

CANADA / JUDGMENT

Keshvari v. Ahani

2024 BCSC 1832

COURT

Supreme Court of British Columbia

DECIDED

7 October 2024

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2024 BCSC 1832 Keshvari v. Ahani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keshvari v. Ahani,

2024 BCSC 1832

Date: 20241007

Docket: E62331

Registry: New Westminster

Between:

Hengameh Keshvari

Claimant

And

Hamidreza Ahani

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Claimant:

P. Cote

J. Morneau

Counsel for the Respondent:

S. Leung

Place and Date of Hearing:

New Westminster, B.C.

March 15 and

September 26-27, 2024

Place and Date of Judgment:

New Westminster, B.C.

October 7, 2024

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Introduction

[1] The trial in this matter was held on October 16 and 17, 2023, in the absence of the respondent. At the conclusion of the trial, I gave oral reasons. Those reasons addressed divorce, parenting, child support, section 7 expenses, and division of family property. The final order was entered on January 15, 2024 (the "Final Order").

- [2] By notice of application filed February 16, 2024, the respondent now applies to set aside parts of the Final Order. In particular, the respondent applies to set aside the property division aspects of the Final Order wherein it was ordered that three real properties be transferred into the name of the claimant as her sole property. The application is opposed by the claimant.
- [3] For the reasons that follow, I decline to set aside the Final Order. The respondent's failure to attend the trial was calculated, deliberate and wilful and, although he has defences worthy of investigation, it is not in the interests of justice to set aside the Final Order.

Facts

- [4] The parties were married in Tirak, Tehran, Iran, on May 28, 1995.
- [5] In 1995 they immigrated to Canada where they have lived since.
- [6] The parties separated on December 14, 2019.
- [7] On April 20, 2021 the notice of family claim in this matter was filed. It was served on the respondent on April 28, 2021.
- [8] Schedule 4 of the notice of family claim listed two real properties over which the claimant claimed an interest as family property. Those properties were 1419 Pipeline Road, Coquitlam and 3378 David Avenue, Coquitlam. Certificates of pending litigation ("CPL") were filed against both properties on the date of filing of the notice of family claim.
- [9] It is to be noted that, at the time the notice of family claim was filed, 1419 Pipeline Road was in the process of being subdivided by the respondent.
- [10] On May 13, 2021, a lawyer, Larry Pippard, wrote to claimant's counsel, Ms. Morneau, advising that he had been consulted by the respondent and had discussed mediation options with him. He recommended a mediator and requested that the time limit for the filing of a response be suspended.
- [11] On May 27, 2021, Ms. Morneau responded to Mr. Pippard advising that they were agreeable to mediation.
- [12] By June 2021, the subdivision of 1419 Pipeline Road had been approved and the property was subdivided into eight separate lots.
- [13] On June 4, 2021, the claimant filed an amended notice of family claim. The only amendments to the notice of family claim were in relation to 1419 Pipeline Road. Specifically, the eight subdivided lots were substituted for 1419 Pipeline Road. The claimant also caused new certificates of pending litigation to be filed in respect of the eight subdivided lots.

