

CANADA / JUDGMENT

Malik v. Eagle Mountain Farms

2020 BCSC 1481

COURT

Supreme Court of British Columbia

DECIDED

17 July 2020

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2020 BCSC 1481 Malik v. Eagle Mountain Farms

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malik v. Eagle Mountain Farms,

2020 BCSC 1481

Date: 20200717

Docket: 208116

Registry: New Westminster

Between:

Raminder Kaur Malik

Plaintiff

And

Eagle Mountain Farms (A Partnership), Jasbir Singh Banwait

and Manmohan Singh Heer

Defendants

Before: The Honourable Mr. Justice Armstrong

Oral Ruling Re Applications to Vacate Judgments and Set Aside Garnishing Orders

In Chambers

Counsel for the Plaintiff:

J.S. Malik

Counsel for the Defendants:

G. Badh

Place and Date of Hearing:

New Westminster, B.C.

January 13 & June 30, 2020

Place and Date of Ruling:

New Westminster, B.C.

July 17, 2020

- [1] THE COURT: These reasons concern applications made in two separate actions, one involving the Satnam Education Society of British Columbia (the "SES") versus Eagle Mountain Farms (A Partnership) ("EM Partnership") under action E20793. The other claim is in a separate action by Ms. Malik also against the EM Partnership under action 201866; this was the primary application before me. These reasons will address applications in both matters.
- [2] If either party requires a copy of a transcript of these proceedings, I reserve the right to make edits to the transcript to ensure that it accurately and correctly reflects my decision, the reasoning and the outcome. Nothing in the outcome or the reasoning will change other than for clarification purposes.
- [3] The defendants seek orders vacating default judgments granted against them on September 24, 2019, and an order setting aside a garnishing order obtained and executed against an account in the name of EM Partnership. At the time of judgment, the defendants in action number 201866 were ordered to pay the plaintiff \$259,740 together with interest at \$13,805.41 on a loan that had been advanced by the plaintiff to Eagle Mountain Farms Ltd. ("EM Ltd."). The plaintiff seeks an order to remove EM Partnership as a defendant and substitute EM Ltd. as defendant.

Background

- [4] On December 1, 2013, the plaintiff entered into a loan agreement, ("the Agreement") with EM Ltd. as borrower and J.S. Banwait and Manmohan Heer as guarantors (the "Guarantors") for a loan to EM Ltd. for \$500,000.
- [5] From in or around 2013, EM Ltd. had leased a blueberry farm from the SES, which is a trust managed by Mr. Ripudaman Singh Malik, who is the plaintiff's husband. The Agreement contained the following term:
4. The loan shall be personally guaranteed by Jasbir Singh Banwait and Manmohan Singh Heer.

