

**ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)
CIVIL ENDORSEMENT FORM**
(Rule 59.02(2)(c)(i))

BEFORE	Justice L. Merritt	Court File Number: CV-20-645492
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Title of Proceeding:

..... **EQUIBIT GROUP LTD.** **Plaintiff(s)**

-v-

..... **THE ATTORNEY GENERAL OF CANADA et al** **Defendants(s)**

Case Management: **Yes** If so, by whom: _____ **No**

Participants and Non-Participants: *(Rule 59.02(2)(vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Plaintiff	Sara Erskine Vince DeMarco	Sara.erskine@wehlitigation.com Vincent.demarco@wehlitigation.com		Y
2) Defendant Sachkov	Kim Ferreira Dora Konomi	kim@ontlaw.com dora@ontlaw.com		Y
3)				

Date Heard: *(Rule 59.02(2)(c)(iii))* **May 12, 2023**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

Motion Appeal Case Conference Pre-Trial Conference Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

In Writing Telephone Videoconference In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

Motion by the Defendant to set aside noting in default, two default judgments, related enforcement and execution proceedings, writs, and garnishments, for return of garnished funds and for leave to file a Statement of Defence.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

The noting in default dated May 17, 2021, the Judgment for liability dated October 5, 2022, the Judgment for Damages dated December 21, 2022 and all related enforcement and execution proceedings including notices of garnishment to CIBC and MetaVRse and any writs of seizure and sale are set aside.

The Sheriff of the Regional Municipality of Halton is directed to remit the funds garnished from CIBC and presently held by the Sheriff to the Defendant Sergei Sachkov ("Sachkov" or the "Defendant").

Sachkov is granted leave to file a statement of defence within 20 days of this order.

Costs: On a		indemnity basis, fixed at \$	are payable
by	to	[when]	

Brief Reasons, if any: (Rule 59.02(2)(b))

Overview

The Defendant moves to set aside a default judgment on liability dated October 5, 2022, a default judgment for damages in the amount of \$1,744,711 dated December 21, 2022 and related garnishment proceedings. The Plaintiff Equibit Group Ltd ("Equibit") was a start up company that planned to have a network for the exchange of cryptocurrency and also to create cryptocurrency tokens of its own. Sachkov was first employed by Equibit in March 2017 to write the code for a decentralized transfer service which would facilitate the exchange of cryptocurrencies and other blockchain based securities (the "Code"). On August 13, 2018 Sachkov gave two (2) weeks' notice and resigned. On August 12, 2020 Equibit commenced this action against Sachkov claiming that he stole the Code, destroyed it on his computer and conspired with the Canadian Security and Intelligence Services ("CSIS") to ruin Equibit. The claim was served on February 9, 2021 and default proceedings followed.

Decision

The default judgments dated October 5, 2022 and December 21, 2022 are set aside. Sachkov meets the test for setting aside default judgment. He has a plausible excuse for not responding to the claim and subsequent documents because he believed the documents served on him were fraudulent for several reasons including the fact that he had not worked for or heard from the company for two and one half (2 ½) years by the time the claim was served and the Plaintiff company was out of business. It was also reasonable for him to be concerned about fraud because there are many unsavory characters in the cryptocurrency space, and the manner of service was very different in Canada than the manner of service familiar to him in Russia. Sachkov moved promptly once he understood that default judgement(s) had been obtained against him. Sachkov has an arguable defence on the merits. He denies destroying the Code without authorization or providing it to any other party and the Plaintiff has no proof that he did so. He disputes that any of his conduct could have destroyed the Plaintiff company and there is evidence that the Plaintiff company failed for other reasons.

