

**CITATION:** Protrans Personnel Services Inc. v. Stevens Resource Group – USA Inc., 2023 ONSC 5840  
**COURT FILE NO.:** CV-21-00001961-0000  
**DATE:** 2023 10 17

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** PROTRANS PERSONNEL SERVICES INC., Plaintiff

**-and-**

STEVENS RESOURCE GROUP – USA INC.,  
STEVENS RESOURCE GROUP INC. – ONTARIO, and  
STEVENS, Sherri, Defendants

**BEFORE:** Regional Senior Justice L. RICCHETTI

**COUNSEL:** FORGET, M., for the Plaintiff.

PINIZZOTTO, F., CHUMAK, J., and UPENIEKS, E. (Observer), for  
the Defendants, Stevens Resource Group – USA Inc., and Sherri  
Stevens.

**HEARD:** October 13, 2023, via Video Conference

**ENDORSEMENT**

**THE MOTION**

[1] This is a motion by the Defendants, Sherri Stevens (Ms. Stevens) and Stevens Resource Group – USA Inc. (SRG USA) (or jointly as Stevens) to set aside a noting of default.

[2] The Defendant, Stevens Resource Group Inc. – Ontario (SRG Ontario) has since gone bankrupt.

## **BACKGROUND**

[3] This is a Simplified Procedure proceeding.

[4] The Plaintiff purchased, by way of asset purchase, the assets of Stevens Resource Group Inc. (Ontario), on January 28, 2019.

[5] A separate side agreement provided that SRG USA would pay the sum of \$100,000 to the Plaintiff if the sales did not meet \$5,000,000 in the first year and that Ms. Stevens would assist in the transition and promotion of the Plaintiff's acquired business for 6 months.

[6] At issue in this proceeding is the payment of the \$100,000 and \$5,808 of monies diverted/or incorrectly credited to SRG USA rather than the Plaintiff.

[7] This proceeding was commenced on May 27, 2021.

[8] The Defendants' counsel served a Notice of Intent to Defend on July 14, 2021.

[9] No Defence was filed as the Defendants took the position that there were deficiencies in the Statement of Claim. The exact wording of the Defendants' counsel's objection was:

We have received instructions to bring a motion to strike portions of the Statement of Claim for failing to particularize the damages sought in respect of each claim.

[10] Considerable delay occurred in bringing the motion.

[11] At one point, the Defendants sought to resolve the issue by requiring the Plaintiff delivering a Fresh as Amended Statement of Claim by March 14, 2022, which would then require the Defendants to deliver a statement of defence or demand for particulars within two weeks.

[12] To resolve the pleadings issue, the Plaintiff delivered a draft Amended Statement of Claim on March 24, 2022 and suggested that the Defence be delivered by April 14, 2022.

[13] Considerable time passed. The Plaintiff's counsel followed up on several occasions including on November 8, 2022. On November 8, 2022, the Plaintiff's counsel wrote to the Defence counsel "we are still waiting on your Statement of Defence".

[14] Eight months later, the Defendants' counsel had instructions. The motion was resolved on November 11, 2022. The Plaintiff formally delivered a Fresh Amended Statement of Claim.

[15] The Plaintiff's counsel suggested the Defence be delivered by December 14, 2022. No objection to this was raised by the Defendants' counsel.

[16] Two days before the December 14, 2022 date for the delivery of the Defence, the Defendants' counsel wrote to the Plaintiff's counsel stating: "I will endeavour to provide our client's Defence by December 30, 2022." The Plaintiff's counsel didn't object.

[17] Two days before the December 30, 2022 deadline for delivery of the Defence, on December 28, 2022, the Defendant's counsel wrote: "...due to the fact that primary counsel will be out of the country until January 9, 2023, we would request that we be given until January 13, 2023 to provide it to you."

[18] Again, the Plaintiff's counsel didn't object. But on January 2, 2023, the Plaintiff's counsel wrote to the Defendant's counsel as follows:

We have been working with you on this matter and December 30, 2022 was proposed by you as the date for delivery of the Statement of Defence. Please be advised that if we do not receive the Statement of Defence by January 13, 2023 (again as proposed by you), we will proceed to note your client in default.

(Emphasis added).

[19] On the day the Defence deadline was due on January 13, 2023, the Defendant's counsel wrote to the Plaintiffs' counsel as follows:

I appreciate your continued patience in granting our previous requests for extensions of time in which to submit our client's Statement of Defence. I apologize, but I have been very ill this week and would request one final very brief extension of one business day. I will ensure that the Defence is provided to you by Monday and would request that you not take any steps to note our client in default in the interim. I hope that you have a good weekend.

(Emphasis added).