- [6] Loan payments were to be made on September 1, 2017, 2018, 2019, 2020 and 2021. By October 2, 2018, EM Ltd. had defaulted on the loan and the plaintiff had made demand on EM Ltd. and the Guarantors for the accelerated amount and full payment under the Agreement. On November 7, 2018, the plaintiff commenced this proceeding against EM Partnership and the Guarantors, Mr. Banwait and Mr. Heer, by notice of civil claim. No response to civil claim was filed or served by any of the defendants.
- [7] Mr. Banwait and Mr. Heer were partners in EM Partnership and directors of EM Ltd. In 2017 and 2018 there were many communications between Mr. Banwait and Mr. Malik, several of which referred to the outstanding loan between EM Ltd. and the plaintiff. In October 2017, Mr. Malik wrote to Mr. Banwait indicating that they had given a loan to develop the farm with certain promises. On August 10, 2018, Mr. Banwait had written to Mr. Malik indicating that the balance owing on the loan was \$248,000. The main focus of correspondence between Mr. Malik and Mr. Banwait related to blueberry farm lease.
- [8] On November 15, 2018, current counsel for the defendants, Mr. Badh, informed the plaintiff that he did not have instructions to accept service of a notice of civil claim which had been filed and had been sent to him at or around that time. It appears the parties were in negotiations concerning the claims between the SES and the Guarantors.
- [9] On November 16, 2018 counsel for the plaintiff wrote to counsel for the defendant setting out a chronology and confirming that Mr. Badh acted for EM Ltd., Mr. Banwait and Mr. Heer. Mr. Badh was informed that two notices of civil claim had been filed but that some negotiations were continuing. Mr. Banwait and Mr. Heer were served with the notices of civil claim on December 2, 2018, and December 9, 2018, respectively by John McTaggart, a process server. I accept the two affidavits of service accurately reflected service of the notice of civil claim in Action 20688 on Mr. Banwait and Mr. Heer, notwithstanding that Mr. Banwait did not recall being served and Mr. Heer denied being served. Mr. Badh conceded in submissions that the notices of civil claim had been served.
- [10] The affidavit for service of the NOCC on Mr. Banwait indicates he was served at 1444 Clearbrook Road, Abbotsford. This is the same address for Mr. Banwait shown on the Agreement. Similarly, the affidavit of service reflects that Mr. Heer was served at 34945 Hallert Road, Abbotsford, which is the same address associated with Mr. Heer on the Agreement.
- [11] I accept the concession of counsel for the defendants that both Guarantors had been served in December of 2018 with the notices of civil claim.
- [12] On August 12, 2019, the plaintiff filed an affidavit setting out the basis on which she was seeking judgment in default of a response to the NOCC. In that affidavit she attached a copy of the Agreement and swore that the debt was owing by EM Partnership and that Mr. Banwait and Mr. Heer were guarantors of the debt owed.

- [13] At the application for default judgment, plaintiff's counsel informed the court that the debt claim was against EM Partnership. It was obvious he had not compared the pleadings with the Agreement and clearly misrepresented the claim when speaking to judgment. Nevertheless, judgment was granted against all defendants on September 24, 2019.
- [14] On December 10, 2019, the plaintiff obtained a garnishing order after judgment, and the sum of \$275,126 was paid into court. The garnishing order named each of the three defendants. Mr. Banwait and Mr. Heer affirmed that they had learned about the judgment granted by Madam Justice MacDonald on December 19, 2019, when they received information concerning the garnishing order. They moved promptly on December 20, 2019 to seek to set aside the default judgment.
- [15] On this application the plaintiff concedes that the judgment obtained against EM Partnership is to be set aside. She contends that the garnishing order should not be set aside unless judgment against the guarantors is also set aside. She argued that the evidence filed so far did not establish whether the funds paid into court came from the EM Partnership bank account or from individual bank accounts of Mr. Banwait and Mr. Heer. Today Mr. Malik says that there is an unresolved issue about whether the bank account may have been joint between EM Partnership, Mr. Banwait and Mr. Heer.
- [16] The plaintiff contends that name "EM Partnership" in the NOCC stemmed from her lawyer erroneously relying on a partnership search of Eagle Mountain Farms (A Partnership) instead of a corporate search which would have identified Eagle Mountain Farms Ltd. as the correct borrower; EM Ltd. would have been the correct description of the borrower under the Agreement.
- [17] The plaintiff makes a separate application to remove the defendant EM Partnership as a party and substitute EM Ltd. as a defendant in both the actions involving Ms. Malik and the SES.
- [18] The defendants argue that the plaintiff's choice in suing EM Partnership was a deliberate and deceptive strategy taken by the plaintiff. They contend the plaintiff's affidavit in support of the default judgment was untruthful and is designed to inflict some harm or damage on EM Partnership. Other than taking judgment and filing the garnishing order, there was no evidence that the plaintiff's error resulted from anything other than counsel's failure to fully or carefully read the Agreement and incorporate those terms and the designation of the proper defendant in the terms of the notice of civil claim.

