

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1095338 B.C. Ltd. v. Extreme Doors Ltd.*,
2024 BCSC 349

Date: 20240229
Docket: S249223
Registry: New Westminster

Between:

1095338 B.C. Ltd. doing business as Thabel Doors

Plaintiff

And

Extreme Doors Ltd.

Defendant

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

R.R.S. Uppal

Counsel for the Defendant:

N.K. Singh

Place and Date of Hearing:

New Westminster, B.C.
February 9, 2024

Place and Date of Judgment:

New Westminster, B.C.
February 29, 2024

Introduction

[1] These reasons address the defendant's application to set aside a default judgment granted October 19, 2023 and to grant the defendant an opportunity to file a response to the Notice of Civil Claim (the "NOCC").

Background

[2] The plaintiff manufactures and sells interior and exterior doors. Gurpreet Thabel is the manager of the plaintiff. Dalbag Singh Grewal is the owner and operator of the defendant.

[3] In June 2021, the plaintiff placed certain pieces of equipment at the defendant's premises located at 13055 84 Avenue, Surrey, BC on the understanding the equipment would be stored for the plaintiff but could be used by the defendant. This equipment remained on the defendant's premises until March 2022 when the defendant orally agreed to purchase the equipment from the plaintiff at a cost of \$157,494.75 (the "purchase and sale agreement"). The plaintiff issued an invoice to the defendant for that sum on March 2, 2022. The defendant contends that he received assurances from Mr. Thabel, the manager of the plaintiff that the agreed price was "much lower than the current market price of the Equipment".

[4] Before and after agreeing to purchase the equipment the defendant used the equipment in its business.

[5] There is controversy in the affidavit evidence concerning the terms of three other oral agreements. I will not address the details of those agreements, save to say that the defendant contends it has a set-off because of other promises made by the plaintiff:

- a) The parties agreed the defendant would be allowed to use the equipment without cost;
- b) The plaintiff would pay one-half of the monthly rent and utilities and other expenses;

- c) The plaintiff would be responsible for care, repair and maintenance of the equipment;
- d) The plaintiff agreed to take the equipment back and return the defendant's payment of \$80,000; and
- e) Mr. Grewal loaned money to Mr. Thabel which has not been repaid. Mr. Grewal contends this was a personal loan rather than payment for the equipment.

[6] The defendant also claims there is a missing chain from his premises which was removed by Mr. Thabel.

[7] The defendant also asked that the Court order the parties obtain a valuation of the market value of the equipment and after subtracting the difference between the market value of the equipment from the \$157,494.75 purchase price and the defendant would pay any balance owing based on that difference.

[8] The defendant paid the plaintiff \$80,000 on July 19, 2022 and \$2,500 on October 20, 2022. The plaintiff contended \$74,994.75 remains due and owing from the defendant.

The Default Judgment

[9] The plaintiff commenced this action on April 25, 2023. After service of the documents, the plaintiff obtained default judgment on June 15, 2023 with damages and costs to be assessed, plus interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 ("the Act").

[10] The NOCC was served on the defendant by Avtar Bains, process server, by handing the NOCC and a letter from plaintiff's counsel to Mr. Grewal at 109-13055 84 Avenue, Surrey, on May 4, 2023. At that time, Mr. Grewal admitted to Mr. Bains that he was the proper person to be served.

[11] The evidence established that Mr. Grewal was the sole director and president of the defendant. Within seven minutes of receiving the NOCC, Mr. Grewal telephoned plaintiff's counsel's office and discussed the service of the NOCC with Lisa Hucal, paralegal, who could only speak to him in English. He then spoke with Jasmine Virk, a staff member at the firm.

[12] Ms. Virk spoke to Mr. Grewal in Punjabi which he seemed to understand. She said that Mr. Grewal was questioning why he had been served with the NOCC; she told him that he was served as the director of the defendant and suggested he speak with a lawyer and get legal advice.