[20] The Plaintiff's counsel acted extremely reasonable. Plaintiff's counsel's immediate response to the January 13, 2023 email from the Plaintiff's counsel was:

Please have the Statement of Defence served and filed by January 20, 2023.

[21] Again, the Defendants' didn't comply with their own deadline. Three days after the January 20, 2023 deadline for the delivery of the Defence, on January 23, 2023, the Defendant's counsel again wrote to the Plaintiff's counsel as follows:

Jordan is on a leave of absence for personal reasons. I will need to take over his practice which includes this file. Given the circumstances, I ask that you provide to me a due date of January 27 to submit the Statement of Defence.

(Emphasis added).

[22] Later the same day, the Defendant's counsel again wrote to the Plaintiff's counsel as follows:

On Monday January 23, 2023, Jordan took a sudden leave of absence, and we have not been able to locate his work product with respect to the Statement of Defence. We will need to start from scratch. I am requesting an extended period of time to prepare the Statement of Defence. Given the circumstances, I hope that you understand the need for an extension. Kindly confirm that our client has not been noted in default.

(Emphasis added).

[23] Again, on the day the deadline for the delivery of the Defence set by the Defendants' counsel, on January 27, 2023, the Defendant's counsel wrote to the Plaintiff's counsel as follows:

As explained previously by Tanya, we are still not able to locate the work product of the lawyer who was previously working on our client's defence. Due to this unfortunate situation, we kindly request that you provide us with an extension. Tanya and I are arranging a meeting with our client (hopefully for next week). Once we meet with our client, we will provide a reasonable date by which you can expect our client's defence.

(Emphasis added).

[24] The suggestion was that the delay was due to obtaining client's instructions.

[25] On January 31, 2023, the Plaintiff's counsel, having not taken steps to note the Defendants in default, was frustrated and wrote to the Defendants' counsel as follows:

On Thursday January 26, 2023, I returned Ms. Walker's call and left her a voice message.

I am attaching the email communication between Jordan and myself since December 2022, Ms. Walker is cc'ed to most of them.

On December 12, 2022, Jordan confirmed the receipt of the \$1,000 for the cost of motion and advised that the Statement of Defence will be served by December 30, 2022.

On December 28, 2022, Jordan again emailed me:

"I hope that you have been enjoying the holiday season. We are still working toward having a fulsome Defence ready by December 30, 2022, but due to the fact that primary counsel will be out of the country until January 9, 2023, we

would request that we be given until January 13, 2023 to provide it to you, so that Ms. Walker will have a chance to review it before it is submitted. I trust that no steps will be taken to note our client in default without prior reasonable notice. “

On January 2, 2023, I responded agreeing to this, under the impression that the Statement of Defence is already drafted and waiting for Ms. Walker’s approval.

On January 13, 2023, Jordan again emailed asking for a day’s extension due to health concerns and I responded agreeing to until January 20, 2023.

When I did not hear from your office, I followed up on January 23, 2023 and was advised that Jordan is on leave of absence, and you requested another extension until January 27, 2023.

At this time, all I would need is a firm date on when can we expect the Statement of Defence?

Also, could we schedule a time to discuss this matter? If so, what is your availability for next week?

Please advise at the earliest.

[26] On February 2, 2023, the Defendant’s counsel wrote to the Plaintiff’s counsel as follows:

You can expect our defence by February 24, 2023. Please confirm that you are ok with this.

(Emphasis added).

[27] The Plaintiff’s response the same day was:

As for the Statement of Defence, I will speak to my client and get instructions. In the meantime, I hope your office is working on getting the Statement of Defence completed.

(Emphasis added).

[28] Before the Plaintiff's counsel could get back with instructions on the date for extended delivery date for the Defence, the Defendant's counsel wrote to the Plaintiff's counsel on February 3, 2023, in the morning:

Please be advised that the Defendants in the above-noted matter have terminated our representation of them. We have advised them to ask their new lawyer to serve a Notice of Change of Lawyers.

(Emphasis added).

[29] Now getting instructions no longer mattered to the Plaintiffs. The existing deadline had already expired and without new counsel, further delay was inevitable.

[30] On February 11, 2023, the Defendants were noted in default.

[31] No Notice of Change was delivered for approximately two months.

[32] No Defence was delivered even on the previous Defendant's counsel's own proposed deadline of February 24, 2023.

[33] The Defendants' new counsel discovered on March 31, 2023 that the Defendants had been noted in default.

[34] Nothing was heard from the Defendants' until new counsel wrote on April 4, 2023 stating the following:

We have recently become aware that our clients have been noted in default on February 11, 2023, prior to retaining our firm to assist with the above-noted



matter. As we have now been retained and are in the process of obtaining instructions for a defence, we trust that you will consent to have the noting in default set aside. We undertake to have our Statement of Defence to you within the time prescribed in the Rules.