Notice of the Proceedings

There is no dispute that Sachkov was served with the claim on February 9, 2021 by way of personal service. He was noted in default on May 17, 2021 but not advised of same then. There is also no dispute that Sachkov was served with further materials. On August 23, 2022 Sachkov was served with the Motion Record for the motion for judgment and the Noting if Default was contained therein. On August 30, 2022 he was served with the unsigned endorsement of Black J. requiring service of the Motion Record and a draft order. On September 21, 2022 he was served with a supplementary Motion Record and Factum. On October 5, 2022 Myers J. granted judgment on liability for breach of contract only (the Liability Judgment). On December 16, 2022 Sachkov was served with the Motion Record for the motion for judgment on damages and the Liability Judgment was contained therein. On December 21, 2022 Myers J. granted judgment in favour of the Plaintiff in the amount of \$1,744,711 plus \$21,525 for costs (the "Damages Judgment"). On February 13 and 14, 2023 the Plaintiff garnished Sachkov's bank account and wages. Sachkov says that this was the first time he knew that judgments had been obtained and the documents were "real". The Damages Judgment was not served until February 17th, 2023 when his lawyer requested same. After that, counsel for the Defendant attended CPC court on February 28, 2023 and a case conference on March 31, 2023. The Defendant's motion to set aside the default judgments was served prior to the case conference. May 12, 2023

was the first available date for an urgent motion that did not create a conflict for counsel.

In *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 (CanLII) at para 48 - 49 the court set out the test for setting aside default judgment:

The court must consider the following three factors:

- (a) whether the motion was brought promptly after the defendant learned of the default judgment;
- (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules; and
- (c) whether the facts establish that the defendant has an arguable defence on the merits.

To this list, I would add the following two factors the court should have regard to, as set out in *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.* [2007] O.J. No 1685, 2007 ONCA 333, 87 O.R. (3d) 479 (C.A.), at para. 2:

- (d) "the potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed"; and
- (e) "the effect of any order the court might make on the overall integrity of the administration of justice".

Plausible Explanation for the Default

A default judgment will not be set aside if a defendant makes an intentional decision not to defend a lawsuit (*Sunlife Assurance Company of Canada v. Premier Financial Group Incorporated*, 2013 ONCA 151 at para 1). I find the defendant did not make an intentional decision not to defend the claim. He did not understand the claim was legitimate. To make an intentional decision, one must understand the underlying facts.

Sachkov says he did not defend the action or take steps in the face of service of the subsequent documents because he held an honest belief that they were fraudulent. In *Theralase Technologies Inc. v Lanter*, 2021 ONSC 943 (CanLII) the court rejected the Defendant's explanation that he thought the documents sent to him were "a scam". The facts of that case are distinguishable from the present case. In *Theralase*, the Defendant's evidence was internally inconsistent; he said he quickly scanned and deleted all the correspondence, he said he never read the material because he thought it was a scam and he also said that he quickly read the material. He provided no further evidence as to why he thought it was a scam.

The present case is different. Sachkov had not heard from his former employer for two and one half (2 ½) years when he was served with the claim. He "Googled" the company and discovered it was out of business. In 2018 the company started laying off employees and by 2019 had ceased operations in Canada. The company attempted to carry on business in Switzerland but in 2021 it was in liquidation in Switzerland and is now out of business altogether. It would be reasonable to expect that if Sachkov did steal the Code and destroy the company, Equibit would have moved for an injunction for taking confidential information as it was entitled to do under the terms of his employment agreement, or at the very least had a lawyer write a demand letter. Equibit admits it made no prior demands of Sachkov about the matters that are the subject of the Statement of Claim.

Sachkov also says there are a number of unsavory characters in the cryptocurrency space and fraud is a real risk. Equibit admits there are many dangerous characters in the cryptocurrency industry and fraud is rampant. In 2018 someone approached Sachkov, said they were from the Canadian government and said they were investigating Equibit. Sachkov reported this to the co-founder of the Plaintiff company Chris Horlacher ("Horlacher") who told him that the government agent was trying to perpetrate a scam. This was also a basis for Sachkov's belief that the documents he received were fraudulent.

Sachkov also says he believed the documents were fraudulent because he was unfamiliar with the Canadian legal system. Sachkov is from Russia and came to Canada in 2013 when he was 36 years old. At the time the claim was served he was unfamiliar with the Canadian legal system. The Plaintiff points to the fact that Sachkov had been in Canada for seven (7) years when he was served with the claim and reads and writes English. Sachkov does not say he could not read or understand the documents. He says he believed they were fraudulent. The Plaintiff says

Sachkov had familiarity with the Canadian legal system because he applied for immigration status and got a speeding ticket. I note he paid the speeding ticket without contesting it and there was no evidence Sachkov had ever been sued in Canada. Sachkov provided evidence that in Russia when legal documents are served, they come with a subpoena which is sealed and signed, and they are served by a court official or process server from the Official Post Office of Russia who introduces themselves and asks the person served to sign confirmation that the person has received the documents.

