

CANADA / JUDGMENT

Du v. UpMeals Technologies Inc.

2024 BCSC 2260

COURT

Supreme Court of British Columbia

DECIDED

9 January 2024

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2024 BCSC 2260 Du v. UpMeals Technologies Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Du v. UpMeals Technologies Inc., 2024 BCSC 2260 Date: 20240109 Docket: S235074 Registry: Vancouver Between: Susana Du Plaintiff And: UpMeals Technologies Inc. Defendant Before: The Honourable Mr. Justice Brongers Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: P. Chan Counsel for the Defendant: D.A. Frenette Place and Date of Hearing: Vancouver, B.C. January 8, 2024 Place and Date of Judgment: Vancouver, B.C. January 9, 2024

- [1] THE COURT: This is an application brought further to the issuance of a default judgment.
- [2] The applicant is UpMeals Technologies Inc. ("UpMeals"). The respondent is Susana Du.
- [3] Ms. Du obtained a default judgment against UpMeals in respect of an unpaid loan. The judgment is for \$569,698.63.
- [4] UpMeals seeks an order that would relieve it from the obligation to immediately pay Ms. Du the total owing under the judgment and which would provide instead that UpMeals must pay its judgment debt in six installments over a 30-month period.
- [5] Ms. Du is willing to consent to relieve UpMeals from having to strictly comply with its obligation to pay the default judgment, but not to the extent UpMeals is seeking. In particular, Ms. Du would accept an order that the default judgment be paid in full within a period of 12 months, so long as UpMeals provides her with monthly financial disclosure of its financial situation. UpMeals is prepared to provide such disclosure.
- [6] As such, the only real issue in dispute is how much additional time UpMeals should be afforded to pay its judgment debt to Ms. Du.
- [7] I have now had an opportunity to review the application record and consider the submissions of counsel for UpMeals and counsel for Ms. Du. Further to this review, I am not satisfied that the present circumstances warrant modifying the terms of the default judgment beyond what Ms. Du is willing to agree to. Accordingly, an order will be issued varying the default judgment so that it need not be paid until 12 months from today. UpMeals will also have to provide monthly financial updates to Ms. Du. UpMeals' application

will otherwise be dismissed.

- [8] The reasons for my conclusion are as follows. Factual Background
- [9] UpMeals' co-founder and chief executive officer is Andrew Munro. He describes UpMeals as a "startup company engaged in the business of fresh food vending machines, tech-enabled corporation catering services, and ready-to-eat meal production for retail."
- [10] On October 27, 2021, a loan agreement was made between UpMeals and Ms. Du. Under its terms, Ms. Du agreed to lend UpMeals \$500,000 for a three-month term at an interest rate of 8% per annum. According to Ms. Munro, this loan was arranged by Ms. Du's son-in-law, Glenn Lee.
- [11] Mr. Lee was once involved with UpMeals in various capacities, serving as UpMeals' chief operations officer and as a member of UpMeals' board of directors. However, Mr. Lee is no longer associated with UpMeals. Furthermore, there is contested litigation pending between Mr. Lee and UpMeals in relation to certain investments he allegedly made in the company.
- [12] That said, there is no dispute that Ms. Du provided UpMeals with the \$500,000 loan as agreed, but UpMeals failed to repay it within the three-month term.
- [13] On July 26, 2023, Ms. Du filed a notice of civil claim in this court seeking judgment in debt against UpMeals in the amount of \$569,698.63, representing the unpaid principal and interest owing under the loan agreement. While a pro forma response to civil claim was filed by UpMeals on October 16, 2023, a default judgment in the amount sought by Ms. Du was nevertheless issued by the court on October 18, 2023.
- [14] These circumstances notwithstanding, UpMeals now accepts the default judgment in the sense that it agrees that it must make good on its promise to repay Ms. Du's loan with interest. However, UpMeals is of the view that its current financial situation is such that it does not have the requisite resources to effect such repayment at this time.
- [15] UpMeals is nevertheless hopeful that its fortunes will improve if it is able to secure an equity contribution from an outside investor. To that end, UpMeals has been in discussions with First Tracks Capital Inc. ("First Tracks"), a private equity firm. According to managing partner Michael Kline, First Tracks is interested in making a sizable investment in UpMeals. However, First Tracks does not wish to provide equity if UpMeals will use it to fund immediate cash outflows to debt, particularly where such debt is owed to parties related to UpMeals, such as Mr. Lee and Ms. Du. First Tracks would, however, accept an arrangement whereby UpMeals repays its debt to Ms. Du in installments over the next three years.
- Procedural Background
- [16] On December 13, 2023, UpMeals filed the present application with the court.