- [14] A copy of the amended notice of family claim was delivered to Mr. Pippard by letter dated June 15, 2021. In that same letter, Mr. Pippard was requested to confirm he had been retained by the respondent and to advise when a response to family claim would be filed.
- [15] On August 30, 2021, Mr. Pippard's office advised claimant's counsel that he had not been retained.
- [16] In September 2021, Ms. Morneau corresponded with Richard Payne, a lawyer retained by the respondent in relation to the sale of lots 5 and 6 of the Pipeline Road property. It was then agreed that the claimant would release the CPLs on lots 5 and 6 on the condition that the proceeds of sale would be used to pay down the mortgage.
- [17] On October 8, 2021, claimant's counsel, Ms. Morneau, sent a letter to the respondent advising that he had not filed a response to the notice of family claim. She encouraged him to retain legal counsel and to file a response. She also advised him that if he did not, the claimant would proceed to obtain default orders. I note that the letter of October 8, 2021, is not in the materials before me but Ms. Morneau deposes that the letter was sent and I accept her evidence.
- [18] In February of 2022, Ms. Morneau and Mr. Payne again corresponded in relation to the sale of lots 7 and 8 of the Pipeline Road Property. The parties agreed that the claimant would release her CPLs over these lots and that the proceeds of sale would be used to clear the mortgage over the lots to be sold and to pay off the two mortgages on the Davies Road property. Any remaining proceeds were to be held in trust. Ultimately, there was only approximately \$3,000 remaining after all mortgages were paid and this amount was divided equally between the parties.
- [19] It is noteworthy that during the February 2022 exchanges between Ms. Morneau and Mr. Payne, the respondent attempted to contact Ms. Morneau in relation to the sale of lots 7 and 8. Ms. Morneau brought this to the attention of Mr. Payne. On February 8, 2022, Mr. Payne emailed Ms. Morneau advising that he had told the respondent not to contact her office concerning land matters. He also advised that he had "encouraged him to seek matrimonial counsel".
- [20] On August 2, 2022, claimant's counsel served the respondent with a notice of judicial case conference set for November 30, 2022. The respondent replied by email on August 9, 2022 as follows:

Who is this? Why should I be there?

Just to confirm that I am out of country at that time, and not sure when I will be back.

- [21] Claimant's counsel responded to the respondent's email on the same day advising who she was and stating that the claimant was proceeding with the family law claim. She urged him to obtain independent legal advice. She also reminded him he had not filed a response to the notice of family claim.

- [22] On September 22, 2022, the respondent was provided with a copy of the claimant's F8 financial statement.
- [23] On November 30, 2022, the judicial case conference was held before Justice Armstrong. I note that although the respondent had advised he would be out of the country, he did attend the conference.
- [24] The transcripts of the judicial case conference held on November 30, 2022 are before me. During the conference, the respondent was advised that the litigation was proceeding ahead and that, if he did not participate, orders could be made in his absence. He was strongly encouraged to seek legal advice and to file a response to the notice of family claim.
- [25] In or about December of 2022, the respondent retained Harlene Gill of LeBeau Law Corporation to assist him with the sale of the Pipeline Road lots 1 and 2. Ms. Morneau and Ms. Gill corresponded regarding the sale of these lots and the release of the CPLs on them. The parties ultimately agreed that the net proceeds from the sale would be divided as follows: \$425,081.92 to the respondent in respect of invoices and expenses incurred by him and his company to develop the Pipeline Road property; and approximately \$631,000 to each of the parties.
- [26] On January 27, 2023, the claimant filed a notice of trial setting the trial for October 16, 2023. The respondent acknowledges receiving a letter from the claimant's counsel at the end of January attaching the notice of trial. He deposes that he did not understand what trial meant but understood that it was another court date. As I will address further, I do not accept the respondent's assertion that he did not understand what "trial" meant.
- [27] On June 20, 2023, a requisition was issued for a trial management conference to be held on August 18, 2023. That conference was adjourned and reset by the claimant by requisition filed on August 17, 2023. The new date for the trial management conference was September 7, 2023. The respondent was advised of the new date on August 17, 2023, by email.
- [28] Despite having been advised in January 2023 that the trial would commence on October 16, 2023, on August 16, 2023 the respondent booked airline tickets to Iran with a departure date of September 24, 2023 and a return date of October 24, 2023.
- [29] On August 22, 2023, the claimant filed and served an application for an order adding the respondent's company as a party to the action and for disclosure from the respondent.
- [30] On September 5, 2023, the claimant's application came on for a hearing before Justice Gibb-Carsley. The application to add the company was denied but the respondent was ordered to provide nine categories of documents within two weeks. The documents ordered were:
- a) Income Tax Returns from 2018 to present;
 - b) Notices of Assessments or Reassessments from 2018 to present;
 - c) T2 Corporation Income Tax Returns for the company from 2018 to present;

