IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacLean Bros. Drywall Ltd. v. 1114136 B.C. Ltd.,* 2023 BCSC 2356

Date: 20231102
Docket: S60477
Registry: Kamloops

Between:

MacLean Bros. Drywall Ltd.

Plaintiff

And

1114136 B.C. Ltd. and Lucas Siemens

Defendants

Before: The Honourable Justice Dley

Oral Reasons for Judgment

In Chambers

(Hearing proceeded via MS Teams)

Counsel for the Plaintiff:	G.K. Randhawa
Counsel for the Defendants:	M. Nied
Place and Date of Hearing:	Abbotsford, B.C. October 24, 2023
Place and Date of Judgment:	Abbotsford, B.C. November 2, 2023

[1] **THE COURT:** This is an application to set aside a default judgment by the defendant numbered company. The company's director, Mr. Siemens, had filed a somewhat confusing response to civil claim which included references to both the company and himself.

[2] This is a case that highlights the difficulties that counsel encounter when dealing with a self-represented litigant.

[3] For the reasons that follow, the default judgment is set aside.

BACKGROUND FACTS

[4] The plaintiff installed drywall at a residence owned by Mr. Siemens. The installation was supposed to be of the highest quality. The parties entered into a written agreement. Later, Mr. Siemens sent an email to the plaintiff asking that the billing for the project be sent to the numbered company of which he was the sole director and shareholder. The numbered company paid a portion of the $52,500 of billings rendered; there remained $31,762.50 outstanding.

[5] Mr. Siemens has refused to pay the outstanding amount because he says the work was not done to the standard agreed upon and the deficiencies have caused him loss and damage.

[6] The plaintiff, represented by counsel, commenced an action on August 30, 2021. The notice of civil claim was served on the numbered company at its registered office. Mr. Siemens was not served personally.

[7] Mr. Siemens promptly filed a response to civil claim on September 14, 2021. The response is somewhat ambiguous regarding references to the respective defendants. At times, the response of a defendant is in the singular and at other times it refers to the defendants in the plural. In Part 2 of the response to relief sought, the following pleadings are stated:

> 1. The defendant(s) consent(s) to the granting of the relief sought in paragraphs The Defendant consents to the granting of relief

> sought in Paragraph NIL of Part 2 of the Notice of Civil Claim of Part 2 of the notice
>
> 2. The defendant(s) oppose(s) the granting of the relief sought in paragraphs The Defendants oppose the granting of the relief sough in Part 2 of the Notice of Civil Claim of Part 2 of the notice of civil claim.
>
> 3. The defendant(s) take(s) no position on the granting of the relief sought in paragraphs The Defendants take no position on the granting of the relief sough NIL of Part 2 of the notice of civil claim of Part 2 of the.

[8] Mr. Siemens signed the last page of the response above the designation "Signature of Defendant".

[9] On February 9, 2022, plaintiff's counsel sent an email to Mr. Siemens' email address that he had used to request billing to the numbered company. The email stated:

> We confirm receipt of the filed Response to the Civil Claim. Kindly confirm if you filed the Response on behalf of both yourself personally and on behalf of the Company 1114136 BC Ltd. The endorsement at the bottom of the Response only indicates that it was signed on behalf of the Defendant and states your name.
>
> In addition, please confirm that you will accept delivery and service of future documents via email, specifically to lucascsiemens@me.com. Kindly also provide a telephone number for us to call you on in order to schedule Examination and Trial dates.

[10] Mr. Siemens says that he did not receive the email and that he had no email address.

[11] On March 3, 2022, Mr. Siemens wrote the plaintiff's counsel and stated the following:

> … [T]his letter serves as a notice to proceed for action KAM-S-S-60477.
>
> It has been sometime you have commenced this action and would like to proceed. Lets keep this claim moving forward. You are required under the rules to keep moving things along with this demand. If you do not want to proceed any longer please discontinue your claim.

[12] On March 11, 2022, plaintiff's counsel wrote to Mr. Siemens:

> Further to our letter of February 9, 2022, a copy of which I have enclosed for your ease of reference, kindly provide a response to same. Also, please provide an e-mail address and/or a telephone number for us to call you in order to schedule examination and trial dates.