Analysis

- [19] I find that the balance owing on the loan as at October 2, 2018, was \$259,740 and that the plaintiff had properly demanded payment from EM Ltd., not EM Partnership, and the Guarantors under the Agreement also received demand for payment under their guarantees from the plaintiff. After that date EM Ltd. and the Guarantors were obligated to pay the full amount of the debt owing to the plaintiff in full. The defendants did not suggest that the

amounts owing were incorrect but contends that the notice of civil claim incorrectly named EM Partnership as the principal debtor and defendant, and not EM Ltd. and the Guarantors. EM Ltd. was the borrower of the money from the plaintiff and was indebted to the plaintiff.

- [20] The defendants alluded to negotiations with Mr. Malik concerning the blueberry farm lease and claims that there should be some financial accommodations given to them because of problems with the lease property. The blueberry farm lease was between SES and EM Ltd. The lease agreement was negotiated between Mr. Malik, Mr. Heer and Mr. Banwait. The plaintiff is the wife of Mr. Malik.
- [21] At or about the same time, SES had commenced an action against EM Partnership claiming past and future rent charges exceeding \$500,000. Judgment was not taken against EM Partnership in that proceeding. The Guarantors specifically claim that the NOCC could not form the basis of a judgment on the guarantee because it particularizes the personal defendants as guarantors of the debt of EM Partnership and they had guaranteed only the debt due from EM Ltd.
- [22] Notwithstanding this assertion, the Guarantors did not file a response to the notice of civil claim served in December 2018 until they were apprised of the judgment by December 2019. As I have indicated, they were duly served and I conclude that they actually stood idly by and deliberately failed to file a response to the proceeding for reasons which they contend related to negotiations.
- [23] It would have been a simple matter for the personal defendants to file a response and to cause that response to be filed by the partnership. There is no explanation given by the defendants for not responding to the NOCC, as I say, except with regard to some vague statement concerning negotiations.
- [24] There is no doubt that on October 1, 2013, EM Ltd., the borrower, entered into a loan agreement with Ms. Malik, the lender. The loan was personally guaranteed by Jasbir Singh Banwait and Manmohan Singh Heer.
- [25] The NOCC accurately alleges that Mr. Banwait and Mr. Heer had guaranteed the loan given by the plaintiff. There was no loan ever made to EM Partnership by the plaintiff.
- [26] The demand for payment on the loan was addressed to EM Ltd. and the Guarantors and clearly referred to the loan contract dated December 1, 2013. That is the only loan made by the plaintiff and guaranteed by Mr. Heer and Mr. Banwait. Neither Mr. Banwait nor Mr. Heer have suggested in their affidavit material or response that the debt claimed against EM Ltd. is not due and owing or that their obligations as guarantors to pay the debt had not been demanded by the plaintiff from EM Ltd. Their application response material contends only that the NOCC alleging a debt owing by EM Partnership was a deliberate and fraudulent attempt by the plaintiff to cause significant financial loss to the defendants and to damage the credit ratings of Mr. Banwait and Mr. Heer.

[27] I accept the plaintiff's explanation that misnaming the defendant was caused by her lawyer's error. Before the litigation was commenced, communications were exchanged between the Guarantors and Mr. Malik. Mr. Banwait wrote to Mr. Malik on August 10, 2018, and confirmed that the amount owing on the loan was \$248,000. Communications regarding these claims continued in October and November 2018. There was communication between plaintiff's counsel and counsel for the defendant and the Guarantors, Mr. Gurpreet Badh. After receiving a copy of the notice of civil claim, Mr. Badh informed plaintiff's counsel that he acted for EM Ltd. and the Guarantors but did not have instructions to accept service of the notice of civil claim.

[28] Counsel for the defendants again wrote to plaintiff's counsel on November 26, 2018 indicating that he still did not have instructions to accept service of the notice of civil claim on behalf of the defendants. In Mr. Banwait's affidavit he said:

I verily and vehemently believe that the material facts stated under the statement of facts are false, and thus there is no case against the Eagle Partnership.

