

ORIGINAL

Date: 20020710  
Docket: S017277  
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment  
The Honourable Mr. Justice Pitfield  
July 10, 2002

BETWEEN:

JIM GRANGER

PLAINTIFF

AND:

HUDSON HOUSE LTD.

DEFENDANT

Counsel for the Plaintiff: R. S. Fleming

Counsel for the Defendant: H. Grewal

[1] **THE COURT:** This is an application by Hudson House Limited to set aside a default judgment that was entered by the plaintiff, Mr. Granger.

[2] The circumstances with respect to the action are that the Writ of Summons and Statement of Claim were filed December 24, 2001 and appear to have been served on December 27, 2001. On January 11, 2002 an unfiled appearance was delivered to the

plaintiff by the defendant. On January 14th the appearance was actually filed. The appearance was more than seven days late under the rules.

[3] On January 29, 2002 the plaintiff provided the defendant with notice that default judgment would be entered if no defence were filed by February 4, 2002. No defence was filed and a search for the defence was made by the registry in response to praecipe on February 7, 2002. None was found, and on February 12, 2002 the plaintiff obtained a default judgment. That order was actually entered on February 18th.

[4] On February 18th, notwithstanding the grant of the prior default judgment the Statement of Defence was filed by the defendant. It was delivered to the plaintiff on February 19th. The default judgment was delivered to the defendant on February 19th. On February 27th, the defendant asked the plaintiff to consent to setting aside the default judgment. On February 28th the plaintiff advised that it would refuse to do so on the basis that the defence disclosed no credible defence to the Statement of Claim.

[5] The Notice of Motion making an application for the order setting aside the default judgment was filed on April 23, 2002. It has been called for hearing on a number of occasions

and it is only on this date that the parties have been able to obtain a hearing before the court.

[6] The circumstances giving rise to the complaint as evidenced by the Statement of Claim are that the plaintiff was employed by the defendant as a property manager in Squamish. He was provided with a letter of termination on August 12, 2001. The letter of termination stated as follows:

Effective August 12, 2001 your employment with Hudson House Limited has been terminated for the following reasons:

1. Failure to manage the building in a professional manner.
2. Diversion of funds due to Hudson House.
3. Failure to collect rents when due and to actively pursue and evict delinquent tenants.

[7] The letter of August 12th specified that the plaintiff would be allowed to remain in the possession of the suite occupied by the person holding the position of manager on a rent-free basis until September 30, 2001. The plaintiff, having been terminated on August the 12th, was rehired by the defendant on August the 16th.

[8] There is a conflict in the evidence as to whether or not the rehiring was for a limited or unlimited term. The plaintiff takes the view that he had been rehired to perform his regular duties. An officer on behalf of the defendant

takes the view that his re-employment was for a more limited purpose and of limited duration.

[9] The principal incident, which is said to justify the dismissal, concerns the receipt of \$1,500 by the plaintiff from a film company in respect of the film company's use of the managed property for movie production purposes. The defendant, or an officer on its behalf, says that it was of the impression that the proceeds from the use of the property were to be paid to the defendant. The defendant learned that the proceeds had in fact been paid to the plaintiff and the defendant asserts that the property was appropriated by the plaintiff for his benefit to the detriment of the defendant.

[10] The documentary evidence establishes that the contract between the plaintiff and the film company is personal to the plaintiff and describes as well the fact that the property which is to be used by the film company is the rental suite that is occupied by the plaintiff in his capacity as manager of the property. There is no evidence on this application or any materials associated with it indicating that the defendant at any time made demand of the plaintiff for reimbursement of any funds paid by the film company to the plaintiff.

[11] The law with respect to an application to set aside default judgments is clear and well established. The

principles are those enunciated in the case of *Miracle Feeds v. D & H Enterprises Ltd. and Giesbrecht* (1979), 10 B.C.L.R.

P-58. The principles are these:

1. That the defendant did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim.
2. That the defendant 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 the defendant has a meritorious defence or at least a defence worthy of investigation.

