

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wong v. Multani & Caldeira Developments Inc.*,
2023 BCSC 483

Date: 20230329
Docket: S213279
Registry: Vancouver

Between:

**Roger Wong
Cecilia Wong**

Plaintiffs

And

**Multani & Caldeira Developments Inc.
Hael Construction Inc.
Lakhwinder Singh also known as Michael Singh or Michael Multani**

Defendants

Before: The Honourable Justice E. McDonald

Reasons for Judgment

The Plaintiff, Roger Wong appearing in person:

R. Wong

Counsel for the Defendants:

V.S. Chahal

Place and Date of Hearing:

Vancouver, B.C.
December 1, 2022 and
February 14, 2023

Place and Date of Judgment:

Vancouver, B.C.
March 29, 2023

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Introduction

[1] This application concerns the default judgment granted to the plaintiffs on September 29, 2021. One of the defendants, Mr. Singh, applies to set aside that default judgment granted against him.

[2] In seeking to set aside the default judgment, Mr. Singh submits that since he was not personally served and since he has various meritorious defences, the interests of justice would be served by varying the default judgment to remove his name.

[3] The plaintiffs oppose setting aside the default judgment. The plaintiffs oppose the relief on numerous grounds, including because they say Mr. Singh was served with the claim and he deliberately failed to enter a response.

[4] For the reasons that follow, I have decided to set aside the default judgment as against the defendant, Mr. Singh.

Background

[5] On August 24, 2018, the plaintiffs entered into a contract with Multani & Caldeira Developments Inc. (“Multani”) for the construction and development of a laneway home on the plaintiffs’ property. Multani assigned the contract to Hael Construction Inc. (“Hael”). The individual defendant, Mr. Singh, is a director of Multani and Hael.

[6] The laneway home was built. However, there is a dispute concerning the construction of the laneway home and on April 6, 2021, the plaintiffs filed a notice of civil claim naming Multani & Caldeira Developments, Hael Construction Inc. and Mr. Singh, as defendants (the “Claim”).

[7] The Claim is lengthy. It alleges, among other things, that Mr. Singh owes the plaintiffs a fiduciary duty which he is alleged to have breached. The Claim seeks a variety of relief, including, damages for breach of contract.

[8] On April 8, 2021, the plaintiff, Mr. Wong delivered copies of the Claim to the registered and records address for the corporate defendants. That address is the same address that Mr. Singh used as his residential address for purposes of mail delivery.

[9] On April 8, 2021, Mr. Wong received a text message from Mr. Singh stating:

Hi Roger, I got your civil paperwork and I don't understand what this is for? We have already settled final payment and agreed to not put any liens or case against each other in a civil matter. Before I move ahead with this I would like to know why this was sent. Thank you.

[10] On April 9, 2021, Mr. Singh emailed Mr. Wong stating as follows:

Hi Roger,

Thank you for replying to my message, when we had our last meeting, all parties agreed on all terms and there is an email written regarding the final payment and no legal action will be taken by any party. We had filed your warranty paperwork and I will check why they never sent you the package and get back to you. ... In Covid situation no one knows how long court case will take to get a date. I looked at your relief and warranty will be settled today and regarding minor issues you held the money back for we will hire someone to come in and take care of the issues. But if you would like to proceed with court then that is fine we will respect that but this will be very costly to you and us and it will not stand as we know how the contract has been breached and we both have legally signed off on not sueing [sic] each other.

If you would like to discuss you can call us.

[11] Mr. Jason Guidi, a process server, testified about serving the Claim on Mr. Singh. According to Mr. Guidi, on May 27, 2021, he called Mr. Singh to arrange a time to serve him with the Claim. That day, at approximately 10:00 a.m., Mr. Guidi testified that he handed Mr. Singh a copy of the Claim at the address of the corporate defendants.

[12] Mr. Singh denies that he was personally served with the Claim on May 27, 2021. Mr. Singh says that on the morning of May 27, 2021 he attended meetings at various locations and he was not at the address of the corporate defendants at the time Mr. Guidi says he served him. I also received affidavit evidence from a client and a business associate of Mr. Singh stating that they were with Mr. Singh at other

locations around the time that Mr. Singh was allegedly being personally served with the Claim.

[13] No response was filed by any defendant to the Claim. On September 29, 2021, default judgment was granted against all of the defendants.

