

Date: 20080703

Docket: T-526-05

Citation: 2008 FC 835

Ottawa, Ontario, July 3, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

**HARLEY-DAVIDSON MOTOR COMPANY
GROUP, INC., H-D MICHIGAN, INC.,
HARLEY-DAVIDSON MOTOR COMPANY, INC.
and FRED DEELEY IMPORTS LIMITED**

Plaintiffs

and

**BULL MASTER QUEBEC INC. and
AFZAL ABBAS MALIK
FORMERLY IDENTIFIED AS
JOHN DOE IN ACTION NO. T-2102-04**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion by Bull Master Quebec Inc. (BMQ) to set aside an Order of Justice Blais rendered *ex parte* on August 13, 2007, and to quash the seizure in execution of certain property practiced on October 15, 2007.

[2] Rule 399(1) of the *Federal Courts Rules* allows this Court to set aside Orders that are made *ex parte* in certain circumstances. In the case of an Order for default judgment, a defendant must satisfy a three-part test in order for the Court to set the Order aside:

- (1) The defendant must establish either “substantial reasons”, “a satisfactory excuse” or a “reasonable explanation” for the failure to file its statement of defence;
- (2) The defendant must move the Court promptly to set aside the default judgment; and
- (3) The defendant must establish a *prima facie* defence. (*Brilliant Trading Inc. v. Wong*, 2005 FC 571 (T.D.); *Taylor Made Golf Co. v. 1110314 Ontario Inc. (c.o.b. Selection Sales)* (1998), 148 F.T.R. 212 (T.D.))

[3] Although Justice Blais' Order was made on a motion for summary judgment, neither party has suggested that a different test is applicable in these circumstances.

[4] In this case, the defendant submits that the test is met because it was not until October 13, 2007, when plaintiffs' representatives arrived to execute the seizure of the property belonging to BMQ, that BMQ learned of the action brought against it by the plaintiffs. As soon as it learned about it, an attorney was consulted and this motion was brought promptly. Furthermore, contrary to the plaintiffs' representations, Mr. Malik was never in any way associated with BMQ, and BMQ did not know of Mr. Malik's activities relating to the goods in question. Since Mr. Malik was never an employee of BMQ, the defendant contends that the plaintiffs' statement of claim does not allege any wrongdoing on the part of that corporation.

[5] In my opinion, this case can be dealt with based on the first element of the test. Mr. Nadeem, defendant's president and principal shareholder, affirms that he was unaware, until October 13, 2007, of the action being brought against BMQ by the plaintiffs. However, this statement is belied by the fact that on March 29, 2005, someone signed confirming receipt of Justice Beaudry's Order adding BMQ as a defendant in this action. As the plaintiffs have pointed out, the signature is remarkably similar to Mr. Nadeem's signature as it appears on his affidavit filed in this motion. The defendant submits that the plaintiffs did not file expert evidence demonstrating that the two signatures are the same, but has provided no alternative explanation as to whose signature it is. Based on the similarities between the two signatures, I am satisfied, on the balance of probabilities, that the signature is that of Mr. Nadeem. Furthermore, the Order was delivered to what BMQ admits is its address. Even if it was not Mr. Nadeem who signed for receipt of the document, there is no explanation as to why the defendant would not have been aware of its existence. Therefore, I would conclude that the defendant has not provided a reasonable explanation for its failure to file a statement of defence.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs.

“James K. Hugessen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-526-05

STYLE OF CAUSE: HARLEY-DAVIDSON MOTOR COMPANY GROUP,
INC., et al v. BULL MASTER QUEBEC INC. et al

MOTION IN WRITING PURSUANT TO RULE 369

**REASONS FOR ORDER
AND ORDER:** HUGESSEN J.

DATED: July 3, 2008

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