[29] He went on to say that there was a dispute concerning the amount due under the agreement:

Because there had been considerable amount of expense that was incurred by Eagle Ltd. to prepare the lease property for land for growing blueberry. There were discussions between me and Mr. Malik regarding setting off some of the amount of the loan due to Ms. Malik against the expense incurred by Eagle Ltd. on the leased land.

[30] The precursor to the litigation and the judgment obtained by the plaintiffs is evident from exchanges between the defendants' lawyer and the plaintiff's lawyer. As noted, the personal defendants allude to some discussions concerning issues between SES, Mr. Malik and themselves. Mr. Banwait said this:

I was under the impression that the Malik family was communicating with me in order to resolve these issues.

[31] In regard to issues between EM Ltd. and the SES, he went on to say:

It shows that the discussions between me on behalf of Eagle Ltd. and the Malik family are in relation to the lease agreement and the issues that arose after taking over the lease, such as the need of fencing around the leased land to save the blueberry from bear and other wild animals and correcting the interest calculations on the interest payments under the loan agreement.

[32] He said that there had been discussions about the amount due under the loan because there had been considerable amount of expense that was incurred by Eagle Ltd. to prepare the leased land for the growing of blueberries:

There were discusses between me and Mr. Malik regarding setoff of some of the loan amount due to Ms. Malik against the expense incurred by Eagle Ltd. on the leased land.

[33] He also referred to some correspondence on the subject.

- [34] On October 2, 2018, the plaintiff sent a notice of default to EM Ltd. and the individual defendants, and that was when demand was made for the full amount owing under the loan as of September 1, 2018. As I say, Mr. Badh responded in his letter saying we represent Eagle Mountain Farms Ltd., Mr. Banwait and Mr. Heer collectively are our clients. Mr. Badh said that his clients would be reviewing the demands and asked that no further steps be taken without prior notice to his office.
- [35] The plaintiff responded on October 19, 2018, and the defendants had not contacted the plaintiff to arrange payment or regularize loans. Mr. Malik said that he needed to hear from Mr. Badh by 4:00 p.m. on October 22, 2018 or action will be contemplated. Mr. Badh followed up on October 21, 2018 suggesting that once he had reviewed the material, he would advise of their position. On October 9, 2018, the notice of civil claim was sent to Mr. Badh, and he repeated that he had no instructions to accept service on behalf of the defendants. On November 15, 2018, Mr. Badh reiterated that he had no instructions to accept service and suggested steps should be taken to personally serve the material on the defendants.
- [36] On November 16, 2018, Mr. Malik wrote to the defendants offering two choices to deal with their ongoing dispute. He set a deadline of November 19, 2018 for the defendants to begin the process of resolving the matter. He said that if no meaningful efforts were made to resolve the matter, his clients would not negotiate further and they would move forward with the litigation. That deadline was extended to November 26, 2018. Mr. Malik informed Mr. Badh that if negotiations were to continue, the defendants were required to accept service of the pleadings. Later, on November 26, 2018, Mr. Badh replied that his clients still refused to permit him to accept service on their behalf. Thus, the plaintiff proceeded to effect service of the notice of civil claim, followed by a judgment obtained in August of 2019.

Legal Framework

- [37] Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], Rule 3-8(11) gives the court discretion to set aside judgments given in default of a response to civil claim. The general principles underlying an application to set aside judgment were established in *Miracle Feeds v. D. & H Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) [Miracle Feeds]. In *Andrews v. Clay*, 2018 BCCA 50, a 2018 decision of the Court of Appeal, the approaches were summarized by the court:
- [28] The factors customarily considered on an application to set aside a default judgment are often referred to as the Miracle Feeds tests, as they were articulated in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) in the context of failing to file an appearance or defence. Judge Hinds (as he then was) expressed these factors in this way:

in order for a defendant to succeed on an application to set aside a default judgment, he must show:

1. That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
 2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
 3. That he has a meritorious defence or at least a defence worthy of investigation; and
 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.
- [29] I have described these factors as factors rather than tests as they are not intended to be either mandatory or exhaustive of the considerations relevant, though in most cases they will be appropriate indicators of whether it is in the interests of justice to set aside the default judgment.
- [38] The four steps of analysis set out in *Miracle Feeds* are not exclusive factors in the considerations of applications to set aside default judgments: see *British Columbia v. Ismail*, 2007 BCCA 55 at para. 11.
- [39] In *Ismail*, Smith J.A. reminded the court that pursuant to Rule 1(5) (now Rule 1-3), the object of securing the just, speedy and inexpensive determination of a proceeding should always be taken into account when considering the exercise of discretion.
- [40] I accept the concession of the parties that the judgment against EM Partnership should be set aside. The plaintiff consents to that order. I am satisfied that the defendants consent to the substitution of EM Ltd. for EM Partnership provided that the judgment against the partnership be vacated. Thus there will be an order substituting EM Ltd. as defendant in the action and substituting EM Ltd. for the EM Partnership in the proceeding brought by the SES. The filing of the plaintiff's amended notices of civil claim must occur within 14 days and be served on EM Ltd. within 14 days. Responses by the defendant will be delivered within the time prescribed by the Rules.
- [41] The basis of the applications by Mr. Banwait and Mr. Heer to vacate the order are based on their contention that they gave personal guarantees of the debt to EM Ltd. and not EM Partnership. Thus because they were sued as guarantors and the debt was described in the notice of civil claim as a partnership debt, they claim the proceeding against them was ill founded and should be dismissed and the judgment set aside.
- [42] The personal defendants do not argue that their debt to the plaintiff had not become due and owing in the amount claimed when the demand was made and the judgment taken. They do not deny the fact that when the demand was made by the plaintiff, the demand properly named EM Ltd. and not EM Partnership. In my view the defendants Mr. Banwait and Mr. Heer were willful and deliberate when they did not file a response, because they believed that simply because the NOCC had named the wrong defendants by describing the loan as a

partnership loan, which was one that they had not guaranteed, they were not liable to pay.

- [43] Strangely, if that had been the case, one would have expected they would have filed a response to the NOCC to put the plaintiff on notice concerning that error. They provided no explanation for not responding to the claim against themselves. Interestingly, Mr. Banwait could not even remember if he had been served with the notice of civil claim and Mr. Heer simply denied it. In the face of the affidavits I have concluded that both men were served and both men have conceded that fact.
- [44] I accept that the defendants acted in a timely fashion after obtaining knowledge of the judgment to bring this application and have satisfied that criteria set out in the *Miracle Feeds* case. I am not satisfied the defendants Mr. Banwait and Mr. Heer have a meritorious defence to the claim. There is no question they guaranteed the loan, received the demand from the plaintiff on October 2, 2018 and owed the amount claimed to the plaintiff. The plaintiff's demand named EM Ltd. and not EM Partnership. The debt owing by EM Ltd. is referenced in all discussions reflected in the correspondence and in the affidavits on this application.
- [45] In none of the correspondence is any mention made that neither EM Ltd. or Mr. Banwait or Mr. Heer did not owe the loan amounts due. Although I accept that they were hoping that the plaintiff would grant a reduction in the amount due under the loan due to issues between EM Ltd. and the SES. There was only one loan made by the plaintiff that was guaranteed by Mr. Banwait and Mr. Heer, and there is no evidence to indicate that they were confused who the lender under the loan was, nor that they had issued their personal guarantees and the debt was due.
- [46] As noted, to successfully set aside a default judgment, these defendants were required to establish by affidavit evidence that they had a defence worthy of investigation. To obtain an order setting aside an entered judgment, the applicant must provide some details of the defence they wish to advance in the proceeding if the judgment is vacated. See *Rangi v. Rangi*, 2007 BCCA 352, where the test was summarized as follows:
- [81] In my respectful opinion there is insufficient particularity in Kumikker's allegations to show that there is a meritorious defence or one worthy of investigation: see *Schmid v. Lacey* (1991), 1991 CanLII 1817, 7 B.C.A.C. 77 (BC CA). In that case Mr. Justice Locke, with the other judges concurring, said:

10 ... The leading case in setting aside a default judgment is that of *Bank of Montreal v. Erickson* (1984), 1984 CanLII 277 (BC CA), 57 B.C.L.R. 72, a case in this Court. The phrase was used in there as to the third ground that the applicant "has a meritorious defence, or at least a defence worthy of investigation". In my opinion, the phrase "worthy of investigation" does not mean that one is merely entitled to make the allegation. One must, I think, descend to details such as to enable the judge to correctly exercise his mind upon whether there is indeed such a defence ...

- [47] In the defendants' affidavit material, they provide no details concerning any defence except the misnomer of EM Partnership for EM Ltd.
- [48] Personal service occurred in December of 2018, and although the defendants refused to instruct counsel to acknowledge service of the NOCC, there is no doubt in my own mind that by December 2, 2018, or shortly thereafter, they were well aware of the outstanding proceeding and had discussions with Mr. Badh about the NOCC. They had informed him not to accept service of the documents on their behalf.
- [49] The only conclusion available to me is that the defendants believed that due to some deficiencies in the farm lease from SES that they could obtain the plaintiff's concession to some reduction in the amount owed. However, they have provided no details of that defence, as to amount nor any details of why they believe their debt to the defendant would be reduced if the question had been litigated.
- [50] At best, the defendants were deliberately avoiding dealing with their legal obligations and hoping that some sort of a compromise might be offered by Mr. Malik on Ms. Malik's behalf. It is clear to me that the defendants had no defence to the loan claim. It is also apparent they could not provide details of any arguable defence or a defence worthy of investigation because none existed. In those circumstances the defendants showed no meritorious defence on the evidence and no details on which this Court could assess whether the defence was even worthy of investigation.
- [51] I infer that the personal defendants had some strategic reason for their approach to the plaintiff's claim which was not disclosed in any affidavit material. Although those defendants argued that a failure to respond to the claim was connected to ongoing negotiations towards settlement of the loan claim and the lease issue, neither party detailed or affirmed that connection. Neither personal defendant suggested there was an agreement or understanding that the plaintiff would not proceed with its claims. Possibly because they say they could not remember or not recall if the NOCC had been served on them at the time.
- [52] Neither party suggested that they had any confusion about the state of affairs, particularly in light of the negotiations that had been ongoing and the deadlines that had been placed on them by the plaintiff. As noted in the fourth part of the Miracle Feeds test, the evidence to warrant vacating a judgment must be through affidavit material by or on behalf of the defendants. They were obliged to disclose these facts indicating there was a defence worthy of investigation. They were not required to demonstrate likely success on the balance of probabilities. Their obligation was simply to demonstrate some defence worthy of investigation.
- [53] There must be such sufficient detail in an affidavit to enable the court to conclude that such defence was possible, and I accept that there were many factors to consider in the analysis of an application to set aside judgments, but the defendants in this case had not met those requirements. In this case the dealings between the parties referred to in affidavits, the nature of the action, and the simple error in wrongly describing "EM Partnership" instead of

"EM Ltd." are important. These coupled with the defendants' deliberate decision not to file responses militate against their applications.

