

**CITATION:** Advanced Farms Technologies-Ja, Limited v. Yung Soon Farm Inc. et al., 2020  
ONSC 3831  
**COURT FILE NO.:** 17-00588255-0000  
**DATE:** 20200619

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ADVANCED FARM TECHNOLOGIES-  
JA, LIMITED, carrying on business as  
ADVANCED FARM TECHNOLOGIES,  
JA. LTD., and ADVANCED FARM  
TECHNOLOGIES, JAMAICA

Plaintiff

**- and -**

YUNG SOON FARM INC., MICHAEL  
CHUNG, WALTER CHUNG, and  
STEPHEN CHUNG

Defendants

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) *M. Hussein*, for the Plaintiff  
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) *J. H. Chow*, for the Defendant, Yung Soon  
) Farm Inc.  
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) **HEARD:** In writing, June 15-19, 2020

**REASONS FOR DECISION**

**LEIPER J.**

**INTRODUCTION**

[1] The plaintiff brought a motion to strike out the statement of defence and counterclaim of the defendant, Yung Soon Farm Inc. pursuant to Rules 60.12 and 57.03(1) of the *Rules of Civil Procedure*.

[2] In the alternative, the plaintiff seeks an order dismissing the defendant/plaintiff Yung Soon Farm. Inc.'s (the defendant) counterclaim for delay.

[3] The claim concerns non-payment for papayas which were delivered in September-October of 2017, at a price of \$48,238.49. The plaintiff says it was due funds for the papayas. The defendant

defends on the basis that the plaintiff was not the contracting party, and, in any event, the papayas were defective. The defendant counterclaimed for \$5 million in damages for breach of contract and for \$1 million in punitive damages.

[4] The plaintiff submits that the defendant has failed to abide by the timetable scheduled on October 2, 2019, failed to pay costs within 60 days as ordered on that date, and has been non-responsive to correspondence and telephone communications directed to moving the litigation forward since August of 2019. The plaintiff argues that the defendant has displayed a pattern of using delay and putting the plaintiff to additional cost of bringing motions to enforce court orders.

[5] The defendant's only explanation for its past conduct is that it believes the litigation is vexatious. The defendant asks that this motion be dismissed because on June 11, 2020, after this motion was scheduled, it complied with the October 2, 2019 order made by Master Short by delivering its affidavit of documents and paying the overdue costs as ordered.

## **HISTORY OF THE LITIGATION**

[6] In December 2017, the defendants were personally served with the statement of claim brought under the simplified procedure. No statement of defence was filed.

[7] In January of 2018, the plaintiff obtained default judgment.

[8] In August 2018, the defendants set aside the default judgment, on the condition that they pay costs, and deliver a statement of defence within 30 days. At the same time, the plaintiff discontinued the action against the individual directors of the corporate defendant.

[9] The defendant delivered its statement of defence and counterclaim, which sought \$5 million for breach of contract and \$1 million in punitive damages. Delivery of this pleading converted the action from simplified to ordinary procedure.

[10] The plaintiff moved to strike portions of the pleading of the defendant: the defendant delivered a fresh as amended statement of defence in January 2019.

[11] On June 7, 2019, the plaintiff delivered its affidavit of documents.

[12] The plaintiff sent correspondence and took the following procedural steps after it delivered its affidavit of documents as follows:

- a. **July 11, 2019:** Plaintiff counsel's office wrote to defendant's counsel to attempt to schedule examinations for discovery. Counsel to the plaintiff advised defendant's counsel that, "We have tried contacting your office numerous times and only reach your voice mail. You have not returned any of our recent voice mails."
- b. **July 24, 2019:** Plaintiff's counsel set dates for examination for discovery, as it had not heard from defendant's counsel nor had it received its affidavit of documents.