- d) Financial Statements for the company from 2018 to present;
- e) Any and all bank account statements in the name of the company from January 2018 to present;
- f) Any and all statements for all credit cards, loans, line of credits or mortgages in the company's name;
- g) Any and all bank account statements including but not limited to chequing savings, TFSA's and RRSP's in the respondent's name or held jointly with another, from January 2018 to present;
- h) Statements for any investment accounts in the respondent's name or in which he holds an interest in from January 2018 to present; and
- i) Any and all statements for all credit cards, loans, line of credits or mortgages in respondent's name or held jointly with another from January 2018 to present.

[31] It is noteworthy that the respondent attended the application on September 5, 2023 and made submissions. In fact, he deposes that he told "the court" that he was concerned about his sick mother and that he would be leaving for his home country in the middle of September for one month.

[32] The transcripts of the September 5, 2023 hearing are in evidence. On two occasions the respondent did say that he was leaving the country. The first occasion is at p. 17 lines 41-43 of the transcript. Just before rendering judgment, Justice Gibb-Carsley asked the respondent if he had anything further to say. He replied:

Nobody talked to me but I'm just concerned that my mom is sick and me upset - I'm going back to my home country for somehow one month, part from the country. [sic]

[33] The second occasion is at p. 19 of the transcript, lines 31-34. The discussion at the time was about how the respondent would get a copy of the order. The respondent said:

I have to go - again middle of the - month I'm going to leaving this country by the way. I'm not here by the way middle of - this month. [sic]

[34] It is to be noted that on neither occasion was the discussion about the upcoming trial or attendance at the upcoming trial and, although the respondent did advise that he would be leaving in the middle of the month, he did not say that he would not be back for the commencement of the trial.

[35] On September 7, 2023, the adjourned trial management conference was held. The respondent did not attend the conference. The directions made at the conference were: (1) that the parties provide updated F8 financial statements; (2) that the claimant provide a book of documents for trial by October 3, 2023; and (3) that the respondent provide claimant's counsel with the documents he intended to rely upon at trial by October 9, 2023.

[36] On September 9, 2023, the respondent emailed Ms. Morneau's office in relation to the disclosure order by Justice Gibb-Carsley. In the body of the email he wrote "I have only the attached file, the rest are N/A". The only attachments to the email were the financial statements for his company, Ahani Developments Ltd., for 2021 and 2022 and the T2 corporate tax returns for Ahani Developments for 2020 and 2021. None of the other documents ordered to be disclosed were provided.

[37] On September 15, 2023, claimant's counsel wrote to the respondent advising that his disclosure pursuant to the order of Justice Gibb-Carsley was incomplete. She also advised him that he had 15 days to comply with the order. The respondent responded as follows:

I am out of country next week. I do not know for how long.

Play with your self lots till then.

I will call you when I return

[38] On September 25, 2023, a copy of the filed trial certificate was emailed to the Respondent. He replied by email on October 2, 2023, as follows:

I am out of country now, Do not disturb me again.

[39] On October 11, 2023, a copy of the index to the claimant's book of documents was emailed to the respondent.

[40] On October 16, 2023, the trial of this matter was held. The respondent did not attend.

[41] The only witness at the trial was the claimant.

[42] I rendered oral reasons at the conclusion of the trial on October 17, 2023. Those reasons addressed divorce, parenting arrangements, child support and property division. Concerning property division, I ordered that title in three real properties be transferred to the claimant as her sole property. The three properties were: 3378 David Avenue, and the two remaining unsold lots at Pipeline Road, bearing addresses 1413 and 1415 Pipeline Place. I found that the combined value of the three properties was \$4.482 million.

