

CANADA / JUDGMENT

Fox Estate v. Sevilla-Blanco

2020 BCSC 497

COURT

Supreme Court of British Columbia

DECIDED

1 April 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 497 Fox Estate v. Sevilla-Blanco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fox Estate v. Sevilla-Blanco,

2020 BCSC 497

Date: 20200401

Docket: S121650

Registry: Kelowna

Between:

Theresa Anne Dobson, in her capacity as executor of the

British Columbia will of Richard Junior Fox, deceased

Plaintiff

And

Lorena Sevilla-Blanco and Jean Michel Vives

Defendants

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Plaintiff:

S.T. Rule

Counsel for Defendant,

Lorena Sevilla-Blanco:

A.P. Morrison

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 10, 2020

Place and Date of Judgment:

Kelowna, B.C.

April 1, 2020

Nature of the Application

- [1] The defendant, Lorena Sevilla-Blanco, applies to set aside a default judgment taken against her by the plaintiff.
- [2] The plaintiff filed the default judgment on May 21, 2019, for damages to be assessed. The Court assessed damages on July 17, 2019, and ordered that Ms. Sevilla-Blanco pay damages of \$438,468 plus costs in the amount of \$2,469.56 (the "Damages Order").
- [3] The Damages Order represents the value of gold coins alleged to have been taken by Ms. Sevilla-Blanco and converted to her own use.

Background Facts

- [4] The plaintiff is the executor of the British Columbia will executed by Richard Junior Fox, deceased. The defendant, Lorena Sevilla-Blanco, is the deceased's widow. The defendant, Jean Michel Vives, is the son of Ms. Sevilla-Blanco.
- [5] Ms. Sevilla-Blanco is one of the beneficiaries of the deceased's estate in the USA and Mexico under testamentary documents executed by the deceased in California. Ms. Sevilla-Blanco and her son reside in California, as did the deceased.
- [6] The beneficiaries of the deceased's British Columbia will are the plaintiff, the plaintiff's father, Stanley John Palmer, and the plaintiff's siblings, Andrew Rod Palmer, Gregory Paul Palmer, and Katherine Gale McKay. Neither of the two defendants are beneficiaries under the deceased's British Columbia will.
- [7] Ms. Sevilla-Blanco is originally from Mexico. Her first language is Spanish. Therefore she claims to have difficulty with the English language. Ms. Sevilla-Blanco has never lived in Canada. She has no family in Canada and she owns no property in this country.

- [8] The relationship between Ms. Sevilla-Blanco and the deceased began in 2014 as a business relationship but it eventually became a romantic relationship. The deceased entered the hospital after suffering a heart attack in late November or early December 2016. While in hospital the deceased and Ms. Sevilla-Blanco decided to get married. They were married on December 9, 2016. However, the deceased passed away on December 10, 2016, in San Diego, California.
- [9] The deceased owned two vacation homes in Campbell River, British Columbia. Ms. Sevilla-Blanco visited Campbell River with the deceased and her children on occasion. On August 8, 2016, Ms. Sevilla-Blanco became a joint lessee, with the deceased, of a safety deposit box located at the Scotia Bank in Campbell River.
- [10] Shortly before his death, the deceased advised Ms. Sevilla-Blanco that the safety deposit box in Campbell River contained title documents to property in California as well as a cashier's cheque. He directed Ms. Sevilla-Blanco to collect these items from the safety deposit box after his death.
- [11] On January 12 and 13, 2017, Ms. Sevilla-Blanco attended at the Scotia Bank in Campbell River to retrieve the items in the safety deposit box as directed by the deceased. According to Ms. Sevilla-Blanco, the cashier's cheque and the title documents were the only items in the safety deposit box. Ms. Sevilla-Blanco claims that there were no gold coins in the safety deposit box when she attended.
- [12] The cashier's cheque from the safety deposit box had been made out to the deceased but Ms. Sevilla-Blanco attempted to negotiate it for herself. As a result, a dispute arose over whether the cashier's cheque formed part of the deceased's British Columbia estate or the deceased's US estate. Between July 2017 and April 2018, Ms. Sevilla-Blanco had a lawyer in Vancouver dealing with the issues surrounding the cashier's cheque. However, there is no evidence that the Vancouver lawyer was consulted about this action.
- [13] After retrieving the items from the safety deposit box in January 2017, Ms. Sevilla-Blanco returned to California. She next came to British Columbia in August and September 2018, on a camping trip with her children. At that time, she leased a safety deposit box at a Royal Bank of Canada branch in Vancouver. Ms. Sevilla-Blanco deposes that this safety deposit box was used to store her passport and the passports of her children during the camping trip.
- [14] In support of the default judgment, the plaintiff relies upon the evidence of Stanley Palmer. Mr. Palmer lives in Campbell River and was a long-standing friend of the deceased.
- [15] Mr. Palmer deposes that in the summer of 2016, the deceased expressed a desire to purchase gold in Canada. Therefore Mr. Palmer accompanied the deceased to the Campbell River Scotia Bank to make the purchase. A receipt from the Scotia Bank, appended to Mr. Palmer's affidavit, shows that on June 23, 2016, 244 gold coins, each with a weight of one ounce, were purchased from the Scotia Bank. The price per coin stated in the receipt is \$1,352.15. Accordingly, the receipt indicates that a total of \$329,924.60 was paid for the 244 gold coins.