- c. **August 12, 2019:** Four days before the scheduled examinations for discovery, defendant's counsel advised that his client was unable to attend and asked the plaintiff to provide further dates. Counsel did not advise when his client would provide its affidavit of documents.
- d. **August 27, 2019:** Plaintiff's counsel made a further request for the defendant's affidavit of documents and provided available dates for examinations between September and October 2019. Plaintiff's counsel advised that if defendant's counsel did not respond it would schedule a motion to compel the defendant's affidavit of documents and would issue a further notice of examination. Defendant's counsel did not respond to this correspondence.
- e. **September 13, 2019:** Plaintiff's counsel unilaterally set an examination for discovery of the defendant for October 17, 2019 and sent correspondence to the defendant's counsel advising of this date. Defendant's counsel did not respond to this correspondence.
- f. **September 23, 2019:** Plaintiff's counsel served a motion record on the defendant's counsel with a return date of October 2, 2019, seeking the defendant's affidavit of documents and an order for the defendant to attend the scheduled examination for discovery. The defendant filed no responding materials for this motion. Defendant's counsel did not respond to this correspondence.
- g. **October 2, 2019:** The court imposed a timetable with the consent of defendant's counsel and ordered costs of \$1500 payable to the plaintiff in 60 days. The order required the defendant to deliver its unsworn affidavit of documents by November 1, 2019. The defendant did not comply with the timetable. The defendant did not pay the costs ordered within 60 days.
- h. **November 4, 2019:** Plaintiff's counsel sought to formalize the October 2, 2019 endorsement. In that letter, counsel sought the status of the defendant's affidavit of documents. Plaintiff's counsel also put defendant's counsel on notice that it would move to strike the defence. Defendant's counsel did not respond to this correspondence.
- i. **March 6, 2020:** Plaintiff's counsel enclosed a notice of examination in aid of execution seeking payment for the outstanding cost award from the October 2, 2019 motion. Plaintiff's counsel also sought dates for a motion to strike the defendant's defence for failing to abide by the terms of the October 2, 2019 endorsement. This letter asserted that "It is clear that your client has no interest in litigating the action." Defendant's counsel did not respond to this correspondence.
- j. **March 16, 2020:** Plaintiff's counsel wrote to inform defendant's counsel that due to the COVID-19 pandemic the court would not schedule its motion. Plaintiff's counsel sought a virtual mediation in accordance with Rule 24 of the *Rules of Civil Procedure*. Defendant's counsel did not respond to this correspondence.

- k. **May 12, 2020:** Plaintiff's counsel informed defendant's counsel via email of the chamber's appointment returnable on May 15, 2020. Defendant's counsel did not respond to this correspondence.
- l. **May 13, 2020:** Plaintiff's counsel provided defendant's counsel with a proposed schedule for the litigation ahead of the chamber's appointment. Defendant's counsel did not respond to this correspondence.
- m. **May 15, 2020:** The court convened a chambers appointment. Defendant's counsel did not attend. This motion was scheduled on that date and timelines set for delivery of motion materials.

[13] On June 10, 2020, the defendant delivered its unsworn affidavit of documents and paid the costs order that was due on December 1, 2019. The defendant gave no explanation for the delays in delivering the affidavit of documents or paying the costs that were due on December 1, 2019. These steps were taken after the plaintiff had taken fresh steps to enforce them, attended in court and prepared and served its motion record and factum for this motion.

[14] Although the plaintiff's motion record and factum described the correspondence and the telephone calls that were not acknowledged or answered between August 27, 2019 until June 11, 2020, the defendant provided no explanation for the failure to respond during that period of time.

[15] On June 11, 2020, the defendant sent a cheque for the outstanding costs due to the plaintiff under cover of a letter which included an apology for the delay in providing the cheque.

[16] On June 12, 2020, the defendant delivered its responding factum in this motion under cover of a letter which apologized for the delay, proposed mediation, and asked the plaintiff for its position on posting security for costs of the litigation. The responding motion record included an affidavit from an officer of the defendant, Mr. Chung, who stated that the defendant believes it has a strong case and intends to proceed expeditiously and will participate in mediation. Mr. Chung's affidavit provided no explanation for any of the delays or the failure to abide by Master Short's order of October 2, 2019.

#### **APPLICATION OF THE PRINCIPLES ON A RULE 60.12 MOTION**

[17] Rule 60.12 of the Rules provides for sanctioning parties who do not comply with an interlocutory order. The court may stay the proceedings, dismiss a proceeding, strike a defence or make such other order as is just.

[18] Justice Bellamy summarized the approach to Rule 60.12 in *Dew Point Insulation Systems Incorporated v. JV Mechanical Limited*, 2009 CanLII 71721. The purpose of Rule 60.12 is to give meaning to the Rules and to sanction repeated procedural breaches. However, striking a defence is an "extreme remedy." It should only be used as a last resort, where there has been an utter disregard of court orders or when the moving party can demonstrate prejudice.

[19] Here the plaintiffs argue it is the former problem that requires a remedy: that is an utter disregard of court orders. The defendant submits that although late, it has complied with the

court's orders. Further, the defendant submits there is no evidence of prejudice to the plaintiff because of these delays.

