

CANADA / JUDGMENT

Fraser Valley Disposal Ltd. v. Cho

2016 BCSC 1923

COURT

Supreme Court of British Columbia

DECIDED

29 September 2016

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2016 BCSC 1923 Fraser Valley Disposal Ltd. v. Cho IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fraser Valley Disposal Ltd. v. Cho, 2016 BCSC 1923 Date: 20160929 Docket: S139517 Registry: Vancouver Between: Fraser Valley Disposal Ltd. Plaintiff And Yvonne Cho and Qi Qing Gu (also known as Jay Gu) dba JPC and 1158 Disposal Service Ltd., and Yong Hua Chen Defendants Before: The Honourable Mr. Justice Kent Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: Mark A. Wang Counsel for the Defendant Yong Hua Chen: Chi Ming Lo No other appearances Place and Date of Hearing: Vancouver, B.C. Place and Date of Judgment: Vancouver, B.C. September 29, 2016

- [1] THE COURT: The defendant Mr. Chen applies to set aside a Default Judgment obtained against him on January 13, 2015. He swears in his affidavits that he was not personally served with the Notice of Civil Claim at first instance.
- [2] The plaintiff tenders an affidavit of service sworn by a process server on December 18, 2014, swearing that on Thursday, December 4, 2015, at 8:14 a.m., he served Yong Hua Chen with various documents, including the Notice of Civil Claim in this matter.
- [3] Mr. Fraser, the affiant, does not in any way articulate in his affidavit how he came to identify the individual whom he says he served as the defendant Mr. Chen. It is, in my view, a fatal flaw, not just in this case but insofar as affidavits of personal service are concerned generally, and Mr. Fraser and West Coast Title Search Ltd. might be wise to revise their pro forma document for the purposes of addressing that issue in the future.
- [4] Mr. Chen testifies in his affidavits that he had left his house at around 7:30 on the morning of the purported service and he provides a schedule of his various activities throughout the balance of the morning, that sees him arriving in Richmond at approximately 7:45 a.m., proceeding to a customer's location on Robson Street, Vancouver, at 8:30 a.m., driving thereafter to another customer's location in West Vancouver at approximately 9:00 a.m., and thence to a transfer station in Chilliwack where he arrived at approximately 10:56 a.m. on the day in question. The last attendance is confirmed by a certain receipt attached to the affidavit.

- [5] I agree with counsel for the plaintiff that Mr. Chen has provided no corroboration of his activities in the early morning of the day on which he was served. I acknowledge that an extract from a work journal was put into evidence purporting to confirm that he was at least working that day.
- [6] Nonetheless, the very detailed nature of the chronology Mr. Chen provides is compelling and, in my view, is evidence of a more specific nature that, given the flaw in Mr. Fraser's affidavit, must be preferred over the evidence provided by Mr. Fraser.
- [7] In my view, the evidence militates in favour of a conclusion that Mr. Chen was not, in fact, served on December 4, 2014, at 8:14 a.m., or any other time thereafter before default judgment was taken, with the initiating process in this litigation.
- [8] I might add that this litigation involves very serious allegations of wrongdoing on the part of Mr. Chen. In essence, the claim alleges that he was an accessory to fraud committed by two former employees of the plaintiff company. In his affidavit, he expressly denies any involvement in any such fraudulent scheme. If his assertions are correct, it would be unjust indeed not for the merits of the case to be aired in front of the court but, rather, for Mr. Chen to be saddled with not only a default judgment in a fraud case, but be exposed to substantial damages as a consequence. That is a factor, in my view, a weighty one, that also serves to persuade me it is more just to set aside the default judgment.
- [9] The case law is clear that if the court is satisfied service has not been effected upon a defendant, then any subsequent default judgment against that defendant is a nullity and the defendant is entitled to have the order set aside as of right. The discretionary considerations usually invoked in cases of this sort, and which have been articulated in *Miracle Feeds v. D. & H Enterprises Ltd.*, [1979] B.C.J. No. 1965, simply do not apply to applications to set aside default judgments where proper service was not first effected.
- [10] Authority for the propositions that I have just espoused can be found in the case of *Wright v. Czinege*, 2008 BCSC 1292, and in particular para. 44 thereof.
- [11] In the result, I am satisfied that justice requires in this particular case for the default proceeding to be set aside and I make an order to that effect. I also direct that Mr. Chen file and serve a Response to Notice of Civil Claim in this matter no later than 30 days from the date of this judgment, and if he fails to do so then it will be open to the plaintiff Fraser Valley Disposal Ltd. to again apply for default judgment against him.
- [12] Costs of this application will be in the cause. "KENT J."

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Prepared on 29 October 2026 · Esheria