(Emphasis added).

[35] The new Defence counsel were waiting to get “instructions for a defence”. That makes little sense given the extensive history described above.

[36] On April 4, 2023, Plaintiff’s counsel wrote:

At this point my client is not prepared to consent to the setting aside of the default judgment.

[37] The Defendants’ motion record to set aside the noting in default was delivered on May 25, 2023. The first draft of the Statement of Defence was the attachment to this motion record.

## **THE LAW**

[38] Rule 19.03(1) of the *Rules of Civil Procedure O. Reg. 575/07*, s. 6 (1)., provides:

“The noting of default may be set aside by the court on such terms as are just.”

[39] The Court of Appeal’s decision in *Nobosoft Corporation v. No Borders, Inc.*, 2007 ONCA 444 remains authoritative on this issue:

[3] On the authority of this court’s decision in *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 1991 CanLII 7095 (ON CA), 3 O.R. (3d) 278 at para. 18, the full context and factual matrix in which the court is requested to exercise its remedial discretion to set

aside a noting in default are controlling factors. In particular, as noted by the court at para. 18 of *Bardmore*, such factors as the behaviour of the plaintiff and of the defendant, the length of the defendant's delay in seeking to respond to the plaintiff's claim, the reasons for the delay and the complexity and value of the claim involved, are all relevant matters to be taken into consideration.

(Emphasis added).

[40] In *Franchetti v. Huggins* 2022 ONCA 111 at para. 9, the Ontario Court of Appeal again revisited the criteria for setting aside a noting in default, and provided a concise summary of all the relevant factors to be considered:

To summarize the jurisprudence, the following factors have been found to be relevant in considering whether a noting of default should be set aside:

1. The parties' behaviour;
2. The length of the defendant's delay;
3. The reasons for the delay;
4. The complexity and value of the claim;
5. Whether setting aside the noting of default would prejudice a party relying on it;
6. The balance of prejudice as between the parties; and
7. Whether the defendant has an arguable defence on the merits.

[41] Setting aside noting in defaults are often common, usually uncontested. The court prefers that civil disputes be resolved on their merits. However, that does not mean that orders setting aside a noting in default should be granted in all cases. The court must consider all relevant factors to arrive at a fair and just decision.

## **ANALYSIS**

[42] Let me deal with the relevant factors in the exercise of this court's discretion to grant the order sought.

### **Behaviour of the Parties**

[43] In my view, the behaviour of the Defendants demonstrates a deliberate and shocking laxity in complying with the *Rules*. One deadline, after another, often set by the Defendants' counsel, was missed – a kind way of saying ignored.

[44] This is a Simplified Procedure action. And more than 2 years have gone by since the Statement of Claim was served.

[45] The Plaintiff's counsel was extremely patient and reasonable in not having previously noted the Defendants in default. Quite frankly, in my view, the Plaintiff's counsel demonstrated the utmost professionalism in attempting to be reasonable and cooperative with opposing counsel.

[46] The Defendants counsel on the other hand believed, and its repeated often in this motion, that counsel had request an extension to deliver a pleading as if requesting an extension is sufficient to extend the time for delivery. It is not. Particularly, as the Defendants were on notice that if the Defendants didn't deliver their Defence by January 13, 2023, the Defendants would be noted

in default or when the request to extend the delivery to February 24, 2023 had not been agreed to and Plaintiff's counsel was obtaining instructions on this further extension request.

[47] Criticizing the Plaintiff for noting the Defendants in default on February 11, 2023, ignores two things:

- a) First, it was a request for a further extension to February 24, 2023 and the Defendants' counsel knew that the Plaintiffs counsel was seeking instructions on this extension.
- b) Secondly, it is hardly persuasive that the noting in default was 13 days before the REQUESTED deadline of February 24, 2023, when no defence was delivered by that date any way. Perhaps if it had, this motion would have ended with a different result.

[48] The Defendants' explanation for the many delays lacks a reasonable explanation. Further in the midst of this, the Defendants (not just counsel) knew that the Defence had not been filed by the January 27, 2023 deadline (as Ms. Stevens gave instructions on February 2, 2023 to Defence counsel to proceed to file the defence), but then immediately terminated Defence counsel and took two months to retain new counsel.

[49] This factor favours not granting the order requested.

### **Length of Delay and Reasons for the Delay**

[50] Having looked at the Statement of Claim and the Fresh Amended Statement of Claim, there is no discernable material difference except that now the Plaintiff is specifying its claimed damages. I am not persuaded that the delay attributed to the delivery of the Fresh Amended Statement of Claim should be borne by the Plaintiff as the Defendants could have pled to the Statement of Claim.

