductif d’instance qui a été délivré est signifié à personne sauf dans le cas de l’appel d’une décision de la Cour fédérale devant la Cour d’appel fédérale et dans le cas d’une demande visée à la règle 327 et présentée ex parte.</p>
<p>Exception</p> <p>(2) A party who has already participated in the proceeding need not be personally served.</p>	<p>Exception</p> <p>(2) Il n’est pas nécessaire de signifier ainsi l’acte introductif d’instance à une</p>

Service of notice of appeal on the Crown

(3) Despite subsections (1) and (2), in the case of an appeal from Federal Court to the Federal Court of Appeal, if the Crown, the Attorney General of Canada or any other minister of the Crown is a respondent, the notice of appeal shall be served personally on them in accordance with rule 133.

Personal service on individual

128 (1) Personal service of a document on an individual, other than an individual under a legal disability, is effected

(a) by leaving the document with the individual;

(b) by leaving the document with an adult person residing at the individual's place of residence, and mailing a copy of the document to the individual at that address;

(c) where the individual is carrying on a business in Canada, other than a partnership, in a name or style other than the individual's own name, by leaving the document with the person apparently having control or management of the business at any place where the business is carried on in Canada;

(d) by mailing the document to the individual's last known

partie qui a déjà participé à l'instance.

Signification de l'avis d'appel à la Couronne

(3) Malgré les paragraphes (1) et (2), dans le cadre de l'appel d'une décision de la Cour fédérale devant la Cour d'appel fédérale, lorsque la Couronne, le procureur général du Canada ou tout autre ministre de la Couronne est l'intimé, l'avis d'appel est signifié à personne conformément à la règle 133.

Signification à une personne physique

128 (1) La signification à personne d'un document à une personne physique, autre qu'une personne qui n'a pas la capacité d'ester en justice, s'effectue selon l'un des modes suivants :

a) par remise du document à la personne;

b) par remise du document à une personne majeure qui réside au domicile de la personne et par envoi par la poste d'une copie du document à cette dernière à la même adresse;

c) lorsque la personne exploite une entreprise au Canada, autre qu'une société de personnes, sous un nom autre que son nom personnel, par remise du document à la personne qui semble diriger

address, accompanied by an acknowledgement of receipt form in Form 128, if the individual signs and returns the acknowledgement of receipt card or signs a post office receipt;

(e) by mailing the document by registered mail to the individual's last known address, if the individual signs a post office receipt; or

(f) in any other manner provided by an Act of Parliament applicable to the proceeding.

Effective day of service

(2) Service under paragraph (1)(b) is effective on the tenth day after the copy is mailed.

Effective day of service

(3) Service under paragraph (1)(d) or (e) is effective on the day of receipt indicated on the acknowledgement of receipt form or post office receipt, as the case may be.

[...]

Acceptance of service by solicitor

134 Personal service of a document on a party may be effected by the acceptance of service by the party's solicitor.

[...]

ou gérer tout établissement de l'entreprise situé au Canada;

d) par envoi par la poste du document à la dernière adresse connue de la personne, accompagnée d'une carte d'accusé de réception selon la formule 128, si la personne signe et retourne la carte d'accusé de réception;

e) par envoi par courrier recommandé du document à la dernière adresse connue de la personne si la personne signe le récépissé du bureau de poste;

f) le mode prévu par la loi fédérale applicable à l'instance.

Prise d'effet

(2) La signification effectuée selon l'alinéa (1)b) prend effet le dixième jour suivant la mise à la poste de la copie du document.

Prise d'effet

(3) La signification effectuée selon les alinéas (1)d) ou e) prend effet le jour indiqué sur l'accusé de réception ou le récépissé du bureau de poste comme étant le jour de la réception.

[...]

Acceptation de la signification par l'avocat

134 La signification à une personne d'un document à une

Service outside Canada

137 (1) Subject to subsection (2), a document to be personally served outside Canada may be served in the manner set out in rules 127 to 136 or in the manner prescribed by the law of the jurisdiction in which service is to be effected.

Hague Convention

(2) Where service is to be effected in a contracting state to the Hague Convention, service shall be as provided by the Convention.