[13] Mr. Grewal did not deny speaking with Ms. Virk or Ms. Hucal on May 4, 2023 nor did he deny the substance of those conversations set out in the affidavits of Ms. Virk and Ms. Hucal.

[14] It should be noted that during argument, counsel recognized that Mr. Grewal did not speak, read or write in English very well and he required the assistance of his son to communicate for him. Counsel acknowledged Mr. Grewal had not read his affidavit himself. I granted leave for Mr. Grewal to have the affidavit translated for him, with certification that the affidavit had been interpreted for him when he swore it.

[15] In Mr. Grewal's first affidavit, he swore the following:

21. While they patiently waited for Mr. Thabel's response, they were taken aback when they received the Notice of Application for assessing the damages (the "NOA") merely two days before the scheduled hearing on October 19, 2023 (attached as Exhibit "D"). The Defendant was never served with any other documents prior to that. The Defendant was not served with the above-mentioned NOA directly. The Defendant received it from their Accountant. The Plaintiff was completely aware with the Defendant's place of business at all the times as he had the Equipment [there] too. At that time, the Defendant came to know about this matter. They came to know that the Notice of Claim was filed on April 25, 2023 (attached as Exhibit "B") and that a Default judgement application was filed without any notice to the Defendant and the default judgment was already obtained (attached as exhibit "C"). When they received the above the NOA, Mr. Grewal called some law offices to get an appointment, but no one was available on such a short notice. When he could not get any lawyer, he appeared in the Court and informed

honorable Mr. (*sic*) Justice Chan about this situation and requested for an opportunity to be heard, which was granted to him.

[16] The defendant provided no evidence concerning any steps or efforts he might have made between October 19, 2023 and December 12, 2023, to address the default judgment. He filed this application and an affidavit on December 14, 2023 seeking to set aside the default judgment. The plaintiff's application to assess damages, filed on September 25, 2023, was subsequently adjourned by Chan J.

[17] However, contrary to Mr. Grewal's affidavit, the application to assess damages was served on the registered and records office of the defendant on September 26, 2023. This office was also the office of Harpreet Kaur, accountant.

[18] Mr. Grewal said it is almost inconceivable that Harpreet Kaur would have received the application to assess damages and not forwarded that document to the defendant until October 17, 2023 but no evidence from Harpreet Kaur was tendered. October 17, 2023 was the first time he learned about the claim and the judgment.

[19] In addition, on July 20, 2023 plaintiff's counsel sent three letters to the defendant at three addresses associated with the defendant confirming that default judgment was taken on June 15, 2023. These three addresses were:

- a) 105-7168 128 Street, Surrey, BC, V3W 4E2;
- b) 109-13055 84 Avenue, Surrey, BC, V3W 1B3; and
- c) 110-13055 84 Avenue, Surrey, BC, V3W 1B3.

[20] The first address noted above is the registered and records office of the defendant. The second address is the location of the defendant's business described on its November 20, 2022 cheque paid to the plaintiff; this is also the address listed on the plaintiff's invoice to the defendant for the equipment, and the address at which Mr. Grewal was served with the NOCC on May 4, 2023. The third address appears to be adjacent to the second address.

[21] The defendant has not denied receiving letters at any of these addresses and none of these letters were returned to plaintiff's counsel's office.

[22] Overall, the uncontradicted evidence establishes that the defendant received the NOCC on May 4, 2023 and queried plaintiff's counsel about service of that document. It is also uncontradicted that the defendant received notice of the default judgment with the notice of application to assess damages four months prior to taking any steps to address the default judgment. There is no explanation given by the defendant for this delay in dealing with the default judgment.

Analysis and Conclusion

[23] The court has historically relied on the factors set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58, [1979] B.C.J. No. 1965 (Co. Ct.) that may be considered on an application to set aside a judgment.

