
CANADA / JUDGMENT

Benard v. Goodwill Investments Ltd.

2020 BCSC 1715

COURT

Supreme Court of British Columbia

DECIDED

13 November 2020

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2020 BCSC 1715 Benard v. Goodwill Investments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Benard v. Goodwill Investments Ltd.,

2020 BCSC 1715

Date: 20201113

Docket: M202321

Registry: Victoria

Between:

Chad Benard

Plaintiff

And

Goodwill Investments Ltd. and Joel Thomas Craig

Defendants

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

M. Durando

Counsel for the Defendants:

S. Casey

Place and Date of Hearing:

Victoria, B.C.

November 6, 2020

Place and Date of Judgment:

Victoria, B.C.

November 13, 2020

- [1] The defendants apply to set aside a default judgment obtained by the plaintiff on September 1, 2020.
- [2] The factors which must be considered on such an application are set out in the decision of Hinds Co. Ct. J. (as he then was) in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. P-58 (Co. Ct.) [Miracle Feeds], as endorsed by the Court of Appeal in *Bank of Montreal v. Erickson* (1984), 57 B.C.L.R. 72 (C.A.). On affidavit evidence, the applicant must show:
- a) That the failure to defend was not wilful or deliberate;
 - b) That the application to set aside is being made as soon as reasonably possible after obtaining knowledge of the default judgment, or any delay explained; and
 - c) That there is a meritorious defence or defence worthy of investigation.

These factors are not to be applied inflexibly: *BCI Bulkhaul Carriers Inc. v. Aujla Trucking Ltd.*, 2015 BCCA 411 at para. 3.

- [3] This is a motor vehicle accident claim, stemming from an accident that occurred on January 24, 2020. The plaintiff was riding a bicycle. He says he was cut off by the defendant Mr. Craig, in an act of "road rage", and the plaintiff's version of events is supported by two independent witnesses, whose evidence is before me in affidavit form. The cause of action pleaded in the notice of civil claim is negligence; the particulars of the alleged negligence of Mr. Craig pleaded include operating a motor vehicle while impaired by emotional upset and/or rage; targeting the plaintiff in an act of retribution or road rage; and blocking the plaintiff's path. Mr. Craig has a different version of events; he says in his affidavit that the plaintiff attempted to pass him on the right as he was stopped in traffic, and punched his passenger side mirror as the plaintiff passed him, damaging it. He says that he drove past the plaintiff once the light turned, and then pulled over to speak with the plaintiff, and that the plaintiff then swerved to avoid another vehicle and collided with his truck.

- [4] The plaintiff's counsel put the Insurance Corporation of British Columbia ("ICBC") on notice of the claim, and thereafter communicated with an ICBC adjuster, Ms. Blandford. He wrote an email to Ms. Blandford on July 14, 2020. He summarized his client's medical condition, advised that he was going to be filing a notice of civil claim, and acknowledged that there were liability and coverage issues that would have to be "sorted out over the next year".
- [5] The notice of civil claim was filed July 14, 2020; Mr. Craig was served personally on July 17, and the corporate defendant (alleged in the notice of civil claim to be the owner of the vehicle driven by Mr. Craig) was served on July 20, 2020.
- [6] Defence counsel was retained, and wrote to plaintiff's counsel on July 28, 2020. He advised that he was in the process of receiving and reviewing ICBC's file materials, and requested that plaintiff's counsel not take default proceedings without prior written notice.
- [7] Plaintiff's counsel replied the following day, July 29, 2020. His letter did not state that he was requiring strict compliance with the time requirements set out in the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], or with the specific requirement in Rule 3-3(3) for filing a response to civil claim within 21 days of service. Nor did he state a specific deadline for service of a filed response. Instead, he noted that the defendants had been served on July 17, 2020, and said he would require "timely delivery" of a filed response to civil claim to avoid default proceedings. (The July 17 date was incorrect, as the corporate defendant was only served three days later, though nothing turns on this.)
- [8] Not having received a response to civil claim by August 31, 2020, the plaintiff's counsel filed for default judgment. He did not put defence counsel or ICBC on notice before doing so.
- [9] A legal assistant employed by defence counsel says in an affidavit that the July 29, 2020 letter requiring "timely delivery" was not brought to defence counsel's attention until September 2020, due to inadvertence and the letter's vague contents.
- [10] Defence counsel received a letter from plaintiff's counsel on September 2, 2020, advising of the default judgment. Defence counsel wrote on September 14, 2020 to say that an application to set aside the judgment would be made. At some point during the month of September, defence counsel received confirmation from ICBC that coverage was in order for the defendants, and they were instructed to proceed with an application to set aside the default judgment. Defence counsel filed the present notice of application on October 27.
- [11] I am satisfied that the failure to file a response to civil claim within 21 days after service - i.e. by August 10, 2020 - was neither wilful nor deliberate. Plaintiff's counsel did nothing to convey any sense of urgency in obtaining a filed response; he had acknowledged there were liability and coverage issues that could take a year to sort out, and he had to have known that any uncertainty as to coverage could have impacted the role of defence counsel and the nature of the defence that would be filed, such that filing a defence might require some time. I agree with the legal assistant's characterization of plaintiff's counsel's request for "timely" delivery of a defence as vague. The word "timely" has many meanings, most of