- [17] UpMeals essentially seeks an order that would enable it to pay the \$569,698.63 owing pursuant to the October 18, 2023 default judgment, plus \$8,986.30 in prejudgment interest (which I will collectively reference as the "Default Judgment Funds") in six installments as follows:
- 1) within 12 weeks of the order, UpMeals would pay 16.67% of the Default Judgment Funds plus post-judgment interest;
 - 2) within six months of the order, UpMeals would pay 16.67% of the Default Judgment Funds plus post-judgment interest;
 - 3) within 12 months of the order, UpMeals would pay 16.67% of the Default Judgment Funds plus post-judgment interest;
 - 4) within 18 months of the order, UpMeals would pay 20% of the Default Judgment Funds plus post-judgment interest;
 - 5) within 24 months of the order, UpMeals would pay 20% of the Default Judgment Funds plus post-judgment interest; and
 - 6) within 30 months of the order, UpMeals would pay 10% of the Default Judgment Funds plus post-judgment interest, and costs of this action to be assessed or agreed by the parties.
- [18] UpMeals' application is supported by two affidavits. The first is made by Mr. Munro. The second is made by Mr. Kline.
- [19] Ms. Du filed her application response on January 5, 2024. It indicates that she is opposed to the specific relief sought by UpMeals. However, it also indicates that Ms. Du is agreeable to an order that the Default Judgment Funds be paid in full within a period of 12 months so long as UpMeals provides monthly financial disclosure confirming its financial status as insolvent. Ms. Du did not file any affidavit evidence in response to UpMeals' affidavits.
- [20] The application came on before me yesterday in general chambers, on January 8, 2024. Counsel for the parties were able to reach an agreement on the terms of a financial disclosure order. What remains to be decided is the question of whether an order should be issued modifying the default judgment terms to permit UpMeals to defer its obligation to pay and if so, on what terms. The Law
- [21] Counsel for the parties have identified two legislative sources for the court's authority to change the timing and modalities of UpMeals' obligation to pay immediately the money it owes to Ms. Du under the default judgment.
- [22] The first is s. 48 of the Court Order Enforcement Act, R.S.B.C. 1996 c. 78. It reads as follows: When order is payable 48(1) If an order has been obtained for a sum of money, the sum is payable immediately unless the court orders otherwise.

- (2) The court may provide that an order is payable by instalments or may suspend execution for the time it considers proper.
- [23] The second is Rule 13-2(31) of the Supreme Court Civil Rules, B.C. Reg. 165/2024. It reads as follows: Stay of execution
- (31) The court may, at or after the time of making an order,
- (a) stay the execution of the order until such time as it thinks fit, or
- (b) provide that an order for the payment of money be payable by instalments.
- [24] Further authority to make the order sought in the circumstances of the present case can also be found at Rule 3-8(11), the default judgment variation rule. It reads as follows: Court may set aside or vary default judgment
- (11) The court may set aside or vary any judgment granted under this rule.
- [25] With respect to the test to be applied, the parties have highlighted a number of decisions in which the court has been asked to relieve a judgment debtor from the requirement to immediately pay the total amount owing, either through a stay of execution or by permitting payment by installments. It is clear from this jurisprudence that the court's decision to grant such relief is discretionary and should only be done where there are "special circumstances" or it is otherwise necessary to do so in the interests of justice. The following cases are illustrative: A) *Royal Bank of Canada v. McLennan*, [1918] 2 W.W.R. 225, [1918] 41 D.L.R. 27 (B.C.A.), at page 29: In my opinion, it was clearly the intention of the legislature to confer upon the Supreme Court an additional power to meet the special case, where justice should seem to require it to be done, of those debtors, who, while not able to pay forthwith, yet could of do within a reasonable time by installments. This is a very merciful and appropriate provision, which would save many a man from bankruptcy. B) *Safarik v. Ocean Fisheries Ltd.* [1994] B.C.J. No 2225, 22 C.P.C. (3d) 214, 44 A.C.W.S. (3d) 1081, at paras. 24 and 27:
- [24] In support of his position, Mr. Bowman referred me to but one decision of the courts of this province, being the judgment of Cowan L.J.S.C. (as he then was) in *MacMillan v. Progressive Mill Supplies Ltd.*, [1986 Carswell BC 3288 (B.C.S.C.)] (November 20, 1986), Vancouver A843237 (B.C.S.C.). In *MacMillan*, supra, the respondent sought an order pursuant to R. 42(25)(a) that the petitioner's judgment be paid by installments. The court commented that the order sought is one which should only be made in special circumstances and that such special circumstances might include a situation where to award installment payments would enable the judgment debtor to avoid bankruptcy. ...
- [27] After further consideration I am not satisfied that Ocean has demonstrated that it is necessary for its survival that the order here "for the payment of money be payable by installments" be granted. ... C) *Greenside Properties Inc. v. 8458429 Holdings Ltd.*, 2001 BCSC 983, at paras. 13 and 14:

- [13] The granting of a stay of execution is a discretionary remedy that seems to be fairly broad in its application provided the circumstances warrant the making of the order. While the test of "special circumstances" has been applied in making an order under Rule 42(a)(ii) for instalment payments on a judgment (see: *Bull Housser & Tupper v. Williams* (1998), 25 C.P.C. (4th) 336 (B.C.S.C.) at para. 5), and under s. 18.1 of the Court of Appeal Act R.S.B.C. 1996, c. 77 (see: *Bull Housser & Tupper v. Stromotich*, (1997), 9 C.P.C. (4th) 52 (B.C.C.A.) at paras. 2 and 3), I am satisfied the grounds for making such an order are not limited to establishing "special circumstances".
- [14] In this case, however, I do not find any circumstances, special or otherwise, to warrant the granting of a stay of execution.
- [26] I will apply these principles to the present application, with the understanding that it is the applicant UpMeals that bears the burden of showing that there are circumstances which warrant the granting of the remedy it seeks. Ms. Du does not have the burden to prove the opposite.

Analysis

- [27] UpMeals' essential submission is that there are four "special circumstances" in this case; namely:
- UpMeals cannot pay the default judgment at this time;
 - UpMeals will likely fail if it does not receive an equity infusion from an outside investor such as First Tracks;
 - First Tracks is not willing to invest in UpMeals if its funds will be used to repay Ms. Du's loan immediately; and
 - if UpMeals ceases to operate, its 50 employees will likely lose their jobs.
- [28] On my review of the affidavits of Mr. Munro and Ms. Kline, I accept that these assertions are generally valid. Ms. Du has not taken issue with their veracity either. Therefore, I am of the view that some relief should be afforded to UpMeals in relation to its obligation to pay the default judgment. Ms. Du is evidently of the same opinion, given her willingness to agree that the debt she is owed need not be paid until 12 months from now.
- [29] However, I am not persuaded that UpMeals' evidence justifies the issuance of an order permitting it to pay the outstanding judgment in six varying installments over a 30-month period.
- [30] When asked to provide the justification for this particular schedule and why it was acceptable while the 12-month deferral Ms. Du consents to is not, counsel for UpMeals was not able to give a clear answer. Indeed, there is no explanation in Mr. Munro's affidavit for the specifics of UpMeals' oddly complex proposed 30-month repayment schedule, one that actually provides for 90% of the judgment debt to be paid in just 24 months. This is

particularly curious when Mr. Kline's affidavit suggests that First Tracks may not be comfortable with such an arrangement, since it feels the repayment should take place over a period of at least 36 months.

- [31] Furthermore, while Mr. Munro's affidavit contains some speculation regarding Ms. Du's hypothetical position as a creditor should UpMeals declare bankruptcy, he does not state that UpMeals has any intention of taking such a drastic step if the court were to dismiss this application. To the contrary, Mr. Munro says in his affidavit that while UpMeals cannot presently repay Ms. Du, he believes that "UpMeals is very close to achieving profitability, and UpMeals is certainly continuing to grow at a rapid pace."
- [32] In sum, on the evidence before me, I am not prepared to vary the default judgment beyond the significant modification to which Ms. Du has consented, namely, a provision that will not require UpMeals to pay the amounts owing under the judgment until 12 months from today. I am satisfied that such a deferral is in the interests of justice, and will assist in giving UpMeals an opportunity to ameliorate its financial situation, with a view to attempting to ensure that it has sufficient resources to pay the amounts it owes to Ms. Du.
- [33] Finally, on consent, I will also order that monthly financial disclosure be provided by UpMeals to Ms. Du regarding the company's assets and liabilities. I trust that such disclosure will be of assistance going forward should issues arise again when UpMeals' obligation to pay Ms. Du's judgment debt becomes enforceable in one year's time.

Disposition

- [34] For all of these reasons, the following order is issued:
- 1) Execution of the October 18, 2023 default judgment issued in favour of Susana Du against UpMeals Technologies Inc. in this action is hereby stayed for a period of 12 months from the date of this order.
 - 2) Commencing February 1, 2024, and continuing until February 1, 2025, UpMeals Technologies Inc. shall provide a monthly financial statement to Susana Du containing:
 - a. details as to assets, namely, cash on hand, accounts receivable, inventory, pre-paid expenses, and other current assets; and
 - b. details as to liabilities, namely, accounts payable, short-term debt, long term debt, and deferred revenue.
- [35] Would the parties like to make any submissions on costs? (SUBMISSIONS ON COSTS)
- [36] THE COURT: Thank you. Well, on consent, then, the order will indicate that each party is to bear their own costs. "Brongers J."

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