

CANADA / JUDGMENT

Taylor v. Geyser Management Inc.

2021 BCSC 2162

COURT

Supreme Court of British Columbia

DECIDED

4 November 2021

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2021 BCSC 2162 Taylor v. Geyser Management Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Geyser Management Inc.,

2021 BCSC 2162

Date: 20211104

Docket: S194154

Registry: Vancouver

Between:

Derek Taylor and Glen Wilson

Plaintiffs

And

Geyser Management Inc.

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Re Application to Set Aside Default Judgment

Counsel for the Plaintiffs, appearing via teleconference:

R.U. Bennett

Counsel for the Defendant, appearing via teleconference:

J. Corbett

Place and Date of Hearing:

Abbotsford, B.C.

June 30, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2021

[1] The defendant, Geyser Management Inc., has applied to set aside a default judgment under Supreme Court Civil Rule 3-8(11), based upon an admitted solicitor's error. The defendant submits the factors relevant to setting aside a default judgment as set out in the long-established decision of *Miracle Feeds v. D.& H. Enterprises Ltd.*, [1979] B.C.J. No. 1965 (Co. Ct.) have been met, those factors being:

- a) That the failure to file a response or defence was not willful or deliberate;
- b) That the application to set aside the default judgment was made as soon as reasonably possible upon learning of it or an explanation for delay is given;
- c) That there is a defence worthy of investigation; and
- d) That all requirements are established through affidavit material filed on behalf of the defendant.

[2] I will summarize the circumstances which have led the parties to this point.

SUMMARY OF FACTS

[3] The facts are summarized in paras. 3-7, inclusive of the defendant's submissions, which I reproduce as follows:

3. The within action arises out of a share purchase agreement entered into by the plaintiffs and the defendant. The plaintiffs say that the defendant repudiated the agreement, along with a number of collateral agreements. The defendant denies that it repudiated the agreement. It also says the plaintiffs failed to meet their contractual obligations causing loss to the defendant, and that this loss should be set off against any amounts owing to the plaintiffs.
4. The plaintiffs filed their notice of civil claim in this matter on April 4, 2019. The defendant filed its response to civil claim on May 13, 2019.
5. On March 9, 2020, the plaintiffs brought an application to strike the defendant's response to civil claim. At the hearing it became apparent that the plaintiffs were seeking to rely on an original share purchase agreement dated January 10, 2018, while the defendant was relying on a revised agreement dated April 12, 2018. Madam Justice [MacNaughton] ordered the

defendant to file a "fresh" amended response to civil claim within 21 days that particularized which share purchase agreement and which specific provisions it was relying on in defending the action. The 21 day deadline set by Madam Justice [MacNaughton] expired on March 30, 2020.

6. Due to oversight, counsel missed the deadline for filing the fresh response to civil claim. The plaintiffs then applied for default judgment on August 14th, 2020. Madam Justice Warren granted the default order, but specifically ordered that the defendant had the right to apply to set aside the default pursuant to R. 3-8(11).
7. Defence counsel advised counsel for the plaintiffs that he would be moving to set aside the default, and retained independent counsel to bring the within application.

WAS THE FAILURE TO FILE DELIBERATE OR WILLFUL?

- [4] In his affidavit, original counsel for the defendant deposed as follows, his evidence relating to the issue that the failure to file in a timely way was not deliberate or willful:
8. It was always my intention to file the revised response to civil claim in compliance with Madam Justice [MacNaughton]'s order. However, shortly after she made her order the state of emergency was declared in the province. The state of emergency contributed to my inadvertence in missing the deadline.
9. On or about March 18, 2020, the Supreme Court suspended court imposed deadlines - initially to May 1, 2020. This suspension was subsequently extended to May 29, 2020. Although I drafted an initial revised response to civil claim in early April I did not immediately follow up on finalizing it as the courts were closed.
10. In mid-March I began to work from home and did not have the level of staff support I usually have in running my practice. Unfortunately, while working at home without the support of my staff, I missed the announcement that deadlines would begin to run again on May 29th. This was inadvertence on my part.
- 12 With deadlines running again as of May 29th, I should have filed the revised response by June 10, 2020 in order to comply with Madam Justice [MacNaughton]'s order. However, again, I had lost track of the deadline given the court closure.
13. I accept responsibility for failing to meet this deadline. Ultimately, it was due to my own inadvertence. I do not blame the state of emergency for this but only to explain how I missed the deadline.
14. In the meantime, on April 6, 2020, the plaintiffs sought a desk order for default. This was rejected by the court. I was not aware the plaintiffs were seeking the order at that time. Plaintiff's counsel did not advise me that he was taking these steps.