[20] The defendant aligns itself with the decision of Horkins, J. in *Signal Chemicals Ltd. v. Singh*, 2014 ONSC 5228 in which a single failure to comply with a court order did not support the extreme remedy of striking out the statement of defence. Horkins J. noted that in motions such as these, "the difficult issue "is to determine when non-compliance reaches the point that it can no longer be excused.'" The court must grapple with the nature of the default and how it impacts the court's ability to do justice: *Signal Chemicals* at para. 21.

[21] In a proceeding that led to the striking out of a statement of defence and counterclaim, the action had been ongoing for four years. The defendant had only complied with next steps after deadlines were set and at then at the last minute, when facing motions to dismiss: *Cheng v. Li*, 2005 CanLII 10902 (ON SC).

[22] I have concluded that the actions of the defendant merit an order striking the statement of defence and counterclaim. I make this finding based on five aspects of the record.

[23] First, the defendant has taken no action to move forward the litigation or to act without a court order to move the litigation forward: this can be seen in the failure to file a defence in 2018, followed by the failure to agree to a timetable for delivery of affidavits of documents and other procedural steps in 2019 and the failure to correspond with counsel in 2020 on the suggestion to engage in mediation. In each of these three steps over a two- year period, the defendant has not taken a step without a further motion being required to nudge it forward.

[24] Second, the defendant failed to deliver its affidavit of documents in accordance with the ordered timetable or to pay the costs ordered on October 2, 2019 until June 11, 2020. These amount to two breaches of orders of the court.

[25] Third, the breaches of the orders of the court were not remedied until after the plaintiff scheduled a motion and prepared a motion record and factum. This directly added to the costs incurred by the plaintiff. An apology devoid of explanation accompanied the remedial steps. After six months post-default, and after more than one warning that a motion to strike was being contemplated and then scheduled, this is wholly insufficient. It speaks to a disdain for or failure of understanding of the importance of abiding by court orders. The defendant did nothing to seek extensions or indulgences from the plaintiff, relative to its non-compliance.

[26] Fourth, the defendant/plaintiff by counterclaim has displayed a months-long pattern of not responding or acknowledging correspondence from the plaintiff. A course of conduct like this unnecessarily lengthens litigation, leads to unnecessary motions, and use of court time. The demands on the administration of justice to provide timely access to justice become unnecessarily strained by having to adjudicate matters that ought to be worked out between counsel.

[27] Finally, the defendant has asserted that the plaintiff's action is "vexatious." There are interim remedies to address vexatious litigation, yet the defendant did not avail itself of any such processes. In a simplified action to recover payment of less than \$50,000.00 for the sale of

papayas, the countermove of launching a \$5 million dollar counterclaim does not lend itself to an impression that the litigation is vexatious even from the defendant's perspective. If the defendant continues to take the view that it is unfairly being sued on a matter wholly without foundation the correct response is not to ignore counsel's correspondence but to bring the matter before the court for an early resolution. That did not happen.

[28] I conclude that the defendant's failure to abide by the interlocutory order of October 2, 2019 of Master Short, in the overall context of this litigation, shows an utter disregard for court orders. The history of this litigation involves the defendant requiring the plaintiff to seek further orders before the defendant will do the minimum to have the litigation continue. This has added delay, cost, and frustration to the litigation. The combination of informal and formal deadlines and warnings have not altered the defendant's conduct of the litigation. Facing a motion for the extreme remedy of striking its pleadings, the defendant opted to wait until the last possible day to bring itself into compliance with the interlocutory order of Master Short. The plaintiff seeks an extreme remedy, and I do not grant it lightly. Having considered all the steps taken by the plaintiff, and the responses from the defendant in the overall context, I have nevertheless concluded that the remedy sought by the plaintiff is the appropriate one. I will make the order to strike out the defendant's statement of defence and counterclaim.

#### **RULE 57.03 AND RULE 24.01**

[29] As a result of my findings in relation to Rule 60.12, I find it unnecessary to address the alternative arguments by the plaintiff under Rule 57.03 and Rule 24.01.

#### **CONCLUSION**

[30] The defendant Yung Soon Farm Inc.'s statement of defence and counterclaim is struck out.

This decision is effective when made without the need for entry or filing. No formal order is required.

#### **COSTS**

[31] If the parties are unable to agree on costs, brief written submissions (8 pages maximum) may be made on or before July 9, 2019.



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Leiper J.

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TECHNOLOGIES, JA. LTD., and ADVANCED FARM  
TECHNOLOGIES, JAMAICA

Plaintiff

– and –

YUNG SOON FARM INC., MICHAEL CHUNG,  
WALTER CHUNG, and STEPHEN CHUNG

Defendants

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**REASONS FOR DECISION**

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Leiper J.

**Released:** June 19, 2020