
CANADA / JUDGMENT

Pepinieres Guillame SA v. Holman

2012 BCSC 1291

COURT

Supreme Court of British Columbia

DECIDED

31 August 2012

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2012 BCSC 1291 Pepinieres Guillame SA. v. Holman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pepinieres Guillame SA. v. Holman,

2012 BCSC 1291

Date: 20120831

Docket: 31477

Registry: Penticton

Between:

Pepinieres Guillaume SA

Plaintiff

And

Keith Holman and Lynn Holman,

Holman and Lynn Holman carrying on business as

Holman Farms

and the said Holman Farms

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Application Respondents, Carloni Capital Corp., Karlann Financial Corp., and 0734575 B.C. Ltd., assignees of the Plaintiff:

Peter J. Roberts

Counsel for the Defendants:

Reinhard Burke

Place and Date of Hearing:

Kelowna, B.C.

August 13, 2012

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2012

INTRODUCTION

- [1] By application filed on July 25, 2012, the defendants apply to set aside the default judgment which Pepinieres Guillaume SA obtained against them on March 25, 2009 in the amount of \$236,340.52.
- [2] Pepinieres Guillaume SA grows grapevines in France for export. By its statement of claim filed February 18, 2009, the plaintiff claimed against the defendants in debt for the balance owing on the sale of 200,000 vine plants sold to them in April 2007 and delivered in May 2007.
- [3] On November 29, 2010, Pepinieres Guillaume SA assigned its judgment to Carloni Capital Corp., Karlann Financial Corp. and 0734575 B.C. Ltd., the respondents to this application. The assignees of the plaintiff brought proceedings in California to execute on the default judgment, and on November 21, 2011 obtained an order of the Superior Court of California attaching property owned by the defendants Keith Holman and Lynn Holman located at San Diego, in the State of California.
- [4] If the default judgment is set aside, the defendants intend to raise two defences. First, they say they were not personally liable for the debt to Pepinieres Guillaume SA, because the purchaser was Holman Lang Wineries Ltd. ("HLWL"), a company of which Mr. Holman was the principal. Second, the defendants say they have recently discovered that the vines supplied by the plaintiff in 2007 were probably infected with a virus that caused all of them to die by 2010.

BACKGROUND

- [5] In 2007, the defendants Keith and Lynn Holman, in their personal capacities, and through Holman Farms and various corporate entities, including HLWL, owned and operated vineyards and several wineries in the south Okanagan.

- [6] The defendants assert that HLWL purchased the 200,000 grapevines from Pepinieres Guillaume SA in April of 2007.
- [7] The 200,000 grapevines purchased in April 2007 were planted in May of that year. One half of the vines were planted in several vineyards while the remaining half were planted in an outdoor nursery.
- [8] During the winter of 2007/2008, all 100,000 grapevines planted in the nursery, and 20 per cent of the grapevines planted in the vineyards died.
- [9] Mr. Holman has deposed that when he discussed the death of the grapevines with Pepinieres Guillaume SA in the spring of 2008, the plaintiff attributed the loss of the vines to winter kill due to severe winter weather. At that time, the defendants accepted that explanation for the vines' mortality.
- [10] During the winters of 2008/2009 and 2009/2010, the remaining vines purchased in April of 2007 died, as did further vines purchased from Pepinieres Guillaume SA in 2008.
- [11] In 2008, the Bank of Montreal stopped lending money to the defendants and their companies and demanded repayment of outstanding loans.
- [12] By writ and statement of claim filed on February 16, 2009, the plaintiff commenced these proceedings against the defendants.
- [13] At paragraph 15 of his affidavit sworn July 24, 2012, Mr. Holman deposes:
- In February 2009, Pepinieres Guillaume SA commenced an action against my wife and I and Holman Farms for the sum of approximately \$231,000 that was still owed for the April 2007 purchase. My wife and I considered the sum to be owed to Pepinieres Guillaume SA although it did not occur to us that the claim should be against HLWL, and not us personally. We did not defend the action because we considered the debt alleged by Pepinieres Guillaume SA to be owed by HLWL.
- [14] On May 3, 2009, the defendants filed an appearance in this action.
- [15] By letter dated March 5, 2009, counsel for Pepinieres Guillaume SA advised the defendants that if they failed to file a statement of defence on or before March 17, 2009 the plaintiff would apply for default judgment.
- [16] The defendants did not file a defence and on March 25, 2009 the plaintiff obtained default judgment in the amount of \$236,340.52.
- [17] On May 6, 2009, the plaintiff registered a Certificate of Judgment in the Kamloops Land Title Office against real property in British Columbia owned by Mr. and Mrs. Holman. On or about June 9, 2009, the plaintiff provided the defendants with a copy of the default judgment and a demand for payment.

[18] On September 17, 2010, about 15 months after the default judgment was granted, a Receiver Manager was appointed on the application of the Bank of Montreal over the business of the defendants and their related corporations, including HLWL, in *Bank of Montreal v. 0740103 B.C. Ltd. et al*, SCBC Action No. S106152.