Proof of service

(3) Service of documents outside Canada may be proven

(a) in the manner set out in rule 146;

(b) in the manner provided by the law of the jurisdiction in which service was effected; or

(c) in accordance with the Hague Convention, if service is effected in a contracting state.

[...]

Service pursuant to Hague Convention

212 (1) Where a statement of claim was sent abroad for service on a defendant in a contracting state to the *Hague Convention* and the defendant

partie peut être effectuée auprès de son avocat si celui-ci en accepte la signification.

[...]

Signification à l'étranger

137 (1) Sous réserve du paragraphe (2), le document devant être signifié à personne à l'étranger peut l'être soit de la manière prévue aux règles 127 à 136, soit de la manière prévue par les règles de droit en vigueur dans les limites territoriales où s'effectue la signification.

Convention de La Haye

(2) La signification dans un État signataire de la Convention de La Haye s'effectue de la manière prévue par celle-ci.

Preuve de signification

(3) La preuve de la signification de documents à l'étranger peut être établie :

a) de la manière prévue à la règle 146;

b) de la manière prévue par les règles de droit en vigueur dans les limites territoriales où la signification a été effectuée;

c) conformément à la Convention de La Haye, dans le cas où la signification a été effectuée dans un État signataire.

has not filed a defence, judgment shall not be given under rule 210 unless the Court is satisfied that

(a) the statement of claim was

(i) served by a method prescribed by the law of the state in which service was made, or

(ii) delivered to the defendant or to the defendant's residence by another method provided for in the *Hague Convention*; and

(b) the defendant has had sufficient time after the service or delivery to file a defence.

Judgment

(2) Notwithstanding subsection (1), the Court may give judgment under rule 210 if

(a) the statement of claim was sent by a method provided for in the *Hague Convention*;

(b) a period of not less than six months, or such longer period as the Court considers adequate in the circumstances, has elapsed since the day on which the statement of claim was sent; and

(c) no certificate under article 6 of the *Hague Convention* was received, and every reasonable effort was made to obtain such a certificate through the competent

[...]

Signification en vertu de la Convention de La Haye

212 (1) Lorsque la déclaration a été envoyée à l'étranger pour être signifiée à un défendeur qui se trouve dans un État signataire de la Convention de La Haye et que le défendeur n'a pas déposé de défense, la Cour ne rend jugement en vertu de la règle 210 que si elle est convaincue:

a) d'une part, que la déclaration a été :

(i) soit signifiée selon l'un des modes prescrits par les règles de droit de l'État où la signification a été effectuée,

(ii) soit transmise au défendeur ou à sa résidence par un autre moyen prévu par la Convention de La Haye;

b) d'autre part, que le défendeur a eu un délai suffisant après la signification ou la transmission pour déposer une défense.

Jugement de la Cour

(2) Malgré le paragraphe (1), la Cour peut rendre jugement en vertu de la règle 210 si les conditions suivantes sont réunies :

a) la déclaration a été envoyée par l'un des moyens prévus par la Convention de La Haye;

authorities of the state to which the statement of claim was sent.

Interlocutory injunction or mandamus

(3) This rule does not preclude the Court from making an order under rule 373 before service of the statement of claim.

b) un délai d'au moins six mois, ou tout délai plus long que la Cour estime suffisant dans les circonstances, s'est écoulé depuis le jour où la déclaration a été envoyée;

c) le certificat prévu à l'article 6 de la Convention de La Haye n'a pas été reçu, même si des efforts raisonnables ont été déployés pour l'obtenir des autorités compétentes de l'État où la déclaration a été envoyée.

Possibilité d'injonction interlocutoire ou de mandamus

(3) La présente règle n'empêche pas la Cour de rendre une ordonnance en vertu de la règle 373 avant la signification de la déclaration.

[19] I note that the statement of claim asserts in paragraph 2 that the defendant “is an individual residing in the Province of Ontario and was at all material times a “Pop singer” in Canada”. However, as noted above, the applicable rule is determined by where service is effected.