[12] I am satisfied that the defendant has met the first test in that while there is dilatory conduct on the part of the defendant, there is an indication by virtue of the filing of a defence on February 18th, 14 days after the deadline imposed upon the defendant by the plaintiff that the defendant wished to defend this action.

[13] The second question is not so easily answered, but on all of the evidence I conclude that the defendant has not acted on a timely basis within the meaning of the second principle in the *Miracle Feeds* case. I say that for the reason that the defendant was provided with the default judgment on February 19th and made no inquiry of the plaintiff about setting aside the default judgment until February 27th. Notwithstanding a response on February 28, 2002 it did nothing by way of

bringing an application before the court until April 23, 2002. The explanation offered by the defendant is that its principal was on vacation in Arizona. I do not accept that as a reason given the materiality of the events surrounding this litigation, its institution and the entering of the default judgment. I do not consider the absence of the individual in Arizona to be a reasonable explanation of the delay. Moreover the affidavit evidence satisfies me that the defendant's principal returned to the city in early March of 2002 and that notwithstanding, the application to set aside the default judgment was not made for a period of some six weeks or more after the principal's return.

[14] I am satisfied that the delay associated with the application to set aside the default judgment is comparable to the delay and disregard for the admonitions offered by the plaintiff to the defendant of the result that would follow in the event there was a failure to comply with deadlines. In matters of employment law it is imperative that the plaintiff be able to proceed on a timely basis both because of the need to resolve issues and as well to accommodate the requirement that the employee do everything he can to mitigate loss. It does not behoove a defendant to delay in the manner in which

this defendant appears to have delayed in the litigation process.

[15] Finally, I am satisfied on all of the evidence that there is neither a meritorious defence nor a defence worthy of investigation in this case. I say that for the reason that as I have noted the notice of termination of employment was given to the plaintiff on August 12, 2001, and there was no indication in the letter that employment had been terminated for cause. Rather reasons for termination are enunciated. The reasons are equally consistent with termination without cause as for termination with cause, but most assuredly there is no assertion of termination for cause.

[16] The employer's conduct is inconsistent with termination for cause. The agreement that the plaintiff could occupy the apartment until September 30, 2001 on a rent-free basis was inconsistent with the suggestion that there was justification for termination. As I have mentioned, no claim was made or alleged at any time that the plaintiff was obliged to account to the defendant for the money received from the film production company. Four days after termination the employer re-employed the plaintiff to perform at least some of the tasks of his former employment. The explanation offered by the defendant is that the plaintiff had been unable to find a

replacement manager was satisfactory although it purports to have had one in place over the period August 12 to August 15, 2001. I find it ironic, to say the least, that the defendant would say that it was unable to find a reliable replacement manager on short notice, but at the same time be prepared to re-employ what it regarded as an untrustworthy employee to carry out the management functions including entrusting the individual with the keys to all of the suites and premises that were the subject of management.

[17] In all of the circumstances I am satisfied that the defendant cannot reasonably assert that it has a meritorious defence to the termination based on cause, nor is there a case pleaded by the defendant to suggest that any allegation that there was termination for cause is worthy of investigation.

[18] Finally, I wish to note that in the Statement of Defence which was filed after the default judgment was obtained, the defendant admits that the plaintiff was employed from 1989 through September 30, 2001. That is an admission that suggests that any suggestion there was termination for cause would not withstand scrutiny. I am satisfied that this is not an appropriate instance in which the default judgment should be set aside. Rather it should be sustained and the matter

should proceed to the assessment of damages as mandated by the default judgment.

[19] The plaintiff will be entitled to its costs at Scale 3.

[20] Is there anything else required?

[21] MR. FLEMING: Not for me, My Lord, thank you.

[22] THE COURT: Mr. Grewal.

[23] MR. GREWAL: No thank you, My Lord.

[24] THE COURT: All right, thank you.