[14] According to Mr. Singh, he was never served with the default judgment, but in or around the end of March 2022, he became aware of it because he was working with a mortgage broker and conducting a credit search in respect of himself. Mr. Singh says that upon learning of the default judgment, he immediately contacted counsel.

Issue

[15] To determine this application, I must decide whether, as against the defendant, Mr. Singh, the default judgment should be set aside and whether Mr. Singh should be permitted to file a response.

Analysis

[16] Mr. Singh applies to vary the default judgment order to remove his name as a defendant against whom default judgement is granted.

[17] Rule 3-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 sets out the requirements for matters such as default judgment applications. Rule 3-8(11), provides jurisdiction for the court to set aside or vary an order for default judgment.

[18] In *Andrews v. Clay*, 2018 BCCA 50 [*Andrews*], the Court of Appeal confirms the continued applicability of the factors set out in *Miracle Feeds v. D. & H. Enterprises Ltd.*, (1979), 10 B.C.L.R. 58 (B.C. Co. Ct.) [*Miracle Feeds*] to applications seeking to set aside default judgment for failure to file a defence.

[19] To succeed, the defendant must demonstrate, on the evidence, that he:

- 1) did not wilfully or deliberately fail to enter appearances or file a defence to the plaintiff's claim;

- 2) 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; and
- 3) has a meritorious defence or at least a defence worthy of investigation.

[20] These factors are not mandatory or exhaustive of the relevant considerations, although in most cases involving applications to set aside default judgment, these factors will be “appropriate indicators of whether it is in the interests of justice to set aside” the default judgment: *Andrews* at para. 29. The considerations described in *Miracle Feeds* are factors that a judge ought to consider and weigh, but they are not immutable: *Forgotten Treasures International Inc. v. Lloyd’s Underwriters*, 2020 BCCA 341, para. 17

[21] In deciding whether to set aside a default judgment order, the principal consideration is the interests of justice: *Robinson Estate v. Wolsey*, 2018 BCSC 2287 at para. 21, referring to *Andrews* at para. 29.

[22] The failure or inability of a defendant to address a particular factor from the *Miracle Feeds* case is not necessarily fatal and there may be other factors identified by a defendant that are relevant: *Nicol v. Nichol*, 2015 BCCA 278 at para. 37, citing *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at para. 15.

Was Mr. Singh served with the Claim?

[23] The first issue to consider is whether Mr. Singh was served with the Claim because if he was not served with it, then the obligation to respond did not arise and the default judgment ought not to have been granted.

[24] There is conflicting evidence about whether Mr. Singh was personally served with the Claim on May 27, 2021. Mr. Guidi, a highly experienced process server, testified about the steps he took to effect personal service. In contrast to that, Mr. Singh denies that he was personally served on May 27, 2021.

[25] Mr. Singh gave detailed testimony denying that he was at the service address at the time of the alleged personal service. I note that there is some corroborating evidence that Mr. Singh was attending meetings elsewhere at various points during the morning of May 27, 2021. That evidence came from third parties who were involved in the meetings with Mr. Singh.

[26] Some of the cellular phone records put to Mr. Singh during his cross-examination potentially contradicted his evidence about his location at the time of the alleged personal service. However, in my view, I do not need to resolve the question of whether Mr. Singh was personally served with the Claim on May 27, 2021. That is because there is clear evidence, including evidence from Mr. Singh himself, that he knew about the Claim shortly after it was delivered by Mr. Wong to the records office address for the corporate defendants.

[27] In fact, prior to May 27, 2021, there is evidence that Mr. Singh messaged Mr. Wong about the Claim. Therefore, even if I accepted that on May 27, 2021, Mr. Singh was not personally served with the Claim, I fail to see how it assists Mr. Singh. That is because there is evidence, that I accept, indicating that Mr. Singh had the Claim before May 27, 2021 and he was communicating with Mr. Wong about it.

Wilful or Deliberate Failure to File a Defence

[28] On numerous occasions after he delivered the Claim, Mr. Wong emailed Mr. Singh to warn him that he intended to proceed. Mr. Wong warned Mr. Singh that he needed to file a response to the Claim. Mr. Wong said he would apply for default judgment if no response was received. It is not disputed that no defendant, including Mr. Singh, ever entered a response to the Claim.

[29] Mr. Singh submits that he was not acting wilfully or deliberately by failing to respond to the Claim. He testified about the reasons why he failed to enter a response to the Claim. Mr. Singh said that he had never been involved in a legal claim before and he had no experience.

