

CANADA / JUDGMENT

Westgate Koenig Group Ltd. v. 1371212 B.C. Ltd.

2024 BCSC 2008

COURT

Supreme Court of British Columbia

DECIDED

19 September 2024

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2024 BCSC 2008 Westgate Koenig Group Ltd. v. 1371212 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Westgate Koenig Group Ltd. v. 1371212 B.C. Ltd.,

2024 BCSC 2008

Date: 20240919

Docket: S243270

Registry: Vancouver

Between:

Westgate Koenig Group Ltd.

Plaintiff

And

1371212 B.C. Ltd., 1371212 B.C. Ltd. doing business as

North Star Finishing Systems and Aaron Samuels

Defendants

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M.N. Barr

Counsel for the Defendants:

U. Ghani

Place and Date of Hearing:

Vancouver, B.C.

September 19, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 19, 2024

- [1] THE COURT: The defendants in this action bring this application seeking to set aside a damages assessment and, if successful in doing that, a default judgment obtained against them by the plaintiff on, respectively, August 26 and July 24 of this year. The application is opposed by the plaintiff.
- [2] By way of background, the dispute arises from a construction project at a residential property in West Vancouver. The plaintiff was the general contractor on the project and retained the corporate defendant to provide certain painting work. The defendants' involvement in the project appears to have ended on or around April 10, 2024.
- [3] In the notice of civil claim filed May 17, 2024, the plaintiff alleges that the defendants' work was defective and that the faulty work caused it to suffer damages. Further, it alleges that the personal defendant, Mr. Samuels, who is the principal of the corporate defendant, agreed to guarantee the obligations of the corporate defendant, and so on that basis, judgment was sought and ultimately obtained against both of the defendants jointly and severally.
- [4] It appears to be common ground that before the claim was brought, there were ongoing settlement discussions between the parties. It also appears that the defendants claimed in those discussions, and remain of the view, that it was they who were owed money. Apparently frustrated by the lack of progress in those discussions, the plaintiff retained counsel, who sent a without-prejudice letter seeking a response by May 9, 2024. No response was received.
- [5] Having received no response, the plaintiff commenced this action on May 17, 2024 and served the corporate defendant later that same day. Mr. Samuels was personally served a few weeks later, on June 13, 2024. Neither defendant responded to the claim or indeed took any steps in relation to the claim before default judgment was taken on July 24, 2024. It appears that the defendants were busy with other things at that time. The evidence shows that on June 26, 2024, just over a month after being served with the claim in this action, the corporate defendant commenced separate proceedings on an unrelated project, in respect

of which it was seeking a builders lien. The corporate defendant was represented in that claim by Mr. Ghani, the same lawyer who acts for it today. Further, Mr. Ghani had also assisted the corporate defendant in earlier builders lien claims filed in July and October 2023.

- [6] In any event, the plaintiff sent Mr. Samuels by email a copy of the default judgment after it was obtained on August 14, which was a Saturday, along with another without-prejudice offer. Again, Mr. Samuels provided no response to that letter, but this time, he retained Mr. Ghani to assist him with the matter.
- [7] On August 16, 2024, which was the following Monday, Mr. Ghani contacted Mr. Barr, plaintiff's counsel, by email and told him that he was in the process of being retained. He asked him to agree to set aside the default judgment. He added that if the plaintiff was not prepared to agree, that he, Mr. Ghani, would bring an application on the defendants' behalf for an order setting it aside. Finally, Mr. Ghani asked Mr. Barr not to set a date to assess damages without consulting with him.
- [8] This time, it was Mr. Barr's turn not to respond, so Mr. Ghani followed up by phone and email on August 21, 2024. Mr. Barr responded that day by email confirming receipt of Mr. Ghani's emails and phone messages. Mr. Barr told Mr. Ghani that he was seeking instructions and would respond by the following Friday. August 21 was a Wednesday. On the following day, August 22, a Thursday, Mr. Barr, without notice to Mr. Ghani, filed the application to have damages assessed, and on the following Monday, August 26, obtained an assessment of damages in an amount in excess of \$151,000.
- [9] That is the background. I turn now to the legal framework. The parties generally agree on the law to be applied. First, the court cannot consider the question of whether the default judgment should be set aside unless it finds that the damages assessment should be set aside first: *Wang v. Corsa Auto Gallery Ltd.*, 2023 BCSC 382; *Preet Excavating Ltd. v. HS Sidhu Holdings Ltd.*, 2016 BCSC 1585. That issue turns on whether the damages assessment amounted to a miscarriage of justice. The test to be applied in that regard was set out by Blake J. in *Wang* and by Mayer J. in *Port Alberni Shelter Society v. Literacy Alberni Society*, 2022 BCSC 239. In brief, there has to have been a miscarriage of justice, which is, it is said, almost always procedural. Moreover, the blemish must be such as to make the assessment not a judicial procedure at all.
- [10] Here, the only defect asserted by the defendants in relation to the damages assessment is that defendants' counsel had called and asked to be advised of the date of the hearing. The plaintiff argues that this cannot amount to a miscarriage of justice because the plaintiff had no obligation under the Supreme Court Civil Rules to give notice to a non-party, which is what the defendants were after they defaulted. In support of that submission, the plaintiff relies on *Wang and Humphries v. MacDonald*, 2024 BCSC 1414.

