

CANADA / JUDGMENT

J Power Excavating & Trucking Ltd. v. Icon Projects Ltd.

2020 BCSC 1327

COURT

Supreme Court of British Columbia

DECIDED

9 September 2020

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2020 BCSC 1327 J Power Excavating & Trucking Ltd. v. Icon Projects Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J Power Excavating & Trucking Ltd. v. Icon Projects Ltd.,

2020 BCSC 1327

Date: 20200909

Docket: S36309

Registry: Chilliwack

Between:

J Power Excavating & Trucking Ltd.

Plaintiff

And:

Icon Projects Ltd.

Sanjeev Aggarwal

Lata Ishwar Aggarwal and

N2 Investments Inc.

Defendants

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:

A. Habib

Counsel for the Defendants:

K. Naslund

Place and Date of Hearing:

Chilliwack, B.C.

August 17, 2020

Place and Date of Ruling given to Parties with Reasons to Follow:

Chilliwack, B.C.

August 19, 2020

Place and Date of Judgment:

Chilliwack, B.C.

September 9, 2020

Introduction

- [1] This is an application by the defendant Icon Projects Ltd., seeking to set aside a default judgment. On 19 August 2020, I granted the application with reasons to follow. These are the reasons.

Facts

- [2] On 30 April 2019, the plaintiff J Power Excavating & Trucking Ltd. ("J Power") filed a notice of civil claim against the four defendants, Icon Projects Ltd. ("Icon"), Sanjeev Aggarwal, Lata Ishwar Aggarwal, and N2 Investments Inc. ("N2").
- [3] The claim relates to work done or allegedly done by the plaintiff on a property located on Aquila Drive in Abbotsford. The defendant N2 is the registered owner of the property. The defendant Icon was the general contractor for the construction work. The personal defendants Sanjeev Aggarwal and Lata Ishwar Aggarwal are principals and directors in control of the two corporate defendants.
- [4] Between 5 May and 7 May 2019, the notice of civil claim was served on all four defendants. The two individual defendants, Sanjeev Aggarwal and Lata Aggarwal, were served personally. The corporate defendants, Icon and N2, were served through Sanjeev Aggarwal, as a director of both companies.

- [5] As set out in more detail in my analysis below, the defendants do not appear to deny being served with the notice of civil claim. In particular, the defendant Sanjeev Aggarwal acknowledges receiving some papers in May of 2019, but claims he did not fully appreciate their effect because he had never been involved in any form of litigation before this case.
- [6] No response to civil claim was filed, although Sanjeev Aggarwal asserts on his own behalf and on behalf of the corporate defendants that he did not ignore the legal action. He says he took at least some steps to protect the position of the defendants by engaging in dialogue with representatives of the plaintiff company and the plaintiff's counsel, as discussed in more detail below.
- [7] Default judgment was granted on 3 June 2019, against the defendant Icon only. More specifically, judgment was granted in the amount of \$37,554, plus interest of \$656.15, plus costs of \$821.26.
- [8] The defendants claim they did not become aware of the default judgment until approximately 15 October 2019, when plaintiff's counsel took steps to file a lien against the property in question, to collect on the judgment.
- [9] It is common ground that from 19 October 2019 onward, the defendants took steps to protect their position, by corresponding with plaintiff's counsel (through his legal assistant), by corresponding with representatives of the plaintiffs, and by eventually retaining counsel who ultimately brought this application to set aside the default judgment. From 19 October 2019 onward there were discussions about resolving the entire claim, that is, all outstanding matters between the plaintiff and the defendants. Those discussions evidently did not lead to a resolution, but they explain much of the delay in bringing the current application to set aside the default judgment.
- [10] The application to set aside default judgment was filed on 5 March 2020, but the hearing was delayed largely due to the impact of COVID-19 and the resulting shut down of the courts.

Analysis

- [11] The application to set aside the default judgment is brought under R. 3-8(11) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 and requires a consideration of the well known list of factors set out in *Miracle Feeds v. D & H Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) [Miracle Feeds]. The four factors listed in *Miracle Feeds* are:
- (1) That the defendant did not wilfully or deliberately fail to enter an appearance or file a defence;
 - (2) That the defendant made the application to set aside the default judgment as soon as reasonably possible after learning of it;
 - (3) That the defendant has a meritorious defence to the claim;

