

ONTARIO
Superior Court of Justice
(Name of Court)

Court File Number
FS-17-00418781

at 393 University Avenue,,10th Floor
Toronto, ON M5G 1E6

Endorsement

(Court office address)

Date	Applicant(s):		
December 21, 2017	JOHN KOKKINIAS	<input checked="" type="checkbox"/>	Present
Justice Kristjanson	Counsel: William Fanjoy	<input checked="" type="checkbox"/>	Present
		<input type="checkbox"/>	Duty Counsel
	Respondent(s): ILIANNA KOKKINIAS	<input checked="" type="checkbox"/>	Present
	Counsel: Laura Settanni	<input checked="" type="checkbox"/>	Present
		<input type="checkbox"/>	Duty Counsel

This is a motion to set aside the noting in default of the Respondent, varying the temporary order of Justice Moore dated November 1, 2017, and extending the time for filing of the Answer. The motion is granted.

The Application was served August 1, 2017. The Respondent did not file her Answer within the time required, and Justice Moore made the order at the Case Conference directing that she file her Answer and Financial Statement within 30 days, failing which the Order would go which among other things,(a) grants exclusive possession of the Matrimonial Home (which the Respondent now occupies with the adult daughter of the parties) to the Applicant January 15, (b) directs a listing of the home for sale with control by the Applicant; and (c) prevents the Respondent from claiming spousal support. She was self-represented at the Case Conference.

The Respondent sought to obtain a lawyer, as detailed in her affidavit. Critical facts are that a lawyer, Ms. Spingos, wrote on November 29, indicating that she was in the process of being retained, and requesting an extension until January 8. Mr. Fanjoy replied, advising that his position would depend on whether all materials would be delivered by January 8, and asking whether the Respondent would consent to the listing of the Matrimonial Home early in the New Year. Ms. Spingos did not reply.

On Dec. 7, Ms. Spingos advised she could not represent the Respondent, and referred the matter to another lawyer, Sage Harvey,

who agreed to represent the Respondent to bring a motion to vary or set aside Justice Moore's temporary order and permit an extension of time for filing the Answer/Financial Statement. This appears to be a limited retainer.

On December 8, Ms. Settani, an associate in Mr. Harvey's office, contacted Mr. Fanjoy advising "our office has just been retained" and requesting an extension of 30 days. Mr. Fanjoy replied on December 8: "Your client is out of time on this and my client will not grant an extension."

The Order was issued on December 14, 2017.

As a result, the Respondent brought this motion December 15, to vary or set aside the Order of Justice Moore, with a draft Answer attached indicating that she is seeking spousal support, exclusive possession of the Matrimonial Home, and an unequal division of net family property.

I find that the Respondent has met the criteria for varying or setting aside the default judgment of Justice Moore. The Respondent brought the motion as soon as possible; provided a plausible explanation for the default; and has an arguable case on the merits: *Gibson v. Ulrich*, 2015 ONSC 5679 at para. 18.

As importantly, I am concerned that when the self-represented party retained counsel, and both lawyers asked for reasonable extensions in the circumstances, that the Applicant should have agreed to such extension. In the circumstances, the setting aside of the default judgment was almost inevitable. Instead, what has happened is that both parties have had to incur substantial expense, to obtain what should have been an accommodation for newly retained counsel. Civility and professionalism require reasonable accommodations. At the same time, the Respondent should have retained counsel earlier. The matter is complicated by Ms. Spingos' failure to respond to the Nov. 29 letter from Mr. Fanjoy, and that lawyer's referral on Dec. 7 to another lawyer. When that new lawyer was retained, one week after the deadline, and ultimately served the motion materials, I would have expected the Respondent to consent, or at least not oppose, this motion in the circumstances. Both parties have failed to meet conduct expected by the Court. I urge both parties to act reasonably in the future.

Neither party served an offer to settle. The Applicant sought costs of the motion. He did not succeed and is not entitled to costs. He seeks costs essentially as a matter of prejudice, and to sanction the Respondent's conduct given that the Respondent failed to meet the terms of Justice Moore's Order. For the reasons given above, I find that the Applicant acted unreasonably in opposing the setting aside/variance, and find that no costs should be awarded to the Applicant. While the Respondent, the successful party, is prima facie entitled to costs, in the circumstances, no costs should be awarded.

The motion is granted. Order to go as follows:

1. The November 1, 2017 Order of Justice Moore is varied by setting aside all provisions except para. 10, in that the Applicant may obtain a Family Law Value for valuation date of September 23, 2015, without the requirement of the Respondent signing the necessary valuation forms with FSCO or his pension administrator.

2. The following timetable is set:

January 8 – Respondent to serve and file Answer and Form 13.1 Financial Statement

January 15th – Financial disclosure by both parties to be exchanged

January 24 – Case Conference set for 12:00 noon

Case conference will specifically address issues regarding disposition of the matrimonial home and interim spousal support.

January 30 – Both parties to complete non-financial disclosure and provide to the other side

February 14 – Questioning, both sides, half-day each

3. The Respondent to pay the outstanding costs of the November 1, 2017 case conference - \$1,500 – by delivering a cheque to the Applicant's counsel by 12 noon December 22d

4. The Applicant is to remove personal items from the Matrimonial Home on a date in January to be agreed upon, and the Respondent shall cooperate in setting the date and affording access for those purposes. The parties should jointly agree on what is to be removed in advance, since the Applicant has indicated a truck is required which implies a large quantity of personal items.

5. No costs of this motion.



Justice Kristjanson