The receipt bears the signature of Mr. Palmer. Mr. Palmer confirms that the funds for the purchase came from the deceased.

- [16] Mr. Palmer also deposes that he accompanied the deceased when the gold coins were placed into the deceased's safety deposit box at the Scotia Bank. However, Mr. Palmer does not state when he accompanied the deceased to deposit the coins into the safety deposit box nor does he state how many coins were placed in the box.
- [17] However, a "safekeeping register" from the Scotia Bank indicates that on July 6, 2016, "144 gold bars" were placed with the bank for safekeeping. The same safekeeping register includes a notation on July 11, 2016, "removing 144 oz gold bars". Below this notation appears the signature of Mr. Palmer.
- [18] The evidence of the executor is that on July 26, 2017, after the deceased's death, she attended the Scotia Bank as the executor of the will. When she attended at the Scotia Bank, the executor formed the impression that there was gold in the safety deposit box because a bank representative told her that she would not be able to remove the gold that day. However, the executor deposes that when she opened the safety deposit box it was empty.
- [19] When the executor reviewed the activity record for the safety deposit box she saw that Ms. Sevilla-Blanco had accessed the safety deposit box on January 12 and January 13, 2017.
- [20] From the foregoing facts, the executor deposes as follows:

I infer from the safety deposit box activity record that Ms. Sevilla-Blanco removed the gold coins on either or both of January 12, 2017 and January 13, 2017 after Richard Fox's death but before I got access to the Scotia Bank safety deposit box.

- [21] The executor further deposes:

Although I do not have direct knowledge, I infer that it is likely that Ms. Sevilla-Blanco deposited the gold coins in the Royal Bank safety deposit box. I am not aware of any other reason that Ms. Sevilla-Blanco or her son would need a safety deposit box in British Columbia.

- [22] Based on the inferences made by the executor, she commenced this action against Ms. Sevilla-Blanco and her son. The executor filed the notice of civil claim on December 6, 2018. It was served upon Ms. Sevilla-Blanco in California on January 26, 2019.
- [23] On February 19, 2019, Ms. Sevilla-Blanco's estate attorney in California contacted plaintiff's counsel to request that Ms. Sevilla-Blanco be given time to retain a lawyer in British Columbia and to file a response to the notice of civil claim.
- [24] Plaintiff's counsel responded to the request for additional time on February 22, 2019. He confirmed that no steps in default would be taken without providing Ms. Sevilla-Blanco's counsel with reasonable prior notice.

