IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Marwaha Development & Investors Ltd. v. 1167760 B.C. Ltd.,* 2023 BCSC 1586

Date: 20230727
Docket: S240499
Registry: New Westminster

Between:

Marwaha Development & Investors Ltd.

Plaintiff

And

1167760 B.C. Ltd.

Defendant

Before: The Honourable Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	I. Gill
Counsel for the Defendant:	P.I. Sahota
Place and Date of Hearing:	New Westminster, B.C. July 27, 2023
Place and Date of Judgment:	New Westminster, B.C. July 27, 2023

[1] **THE COURT:** This is an application brought by the defendant numbered company for an order to set aside default judgment that was obtained by the plaintiff on December 3, 2021, and for leave to file a response to civil claim and counterclaim.

[2] By way of very brief background, the parties entered into a contract of purchase and sale dated May 7, 2021 with respect to a piece of property in Surrey. The defendant was the vendor and the plaintiff was the purchaser. The property was tenanted, and the tenancy became an issue in the negotiations between the plaintiff and the defendant because the plaintiff wished to develop the property once it was purchased.

[3] An addendum to the contract of purchase and sale says as follows:

> Upon buyer request, seller agrees to give the buyer a vacant possession. The seller will promptly give a notice to end the tenancy in accordance with the provisions of the *Residential Tenancy Act* to any tenants of the property upon receiving the first deposit of $100,000 on May 14, 2021.

[4] There is a dispute in the evidence as to whether or not Mr. Nair, the principal of the defendant corporation, delivered a notice to end tenancy to Mr. McDonald, who was the tenant on the property at the time.

[5] In any case, the closing of the property sale came at the end of July 2021. The sale proceeds were paid and released and title was transferred to the plaintiff. However, the tenant did not leave the premises. The plaintiff was required to take steps to evict the tenant, ultimately going to the Residential Tenancy Branch.

[6] The plaintiff then commenced this action against the defendant for breach of the contract of purchase and sale. Specifically, the claim relates to the fact that the defendant failed to provide vacant possession and required the plaintiff to incur the cost of removing the tenant.

[7] The action was filed on September 23, 2021. Because the defendant is a company, the plaintiff served the defendant in accordance with the rules for service on a corporation. Specifically, the defendant was served by registered mail to the

registered records office of the company, which is the home of Mr. Nair and his wife. Mr. Nair is the principal of the defendant company.

[8] Mr. Nair has deposed that he never personally received the notice of civil claim that was served at his home, nor did his wife, nor did anyone in his house. It appears that the claim was served at a time that he was focused on his daughter's wedding, and it was likely overlooked in a busy home full of houseguests.

[9] The plaintiff obtained default judgment on December 3, 2021. Mr. Nair still did not have notice of the proceeding. An application was brought seeking assessment of damages after the default judgment was entered. Mr. Nair was not aware of the proceeding until July 26, 2022, when he received a letter via registered mail relating to the application for assessment of damages.

[10] At that point, the defendant took steps to obtain a lawyer. There was a fair amount of back and forth between the lawyer for the defendants and the lawyer for the plaintiffs about the assessment hearing, and as early as September 2022, a proposed application to set aside the default judgment was discussed. For various reasons, about a year has passed between the time Mr. Nair learned of the proceeding and the application today to set aside the default judgment.

[11] The parties agree on the applicable law and that the test for setting aside default judgment under our rules is still the same as what was set out by the court in *Miracle Feeds v. D. & H Enterprises Ltd.*, [1979] B.C.J. No. 1965 (C.C.). There is essentially a four-part test that must be met in order for default judgment to be set aside:

1) The defendant did not willfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim.

2) The defendant made an 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) The defendant has a meritorious defence or at least a defence worthy of investigation.

4) The forgoing requirements must be established to the satisfaction of the court through affidavit material filed on or behalf of the defendant.

[12] All four of these criteria must be met in order for default judgment to be set aside.

[13] Turning to the first branch of the test, I am satisfied that the defendant did not willfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim. It is unfortunate that the claim was not brought to the attention of the controlling minds of the defendant corporation, but I do not find that Mr. Nair did anything willful or deliberate in this case. He simply did not know about the action until some time after it had been commenced and after default judgment had been granted.

[14] With respect to the second branch, while I accept the defendant's submissions that a client is not generally responsible for the actions of their lawyer, I do think it would have been reasonable for Mr. Nair to have taken steps to set aside the default judgment more promptly than a year after learning about the default judgment. The evidence of the inexplicable delay that took place over the fall of 2022 and the winter of 2023, after Mr. Nair knew about the default judgment, is troubling.

[15] However, the most significant reason why I will not allow the application today is the third branch of the test. The defendant has to show that he has a defence worthy of investigation. Looking at the contract of purchase and sale, I cannot see a defence worthy of investigation to breach of contract claim against the defendant. There may also have been breaches of the contract by the plaintiff. I am not here to adjudicate that. The only issue before me is whether there is any defence to the plaintiff's claim that the defendant breached the contract of purchase and sale by failing to give the buyer vacant possession.

[16] The contract of purchase and sale clearly requires vacant possession, and it is clear that vacant possession was not provided. It does not matter if the tenant did or did not see the notice to end tenancy, or (as the defendant now submits) his wife saw the notice and didn't tell him. At the end of the day, there was a requirement under the contract to provide vacant possession, and the defendant did not provide it. The defendant therefore breached the contract.

[17] Many of the facts raised by the defendants in their materials are likely relevant to the assessment of damages. It is not clear to me in looking at the materials that all of the damages sought by the plaintiff could possibly be recoverable against the defendant for failing to successfully evict a tenant and provide vacant possession.

[18] However, that is not the issue before me. The issue before me is whether or not there is any defence worthy of investigation, and with respect to the very discrete issue that gives rise to liability on the claim, I find there is no defence worthy of investigation.

[19] As such, I dismiss the application. Given the state of the litigation so far and the pending assessment of damages, I am not going to order costs. Costs shall be determined by the judge who assesses damages.

"Francis, J."