

CANADA / JUDGMENT

B. v. B.

2005 BCCA 407

COURT

British Columbia Court of Appeal

DECIDED

9 August 2005

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2005 BCCA 0407internet B.v. B.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

B. v. B.,

2005 BCCA 407

Date: 20050809

Docket: CA032583

Between:

B. B.

Respondent

(Plaintiff)

And

M. B., a.k.a. M. B.

Appellant

(Defendant)

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Low

B. Toy and M.B.

Counsel for the Appellant and,

Appellant in person

G. Edwards and J. Oland

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

7 June 2005

Place and Date of Judgment:

Vancouver, British Columbia

9 August 2005

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] This is an appeal of an order made in chambers on 17 December 2004 by Madam Justice Koenigsberg dismissing the appellant's application to set aside a default judgment obtained against him by the respondent, his daughter, on 29 September 1999.
- [2] The action is for physical and emotional abuse by the appellant of his daughter that occurred while she was a child. She was born in 1965. She commenced the action in September 1998 and the appellant was served with the writ and statement of claim the following month. He entered an appearance prepared by a lawyer who did not get on the record. He had a falling out with the lawyer and did nothing further in the proceedings until late November of 2004 when he brought the application to set aside the judgment. He claimed in an affidavit that he did not know that it was essential that he promptly file a statement of defence. He learned of the default judgment in March 2001. He claimed that until he heard to the contrary from her solicitors in June 2004 he thought his daughter was not going to pursue the case.
- [3] Rule 25 of the Rules of Court sets out the available procedure when a litigant does not file a pleading and the time for filing has expired. If the plaintiff is the defaulting litigant, the defendant may seek an order dismissing the action. If a defendant defaults by not filing a statement of defence and the claim is for unliquidated damages (as in the present case), the

plaintiff, under R. 25(6), may "enter judgment in Form 86 against that defendant for damages to be assessed and costs". The respondent entered judgment in full compliance with that sub-rule. Damages are yet to be assessed.

- [4] Rule 25(15) authorizes the court to set aside or vary any judgment entered under the rule. The requirements for a successful application to set aside a default judgment were stated by Hinds, C.C.J. (as he then was) in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 at 61. The defendant must show:
1. That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
 2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
 3. That he has a meritorious defence or at least a defence worthy of investigation; and
 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.
- [5] The chambers judge gave brief reasons for refusing to set aside the default judgment. On all three factors set out in *Miracle Feeds* and addressed in the affidavits before her she said that the application failed. She was satisfied that the appellant deliberately failed to file a statement of defence. Too much time had gone by after the appellant had knowledge of the default judgment and it is implicit in her reasons that there was no satisfactory explanation for the delay in moving to set aside the default judgment. Finally, she concluded that there was insufficient evidence of a meritorious defence.
- [6] The appellant argues that the chambers judge erred: (1) in concluding that there was insufficient evidence that the failure of the defendant to file a statement of defence was not deliberate; (2) in finding that there was too much delay in moving to set aside the default judgment rather than determining whether the delay had been satisfactorily explained; and (3) in concluding that there was insufficient evidence of a meritorious defence.
- [7] The appellant further argues that the chambers judge, in the interests of the proper administration of justice, should have exercised her discretion in favour of setting aside the default judgment because the truth of the respondent's allegations of abuse must be enquired into in any event when the court assesses damages. On this point the appellant relies on the decision of McEwan J. in *May v. Williams*, [1997] B.C.J. No. 900 (Q.L.) (S.C.).
- [8] In my opinion, allowing this appeal and setting aside the default judgment would render meaningless the obtaining of a default judgment by a diligent plaintiff in accordance with the Rules in an action in which the plaintiff seeks unliquidated damages.