- [25] Due to her limited ability to communicate in English, Ms. Sevilla-Blanco enlisted the assistance of a friend to find a lawyer in British Columbia. With the assistance of her friend, Ms. Sevilla-Blanco contacted the Canadian Bar Association's Lawyer Referral Service on February 27, 2019. She requested contact information for lawyers in British Columbia who may be able to assist her in this action. In early March 2019, Ms. Sevilla-Blanco received a list of lawyers who she could contact for assistance. The lawyers that Ms. Sevilla-Blanco contacted either did not respond or were not prepared to represent her.
- [26] Plaintiff's counsel advised Ms. Sevilla-Blanco's California lawyer in a letter dated April 3, 2019, that he had received no contact from any counsel in British Columbia. In the same letter, plaintiff's counsel also gave Ms. Sevilla-Blanco a further 14 days to file a response to the civil claim.
- [27] On April 18, 2019, plaintiff's counsel delivered a second letter to Ms. Sevilla-Blanco's California lawyer confirming that he had still not heard from a lawyer in British Columbia and that he had instructions from his client to take steps in default against Ms. Sevilla-Blanco.
- [28] On April 25, 2019, Ms. Sevilla-Blanco personally sent an email to plaintiff's counsel with the following information:
- a) that she was still looking for a lawyer in British Columbia;
 - b) that every time the lawyers do a conflict search they find out there is a conflict because they personally know plaintiff's counsel or they have other cases with him; and
 - c) that she never saw or had any knowledge of gold coins or gold bars that the deceased may have purchased.
- [29] Plaintiff's counsel responded to Ms. Sevilla-Blanco's email on the same day. In that response, plaintiff's counsel states that he cannot provide Ms. Sevilla-Blanco with any further time to file a response before taking a default judgment. However, Ms. Sevilla-Blanco deposes that she was not aware of this email until she saw it as an attachment to an affidavit sworn by Samantha Peebles and filed in response to this application on February 18, 2020. Ms. Sevilla-Blanco took no further steps to defend this action or to communicate with plaintiff's counsel after April 25, 2019.
- [30] On May 21, 2019, the executor took default judgment against Ms. Sevilla-Blanco for failing to file and serve a response within the time required by the Supreme Court Civil Rules. The default judgment provided that Ms. Sevilla-Blanco pay "damages to be assessed".
- [31] The executor brought an application to assess damages on July 17, 2019. Ms. Sevilla-Blanco did not receive notice of the application because she was not a party of record as she had failed to file a response. Therefore, the assessment of damages was unopposed.

- [32] Master Schwartz heard the application to assess damages on July 17, 2019. He assessed the damages to be \$438,468. The Master also ordered that costs in the amount of \$2,469.56 be paid by Ms. Sevilla-Blanco.
- [33] After the assessment of damages, plaintiff's counsel delivered a letter by email to Ms. Sevilla-Blanco dated July 22, 2019. The letter confirmed that the executor had taken default judgment and that the amount of the judgment was \$440,937.56. Copies of the default judgment and the Damages Order were enclosed with counsel's correspondence. Ms. Sevilla-Blanco deposes that she did not see the July 22, 2019, correspondence from plaintiff's counsel until it appeared in an affidavit sworn by Samantha Peebles and filed in response to this application on February 18, 2020.
- [34] Ms. Sevilla-Blanco deposes that she first became aware of the default judgment against her at the end of October 2019. She learned about the default judgment when she received notice of the executor's California action to enforce the default judgment. Ms. Sevilla-Blanco has California counsel representing her in the California action. In mid-December 2019, Ms. Sevilla-Blanco retained her current counsel in this action and instructed him to apply the set aside the default judgment.