[24] The *Miracle Feeds* framework includes the following three part inquiry:

- 1) The applicant must establish that they did not willfully and deliberately fail to file a Response to the NOCC. This inquiry is meant to focus on personal and actual intent of the respondent and not his or her counsel.
- 2) The applicant must establish that application to set aside the final order is made as soon as reasonably possible after having had obtained knowledge of final order or, alternatively, must offer a reasonable explanation as to any delay in applying to set the order aside.
- 3) The applicant must establish that they have a meritorious defence or at least a defence "worthy of investigation". *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341 contains a recent summary of the principles applicable in this case. There, the Court said:

[16] Rule 3-8(11) of the *Supreme Court Civil Rules* provides:

Court may set aside or vary default judgment

(11) The court may set aside or vary any judgment granted under this rule.

[17] *Miracle Feeds* establishes a framework to address an application to set aside a default judgment. It is important to recognize that the various considerations that are identified in *Miracle Feeds* are just that: they are factors that a chambers judge should consider and weigh. These factors are not fixed or immutable; rather, they are discretionary. In *Andrews v. Clay*, 2018 BCCA 50, this Court recently reviewed a number of relevant authorities and said:

[29] I have described these as factors rather than tests, as they are not intended to be either mandatory or exhaustive of the considerations that are relevant, though in most cases they will be the appropriate indicators of whether it is in the interests of justice to set aside the default judgment.

[30] In *H.M.T.Q. in right of the Province of British Columbia v. Ismail*, 2007 BCCA 55 (Chambers), for instance, Smith J.A. considered *Miracle Feeds* in the context of a default judgment in the Supreme Court of British Columbia and made these comments:

[11] In my view the items enumerated in the *Miracle Feeds* test are not conditions that must be satisfied by an applicant. Rather, they are relevant factors to be taken into account by a chambers judge in exercising the discretion conferred by Rule 17(12). I find support for this view in the remarks of Madam Justice Saunders in *Deline v. Whittle*, [2002 BCCA 662] where she said,

[12] On the merits, I observe that the order appealed involves the exercise of discretion. Although Mr. Deline vigorously contends that the *Miracle Feeds* test was not met, and thus there is sufficient merit in the appeal to warrant leave being granted, I do not agree. There are, necessarily, aspects of judgment that must be applied by a chambers judge in the exercise of discretion under Rule 25(15). ...

[31] In *Nichol v. Nichol*, 2015 BCCA 278, this Court cautioned against an inflexible application of the *Miracle Feeds* factors:

[37] The factors set out in the *Miracle Feeds* decision are not meant to be applied inflexibly, nor are they immutable: see *H.M.T.Q. in right of the Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11. The discussion by Mr. Justice Voith in *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at para. 15 in the context of the R. 17(12) of the previous Supreme Court Rules is apt:

[15] ... [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds*

precludes them from being successful on an application under Rule 17(12) [the rule in the previous Supreme Court Rules that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.

[18] The discretionary nature of the decision made by a chambers judge on an application to set aside a default judgment also informs the deference to be afforded to that decision: *Nichol* at para. 40; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27; *Shoolestani v. Ichikawa*, 2016 BCCA 452 (Chambers) at paras. 16–18.

Wilful or Deliberate Failure to Respond to a Notice of Civil Claim

[25] The defendant's treatment of the NOCC is unexplained in Mr. Grewal's affidavit. Mr. Grewal's credibility and reliability on this factor from the *Miracle Feeds* test is important. In submissions, the defendant conceded it had received the NOCC but did not address the fact of letters from the plaintiff's lawyer in July 2023 about the default judgment. I do not believe Mr. Grewal when he said he was "never served with any other documents" before October 17, 2023. It is abundantly clear that Mr. Grewal received the information and acknowledged to the process server that he was a proper person to be served. Moreover, within minutes of receiving the NOCC, he contacted plaintiff's counsel's office and was informed that he should obtain legal advice. Further, the records and registered office of the defendant was served with the notice of application on September 25, 2023. There is no affidavit evidence from the accountant, who received the documents at the defendant's records and registered office.

[26] There are significant discrepancies between assertions by Mr. Grewal and Mr. Thabel concerning claims by the defendant that it was owed money by the plaintiff. I do not need to resolve those differences on this application.

