

Date: 19970120
Docket: C963847
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

PLAINTIFF

AND:

RAYMOND HUNG SAM, ANDREZ (ANDREW) BABA,
IRENA BABA, JAROSLAW (JERRY) BABA,
JANUZ (JOHN) BABA, DO WA CHAN,
ERNEST TINLAP CHENG, GEORGE YIU MAN CHU,
BIBI AJEET KAUR FISHMAN, JEREMY STEPHEN JONES,
DICKSON KAR LEE, DEBBIE LEE,
ENTON (TONY) MULLARAI, ALEXIS (ALEX) OSORIO,
DOI TAI WONG, MAURO MASSIMO ZUZOLO,
MICHELLE KULAS and CHRISTIAN MARIO SALINA

DEFENDANTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE HOLMES
(CHAMBERS)

Counsel for the Plaintiff: F.G. Potts

Counsel for the Defendant George Chu: M.J. Hambrook

Counsel for the Applicant Mauro Zuzolo: S. Moir

Place and Date of Hearing: Vancouver, B.C.
January 14, 1997

[1] The defendants George Yiu Man Chu ("Chu") and Mauro Massimo Zuzolo ("Zuzolo") are two of 18 defendants alleged by the plaintiff to have:

... wrongfully and maliciously conspired together and continue to conspire together to defraud and injure the Plaintiff by combining in various combinations and at different times and in different combinations for the purpose of assisting and encouraging each other in making fraudulent insurance claims as against the Plaintiff and/or the Plaintiff's insureds in respect of non-existent and/or exaggerated personal injury claims and in respect of non-existent or exaggerated damage to or loss of property claims and in respect of non-existent or exaggerated claims for benefits pursuant to the Insurance (Motor Vehicle) Act, R.S.B.C. 1979 and amendments thereto.

[2] Neither Chu nor Zuzolo appeared nor filed a defence within the time limited and the plaintiff took default judgment against each. These two defendants now apply to set aside the

default judgments and be permitted to defend the action.

[3] I understand from counsel for the plaintiff that this action does not concern a conspiracy amongst all the defendants to defraud the Insurance Corporation of British Columbia ("ICBC") as the pleading appears to suggest. It is I gather a collection of a number of unrelated conspiracies and frauds joined into this one action. That is confusing, but does not directly impact upon the issue of whether the default judgments should be set aside.

[4] The test to be met by each defendant is the four step proof articulated in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58, as approved by the Court of Appeal in *Bank of Montreal v. Erickson and Erickson* (1984), 57 B.C.L.R. 72:

1. the failure to file an appearance or defence was not wilful or deliberate;
2. the application to set aside the default judgment was made as soon as reasonably possible upon learning of it, or an explanation of delay is given;
3. there is a defence worthy of investigation; and,
4. all requirements are established through affidavit material filed on behalf of the defendant.

[5] In regard to the third step some particularity should be provided beyond a simple denial of the plaintiff's allegations. [Schmid v. Lacey, Unreported, (18 November 1991), Vancouver Registry CA012653 (B.C.C.A.); *Hollyburn Properties Limited v. Hillen et al*, Unreported, (3 May 1994), Vancouver Registry C935975 (B.C.S.C.)].

APPLICATION OF CHU

[6] The Writ and Statement of Claim were served on July 8, 1996 and default judgment entered July 17, 1996.

[7] Chu was already plaintiff in an action against ICBC commenced August 1, 1995 in which he claimed for personal injury as a result of an accident November 5, 1994 wherein he alleges he was struck by a stolen motor vehicle driven by an unknown person.

[8] Chu was "... extremely concerned ..." about the allegations of fraud and conspiracy and therefore gave the Writ and Statement of Claim to his solicitor in that action "...within a few days ..." of service.

[9] His solicitor wrote to the plaintiff's solicitor on July 26, 1996 advising he would be absent on vacation until the end of August but would file a Statement of Defence on behalf of Chu on his return. He asked no default action be taken without prior notice.

[10] Default judgment had however already been entered, and the plaintiff's solicitor replied on August 7, 1996 to that effect.

[11] Chu's solicitor tried unsuccessfully to advise Chu of the default judgment. Chu had left Canada for Hong Kong August 12, 1996 and did not return until November 11, 1996. The plaintiff's attempt to advise Chu of the default judgment by personal service on October 9, 1996 failed with the process server advising he was told Chu "... had moved some time ago. Leaving no forwarding address."

[12] Chu did not in fact learn of the default judgment until contacted by his solicitor December 3, 1996. This Motion to set aside the default judgment was filed December 13, 1996.

[13] I note that although ICBC was a defendant in the earlier action commenced by Chu, involving an accident claimed in the present action to be fraud, they did not give his solicitor notice of the commencement of this action. Indeed they took default judgment without any contact with the solicitor already

involved on Chu's behalf in the existing litigation.

[14] When allegations of fraud and conspiracy are made it is often not possible for a defendant to provide specific particulars in support of his defence that he did not conspire with anyone and was not party to fraud. The plaintiff's allegations are quite general. Chu has denied the fraud and conspiracy allegations. He reported the accident of November 5, 1994, gave statements to the police and ICBC, as did his passenger Lee. He denies the allegation that he faked the sale of his vehicle to another person solely to obtain insurance he could not himself obtain.