[19] The Receiver Manager took possession of all of the defendants' financial records and bank accounts, and assumed the management of the business affairs of the defendants and the corporations subject to the receivership order.

[20] Paragraph 8 of the receivership order provided:

No Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently underway against or in respect of the Debtor's or Property are hereby stayed and suspended pending further Order of this Court. ...

[21] On or about November 29, 2010, Pepinieres Guillaume SA assigned the default judgment to the application respondents, who registered the assignment in the Kamloops Land Title Office on February 3, 2011.

[22] The defendant Keith Holman has deposed that in the spring of 2011 he learned that the Canadian Food Inspection Agency ("CFIA") had determined that grapevines exported to Canada by the plaintiff in 2010 contained grapevine viruses A and B, and that CFIA had suspended imports to Canada of plants from Pepinieres Guillaume SA. After corresponding with CFIA about the viruses in May, 2011, and making inquiries of other growers who had lost vines purchased from the plaintiff, the defendants became convinced that viruses had also infected the vines purchased from the plaintiff in April 2007, and had caused the loss of all 200,000 plants.

[23] In late 2011, Mr. Holman requested that the Receiver Manager take steps to set aside the default judgment. The Receiver Manager declined to do so.

[24] During 2011, the Receiver Manager liquidated all of the corporate assets of HLWL and related corporations, and the Bank of Montreal foreclosed against properties in British Columbia owned by Mr. and Mrs. Holman. After losing all of the properties they formerly owned in British Columbia, the Holmans now live in a trailer, which they move from place to place. They spent the winter of 2011-2012 in their trailer at San Diego.

[25] On November 21, 2011, a Judge of the Superior Court of California, County of San Diego, granted the application respondents an order attaching real property owned by Mr. and Mrs. Holman in San Diego. The application respondents served Keith Holman and Lynn Holman with the order of the California court on or about November 28, 2011, by posting a copy on their San Diego property, and mailing copies to their addresses in Penticton, British Columbia and in California.

- [26] The defendants do not deny that they received notice of the California attachment order at or about the time it was posted on their property in San Diego.
- [27] Mr. Holman has deposed that the delay in bringing this application in 2012 was caused by the defendants' lack of funds and difficulties they encountered in obtaining access to HLWL's records that were held in storage in Vancouver by the Receiver Manager.

DISCUSSION

- [28] Under the test for setting aside a default judgment as stated in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (C. Ct.), and approved in *Bank of Montreal v. Erickson and Erickson* (1984), 57 B.C.L.R. 72 (C.A.), a defendant must establish:
- (a) That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
 - (b) 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;
 - (c) That he has a meritorious defence or at least a defence worthy of investigation; and
 - (d) 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] In *H.M.T.Q. in Right of the Province of British Columbia v. Ismail*, 2007 BCCA 55, the court held that the factors enumerated in the *Miracle Feeds* test are not conditions that must be satisfied by an applicant, but rather are relevant factors to be taken into account by a chambers judge in exercising his or her discretion on whether to set aside a default judgment. Thus, the failure of a defendant to meet all of the *Miracle Feeds* factors will not necessarily defeat an application to set aside a default judgment: *British Columbia (Director of Civil Forfeiture) v. John Doe*, 2010 BCSC 940 at para. 15.
- [30] I begin with the third factor. Here, the defendants assert that they have two defences which are meritorious, or at least worthy of investigation. First, they maintain that the contract to purchase the grapevines was made between *Pepinieres Guillaume SA* and HLWL, and that they are therefore not personally liable for the debt.
- [31] The defendants must have known both when they received invoices from the plaintiff, and when the plaintiff commenced this action and served its statement of claim, whether HLWL was the purchaser. The plaintiff issued invoices for the grapevines to Holman Farms. When the plaintiff brought this action in February 2009 the defendants retained possession of all of their business records, both personal and corporate. The defendants did not assert at any time before the plaintiff took default judgment that HLWL was the purchaser of the vines.