which are imprecise. The Shorter Oxford Dictionary provides several definitions: "occurring, done, or made at an appropriate or suitable time; opportune", "occurring or appearing in good time; early", "of or in time", "early, in good time; soon, quickly", and "formerly, soon enough, in time". Webster's Third New International Dictionary of the English Language, Unabridged provides several definitions: "early, soon", "in time: opportunely, seasonably", "done or occurring at a suitable time", "occurring at a normal or expected time", "falling within a time prescribed by law or contract", "appropriate to the times or the occasion", and "advance, early". In context, the word "timely" in the July 29 letter might have reasonably been understood to mean "within the time limits prescribed by Rule 3-3". But it might equally reasonably have only been understood to mean "promptly" or "without undue delay".

- [12] Having been requested to provide written notice before taking default, and having made only this vague demand, plaintiff's counsel's failure to extend the courtesy of even verbal notice to defence counsel or to ICBC of his intention to take default judgment is regrettable.
- [13] As to the second factor set out in *Miracle Feeds*, it appears counsel were instructed to bring the present application within only a very short time after the default judgment came to light. I find the defendants - in this case their surrogate, ICBC - did act with reasonable dispatch.
- [14] As to the third factor, Madam Justice Ross summarized the applicable principles in *Noble Moving Services Inc. v. Kohn*, 2008 BCSC 434:
- [27] The courts have identified the following principles with respect to the question of whether the party has a meritorious defence or a defence worthy of investigation:
- (a) while the applicant must cite facts disclosing a defence worthy of investigation he need not demonstrate that the defence will succeed: see *Innovest Development Corp. (Receiver of) v. Lim*, [1999] B.C.J. No. 2969 (QL) (S.C.);
 - (b) there must be sufficient detail in the affidavit material to enable the judge to correctly exercise his or her mind upon whether there is indeed such a defence: see *Schmid v. Lacey* (1991), 7 B.C.A.C. 77, [1991] B.C.J. No. 3501 (QL) (C.A.) [[Schmid]];
 - (c) it is not necessary for a person seeking to set aside a default judgment to swear to all of the evidence he believes might support the defence: see *Brar v. Sahota* (1998), 61 B.C.L.R. (3d) 194 (C.A.) [[Brar]].
- [15] Plaintiff's counsel submits that I should find the plaintiff's version of the accident credible and reliable, given that it is supported by affidavit evidence of two independent witnesses, and that I should therefore find there is no meritorious defence. It is submitted that the defendant, on this application, ought to be subject to a greater burden than merely showing there is a triable issue, or that a successful defence is a possibility. Rather, it is submitted, the test of a proposed defence being "meritorious" requires a qualitative analysis of the evidence. The plaintiff relies on *Hawkins v. Fernie One Outfitter Ltd.*, 2012 BCSC 84

[Hawkins], as establishing that the defendant must show a "plausible" defence worthy of investigation. On the evidence as a whole, the plaintiff says Mr. Craig's version of events is implausible.

