

Federal Court



Cour fédérale

**Date: 20101108**

**Docket: T-1383-09**

**Citation: 2010 FC 1108**

**Ottawa, Ontario, November 8, 2010**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

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

**Plaintiffs**

**and**

**DRAKE J. BEAUCHAMP**

**Defendant**

**REASONS FOR ORDER AND ORDER**

[1] Motions in three separate but factually similar files came before the Court on November 1, 2010. Each involves an action against the defendant Drake J. Beauchamp and each claims that he sold goods bearing the trademarks of the plaintiffs (Calvin Klein Trademark Trust and Calvin Klein, Inc. in T-1381-09, Harley-Davidson Motor Company Group, Inc., H-D Michigan, LLC, Harley-Davidson Motor Company, Inc., and Fred Deeley Imports Limited in T-1383-09, and Molson

Canada 2005 (An Ontario General Partnership) and Coors Brewing Company in T-1384-09). In each motion Drake J. Beauchamp seeks an Order (1) setting aside the noting in default and Default Judgments issued by Justice Hughes of this Court on March 8, 2010 in T-1381-09, November 18, 2009 in T-1384-09, and September 27, 2010 in T-1383-09, and (2) vacating all writs of seizure and sale issued pursuant to the Default Judgment and releasing to the defendant all assets seized pursuant to such writs.

[2] These three motions were argued together and thus while I will be issuing three separate Reasons for Order and Order, they will be identical.

[3] Drake J. Beauchamp owns and operates a leather retail business. He primarily sells purses, belts, belt buckles and wallets from kiosks at shopping malls and special events. The plaintiffs claim that he sold counterfeit product, i.e. product bearing a trademark or trade name of the plaintiffs that they have not authorized.

[4] In each action, the plaintiffs asserted that the defendant had been properly served. No Statement of Defence was filed. Accordingly, Default Judgment was granted. Each Judgment ordered the defendant to deliver up to the plaintiffs in each action all counterfeit goods and also ordered general damages to be paid to the plaintiffs in varying amounts (\$3,000 in T-1381-09, \$6,000 in T-1383-09, and \$10,875 in T-1384-09). Costs of varying amounts were also awarded against the defendant in each action. Only in T-1384-09 was there an award of punitive damages made, in the amount of \$21,750.

[5] The test to set aside Default Judgment, as established by the jurisprudence, is a tri-partite test. Drake J. Beauchamp must satisfy the Court that:

- (1) He has a reasonable explanation for his failure to file a Statement of Defence;
- (2) He has a *prima facie* defence on the merits to the claim; and
- (3) He moved promptly to set aside the Default Judgment.

#### **Explanation for Failure to File Statements of Defence**

[6] Drake J. Beauchamp has filed affidavits from himself and his brother wherein he attests that the Statements of Claim were served on his brother, not on himself, when they were both working at the CNE show. I agree with the responding parties that service was effected on Drake J. Beauchamp under the *Federal Courts Rules* because the three Statements of Claim were left with “the person apparently having control or management of the business” or the “person apparently in charge, at the time of service, of the business” as described in Rule 128(1) and Rule 131.1, respectively.

[7] However, even if served, Drake J. Beauchamp says that the Statements of Claim never came to his attention and he seeks relief from this Court under Rules 148 and 399 of the *Federal Courts Rules*.

[8] The position of Drake J. Beauchamp is that after his brother received the Statements of Claim at the CNE, their father, who suffers from a psychological disability, tore them up.

Their father was subsequently taken home by Drake J. Beauchamp. In the affidavit of Drake J. Beauchamp, he swears that his father “grabbed them and, without reading them or even removing them from the envelope, tore them to shreds.” As a result he swears that “no one had a chance to read the documents.” His brother, Percy Beauchamp, in his affidavit swears that “I handed the documents to my father, who went into a fit of anger, as a result of his existing psychological condition [and] proceeded to rip up the documents, maintaining his fit of anger.”

[9] Aside from the conflict between the two brothers’ versions of events as to whether the documents were grabbed by the father or handed over to him and whether they were in an envelope or not, I have other concerns with their version of events.

[10] The Statement of Claim in each action is 14 pages, and in addition includes the backing page plus a Schedule. The Schedules run from 5 to 30 pages in length. Accordingly, the three Statements of Claim in these actions total 19, 23, and 44 pages. I simply do not accept that the defendant’s father could have ripped documents of this thickness to “shreds” such that it could not be determined what they were, if in fact Drake J. Beauchamp had any interest in finding out what they were.

[11] Mr. Beauchamp’s actions on the date of service and previously in failing to respond to cease and desist letters are evidence of wilful blindness, not of a “comedy of errors” as was submitted by his counsel. Accordingly, I find that the defendant in these actions has failed to provide a reasonable explanation for his failure to file Statements of Defence. It was only when his

goods were seized and the seriousness of the situation required him to respond that he did so. I concur with the observation of Justice Cullen in *UMACS of Canada v. S.G.B. 2000 Inc.*, [1990] F.C.J. No. 1112, that “[p]eople in business in Canada should give legal documents significantly more attention” than the defendant did in these cases; indeed significantly more attention than the defendant gave was warranted over many months.

### ***Prima Facie Defence***

[12] The defence of the defendant in each action is that he did not sell any of the counterfeit goods as alleged in the claim. He submits that the “threshold for finding that this element has been satisfied is very low:” *Louis Vuitton Malletier S.A. v. Yang*, 2008 FC 45. He does not dispute that he sold product bearing one or more of the trademarks owned by the plaintiffs in these actions but asserts that these trademarked goods, to the best of his knowledge, were legitimate goods, not counterfeits. It is no *prima facie* defence in these circumstances to simply deny the allegation without offering some evidence to show that the defence has some merit, such as an affidavit from the supplier attesting that the goods were manufactured under license. Nothing has been offered by Mr. Beauchamp, not even the name of his supplier; he offers merely a denial. That, in my view, does not meet even the low threshold for showing that a *prima facie* defence is available.

### **Moving Promptly**

[13] I am prepared to accept that Mr. Beauchamp moved promptly when he became aware of the Default Judgment, which he did when the goods were seized.

**Costs**

[14] The plaintiffs are entitled to their costs. They asked for \$7,500 in each action, an amount I find to be too high. As was noted by counsel for Mr. Beauchamp, an award of costs is not intended to fully compensate a party, barring exceptional circumstances. I find that \$3,000 in costs in each matter is a fair and proportional amount.

**ORDER**

**THIS COURT ORDERS that** the defendant's motion is dismissed, with costs to the plaintiffs fixed in the amount of \$3,000, inclusive of taxes and disbursements.

“Russel W. Zinn”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1383-09

**STYLE OF CAUSE:** HARLEY DAVIDSON MOTOR COMPANY GROUP  
INC. ET AL v. DRAKE J. BEAUCHAMP

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 1, 2010

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

**DATED:** November 8, 2010

**APPEARANCES:**

Daniel Ovadia (by teleconference) FOR THE PLAINTIFFS

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