[20] The plaintiff’s evidence of service of the statement of claim consists of the following three affidavits of service (collectively, “Plaintiff’s Affidavits of Service”). Each is discussed below. All are affidavits of service of the plaintiff.

[21] The first is an affidavit of service of S M Tauhid Alam dated July 21, 2023 (“First Affidavit of Service”). The particulars of service provided in this affidavit are found in paragraph 1, which states:

1. I served *Aaron Rosenberg* with a Statement of Claim by sending a copy by registered mail via DHL Express on July 20, 2023, the lawyer for the *Defendant*.

[22] Points to note regarding the First Affidavit of Service include the following:

- a) “registered mail” is not sent by courier as suggested in the affidavit. The *Rules* recognize “registered mail” and “courier” as different forms of delivery (for example, see Rule 128(1)(e), which refers to registered mail, and Rule 139(1)(c), which refers to courier);
- b) no address is specified as to where the statement of claim is said to have been sent;
- c) there is nothing to support the bold assertion in this affidavit or elsewhere that “Aaron Rosenberg” is “the lawyer for the Defendant” (leaving aside that this is not one of the means of personal service of an originating document enumerated in Rule 128(1));
- d) the affidavit appears to have attached to it a document bearing a “DHL” logo and which states “This is proof of delivery / statement of final status for the shipment [...]”. This is one of the Plaintiff’s Other Documents. Notably, this document is not marked or identified as an exhibit to that affidavit of service. As such, it is not appropriate to consider it for the purposes of a motion for default judgement. However, even if it was properly in evidence, it adds nothing of significance. It does not include the name of the addressee, or the address the shipment was delivered to. It does include a field labelled “Destination Service Area” which says “LOS ANGELES UNITED STATES OF AMERICA”, but no actual delivery address is included. This

is not to suggest that proof of delivery documents are not important, but there must be some sort of evidentiary link to the details relating to the service including such things are the address; and

- e) the signature of the “Commissioner for Taking Affidavit (or as the case may be)” is not visible on the copy of the affidavit in the Motion Record. However, I note that the signature is visible on the copy of the affidavit of service in the Court file that was filed on July 21, 2023.

[23] The second affidavit of service is of S M Tauhid Alam dated August 23, 2023 (“Second Affidavit of Service”). The particulars of service provided in this affidavit are found in paragraph 1, which states:

1. I served Mark Biernaki with a Statement of Claim by sending a copy by registered mail via Canada Post on August 23, 2023, the lawyer for the Defendant.

[24] Points to note regarding the Second Affidavit of Service include the following:

- a) the affidavit appears to have attached to it a document bearing a “Canada Post Postes Canada” logo. Notably, this document is not marked or identified as an exhibit to that affidavit of service. As such, it is not appropriate to consider it for the purposes of a motion for default judgement. However, even if it was properly in evidence, it adds nothing of significance. It does not indicate what was delivered, other than containing a reference to “Lettermail”, and it does not show who the item was sent to, or the address.

[25] The third affidavit of service is of S M Tauhid Alam stated to be “Sworn/Affirmed” on “Sept.____, 2023” (“Third Affidavit of Service”). The particulars of service provided in this affidavit are found in paragraphs 3 and 4 which state:

3. I have served the Defendant known as Justin Drew Bieber’s representative in USA, Aaron Rosenberg via email, advertisement in the newspaper named Bluffs Monitor’s September Edition, by DHL courier and Expresspost

4. I have served the Defendant’s legal representative in Canada, Mr Mark Biernacki by hand delivery. and Registered mail.

[26] Points to note regarding the Third Affidavit of Service include the following:

- a) it does not provide a specific date on which it is stated to be “Sworn/Affirmed”;
- b) it does not indicate what document it says was served;
- c) it does not indicate what date any of the steps referred to in the affidavit were taken;
- d) it does not indicate what email or physical address anything was sent to.