[51] I repeat, the claim is for \$105,808 whereby SRG USA was to pay the Plaintiff \$100,000 if the sales of the acquired business assets didn't reach \$5 million within 12 months and Ms. Stevens would assist in the transition and promotion for the Plaintiff for 6 months without compensation. The claim for \$5,808 is that these funds were misdirected to SRG USA during the transition instead of the Plaintiff's new business.

[52] The Defences raised are clear and didn't require extensive time to prepare. The issues to be pled were not complex.

[53] Considering the delay from November 2022 when the Fresh Amended Statement of Claim was delivered, the delay is measured in months.

[54] While the delay is not measured in years (as in some cases), the circumstances must be carefully reviewed. At one point the Defence counsel stated that only one additional day was needed to deliver the Defence, or on

another date Defence counsel said they just needed approval from the Defendants. The nature and circumstances of the repeated delays in this case is, as I stated above, quite shocking, excessive and simply not accepted as reasonable conduct for the prior Defence counsel.

[55] And, the Defendants rely on the fact that Defendants always intended to defend the action. As the Defendants raise this issue, I am not impressed with the 16-month delay in objecting to a pleading as it is hard to imagine that the Defence to the original Statement of Claim would have been different in any material way than the proposed Defence to the Fresh Amended Statement of Claim.

[56] The Defendants state they instructed their counsel on January 3, 2023 and February 1, 2023 to proceed to submit a defence. The Defendants themselves knew that a Defence had not been submitted. So, she knew that no Defence had been delivered by the last deadline for filing a Defence - January 27, 2023.

[57] The Defendants did nothing to deal with this. There is no evidence they got confirmation that the Defence had been delivered. Or whether a new agreed upon extension for delivery was.

[58] Instead, the Defendants chose to terminate their counsel without obtaining information about the status of the delivery of the Defence.

[59] Then, they took almost 2 months to retain new counsel!

[60] In my view, the Defendants were either shockingly negligent in ensuring their Defence was filed or were engaged in deliberately delaying this proceeding.

### **The Complexity of the Claim**

[61] This is not a complex claim. It is a claim for \$105,808.

[62] Essentially, the claim against the SRG USA is that they agreed to pay an additional \$100,000 if the sales of the company did not exceed \$5 million dollars in the first year and \$5,808 dollars that were misdirected to SRG USA.

[63] The essence of the Defence is found at paragraphs 38 – 44 that it was the Plaintiff's fault that the \$5 million dollar threshold was not met. As for Ms. Stevens, the essence of the Defence is at paras. 47-50 that Ms. Stevens obligation to provide transition services "are separate and distinct" and she should not be a party to the proceeding and raises a limitation defence.

[64] From the Defendants counsel's emails, the Defence was essentially done well before the Defendants chose to terminate counsel's retainer. What was the problem? No explanation is given by the Defendants.

[65] I am not persuaded that the complexity of the issues contributed to the delay in filing their Defence in a timely way.

[66] This factor favours the Plaintiff.

### **Arguable Defence**

[67] As for arguable Defence, I will accept for the purpose of this motion that the Defendants do not have to demonstrate an arguable Defence.

### **Potential Prejudice**

[68] In my view, this factor is neutral as a dismissal will always result in the matter not being heard on the merits and will always delay the Plaintiff's entitlement to have its claim heard.

[69] If this were the determinative factor, it would always favour granting the order, regardless of the circumstances. The other factors mean something and do provide guidance to the court's exercise of its discretion.

### **Effect on the Overall Integrity of the Administrative of Justice**



[70] Simplified Proceedings are intended to be a streamlined, less costly proceeding. The parties can expect to get to a trial much quicker and cheaper than a regular procedure trial.

[71] Here the delay by the Defendants was continuous and resulted in a deliberate, unexplained, extensive delay from this proceeding going ahead.

### **CONCLUSION**


[72] This is not a typical case of setting aside a noting of default. This one is highly unusual given the unusually short time, but the many repeated unmet deadlines (set by the Defendants' counsel) for filing the Defence which remained unmet and then added to that by the Defendants choosing to terminate counsel's retainer at these numerous delays and then taking two months to retain new counsel to deal with the problem.

[73] Surely, the Plaintiff cannot wait forever for the Defence. There are *Rules* to be complied with. At some point the Plaintiff is entitled to say "enough", especially where the Plaintiff had already been very accommodating for a very long time.

[74] Considering all the factors, this is a proper case to dismiss the motion.

[75] The motion to set aside the noting in default is hereby dismissed.

[76] The costs of this motion can be added to the Plaintiff's costs of the action.

  
RSJ L. RICCHETTI

**Released:** October 17, 2023

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