IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20081107
Docket: S077088
Registry: Vancouver

Between:

Her Majesty the Queen in right of the province of British Columbia as represented by the Attorney General of British Columbia

Plaintiff

And:

Ripudaman Singh Malik, Raminder Kaur Malik, Jaspreet Singh Malik, Gurdip Singh Malik, Hardeep Singh Malik, Darshan Singh Malik, Khalsa Developments Ltd., Papillon Eastern Imports Ltd., 0760887 B.C. Ltd. and 0772735 B.C. Ltd.

Defendants

Before: The Honourable Mr. Justice McEwan

Oral Ruling

In Chambers
November 7, 2008

Counsel for Plaintiff	F.G. Potts B. Martyniuk
Counsel for Defendant Gurdip Malik	G.P. Forrester
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is an application brought by Gurdip Malik in this matter to set aside a default judgment taken against him January 31, 2008. I will not review the material. The colloquy between myself and counsel will make it clear the grounds and basis upon which I make this judgment. Suffice it to say that I am wholly unsatisfied that the standard test under ***Miracle Feeds v. DNH Enterprises Ltd.***, 1979, 10 BCLR 58 has been met in this case. I say so having regard to the somewhat more flexible attitude taken toward the criteria set out in ***Miracle Feeds*** articulated in the case of ***British Columbia v. Ismail***, 2007 BCCA 57. Mr. Malik, in his material, has not been able to satisfy me that he did not willfully or deliberately fail to enter an appearance or file a defence to the claim. I say that bearing in mind what was said in ***Northguard Mortgage Corporation v. Hamada***, 1985 B.C.J. 25, among other cases. There Mr. Justice Craig, at paragraphs 27 to 29, made it clear that the sort of thing that happened in this case, wherein Mr. Gurdip Malik left it to his brother Ripudaman Singh Malik to take care of his interests in the face of allegations that the two of them, among other family members, colluded in a fraud, is completely inadequate to meet the test that is imposed on him.

[2] There is only one concern that I have, and that is that in refusing to set aside a default judgment the court is normally protecting the integrity and the administration of justice in seeing that matters move appropriately through the courts, and in seeing that all parties are fairly dealt with. In a case of this kind where the default judgment occurs in a context where other claims will be advanced and will inevitably involve, whether there is a default or not, the party Gurdip Malik, the remote possibility that a meritorious defence will arise, leaves open the spectre that

having taken the default judgment and having had that affirmed in this forum, the plaintiff will have a judgment that appears at the other end of this case to have been contrary to the interests of justice on the merits of the case. Because of that possibility it seems to me that despite the fact that the ***Miracle Feeds*** test is not remotely met in this case, the proper thing to do, in consideration of the overall appearance of the administration of justice, is to permit the filing of a statement of defence, that is, to set aside the default judgment. I do so applying the reasoning set out in ***May v. Williams***, 1997 B.C.J. 900. That is to say that in a case where the default judgment occurs in the background that includes other cases, particularly like this one, where the merits are going to be bound up in evidence that implicates the party in default, it may be that applying the principles that ordinarily would pertain to a default judgment will leave open the possibility of a technical judgment against a party who is ultimately, on the circumstances in the ongoing case able to demonstrate that that judgment is contrary to the merits.

[3] For that reason I will accede to the application. A statement of defence will be filed by November 18th at 4 o'clock p.m.

[4] Do you have any comments to make, Mr. Potts, on the scale of costs that should be imposed?

[5] MR. POTTS: Given your rulings, My Lord, special costs. We should not have to be here.

[6] THE COURT: I do not have any hesitation in saying special costs ought to be granted in this matter.

[7] Anything else?

[8] MR. POTTS: Payable in any event, My Lord, or forthwith or in the cause or ...

[9] THE COURT: I think they should be payable forthwith. Do you have anything to say about that?

[10] MR. FORRESTER: I would say --

[11] THE COURT: Look, this is so outrageous that I say payable as a condition of the filing of the statement of defence.

[12] MR. FORRESTER: In that case, My Lord, I was initially thinking that I could file the statement of defence -- if you told me to do it in an hour I could have done it, but I am a little bit concerned with applying a deadline of November 18th. First of all, we have to assess the special costs, and secondly, what if my client for some reason has to make payment at some --

[13] THE COURT: What would the costs be approximately, Mr. Potts? Do you have any sense?

[14] MR. POTTS: I am sorry, My Lord, I do not. But I know that if they were regular costs it would be something in the order of $500 or thereabouts. It depends whether this is a two-day -- or a full day hearing or a half day hearing. I would much prefer, My Lord, to have Your Lordship, if you are disposed to do it, just assess them even if the number turns out to be less than what special costs would be, because there is also the issue of privilege.

[15] THE COURT: I am going to assess them at $1,500 payable by the date of filing as a condition; otherwise, he will be in default again.

The Honourable Mr. Justice McEwan