[27] Service of the NOCC on Mr. Grewal has been proved supported in part by his immediate contact with plaintiff's counsel concerning service on him.

[28] During argument, counsel for the defendant conceded that Mr. Grewal was not truthful concerning service of the pleadings and default judgment but it gave no explanation for the incredible assertions in Mr. Grewal's affidavit and his failure to address other reasons for its failure to deal with this claim in a timely manner after service of documents, the July 2023 letter and notice about the September 2023 application to assess damages. On balance, I conclude that Mr. Grewal chose to ignore the NOCC until faced with the impending damages assessment in October 2023.

Delay in Making Application to Set Aside the Default Judgment as Soon as Reasonably Possible

[29] This is another factor that does not favour the defendant's application. I am satisfied the default judgment more than likely came to the defendant's attention by the end of July 2023 and would have been known at the latest by September 2023 and further supports my conclusion that the defendant was aware of the default judgment well before October 2023, and took no steps to set aside the judgment until December 14, 2023.

[30] The defendant does not explain why it did not take steps between July and December 2023 or September and December 2023 or October 17 and December 2023. I conclude the defendant has not adequately addressed this factor from the *Miracle Feeds* framework.

The Defence

[31] In attempting to ascertain whether the defendant was advancing a defence worthy of investigation, I note that the defendant said there was an agreement that the defendant could continue using the equipment in its business, but did not inform the Court that it was in fact using the equipment from sometime in 2021 until the present.

[32] The defendant contends its defence is based on the plaintiff's breach of the four agreements between the parties. That might warrant a set-off or counterclaim for rents owed by the plaintiff to the defendant, cost of utilities to be paid by the

plaintiff to the defendant, return of a metal chain, and repayment of the loan made to the plaintiff from the defendant. Counsel contended that the consequences of these three agreements would entitle the defendant to a reduction in the amount payable for the equipment.

[33] On further inquiry, counsel for the defendant said that the defendant wanted to continue with the purchase of the equipment after a reassessment of the value at the time of the sale. The defendant appeared to be asserting its right to enforce the purchase and sale agreement with an abatement of the purchase price stemming from the plaintiff's representation that the price agreed on was less than the actual value of the equipment. The defendant has not accepted repudiation of the purchase and sale agreement by the plaintiff and I construed counsel's remarks to suggest it was seeking specific performance subject to the abatement in price although details of this defence were not articulated during submissions.

[34] Nowhere in Mr. Grewal's affidavit does he articulate the defence he contends might be meritorious and worthy of investigation other than to suggest that the plaintiff has breached the collateral agreements. No proposed response to civil claim was included in the defendant's material.

[35] I accept that to set aside a default judgment because the defence is "worthy of investigation" is a low bar to be met, but merely making an allegation is not sufficient. There must be sufficient detail in an applicant's affidavit to enable the court to determine whether a possible defence is shown.

[36] In the end, it is possible the defendant would be able to articulate a defence as to amount may be worthy of investigation from the facts set out in Mr. Grewal's affidavit. The defendant did not provide any authorities or analysis to enable the Court to make the necessary finding. I appreciate the bar is low at this stage in the proceedings and notwithstanding serious reservations about the defence, I would not dismiss the application on this ground alone.

The Interests of Justice

[37] The court retains a residual discretion to set aside default judgments on other factors including the interests of justice. The defendant invokes the use of this discretion as a reason to set aside the judgment. The defendant provides no support for its claim except that it contends the defence should be argued on the merits. There is nothing in the defendant's evidence or submissions that would support a claim that the interests of justice will be damaged if this defendant is unable to defend the action.

[38] In *Doyle v. Lunny Design and Production Group Inc.*, 2009 BCSC 925, Justice N. Smith said:

[21] Even where there has been willful delay or default, the judgment may still be set aside if "a serious miscarriage of justice has occurred": *Lin v. Tang* (1997), 147 D.L.R. (4th) 577, 37 B.C.L.R. (3d) 325 (C.A.).

