

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20131210**

**Docket: A-126-13**

**Citation: 2013 FCA 288**

**CORAM: EVANS J.A.  
STRATAS J.A.  
WEBB J.A.**

**BETWEEN:**

**WALDEMAR BABIS, CARRYING ON BUSINESS  
AS DOMENIC PUB**

**Appellant**

**and**

**PREMIUM SPORTS BROADCASTING INC.**

**Respondent**

Heard at Toronto, Ontario, on December 5, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on December 5, 2013.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**EVANS J.A.**

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20131210**

**Docket: A-126-13**

**Citation: 2013 FCA 288**

**CORAM: EVANS J.A.  
STRATAS J.A.  
WEBB J.A.**

**BETWEEN:**

**WALDEMAR BABIS, CARRYING ON BUSINESS  
AS DOMENIC PUB**

**Appellant**

**and**

**PREMIUM SPORTS BROADCASTING INC.**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on December 5, 2013).**

**EVANS J.A.**

[1] This is an appeal by Waldemar Babis carrying on business as Domenic Pub from a decision of the Federal Court in which Justice Gagné (Judge) dismissed his motion under rule 399(1) of the *Federal Courts Rules*, SOR/98-106 (Rules). The decision is reported at 2013 FC 235.

[2] Mr Babis' motion was to set aside a default judgment, dated August 26, 2011 (Court File No. T-1938-10). The judgment was issued by Justice Mandamin in favour of Premium Sports Broadcasting Inc. (Premium), the respondent in the present appeal, on the failure of Mr Babis to file a Statement of Defence or to respond to its action for copyright infringement.

[3] Justice Mandamin found that Mr Babis had knowingly infringed Premium's copyright in Ultimate Fighting Championship (UFC) pay-per-view matches and events by broadcasting them at the Domenic Pub without Premium's authorization.

[4] The default judgment permanently enjoined Mr Babis, the Domenic Pub and their employees from further infringements of Premium's copyright in UFC events, and ordered him to pay \$20,000 in damages and costs of \$1,500. Since then, Premium has taken steps to collect the judgment debt.

[5] The Judge whose decision is the subject of the present appeal stated that, in order to succeed on his motion to set aside the default judgment, Mr Babis had to satisfy each part of a three-part test by showing that:

- (i) he has a reasonable explanation of his failure to file a Statement of Defence;
- (ii) he has a *prima facie* defence on the merits of Premium's claim; and
- (iii) he has moved promptly or within a reasonable time to set aside the default judgment.

[6] This is the correct legal test. Therefore, this Court can only intervene if the Judge exercised her discretion under rule 399 of the Rules on the basis of an error of principle or a serious misapprehension of the facts, or in an otherwise unreasonable manner.

[7] On the first part of the test the Judge found that Mr Babis had been served with a copy of Premium's Amended Statement of Claim on December 5, 2010. The material was left with an employee at Mr Babis' place of business who apparently had control or management of it. Mr Babis was thus duly served in accordance with rules 128(1)(c) and 131.1(b).

[8] Mr Babis alleged that he only learned of the Amended Statement of Claim nearly two years later, in September 2012. He argued that he had not been properly served earlier because documents were left with part-time staff, who had failed to bring them to his attention.

[9] After carefully reviewing the evidence regarding the service of the Amended Statement of Claim, as well as Mr Babis' failures to respond to documents served on him after December 5, 2010 in related proceedings, the Judge held that he had been served in accordance with the Rules, and was responsible for instructing his employees to hand over to him any legal documents addressed to him that they received. Accordingly, Mr Babis had not provided a reasonable explanation of his failure to file a Statement of Defence.

[10] Recognizing that this was sufficient to dismiss Mr Babis' motion, the Judge nonetheless briefly considered the other two parts of the test.

[11] She held that he had not adduced evidence of a *prima facie* defence to Premium's claim for copyright infringement. Affidavits sworn by employees and friends were silent on whether a UFC event was shown in the Domenic Pub on one of the nights in question, or whether, to their knowledge, UFC events were ever shown there.

[12] Finally, the Judge held that Mr Babis had not moved promptly after September 2012 when he said that he first learned of Premium's Amended Statement of Claim. He did not retain counsel until November 1, 2012, and the motion to set aside the default judgment was not filed until January.

[13] In our view the Judge's reasons are clear and comprehensive, and reveal no error warranting our intervention in the exercise of her discretion. In particular, there was ample evidence that enabled the Judge to find that the Amended Statement of Claim had been served in accordance with the Rules.

[14] The appeal will therefore be dismissed with costs fixed in the lump sum amount of \$3,000, inclusive of disbursements and any applicable taxes.

"John M. Evans"

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-126-13

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE GAGNÉ OF THE  
FEDERAL COURT OF CANADA, DATED MARCH 6, 2013, DOCKET NO. T-1938-10**

**STYLE OF CAUSE:** WALDEMAR BABIS, CARRYING  
ON BUSINESS AS DOMENIC PUB  
v. PREMIUM SPORTS  
BROADCASTING INC.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 5, 2013

REASONS FOR JUDGMENT OF

STRATAS J.A.  
WEBB J.A.

DELIVERED FROM THE BENCH BY:

EVANS J.A.

**APPEARANCES:**

Leo Klug

FOR THE APPELLANT

Kevin W. Fisher

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Klug Law LLP  
Barristers and Solicitors  
Markham, Ontario

FOR THE APPELLANT

Basman Smith LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE RESPONDENT