[27] In addition to the affidavits of service relied on by the plaintiff and included in the plaintiff’s motion record, I note that in the Court file there is a fourth affidavit of service of S M Tauhid Alam which was sworn August 31, 2023 and filed September 5, 2023 (“Fourth Affidavit of Service”). As it was not included in the plaintiff’s motion record, it is not necessary to consider that affidavit of service. However, even if it were considered, it adds nothing of significance as it deals with delivery of a copy of the statement of claim to Mark Biernacki. The particulars of the service provided in that affidavit are found in paragraphs 1 and 2 which state:

- 1. On august 31, 2023, I served Smart & Biggar, where Mark Biernacki is working as a lawyer, with a copy of Statement of Claim by hand delivery to Defendant’s lawyer of record,

address at 150 York Street, Suite#1100, Toronto, ON.,
M5H3S5.

2. On *August 31, 2023 at 2:42PM*, I served Smart & Biggar, Mark Biernacki with the Statement of Claim.

[28] As can be seen from the details set out above, the Plaintiff's Affidavits of Service deal with various forms of delivery of the statement of claim on the following two individuals:

- a) Aaron Rosenberg who is stated to be, depending on the affidavit of service, "Justin Drew Bieber's representative in USA" and "the lawyer of the *Defendant*"; and
- b) Mark Biernacki who is stated to be, depending on the affidavit of service, the "Defendant's | legal representative in Canada" and "the lawyer of the *Defendant*".

[29] There is no evidence at all that personal service of the statement of claim on the defendant was effected in any of the ways provided for in Rules 128 and 134. Further, this is the case even if all issues with the affidavits of service noted above were ignored—although those issues should not be ignored.

[30] This leaves the question of whether there was service outside of Canada and, if so, whether it would be Rule 137(1) or Rule 137(2) that applies. The plaintiff did not make any submissions in that regard. However, it is not necessary to determine whether there was service outside of Canada and, if so, whether it would be Rule 137(1) or Rule 137(2) that applies since there is no evidence to satisfy either, or to satisfy Rule 212(1).

[31] The fact that the defendant has counsel who sent correspondence to the plaintiff regarding the purported service of the Claim, and who responded on this motion for default judgment, is of no consequence. Counsel did not accept service of the Claim and therefore, there was no personal service pursuant to Rule 134. In addition, there was no order under Rule 136 for substitutional service or dispensing with service, and no order under Rule 147 validating service.

[32] As stated in *The Queen v. Spelrem*, 2001 FCT 1064:

[5] The difficulty is that service is not simply a question of whether the defendant somehow could be expected to have received word of the claim. Service goes to jurisdiction. It is the foundation of the jurisdiction of the Court to make an order against the person of the defendant [...]

[6] Attention is drawn to the fact that, according to the learned author, jurisdiction over a defendant is based on the requirement and *sufficiency* of service. Both the requirement and sufficiency of service, but the latter in particular, are to be determined by reference to the rules dealing with service of documents. So compliance with the rules of personal service is not an inconvenient formality. It is the foundation of the right to a judgment against the defendant.

[...]

[12] In the absence of proof of valid service, the motion for default judgment is dismissed.

[33] Therefore, there is no evidence that the defendant was served with the statement of claim in a manner that complies with the *Rules*, and as a result, the time period for the defendant to serve and file a statement of defence never started to run. The defendant is not in default.

IV. If the defendant is in default, should default judgment be granted?

[34] However, even if the defendant was in default (which he is not), there is no basis upon which to grant default judgment. Default judgment is not automatic when a defendant is in default. A plaintiff must establish that they are entitled to the judgment sought. The law on this point was canvassed by Justice Andrew Little in *NuWave Industries Inc v Trennen Industries Ltd*, 2020 FC 867:

[16] As NuWave submitted, on a motion for default judgment, all of the allegations in its statement of claim are to be taken as denied. Unlike in some provincial superior court regimes, in the Federal Court the plaintiff bears the onus, and must lead evidence that establishes, on a balance of probabilities, the claims set out in its statement of claim and its entitlement to the relief it requests: *BBC Chartering Carriers GMBH & CO. KG v Openhydro Technology Canada Limited*, 2018 FC 1098 (McDonald, J.), at para 15; *Canada (Citizenship and Immigration) v Rubuga*, 2015 FC 1073 (Gleason, J.), at para 77; *Teavana Corp. v Teayama Inc.*, 2014 FC 372 (Bédard, J.), at para 4; *Aquasmart Technologies Inc. v Klassen*, 2011 FC 212 (Shore, J.), at para 45; *Louis Vuitton Malletier S.A. v Yang*, 2007 FC 1179 (Snider, J.), at para 4.