- [54] Mr. Banwait and Mr. Heer are both partners in EM Partnership and directors in EM Ltd. It is clear their solicitor, Mr. Badh, was in possession of the notice of civil claim by December 2018 and had obtained specific instructions from them not to accept service and took no steps in spite of service that occurred in December of that year. The affidavit material relied on to obtain the default judgment included, amongst other things, as I have indicated before, a copy of the loan agreement between the plaintiff and EM Ltd. and the Guarantors.
- [55] In summary, the defendants have not met the requisite but flexible test under Miracle Feeds to warrant the court exercising its jurisdiction to set aside the judgment. They have not established any other factors in addition to the Miracle Feeds test that would warrant the Court exercising its discretion. There is no meritorious defence worthy of investigation, and I find that as a result of the personal defendants' decision to not file a response to the notice of civil claim, that they have not established the factors in favour of vacating the judgments. There are no reasons for me to exercise my discretion to set aside the judgments against Mr. Banwait and Mr. Heer, and it is in the interests of justice and taking into account Rule 1-3 that the judgment obtained against Mr. Banwait and Mr. Heer not be set aside.
- [56] The defendants collectively opposed the substituting "EM Ltd." for "EM Partnership" out of fear that Ms. Malik would assert that the judgment had been properly obtained and that by reason of substitution it would simply become a judgment against EM Ltd. Counsel for the plaintiff assured the defendants and the Court that there would be no claim that the judgment would bind EM Ltd. In the face of that assertion, counsel for the defendants consented to the substituting of EM Ltd. for EM Partnership in both proceedings. The only question arising following that concession was the question of costs. I would thus make those orders in both proceedings.
- [57] In summary, "EM Partnership" is removed and "EM Ltd." substituted as defendant in the action by Ms. Malik. "EM Partnership" is removed and "EM Ltd." is substituted as defendant in the Satnam Education Society proceeding. The judgments granted against Mr. Banwait and Mr. Heer stand.
- [58] The defendants seek an order for special costs because of the error in naming the corporate defendant and deliberately causing it considerable stress and expense. The plaintiffs seek costs arguing the defendants acted obstructively in refusing to concede the points it wished to bring.
- [59] On the question of costs, the defendants requested the order vacating the garnishing order, under which a substantial amount of money was paid into court. At the time the evidence did not establish which party's funds were paid into court. I granted the defendants leave to file further affidavit material on this point so that it could be determined whether or not the funds in court belonged to the partnership or, in fact, belonged to the individual partners.

[60] The defendant EM Partnership relied on the decision of *General Motors Acceptance Corporation of Canada Limited v. McClintock*, 2000 CanLII 27017 (ON CA). In that case the lower court concluded that a garnishing order is available where a debt is payable to one or more co-owners, but in that case the court concluded that partners were unable to deal with partnership assets, were not subject to, and could not stand to, answer to claims against the individual partners. Those sums owned by a partnership are not divisible among the partnership and could not be garnished. The Ontario Court of Appeal upheld that decision in these words:

We agree with the reasons of Hockin, J. for the purposes of Rule 60.08(1.1) the bank account here was a debt payable to the partnership, the holder of the account not to Mr. McClintock, among others, as a partner.

[61] I have now had the opportunity to review the affidavit given to me this morning by Mr. Badh concerning the bank account. I am satisfied based on the material provided to me that this bank account was held in the name of Eagle Mountain Farms without any designation, certainly on its bank statements, without any designation of whether it is "Ltd." or "Partnership." That distinction does not matter on this application. The account details clearly demonstrate that \$275,126.39 were garnished from that account on December 18, 2019.

[62] I was provided as well with the customer snapshot from the Bank of Montreal, which describes this account as Eagle Mountain Farms (A Partnership). It references account 0701070515. It shows that the account is now closed. I am satisfied on the balance of probabilities, there being no evidence to the contrary, that the money was that taken out of the bank account by the garnishing order did come from the partnership bank account, and accordingly I will order that the garnishing order issued in December 2019 be set aside and that the funds be returned to EM Partnership.