- [11] Although I agree with plaintiff's counsel that the Rules generally do not require that notice be given of a damages assessment once default judgment has been taken, this case is distinguishable from *Wang and Humphries*. Here, plaintiff's counsel had heard from defendants' counsel in advance of the assessment hearing. He was asked to agree to set aside the default judgment by consent, or, failing that, not to take further steps because, in the absence of consent, the defendants would be bringing an application of their own seeking to have the default judgment set aside. By delaying his response and indicating that it would be forthcoming by the following Friday, but then setting down the assessment before then, without notice, he improperly deprived the defendants of the opportunity to attack the default judgment in a timely manner at that stage. In my view, this distinguishes this case from those that the plaintiff relies upon. In the circumstances, and having regard to how events unfolded, I do find that the manner in which the damages were assessed amounted to a miscarriage of justice and I am therefore setting it aside.
- [12] This raises the question of whether the default judgment should also be set aside. That question turns on the application of the so-called *Miracle Feeds* test, which was conveniently summarized by Brongers J. in *Mrsic v. 1106468 B.C. Ltd.*, 2022 BCSC 1149. It consists of the following three substantive elements:
- 1) did the defendant willfully or deliberately fail to respond to the claim;
 - 2) did the defendant apply to set aside the default judgment as soon as reasonably possible after hearing of it; and
 - 3) does the defendant have a meritorious defence, or at least one worthy of investigation?

Mrsic at para. 15

- [13] It has been held that the failure to address any one element of the test is not necessarily fatal and there may be other factors present. Even if not all factors are present, the court can still set aside a default judgment if failing to do so would lead to a miscarriage of justice.
- [14] The plaintiff relies in this regard on the evidence of Mr. Samuels, who says he was constantly negotiating the dispute with the plaintiff, and that he was busy with other problems and overwhelmed. Mr. Samuels says he was under pressure and did not properly turn his mind to the claim. He asserts that the corporate defendant was facing financial difficulties, and that he assumed, since settlement discussions were underway, that the plaintiff would not take default judgment when it did. Once he did become aware of the default judgment, he says he acted quickly, and he goes on to assert that he has strong defences to the claim and a counterclaim that he wishes to advance.

- [15] The plaintiff does not seriously dispute the second and the third branch of Miracle Feeds test, namely, that the defendants in this case acted quickly once they learned of the default judgment, and that they have a defence that is at least worthy of investigation. The real controversy here is whether the delay that led to the default judgment is one that is blameworthy.
- [16] The plaintiff disputes Mr. Samuels' assertion that negotiations were ongoing. I accept that it appears that negotiations had effectively ceased by May 1, 2024, and that the defendants simply did not respond to the without-prejudice offers sent by plaintiff's counsel after that.
- [17] I agree with the plaintiff that the delay here was blameworthy, however, I find it was negligent rather than deliberate. The other litigation that was extant that has been referred to in the plaintiff's materials lends support to Mr. Samuels' assertion that he was under pressure at the time and that he had many balls in the air that he was seeking to juggle.
- [18] I agree with the plaintiff that Mr. Samuels should not have assumed that he could carry on negotiations indefinitely or fail to respond to the offers that were put to him. If satisfying the first element of the Miracle Feeds test were essential to achieving the relief that the defendants seek, I would dismiss the application, but there are other considerations in play here. In particular, I accept that the defendants have a defence that is not just worthy of investigation but potentially strong, particularly in relation to the alleged personal guarantee upon which judgment against Mr. Samuels is based. Further, I agree with the defendants that it makes little sense to allow the defendants to pursue a counterclaim (or what was a counterclaim) in separate proceedings while this default judgment remains in place. Rather, I find, after considering all of the circumstances, that it is in the interests of justice that the dispute be addressed and resolved in its entirety, including both the claim and the counterclaim, and that they be heard together.
- [19] Having weighed those factors, I have concluded, not without some reluctance, that the application should be allowed and the assessment of damages and default judgment should both be set aside.
- [20] I turn, finally, to the issue of costs. Although I have found in favour of the defendants, I am not going to award them costs. That is because I have found that Mr. Samuels was negligent in letting the claim go unanswered as long as he did. As a result, the plaintiff was put to the wasted expense of obtaining default judgment. Although I have also found that the costs assessment should not have proceeded when it did, all of this could have been avoided had the defendants done what they were supposed to do. The remedy for that omission, I have decided, should not be a default judgment and consequent liability for damages assessed as they were, but it should at least be a denial of their costs and that will be my order.

"Milman J."

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Prepared on 29 October 2026 · Esheria