

CANADA / JUDGMENT

Gill v. Sandhar

2022 BCSC 255

COURT

Supreme Court of British Columbia

DECIDED

17 February 2022

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2022 BCSC 255 Gill v. Sandhar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Sandhar,

2022 BCSC 255

Date: 20220217

Docket: S215530

Registry: Vancouver

Between:

Mukhtiar Gill and Jasjit Gill

Plaintiffs

And

Harpreet Singh Sandhar and Flying Home Construction Ltd.

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

D. Penner

Counsel for the Defendants:

P. Grewal

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 3, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 17, 2022

- [1] The defendants Harprett Sandhar and Flying Home Construction Ltd. seek an order setting aside a default judgment order, dated September 27, 2021, obtained by the plaintiffs Mukhtiar Gill and Jasjit Gill (the "Default Judgment Order") and discharging a subsequent certificate of judgment issued October 14, 2021 registered against the defendants' property.
- [2] The underlying dispute concerns a contract for construction, or construction management, of the plaintiffs' home in Vancouver, British Columbia (the "Home"). The contract for construction of the Home is set out in an agreement between Mr. Sandhar as builder, the plaintiffs and Mr. Sandhar's company Flying Home Construction Ltd., as guarantor, made July 18, 2018 (the "Construction Contract"). On February 17, 2021, the parties entered a second agreement under which the defendants agreed to remedy various alleged deficiencies in the construction of the Home (the "Amendment Agreement").
- [3] The defendants say that although they became aware that the plaintiffs had commenced an action alleging breach of contract in April 2021, the default judgment was obtained while they were finalizing work to remedy the alleged deficiencies. The defendants say that they were led to believe that the plaintiffs would not take any steps in the litigation and in fact, continued to work on the Home, after default judgment had been taken by the Plaintiffs, before they were served with the Default Judgment Order.
- [4] The defendants contend that the circumstances justify setting aside the Default Judgment Order, pursuant to the factors which may be considered in setting aside a default judgment set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58.
- [5] The plaintiffs contend that the defendants willfully or deliberately failed to file a response to the notice of civil claim. Further, the plaintiffs' contend that the defendants have not brought this application to set aside the Default Judgment Order expeditiously, without explaining the delay in doing so. Finally, the plaintiffs contend that the defendants do not have a meritorious defence to the plaintiffs' claims. For these reasons the plaintiffs say that the Default Judgment Order should not be set aside.

- [6] For the reasons that follow I find that the Default Judgment Order should never have been issued, is a nullity, and should be set aside, as the claim advanced by the plaintiffs was not for a specified or ascertainable amount, as required by Rule 3-8(3) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). Even if this was not the case, I would find that that in the circumstances it would be in the interests of justice to set aside the Default Judgment Order.

Obtaining and Setting Aside Default Judgments

- [7] Pursuant to Rule 3-8(1) of the Rules a plaintiff may seek a default judgment where the time for filing a response to a notice of civil claim has expired. A party may seek a default judgment for recovery of a specified or ascertainable amount, pursuant to Rule 3-8(3), for an amount to provide that a default judgment may be obtained where the claim includes a claim "for recovery of money in a specified or ascertainable amount". Alternatively, pursuant to Rule 3-8(5), where as an assessment of damages is required a party may seek a default judgment with damages to be assessed.
- [8] In this case the plaintiffs obtained a default judgment pursuant to Rule 3-8(3).
- [9] Rule 3-8(11) provides this Court with the jurisdiction to set aside a default judgment order. Some relevant factors which may be taken into consideration in an application to set aside a default judgment are found at para. 5 of *Miracle Feeds*. Those factors include the following:
- a) Whether a defendant willfully or deliberately failed to enter an appearance or file a defence to a plaintiff's claim;
 - b) Whether the defendant applied to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or provided an explanation for any delay in doing so;
 - c) Whether the defendant has a meritorious defence or at least a defence worthy of investigation; and
 - d) The foregoing factors are to be established to the satisfaction of the court through affidavit material filed on behalf of the defendant.
- [10] The factors set out in *Miracle Feeds* are not exhaustive and it is not necessary to apply each of them in considering an application to set aside a default judgment, although in most cases they provide appropriate indicators of whether it is in the interests of justice to set aside a default judgment: see *Robinson Estate v. Wolsey*, 2018 BCSC 2287, at para. 21, referring to *Andrews v. Clay*, 2018 BCCA 50, at para. 29.
- [11] As was stated by Chief Justice Hinkson at para. 24 of *Robinson Estate*, "in the final analysis, the interests of justice are the principal consideration to be addressed in determining whether to set aside a default judgment."

Analysis

[12] The legitimacy of the Default Judgment Order turns on the question of whether the plaintiffs obtained a default judgment for a specified or ascertainable amount.

[13] In *Standard Oil Company of British Columbia v. Wood* (1964) 47 W.W.R. 494 the Court defined a claim for a liquidated sum, which is equivalent to a claim for a specified or ascertainable amount, at p. 497:

The following is interpretative of the meaning of the words 'a debt or liquidated money demand.'