Sachkov took no steps to verify the documents that he received: He did not call the Plaintiff's counsel and he did not call the police. In addition to his belief that the documents served were fraudulent, Sachkov explains his failure to act by the fact that he was personally distracted by the Russian invasion of the Ukraine. Being Russian, this was an issue of great concern to him, also his parents lived in the Ukraine and he and his wife were consumed with trying to get them out of the country.

In *DH Partnership Ltd. v. 10313149 Canada Inc.*, 2023 ONSC 667 (CanLII) Regional Senior Justice C. MacLeod said:

Failure to read documents and ignorance of the law or legal procedure is generally insufficient to relieve a party of the legal consequences if they fail to comply with their obligations. This is particularly so for reasonably sophisticated businesspeople with access to legal advice. If the defendants were in any doubt about the significance of the document, they could (and should) have forwarded it to their legal counsel. On the other hand, default judgment and loss of the right to defend is a drastic outcome. The evidence that the defendants misunderstood their obligations and their failure to defend was unintentional is uncontradicted. This explanation for failing to defend is a barely plausible explanation particularly when it is combined with evidence suggesting the defendant Hong had been purposely evading service, when there had been several demand letters and a notice of sale. Nevertheless, it may be sufficient to open the door to relief if the other factors weigh sufficiently in their favour. There is no evidence that they consciously decided not to defend the action and have now changed their minds

I find that that the Plaintiff has provided a plausible explanation that he believed that the Statement of Claim was fraudulent and all subsequent documents were part of the continuing fraud. This explanation is sufficient, particularly in view of the other factors considered below.

Motion Brought Promptly

Even if there is an explanation for not defending and an arguable defence on the merits, the court may decline to set aside default judgment unless the Defendant moves expeditiously or explains his undue delay in doing so (*Frankie Tomatto's Woodbine Inc. v. De Groot*, 2015 ONSC 1545 (CanLII) at para 25).

Sachkov moved very promptly after he knew that there was a default judgment against him on February 13 and 14, 2023 when his bank account and wages were garnished and on February 17, 2023 when the default judgment was served on him. His counsel attended CPC court less than two (2) weeks later on February 28, 2023 and a case conference on March 31, 2023. Sachkov's motion to set aside the default judgments was served prior to the case conference. May 12, 2023 was the first available date for an urgent motion that did not create a conflict for counsel.

Here, the Plaintiff did follow the best practice enunciated in *Elekta Ltd. v Rodkin* 2012 ONSC 2062 (CanLII) and served both of the motions for default judgment. On August 23, 2022 Sachkov was served with the Motion Record for the motion for judgment and the Noting if Default was contained therein. Sachkov was served with the Motion Record for judgment on damages on December 16th, 2022 and it did contain the Liability Judgment so, arguably, he knew then that there was a judgment against him albeit on liability only. Sachkov says he believed that all of the documents were part of an ongoing fraud. In any event, he took steps to bring this motion within two and one half (2 ½) months of having been served with the Liability Judgment.

In most cases, following best practices will ensure that the defendant has the materials and satisfy the court that the defendant knew about the motion for default judgment, made an intentional decision and elected not to respond. In the unusual circumstances of this case, Sachkov had the documents but believed they were fraudulent. This was not a mere allegation on his part, he provided substantial evidence for the basis of this belief. I find that Sachkov moved promptly once he understood that the Plaintiff had a judgment against him. Alternatively, I find that he has explained his delay adequately.

Arguable Defence on merits

Sachkov has an arguable defence on the merits. He denies breaching his employment agreement, actively trying to destroy the Code or providing it to any other party. The Plaintiff has no proof that he did so. Horcaher admits there are no documents to support the allegation that Sachkov stole the Code. During his employment, Sachkov stored the Code and on a repository on the GitHub website which was created by the Plaintiff. GitHub is a public forum which is a repository for uploading code so that others can work on it. Sachkov says the Code is still there and Equibit has access to it.

