COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ibrahim v. Hashemi,*
2024 BCCA 383

Date: 20241031
Docket: CA49827

Between:

Ali Ibrahim

Appellant
(Plaintiff)

And

Shima Hashemi, Starmark Properties Corp., 0930825 B.C. Ltd., Maryam Pour-Nasrollah, and Shadi Hashemi

Respondents
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Horsman
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated March 28, 2024 (*0928234 B.C. Ltd. v. Starmark Properties Corp.*, 2024 BCSC 615, Vancouver Docket S213035).

Oral Reasons for Judgment

Counsel for the Appellant:	N. Kamoosi C. Trudel V. Li, Articled Student
Counsel for the Respondents:	L.B.M. Rogers S.S.F. Chua
Place and Date of Hearing:	Vancouver, British Columbia October 31, 2024
Place and Date of Judgment:	Vancouver, British Columbia October 31, 2024

Summary:

The appellant appeals the order of a chambers judge setting aside a default judgment and assessment of damages. The appellant argues that the judge applied the wrong test, erred in principle in refusing to order cross-examination of the affiants, and committed palpable and overriding errors of fact. Held: Appeal dismissed. The judge did not commit the errors alleged by the appellant, and there is no basis for appellate intervention.

[1] **HORSMAN J.A.**: The appellant appeals the order of a chambers judge setting aside a default judgment order and an order assessing damages against the respondent, Shima Hashemi ("Ms. Hashemi").

Factual background

The appellant's claims

[2] In this proceeding, the appellant alleges that he entered into an agreement with the respondent, Starmark Properties Corp. ("Starmark"), pursuant to which he would provide services towards the development of a property in Whistler, British Columbia. The property was owned by the corporate respondents, Starmark and 0930825 B.C. Ltd. ("093"). In return, the appellant says, Starmark agreed that the appellant would be given an interest equal to 5% of the assessed land value of the Whistler property, and compensation in the form of a 5% equity interest in any increase in the value of the Whistler property.

[3] The respondent, Maryam Pour-Nasrollah, is the majority shareholder of Starmark and the sole shareholder and director of 093. Ms. Hashemi is Ms. Pour-Nasrollah's daughter. The other individual respondents are also personally related to Ms. Pour-Nasrollah. Ali Ashgar Hashemi is Ms. Pour-Nasrollah's ex-husband. Ms. Hashemi and Shadi Hashemi are both adult daughters of Ms. Pour-Nasrollah. Parham Golfeshan is Ms. Hashemi's husband.

[4] The amended notice of civil claim pleads that the agreement was signed by the appellant on his own behalf, and by Ms. Pour-Nasrollah on behalf of Starmark. It is not alleged that Ms. Hashemi is a party to the agreement.

[5] The appellant alleged that in 2020 and 2021, he performed services under the agreement which had the result of increasing the value of the Whistler property by $2.69 million, however the respondents have refused to pay the agreed-upon compensation to him. The appellant sought damages for breach of contract, or alternatively on the basis of the doctrine of unjust enrichment, as well as a declaration of a constructive trust over the Whistler property.

Procedural history

[6] The original notice of civil claim was filed on March 26, 2021.

[7] Ms. Pour-Nasrollah, Starmark Properties, and 093 filed a response to civil claim on February 15, 2022.

[8] On July 5, 2022, the appellant filed an amended notice of civil claim.

[9] On November 17, 2022, the appellant claimed to have personally served Ms. Hashemi with the amended notice of civil claim at her residence on Chancellor Boulevard.

[10] On May 5, 2023, the appellant filed a without notice application for default judgment against Ms. Hashemi on the basis that she had not filed a response to civil claim. On May 8, 2023, a judge granted default judgment, with damages to be assessed.

[11] The appellant then brought an application for the assessment of damages. This application originally came on for hearing before Justice Fitzpatrick on June 22, 2023. She adjourned the hearing, and ordered that the appellant must serve the application on Ms. Hashemi. Justice Fitzpatrick's order included the following term:

> That Mr. Ali Ibrahim to serve Ms. Shima Hashemi by registered mail at the address on [Chancellor Boulevard] and to make sure that she signs for it. This is to be in hand so that Mr. Ibrahim can reset this matter.

[12] On August 18, 2023, the appellant's application for an assessment of damages came on for hearing again. The appellant asserted that Ms. Hashemi had

been served on July 5, 2023, as directed by Justice Fitzpatrick. He put into evidence a Canada Post confirmation of receipt of the application material that was purportedly signed by Ms. Hashemi.