[43] The property division orders were made in furtherance of an equal division of family property, not unequal division. This is reflected in paras. 23-27 of my reasons:

[23] The claimant seeks to have title in those properties transferred into her name solely and exclusively. She submits that this is appropriate as the respondent has failed to participate in the proceedings and has failed to disclose his assets and that I can infer that he has assets equal to or greater than the value of these three properties. She relies, of course, on the very well-known decision of Justice Fraser in *Cunha v. Cunha* (1994), 99 BCLR (2d) 93, 1994 CanLII 3195 (B.C.S.C.). I agree with the claimant that such an inference is to be made in this case. I agree for the following reasons:

- a) First, the evidence before me discloses that a deposit was made with the City of Coquitlam in relation to the development of the Pipeline properties in the amount of \$1.234 million. The claimant has attempted to ascertain what if any amount of that deposit which was made during the course of the marriage and from family property. The claimant attempted to determine what amount of that was still remaining with the City of Coquitlam and what amounts if any had been returned to the respondent. The City of Coquitlam refused to provide her with any information given that she was not on title or listed as a developer. Therefore, I am satisfied and I am prepared to infer that there is \$1.234 million in cash in a deposit with either the City of Coquitlam that the respondent has access to or that the respondent has already received. Some or all of that \$1.234 million was family property.
- b) Secondly, the evidence discloses a property at 19646 Joyner Place, Pitt Meadows that is in the joint name of the respondent and one other person. That property is not family property, but it was purchased after separation, and I infer it was purchased using family property. The value of that house is assessed at \$1.57 million. Although there is no evidence as to the relative interests of the two joint owners, once again I am prepared to infer that close to 100 percent of that property is beneficially owned at least by the respondent.
- [24] With the value of the Joyner property and the deposit with the City of Coquitlam, the respondent has a total of approximately \$2.8 million of assets in his name. However, the claimant gave evidence of additional properties in the name of the respondent. Namely, she testified that she was shown a document by the respondent indicating that he had title to a house in Iran. She also testified that he owns a farm in Iran, which she herself had attended on various occasions. Further, she testified that he owns some shares in two shopping malls in Iran that are owned by his parents. She had no evidence of the value of these various real properties in Iran or the shares. That is not surprising, as the evidence of those values would be in the exclusive possession of the respondent.
- [25] I infer that the value of the assets in the respondent's name in Iran, plus the value of the deposit with the City of Coquitlam and the value of his interest in 19646 Joyner Place equal or exceed the value of the two Pipeline lots and the David property.
- [26] Therefore, it is appropriate that the claimant be given sole and exclusive title to the two Pipeline lots and to the David property as she has requested.
- [27] I will note that this is an exercise in dividing the properties between the parties on an equal basis, the division being difficult because of the lack of involvement and lack of disclosure from the respondent.
- [44] On January 15, 2024, the Final Order was entered giving effect to my reasons.
- [45] On February 16, 2024, the subject application to set aside the property division aspects of my order was filed.

Positions of the Parties

- [46] The respondent submits that the test for setting aside the trial judgment is as set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 [Miracle Feeds]. He submits that it is in the interests of justice that the judgment be set aside. More particularly, he submits that: his failure to appear at the trial was not wilful or deliberate; this application to set aside the judgment was made in a timely fashion; and that there is a defence to the property division orders that is worthy of investigation.
- [47] The claimant agrees that the test in *Miracle Feeds* applies but submits that the respondent does not meet the test. In particular, she submits that the respondent's failure to attend the trial was wilful and deliberate and that on this basis alone the application should be dismissed. She further submits that the respondent has not shown that there is a defence on the merits worthy of investigation.
- [48] The claimant does not dispute that the application to set aside the judgment was brought in a timely manner.

Principles and Framework

FLA

- [49] Section 200 of the Family Law Act, S.B.C. 2011, c. 25, [FLA] specifically provides that the court may hear an application in the absence of a party and may set aside an order made in the absence of a party.