Analysis

Authority to Set Aside the Default Judgment

- [35] If this application to set aside the default judgment had been made before the damages were assessed, the application could have been decided under Rule 3-8(11) of the Supreme Court Civil Rules. Rule 3-8(11) provides that the court may set aside or vary a judgment granted by default.
- [36] However, once damages are assessed pursuant to the default judgment, the court no longer has authority to set aside the Damages Order pursuant to Rule 3-8(11). A complete and detailed analysis of the court's lack of authority to set aside a default judgment after damages are assessed was conducted by Justice Riley in *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.*, 2018 BCSC 234. Riley J. relied upon *0754306 B.C. Ltd. v. Bains*, 2010 BCCA 244, and *Bassi v. Bassi*, 2013 BCSC 284 (varied on other grounds by 2013 BCCA 422) to conclude that Rule 3-8(11) cannot be invoked to set aside either a default judgment or an order assessing damages once the assessment of damages has been concluded.
- [37] Justice Riley was bound by the decision of the Court of Appeal in *Bains*. Justice Chiasson held in that case that an order assessing damages following a default judgment is a final order. Therefore, it could not be set aside under Rule 3-8(11).
- [38] Since the order assessing damages in *National Home Warranty Group Inc.* was made as a chambers order, Riley J. addressed whether that order could be reconsidered pursuant to Rule 22-1(3). Rule 22-1(3) provides for a reconsideration of an order made in chambers if a

"party to a chambers proceeding" fails to attend the hearing. However, Riley J. found that a party who is not a "party of record" in the action is not a "party to a chambers proceeding". Therefore, a party who is not a "party of record" is not entitled to notice of the chambers' application and cannot rely upon Rule 22-1(3) for a reconsideration of a damages order.

- [39] Since Ms. Sevilla-Blanco is not a party of record in this action, she cannot rely upon Rule 22-1(3) for a reconsideration of the Damages Order.
- [40] Once Justice Riley found that he had no authority to reconsider the order assessing damages under the Supreme Court Civil Rules, he went on to consider whether he had authority to do so pursuant to the court's inherent jurisdiction. Riley J. held that the court maintained an inherent jurisdiction to regulate its practice and procedures so as to prevent a miscarriage of justice. He relied on the court's inherent jurisdiction to decide that it would be a miscarriage of justice to allow the order assessing damages to stand.
- [41] On the analysis of Justice Riley in *National Home Warranty Group Inc.*, the Damages Order against Ms. Sevilla-Blanco may be set aside if allowing it to stand would be a miscarriage of justice.

Miscarriage of Justice and the Damages Order

- [42] The phrase "miscarriage of justice" has been described in various ways. In *Lin v. Tang* (1997), 147 D.L.R. (4th) 577 (BCCA) Justice Huddart described a miscarriage of justice at para. 64:
- [64] In my view, miscarriage of justice means that which is not justice according to law. A miscarriage of justice will almost always be procedural. The blemish must be such as to make the judicial procedure at issue not a judicial procedure at all: *Robins v. National Trust Co. Ltd.*, [1927] 2 D.L.R. 97 (P.C.), aff'g 57 O.L.R. 46 (Ont. C.A.). There was no such blemish here.
- [43] Huddart J.A. goes on to discuss a miscarriage of justice at para. 68:
- [68] To establish the probability of a miscarriage of justice on the substance of the case, Mr. Liao must establish that the trial judge was probably wrong in fact or in law. Mr. Liao does not allege, nor could he on the evidence, that Saunders J. erred in law. Otherwise he could and undoubtedly would have appealed her decision. As I noted earlier, Mr. Liao was represented by a lawyer on the application that resulted in the order under appeal.
- [69] I am convinced that a reasonable, well-informed member of the public would not see any unfairness, prejudice, or miscarriage of justice in the circumstances of this case in the absence of objective evidence that the judgment was clearly wrong on the facts. Then the deliberate decision not to defend might be forgiven, if not excused. Such forgiveness can be seen as required to prevent a miscarriage of justice. . . .

