

CANADA / JUDGMENT

Sekhon v. Fernandes

2020 BCSC 1624

COURT

Supreme Court of British Columbia

DECIDED

20 February 2020

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2020 BCSC 1624 Sekhon v. Fernandes IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Sekhon v. Fernandes, 2020 BCSC 1624 Date: 20200220 Docket: M184922 Registry: New Westminster Between: Kulwinder Sekhon Plaintiff And Agnelo Fernandes and Alvito Fernandes Defendants

- And - Docket: M187939 Registry: New Westminster Between: Kulwinder Sekhon Plaintiff And Peter De Groot, Fraser Valley Bakery Distribution Ltd., Yao Li, and Jie Zhang Defendants Before: The Honourable Mr. Justice Edelmann Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: Y.H.A, Ng Counsel for Defendants: R. Rakhra Place and Date of Trial/Hearing: New Westminster, B.C. February 20, 2020 Place and Date of Judgment: New Westminster, B.C. February 20, 2020
- [1] THE COURT: There are two applications before me on different files relating to damages arising from three motor vehicle accidents. The two matters were set to be heard together. The application materials in the two files are essentially identical. These reasons will therefore address both applications together.
- [2] These matters were set for trial in March 2018, by former counsel for the plaintiff, with a trial date scheduled for September 30, 2019.
- [3] On March 19, 2019, the plaintiff, Ms. Sekhon, was to attend for an examination for discovery. That examination did not go ahead because her former counsel Ms. Gandhi, in the words of the plaintiff, "was going to stop being my lawyer and I was to find a new lawyer."
- [4] Notice of intention to withdraw as counsel on behalf of Ms. Gandhi dated April 4, 2019, indicates it was served to an address on East 54th Avenue in Vancouver. A notice of withdrawal of lawyer was filed with the Court on April 24, 2019, providing the last known address as the one on East 54th.
- [5] Ms. Sekhon's affidavit indicates she did reside at the address on East 54th prior to October 2018, but was renting it out thereafter. She continues to receive mail at that address, although she states it is "not on a regular a basis, and it's usually when my husband goes to pick it up."

- [6] Ms. Sekhon's affidavit is silent on a number of salient points. It is notably silent about the receipt of the notice of withdrawal from Ms. Gandhi and whether she had communicated her new residential address to her former counsel.
- [7] The affidavit is silent on whether she was aware of the date set for trial and whether she communicated the trial date to her new counsel. I note that her new counsel, who is not the counsel on this application, deposes that he was not aware of the date for trial, despite the fact that it would seem to be a rather salient question to ask a new client.
- [8] New counsel was retained on or about May 8, 2019. He deposes that he did not receive a file from Ms. Sekhon until September 19, 2019, and he did not review the file "in earnest" until early October 2019.
- [9] Ms. Sekhon's affidavit is notably silent on when she received the file from her former counsel, Ms. Gandhi, but it does not contradict a letter from former counsel dated May 16, 2019, confirming that Ms. Sekhon already had possession of the file as of that date.
- [10] Ms. Sekhon in her affidavit points to an unspecified kidney problem that she had over the summer and that resulted in a hospital stay at unspecified times, although there does appear to have been at least some time in the hospital in late September or early October.
- [11] The affidavit is silent on the reason why these health problems prevented her from providing her file to new counsel between May and September. Based on the information in the affidavit, the kidney problem was apparently getting worse by September when she was hospitalized, but that is precisely the timeframe in which she finally did provide the file to her new counsel.
- [12] Ms. Sekhon failed to attend at a rescheduled examination for discovery in May 2019, at a trial management conference, and at the scheduled trial date. Throughout the process materials were served to the address on 54th Avenue, which was the last address provided for service in the notice of withdrawal.
- [13] An application was made for default judgment, which was granted by this court. It is those default judgments that the plaintiff now seeks in the application before me to have set aside. Default judgement in one of the actions was granted on September 24, 2019 and in the other on September 30, 2019.
- [14] The test for setting aside a default judgment was summarized by Voith J. in *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940, at para. 11:
- [11] The leading case which sets out the principles applicable to such an application is *Bank of Montreal v. Erickson and Erickson* (1984), 57 B.C.L.R. 72 (C.A.), in which the Court of Appeal confirmed the test established in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.). A defendant is required to demonstrate:

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.
- [15] For present purposes points 1 and 4 are of particular pertinence. I have not addressed the period of time that it has taken to bring this application before the court because although there is little in the way of explanation for the delay, this application fails on the first prong. I am not satisfied that Ms. Sekhon has established through the materials that are before me that she did not wilfully or deliberately fail to enter an appearance as set out in my reasons. Her materials are simply silent on a number of salient points.
- [16] The onus in this application is on Ms. Sekhon, and she has failed to meet the burden that is on her to demonstrate why she did not attend the proceedings.
- [17] Therefore both applications are dismissed.
- [18] Is there anything arising from that, counsel?
- [19] MR. RAKHRA: My Lord, I'm also seeking costs for the preparation of the response materials and attendance in chambers today.
- [20] THE COURT: Yes, costs with respect to these applications for the defendant.
- [21] MR. NG: My Lord, one set of costs for the application?
- [22] THE COURT: Yes, if you are unable to agree on the details, you go can before the registrar. "Edelmann J."

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