Date: 20080114

Docket: T-1236-07

Citation: 2008 FC 45

Vancouver, British Columbia, January 14, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

LOUIS VUITTON MALLETIER S.A.
AND LOUIS VUITTON CANADA, INC.

Plaintiffs

and

LIN PI-CHU YANG
(also known as PI-CHU LIN, WAI YING, MARTINA and COCO)
and TIM YANG WEI-KAI (also known as WEI-KAI YANG),
both doing business as K2 FASHIONS

Defendants

REASONS FOR ORDER AND ORDER

[1] On November 14, 2007, this Court granted the Plaintiffs' motion for default judgment against two Defendants (*Louis Vuitton Malletier S.A. v. Lin*, 2007 FC 1179 [*Louis Vuitton Malletier*]). The Court found that the Defendants, through a business known as K2 Fashions, were selling counterfeit Louis Vuitton merchandise, in contravention of provisions of the *Trade-marks*

Act, R.S.C. 1985, c. T-13 and the *Copyright Act*, R.S.C. 1985, c. C-42. The Plaintiffs were granted a permanent injunction, damages in the amount of $227,000 and a lump sum of $36,699.14 in respect of solicitor-client costs (the Default Judgment).

[2] One of the Defendants, Lin Pi-Chu Yang (also known as Pi-Chu Lin, Wai Ying, Martina and Coco), has now brought a motion to set aside the Default Judgment. In brief, Ms. Lin argues that she was never served with the Statement of Claim and that she has no interest whatsoever (other than as the lessor of the premises) in the business known as K2 Fashions.

I. Issues

[3] The key issue is whether the Default Judgment should be set aside as against Ms. Lin. If I find that it should be set aside, a subsidiary issue is whether a judgment registered against Ms. Lin's property should be discharged. Finally, the issue of costs of this motion must be addressed.

II. Analysis

[4] The test for setting aside a default judgment is well-established (*SEI Industries Ltd. v. Terratank Environmental Group*, 2006 FC 218 at para. 4; *Brilliant Trading Inc. v. Wong*, 2005 FC 571 at para. 8; *Taylor Made Golf Co. v. 1110314 Ontario Inc. (c.o.b. Selection Sales)*, [1998] F.C.J. No. 681 (T.D.) (QL); *Contour Optik Inc. v. E'lite Optik, Inc.*, 2001 FCT 1431 at para. 4) and is not disputed. As established by this jurisprudence, both parties accept that Ms. Lin must satisfy the Court that:

1. she has a reasonable explanation for her failure to file a Statement of Defence;
2. she has a *prima facie* defence on the merits to the Plaintiffs' claim; and
3. she moved promptly to set aside the Default Judgment.

[5] The Plaintiffs concede that Ms. Lin brought her motion to set aside the Default Judgment promptly. Thus, there is no need to address the third element of the test (*SEI Industries*, above at para. 5).

[6] I turn to a consideration of the other two elements.

A. *Explanation for failure to file a Statement of Defence*

[7] Ms. Lin's only explanation for her failure to file a defence is that she was never served with any documents and had no knowledge of the Plaintiffs' motion for default judgment against her. As noted in *Louis Vuitton Malletier*, above at para. 5, the Court was satisfied on the evidence then before it that Ms. Lin had been personally served. Other than a bald denial that she was ever served, Ms. Lin has not provided any evidence or made any submissions that would suggest that this finding was made in error.

[8] The "bald denial" by Ms. Lin must also be placed into the context of the cross-examination on her affidavit. The transcript of the cross-examination reveals at least 20 contradictions or inconsistencies over the course of the examination. Ms. Lin was also evasive or unresponsive on a number of occasions. These problems with her testimony raise credibility concerns. Given that she

was untruthful, contradictory, evasive or inconsistent throughout her examination, I have serious doubts about the truth of her statement that she was not personally served with the Statement of Claim.

