

CANADA / JUDGMENT

Bauder v. Free Will Public Holdings Inc.

2019 BCSC 619

COURT

Supreme Court of British Columbia

DECIDED

11 April 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 619 Bauder v. Free Will Public Holdings Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bauder v. Free Will Public Holdings Inc.,

2019 BCSC 619

Date: 20190411

Docket: S161224

Registry: Vancouver

Between:

Greg Bauder

Plaintiff

And

Free Will Public Holdings Inc. d.b.a. Drugland Pharmacy,

Second Chance Pharmacy Ltd. d.b.a. Capital Care Pharmacy,

Hashem Moazzen-Ahmadi, Vesna Vlacina-Ljpeic,

Sami Sheikh, John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Mayer

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M. Magaril

Counsel for the Defendants Hashem Moazzen-Ahmadi and Second Chance Pharmacy Ltd.:

D.S. Gray

Counsel for the Defendant Vesna Vlacina-Ljpeic:

D. Turner

K. Mase

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 11, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 11, 2019

Introduction

- [1] THE COURT: The plaintiff, Greg Bauder, commenced an action alleging that in February of 2014, one or more of a group of defendant dispensing pharmacists reduced the quantity of a certain prescription medication which had been prescribed to him for treatment of a psychoaffective disorder, and as well, in the latter part of March of 2014, that one or more of the pharmacists failed to fill a requested prescription in a timely manner.
- [2] As a result of these alleged actions, Mr. Bauder claims to have suffered a decline in his mental health, which resulted in his hospitalization for approximately five weeks.
- [3] The defendants Mr. Moazzen-Ahmadi and Ms. Vlacina-Ljpeic are both pharmacists. The defendant Second Chance Pharmacy Ltd. is owned by Mr. Moazzen-Ahmadi and he is the sole director.
- [4] At some or all of the relevant times, Ms. Vlacina-Ljpeic was employed as a part-time pharmacist at Second Chance Pharmacy. I will refer in the balance of my reasons to Mr. Moazzen-Ahmadi and Ms. Vlacina-Ljpeic and Second Chance Pharmacy collectively as "the Applicants."
- [5] On January 18, 2017, Mr. Bauder obtained an order for alternate service on Mr. Moazzen-Ahmadi from a Master of this Court and he attempted service in compliance with this order.

- [6] Service on Ms. Vlacina-Ljpeic was purported to have been made on her at another pharmacy doing business as Drugland Pharmacy where she also worked part-time. She was a director of Drugland Pharmacy, which directorship, she contends, only arose as a result of licensing requirements to enable the dispensation of drugs from this location. Second Chance Pharmacy was purported to have been served by mail.
- [7] On May 8, 2017, a Master of this Court granted default judgment against these defendants with damages to be assessed and made an order that all further documents and the default judgment order could be served on Mr. Moazzen-Ahmadi by alternate service.
- [8] By order entered November 20, 2018, a Justice of this Court assessed damages against these applicants in the amount of \$85,000 and awarded \$48,534.86 to the Province of British Columbia pursuant to the Health Care Cost Recovery Act, S.B.C. 2008, c. 27 and as well awarded Mr. Bauder costs.
- [9] It did not arise during the proceedings, and I have assumed, that the Province was notified of the application to set aside the default judgment.
- [10] MR. MAGARIL: I act for the Province. They essentially take no positions. They ride along with Mr. Bauder. Thank you.
- [11] THE COURT: Thank you. Appreciate that.
- [12] The Applicants either deny that they were served or deny that they were aware of service having been made, and contend that they only became aware of the action commenced by Mr. Bauder, the default judgment and the assessment of damages, in December of 2018, after inquiries were made on behalf of the plaintiff for their personal information through the College of Pharmacists.
- [13] In addition, Mr. Moazzen-Ahmadi and Ms. Vlacina-Ljpeic contend that they were not responsible for preparing or dispensing any of the prescription medication alleged to have been improperly prepared for Mr. Bauder or that there was a failure for which they are responsible to ensure that prescription medication was dispensed to Mr. Bauder in a timely manner.
- [14] The Applicants seek an order setting aside the damages assessment and default judgment and extending the time for filing their response to notice of civil claim to 14 days after the hearing of this application.

Analysis and Decision

- [15] The Applicants contend that it would be a miscarriage of justice to allow the assessment of damages award to stand in face of the documentary evidence which they say demonstrates that Mr. Bauder's claims are demonstrably untrue.

- [16] It is common ground that the reasoning set out in *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.*, 2018 BCSC 234, referencing the decision of *Bassi v. Bassi*, 2013 BCSC 284 applies. The relevant finding is that an application to overturn a default judgment in a subsequent and extant assessment of damages order cannot rely on Rule 3-8(11), which deals with applications to set aside default judgments, or Rule 22-1(3), which deals with reconsideration of an order obtained in chambers in the absence of a party. The Applicants say that the Court has the inherent jurisdiction to overturn both a default judgment and assessment of damages award where not doing so would amount to a miscarriage of justice.
- [17] Some of the factors to be applied in determining whether it would be appropriate to set aside a default judgment and damages assessment are set out in the *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) case.
- [18] In this case, given the factual and procedural history, in my view, it is not appropriate to apply the *Miracle Feeds* factors twice, that is, first to the assessment of damages order, and then to the default judgment. As stated by Justice Riley in *National Home*:
- there is no real distinction to be drawn between the order assessing damages and the order of default judgment that preceded it when considering the *Miracle Feeds* criteria.
- [19] This leads me to the application of the factors set out in *Miracle Feeds*, which again I note, and the authorities are quite clear on this, is not an exhaustive list. Both Mr. Moazzen-Ahmadi and Ms. Vlacina-Ljpeic have sworn that they only became aware of the proceedings and the resulting default judgment and damages assessment in December of 2018. In respect of Mr. Moazzen-Ahmadi, this includes his company Second Chance Pharmacy.
- [20] Despite the able arguments of counsel for Mr. Bauder -- and I think that the submissions were well put both by sides -- I am satisfied that Mr. Moazzen-Ahmadi was not aware of the proceedings. I find that Mr. Moazzen-Ahmadi was not aware, nor was Second Chance Pharmacy, that proceedings had been commenced, and for this reason did not file a response to the original notice of civil claim. I also find, and this in respect of both applicants, that they only became aware of the default judgment and damages assessment in December of 2018.
- [21] To the extent that the evidence they have adduced denying that they were aware of these proceedings raises some questions, I am satisfied with the explanations of the Applicants in this respect as set out in the materials. For example, I accept that Ms. Vlacina-Ljpeic was not authorized to review mail, which included the pleadings apparently served on her at Drugland Pharmacy. I am also satisfied that Mr. Moazzen-Ahmadi did not receive the pleadings, or, rather, there is not sufficient evidence causing me to disbelieve his sworn statement that he had not reviewed those materials.