[17] To determine whether the plaintiff has met its burden on this motion for judgment, I am guided by the principles established in *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41. Speaking for a unanimous Court, Justice Rothstein stated that in all civil cases, the “evidence must be scrutinized with care by the trial judge” and that “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”: *McDougall*, at paras 45 and 46. The Supreme Court reiterated this standard in *Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720, at paras 35-36, and in *Nelson (City) v Mowatt*, 2017 SCC 8, [2017] 1 SCR 138, at para 40.

[18] The requirement of "sufficiently clear, convincing and cogent" evidence has been recognized by this Court in patent matters: *Bombardier Recreational Products Inc. v Arctic Cat Inc.*, 2017 FC 207 (Roy, J.), at para 368, rev'd in part on other grounds 2018 FCA 172, leave to appeal dismissed, SCC File No. 38416 (May 16, 2019); *Bombardier Recreational Products Inc. v Arctic Cat, Inc.*, 2020 FC 691 (Roy, J.), at para 40.

[19] I have been unable to locate a default judgment case from this Court in which the principles from *McDougall* have been expressly

applied. However, one can see the principles in *McDougall* in default judgment decisions. Justice Bédard declined to give effect to certain submissions of the moving party in *Teavana Corporation*, citing at various points, insufficient evidence, “bald assertions”, no convincing evidence, or no evidence at all (at paras 24-26, 30 and 36). In addition, it is clear from the reasons of Justice Snider in *Louis Vuitton Malletier S.A.* (decided before *McDougall*) that judgment was only granted on the basis of significant direct evidence and careful review by the Court (see e.g. paras 9-11, 30, 35 (“[i]n spite of careful and detailed analysis by the affiants, I have some difficulties with the calculations”), 38 and following).

[20] Having said that, I am also mindful that a plaintiff’s burden is to prove a claim on a balance of probabilities, not a higher standard. In addition, as the Supreme Court noted in *McDougall*, there is no objective standard to measure the “sufficiency” of evidence (at para 46).

[21] In *Johnson v Royal Canadian Mounted Police*, 2002 FCT 917, Justice Dawson held that default judgment is never automatic; it is a discretionary order (at para 20).

[35] The only evidence filed by the plaintiff on this motion are affidavits of service. The plaintiff has not filed any evidence on the merits of the claim. Accordingly, even if the defendant was in default, there is no evidence upon which to conclude that the plaintiff has made out the claims in the statement of claim, or any entitlement to the judgment sought of \$8,000,000.00, or any other amount. Further, as explained below, the statement of claim fails to disclose a cause of action which is an insurmountable hurdle on a motion for default judgment, regardless of the evidence.

V. Should the action be dismissed?

[36] As noted above, the defendant relies on Rule 210(4)(b) and argues that the action should be dismissed.

[37] The defendant submits that the Court may dismiss an action pursuant to Rule 210(4)(b) where it is plain and obvious that the action has no reasonable prospect of success. In support of that proposition, the defendant relies on *Chaudhry v. Canada*, 2008 FC 356 at paragraph 27; aff'd 2008 FCA 417, at paragraphs 9 to 12. While there is no discussion in that case as to whether there may be other grounds upon which to dismiss an action pursuant to Rule 210(4)(b), it is apparent that the action in that case was dismissed on the basis that there was no reasonable prospect of success, applying the test set out by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959. That is the test on a motion to strike. As explained below, it is plain and obvious that the statement of claim in this case discloses no reasonable cause of action. As a result, it is not necessary to consider whether there may be other grounds available under Rule 210(4)(b) to dismiss the action.