[13] That letter was sent by regular mail to Mr. Siemens at his address of 33055 Downes Road, Abbotsford, B.C.

[14] On April 7, 2022, plaintiff's counsel wrote to Mr. Siemens and enclosed a list of documents and copies of the documents listed under part 1 of the list. Counsel also requested a defendants' list of documents by April 21. Mr. Siemens responded on April 29, 2022 as follows:

> I have just received your letter Dated April 7, 2022. I have recently just hired a new controller and your letter was on a stack of paperwork my apologies for not being able to get back to you sooner.
>
> I am not sure you are aware but your client's employee has thrown eggs at one of my employees vehicles as well as my house at Nicola Lake. His name Kris Van Elswyk. I am not sure that Maclean Bros Drywall is aware of this as of yet. I am considering the possibly starting criminal charges against Kris and Maclean Bros. Drywall. A police file has already been started. The employee of Maclean Bros Drywall was caught red handed.
>
> I am not sure at this point whether or not Maclean Bros Drywall will deny this person worked for them on my house or not. I can only assume Maclean Bros instructed Kris to do this.
>
> Not sure where to go from here but there is a much bigger criminal issue at hand that we should talk about as it involves my house that Mclean Bros did poor workmanship on.

[15] On July 13, 2022, counsel's paralegal sent an email to Mr. Siemens regarding examinations for discovery:

> Further to our telephone conversation on April 21, 2022, you were going to call me to discuss document production, setting down the Examinations for Discovery and Trial dates. I have not heard back from you with respect to same. Kindly contact me asap or we will attend to unilaterally setting down the dates.

[16] On September 8, 2022, the plaintiff's counsel wrote to Mr. Siemens:

> Thank you for your correspondence of February 1, 2023 which we received on February 7, 2023. I wrote to you via e-mail on September 26, 2022 and did not receive a response. I emailed you at lucascsiemens@me.com. Please advise if e-mail is a convenient manner in which to communicate with you

> and if so, which e-mail is best to contact you at. If not, then we are happy to communicate with you by regular mail.
>
> We sent you our list of documents along with our documents. This was mailed and e-mailed to you on April 7, 2022. We gave you until April 21, 2022 to provide your list of documents. We have not received your list of documents or your documents. Kindly consider this our final demand for your list of documents and documents. If we do not receive the same by February 24, 2023, we will bring an application for production of the same and we will seek costs.

[17] There were some phone calls from Mr. Siemens to plaintiff's counsel with respect to a court application. It does not appear that there was any telephone conversations between counsel and Mr. Siemens.

[18] The plaintiff's counsel attempted to secure dates for examinations for discovery, but no response was forthcoming from Mr. Siemens. He did not provide a list of documents.

[19] On November 22, 2022, the plaintiff applied for default judgment against the numbered company. The defendants were not notified of the application.

[20] On February 1, 2023, Mr. Siemens wrote to plaintiff's counsel with respect to the plaintiff's application for substitutional service.

> Following up on things. There was a hearing that I was unable to call into a while back. I tried calling the court house but was unable to get in on the phone call. I called you the exact time of the court voice hearing but you did not take my call. I told you assistant that I could not get in on the call. I left you a voicemail. You did not call me back. I called again 30 mins later and left another voicemail.
>
> I don't know why you did not return either of my phone calls. You do know my phone number but do not call me back.

[21] The plaintiff's counsel did not advise Mr. Siemens that default judgment had already been applied for.

[22] On March 20, 2023, the default judgment was entered against the numbered company for $31,762.50, together with costs of $2,028.17, and interest in the amount of $301.40.

[23] On May 12, 2023, the plaintiff secured a garnishing order after judgment and the funds set out in the default judgment have been paid into court.

[24] Once the defendants became aware of the default judgment, counsel was retained and process was undertaken to set aside the default judgment.

[25] This matter is subject to the fast-track rule and a trial date has been scheduled for March 2024.