[13] The judge hearing the appellant's application to assess damages proceeded in Ms. Hashemi's absence. The appellant's damages were assessed at $225,000, plus costs and interests. The basis for this assessment was the terms of the alleged agreement between the appellant and Starmark, as well as the appellant's evidence of the value of the Whistler property and the increase in its assessed value in 2021 and 2022.

[14] Ms. Hashemi's evidence was that it was not until October 2023 that she saw the pleadings in this action, learned that she was a defendant, and that default judgment had been granted and damages assessed. She then retained counsel, and instructed him to immediately prepare an application to set aside the default judgment and the assessment of damages. The application was filed and served in November 2023, and heard on March 12, 2024.

[15] In her evidence on the application to set aside the orders, Ms. Hashemi denied that she was served with the amended notice of civil claim or the notice of application to assess damages. She deposed that she had never lived at the Chancellor Boulevard property, and that the property had been leased to tenants in November of 2022, when the appellant allegedly personally served her there with the amended notice of civil claim. Ms. Hashemi provided a copy of a signed residential tenancy agreement for the property commencing November 1, 2022. She also provided evidence to demonstrate that she was in Los Angeles on July 5, 2023, when the notice of application to assess damages was allegedly served.
Ms. Hashemi denied that the scrawled signature that appeared on the Canada Post confirmation was her own.

The chambers judgment: 2024 BCSC 615

[16] The submissions before the chambers judge focussed on the test for setting aside an assessment of damages following default judgment. The parties agreed

that the governing law was set out in the judgment of Justice Riley, as he then was, in *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing*, 2018 BCSC 234 [*National Home Warranty*].

The *National Home Warranty* framework

[17] In *National Home Warranty*, Justice Riley reviewed the relevant case law and concluded that the court had no express jurisdiction under the *Supreme Court Civil Rules* [*Rules*] to set aside an assessment of damages. He reasoned as follows:

a) In *0754306 B.C. Ltd v. Bains*, 2010 BCCA 244 (Chambers) [*Bains*], Justice Chiasson held that the power in what is now R. 3-8(11) of the *Rules* only allows a judge to set aside a default judgment, and an assessment of damages under R. 3-8(13) does not constitute a "judgment". Therefore, the Supreme Court has no authority to revisit an assessment of damages under R. 3-8(11) of the *Rules*. Justice Riley considered himself bound by *Bains*: *National Home Warranty* at paras. 30–31.

b) In *Bassi v. Bassi*, 2013 BCSC 284, varied on other grounds 2013 BCCA 422, Justice Joyce held that because *Bains* precludes the Court from invoking R. 3-8(11) of the *Rules* to set aside an order assessing damages, then the default order on which the damage assessment is based cannot be set aside under R. 3-8(11) once damages have been assessed. Justice Riley also considered himself bound to follow *Bassi* under the principles in *Re: Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.): *National Home Warranty* at paras. 33–34.

c) While R. 22-1(3) of the *Rules* provides the court with jurisdiction to reconsider an order made in the absence of the other party, the precondition to the operation of R. 22-1(3) is that the absent party was entitled to notice. A party in default is not generally entitled to receive notice of an application to assess damages following a default judgment: *National Home Warranty* at paras. 35–39.

[18] Despite the absence of express authority under the *Rules*, Justice Riley concluded that the Supreme Court has the inherent jurisdiction to set aside an assessment of damages in order to prevent a miscarriage of justice. The onus is on the party in default to demonstrate that allowing the assessment of damages to stand "would be viewed by a reasonable, well-informed member of the public as 'shocking and unconscionable'": *National Home Warranty* at para. 49.

The chambers judge's analysis

[19] Relying on the principles in *National Home Warranty*, the chambers judge stated that he had jurisdiction to make an order setting aside the assessment of damages if Ms. Hashemi established that such an order would prevent a miscarriage of justice. If the damage assessment was set aside on that basis, Ms. Hashemi could then seek to set aside the default judgment on the conventional test under R. 3-8(11) of the *Rules*: Chambers Judgment at paras. 29–30.