15. Subsequently the plaintiffs filed and served an application for default. This was the first time I realized I had missed the deadline for filing. It was the first time I had heard from counsel on this file.
16. On August 14th, after hearing mainly from counsel for the plaintiffs and only briefly from me, Madam Justice Warren granted the default order, but specifically ordered that the defendant had the right to apply to set aside the default pursuant to R.3-8(11)
17. On August 17, 2020, in an email exchange about entering the order of Madam Justice Warren, I advised counsel for the plaintiffs that I would be applying to set aside the default order.
- [5] The defendant filed a response to civil claim in a timely manner, and was clearly intent on defending the claim. Due to COVID-19 induced changes in court procedures, time limits were extended after the defence had begun to prepare a revised response to civil claim. On March 9, 2020, during the application of the plaintiffs to strike the response to civil claim and 10 months after the civil claim was initially filed, events began to go sideways for the defendant.
- [6] Ultimately, the defendant missed the deadline given the court closure. The former solicitor for the defendant admits to his error in overlooking or failing to file an amended response within the 21-day time period imposed by Madam Justice MacNaughton.
- [7] The plaintiffs submit that the statement by the former solicitor for the defendant that the Supreme Court "suspended court imposed deadlines" was incorrect, in that deadlines under existing court orders were unaffected.
- [8] Finally, the plaintiffs further submit that a partner of the defendant's former solicitor would have been at all material times aware of the "strike order" of Justice MacNaughton, as the partner was a director of the parent company of the defendant.
- [9] I find that the effect of COVID-19 on the court's closure and subsequent re-opening with new deadlines created a situation where it is understandable that the defendant may have inadvertently missed, or at least misunderstood, the new deadline. I accept that the defendant's failure to file a revised response to civil claim was not deliberate or willful. Regarding the plaintiffs' submissions on the issue of whether the failure to file was deliberate, I find it irrelevant whether it was a suspension of limitations under the Rules or a failure to file in accordance with a deadline set by the court; as either way, the failure to file was due to an oversight or error on the part of counsel.
- [10] As well, it is not relevant if the lawyer's partner was a director of the parent company of the defendant, in light of the evidence of the former solicitor which is reasonable in the circumstances.

WAS THE APPLICATION TO SET ASIDE THE DEFAULT MADE AS SOON AS REASONABLY POSSIBLE?

- [11] On August 27, 2020, three days after the order, the defendant promptly advised through counsel that he would be applying to set aside the order of Justice Warren. Counsel then proceeded to retain independent counsel to bring on an application to set aside the default judgment.
- [12] Although this application could have been brought earlier, the need for independent counsel to be appointed, prepare and file this application is understandable, and the period of delay was not significant.

IS THERE A DEFENCE WORTHY OF INVESTIGATION?

- [13] In his affidavit filed January 13, 2021, Aerock Fox ("Mr. Fox"), a director of the defendant company, set out facts supporting the defence:
14. The only binding agreement between the parties is the share purchase agreement, dated January 10, 2018 and subsequently revised. This revised share purchase agreement is the document that governs the relationship between the parties.
 15. The revised share purchase agreement specifically noted that the original agreement was invalid, and that the terms and conditions of the revised agreement superseded the original agreement in all respects. The revised agreement took effect from the date of the original agreement.
 16. The revised share purchase agreement was the entire agreement between the parties, and there are no other binding agreements governing either the purchase of the shares or the subsequent business relationship between the parties.
 17. As such, given the wording of the revised agreement, the company denies that it agreed to pay each of the plaintiffs the compensation or the car and phone allowance. There was also no agreement to reimburse the plaintiffs for the damage deposit on the lease or the balance remaining on the company credit card. Again, the dispute between the parties on these issues arises from the plaintiffs' reliance on the original share purchase agreement and the company's reliance on the revised agreement.
 18. The company also relies on the entire agreement clause, found at s. 11.6 of the share purchase agreement, to argue that this is the only valid agreement between the parties. The share purchase agreement contemplated ongoing negotiations about the potential employment relationship between the parties, but these negotiations were never concluded.
 19. Accordingly, the parties had never agreed on the terms of their continuing relationship. The plaintiff Mr. Wilson was the Responsible Person in Charge (RPIC) and the plaintiff Mr. Taylor was the master grower for Health Canada's purposes. In the meantime, the parties were still in negotiations about the plaintiff's subsequent role in the organization. While the plaintiffs are obviously entitled to fair compensation for their work, that is not necessarily on the terms as set out in their claim.