[39] Taking into account Mr. Grewal's serious credibility and reliability problems and his unexplained and inordinate delay in moving to set aside this judgment, the defendant has failed to meet two of the most important factors that could persuade the Court to act. Further, I conclude that the defendant's assertion of a "meritorious defence or a defence worthy of investigation" is seriously undermined by the submissions made at the application and the evidence presented.

[40] In regard to three of the oral agreements alleged by the defendant, one appears to relate to a loan agreement between Mr. Grewal and Mr. Thabel, and not the plaintiff. The two other agreements relating to rent, utilities and repair costs appear to involve set-offs but not defences to the plaintiff's claim and represent something more in the nature of a counterclaim and set-off. The defendant did not make that submission.

[41] The defendant claims that it was induced to enter into the purchase and sale agreement on a misrepresentation as to the market value of the equipment at the time it agreed to purchase these assets. This may be a defence to some portion of the debt. However, the defendant did not provide any convincing detail or analysis

about the foundations of that claim. It did not detail the quantum of the difference between the contract of purchase and sale price and “market value” of the equipment at the time. As this point was described by Mr. Grewal, the plaintiff promised that the asking price of \$157,494 was “much lower than the market price of the equipment”.

[42] The defendant said it attempted to sell the equipment and discovered that the actual value was lower than the amount they paid to the plaintiff. No evidence was tendered on this point nor was there any evidence concerning the timing of the attempted sale contrasted to the contract of purchase and sale in March 2022.

[43] I am satisfied that there will not be any miscarriage of justice resulting from a refusal of the defendant’s application. Taking into account all of the evidence, including Mr. Grewal’s incredulous assertions under oath that he had not been served with the NOCC and his failure to explain the delay between receipt of information concerning the judgment and the application to set aside the judgment, I am not persuaded that here will be a miscarriage of justice if the application fails.

[44] I infer from these facts that Mr. Grewal intentionally decided against responding to the NOCC and the judgment until the defendant’s jeopardy became obvious to him. Mr. Grewal did not have regard to the truth when swearing his affidavit nor did he provide explanations for his delay.

[45] In my view, his failure to take the necessary actions is blameworthy.

[46] I find that the plaintiff acted responsibly to ensure the defendant was informed that the judgment had been obtained and assessment of the damages was proceeding. In the result, I have not been persuaded to exercise the Court’s discretion to set aside the judgment at this time.

[47] The application to set aside the judgment is dismissed.

Assessment of Damages

[48] The plaintiff seeks an order that damages be assessed in the sum of \$76,786.75 together with pre-judgment interest to June 15, 2023 and post-judgment interest thereafter. Costs of this application are claimed at \$1,340.86.

[49] The defendant made no argument on the question of damages to be assessed.

[50] The plaintiff contends that the assessment of damages in this case is largely an arithmetical exercise. The plaintiff says that the damages in question are supported by documentary evidence, which is adequate to support the quantification of the loss.

[51] Although the defendant is not entitled to notice of the application to assess damages, it did have opportunity to speak to the issue as part of the application to set aside the judgment: see *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.*, 2018 BCSC 234. In any event, after default judgment is granted, each fact pleaded in the NOCC can be accepted and the defendant is precluded from challenging those assertions.

[52] In the circumstances, I accept that the contract of purchase and sale required the defendant to pay \$157,494.75. Of that sum, \$82,500 has been paid in response to plaintiff's invoice #2187; thus, the balance owing is \$74,994.75. Further, \$1,792 remains owing from the defendant to the plaintiff under an agreement between the parties for repair work done on the equipment.

[53] In my view, the plaintiff is entitled to pre-judgment interest under the *Act* up to the date of this judgment and post-judgment interest thereafter: see *Boutsakis v. Alexis House Café Limited*, 2014 BCSC 221; *0679372 B.C. Ltd. v. The Winking Judge Pub Ltd.*, 2011 BCSC 633.

[54] The plaintiff has been successful on both applications and will have its costs for the application to set aside the judgment of \$1,340 and the costs for the damage assessment.

“Armstrong J.”