[20] The judge concluded, based on the evidence presented on the application, that Ms. Hashemi had not been served with either the amended notice of civil claim or the application for assessment of damages. He stated:

> [38] My findings about service are based on Ms. Hashemi's evidence that she never lived in, or frequented, the Chancellor property which was tenanted at the time of the alleged services. As mentioned, this is supported by the residential tenancy agreement for the Chancellor property she has put in evidence, suggesting she would not have been inside the home on November 13, when Mr. Ibrahim says he saw her there; or been just outside of it on November 17, when he says he personally handed her the Claim. It also supports her position that she did not sign for the damages materials on July 5 when they were delivered there by registered mail. It is further supported by her evidence showing that the signature on the Canada Post confirmation bears no resemblance to her actual signature, and her evidence that she was in Los Angeles on July 5 and the copy of the boarding pass for her flight home on July 6.
>
> [39] Ms. Hashemi's version of events about her whereabouts and absence from the Chancellor property is also supported by the evidence of her husband.

[21] The judge reviewed the evidence that the appellant relied on in support of the assertion that, service aside, Ms. Hashemi must have known of the proceeding. He concluded that it did not undermine Ms. Hashemi's evidence.

[22] The judge then turned to the merits of the case. He observed that there were "obvious problems" for the claim against Ms. Hashemi: Chambers Judgment at para. 48. The central claim advanced in the amended notice of civil claim was for damages for breach of a contract that was between the appellant and Starmark. The judge stated that there was "nothing in the pleadings, evidence or submissions that would make Ms. Hashemi liable for breach of this alleged contract": at para. 48. As to the appellant's alternative claim for restitution based on unjust enrichment, the judge similarly found that he had provided "no material facts, legal basis, or authority" for why his claims against Starmark could give rise to a claim for unjust enrichment against Ms. Hashemi personally: at para. 50.

[23] The judge rejected the argument raised by the appellant in the course of the hearing that he should order cross-examination of the witnesses regarding the question of service. He stated:

> [53] … The plaintiffs never applied for such cross-examinations, and I do not see the time and cost as in the interests of justice, particularly given my concerns about the merits of the plaintiffs' claims against Ms. Hashemi.

[24] The judge summarized his conclusion on Ms. Hashemi's application as follows:

> [36] In my view, the damages assessment against Ms. Hashemi should be set aside as a miscarriage of justice. It would be seen by a reasonable, well-informed member of the public as shocking and unconscionable for Ms. Hashemi to have a $225,000 damages award against her obtained in default and be denied an opportunity to defend the claim on the merits. I also find that it is the interests of justice for the default judgment itself to also be set aside under Rule 3-8 (11) based on the *Miracle Feeds* considerations.

[25] Accordingly, the judge ordered that the default judgment and damage assessment order against Ms. Hashemi were both set aside.

On appeal

[26] The appellant alleges that the chambers judge made three errors:

a) He conflated the test for setting aside the order assessing damages and the test for setting aside the default judgment;

b) He considered irrelevant factors, and failed to consider relevant factors, in declining to order cross-examination on the conflicting evidence around service; and

c) He committed palpable and overriding errors in his assessment of Ms. Hashemi's evidence, and made findings that were unsupported by the factual record.

Analysis

The first ground of appeal: the test for miscarriage of justice

[27] The appellant's first ground of appeal is that the judge erred by considering the merits of the appellant's claim against Ms. Hashemi in deciding whether the damage assessment order should be set aside. He says the merits are relevant to the test for setting aside a default judgment, as set out in *Miracle Feeds v. D. & H. Enterprises Ltd.*, 10 B.C.L.R. 58, 1979 CarswellBC 48 (Co. Ct.), but not to the assessment of whether a miscarriage of justice will result if the damage assessment stands.

[28] I consider it unnecessary to decide the issue as framed by the appellant. A division of this Court has yet to consider the correctness of *Bains* and *Bassi*, the two cases that grounded Justice Riley's conclusion in *National Home Warranty* that there is no express authority under the *Rules* to set aside an order assessing damages following a default judgment. Accepting for the purposes of this appeal, and without deciding the point, that *Bains* and *Bassi* are correct, the facts of the present case are distinguishable. As explained in *National Home Warranty*, a party in default is generally not entitled to notice of an application to assess damages, and therefore has no standing to apply under R. 22-1(3) of the *Rules* for reconsideration of an assessment of damages order made in the party's absence. In this case, however, Ms. Hashemi was entitled to notice of the application to assess damages pursuant to the June 22, 2023 order of Justice Fitzpatrick. As such, she had standing to apply for reconsideration under R. 22-1(3).

[29] The division invited the parties to this appeal to provide submissions on the question of whether the judge could have set the assessment of damages aside under R. 22-1(3), rather than having resort to the court's inherent jurisdiction. The appellants say that R. 22-1(3) does not apply because Justice Fitzpatrick did not order personal service of the application material. I do not agree. The fact that Ms. Hashemi was entitled to notice gave her standing to apply to set the order aside under R. 22-1(3): *Main Acquisitions Consultants Inc. v. Prior Properties Inc*., 2022 BCCA 102 at para. 40.