- [44] In *Aquiline Resources Inc. v. Wilson*, 2005 BCSC 1461, Justice Smith held at para. 9 that the concept of miscarriage of justice contemplates "a result that would leave one party with such an unfair benefit or advantage at the expense of the other that a reasonable person would regard it as shocking and unconscionable".
- [45] Justice Riley in *National Home Warranty Group Inc.* held, at para. 42, that:
- [42] The burden rests on the party alleging a miscarriage of justice to prove that allegation on a balance of probabilities. The mere existence of an arguable case is not sufficient to demonstrate a miscarriage of justice. The test is "objective", and is "based on a consideration of how the result in question would be viewed by a reasonable, well-informed member of the public": *Sharma v. Sharma*, 2007 BCSC 1185 at para. 15-16, relying upon *Lin v. Tang* (1997), 37 B.C.L.R. (3d) 325 (C.A.) at para. 59, 64, 69.
- [46] I have concluded that based on the evidence that is currently before the court, the Damages Order against Ms. Sevilla-Blanco would be viewed by a reasonable, well informed member of the public as shocking and as a miscarriage of justice. The judgment against Ms. Sevilla-Blanco for \$438,468 is not established by the evidence that is currently before the court. The evidence presented by the executor does not establish that there were 244 gold coins in the safety deposit box. The evidence also does not establish that Ms. Sevilla-Blanco removed the gold coins from the box.
- [47] The evidence relied upon by the executor to support the judgment is:
- a) before the deceased died, he purchased 244 gold coins from the Scotia Bank in Campbell River on June 23, 2016;
 - b) Stanley Palmer accompanied the deceased when he deposited gold coins into his safety deposit box;
 - c) the safety deposit box activity record showed that Ms. Sevilla-Blanco accessed the box on January 12 and January 13, 2017, after the deceased's death;
 - d) when the executor opened the safety deposit box on July 26, 2017, the box was empty and was devoid of any gold coins; and
 - e) Ms. Sevilla-Blanco leased a safety deposit box at the Royal Bank in Vancouver on August 9, 2018.
- [48] From the foregoing evidence, the executor infers that Ms. Sevilla-Blanco removed 244 gold coins from the safety deposit box and placed them into her safety deposit box at the Royal Bank in Vancouver.
- [49] At the hearing to assess damages, the executor relied on the evidence of Darin Sherstobetoff, a coin and currency trader. Mr. Sherstobetoff deposed that 244 one-ounce gold coins had a value of \$438,468 as of July 9, 2019. It is clear that the Master accepted the opinion evidence of Mr. Sherstobetoff because the damages awarded by the Master were \$438,468.

- [50] The judgment in this case is based upon the inferences made by the executor and urged upon the court at the hearing of this application. However, those inferences, if they can be made at all, are weak at best. The inferences made by the executor ignore the following:
- a) there is no evidence to establish where the 244 gold coins purchased by the deceased on June 23, 2016, were stored from the date of purchase to July 6, 2016;
 - b) there is no evidence to establish how many gold coins were deposited into the safety deposit box;
 - c) only 144 coins were left with the bank for safekeeping on July 6, 2016;
 - d) 144 ounces of gold were removed from the custody of Scotia Bank by Stanley Palmer on July 11, 2016;
 - e) the deceased accessed the safety deposit box on July 11, 2016, which is the date on which 144 ounces of gold were removed from Scotia Bank's safekeeping; and
 - f) the deceased again accessed the safety deposit box on August 8, 2016.
- [51] The inference that Ms. Sevilla-Blanco removed 244 gold coins from the safety deposit box on January 12 and 13, 2017, is not an inference that can reasonably be made from the evidence because:
- a) the deceased may have removed the gold coins himself when he accessed the safety deposit box on August 8, 2016; and
 - b) there is no evidence that connects the purchase of 244 gold coins on June 23, 2016, to the deposit of those 244 gold coins into the safety deposit box.
- [52] At best, an inference could be made that 144 gold coins were deposited into the safety deposit box on July 11, 2016.
- [53] Therefore, a judgment against Ms. Sevilla-Blanco on the evidence currently before the court is a miscarriage of justice since the inference that she removed gold coins from the safety deposit box is not reasonable. Further, a judgment for the value of 244 gold coins is a miscarriage of justice since the evidence does not establish that 244 gold coins were ever deposited into the safety deposit box.
- [54] Accordingly, the Damages Order cannot stand and will be set aside.

Miracle Feeds and the Default Judgment

- [55] Having determined that allowing the Damages Order to stand would be a miscarriage of justice, it is open to consider whether the default judgment should be set aside under Rule 3-8(11) (National Home Warranty Group Inc. at para. 53).
- [56] The test for setting aside a default judgment is established by *Miracle Feeds v. D. & H. Enterprises Ltd.* [1979], 10 B.C.L.R. 58 (County Court).