The Annual Practice, 1964 ed., at p.55 reads:

'Debt or Liquidated Demand.' - A liquidated demand in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue or (sic) a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages.'"(p.4)

[14] In this case the plaintiffs obtained the Default Judgment Order for \$162,880.50.

[15] The first portion of the plaintiffs' claim is for \$107,880 in liquidated damages, payable pursuant to the Amendment Agreement. This amount is equivalent to 15% of the \$719,200 paid by the owner at the time the Amendment Agreement was signed. This is a claim for a specified amount and therefore it was open to the plaintiffs to seek a default judgment for this amount pursuant to Rule 3-8(3).

[16] In addition, the plaintiffs' claim for return of a \$15,000 deposit paid towards the costs of the defendants remedying alleged defects in the Home, paid pursuant to the Amendment Agreement. Again, this is a claim for a specified amount.

[17] Problematically, the plaintiffs' default judgment amount also includes \$40,000.50, which they claim on the basis that they paid this amount into court as security to discharge two builders' liens filed on the Home by the defendants' subcontractors. The plaintiffs included the total amount of these lien claims in the default judgment despite the fact that the amount due to the subcontractors, and who owes this amount, has not been determined.

[18] Given that the builders' lien claims by the subcontractors had not been determined at the time that the Default Judgment Order was obtained by the plaintiffs, it cannot be said that this portion of the plaintiffs' claim is for recovery of money in a specified or ascertainable amount.

[19] Although the Amendment Agreement includes a clause requiring the defendants to indemnify the plaintiffs for liens, including "all liabilities and expenses (including judgments, fines, penalties, amounts paid in settlement and counsel fees", the amount of the indemnity for the builders' liens filed on the Home has not been determined at this time.

- [20] In *Tiamzon v. Vandt*, 2020 BCCA 336 the British Columbia Court of Appeal set aside a default judgment because there was no basis on which the court below could find the sum awarded in the default judgment, involving an alleged constructive trust, was due and owing when the default judgement was ordered: *Tiamzon*, at para 20.
- [21] Although the claim for approximately \$40,000.50 in this case, for security for the moneys paid by the plaintiffs to discharge the builders liens, is not analogous to a claim founded in constructive trust, the basis for dismissal is the same as in *Tiamzon*. That is, there is no basis on which this Court can find that \$40,000.50 was due and owing at the time that the default judgment was obtained. This amount can not therefore constitute a claim for a specified or even ascertainable amount.
- [22] The amount that the defendants may have to pay, as an indemnity for unsatisfied builders' lien claims, is yet unknown. That is, the amount of the indemnity which the defendants may have to satisfy is yet to be determined.
- [23] As a result, I find that the prerequisites for issuance of the Default Judgment Order were not established at the time it was issued and therefore it is irregular to the point of being a nullity. Accordingly, as a matter of right, the defendants are entitled to an order setting it aside, along with the certificate of judgment which followed: see, *Tiamzon*, at para. 15.
- [24] Although given my findings above it is not necessary to apply the factors set out in *Miracle Feeds* to determine whether it is in the interests of justice I will say a few words in that respect.
- [25] First, with respect to the question of delay, I do not find that there was inordinate delay between the time that the defendants first became aware of the default judgment and the time that they took steps to set it aside. The evidence establishes, and the plaintiffs conceded in argument, that the defendants took steps to do so within approximately six weeks.
- [26] Second, with respect to the merits of the defence, I find that the defendants have a meritorious defence - at least with respect to the claim advanced for security for builders' liens, since the requirement for an indemnity has not been determined at this time. It is not necessary for me to address the merits of the defence concerning the claims for liquidated damages or return of the deposit.
- [27] Third, with respect to the question of whether the defendants willfully or deliberately failed to file a response to the plaintiffs' notice of civil claim, in the circumstances, I do not find this to be the case. The evidence establishes to my satisfaction that the plaintiffs were aware that the defendants were continuing to work on remedying the alleged defects in the construction of the Home through the summer and into the fall of 2021. In my view, in those circumstances it was reasonable for the defendants to believe that the plaintiffs would not seek to take default judgment against them as they did in September 2021, when the remedial work was almost complete. The defendants were not represented by counsel during this period of time, while the plaintiffs apparently were. I note that no notice was

provided to the defendants before the plaintiffs took the surprising step of obtaining a default judgment.

[28] In all of the circumstances, I do not find that that is in the interests of justice to allow the Default Judgment Order to stand.

Conclusion

[29] The Default Judgment Order is set aside and the certificate of judgment dated October 14, 2021 shall be discharged forthwith.

[30] Registration of judgment against the defendants' properties located at 7110 141A Street in Surrey and 32477 Oriole Crescent in Abbotsford shall be discharged forthwith.

[31] The defendants are awarded their costs of this application, in any event of the cause.

"Mayer J."

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