Failure to file a statement of defence

- [9] The appellant was served with both the writ and statement of defence on 27 October 1998. He consulted a lawyer in White Rock, Robert Ross, who drafted a statement of defence for him. Mr. Ross gave the appellant the draft and provided him with an appearance which the appellant filed in person on 3 November 1998 giving his home address in Delta, B. C. as the address for delivery. The appellant swore that he severed his relationship with Mr. Ross because of a disagreement as to fees.
- [10] The appellant also swore that he did not file the statement of defence because he did not like the wording of a particular paragraph in it and that the statement of defence "somehow got sidelined", a vague and inadequate explanation for not filing the pleading. He claimed that he received no "communication from Mr. Ross indicating that there was a time limit within which my Statement of Defence had to be filed". There is no affidavit from Mr. Ross. In another affidavit the appellant swore that in previous divorce litigation, the only other law suit in which he had been involved, a different lawyer failed for four years to file a statement of defence on his behalf.
- [11] The appellant swore that because he received appointments for his examination for discovery and letters from the respondent's counsel referring to trial in the present case, he thought he could file his statement of defence "at anytime up to the trial". I think this assertion avails him nothing because these were events that occurred in November 2000 and later, long after the plaintiff had taken default judgment. During the critical time period, these events cannot have affected the appellant's decision to not file a statement of defence. In any event, the communication to which the appellant referred does not support the conclusion the appellant said he reached as to the time in which he had to file a statement of defence.
- [12] The appellant offered no explanation as to why he did nothing in the lawsuit after receiving the draft statement of defence and entering an appearance. He did not disclose how it came about that he knew it was necessary to enter the appearance but was uninformed as to the requirement for filing a statement of defence. Nor did he say that he did not see the notation on the printed portion of the writ of summons clearly informing him that he had fourteen days in which to file a statement of defence. The appellant offered no explanation as to why he did nothing further in connection with the action, or whether he made any enquiries as to what steps he might have to take to defend, during the eleven month period until the plaintiff took default judgment on 29 September 1999. The respondent should not lose her judgment properly obtained because the appellant chose not to read the documents served on him and chose to remain ignorant of what he needed to do in order to defend.
- [13] It can only be inferred that the failure of the appellant to file a statement of defence was deliberate. The chambers judge made no error in the conclusion she reached on this factor.

Delay in bringing application

- [14] Counsel for the respondent, Garth Edwards, had scheduled an examination for discovery of the appellant for 7 February 2001 but sent the appellant a letter dated 24 January adjourning the examination ". . . on the instructions of our client, to allow the two of you to talk". The same letter proposed an adjournment of the trial then scheduled for the following June, to which the appellant agreed. On 15 March 2001, Mr. Edwards swore an affidavit in support of the adjournment application and sent a copy to the appellant. The affidavit referred to and exhibited the default judgment. The appellant swore that this was the first time the default judgment came to his attention and there is no reason to dispute that assertion. However, he waited more than three years to apply to set the judgment aside.
- [15] When Mr. Edwards swore the affidavit of 15 March 2001 there were other defendants against whom the respondent alleged sexual abuse. The Province of British Columbia was also a defendant on the basis of an allegation that its officials were responsible for placing her in harm's way through a foster parenting arrangement. (The action has since been discontinued against all defendants except the appellant.) The principal reasons for seeking the adjournment of the trial were a pending discontinuance against the province, removal of counsel for one of the other defendants from the record, and the emotional condition of the respondent. Mr. Edwards swore that the respondent was then talking to the appellant "to explore their relationship" and that preserving the June trial date "might shatter any chances of salvaging any relationship between" the respondent and the appellant.
- [16] The appellant swore that he did not do anything about the default judgment because the letter from Mr. Edwards and his affidavit led him to believe that the appellant wanted to try to revive their relationship. He claimed he thought she had abandoned the case until he received new material in the summer of 2004. In a later affidavit he stated that he made no attempt to contact the respondent and she did not contact him. He claimed that he did not know the respondent was proceeding with the action until June 2004 when he received from her counsel an application for a summary assessment of damages, returnable on 13 August 2004, together with supporting materials.
- [17] In October 2001, a legal assistant to counsel for the respondent telephoned the appellant to obtain his home address, which he gave as 309 - 14980 Vine Street, White Rock, B.C. The respondent produced a copy of a letter dated 16 October 2001 directed to that address from a lawyer in Mr. Edward's firm. But the affidavit of the legal assistant, Gillian Dawson, does not include an averment that the original was mailed. The letter reminded the appellant of the default judgment and that the remaining step in the action was assessment of damages by a judge. The main purpose of the letter was to propose settlement discussions and it gave the appellant ten days to respond or the respondent would proceed to apply for an assessment of damages. A similar letter dated 2 November 2001 gave the appellant until 15 November to respond, failing which counsel would prepare to bring the matter to court. Ms. Dawson does not swear that she mailed the second letter. She said it was sent via courier with instructions to get a signature and to confirm delivery. There is no evidence confirming delivery.

Documents from the courier company suggest that there was no delivery.

