

**Grieco carrying on business as Unibell
Communications Company v. Marquis**

[Indexed as: Grieco v. Marquis]

38 O.R. (3d) 314
[1998] O.J. No. 1635
Court File No. 97-CV-125904SR

**Ontario Court (General Division)
Epstein J.**

April 6, 1998

Civil procedure — Simplified procedure — Default judgment — Test for motion to set aside default judgment where action under the simplified procedure — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 76.

When an action is under the simplified procedure and a motion is brought to set aside a default judgment signed by the registrar, the criteria for the exercise of the court's discretion are: (1) whether the circumstances giving rise to the default are adequately explained; (2) whether the motion was brought as soon as possible; and (3) whether, in accordance with the test for a summary judgment under the simplified procedure, the defendant has shown a defence such that the issues cannot be decided without cross-examination or it would otherwise be unjust to decide the issues on the motion.

Cases referred to

Bank of Montreal v. Chu (1994), 17 O.R. (3d) 691 (Gen. Div.); Hunt v. Brantford (City) (1994), 34 C.P.C. (3d) 379 (Ont. Gen. Div.)

Statutes referred to

Wages Act, R.S.O. 1990, c. W.1

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 19, 60.08(16)

MOTION to set aside a default judgment.

David M. Sanders, for moving party (defendant). Samuel S. Marr, for responding party (plaintiff).

EPSTEIN J.: — This is a motion brought by the defendant, Sandra L. Marquis ("Marquis"), for an order primarily setting aside the noting of pleadings closed and the default judgment signed by the registrar on August 15, 1997. In the alternative, counsel for Marquis asks for a stay of enforcement of the judgment or at the very least a reprieve from the extent to which Marquis's earnings are currently exposed to garnishment.

The judgment ordered Marquis to pay \$10,224.77 plus costs of \$373 to the plaintiff, John Grieco, carrying on business as Unibell Communications Company ("Grieco").

Counsel for Marquis submits that his client has a valid defence to this action on the merits and that she has a satisfactory explanation for the default. Marquis also alleges that she moved promptly to bring this motion.

The action is based on \$10,000 allegedly loaned from Grieco through his business, Unibell, to Marquis. The loan was secured by a promissory note that provides, in part, as follows:

This will acknowledge that I, Sandra L. Marquis, have received from UNIBELL a cheque in the amount of ten thousand dollars (\$10,000.00) (UNIBELL cheque number 0265) which I promise and undertake to reimburse to UNIBELL within thirty (30) days of the date of this receipt.

If, for any reason, I fail to reimburse UNIBELL within thirty (30) days of the date of this receipt, I hereby authorize my bank manager at Toronto Dominion Bank, 2169 Queen St. E., Toronto, Ont., M4L 1J1, Account Number: [omitted] to withdraw funds from my personal bank account in the amount of ten thousand dollars (\$10,000.00) and pay this amount to UNIBELL immediately upon default of this promissory note.

Marquis provided another, virtually identical, authorization allowing Grieco to access a second bank account at the same branch of the Toronto-Dominion Bank should default be made under the promissory note.

On March 7, 1997, the agreed-upon repayment date, Marquis did not pay the money to Grieco. Grieco tried to withdraw the moneys owing to him from the two bank accounts in accordance with the authorizations he secured through the terms of the promissory note but was unsuccessful. Hence, this proceeding was commenced.

Marquis's evidence on this motion with respect to the circumstances leading up to this action is that Grieco and Mr. Steepe, the then boyfriend of Marquis, were business associates. In fact, at the time the promissory note was signed, Grieco was president of a business owned by Steepe. Steepe needed funds to pay some business debts and approached Grieco for assistance. Grieco was only prepared to lend money to Steepe if Marquis provided security. Marquis, out of loyalty to Steepe, agreed and she signed the promissory note.

As far as the default judgment is concerned, Marquis's evidence is that when she was served with the statement of claim, Marquis turned to Steepe, who told her he would look after it. Instead, he disappeared and, unbeknownst to Marquis, Grieco obtained default judgment.

The judgment did come to Marquis's attention in early November when she was served with a notice of examination in aid of execution returnable November 13.

On December 8, 1997, Marquis was eventually examined, after Marquis failed to attend the one scheduled for November 13, 1997. I note that a portion of the examination was directed toward Steepe's participation in all of this.

Counsel for Marquis argues that since this is a motion to set aside a default judgment signed by the registrar, and since it can be established that correct procedures were not followed in obtaining the judgment, his client is entitled to have default judgment set aside as of right. I disagree that Grieco's

failure to sue Steepe as well amounts to his following an improper procedure. The test to be applied is the standard test in setting aside a default judgment.

In deciding whether discretion will be exercised to set aside a default judgment, the factors to be considered are: whether the circumstances giving rise to the default are adequately explained, whether the motion was made as soon as possible, and a consideration of the defence on the merits.