[9] In contrast to Ms. Lin's assertions, the Court has the detailed affidavit evidence of Mr. Gagnon, a licensed private investigator and an individual uninterested in the outcome of these proceedings. In his affidavits sworn in support of the motion for default judgment, Mr. Gagnon stated that he personally presented Ms. Lin with the Statement of Claim and left a copy of the document on the counter of K2 Fashions. In addition, the Court has a further affidavit wherein Mr. Gagnon states as follows:

> On January 7, 2008 . . . I attended the cross-examination of Pi-Chu Lin… The individual who presented herself as Pi-Chu Lin for the cross-examination on January 7, 2008 is the same individual referred to in my affidavits [from the earlier motion for default judgment] and as shown in the photographs attached as Exhibit C, based both on her physical appearance and her voice.

[10] Mr. Gagnon was not cross-examined on his affidavit for this motion. Counsel for Ms. Lin asserts that there would have been no purpose in examining Mr. Gagnon on his affidavit evidence. I do not agree. Mr. Gagnon could have been questioned with a purpose of establishing some doubt to his positive identification of Ms. Lin.

[11] In my view, the affidavit evidence of Mr. Gagnon is to be preferred to the brief affidavit evidence of Ms. Lin, and is sufficient to demonstrate, on a balance of probabilities, that Ms. Lin was

personally served (*Grinnell Supply Sales Co., a Division of Tyco International of Canada Ltd./Tyco International du Canada ltée v. Heger Contracting Ltd.*, 2001 BCSC 1105 at para. 12).

[12] In sum, Ms. Lin has not persuaded me that she has a reasonable explanation for her failure to file a Statement of Defence.

B. *Prima facie defence*

[13] The second element requires the Court to determine whether Ms. Lin has provided evidence in her motion record to satisfy me that she has a *prima facie* defence on the merits to the Plaintiffs' claim. The threshold for finding that this element has been satisfied is very low. Is Ms. Lin's defence so without merit that it is not "worthy of investigation" (*British Columbia v. Ismail*, 2007 BCCA 55 at para. 2)?

[14] As noted in *Louis Vuitton Malletier*, above at para. 3, the Court was satisfied that Ms. Lin was associated with K2 Fashions through her ownership in fee simple of the property occupied by K2 Fashions (the Premises) since June 4, 2001. Ms. Lin does not dispute this finding but submits that, as a mere landlord, she has no involvement with or interest in K2 Fashions. In support of her argument, Ms. Lin has provided an affidavit, a copy of a title search of the Premises, a copy of two lease agreements for the Premises signed by herself and Mr. Yang (the other Defendant), and a copy of her income tax returns for the years 2002, 2004-2006.

[15] As a landlord to Mr. Yang and not an owner of K2 Fashions, Ms. Lin argues that she should not be liable in respect of counterfeit stock of which she has no knowledge or involvement.

[16] I acknowledge that it is possible that a landlord would not necessarily and always know about the business that is taking place in their leased premises. Such an issue would likely be one that is at least "worthy of investigation". The problem with Ms. Lin's alleged defence in this case is that it does not hold up to any scrutiny.

[17] Although Ms. Lin denies that she has any knowledge of or interest in the business operations of K2 Fashions, the record indicates otherwise. Mr. Gagnon has identified Ms. Lin, on more than one occasion, as being in the K2 Fashions store and taking actions consistent with a person associated with the business. Indeed, she was described by Mr. Gagnon as "the person in control of the business". On two occasions, Mr. Gagnon observed that Ms. Lin "was the only clerk present and I observed her processing items at the cash register behind the front counter".

[18] Further evidence shows that a woman named "Martina" is the owner of K2 Fashions. Such evidence consists of business cards and correspondence with Parker Place Management. Although Ms. Lin denies that she is known as "Martina", the title search on Ms. Lin's properties links her to the name Martina.

[19] Finally, I also point once more to the serious credibility concerns with Ms. Lin's evidence for this motion.

[20] Because of her lack of credibility and because of the contradicting evidence before me, I accord little weight to Ms. Lin's statement that she is merely a landlord. I am not persuaded that Ms. Lin has a *prima facie* defence on the merits to the Plaintiffs' claim. In other words, Ms. Lin's defence is so without merit that it is not "worthy of investigation".

III. Conclusion

[21] In conclusion, I am not persuaded that Ms. Lin has a reasonable explanation for failing to file a defence or that she has a *prima facie* defence to the Plaintiffs' Statement of Claim. The Default Judgment will not be set aside. It follows that Ms. Lin will not be granted leave to file a Statement of Defence and that the execution judgment against her will not be stayed.