DISCUSSION

[26] Mr. Siemens is not an unsophisticated litigant. The evidence shows that he has been involved in multiple lawsuits, both in his personal capacity and with respect to corporate entities that he controls. I am advised that many of the files arise out of developments that Mr. Siemens has been involved in, and are related to the same project as opposed to multiple lawsuits arising out of separate causes of action. Even accepting that explanation, the inference to be drawn is that Mr. Siemens is a litigant who is well aware of the nuances, demands, and obligations of litigation.

[27] I also draw the inference that Mr. Siemens chose not to engage counsel because of the relatively modest amount of the claim and his confidence that he could defend himself and his company. It would be apparent to Mr. Siemens that by saving himself the costs of a lawyer, he would enjoy a decided economic advantage over the represented plaintiff.

[28] After reviewing all of the correspondence and communications between Mr. Siemens and the plaintiff's counsel or her staff, I have grave concerns about Mr. Siemens' veracity in some of the assertions that he has made. For example, Mr. Siemens maintains that he had no email and did not choose to communicate by that method. That is contrary to his instructions to the plaintiff when he emailed the request to have the billing directed to the numbered company. I do not accept that a person engaged in business, in this day and age, would not have an email address, and particularly so when there is evidence that he had used email in the past. When

Mr. Siemens says that he did not receive communications from plaintiff's counsel, I conclude that it defies common sense to accept his position.

[29] It serves no useful purpose to itemize each and every instance where Mr. Siemens sets out his explanations for not responding to plaintiff's counsel.

[30] I conclude that Mr. Siemens deliberately chose not to respond to the request for a list of documents or to set a date for discoveries because he did not want to provide disclosure or be subjected to questioning.

[31] This does not fit within a factual background where an unsophisticated litigant through an innocent oversight failed to file a response to civil claim.

[32] The question is whether in these circumstances the default judgment should be set aside. The factors to consider were referred to in *Andrews v. Clay*, 2018 BCCA 50:

> [28] The factors customarily considered on an application to set aside a default judgment are often referred to as the *Miracle Feeds* tests, as they were articulated in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) in the context of failing to file an appearance or defence. Judge Hinds (as he then was) expressed these factors in this way:
>
> > … in order for a defendant to succeed on an application to set aside a default judgment, he must show:
> >
> > 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.

[33] The *Miracle Feeds* factors are not exhaustive but intended to assist in determining whether it is in the interests of justice to set aside the judgment, *Andrews* at para. 29.

[34] Mr. Siemens filed a response promptly after service of the claim at the registered offices of the numbered company. I note that he was not personally served.

[35] Although the form of the response is lacking particularity in places and is confusing at times with respect to whether or not the defences raised relate to a defendant in the singular or plural, it is apparent that both defendants took issue with the relief being claimed by the plaintiff. There is sufficient substance in the response to show that the defendants disagreed with the claims being made against them and that they intended by their pleadings to defend themselves. I draw that conclusion even though the question was legitimately raised by plaintiff's counsel as to whether the response was intended to cover both defendants or only Mr. Siemens.

[36] I am therefore satisfied that Mr. Siemens did not wilfully or deliberately fail to respond to the civil claim. He did respond with the intention to deliver a defence to the claim. That is what distinguishes this case from those authorities that the plaintiff relies upon.

[37] There is no issue as to whether there were steps taken to set aside the default judgment as soon as reasonably possible.

[38] Mr. Siemens has set out his complaints about the quality of work provided. His affidavits supported the allegations that he made in the filed response. There is some question as to the strength of the complaints that he has made. For example, Mr. Siemens says that there are cracks in the drywall seams and joints. He has attached a photograph of a crack. However, the crack is at an angle and not along a seam or joint.

[39] The plaintiff argues that the cracks are as a result of temperature issues or settling of the construction.

[40] Mr. Siemens' complaints may not withstand the rigours of proper scrutiny, but it is not for this Court, at this stage, to adjudicate on the merits of the dispute. As

long as there is a meritorious defence or one worthy of investigation, then that is sufficient. It is not a high threshold for the applicant to satisfy.

[41] I am satisfied from the affidavit evidence, that with respect to the quality of work and the apparent defects, there is a sufficient body of evidence that has been presented to show that there is a defence worthy of investigation. Those matters were raised in the filed response to civil claim.