- [18] There is some documentary evidence that the courier left copies of both letters at the business address of the appellant at 8389 River Way, Delta, B.C., but these include a notation that the building appeared to be abandoned. There is no evidence of physical delivery of either letter to the appellant in person.
- [19] The appellant swore that he did not receive either of these letters. He said that he moved from the White Rock residence on 30 October 2001 but checked subsequently for mail until Canada Post's forwarding service took effect. He confirmed the business address in Delta.
- [20] The evidence of delivery of the letters to the appellant is incomplete and his assertion that he received neither must be accepted.
- [21] After receiving the summary application for assessment of damages on 25 June 2004 the appellant waited five months before filing his application to set aside the default judgment. His only explanation for this further delay was lack of money to hire a lawyer.
- [22] The failure of the appellant to apply to set aside the default judgment in a timely way, in my opinion, was not adequately explained by him. He had no communication from his daughter in 2001, knew that she had taken judgment against him, took no steps to resolve their differences, and had to have known at all times that she could pursue her claim for damages. Whatever he thought as a result of the communication from her counsel in early 2001, he had no basis for concluding that she had abandoned her claim against him. He chose to ignore the judgment rather than deal with it as he must have known was necessary. Whether his decision to do nothing was for tactical reasons or otherwise, he offered insufficient explanation for not moving in a more timely way to set aside the default judgment.
- [23] The chambers judge did not err in finding that the appellant did not meet the second test in *Miracle Feeds*.

Merits of the appellant's proposed defence

- [24] As to whether the appellant had demonstrated that he had a defence worthy of investigation, the chambers judge merely said: "I am satisfied that on the merits, that is on liability, there is insufficient evidence of a meritorious defence."
- [25] The appellant admits that he was convicted in 1980 of assaulting his daughter and does not deny that he did assault her as alleged in that criminal proceeding. But he denies the years of physical and emotional abuse alleged by the respondent in the pleadings and in an affidavit she swore in support of her application for a summary assessment of damages. There is corroborating evidence from other family members as to a pattern of physical abuse by the appellant of the respondent. Because the respondent claims that she suffered sexual abuse committed by persons other than her father, there are still issues of causation of her damages that are alive. In addition, the duration, nature and extent of the abuse of the respondent by her father are still live issues of fact to be addressed when the court assesses

damages. The criminal assault conviction and the facts underlying it form the basis for civil liability for damages regardless of the ultimate findings of credibility as to whether or not there was additional abuse and, if there was, its extent.

- [26] The appellant had an arguable limitations defence that would have been reduced to a postponement issue. The chambers judge did not address this issue in her reasons and I think she was in error in not finding this to be a defence worthy of investigation. However, I think the appellant has foregone this defence because he is unable to meet the first two factors in *Miracle Feeds*.

Residual discretion

- [27] The appellant argues that because there is a defence worthy of investigation the court has a residual discretion in the interests of the proper administration of justice to permit him to defend despite his failure to file a statement of defence and his inadequately explained delay in moving to set aside the default judgment. The chambers judge seems to have addressed this point by stating that the appellant would be allowed "to participate in defending the case in regard to causation". The order reads that he is to be allowed "to participate in the assessment of damages" upon condition that he disclose certain financial documents by 20 December 2004.
- [28] The appellant says in his factum that if the default judgment stands assessment of damages "would inevitably involve consideration of so much of the 'merits' of the case as to render the exercise of separating the purposes for which evidence would be received or not at any trial of the same, highly artificial" causing "a significant potential for the administration of justice to be embarrassed in such a scenario". These words are borrowed from the judgment of McEwan J. in the *May* case cited above at para. 7.
- [29] Without deciding whether there is a residual discretion to set aside a default judgment as suggested in this argument and in the *May* case, I am not persuaded that it is the appropriate thing to do in this case. I think the chambers judge adequately addressed the concern by noting that the issue of causation is still alive, a point I have already mentioned. The chambers judge included a provision in the order for the appointment of a case management judge and I see no reason why that process could not be employed to sort out the remaining issues. It will be for the trial judge to determine the extent to which the appellant can challenge the nature and extent of the abuse during trial on the issue of quantum of damages. Given the wilful default and the extensive delay in this case, the anticipation of difficulty for the trial judge in making that determination is no reason for setting aside the default judgment. I see no potential for embarrassment of the administration of justice. Indeed, I think it would be embarrassing to the administration of justice to set aside the default judgment in this case.

[30] Without giving reasons that are before us, the chambers judge also dismissed an application of the appellant to set aside an order of Bauman J. made on 18 October 2004 requiring the appellant to pay the respondent an advance on her claim in the amount of \$50,000. That order was not appealed. (Bauman J. had previously referred the case to the trial list after determining that damages could not be assessed on a summary basis.) There was very little argument on this issue before us. I know of no basis on which the chambers judge could have set aside the order of Bauman J.; nor do I know how we could reverse or vary the order in the absence of a direct appeal of it.

[31] I would dismiss the appeal.

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Mr. Justice Mackenzie"

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