

2010 CarswellAlta 1020, 2010 ABQB 356, [2010] A.W.L.D. 3066, 189 A.C.W.S. (3d) 634

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P. (A.) v. M. (L.)

A.P. (Plaintiff) and L.M., C.B., C.S., M.R.E., P.R.H., M.E.C., and A.J.R. (Defendants)

Alberta Master

Master J.T. Prowse

Heard: April 29, 2010

Judgment: May 26, 2010

Docket: Lethbridge/Macleod 9306-00969

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Counsel: Richard A. **Low** for Defendant, M.E.C.

Michael J. Pollard for Plaintiff, A.P.

Subject: Civil Practice and Procedure

Civil practice and procedure --- Default proceedings — Application to set aside default judgment — Requirement to show defence on merits

Cases considered by *Master J.T. Prowse*:

Canadian Union College v. Bonamy (1995), 1995 CarswellAlta 767, 35 Alta. L.R. (3d) 246, [1996] 3 W.W.R. 206, 179 A.R. 122 (Alta. Q.B.) — referred to

Wilson Arches Ltd. v. Sayers (1973), [1974] 2 W.W.R. 277, 1973 CarswellAlta 139 (Alta. C.A.) — referred to

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 158 — pursuant to

Master J.T. Prowse:

Conviction and judgment arising from assault

1 The Defendant M.E.C. was convicted, along with a number of others, of assaulting the Plaintiff A.P. The Plaintiff obtained a default civil judgment against M.E.C. and the others. M.E.C. now applies under Rule 158 to set aside the default judgment against him.

Reason for M.E.C.'s failure to file a defence, and delay in applying to set aside

2 M.E.C. says he did not file a defence because he was not aware of the Plaintiff's statement of claim. The statement of claim was served substitutionally on M.E.C.'s father, from whom he was estranged, and the father never advised M.E.C. of the claim.

3 M.E.C. first learned about the judgment against him ten years later, when he was personally served with an application to renew the judgment. Shortly thereafter M.E.C. applied under Rule 158 to set aside the default judgment.

4 M.E.C. has given a satisfactory explanation for why he did not defend the action. The remaining issue is whether M.E.C. can establish that he has a possible meritorious defence to the Plaintiff's claim. This is a consideration raised in the case law which considers Rule 158.

The onus upon M.E.C. to raise a possible meritorious defence

5 The onus upon M.E.C. is not a heavy one. Typically the court will accept a defendant's version of events in considering the setting aside application, leaving it up to the trial judge to weigh conflicting evidence: see *Wilson Arches Ltd. v. Sayers*, 1973 CarswellAlta 139, [1974] 2 W.W.R. 277 (Alta. C.A.).

6 On the other hand, it is not sufficient for a defendant merely to assert a defence. The defendant must show the nature of the defence and set forth facts which will enable the court to decide whether it raises a triable issue (a possible meritorious defence): see *Canadian Union College v. Bonamy*, 1995 CarswellAlta 767, 35 Alta. L.R. (3d) 246, 179 A.R. 122 (Alta. Q.B.).

7 At first blush, M.E.C. seems to have met the onus on him to raise a triable issue. M.E.C. deposes that he did not personally physically assault the Plaintiff. However, the Plaintiff says that M.E.C.'s criminal conviction for assault precludes M.E.C. from succeeding in raising a triable issue as to his civil liability for the assault.

M.E.C.'s criminal conviction

8 M.E.C. acknowledges that he was present when the Plaintiff was assaulted, and that he was charged with and convicted of assault following a trial at which he was represented by counsel. Other of the defendants were convicted of the more serious offence of assault causing bodily harm. We do not have a transcript of the evidence at the criminal trial. When cross-examined on his affidavit in support of setting aside the default judgment, M.E.C. said of the assault "I was just there, and they charged me with it for not stopping my friends from beating him up".

M.E.C.'s argument regarding the criminal conviction

9 M.E.C.'s counsel notes that it is possible to be convicted of assault without being the person that inflicts the harm on the victim, but acknowledges that to be criminally convicted of aiding and abetting the accused's physical presence at the scene must be accompanied by factors such as prior knowledge of the principal offender's intention to commit the offence, or attendance for the purpose of encouragement. M.E.C.'s counsel also acknowledges that one can be held civilly liable for the tort of assault without actual physical contact, provided that the plaintiff's apprehension of harm is caused by the direct act of the defendant. In the end, counsel for M.E.C. submits that, given the differences between criminal and civil matters, a conviction under a criminal charge is not conclusive proof of civil liability.

The Plaintiff's argument regarding the criminal conviction

10 The Plaintiff's counsel cites case authority in support of the proposition that the criminal conviction is *prima facie* evidence of civil liability for assault, and that heavy weight will be given to the criminal conviction in the civil proceedings. He also argues that, since the civil definition of assault is essentially identical to the definition of assault in the Criminal Code, M.E.C. should be prevented by issue estoppel from re-litigating the issue of whether M.E.C. assaulted the Plaintiff.

Conclusion

11 Both counsel agree that, while the case law is helpful in guiding the court in exercising its discretion under Rule 158, in the end the court's discretion should be exercised with a view to fairness and in the interests of justice.

12 M.E.C. has never had the opportunity of defending the Plaintiff's civil claim against him. While M.E.C.'s criminal conviction provides the Plaintiff with *prima facie* proof of liability, it is possible that M.E.C. might overcome that *prima facie* case. In other words, there is a triable issue as to liability. With respect to the quantum of damages, M.E.C.'s criminal conviction does not establish the civil damages suffered by the Plaintiff. In my view it is fair and just to set aside the default judgment and allow M.E.C. to defend both as to liability and as to quantum.

13 I am ordering that the default judgment against M.E.C. be set aside and that M.E.C. be given 30 days to file a statement of defence. The costs of this application to set aside shall be reserved to the trial judge who hears the trial.

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