[63] Finally, the next step is to deal with the question of costs. The defendants argued that the plaintiff used this notice of application to substitute one party for the other retroactively. It created fear in the minds of the defendants that substituting "EM Ltd." for "EM Partnership" could have left the judgment in place against EM Ltd. Once that point was clarified, the defendants did not oppose the changing of the names. However, the defendant asserts that the claimant deliberately misnamed the defendant and repeatedly misled the Court concerning the claim. They point out that the plaintiff's affidavit in support of the judgment was unequivocally intended to name the EM Partnership. This fact was compounded by counsel for the plaintiff attending the application for default judgment and asserting to the court that the EM Partnership was the proper defendant and the money was properly owing by the defendants to the plaintiff.

[64] In my view there was a measure of carelessness and negligence on the part of the solicitor for the plaintiff who had simply failed to read the Agreement and failed to ensure that the pleadings accurately reflected the proper parties. Counsel's carelessness was compounded

by the plaintiff's carelessness when she falsely swore her affidavit without reading the Agreement and comparing it to the notice of civil claim. This process was begun when the defendant brought an application to set aside the default judgments, and I am satisfied the plaintiffs' approach to the litigation was sufficiently cavalier to warrant a rebuke by the Court and for an order for special costs to be granted on the application to set aside the default judgment.

- [65] This process was begun when the plaintiff brought an application to set aside the default judgments. This triggered the plaintiff's recognition that her claims were improperly advanced and that a correction in the style of cause and naming of the parties in the SES action were necessary. Against that, the individual defendants have been unsuccessful in their application to set aside the plaintiffs' judgment claim against them personally.
- [66] On the question of costs, both parties cited three authorities: *Beach Estate v. Beach*, 2018 BCSC 1108, rev'd on other grounds 2019 BCCA 277 [*Beach Estate BCSC*]; *Korkut v. Kinloch*, 2014 BCSC 1576; and *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 [*Mayer*]. There is a common theme in these authorities that meritless claims and recklessness with regard to truth may warrant a special costs order, particularly when a party making an improper allegation of fraud, conspiracy, breach of fiduciary duty or where a party presents a case so weak that it is bound to fail, and where a party pursues claims frivolous loosely and without foundation: see *Beach Estate BCSC* at para. 71 and *Mayer* at para. 11.
- [67] In *Korkut*, *Abrioux J.* (as he then was) considered an application for special costs in which a plaintiff had sued the wrong party and in which the plaintiff failed to deal with the manifest deficiencies of his claim at an early stage. The court said this sort of recklessness and indifference to that agenda interfered with the interests of the defendant and merited an award of special costs: see para. 27.
- [68] As indicated, I am satisfied that the plaintiff in this case demonstrated a level of carelessness and indifference to the interests of the EM Partnership at a number of important points in the litigation. Firstly, the claim was ill conceived because plaintiff's counsel failed to properly prepare the notice of civil claim.
- [69] Secondly, plaintiff's counsel represented to the court as fact, that the partnership had borrowed the money when such representation was untrue and was clearly wrong on the material contained in the affidavit on which the plaintiff relied to obtain the judgment. Again, with some minimal care that issue could have been avoided.
- [70] Finally, after obtaining a judgment against the wrong party, the plaintiff took a garnishing order which substantially interfered with the interest of the EM Partnership. In my view the burden was on the plaintiff to remedy her errors in proceeding as she chose to do. It would have been a simple matter for the plaintiff to have vacated the judgment against the partnership before her application was begun. Similarly, the plaintiff could and should have agreed to withdraw the garnishing order or made early efforts to ascertain the source of the funds paid into court, but she did not do so.

[71] Overall, I am satisfied that the EM Partnership is entitled to special costs of the application to set aside the judgment. I find the substitution application stemmed from the plaintiff's initial error and resulting confusion and the defendant EM Partnership will have ordinary costs for addressing the substitution of EM Ltd. for EM Partnership.

[72] However, I am also satisfied that the individual defendants are responsible for costs at Scale B to the plaintiff on this application to set aside the default judgment against them.

[73] Thank you.

"Armstrong J."

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