- [16] The plaintiff further submits that the real issue is whether it is in the interests of justice that the default judgment be set aside; that this imports consideration of equitable principles, including the requirement that the applicant come to court with "clean hands"; and that in the present case the defendants violated the clean hands principle by failing to disclose the evidence of the independent witnesses, and failing to give a fulsome response to that evidence or to explain the inconsistencies with Mr. Craig's version of events.
- [17] In Hawkins, one of the individual defendants, Bruchet, had been sued on a promissory note he had given in connection with a share purchase agreement, and the plaintiff took default judgment against him. In applying to set aside the judgment, Mr. Bruchet asserted he had two defences available: that he had agreed to purchase the shares in reliance on misrepresentations as to the prospects for rezoning lands owned by the companies; and that a clause in the promissory note by which he agreed to transfer the shares back to the plaintiff upon default in payment meant that surrendering the shares would relieve him of all liability. The application judge found that interpretation of the promissory note to be counterintuitive, as it ran counter to the promissory note's plain meaning. That interpretation of the note had not been asserted by Bruchet when he had attempted to withdraw from the deal, and appeared to the application judge to have been an afterthought. He further found Bruchet's evidence of a misrepresentation to be "seriously deficient in detail". He referred to the test in Schmid - that the applicant must provide "sufficient detail to enable the judge to correctly exercise his mind upon whether there is indeed such a defence" - and found Bruchet's evidence did not have the degree of plausibility necessary to meet that test.
- [18] Nothing in Hawkins suggests that the proposed defence is to be judged on anything other than its own merits. Here, the plaintiff would have me weigh the reliability and credibility of Mr. Craig's evidence against that of the plaintiff and the independent witnesses, all of that evidence now being only in affidavit form. Clearly, that is a matter for trial, not summary determination. (See Paolucci Holdings Inc. v. Girard Insurance & Financial Service Inc., 2018 BCSC 1810, paras. 39-40.)
- [19] In Brar, the applicant defendant was alleged to having been party to an assault on the plaintiff. Default judgment was taken. In applying to set it aside, the defendant swore an affidavit in which he stated that he was a witness to the assault and nothing more. He specifically denied that he was involved in the assault or caused the plaintiff any injury. The chambers judge found this evidence insufficient to make out a defence, noting that the applicant gave "no accompanying detail to explain the circumstances of his presence, what he observed, or anything of that nature". The appeal of that decision was allowed. McEachern C.J.B.C drew an analogy between the evidence needed to demonstrate a meritorious defence, and that applicant's affidavit. He wrote,

- [11] If Mr. Sahota were to be pleading to the statement of claim, and he were to make those allegations, he would be alleging all the facts necessary to raise a defence.
- [12] It is not, in my view, necessary for a person seeking to set aside a default judgment to swear to all the evidence that he believes might support his defence. When it is a simple cause of action, and I do not say that to diminish the claim, but when it is a simple cause of action like an assault, it is sufficient, in my view, to plead that the defendant did not assault the plaintiff and he did not participate in any way in the assault. There could be particulars, and there could, of course, be discovery to add flesh to those allegations, but I think that that would be a defence that would withstand an application to have it struck out as being insufficient.
- [13] That being so, it is my judgment that although the case is close to the line, there was enough to allow the defendant, to give him leave to defend by setting aside the default judgment, particularly where the delay after Mr. Sahota believed he was required to respond to the writ was not great. ...
- [20] The present case, like Brar, involves only a relatively simple cause of action. The evidence put forward by the applicant in Brar was only a little more than a bare denial; hence, McEachern C.J.B.C.'s characterization of it as "close to the line". Mr. Craig, in contrast, provides more of a narrative of the events leading up to the collision. That narrative, on its face, is not implausible, and clearly establishes a meritorious defence. It is in the interest of justice that the defendants be given the opportunity to put forward that defence, particularly given the circumstances in which the default judgment was obtained.
- [21] The plaintiff's "clean hands" argument is simply without merit. If a defendant is not obliged to swear all the evidence that might support their defence, they cannot be faulted for failing to address evidence that proves a contrary position.
- [22] The default judgment filed September 1, 2020 is therefore set aside. The defendants are at liberty to file a response to civil claim, within 21 days of the date of this order.
- [23] Each party will bear their own costs.

"A. Saunders J."

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