Court generously interprets timeframe for foreign state to set aside default judgment

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Introduction

In a recent Ontario Superior Court of Justice decision the court held that a foreign state seeking to set aside a default judgment against it should not be hindered by the State Immunity Act.(1) In *McDonald v The United States of America*(2) the court dismissed the plaintiff's motion for leave to appeal a decision setting aside a default judgment against the United States on the basis that a purposive interpretation of the State Immunity Act suggests that foreign states may have longer than 60 days to apply to have a judgment set aside as provided in the act. The case provides useful insights to lawyers litigating disputes involving foreign states and the interpretation of the State Immunity Act, as well as those involved in appellate advocacy generally. In rejecting the plaintiff's arguments to appeal the decision, the court found that the circumstances for leave to appeal require that the conflicting decision grounds under Rule 62.02(4)(a) of the Rules of Civil Procedure(3) engage a direct contradiction between judgments on the particular statutory provision in question, and not merely a different exercise of discretion.

Background

Plaintiff Sandra McDonald was employed by the defendant, the US embassy, from 1982 to 2011. She sued the defendant for wrongful termination as a result of an extended sick leave. The claim was issued on July 14 2011 and served on the defendant the following week. However, due to inadvertence and an apparent administrative oversight involving the US State Department, the claim did not reach the defendant's legal counsel. In April 2012 the plaintiff advised the defendant that she was taking default proceedings and moved for default judgment, which was ultimately granted.

By August 27 2012 the Department of Foreign Affairs and International Trade confirmed by certificate that it had sent the default judgment to the defendant. Even after the case was published in the *Ottawa Citizen* in September 2012, the defendant took no action. However, on receiving a copy of the judgment in November 2012 from the plaintiff, the defendant advised that it intended to respond to the action. It was not until May 27 2013 that the defendant moved to have the judgment set aside. At the motion to set aside the default judgment, the defendant argued that the delays could be explained through a series of inadvertences and errors and that there was a genuine issue for trial.(4) In granting the motion to set aside the default judgment, the motion judge ruled that while the circumstances of the default were "extraordinary", the explanation was still plausible.(5) The plaintiff unsuccessfully argued that the defendant was barred due to Section 10(4) of the State Immunity Act, which states that a foreign state "may" apply to have a default judgment set aside within 60 days of being served with the judgment.(6) The motion judge found that Section 10(4) does not impose a mandatory time limitation on the defendant's motion to set aside the judgment. Rather, Section 10(4) was a "procedural guideline" for a foreign government facing default judgment. The word 'may' was permissive, not restrictive.(7)

Decision

On the plaintiff's motion seeking leave to appeal, the Ontario Superior Court of Justice rejected the plaintiff's argument that the State Immunity Act's purpose was to restrict the notion of state immunity. Rather, as the defendant argued, the intent of the act was to codify the existing common law on state immunity, giving them at least as many rights as domestic parties.(8) Section 10(4) of the State Immunity Act offered a guaranteed option for setting aside a default judgment – one which did not prevent a court from setting aside a default judgment on another basis.(9)

The court held that it was appropriate to interpret Section 10(4) in a manner consistent with the purpose of the State Immunity Act, which could be ascertained in Section 3(1), which codified state

immunity and framed any limitation on this immunity as an exception.(10)

Pursuant to the Ontario Rules of Civil Procedure, leave to appeal shall not be granted unless, among other things, "there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal".(11) Here the plaintiff argued that the conflicting decision requirement was met because the motion judge's reasons conflicted with the approach and other decisions to interpreting and applying the State Immunity Act's procedural provisions and their interaction with the rules. The plaintiff argued that the motion judge's analysis relied on different principles of statutory interpretation concerning the use of the term 'may' in the provision at issue and interpreted the State Immunity Act by reference to and in the context of the Ontario rules. The plaintiff cited case law from Ontario and Quebec holding that procedural rules established under the State Immunity Act do not augment corresponding provisions under the rules, but instead displace the ordinary procedural requirements for litigation involving foreign states. Moreover, the plaintiff maintained that the motion judge's approach to the State Immunity Act conflicted with the reasoning in other Canadian jurisprudence on this point. Although the plaintiff cited decisions dealing with other sections of the State Immunity Act, there were no decisions interpreting Section 10(4) in particular.

Overall, the court held that a conflicting decision cannot be found just because a court applies its discretion differently. A different legal principle must be applied to solve a comparable legal problem. Since none of the cases cited by the plaintiff specifically referred to Section 10(4), there could be no conflict in interpretation because there was no conflicting decision in Ontario or elsewhere "on the point in issue".(12)

Comment

McDonald is the first decision to interpret Section 10(4) of the State Immunity Act. Given the apparently flexible timeframe to set aside a default judgment, lawyers representing foreign states in Ontario should be aware that, even if 60 days have passed after the judgment has been served on the foreign state, the window to have it set aside may not be closed and will not be strictly enforced. At the same time, it would be unwise to assume that this timeframe is indefinite. As noted in the original decision, the test to set aside a default judgment ultimately involves discretion. Whether the decision will be set aside still depends on, among other things, the defendant's actions, whether the defendant has raised a genuine issue for trial and the interests of justice in the particular case. Even if those hurdles can be overcome, the defendant could still be faced with a burdensome costs award.(13) Similarly, lawyers on the opposing side may want to think twice before being too quick to note a foreign state in default in light of this case.

While the decision is less significant for its comments on the requirements for leave to appeal, it serves as an important reminder of how not to build a legal argument for leave to appeal under Rule 62.02 of the Ontario Rules of Civil Procedure. Jurisprudence must be examined carefully to determine whether an actual conflict exists, and courts will require those seeking leave to appeal to demonstrate a contradiction with precision, involving the same statutory provision or legal principle in question.

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Endnotes

(1) RSC 1985, c S-18.

(2) 2014 ONSC 5819.

(3) RRO 1990, Reg 194, r 62.02 (4)(a).

(4) 2014 ONSC 1557 at para 5.

(5) *Ibid* at para 11.

(6) *Ibid* at para 9 (in the reported judgment the plaintiff is erroneously referred to as the defendant in this paragraph).

(7) *Ibid*.

(8) *McDonald*, *supra* note 2 at paras 17-19, 23, 29.

(9) *Ibid* at paras 20-21.

(10) *Ibid* at paras 32-34.

(11) *Rules*, *supra* note 3, r 62.02 (4)(a).

(12) *McDonald, supra* note 2 at paras 9, 30.

(13) *Supra* note 4 at paras 2, 15-16.

Jon Pinkus, student, assisted with the preparation of this update.