[38] The principles regarding motions to strike and the requirements of pleading were recently reviewed by Justice MacTavish in *Brink v. Canada*, 2024 FCA 43 (“*Brink*”):

[43] That is, a statement of claim should not be struck unless it is plain and obvious that the action cannot succeed, assuming the facts pleaded in the statement of claim to be true: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at 980; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63. In other words, the claim must have no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[44] The onus is on the party who seeks to establish that a pleading fails to disclose a reasonable cause of action: *La Rose v. Canada*, 2023 FCA 241 at para. 19; *Edell v. Canada*, 2010 FCA 26 at para. 5. The threshold that a plaintiff must meet to establish that a claim discloses a reasonable cause of action is a low one: *Brake v. Canada (Attorney General)*, 2019 FCA 274 at para. 70.

[45] Pleadings must, moreover, be read generously, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document:

see *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 at 451.

[46] Motions judges should not delve into the merits of a plaintiff's argument, but should, rather, consider whether the plaintiff should be precluded from advancing the argument at all: *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at para. 77. Recognizing that the law is not static, motions judges must also err on the side of permitting novel, but arguable claims to proceed to trial: *R. v. Imperial Tobacco*, above at paras. 19-25; *Mohr v. National Hockey League*, 2022 FCA 145 at para. 48, leave to appeal to SCC refused, 40426 (20 April 2023).

[47] That said, it must also be recognized that there is a cost to access to justice in allowing cases that have no substance to proceed. The diversion of scarce judicial resources to such cases diverts time away from potentially meritorious cases that require attention: *Mohr*, above at para. 50; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 13.

[...]

[49] To fail at this stage of the test the claim must be "bereft of any possibility of success": *Wenham*, above at para. 33, citing *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 47.

[...]

[51] Before considering whether the appellants' statement of claim discloses a reasonable cause of action, it is important to first have regard to the requirements of pleading.

[52] Rule 174 of the *Federal Courts Rules* provides that "[e]very pleading shall contain a concise statement of the material facts on which the party relies...". Rule 181(1) further requires that pleadings "contain particulars of every allegation contained therein ...".

[53] As this Court observed in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, "[i]t is fundamental to the trial process that plaintiffs plead material facts in sufficient detail to support the claim and relief sought". This is because pleadings play an important role in providing notice, and in defining the issues to be tried: at para. 16.

[54] Not only is the proper pleading of a statement of claim necessary for a defendant to prepare a statement of defence, the

material facts will also establish the parameters of relevancy of evidence at discovery and trial: *Mancuso*, above at para. 17. In addition, the nature of the facts pleaded allows counsel to advise their clients, prepare their case and map a trial strategy. The Court and the opposing parties should thus not be left to speculate as to how the facts might be arranged to support various causes of action.

[55] A statement of claim must plead each constituent element of every cause of action with sufficient particularity, and each allegation must be supported by material facts. The bald assertion of conclusions does not constitute the pleading of material facts: *Mancuso*, above at para. 27; *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Indeed, if the Court were to “[allow] parties to plead bald allegations of fact or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues”: *Mancuso*, above at para. 17.

[56] What will constitute a material fact in a statement of claim in a given case is to be determined in light of the causes of action asserted and the damages sought. Plaintiffs must plead—in summary form but with sufficient detail—the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant the “who, when, where, how and what” of the actions that allegedly give rise to its liability: *Mancuso*, above at para. 19.

[57] An assessment of the sufficiency of the material facts pleaded in a statement of claim is contextual and fact-driven. There is no bright line between material facts and bald allegations, nor is there a bright line between the pleading of material facts and the prohibition on the pleading of evidence. They are, rather, points on a continuum. It is the responsibility of a motions judge, “looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair”: *Mancuso*, above at para. 18.

[58] Plaintiffs can neither file inadequate pleadings and rely on defendants to request particulars, nor supplement insufficient pleadings to make them sufficient through particulars: *Mancuso*, above at para. 20; *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

[39] If a pleading is deficient, that is not the end of the analysis. As stated by Justice Yvan Roy in *Al Omani v. Canada*, 2017 FC 786:

[32] It does not suffice for the Court to rule that a pleading is deficient. Rule 221 requires consideration of whether a pleading should be struck with or without leave to amend. The jurisprudence points to various considerations which come into play in making such determination.

[...]