- [57] In *National Home Warranty Group Inc.*, Justice Riley commented that theoretically the court would first be required to apply the Miracle Feeds test to determine whether to set aside the order assessing damages and then, if the damages order was set aside, the court would apply the Miracle Feeds test a second time to determine whether to set aside the default judgment (*National Home Warranty Group Inc.* at para. 54).
- [58] Contrary to Justice Riley's comments in *National Home Warranty Group Inc.*, I only see a need to apply the Miracle Feeds test to determine whether the default judgment should be set aside. It is my view that once the Damages Order is found to be a miscarriage of justice, then it should be set aside without having to apply the Miracle Feeds factors. It would be incongruous if an order resulting from a miscarriage of justice is allowed to stand after the application of the Miracle Feeds factors.
- [59] The factors ordinarily considered on an application to set aside a default judgment are those factors set out in *Miracle Feeds* in the following passage:
- [5] . . . in order for a defendant to succeed on application to set aside a default judgment, he must show:
1. That he did not wilfully or deliberately failed to enter an appearance or file a defence to the plaintiff's claim;
 2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being sought;
 3. That he has a meritorious defence or at least a defence worthy of investigation; and
 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.

Meritorious Defence

- [60] It is my view that Ms. Sevilla-Blanco has a meritorious defence to the claims made by the executor in this action. As mentioned earlier in these reasons, the inferences necessary to support a judgment in this case are not reasonable inferences to make on the evidence that is currently before the court. This is not a case in which the defendant comes to the court late in the day with evidence to support a defence that ought to have been disclosed in a response filed in a timely manner. In this case, the executor has the burden to prove her case against the defendant. The inferences that the executor seeks to make from the evidence she tenders are not reasonable.
- [61] Therefore, at this stage in the proceedings, the evidence put forward by the executor establishes a case which is of questionable merit. Accordingly, Ms. Sevilla-Blanco has established that she has a meritorious defence.

Timely Application

- [62] It is also my view that Ms. Sevilla-Blanco made her application to set aside the default judgment as soon as reasonably possible after receiving knowledge of the default judgment.
- [63] The executor filed her default judgment on May 21, 2019. However, the executor did not deliver a copy of the default judgment to Ms. Sevilla-Blanco until after the damages assessment was completed. On July 17, 2019, the court awarded \$438,468 in damages against Ms. Sevilla-Blanco. Plaintiff's counsel sent a letter enclosing a copy of both the default judgment and the Damages Order to Ms. Sevilla-Blanco by email on July 22, 2019. However, Ms. Sevilla-Blanco deposes that she did not see the letter of July 22, 2019, until she read the affidavit of Samantha Peebles sworn in this proceeding on February 18, 2020. Ms. Sevilla-Blanco deposes that she searched her email system for the email and letter of July 22, 2019, but they are not in her system.
- [64] Ms. Sevilla-Blanco first became aware that the executor had obtained a default judgment against her when she was served with documents issued in California to enforce the default judgment. Ms. Sevilla-Blanco was served with these documents at the end of October 2019. Ms. Sevilla-Blanco retained counsel in California to represent her in the California action. She then retained her current legal counsel in British Columbia in mid-December 2019, to apply to set aside the default judgment.
- [65] Counsel for Ms. Sevilla-Blanco filed this application to set aside the default judgment on February 6, 2020. A delay from mid-December 2019 to early February 2020, is not unreasonable given the distance between Ms. Sevilla-Blanco and her British Columbia counsel, her lack of fluency in the English language, the need to determine the history of this action, the need to obtain the relevant documents and the inevitable delays caused by the December holiday season. Accordingly, I find that Ms. Sevilla-Blanco first learned of the default judgment against her in late October 2019, and that she moved to set aside the default judgment as soon as reasonably possible thereafter.

