



PRACTICE

JUDGMENTS AND ORDERS

Default Judgment

Motion brought by defendants R E Stats Inc., operating as ReDatum, Gabriel Stefanescu (defendants) to set aside order granting plaintiff *ex parte* motion for, *inter alia*, default judgment against defendants — No position taken or provided by defendant Kenneth Decena — Defendants also seeking: order extending deadline for service, filing of defendants' statement of defence or any motion by defendants respecting statement of claim (e.g., to strike and/or for particulars) to thirty days from date on which Court issuing order setting aside default judgment; awarding defendants their costs of present motion on full indemnity basis; such further, other relief Court may deem just — Plaintiff largest real estate board in Canada, whose members are comprised of more than 56,000 licensed real estate brokers, salespersons — Is not-for-profit entity, incorporated under laws of Ontario, operated as trade association — Plaintiff developing, operating TRREB MLS® System (System) — Corporate defendant, R E Stats Inc., operating as ReDatum; company based in Toronto, Ontario, providing services to parties in real estate industry — Operates through on-line portal — System alleged to be copyrightable work owned by plaintiff — Plaintiff registered its copyright interest with respect to its System for each successive year since 2015 — In *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236, [2018] 3 F.C.R. 563, Federal Court of Appeal considering whether claim of copyright existed in System database — Case was in context of appeal from two Competition Tribunal decisions — Federal Court of Appeal concluded that originality threshold not established therein — In current action, plaintiff sought interlocutory injunction as against defendants, which Federal Court dismissed (*Toronto Regional Real Estate Board v. RE Stats Inc. (Redatum)*, 2021 FC 30) — Plaintiff sought to restrain defendants from certain activities, allegedly infringing plaintiff's copyright interests — Court considered defendants' reliance on *TREB v. Commissioner of Competition* but nonetheless found that threshold for satisfying first element of interlocutory injunction test (existence of serious issue to be tried) met — However, irreparable harm not established, injunction application dismissed — Court later issued notice of status review to parties since no statement of claim, statement of defence or motion for default judgment filed within time limit — In response, plaintiff proceeded with *ex parte* motion for default judgment — Plaintiff not notifying defendants, Court not sending correspondence to defendants as result of defendants being in default — Counsel for defendants emailed plaintiff's counsel requesting update following issuance of notice of status review but plaintiff's counsel not responding to email — Plaintiff then brought *ex parte* motion for default judgment which motion granted (*Toronto Regional Real Estate Board v. R E Stats Inc. (Redatum)*, 2021 FC 735) — Default Judgment granted permanent injunction restraining defendants from (a) copying or otherwise infringing copyright in the System, (b) circumventing TPMs protecting System; (c) having any involvement in providing access to System or assisting in collection, display, distribution of any information from System — Default judgment also awarded damages of \$50,000 against R E Stats, ordered defendants to disclose all methods, means used to access or obtain content from System; to destroy or deliver all System content in their control — Defendants filing present notice of motion soon after receiving copy of default judgment — Contacting counsel for plaintiff requesting relevant documents but not receiving response — Sole issue whether default judgment should be set aside — Pursuant to *Federal Court Rules*, SOR/98-106, r. 399(1), on motion, Court may set aside or vary order that was made *ex parte* if party against whom order made discloses *prima facie* case for why order should not have been made — Test for

setting aside default judgment obtained *ex parte* well established: moving party must satisfy Court that it has: (1) reasonable explanation for failing to file statement of defence; (2) *prima facie* defence on merits to plaintiff's claim; (3) moved promptly to set aside default judgment — Three elements of test conjunctive – defendants having to be successful on all three parts of test — Regarding first part of test, clear defendants not filing defence, not moving for extension to file defence, not providing evidence that they intended to do so — Nevertheless, failed injunction application, findings of both Federal Court of Appeal, Federal Court that System not having valid copyright protection, lack of any reply by plaintiff to defendants' email, provided reasonable basis for defendants to have assumed plaintiff not actively pursuing present action, provided some basis for delay in not filing statement of defence — Defendants thus satisfied first part of test for setting aside order for default judgment — As to second part of test, though plaintiff's motion for interlocutory injunction not successful, Court nonetheless finding there was serious issue to be tried — Plaintiff *prima facie*, established subsistence of copyright in System, ownership of that copyright as stated in default judgment — However, findings of Federal Court of Appeal, Federal Court finding copyright not subsisting in TREB System then raising serious concern about merits of plaintiff's claim in action — Thus, defendants raising *prima facie* defence; satisfying second part of test — Since defendants acted expediently in bringing present motion, third part of test not at issue in present matter — Respecting plaintiff's duty of full, frank disclosure, in making motion *ex parte*, plaintiff accepted duty of full, frank disclosure required to mitigate risk of injustice inherent in matter where judge may grant order having heard from only one party — Defendants claiming that plaintiff failed in their duty, in particular, by not disclosing notice of status review or status of their written submissions in response to notice of status review, in their motion materials for default judgment — While plaintiff entitled to bring motion for default judgment *ex parte*, Order, reasons for default judgment stating that it would have been more prudent to provide notice to defendants — Was even more true when further evidence of email from defendants' counsel provided — Moreover, under r. 382(1), if notice of status review issued in respect of action, plaintiff, within 15 days of date of notice of status review, must serve, file representations stating reasons why proceeding should not be dismissed for delay — Plaintiff not serving such representations; not answering email from defendants requesting their intentions in regards to notice of status review — While default judgment to be set aside, decision in no way condoning or accepting defendants' failure to file defence in timely manner pursuant to Rules — Motion granted.

TORONTO REGIONAL REAL ESTATE BOARD V. R E STATS INC. (REDATUM) (T-898-20, 2021 FC 1193, Manson J., reasons for judgment dated November 8, 2021, 17 pp.)