[30] The considerations relevant to the court's discretion to set aside an order under R. 22-1(3) where a party fails to appear are similar to the *Miracle Feeds* factors that apply on an application to set aside a default judgment. On an application under R. 22-1(3), as under *Miracle Feeds*, the applicant must demonstrate: (1) that she is not guilty of wilful delay or default; (2) that she has brought the application for consideration as soon as reasonably possible; and (3) that she has shown a meritorious defence, or at least a defence worthy of investigation: *Rangi v. Rangi*, 2007 BCCA 352 at para. 73. The *Miracle Feeds* factors are not meant to apply inflexibly, and they are not immutable: *Nichol v. Nichol*, 2015 BCCA 278 at para. 37. Rather, they are appropriate indicators of whether it is in the interests of justice to set aside a default judgment: *Andrews v. Clay*, 2018 BCCA 50 at para. 29. As I have indicated, similar principles apply to the test under R. 22-1(3).

[31] In my view, it was unnecessary in this case for the judge to resort to the court's inherent jurisdiction to set aside the assessment of damages when R. 22-1(3) had direct application. No doubt this was a function of the manner in which the application was presented to the judge. In any event, it is open to this Court to make any order that the court appealed from could have made, and there is no prejudice to the appellant in addressing the first ground of appeal within a proper procedural framework.

[32] In this case, in light of the order of Justice Fitzpatrick requiring notice, the judge could have made an order setting aside the assessment of damages under R. 22-1(3) of the *Rules*. The appellant's argument that the judge erred in conflating the test for default judgment and the test for a miscarriage of justice is then easily answered. The considerations that apply on an application under R. 22-1(3) mirror the considerations on an application to set aside a default judgment under R. 3-8(11). Those considerations include the merits of the applicant's defence.

[33] Therefore, I would not accede to this ground of appeal.

The second ground of appeal: failure to order cross-examination

[34] The appellant next argues that the chambers judge erred in considering irrelevant factors, and failing to consider relevant factors, when he declined to order cross-examination on the affidavits filed on Ms. Hashemi's application, as permitted by R. 22-1(4)(a) of the *Rules*. Specifically, the appellant argues that the judge did not explicitly engage with the cross-examination factors set out in *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882, and instead inappropriately focussed on the merits of the case. The appellant notes that there were conflicts in the evidence as to whether Ms. Hashemi was served with the amended notice of civil claim and the application to assess damages. The appellant argues that the question of service was material to Ms. Hashemi's application and, therefore, cross-examination would have served a useful purpose in eliciting evidence that would assist in determining the application.

[35] The judge's decision not to order cross-examination on affidavits involved an exercise of discretion that is subject to deference on appeal. This Court will intervene only if it is shown that "the judge misdirected himself, gave no or insufficient weight to relevant considerations, made a palpable and overriding error in his assessment of the facts, or came to a decision that is so clearly wrong as to amount to an injustice": *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 at para. 4.

[36] I am not persuaded that the judge erred in law or principle, or made any palpable and overriding error of fact, in declining to order cross-examination in these circumstances. The factors in *Equustek* are not exhaustive, as "[o]ther cases have

identified additional considerations such as…whether the cross-examination will produce unreasonable delay, or generate unreasonable expense": *Stephens* at para. 5. It is evident from the judge's reasons that he was concerned about the late nature of the request for cross-examination on affidavits—which came only at the hearing of Ms. Hashemi's application—and the additional time and cost that cross-examination would impose on the parties.

[37] In addition, and contrary to the appellant's argument, the judge's conclusion did show a consideration of the cross-examination factors identified in *Equustek*; specifically, whether cross-examination would serve a useful purpose by eliciting evidence that would assisting in determining a material issue. The judge stated that the additional process of cross-examination was not in the interests of justice, particularly given the lack of merit in the appellant's claim against Ms. Hashemi. I take this to mean that the judge considered the apparent strength of Ms. Hashemi's defence to be an overriding factor in assessing the interests of justice, and was of the view the strength of her defence would not be undermined by cross-examination on affidavits on the issue of service. Notably, the appellant does not, on appeal, directly challenge the judge's characterization of his claim against Ms. Hashemi as ungrounded in pleaded facts or a legal basis.