Willful or Deliberate Failure

- [66] The executor's strongest position in this application is that Ms. Sevilla-Blanco wilfully or deliberately failed to respond to the notice of civil claim.
- [67] Initially, Ms. Sevilla-Blanco appeared to have an interest in and an intention to defend against the allegations made in the notice of civil claim. She sought advice from her California lawyer. Through her California lawyer she sought and obtained an extension of time to retain British Columbia counsel and to file a response. Due to her limitations with English, she requested the assistance of a friend to contact the Lawyer Referral Service in British Columbia for names of lawyers who might represent her in this action. She contacted a number of lawyers in British Columbia but she was unable to retain counsel to represent her.

[68] Ms. Sevilla-Blanco contacted plaintiff's counsel by email on April 25, 2019, to ask for more time to file a response. Ms. Sevilla-Blanco claims that she did not receive any response to her request for more time but she took no further steps to find a lawyer in British Columbia.

[69] Ms. Sevilla-Blanco's explanation for not following up with plaintiff's counsel and for not continuing her search for a lawyer is set out in her affidavit as follows:

I assumed that no further steps were taken, as Mr. Rule did not reply to my email to advise me that the plaintiff had taken default judgment. As a result, and due to the difficulties, I was having in retaining counsel in British Columbia, I stopped searching for a lawyer.

[70] It appears that Ms. Sevilla-Blanco did not request assistance from her California lawyer to find a lawyer in British Columbia. It also appears that Ms. Sevilla-Blanco did not request representation from the Vancouver lawyer who she had hired earlier to deal with the dispute over the cashier's cheque.

[71] In her email of April 25, 2019, to plaintiff's counsel, Ms. Sevilla-Blanco states that the lawyers she contacted would not act for her because they had conflicts of interest. She explains that the conflicts in interest arose because those lawyers either personally knew plaintiff's counsel or had other cases with him. The executor submits that this explanation for Ms. Sevilla-Blanco's inability to get representation in British Columbia is nonsensical as the fact that a lawyer may personally know opposing counsel or have other cases with him does not raise a conflict of interest.

[72] I have concluded that Ms. Sevilla-Blanco's lack of diligence in retaining a lawyer and her failure to follow up with plaintiff's counsel after April 25, 2019, indicates that she did not treat this action as a serious matter. It was not until she was served with the legal action in California to enforce the default judgment that she earnestly took steps to retain counsel in British Columbia.

[73] The explanations given by Ms. Sevilla-Blanco, her failure to seek assistance from her previous Vancouver lawyer and her failure to pursue legal representation after April 25, 2019, do not establish a clear and enduring intention to defend the allegations made against her in this action. The onus is upon Ms. Sevilla-Blanco to prove that she did not wilfully or deliberately fail to respond to the notice of civil claim. Ms. Sevilla-Blanco has failed to discharge that onus.

Interests of Justice

[74] The conclusion that Ms. Sevilla-Blanco's failure to respond may have been wilful or deliberate does not end the analysis. The Court of Appeal in *Andrews v. Clay*, 2018 BCCA 50, at para. 29, determined that the components of the test set out in *Miracle Feeds* were factors, rather than tests because:

they are not intended to be either mandatory or exhaustive of the considerations that are relevant, though in most cases they will be the appropriate indicators of whether it is in the interests of justice to set aside the default judgment.

[75] In *Andrews*, Justice Hunter cited, at para. 31, the following passage from *Nichol v. Nichol*, 2015 BCCA 278:

[37] The factors set out in the *Miracle Feeds* decision are not meant to be applied inflexibly, nor are they immutable: see *H.M.T.Q. In Right Of The Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11. The discussion by Mr. Justice Voith in *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at Para. 15 in the context of the R. 17(12) of the previous Supreme Court Rules is apt:

[15] . . . [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them from being successful on an application under Rule 17(12) [the rule in the previous Supreme Court Rules that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by defendant which are relevant to its application and to the court's discretion.

[76] In *May v. Williams*, [1997] B.C.J. No. 900, Justice McEwan exercised his discretion to set aside a default judgment in a defamation action even though the *Miracle Feeds* criteria had not been met. McEwan J. held that the judgment should be set aside in the interests of justice because:

- a) the assessment of damages would inevitably involve consideration of so much of the merits of the case as to render the separation of liability from damages highly artificial; and
- b) there was a significant risk that without setting aside the default judgment, the administration of justice would be embarrassed.