In his draft Statement of Defence, Sachkov says that during his employment and in order to test the Code he reinstalled the operating system on his laptop computer. This was done in July 2018 in front of the Plaintiff's quality control officer who is also a co-founder of the company. There was no evidence from the quality control officer in the Plaintiff's materials for default judgment. The Plaintiff wanted a new feature and Sachkov reinstalled the Windows operating system on his laptop to create same and then he discovered that parts of the Code were missing. He reported this to the company, they started an investigation to attempt to fix the issue. Sachkov asked for directions and they never responded. In the summer of 2019, the Plaintiff was working on a new version of the software with other developers and never asked Sachkov to assist. On December 19, 2018 the Plaintiff released a business plan stating that it was going to launch in 2019.

There are no notes in the company's financial statements up to 2018 that disclose that the Code was destroyed. There was no evidence as to why Sachkov would want to destroy the company for which he worked. The Statement of Claim alleges that he took the Code to Russia. His passport proves he did not travel to Russia at the relevant time. He did vacation in New York but swears that he did not meet with CSIS.

Significantly, these allegations were raised for the first time in the Statement of Claim issued two (2) years after Sachkov left the company.

There is also a serious causation issue regarding whether the alleged breach of contract destroyed Equibit and caused the damages claimed. As Myers J. noted in his Endorsement dated December 21, 2022 at para 15:

In explaining why it failed and did not just spend a few months writing new code, the plaintiff's witness explains that, at the time, it was cash strapped with only modest angel investment on board. Regulators were becoming more interested in the market. Capital was not so freely available. The company did not have the financial wherewithal to withstand a few months deferral of its launch to allow for re-coding. That does not fill one with confidence in assessing its prospects but for the breach by Mr. Sachkov.

and at para 18:

To assume away all risk in the cryptocurrency start-up world is very problematic....

While the Defendant has not retained an expert on damages or causation, Sachkov swore he witnessed continued mismanagement of Equibit and Horlacher did file a text from an investor accusing him of spending the funds invested on luxuries for himself. Horlacher issued a press release on August 29, 2022 in which he says Equibit was destroyed by CSIS and the Canadian government, and also blames the sudden collapse of crypto markets in late 2018.

Sachkov has arguable defences on liability, damages and causation. This factor weighs heavily in his favour.

Prejudice and the Interests of Justice

The Plaintiff says it is prejudiced because it has incurred costs in obtaining the default judgments. This is not actual prejudice for which the Plaintiff cannot be compensated by costs. There is no evidence that witnesses have died or are unavailable, no evidence that documents are lost or destroyed and the action was in its infancy when the default occurred. The Plaintiff's bald allegation that it may not be able to enforce a judgment later is not supported by evidence. Sachkov does not point to any specific prejudice other than the prejudice that is always present if the Defendant is not successful. Prejudice is only one of the factors. Where there is a meritorious defence, "...the prejudice in requiring the defendant to pay a judgment that could have been defeated on the merits may weigh

strongly in favour of setting aside a default judgment even if the explanations for the default and delay are not entirely satisfactory” (*Baron Finance Incorporated v. Marchuk*, 2018 ONSC 6832 (CanLII) at para 59). Here, Sachkov has a judgment against him for \$1,744,711 having had no opportunity to defend the case on the merits in a case where liability, causation and damages are live issues and the case may well be defeated on the merits.

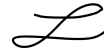
Sachkov has a plausible excuse for the default, he moved promptly once he understood the documents served were not fraudulent and he has an arguable defence on the merits. Therefore, he meets the test for setting aside default judgment.

The Parties may make submissions regarding costs of no more than 5 pages in length (in addition to Costs Outlines) on or before Tuesday, May 30, 2023, by 5:00 p.m.

Additional pages attached: Yes No

May 24 , 20 **23**

Date of Endorsement (*Rule 59.02(2)(c)(ii)*)



Signature of Judge/Case Management Master (*Rule 59.02(2)(c)(i)*)