20. The company was not required to pay the purchase price in annual installments as alleged, and relies on section 2.1.c of the agreement in this respect. As such, the company denies that it was required to make an annual installment in 2019.
- [14] In addition, Mr. Fox deposed at para. 25 that the plaintiffs failed to perform their duties under the agreement to ensure success of the operation in obtaining a license to produce medicinal cannabis. Amid other allegations, he deposed four failures of the plaintiffs in respect of:
- a) the failure to secure licensing, as one plaintiff had a pre-existing criminal conviction;
 - b) the plaintiffs were in a "side business" which was also in the business of cultivating marihuana, which they failed to divulge prior to closing;
 - c) the plaintiffs, upon being retained after the sale, created a hostile work environment for the defendant to operate in; and
 - d) allegedly the plaintiffs were not the only beneficial owners of shares in the numbered company, referred to as "957", that previously carried on the business. The defendant was 'forced' to purchase shares from one shareholder and settle a claim with another, for a total of \$103,944 plus costs.
- [15] The claims being advanced by the defendant are advanced as a set-off against the balance of the purchase price of the business and other sums which were to become payable by the defendant to the plaintiffs, which included:
- \$666,667 to be paid as the balance of the purchase price of \$1,000,000 for the shares in 957, payable over two installments after the date of sale;
 - \$140,000 per year for three years, which would become payable to the plaintiffs to manage the operations for three years; and
 - \$23,333 owed to the plaintiffs, which was due in salary in December 2018 when the plaintiffs were terminated.
- [16] As part of the agreement, the plaintiffs were also to receive shares in the parent company of the defendant.
- [17] In their affidavits the plaintiffs, Derek Taylor ("Mr. Taylor") and Glen Wilson ("Mr. Wilson"), set out defences to the claims by the defendant, which they submit reveal little or no merit to the claims being made by the defendant. I have reviewed those affidavits and if the statements made in those affidavits are proven to be correct, the plaintiffs will likely have a meritorious claim against the defendant.
- [18] Mr. Taylor also deposed in para. 17 of his affidavit that based upon financial statements of the parent company of the defendant, the defendant and its parent are in financial difficulty, although much of the information attached to the affidavit in that respect is hearsay.

- [19] Regarding whether there is a defence worthy of investigation, the defendant has referred to *Noble Moving Services Inc. v. Kohn*, 2008 BCSC 434 at para. 27 in which Madam Justice C. Ross outlined principles to consider as to whether a party has a meritorious defence:
- [27] The courts have identified the following principles with respect to the question of whether the party has a meritorious defence or a defence worthy of investigation:
- (a) while the applicant must cite facts disclosing a defence worthy of investigation he need not demonstrate that the defence will succeed: see *Innovest Development Corp. (Receiver of) v. Lim*, [1999] B.C.J. No. 2969 (QL) (S.C.);
 - (b) there must be sufficient detail in the affidavit material to enable the judge to correctly exercise his or her mind upon whether there is indeed such a defence: see *Schmid v. Lacey* (1991), 7 B.C.A.C. 77, [1991] B.C.J. No. 3501 (QL) (C.A.);
 - (c) it is not necessary for a person seeking to set aside a default judgment to swear to all of the evidence he believes might support the defence: see *Brar v. Sahota* (1998), 61 B.C.L.R. (3d) 194 (C.A.).

[Emphasis in original.]

- [20] The defendant, through the affidavits of its officers including Mr. Fox, has deposed that the defendant has been required to make expenditures as a result of the defaults of the plaintiffs, which were included in a letter on January 9, 2019.
- [21] What is apparent after a review of the defences put forward and the affidavits of the defence is that the set-off amounts claimed, if successful, are likely to be considerably less than the balance of the purchase price that was payable by the defendant, i.e. \$666,667, let alone less than the other additional claims of the plaintiff. In the January 9, 2019 letter referred to above, Mr. Murphy of counsel for the defendant stated at pp. 2-3:

The foregoing summary does not constitute an exhaustive statement of fact and our client expects that it will continue to uncover further damages over the fullness of time. However, as of the date of this letter, based upon the foregoing our client estimates its damages in an amount of at least \$350,000 (as such amount may be adjusted in the future, the "Geyser's Losses"), for which the Vendors are jointly and severally liable.

Accordingly, pursuant to the SPA and the Note, Geyser hereby elects, without limiting or waiving any of its other rights or remedies under the SPA (or ability to increase such set-off), at common law or equity, that \$350,000 of Geyser's Losses be set off against the remainder of the amounts owing under the Note (as such terms are defined in the SPA), and specifically notifies the Vendors that, as a result thereof, Geyser will not be making the 2019 payment of \$333,333.33 to the Vendors.

- [22] After a careful review of the defence, I am unable to say there is a meritorious defence, only that there could be a meritorious defence. If the defence were to be successful, the defence, which is in reality a counterclaim or set-off, is most likely to be valued at considerably less than the claims of the plaintiff, which appear more likely to succeed.
- [23] I agree with the defence that where there is a meritorious defence and the judgment has been obtained by a slip, the general rule is no terms are to be imposed upon the defendant except in extraordinary circumstances, such as posting security for the claim of the plaintiff. (See: *Watson v. Crystal Mountain Resources Ltd.*, [1988] B.C.J. No. 446 (C.A.)).
- [24] In the circumstances of this case, although the plaintiffs appear to have a meritorious claim, I cannot say that the circumstances are extraordinary such as to require the defendant to post security for the plaintiff's claim in an amount of \$1,250,000 as proposed by the plaintiffs.
- [25] According to Mr. Justice Finch in *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swanese Bay Gold Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A.) at para. 17, "The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances [t]he court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal".

CONCLUSION

- [26] Considering the apparent financial precarity of the defendant, even in the event that aspects of its defence or counterclaim are successful, I order the defendant to post security of \$400,000.
- [27] The plaintiffs are entitled to costs thrown away on the judgment.
- "Jenkins J."

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Prepared on 29 October 2026 · Esheria