[34] The case law teaches that a pleading will not be struck out without leave to amend unless there is no scintilla of a cause of action (*McMillan v Canada*, (1996) 108 FTR 32 [*McMillan*] and *Sivak*). But there must be that scintilla. As Associate Chief Justice Jerome put it in *McMillan*, “(t)he burden on the applicant under R. 419 (1)(a) is heavy since portions of the pleadings will only be struck out if it is clear that the claim cannot be amended to show a proper cause of action” (para 39).

[40] Where “there are no material facts that furnish a “scintilla” of a cause of action” a claim may be struck without leave to amend (*McMillan v. Canada*, 2023 FC 1752, at paragraph 80).

[41] In the Claim the plaintiff makes bald and general allegations regarding infringement of intellectual property rights, and pleads and relies on the *Copyright Act*, *Trademarks Act* and the *Patent Act*. Neither the Claim or the motion materials refer to or rely on any specific section of those statutes. The Claim also refers to trade secrets (paragraph (e)) and that “The Defendants' representation was false to the public, acted negligently in making same, and the Plaintiffs works was stolen by Defendant” (paragraph 11).

[42] I will first deal with the claims (if they can be called that) relating to everything other than copyright. I will then deal with the claim for copyright infringement.

[43] Many aspects of the Claim are simply bald assertions of conclusions. As set out above, the “bald assertion of conclusions does not constitute the pleading of material facts”, and “that a statement of claim must plead each constituent element of every cause of action with sufficient particularity” (see *Brink*, paragraphs 55 and 56). To the extent that the plaintiff is attempting to assert claims relating to patents, trademarks, trade secrets, representations to the public that were false, negligence and stealing works, any such attempted claims run afoul of these requirements (this is in addition to the jurisdictional issues for some of them). The Claim does not plead any constituent elements of any cause of action, nor does it plead any material facts. Further, there are no material facts that furnish a “scintilla” of any such claim. As a result, it is plain and obvious that the Claim does not disclose a cause of action for any such claims. That is sufficient to dispose of those items. For each of these items, I set out some additional comments below.

[44] The only reference in the Claim to patents, trademarks or trade secrets are the bald allegations found in paragraphs (e) and the first of the two paragraphs numbered 15, which state:

- (e) Brief Overview: The Plaintiff, S M Tauhid Alam, is the rightful owner and creator of intellectual property protected under Canadian law. This intellectual property includes specify song, lyrics and such as trademarks, copyrights, patents, trade secrets, etc. Further, legal basis as the Plaintiff asserts that the Defendant’s actions constitute a violation of the following legal provisions. Specifically applicable intellectual property laws, statutes, or regulations, such as the Canadian Copyright Act, Trademarks Act, or Patent Act.

[...]

15. The Plaintiff pleads and relies upon the provisions of the following statutes and regulations thereunder:

- a) *The Patent act*; and
- b) *The Copyright Act*; and

c) *Trademarks Act*; and

[45] Notably, in paragraph (c) where the Claim sets out the “specific intellectual property in question”, it refers only to copyright. It makes no mention of patents, trademarks or trade secrets.

[46] Regarding the *Patent Act*, the plaintiff does not allege or refer to any patents, or that any have been infringed. There are no material facts pleaded to support a claim of patent infringement.

[47] Regarding the *Trademarks Act*, the plaintiff does not allege or refer to any registered trademarks. The plaintiff does not specifically allege any unregistered trademarks. While the Claim does allege that the plaintiff was the producer of “STAY” (paragraph 1), there are no facts alleged that “STAY” was ever used by the plaintiff as a trademark, or to support a claim under section 7 of the *Trademarks Act*.

[48] Regarding the reference to trade secrets, it is not clear whether a cause of action is asserted and if so, what cause of action is being asserted. There are causes of action that can be asserted where trade secrets have been misused even if no specific cause of action for trade secret violation exists (*Tewari v. Kazani*, 2023 ONSC 2509, at paragraph 51). However, the Federal Court has no jurisdiction over claims relating to trade secrets (*Gucci v. Levi*, 2005 FC 1186, at paragraph 5 a).