[30] Mr. Singh also testified that prior to the Claim, he and the plaintiffs arranged a meeting to resolve all outstanding claims. As a result of that meeting, Mr. Singh said that the parties specifically agreed to allow the defendants to remedy the alleged deficiencies. Mr. Singh said that they explicitly agreed to resolve all matters and to refrain from making any claims against each other. Mr. Wong denies that there was a settlement and that the plaintiffs agreed to refrain from making a claim.

[31] Mr. Singh further said that at no time did he personally enter into a contract with the plaintiffs. He testified that the defendants met their obligation to remedy all defects and he understood that all matters and claims were finally resolved. In effect, Mr. Singh thought the parties' agreement to resolve all issues superseded the Claim.

[32] The question is whether Mr. Singh's failure to enter a response to the Claim was "wilful" or "deliberate". Those terms refer to something different from "unreasonable or negligent conduct" and they carry an element of blameworthiness: *Summit Leasing Corporation v. Westshore Towing Ltd.*, 2019 BCSC 1058 at para. 15 citing *Passero v. Cupo*, 2010 BCSC 1667 at para. 26 and *Tschurtschenthaler v. Sunlogics Inc.*, 2013 BCSC 1197 at para. 46. In *Hubbard v. Acheson*, 2009 BCCA 251 at para. 20, Chief Justice Finch noted that "wilful delay carries with it the connotation of blameworthy conduct".

[33] It is true that Mr. Singh knew about the Claim and he corresponded with Mr. Wong about it prior to the date of the default judgment. For example, on April 8, 2021, Mr. Singh sent a text message to Mr. Wong confirming that he got the paperwork but saying he did not understand it since the parties had settled the final payment and agreed not to make any claims.

[34] I accept that Mr. Singh ignored the Claim due to his view that the Claim had been resolved. While I make no finding as to whether there was actually a settlement, I conclude that Mr. Singh's conduct in ignoring the Claim was closer to negligence than it was to wilful and deliberate conduct. In other words, Mr. Singh's explanation for his failure to enter a response shows he acted unreasonably but it

does not, in my view, amount to the kind of blameworthy conduct contemplated in *Miracle Feeds*.

Timeliness of Application

[35] Mr. Wong informed me during submissions that he did not serve Mr. Singh with the default judgment order after it was entered.

[36] Mr. Singh testified that he learned about the default judgment order when he was preparing to refinance. At that point, he learned that his credit record made reference to the default judgment against him. Mr. Singh immediately retained counsel and the application to set aside the default judgment order was filed and served promptly.

[37] I find the application seeking to set aside the default judgment order was brought in a timely fashion.

Meritorious defence

[38] Counsel for Mr. Singh submits that he has a meritorious, or at least arguable, defence to the Claim. Mr. Singh has provided affidavits containing information in support of the defence he wishes to advance.

[39] For example, he attaches contractual documents as well as notes from an alleged meeting held between the parties to resolve their disputes as exhibits to his affidavits #3 and #5. Mr. Singh submits that he is not personally a party to any contract. His counsel submits that Mr. Singh has an arguable defence to the claim for breach of fiduciary duty, for example, because the statements attributed to Mr. Singh on the company websites are not statements he made in his personal capacity.

[40] Finally, there is also the issue of whether the parties potentially settled their dispute by agreeing to resolve all alleged outstanding issues including by promising not to make any claims. Regarding the potential defences, I make no findings other

than to agree with the applicant that at the very least, they raise defences worthy of investigation.

Interests of Justice

[41] When I view the evidence as a whole, I conclude that Mr. Singh has met the *Miracle Feeds* factors which in this case provide appropriate and sufficient indicators that it is in the interests of justice to set aside the default judgment order as against him.

[42] In reaching that conclusion, I have kept in mind that the central principle is whether it is in the interest of justice to set aside the default judgment order. Considering the evidence as a whole together with the applicable legal principles, I conclude that the interests of justice are served by exercising my discretion to vary the default judgment order entered on September 29, 2021, to remove Mr. Singh's name from the list of defendants against whom default judgment is granted.

Conclusion

[43] The default judgment entered on September 29, 2021, is varied, to remove the order that the defendant, Lakhwinder Singh, also known as Michael Singh, or Michael Multani, pay damages. For clarity, the order made in respect of the other defendants remains unchanged.

[44] The defendant, Mr. Singh, is directed to file and serve a response to the Claim by no later than seven days from the date of this judgment.

[45] The costs of this application shall be in the cause.

“E. McDonald J.”