On the basis of the record before me, I am persuaded that the circumstances of the default have been adequately explained. All of the evidence, including that of Grieco, points to a situation where Marquis and Steepe were, in some fashion, involved together in borrowing money from Grieco. It is understandable that upon receiving the statement of claim Marquis would consult with Steepe. Marquis had reason to accept Steepe's word, that he would address the situation either because Steepe was the primary debtor or because of some arrangement the two of them made in their business dealings. This was not a deliberate decision to take a calculated risk but the understandable reliance of Marquis upon Steepe's promise to her.

I now turn to whether the motion was brought "as soon as possible". The chronology is this. Marquis learned of the default judgment in early November 1997. She attended an examination in aid of execution in mid-December 1997 and retained counsel in January. At that time, settlement negotiations ensued but obviously were unsuccessful. The motion was then launched in late February 1998.

While Marquis may have moved more promptly in retaining counsel, her delay of six weeks or so in taking that step is understandable in view of the time of year and, perhaps more significantly, in view of Marquis's state of denial as to the exposure she faced.

This takes me to the most difficult part of the test in the circumstances of this case; namely, whether Marquis has raised a defence.

The action is, plain and simply, an action based upon a clear promise to repay moneys loaned from the plaintiff to the defendant. Counsel for Marquis has advanced a veritable myriad of possible defences. Many of them have absolutely no application to the facts of this case as I understand them based on the evidence presented on the motion. Most importantly, it cannot be said that Marquis did not understand that Grieco was going to look to her for payment. By signing the promissory note and acknowledgement, Marquis, in clear terms, acknowledged receipt of the funds, an obligation to repay and even directed her bank manager to withdraw funds to repay Grieco.

It is clear that to meet this aspect of the test, Marquis does not have to satisfy me that she will be able successfully to defend the action. However, in recent cases, under the "regular rules" it has been suggested that in motions such as this the court should examine the facts and issues to determine if the defence has an air of reality to it. Does the defence raise a genuine issue for trial? Justice Wilson, in *Bank of Montreal v. Chu* (1994), 17 O.R. (3d) 691 (Gen. Div.), held that the principles applicable in a motion for summary judgment should be considered in assessing whether a default judgment should be set aside. This approach was supported by Justice Ellen Macdonald in *Hunt v. Brantford (City)* (1994), 34 C.P.C. (3d) 379 (Ont. Gen. Div.).

In keeping with the identification of a relationship between the test under Rule 19 of the Rules of Civil Procedure and the test on a motion for summary judgment, where, as in this case, the action is proceeding under the simplified rules the test should be as follows. The court should not set aside the judgment unless the issues cannot be decided upon without cross-examination or it would otherwise be unjust to decide the issues on the motion.

There are several aspects concerning Marquis's role in all of this that disturb me. Unfortunately, all of them relate to Steepe, not to Grieco. On the basis of all of the evidence before me, Grieco loaned \$10,000 to Marquis and Marquis unequivocally assumed responsibility to repay it. The fact that Marquis decided to direct those funds to Steepe's business, even with Grieco's knowledge, does not alter Grieco's right to look to Marquis for payment. I am of the view that further cross-examination would not change that.

Marquis may well have an action against Steepe but that is not a defence to Grieco's claim. In the end there is no matter disclosed in the record on the motion that discloses a defence available to Marquis as against Grieco.

The motion to set aside the default judgment is dismissed.

Marquis has also asked for an order staying the enforcement of the judgment. However, no argument was advanced in respect of this request.

On the evidence before me, it would appear that Marquis does not even know how to contact Steepe. There is nothing to support a conclusion that whatever rights she may have against her former boyfriend, in this regard, could be resolved in a fashion such that it would be equitable to require Grieco to wait until that time before enforcing his judgment. Accordingly, there will be no stay of the enforcement of the writ of execution and that portion of the motion is dismissed.

Marquis further seeks an order under rule 60.08(16) varying the percentage due on a garnishment. The request is based on the fact that Marquis's income is not protected by the Wages Act, R.S.O. 1990, c. W.1. Counsel for Marquis requests that the percentage of Marquis's income that Grieco should be able to garnish be reduced but made no submissions as to the specific reduction. Counsel for Grieco agrees that the current unlimited garnishment is unfair and suggests it be reduced to 30 per cent. I agree, and an order to this effect will issue, on consent.

Marquis also requests an order for substituted service in respect of any documentation to be served on Steepe. Specifically, the request is that service be effected through a lawyer by the name of Mr. Fletcher, who apparently has had some contact with Steepe. I have no jurisdiction to grant such an order in the context of this action. Steepe is not a party to this action and, among other reasons for refusing such an order, there are no identifiable documents to include in such an order.

Accordingly, the motion is dismissed with the exception of that portion relating to a reduction of what is available for garnishment.

Grieco is entitled to his costs of the motion, fixed in the amount of \$750 in fees plus disbursements and appropriate goods and services tax.

Order accordingly.