

Federal Court



Cour fédérale

Date: 20120709

Docket: T-1715-10

Citation: 2012 FC 866

Toronto, Ontario, July 9, 2012

**PRESENT:** The Honourable Mr. Justice Near

**BETWEEN:**

**THE CANADIAN COPYRIGHT LICENSING  
AGENCY ("ACCESS COPYRIGHT")**

**Plaintiff**

**and**

**THREE CENT COPY CENTRE LTD. AND  
ALL PERSONS CARRYING ON BUSINESS AT  
732 SPADINA AVENUE AND/OR 917 BAY  
STREET, TORONTO, ONTARIO**

**Defendants**

**REASONS FOR ORDER AND ORDER**

[1] The defendants in this action seek a declaration that the default judgment may not be enforced against them, or, alternatively that the default judgment should be set aside. I find that the defendants have not satisfied the applicable test so as to entitle them to have the default judgment set aside nor have they persuaded me in any way that the default judgment should not be enforced against An Le and Anh Ly. As such, the motion will be dismissed.

## I. Background

[2] It is conceded that at all material times, 1247714 Ontario Ltd., An Le and Ahn Ly were persons carrying on a business, described as Three Cent Copy Centre, at one or both copy shops located at 732 Spadina Avenue and 917 Bay Street in Toronto. The plaintiff became aware of possible activities at these places of business that may have amounted to an infringement of their copyright sometime in 2008.

[3] As a result the plaintiff contacted the defendants and demanded that they cease and desist from such activities. The defendants through their counsel advised counsel for the plaintiff that the proper name of the businesses at these locations was Three Cent Copy Centre Ltd. Counsel for the plaintiff undertook the proper corporate searches and had been unable to find a properly registered corporate entity at these locations and relied upon the information provided by counsel for the defendants who understood throughout that it was their activities at these two places of business that were of concern to the plaintiff.

[4] Counsel for the plaintiff and counsel for the defendants exchanged various correspondence from 2008 to 2010 in an attempt to resolve the matter. Ultimately, as no resolution seemed possible the plaintiff commenced an action and filed and served the Statement of Claim in this matter in 2010.

[5] The defendants' acknowledgement being served with the Statement of Claim and retained new counsel to represent their interests. New counsel exchanged various correspondence with counsel for the plaintiff and continued to represent the corporate entity throughout as Three Cent

Copy Centre Ltd. These further attempts to resolve the issues continued throughout 2010 until August 2011 when the plaintiff sought default judgment against the defendants as no statement of defence had been filed on behalf of the defendants and the incidents of possible infringement had increased over that time period.

[6] Default judgment issued on August 9, 2011.

## II. Default Judgment

[7] The defendants now seek to set aside the default judgment on the basis that the proper corporate entity is 1247714 Ontario Ltd and not Three Cents Copy Centre Ltd. (and others) despite having clearly indicated to the plaintiff that the proper name was indeed Three Cents Copy Centre Ltd.. In addition, this falsehood was perpetuated throughout negotiations subsequent to the service of the Statement of Claim. It is rather disingenuous that the defendants now seek to have a default judgment set aside based on their own misrepresentations and despite admitting that at all times that they were in fact the principals behind this business and despite being clearly aware (having retained two separate counsel to act on their behalf) that it was their activities that were the subject matter of the litigation. There is no merit to such a position and I reject it absolutely. The test to set aside a default judgment as set out in many cases of this Court such as *Setanta Sports Canada Limited v. Gentile Enterprises Inc. et al*, (2011) FC 64 is as follows:

- a. Does the defendant have a reasonable explanation for its failures to file a statement of defence?
- b. Does the defendant have a *prima facie* defence on the merits?  
And
- c. Has the defendant brought this motion within a reasonable time?

[8] Further, the three elements of the test are conjunctive as set out in *Contour Optil Inc. v. E'lite Optik Inc.*; 2001 F.C.J. No. 1952 at para. 4, and hence the Court must be satisfied that all three elements have been met.

[9] In my view, there is simply no reasonable explanation for the defendants not to have filed a statement of defence to this matter given their level of knowledge of the proceedings as evidenced through their retention and instruction of counsel throughout a considerable length of time. Further, no evidence of a *prima facie* defence on the merits has been filed with the Court. The only submission is that the defendants were not properly named in the Statement of Claim which is totally without merit given their active participation in both providing the incorrect corporate name and failing to take any measures to correct this misleading and incorrect information. As such, the test to set aside the default judgment has not been met and this part of the motion is dismissed.

### III. Setting aside the writ of execution

[10] Similarly, there is no merit to the submission that the defendants An Le and Anh Ly should not be personally liable for the claims contained in the Statement of Claim and ultimately the default judgment. It is admitted that they have been at all times the principals behind the businesses undertaking the activities that are of concern. Further, they have been fully advised as to the legal proceedings brought on behalf of the plaintiff involving their activities. These activities continued to occur for years after they were first put on notice and indeed after default judgment had been obtained against the corporate entity (which was described in error as a result of communication with their counsel) and them personally. The Court sees no merit in granting any equitable relief to the defendants under such circumstance.

**ORDER**

**THIS COURT ORDERS that** the motions are dismissed, with costs fixed in the amount of \$2,000.

"D.G. Near"

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Judge

Federal Court



Cour fédérale

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1715-10

**STYLE OF CAUSE:** THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT") v THREE CENT COPY CENTRE LTD. AND ALL PERSONS CARRYING ON BUSINESS AT 732 SPADINA AVENUE AND/OR 917 BAY STREET, TORONTO, ONTARIO

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** July 9, 2012

**REASONS FOR ORDER AND ORDER:** NEAR J.

**DATED:** July 9, 2012

**APPEARANCES:**

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FOR THE DEFENDANTS

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