

CANADA / JUDGMENT

Bickert v. Sorci Industries Inc.

2005 BCCA 313

COURT

British Columbia Court of Appeal

DECIDED

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2005 BCCA 313 Bickert v. Sorci Industries Inc. COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Bickert v. Sorci Industries Inc., 2005 BCCA 313 Date: 20050531 Docket: CA032327

Between: Clare Bickert and Nancy Bickert Appellants (Plaintiffs) And Sorci Industries Inc. and Wayne Sorci Respondents (Defendants) Before: The Honourable Madam Justice Rowles The Honourable Mr. Justice Hall The Honourable Madam Justice Levine Oral Reasons for Judgment K.E. McNeilly Counsel for the Appellants D.J. McLellan Counsel for the Respondents Place and Date: Vancouver, British Columbia May 31, 2005

- [1] LEVINE J.A.: The appellants, Clare Bickert and Nancy Bickert, appeal from the order of Mr. Justice Williams granting the application of the defendants, Wayne Sorci and Sorci Industries Inc., to set aside a default judgment granted February 14, 1995.
- [2] The background to this matter may be summarized as follows. The respondent, Wayne Sorci, was the sole shareholder and director of Sorci Industries Inc. (the "Company") at all relevant times. In August 1993, the appellants invested the sum of \$25,000 in the Company, purportedly in exchange for 25 per cent of the Company's shares. The appellants subsequently claimed that the investment was a loan which both Mr. Sorci and the Company were liable to repay. Mr. Sorci maintains that the appellants have incorrectly characterized the investment as a loan. He submits that he was not a party to the agreement between the appellants and the Company and did not personally guarantee the investment of the appellants.
- [3] At the time the appellants invested the money in the Company, the Company had entered into a partnership with another company named OPM Management Corporation. The president of OPM was an individual by the name of Ryan Henning. According to Mr. Sorci's evidence, Mr. Henning assumed responsibility for the decision making and operation of the Company.

- [4] In August of 1994, a settlement offer was made to the appellants by counsel for Mr. Sorci and the Company which acknowledged that the \$25,000 investment was a loan to Mr. Sorci. The letter offered repayment terms and enclosed a personal cheque from Mr. Sorci as the first payment. The appellants rejected that offer and the repayment plan and in October of 1994 filed their statement of claim.
- [5] An appearance was filed on behalf of both Mr. Sorci and the Company. According to Mr. Sorci, he conferred authority on Mr. Henning to resolve the litigation and Mr. Henning was given sole authority to instruct counsel.
- [6] In December 1994, a second offer was made to settle the matter with the appellants. Defendants' counsel provided an offer to the appellants' counsel. The offer was made by OPM Management Corporation over the signature of Mr. Henning as president. The terms of that offer were accepted by counsel for the appellants except for certain terms relating to interest and a consent dismissal order and release. The agreement provided that the Company would make payments in the amount of \$5,000 per month commencing January 20, 1995 with interest running at prime plus 2 per cent. The letter referred to "repayment of the loan".
- [7] January 20, 1995 came and went with no payment. Appellants' counsel put the respondents' counsel on notice that default judgment would be taken without further notice unless the respondents complied with the settlement. At some point during this period of time, Mr. Henning apparently advised Mr. Sorci that the litigation had settled.
- [8] The evidence of the appellants is that their counsel notified Mr. Sorci of the default judgment by way of letter sent by double-registered mail on February 16, 1995. Mr. Sorci maintains that he was not so notified. The appellants also provided evidence of a bailiff who deposed that he attended at the residence of Mr. Sorci and met with him to serve a writ of seizure and sale to enforce the default judgment. The bailiff deposed that he made Mr. Sorci aware of the default judgment. Mr. Sorci claims that he did not meet with the bailiff, was not advised of the default judgment, and would have remembered if that had occurred.
- [9] It appears that nothing further happened in this matter until April 2004 when the appellants filed a subpoena to debtor, which was served on Mr. Sorci on May 1, 2004. The hearing was held on July 7, 2004 and adjourned. In the meantime, on July 5, 2004, Mr. Sorci filed his application to set aside the default order.
- [10] The chambers judge applied the tests set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. p.58 (Co. Ct.) for setting aside a default judgment. A judgment debtor must show that:
1. the failure to defend was not wilful or deliberate;
 2. the application to set aside the default judgment was made as soon as reasonably possible on learning of it or an explanation for the delay is given;

3. there is a defence worthy of investigation; and
 4. the elements that have to be proven are established through affidavit evidence.
- [11] The chambers judge concluded, based on Mr. Sorci's evidence contained in three affidavits; the affidavit of counsel for the appellants at the material times in 1994 and 1995; the affidavit of the bailiff; and the affidavit of the appellant, Nancy Bickert, that Mr. Sorci had met these tests for setting aside the default judgment, and made the order accordingly. The chambers judge concluded it was not irresponsible or unreasonable for Mr. Sorci to delegate the conduct of the proceedings to Mr. Henning. He stated that there was no proof of service of the default judgment on Mr. Sorci in February 1995, despite the evidence that the letter was sent by double-registered mail. The chambers judge determined that there was a defence that was arguably worthy of investigation because there was an issue of whether the Company or Mr. Sorci was liable with respect to the appellants' investment. There was affidavit evidence to establish the elements that had to be proven.
- [12] The chambers judge also considered the prejudice that could arise if the default judgment was set aside and concluded that the prejudice to the appellants from the delay was not of such magnitude that it would cause him to dismiss the application.
- [13] On the appeal, the appellants argue that the defendants have not met the requisite burden of proof to satisfy the tests set out in *Miracle Feeds*. Their counsel maintains that the chambers judge's findings of fact cannot be supported by the evidence and he therefore made a palpable and overriding error of fact. Counsel reviewed the evidence, in particular of Mr. Sorci, and pointed out a number of internal contradictions as well as contradictions between Mr. Sorci's evidence and the evidence of the appellants' witnesses.
- [14] On my review of these materials, I conclude that despite the many flaws in Mr. Sorci's evidence, which cannot be denied, the chambers judge essentially gave Mr. Sorci the benefit of the doubt on all factual issues. In my opinion, he was entitled to do so. There was evidence to support the chambers judge's findings that Mr. Sorci had delegated all matters concerning the Company to Mr. Henning and was not a party to the settlement, thus meeting the onus to show that the failure to defend was not wilful or deliberate; that Mr. Sorci did not know of the default judgment until May 1, 2004 when he received notice of the subpoena to debtor, thus meeting the requirement to show that he made the application to set aside the default judgment as soon as reasonably possible on hearing of it; and that the investment by the plaintiffs was in shares of the Company and not a loan to Mr. Sorci personally, which would constitute a defence.
- [15] As to prejudice from the nine-year delay, the plaintiffs delayed nine years in continuing their enforcement proceedings. It is difficult to impose that burden entirely on Mr. Sorci.
- [16] In the result, I would dismiss the appeal. The appellants have failed to show that the chambers judge made any palpable or overriding error as the facts as he found them were supported by the evidence and he applied the correct legal principles to those facts.

[17] ROWLES J.A.: I agree.

[18] HALL J.A.: I agree.

[19] ROWLES J.A.: The appeal is dismissed. "The Honourable Madam Justice Levine"

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