[49] Regarding the allegation that the defendant “acted negligently”, even if there were material facts to support such a claim (there are not), in the circumstances of this case it is

beyond the jurisdiction of the Court. As stated by Associate Judge Trent Horne in *Van Sluytman v. Canada*, 2022 FC 545:

[29] Claims grounded solely in the common law principles of negligence, independent of a cause of action over which the Court has jurisdiction, are beyond the jurisdiction of the Federal Court (*Kusugak v Northern Transportation Co*, 2004 FC 1696 at para 36 [...])

[50] With respect to the allegation that “the Plaintiffs works was stolen by Defendant”, theft of copyright or intellectual property is not a civil cause of action in Canada (see *Harris v. Canada (Attorney General)*, 2004 FC 1051, paragraph 13).

[51] Regarding the allegation that “The Defendants' representation was false to the public”, no representation is alleged. Further, it is unclear what cause of action, if any, is being asserted.

[52] I will now deal with copyright. Read generously, the Claim appears to assert copyright in the song and lyrics for a song called “STAY” (see paragraphs (c), 1, 2, 3 and 4).

[53] The claim for copyright infringement lacks material facts, particularly on the issue of infringement. However, it is not necessary to consider whether that can be cured by an amendment. As explained below, assuming the facts in the Claim to be true, it is plain and obvious that it does not disclose a reasonable cause of action for copyright infringement.

[54] The Claim alleges in paragraph 3 that “It”, presumably referring to the Song, “was published by the other party- “Justin Beiber” on July 9th, 2021.” However, what is significant for present purposes is what the Claim alleges regarding the making of the Song. In paragraph 3 the

Claim alleges that: the Song was recorded by the plaintiff on the plaintiff's iPhone on December 8, 2014; it was destroyed or deleted on that same day (it is not clear whether this is alleged to have been destroyed or deleted by someone other than the plaintiff); there are no earlier recordings; no out takes or aborted takes; no drafts of the written lyrics; the plaintiff did not work with anyone else; and there were no witnesses. However, there is no allegation that the defendant had access to the Song. This is not surprising since, as set out above, the Claim alleges that the Song was recorded without any earlier or other copies, drafts or witnesses, and the recording was destroyed or deleted the same day. I am not suggesting that is necessary to allege access in every case of copyright infringement. However, without access to a work, there can be no infringement (*U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257, at page 269; *Drolet v. Stiftung Gralsbotschaft*, 2009 FC 17, paragraph 249; *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196, paragraph 194; *Stork Market Inc. v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc.)*, 2017 FC 779, paragraph 78). As a result, in this particular case, assuming the facts in the Claim to be true, including those noted above, it is plain and obvious that the statement of claim does not disclose a reasonable cause of action for copyright infringement.

[55] Therefore, it is plain and obvious that the Claim does not disclose any reasonable cause of action. Accordingly, the action will be dismissed pursuant to Rule 210(4)(b).

VI. Costs

[56] The defendant seeks costs consistent with the middle of column III of Tariff B for item 5. Specifically, five units at \$170 per unit, for a total amount of \$850. The defendant also asks that costs be payable forthwith by the plaintiff to the defendant.

[57] Having regard to Rules 400 and 401, and Tariff B, including the factors articulated in Rule 400(3), and having regard to the defendant's success on the motion, costs of this motion are awarded to the defendant, fixed in the amount of \$850, to be paid by the plaintiff to the defendant within 30 days.

JUDGMENT in T-1419-23

THIS COURT'S JUDGMENT is that:

1. The plaintiff's motion for default judgment is dismissed.
2. The action is dismissed pursuant to Rule 210(4)(b).
3. Costs of the motion are fixed in the amount of \$850, to be paid by the plaintiff to the defendant within 30 days of the date of this Judgment.

"John C. Cotter"
Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1419-23

STYLE OF CAUSE: S.M. TAUHID ALAM v JUSTIN DREW BIEBER

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

JUDGMENT AND REASONS: COTTER A.J.

DATED: MARCH 28, 2024

WRITTEN SUBMISSIONS BY:

S.M. Tauhid Alam

FOR THE PLAINTIFF
(SELF-RESPRESENTED)

Mark Biernacki
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