[42] Ordinarily, that would be sufficient to set aside the judgment. However, I must consider whether it is in the interests of justice to do so. That is the overarching principle that governs the *Miracle Feeds* factors.

[43] If Mr. Siemens had simply responded to plaintiff's counsel's reasonable question of February 9, 2022, seeking clarification about the filed response, any ambiguity as to whether the response was for both defendants would have been resolved. Mr. Siemens also did not respond to requests for document disclosure or with respect to dates for examinations for discovery.

[44] If plaintiff's counsel had placed Mr. Siemens on notice that judgment would be taken if he failed to file a defence for both defendants, it is likely that he would have responded. In these circumstances, plaintiff's counsel should have advised Mr. Siemens of the consequences prior to taking judgment. See *Royal Bank of Canada v. Rose*, 2022 BCSC 1472, at paras. 34 to 37.

[45] I am satisfied that both defendants intended to dispute the plaintiff's claim. The failure by plaintiff's counsel to alert the defendants and, in particular the numbered company that judgment would be taken in the absence of a response, tips the balance in favour of setting aside the default judgment. It would be unjust in these circumstances to prevent the numbered company from defending a claim when its closely related co-defendant had filed a response.

[46] I am mindful that an unscrupulous litigant may take advantage of the rules to draw a matter out so that a legitimate claim is jeopardized because of the costs

involved in the pursuit of a just result. That is a particular concern when one party is represented and the other is not.

[47] Counsel are bound by professional ethics. A self-represented litigant is not bound by the same ethics. It is not uncommon for self-represented litigants to pretend that they do not understand the nature of litigation and the corresponding obligations involved in the conduct of a lawsuit. That does not mean that a self-represented litigant is expected to know the law or procedures as does counsel, but it also does not give free rein to a litigant to ignore the reasonable requests from counsel. All parties are expected to abide by the rules governing litigation, whether represented by counsel or not.

[48] Courts routinely give latitude to self-represented litigants who are not familiar with court procedures or other aspects of litigation, including rules of evidence and legal principles. That is to ensure that all litigants have access to justice. However, it cannot result in an unfair or unjust advantage for one party over the other.

[49] Here, Mr. Siemens chose to ignore repeated asks from the plaintiff with respect to routine matters such as requesting clarification on pleadings, disclosure, and cooperation in setting dates for discoveries. Mr. Siemens' own demands to plaintiff's counsel indicate his misguided view of conducting the litigation on his terms. This type of gamesmanship cannot simply be overlooked or condoned.

[50] Even though I have agreed that the default judgment should be set aside, there must be an accounting for the wasted steps taken by the plaintiff and caused needlessly by Mr. Siemens. The interests of justice are best served by emphasizing that parties to litigation should conduct themselves so that the case can be determined in a just, speedy, and inexpensive manner: Rule 1-3 of the *Supreme Court Civil Rules*.

[51] Mr. Siemens was the architect of proceeding in a manner that ran contrary to that objective. Accordingly, I award the plaintiff its costs of the default judgment and this hearing.

[52] The result is that the default judgment entered on March 20 is set aside. The costs as awarded of $2,028.17 shall be paid to the plaintiff forthwith. The plaintiff is also entitled to the costs of this hearing in any event of the cause and those costs are also to be paid forthwith.

THE COURT: Now, are there any questions, counsel?

[53] CNSL M. NIED: Justice, it's Matthew Nied, counsel for the defendants.

[54] THE COURT: Yes.

[55] CNSL M. NIED: Just a point of clarification, in paragraph 1, part 1 of my client's notice of application, an order was sought not only setting aside the default judgment but also the garnishing order which of course flows from the default judgment, so just a point of clarification, does your order then also extend to setting aside the garnishing order?

[56] THE COURT: Yes.

[57] CNSL M. NIED: Thank you.

(Discussion re the holding of the funds)

[58] THE COURT: All right, well, what I'm going to do is order that the funds be held in court pending an agreement between counsel with respect to the use of those funds to pay the costs award. If no agreement is reached, then the parties are at liberty to come back before the court—you can set it down by requisition—and I'll make the appropriate order then to have the monies that are in court be paid out to satisfy the costs award.

“S.D. Dley J.”

DLEY J.