- [22] I note that there was not an application before me to cross-examine either of the pharmacists on their affidavits denying notice, and, in effect, I am left with the evidence of the Applicants, which in my view has not been sufficiently challenged. I do not mean that as a criticism; it is just simply the reality. I have to make decisions based on the evidence that is before me.
- [23] I agree with submissions of the Applicants that from a common sense perspective, it does not make sense in the circumstances that either of the pharmacist defendants would not have taken steps to respond to the notice of civil claim and to defend their interests had they been aware at the time that those proceedings were commenced. Accordingly, I am satisfied on the evidence that the Applicants are not guilty of wilful default.
- [24] I am also satisfied that the application to set aside the default judgment and assessment of damages has been made as soon as possible. The Applicants only became aware of the default judgment and assessment of damages orders on December 8, 2018, or close to that date, and both had filed their respective applications to set aside these orders within a month. In the case of Mr. Moazzen-Ahmadi, January 8, 2019, and in the case of Ms. Vlacina-Ljpeic, January 11th, 2019.
- [25] Mr. Bauder concedes that after the Applicants received notice of the default judgment and damages assessments in December, they did take rapid steps to set both aside. So there really is no dispute in that respect, and I appreciate the submission of counsel for the plaintiff in that regard.
- [26] With respect to the third factor set out in *Miracle Feeds*, and that is whether the Applicants have a defence worthy of investigation, I am satisfied that - and this is again not an exhaustive list, because there is a significant amount of evidence - that, first, in respect of both pharmacists, that they have an arguable defence that they were not responsible for and did not dispense Mr. Bauder's prescription medication in February of 2014, which he alleges was done improperly. There is evidence which suggests that another pharmacist who initialled the relevant prescription stickers had done so. Further, in respect of all of the Applicants, they have an arguable defence that they did not delay the issuance of Mr. Bauder's prescription on March 19th and 20th of 2014.
- [27] In the circumstances, I consider that allowing the default judgment and the order assessing damages to stand would constitute a miscarriage of justice. Accordingly, the applications of the Applicants is granted, and both of these orders are set aside. The Applicants are granted leave to file a response to the notice of civil claim within 14 days of today's date.
- [28] I will receive submissions on costs, but I have an inclination with respects. So if the parties feel the necessity to speak to it, that's fine, but my inclination is that costs should be in the cause in the circumstances.

Costs

- [29] MR. GRAY: Can I just speak to one thing? I don't want to speak to the costs issue. File a defence within 14 days of today's date, but I understand my friend wants to make an amendment.
- [30] MR. MAGARIL: Yes, My Lord, there is the application to add Ms. Yoon. I'm reluctant in the absence of counsel to ask if My Lord would consider hearing that matter as well. Given the familiarity with it, it would save some time. But if I add it as well because of this new material that came up, especially with the letter that indicates that an emergency supply is not dispensed, I have now material that will allow me to make a further amendment. I don't want to duplicate that. I indicated to my friends I have no issue with giving them time. I'm leaving for Portland tomorrow in the morning. I'm not back till the Tuesday after Easter, and I want to make that application to add Ms. Yoon. That would force the amendment. I don't want to require multiple amended responses from my friends.
- [31] THE COURT: No, I think that is fine. I think your point, Mr. Magaril, is that it may not be prudent for them to file responses to notice of civil claim with 14 days.
- [32] MR. MAGARIL: That's correct.
- [33] THE COURT: Well, that is fine. You are correct; I am not in a position to rule on an application to add another pharmacist as a defendant.
- [34] MR. GRAY: I'm not trying to be difficult with respect to your order. Given my client's experience, he wants to comply with orders, so I don't know how we're going to properly phrase the -
- [35] THE COURT: I think I can amend that term in my order to specify that the responses be filed within 14 days unless otherwise agreed to between the parties, and hopefully that will be sufficient.
- [36] MR. MAGARIL: And just for clarity, My Lord, I wasn't asking My Lord to make that decision to add, but simply to seize yourself if that application is reset, which I anticipate it will be.
- [37] THE COURT: No, I appreciate that. I believe in this case it would be a relatively straightforward application. I do not have the evidence in any event that you are going to be relying on.
- [38] MR. MAGARIL: Thank you.
- [39] THE COURT: Does anyone wish to make any comments with respect to costs?
- [40] MR. GRAY: None, Your Honour.
- [41] THE COURT: So costs will be in the cause. Thank you.

"Mayer J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/06/2019BCSC0619.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bauder-v-free-will-public-holdings-inc-2019>

Prepared on 29 October 2026 · Esheria