[38] Finally, I note that there was documentary evidence that corroborated Ms. Hashemi's assertion that she had not been served with the amended notice of civil claim or the application to assess damages. The judge's determination that the record was sufficient to permit him to fairly resolve the evidentiary conflict in this case without cross-examination is entitled to deference on appeal.

[39] The judge's decision to refuse cross-examination in these circumstances was well within the proper scope of his discretion under R. 22-1(4)(a) of the *Rules*. I see no basis for appellate interference.

The third ground of appeal: assessment of the evidence

[40] The appellant's final ground of appeal concerns the factual findings of the chambers judge. He says the judge committed palpable and overriding errors of fact

in his assessment that Ms. Hashemi's evidence was credible, and in making "improper" factual findings.

[41] In relation to Ms. Hashemi's evidence, the appellant alleges that the judge erred in failing to consider, or give adequate weight to, "numerous inconsistencies and peculiarities" in the evidence which should have led the judge to infer that Ms. Hashemi was aware of the proceeding before October 2023. However, the judge did consider this argument, and he reviewed evidence relied upon by the appellant in support of the assertion that Ms. Hashemi had prior knowledge of the action. The judge may have not cited every piece of evidence, but he is not obliged to. The judge concluded that the appellant's evidence and arguments "raise the possibility" that Ms. Hashemi knew something of the litigation before default judgment was obtained, but did not rise to the level of undermining her evidence about the lack of service: Chambers Judgment at para. 46. Absent a showing of palpable and overriding error, which has not been demonstrated, it is not the role of this Court to re-weigh the evidence, or to consider whether the evidence reasonably supports alternative inferences that the judge declined to draw.

[42] The appellant next criticizes the judge's treatment of Ms. Pour-Nasrollah's statement in her affidavit of April 26, 2022 that: "I am aware that Shadi, Shima, Parham and Ali have not been served with the notice of civil claim in this matter." The judge concluded that Ms. Pour-Nasrollah's statement was too vague and ambiguous to support the inference urged by the appellant that Ms. Pour-Nasrollah and Ms. Hashemi had discussed the existence of the lawsuit. The appellant argues that the evidence is not vague when viewed in context, and the judge's finding to the contrary was improper. However, it was for the judge to interpret the evidence. The appellant's disagreement with the judge's interpretation does not constitute palpable and overriding error.

[43] The appellant is also critical of the judge's reliance on the tenancy agreement in support of his conclusion that Ms. Hashemi was not served with the amended notice of civil claim. The appellant acknowledges that the tenancy agreement on its

face appears to indicate that the Chancellor Property was tenanted in November 2022. However, he says that it would not be unreasonable to infer that Ms. Hashemi may nevertheless have personally attended the Chancellor Property to address tenant concerns on the day the amended notice of civil claim was purportedly served. Even assuming that this is a reasonable inference, it was not one the judge was prepared to draw. Once again, the fact that alternative reasonable inferences could have been drawn from the evidence is not a proper basis for appellate interference.

[44] In summary, I am not persuaded that the appellant has identified any palpable and overriding error of fact by the chambers judge. The chambers judge reviewed the voluminous record before him—over 1,000 pages of affidavit evidence, including exhibits—and made factual findings that were open to him on the record. The appellant invites this Court to consider afresh the evidentiary record, and to draw different inferences and make different credibility findings than those of the chambers judge. However, this is not the role of an appellate court.

The fresh evidence application

[45] The appellant applied to adduce fresh evidence on appeal, consisting of an affidavit filed by the respondent after the chambers judgment which attached Starmark's Central Securities Register. The evidence is said to show that at the time the affidavit was sworn in 2024, Ms. Hashemi was a shareholder in Starmark, contrary to her evidence on the application that she was a minority shareholder in Starmark until October 2022 when she no longer held Starmark shares. The appellant says that this proposed fresh evidence impacts Ms. Hashemi's credibility, and this in turn would have affected the judge's assessment of the evidence on the issue of service.

[46] In light of the judge's analysis, I see no conceivable basis on which it could be said that the proposed fresh evidence would have had any material effect on the outcome in this case. Therefore, I would dismiss the application to adduce fresh evidence.

Disposition

[47] I would dismiss the application to adduce fresh evidence, and dismiss the appeal.

[48] **DICKSON J.A.**: I agree.

[49] **FLEMING J.A.**: I agree.

[50] **DICKSON J.A.**: The application to adduce fresh evidence and the appeal are dismissed.

"The Honourable Madam Justice Horsman"