- (4) That these requirements have been established to the satisfaction of the court via affidavit evidence presented by the defendant.
- [12] In subsequent jurisprudence, it has been made clear that the Miracle Feeds factors are not to taken as immutable elements of a rigid legal test. As stated by Mr. Justice Voith in *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at para. 15, "These requirements are not immutable. The failure or inability of a defendant to address a particular factor in Miracle Feeds is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion". The passage was subsequently endorsed by the Court of Appeal in *Nichol v. Nichol*, 2015 BCCA 278 at para. 38.
- [13] Also, as explained by Madam Justice Sharma in *Tiamzon v. Vandt*, 2020 BCSC 587 at para. 18, the factors "must not be rigidly applied and 'relative strength in one or more of the relevant factors may overcome a relative weakness in another'".
- [14] In the case at bar, plaintiff's counsel opposed the application to set aside the default judgment principally on the basis that the defendants had not adduced sufficient evidence to satisfy the first of the Miracle Feeds factors. While having the benefit of being focused, this position is awkward because it invites the court to concentrate on the first factor, as to whether the defendant wilfully or deliberately failed file a defence, when the case law makes it clear that all of the factors must be considered in deciding whether it is in the interests of justice to set aside the default judgment. The plaintiff's focus on the first factor to the exclusion of the others ignores the principle that the relative weakness of the defendant's position on one of the factors may be overcome by relative strength in the other factors.
- [15] Plaintiff's counsel basically conceded that the defendants have satisfactorily addressed the second and third factors listed in Miracle Feeds. Thus, I take it as accepted by all concerned that after learning about the default judgment, the defendants acted with reasonable diligence in their efforts to have it set aside, and that there is an arguable defence against the claim on its merits. Having perused the materials, I certainly see a basis in the record for saying these two factors have been satisfactorily addressed. All of this weighs in favour of granting the application to set aside the default judgment.
- [16] This brings me back to the first factor, which to repeat is whether the defendants have established through affidavit evidence that they did not wilfully or deliberately fail to file a defence. On this point, although the affidavit evidence is perhaps not as precise as one might hope it to be, it seems to me that there is some basis in the record for saying that the failure to file a defence in time was not a wilful or deliberate action or decision on the part of the defendants. In particular, I see four specific points which emerge from the record.

- [17] First, at a general level the affidavit evidence reflects that the defendants have consistently taken the position that they have a meritorious defence to the plaintiff's claim. The fact that the defendants were evidently motivated to defend the case militates against a finding that there was wilful disregard for the obligation to file a defence.
- [18] Second, more specifically, the second affidavit of Sanjeev Aggarwal indicates that within two weeks of being served with the notice of civil claim, on 23 May 2019, he sent an email to the office of plaintiff's counsel. The email was not sent directly to plaintiff's counsel, but it was sent to the email address of counsel's legal assistant, through which plaintiff's counsel had been communicating with Mr. Aggarwal. The email is not very precise, but it does assert that Sanjeev Aggarwal has been in communication with a representative of the plaintiff company regarding the claim. The email states, "J Power has contacted me regarding this and I am waiting to hear back from them".
- [19] Third, Sanjeev Aggarwal also indicates in his affidavit that he had been dealing specifically with a person called Parmjit - who would appear to be Parmjit Rai - as a representative of the plaintiff company, regarding the claim. Sanjeev Aggarwal's affidavit refers to a recorded conversation which was evidently in Punjabi and has not been transcribed and officially translated into English, but was summarized in Mr. Aggarwal's second affidavit. Based on that summary, the recorded conversation between Mr. Aggarwal and Mr. Rai clearly involved some discussion about the status of the plaintiff's claim against the defendants.
- [20] In response to all of his evidence, plaintiff's counsel submits that Sanjeev Aggarwal's assertions regarding discussions with the plaintiff are too vague to carry much if any weight. There is no indication of the specific date on which the recorded conversation took place, and in particular whether it took place in May of 2019 or at some point much later. Counsel further submits that Sanjeev Aggarwal's assertions about discussions with Mr. Rai are not referenced in the affidavit of Mr. Rai, obtained and filed by defendant's counsel.
- [21] I have taken all this into account, but in the end I am still left with evidence, including contemporaneous emails, that Sanjeev Aggarwal took some steps to communicate with the office of plaintiff's counsel (through the email address by which he was first contacted) and with representatives of the plaintiffs themselves. Quite apart from when the recorded conversation took place, Sanjeev Aggarwal did say in his initial email to the legal secretary for plaintiff's counsel, referenced above, that as of 23 May 2019, Mr. Aggarwal was in communication with someone from J Power and was waiting to hear back.
- [22] Fourth and finally, Sanjeev Aggarwal also says in his second affidavit that after receiving the papers in May 2019, which I infer to be the notice of civil claim, he in fact spoke with and obtained advice from legal counsel, who advised him to contact plaintiff's counsel and also to try and resolve the matter out of court. Mr. Aggarwal was not challenged on these assertions. This evidence, together with the evidence that Sanjeev Aggarwal actually took the steps he was advised to take, weighs in favour of a finding that the failure to file a defence was not deliberate or wilful.

- [23] These four factual points, taken together, satisfy me that Sanjeev Aggarwal, a principal of the corporate defendants, did not wilfully or deliberately fail to file a defence to the claim. He sought advice, and thereafter engaged a representative of the plaintiff in some discussion, and contacted plaintiff's counsel to explain that he was "waiting to hear back from" the plaintiff.
- [24] And, of course, this is just one of the Miracle Feeds factors relevant to whether it is in the interests of justice to set aside the default judgment. As I have already indicated, it is common ground that the defendants have satisfactorily addressed the other two substantive factors listed in Miracle Feeds. Taking all of the factors into account, I am satisfied that it is in the interests of justice to set aside the default judgment.
- [25] The order of default judgment against the defendant Icon is set aside, and all four defendants will have 21 days from the date of this judgment to file a defence to the action. The plaintiff is entitled to costs of the default judgment application in the amount of \$821.26 to be paid within 21 days of this judgment.

"Riley J."

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Prepared on 25 October 2026 · Esheria