[22] The only issue remaining is that of costs of this motion. As the successful party, the Plaintiffs are entitled to their costs. The Plaintiffs seek costs on a solicitor-client basis.

[23] Rule 400(1) of the *Federal Courts Rules* gives the Court the discretionary power to award solicitor-client costs. However, the awarding of solicitor-client costs should only be made where a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3 at 134; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405 at para. 86; *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (2000), 9 C.P.R. (4th) 289 at para. 7 (F.C.A.)). Reasons of public interest may also justify making an award of solicitor-client costs (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 80).

[24] In the case at bar, the Court has already awarded solicitor-client costs against all the Defendants, including Ms. Lin. In doing so, the Court considered the Defendants' "dismissive attitude towards this proceeding and past judgments of this Court" and their "flagrant infringement of the Plaintiffs' intellectual property rights" (*Louis Vuitton Malletier*, above at para. 59). As Ms. Lin's behaviour up to the Court's judgment in *Louis Vuitton Malletier* has already been censured, it would not be just to count that behaviour against her again in determining whether to award solicitor-client costs in respect of the present motion. Indeed, to do so would discourage legitimate proceedings by a party who had been previously sanctioned by the Court and improperly shift the focus away from the conduct of the parties with respect to the motion before the Court.

[25] Having determined the time frame in which to examine whether solicitor-client costs should be awarded in the case at bar in the time since the Default Judgment was granted, I do not find Ms. Lin's behaviour in the relevant period to be so reprehensible that it is deserving of rebuke. To begin, I note there is no evidence that either Ms. Lin or K2 Fashions has continued to infringe the Plaintiffs' trade-marks or copyright since the Default Judgment was granted. Moreover, as conceded by the Plaintiffs, Ms. Lin brought this motion in a timely manner. With respect to the argument that Ms. Lin's motion unnecessarily lengthened the proceedings, I note that this will be true whenever a motion to set aside a default judgment is unsuccessful. A failed motion to set aside a default judgment in itself does not warrant the awarding of solicitor-client costs – something more is required (see, for example, *Brilliant Trading*, above at para. 24). Finally, the Court has repeatedly held that the weakness of a motion is not a reason to award solicitor-client costs (see, for example,

Roberts v. Canada, [1999] F.C.J. No. 1529 at para. 142 (C.A.) (QL), [2002] 4 S.C.R. 245; *Sedpex, Inc. v. Canada (Adjudicator appointed under the Canada Labour Code)*, [1989] 2 F.C. 289 at 302).

[26] In seeking solicitor-client costs, the Plaintiffs rely on the decision of *Fibremann Inc. v. Rocky Mountain Spring (Icewater 02) Inc.*, 2005 FC 1377, where this Court awarded a lump sum of $15,000 in respect of a failed motion to set aside a default judgment. In that decision, at para. 14, the Court stated that: "Given the exceptional circumstances of this case, solicitor-client costs are appropriate". In my view, the facts in *Fibremann* were quite different from those before me. Further, I observe that, despite the fact that the Plaintiff, in that case, was seeking recovery of over $40,000 in legal fees, a lump sum award of $15,000 plus disbursements and GST was made. Thus, it is difficult to accept *Fibremann* as authority for an award of solicitor-client costs in the case now before me.

[27] In sum, I do not find this case to be an appropriate one in which to award solicitor-client costs. Costs will be awarded, to be assessed in accordance with column III of Tariff B.

ORDER

THIS COURT ORDERS that:

1. The motion to set aside the Default Judgment is dismissed; and

2. Costs are awarded to the Plaintiffs, to be assessed in accordance with column III of Tariff B.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1236-07
STYLE OF CAUSE:	LOUIS VUITTON MALLETIER S.A. et al. v. LIN PI-CHU YANG et al.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	January 11, 2008
REASONS FOR ORDER: AND ORDER	SNIDER J.
DATED:	January 14, 2008

APPEARANCES:

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Mr. Stanley Foo	FOR THE DEFENDANTS (representing Lin Pi-Chu Yang)

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