- [32] Nor did they do so after they received notice in June 2009 that the plaintiff had registered the judgment against properties the defendants held in their own names.
- [33] By several emails sent between April 28, 2008 and December 3, 2008, Lynn Holman responded to the plaintiff's requests and demands for payment of its outstanding account by requesting more time to pay. By her email dated December 22, 2008, Ms. Holman confirmed the debt, and again requested additional time for payment. She wrote "We have listed an additional 6 properties with a new real estate company Sotheby's International Real Estate in the hopes that one will sell soon and we can devote those proceeds to our bill. I am enclosing the listings to show you we are serious in our effort to pay you in full as soon as we possibly can.....As soon as a sale happens payment will be made in full."
- [34] In these circumstances, and particularly in the absence of any contemporaneous communication from the defendants to the plaintiff that HLWL was the purchaser of the plants, I conclude that this defence is neither meritorious nor worthy of investigation.
- [35] The defendants' second proposed defence is that the vines purchased in 2007 carried the same viruses as were subsequently found in plants exported by the plaintiff in 2010, and that these viruses caused the loss of all 200,000 plants.
- [36] The application respondents submit the defendants have produced no evidence to show that any plants exported by the plaintiff in 2007 were infected by a virus. They say a defence based on a bare allegation is not a defence worthy of investigation. In order to establish that a defence is worthy of investigation, a defendant must adduce sufficient affidavit evidence to enable the chambers judge to correctly determine if there is indeed such a defence: *Schmid v. Lacey*, [1991] B.C.J. No. 3501 (C.A.).
- [37] The materials filed by the defendants show that they lost one half of the plants purchased from the plaintiff during the winter of 2007/2008, and that the remaining plants perished over the following two winters. They have also adduced evidence that in 2010 CFIA tested samples of 2009 and 2010 imported grapevines originating from Pepinieres Guillaume SA, and found them to contain the disease- causing grapevine viruses A and B, and that the CFIA investigation is continuing with respect to vines imported in 2010. The defendants' materials also indicate those viruses, and the diseases associated with them, may render infected vines more susceptible to winter kill than healthy vines.
- [38] The application respondents correctly argue that the fact that some vines exported by the plaintiff in 2009 or 2010 carried viruses does not establish that vines sold and delivered in 2007 were similarly infected. However here, in light of the catastrophic loss of all 200,000 plants over three winters, the defendants' materials are sufficient to meet the low threshold of establishing a defence worthy of investigation. I say this recognizing that any investigation at this late stage would be difficult, and would likely involve the testing for the presence of grapevine viruses A and B in plants purchased in 2007 from the plaintiff by other growers since none of the plants shipped to Holman Farms in 2007 survived.

- [39] I turn now to the first of the Miracle Feeds factors.
- [40] A defendant who decides not to defend an action, or chooses to ignore it, fails to meet the first branch of the Miracle Feeds test: *Daum v. Elko*, 2009 BCSC 349 at para. 6.
- [41] Here, the defendants, after filing an appearance, and despite being put on notice that the plaintiff intended to apply for default judgment if they failed to file a defence, made a decision not to defend the action. They made that decision because at the time they considered the amount claimed to be owed to Pepinieres Guillaume SA, although they say it did not occur to them that the claim should be against HLWL. I find that the defendants made a wilful and deliberate choice not to file a defence.
- [42] Mr. Holman has sworn that it did not occur to the defendants that the claim should be against HLWL, rather than the Holmans in their personal capacity. He has also deposed that "We did not defend the action because we considered the debt alleged by Pepinieres Guillaume SA to be owed by HLWL." Those statements are difficult to reconcile. If the defendants believed that the debt was owed by HLWL, and that they were not liable to pay \$231,000 to the plaintiff, the prudent course would have been to file a defence by which they contested the plaintiff's claim for judgment against them personally.
- [43] The defendants brought their application three years and five months after the plaintiff obtained the default judgment and gave them notice that it had done so. Mr. and Mrs. Holman knew from the time that the plaintiff commenced this action that its claim was against them in their personal capacities. They knew at that time whether or not HLWL was the purchaser of the vines, but they neither informed the plaintiff that HLWL was responsible for the debt, nor filed a defence.
- [44] The defendants have also been aware since the spring of 2011 that vines exported by Pepinieres Guillaume SA to Canada in 2010 suffered from grapevine viruses A and B. Mr. Holman has deposed that in 2011 he made inquiries of other growers who had purchased grapevines from Pepinieres Guillaume SA and had received information that their vines had also not survived. He has attached to his affidavit email correspondence dated July 21, 2011 from another grower reporting the loss of vines purchased from the plaintiff. The defendants were aware more than a year ago of the facts they now rely upon to assert the defence that the vines they purchased from the plaintiff in 2007 were infected by the same viruses found in grapevines exported by the plaintiff to Canada in 2010.
- [45] Mr. Holman explains his delay in bringing this application in 2012 as being due to a lack of funds and the difficulty the Holmans encountered in obtaining access to HLWL's records. That explanation does not account for the defendants' failure to promptly raise the defence that HLWL was the purchaser of the grapevines following the commencement of this action and while the defendants still had control of the records of HLWL. Nor does it explain the defendants' failure to move to set aside the default judgment during the summer of 2011, after they learned that CFIA had suspended the import of grapevines from Pepinieres Guillaume SA following the discovery of viruses in plants imported in 2009 and 2010.

[46] The defendants have failed to establish that they applied to set aside the default judgment as soon as reasonably possible after receiving notice of that judgment, and have not provided a satisfactory explanation for their delay of almost three and a half years in bringing this application.

[47] Accordingly, the defendants' application to set aside the default judgment is dismissed.

"PEARLMAN J."

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