

CANADA / JUDGMENT

Stadnyk v. Allen

2003 BCSC 2008

COURT

Supreme Court of British Columbia

DECIDED

23 July 2003

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2003 BCSC 2008 Stadnyk v. Allen Citation: Stadnyk v. Allen Date: 20030723 2003 BCSC 2008 Docket: S024812 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA Oral Reasons for Judgment Madam Justice B. Brown July 23, 2003 BETWEEN: ANDREI STADNYK PLAINTIFF AND: RICHARD ALLEN DEFENDANT Counsel for the Plaintiff Ms. J. Basra Counsel for the Defendant Ms. L. Ridgedale

- [1] THE COURT: I am satisfied that the judgment should be set aside. Counsel are clearly of agreement that the four tests in *Miracle Feeds* are those that apply in this case.
- [2] Dealing firstly with wilful failure to respond to the writ and statement of claim. I am satisfied with the explanation provided by Mr. Allen that, had he realized that he had been served, he would have responded. Certainly in the circumstances of this case where he had already been through a criminal trial, where he anticipated civil proceedings and was awaiting them, I cannot understand why, had he known that he had been served, he wouldn't have responded. That's consistent with his immediate action once he received the notice that his wages had been garnished.
- [3] This case is distinguishable from other cases in which the parties have had to be substitutionally served and have come in with explanations for failing to defend that aren't credible. In this particular case it is highly likely that Mr. Allen would have responded had he realized that he was served. There are other possible explanations. There may have been a mistake. Someone may have identified himself as Allen and received the materials. That being so I am satisfied that the failure to respond was not wilful.
- [4] Second test, whether Mr. Allen responded as soon as reasonably possible. Immediately after he received notice that his wages had been garnished, he sought legal advice. Any delay thereafter seems to have been as a result of communications between counsel. I am satisfied that whatever delay arose from counsel's difficulties should not be laid at the feet of Mr. Allen.
- [5] With respect to the merit of his defence it appears that there is at least a defence worthy of investigation here. I have looked through the reasons of the judge in the criminal proceedings and it seems that there was at least some lack of consistency amongst the

evidence of the witnesses. Some of them clearly support Mr. Allen in what he says happened. Some seem to support Mr. Stadnyk in what he says happened. It will be a question of credibility at the trial itself, but there is a defence that is at least worthy of investigation. The materials have been put before me by way of affidavit and I will grant the motion.

[6] Costs in the cause. "B. Brown, J." The Honourable Madam Justice B. Brown

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Prepared on 28 October 2026 · Esheria