200 (1) If permitted under this Act, the Supreme Court Family Rules or the Provincial Court Family Rules, a court, in the absence of a party, may hear an application and make any order the court has authority to make under this Act.

- (2) If an order was made in the absence of a party, the court, in accordance with the Supreme Court Family Rules or the Provincial Court Family Rules, as applicable, may change, suspend or set aside the order.

SCFR

- [50] The Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR], allow the court to conduct a trial in the absence of a party and provide that the court may set aside a verdict or judgment made in the absence of a party. Rules 14-7(76) and (77) of the SCFR provide:
- (76) If a party is not in attendance when the trial of a family law case is called, the court may proceed with the trial, including hearing a counterclaim, in the absence of that party.
- (77) The court may set aside a verdict or judgment obtained if a party does not attend the trial.
- [51] Rule 21-6 of the SCFR similarly provides:

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- (1) Without limiting Rule 21-5, if a party fails to attend at a trial or hearing at the time appointed for that trial or hearing, the court may, after receipt of any evidence of service it considers appropriate, do one or more of the following:
- (a) proceed with the trial or hearing;
 - (b) draw any inference from the failure to attend that the court considers appropriate, including attributing an amount of income to the party;
 - (c) grant some or all of the relief sought.
- (2) Unless the court otherwise orders, if no party is in attendance when the trial of a family law case is called, the family law case must be struck off the trial list.
- (3) A party may apply to set aside a judgment obtained at trial in that party's absence.
- [52] In *Miracle Feeds* it was held that for a defendant to succeed on an application to set aside a default judgment they must show:
- 1. That they did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
 - 2. That they 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 brought;
 - 3. That they have 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.
- [53] More recently, in *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341, at paras. 17-18 [*Forgotten Treasures*], Justice Voith described the applicable principles as follows:
- [17] *Miracle Feeds* establishes a framework to address an application to set aside a default judgment. It is important to recognize that the various considerations that are identified in *Miracle Feeds* are just that: they are factors that a chambers judge should consider and weigh. These factors are not fixed or immutable; rather, they are discretionary. In *Andrews v. Clay*, 2018 BCCA 50, this Court recently reviewed a number of relevant authorities and said:
- [29] I have described these as factors rather than tests, as 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.
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- [30] In *H.M.T.Q. in right of the Province of British Columbia v. Ismail*, 2007 BCCA 55 (Chambers), for instance, Smith J.A. considered Miracle Feeds in the context of a default judgment in the Supreme Court of British Columbia and made these comments:
- [11] In my view the items enumerated in the Miracle Feeds test are not conditions that must be satisfied by an applicant. Rather, they are relevant factors to be taken into account by a chambers judge in exercising the discretion conferred by Rule 17(12). I find support for this view in the remarks of Madam Justice Saunders in *Deline v. Whittle*, [2002 BCCA 662] where she said,
- [12] On the merits, I observe that the order appealed involves the exercise of discretion. Although Mr. Deline vigorously contends that the Miracle Feeds test was not met, and thus there is sufficient merit in the appeal to warrant leave being granted, I do not agree. There are, necessarily, aspects of judgment that must be applied by a chambers judge in the exercise of discretion under Rule 25(15).
- [31] In *Nichol v. Nichol*, 2015 BCCA 278, this Court cautioned against an inflexible application of the Miracle Feeds factors:
- [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 a defendant which are relevant to its application and to the court's discretion.
- [18] The discretionary nature of the decision made by a chambers judge on an application to set aside a default judgment also informs the deference to be afforded to that decision: *Nichol* at para. 40; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27; *Shoolestani v. Ichikawa*, 2016 BCCA 452 (Chambers) at paras. 16-18.
- [54] Although *Forgotten Treasures* concerned a default judgment and did not involve the FLA or SCFR, the same framework applies to applications to set aside a final judgement in family law matters: *Nichol v. Nichol*, 2015 BCCA 278, at paras. 35-37; *Atkinson v. Atkinson*, 2019 BCSC 1220, at para. 13; *A.J.D. v. C.D.*, 2018 BCSC 73; and *Vo v. Vo.*, 2015 BCSC 467.