[77] The discretion exercised in *May* was referred to in *B. v. B.*, 2005 BCCA 407. The Court of Appeal declined to decide if there was a residual discretion to set aside a default judgment outside of the *Miracle Feeds* criteria. Justice Low decided that it would be inappropriate to set aside the default judgment in that case without the need to rely upon any residual discretion.

[78] Since the decision in *B. v. B.*, the court has exercised its discretion to set aside default judgments even where the *Miracle Feeds* criteria have not been met.

- [79] In *Hightime Investments Property Ltd. v. Bromley*, 2008 BCSC 1353, the plaintiff sought rescission of a series of agreements. The defendant did not respond to the action. Since the claim was not for debt or damages, the plaintiff was required to apply for judgment in default. When the defendant applied to set aside the default judgment, the court held that the defendant did not meet the *Miracle Feeds* criteria. However, the court exercised its discretion to set aside the default judgment because:
- a) the judgment affected the rights of third parties who had not been named in the action; and
 - b) the existence of related litigation was not disclosed to the application judge;
- [80] The plaintiff in *Hightime Investments Property Ltd.* applied for leave to appeal the order setting aside the default judgment. In refusing the plaintiff's application for leave to appeal, the Court of Appeal held that the comments made by the chambers' judge about residual discretion to set aside default judgments were obiter dictum. Nevertheless, the default judgment was set aside even though the criteria set by *Miracle Feeds* were not met.
- [81] Similarly, in *Wang v. Wang*, 2012 BCSC 1077, a default judgment was set aside for reasons outside the *Miracle Feeds* criteria. In that case, the default judgment was set aside because refusing to do so would create the possibility of there being inconsistent or contradictory conclusions in the action.
- [82] While Ms. Sevilla-Blanco has not satisfied the *Miracle Feeds* criteria, I have concluded that it is in the interests of justice to set aside the default judgment in this case.
- [83] In reaching this conclusion I am mindful of the comments of Justice Low in *B. v. B.*, in which he made the following comment:
- [8] In my opinion, allowing this appeal and setting aside the default judgment would render meaningless the obtaining of a default judgment by a diligent plaintiff in accordance with the Rules in an action in which the plaintiff seeks unliquidated damages.
- [84] However, this case is unusual in that the evidence relied upon by the executor to support the default judgment is insufficient to support a judgment against Ms. Sevilla-Blanco. In these circumstances, it is in the interests of justice to set aside the default judgment and require the executor to prove her case.
- [85] Justice also requires that the estate of the deceased be compensated for its costs thrown away as a result of Ms. Sevilla-Blanco's failure to respond. Counsel for Ms. Sevilla-Blanco has represented to the court that Ms. Sevilla-Blanco is prepared to pay the estate's costs thrown away on a solicitor-client basis.
- [86] Therefore, I will exercise my discretion to set aside the default judgment on the following conditions:
- a) that Ms. Sevilla-Blanco pay the following costs thrown away, on a solicitor-client basis:

- i. the costs to obtain the default judgment;
 - ii. the costs to apply for and obtain the Damages Order; and
 - iii. the costs to respond to this application;
- b) that Ms. Sevilla-Blanco pay the costs thrown away within 30 days following an agreement on or an assessment of those costs;
 - c) that Ms. Sevilla-Blanco pay the sum of \$22,161.97 US dollars representing the costs thrown away to enforce the default judgment in California within 21 days of these reasons for judgment;
 - d) that Ms. Sevilla-Blanco file and serve a response to civil claim in this action within 14 days of these reasons for judgment;
 - e) should Ms. Sevilla-Blanco fail to fulfill any of the foregoing conditions, the executor will be at liberty to take a default judgment against her; and
 - f) the parties may, by agreement, extend the time limits within which these conditions are to be fulfilled.

"Hori J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/04/2020BCSC0497.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/fox-estate-v-sevilla-blanco-2020>

Prepared on 25 October 2026 · Esheria