[15] The affidavit material on this application could have been far better prepared. In particular Chu's solicitor could have been more direct and specific as to his involvement after he was given the Writ and Statement of Claim by Chu. I am however satisfied that the evidence minimally meets the *Miracle Feeds*, *supra*, test.

[16] I accept Chu did wish to enter an appearance and defend the action and for that purpose forwarded the Writ and Statement of Claim to his solicitor on the expectation he would take the appropriate action.

[17] The solicitor could have moved more expeditiously by phoning and obtaining any requisite extension of time, but with Chu's action for damages already extent he assumed time would not be critical.

[18] When advised that there was default judgment, and the plaintiff would not agree to set it aside, the delay in trying to obtain Chu's instructions was not unreasonable. Chu had unfortunately left the country by then. I cannot infer that Chu left to avoid any matter related to this action, and although he showed poor judgment in not letting his solicitor have a forwarding address, I do not attribute any improper motive on his part.

[19] Given the nature of the plaintiff's allegations proof becomes largely a matter of credibility. Chu has provided some detail that could weigh in support of his denials. I accept he meets the threshold of a defence worthy of investigation.

[20] The default judgment entered will be set aside. Chu will have seven days to enter a defence. The plaintiff is entitled to the costs of this application on scale three, payable forthwith.

APPLICATION OF ZUZOLO

[21] On July 4, 1996 Zuzolo was served with the Writ and Statement of Claim, together with a Demand for Discovery of Documents, Notice to Produce, and a covering letter advising him to contact a lawyer.

[22] Default judgment was entered July 17, 1996. Zuzolo suggests a number of reasons to justify why he took no action to enter an appearance until September 3, 1996.

[23] He suggests that he was confused that the present proceeding was criminal and he had been promised by an ICBC investigator that "... they would leave me alone and that the charges against me would be dropped." In his affidavit he erred as to the date this "interview" is alleged to have occurred by more than a year. The ICBC investigator denies any such promise was made.

[24] Zuzolo then alleges one of the process servers, who were ICBC investigators, when they served him gave him his card and said to "... give him a call if I had any questions." When he called thereafter the investigator did not return his calls.

[25] Zuzolo lost the cover letter with the documents. The evidence is that it told him to contact a lawyer.

[26] Zuzolo called the plaintiff's lawyer and asked "... where do I have to go to fight you guys." The evidence is that when Zuzolo called the plaintiff's lawyer's office he was instructed to contact his own lawyer. Ms. Robinson, a legal assistant, deposed that she spoke to him on September 25, 1996 when he

phoned and apparently at that time he could not recall the name of the "adjuster" he had called on July 4, 1996. He told her that as "... the adjuster did not call him back so he thought the whole thing was not a big deal."

[27] It is suggested later in correspondence by Zuzolo's solicitor that Zuzolo had told him that an adjuster had agreed to an extension of time for the filing of an appearance. I do not see any such statement in Zuzolo's affidavit.

[28] Zuzolo alleges that a friend and co-defendant told him where he had to go "to file a piece of paper" but he could not understand his directions. I note the address of the Registry is clearly set out on page 4 of the Writ of Summons. Finally on September 3, 1996 his friend and co-defendant took him to the Registry and he entered an appearance.

[29] On September 26, 1996 the plaintiff's solicitor mailed a copy of the default judgment. He retained a solicitor the next day, and took the documents served upon him to a solicitor the next week. His solicitor wrote to ICBC's solicitor October 28, 1996 alleging there was a deal not to sue, and that an adjuster told Zuzolo he could be late in filing a defence. This letter was responded to denying the suggestion of any deal not to sue, or delay an appearance. I accept the plaintiff's evidence in that regard.

[30] The affidavit of Zuzolo sworn in this matter December 3, 1996 is grossly inaccurate as to dates of accidents, his arrest, and an interview with an ICBC investigator. I am left with little confidence in Zuzolo's ability to accurately recollect events.

[31] I cannot accept the service of the documents confused him or that he was unaware what they were. I do not accept his allegations that ICBC investigators or adjusters misled him in any way as to the nature of the proceeding or that he need not respond to it.

[32] I find it telling that he loses the cover letter which tells him to contact a lawyer, and that he could not advise Ms. Robinson the name of the person whose card he was given and whom he alleges he phoned several times. He must have lost that card as well. He cannot recall the adjuster who "extended the time for filing an appearance", and although apparently advising his solicitor that occurred, has not deposed to it in the material before the Court.

[33] I conclude Zuzolo does not meet the first test of Miracle Feeds. He chose not to enter an appearance or defence within the time limited, or any time close thereto.

[34] The defendant Zuzolo's application is dismissed, with costs to the plaintiff on scale 3. Zuzolo is of course entitled to appear and defend assessment of damages. In that regard, he has received assurance of counsel for the plaintiff that regardless of the form of Statement of Claim, the only damages sought are those confined to the specific fraud allegations alleged against Zuzolo and not costs or damages at large in the action.

"R.R. HOLMES J."