- [55] The claimant refers me to Vo as authority for the proposition that a deliberate failure to attend trial is sufficient to deny an application to set aside an order. In Vo, the defendant failed to appear at the trial, the trial proceeded in his absence, and orders were made at the conclusion of the trial, although not entered. At paras. 36-37, Justice Punnett found that the respondent's failure to attend the trial was wilful and deliberate and further held that this was sufficient to dismiss the application.
- [36] Given the history of this matter, the fact that Mr. Vo understood he was to be present for trial on earlier trial dates, his failure to stay in contact with his counsel, his failure to contact his counsel immediately on his return to Canada despite the pending trial date all lead me to conclude that his conduct was blameworthy, deliberate and wilful. The defendant is not a novice in this litigation, and has displayed a notably casual attitude towards it throughout its eight-year span. The material provided does not establish that his conduct while deliberate, was not wilful.
- [37] I therefore conclude that Mr. Vo's failure to attend the trial was a deliberate act. Additionally, I find that this conduct was wilful. He therefore has failed to meet the first element of the Miracle Feeds test. While this in itself is sufficient to dismiss his application, in the event I am in error I turn to the other elements of the test. [Emphasis added.]
- [56] Further, at para. 47, Punnett J. wrote:
- [47] While counsel did not apply to re-open the trial, the Court has inherent jurisdiction to do so. However, Mr. Vo has failed to show that a miscarriage of justice would probably occur without a rehearing, and he has not produced evidence to be adduced that would probably change the outcome of the trial: *Fouracres v. Taylor* (1996), 63 A.C.W.S. (3d) 340 (B.C.S.C.), at para.12. Given my finding that he was deliberately absent, it would be a miscarriage of justice to re-open the matter. In my view it is not open to Mr. Vo to ignore the trial and then at his convenience seek a new trial. To do so would impose an unjust burden on Mrs. Vo. [Emphasis added.]
- [57] To the extent that Vo can be said to stand for the proposition that a wilful and deliberate failure to attend trial is determinative in the sense that the other factors need not be considered, I find this difficult to reconcile with the court of appeal's decision in *Forgotten Treasures* and the decisions cited therein. In *Forgotten Treasures* it is expressly noted that Miracle Feeds provides a framework, not a test. That framework involves a consideration of factors, not conditions. Moreover, the factors are not immutable or exhaustive or to be applied inflexibly. The ultimate question is whether it is in the interests of justice to set aside the judgment.
- [58] Accordingly, I proceed on the basis that I must consider all relevant factors and that I must ultimately determine whether it is in the interests of justice that the order be set aside.

Issues

- [59] Given that the claimant concedes the application was brought as soon as reasonably possible, the issues to be determined are:
- Did the respondent wilfully and deliberately fail to appear at the trial?
 - Has the respondent shown he has a meritorious defence or at least a defence worthy of investigation?
 - Is it in the interest of justice that the property division aspects of the Final Order be set aside?

Analysis

Did the respondent wilfully and deliberately fail to appear?

- [60] I am of the view that the respondent did wilfully and deliberately fail to appear at the trial.
- [61] The facts as set out above clearly show that the respondent was aware of the trial date on January 27, 2023, when he was provided with the notice of trial setting the trial for October 16, 2023.
- [62] The respondent, while acknowledging he was aware a court date had been set for October 16, 2023, says he did not understand what "trial" meant. I do not accept this evidence. The respondent is an intelligent and sophisticated person. He has done multiple real estate developments. He has incorporated a company. He has sought legal and tax advice in respect of his company and real estate developments. It is simply unbelievable that he did not understand what a trial was.
- [63] The respondent says that he always believed that the parties would reconcile and, for this reason, he never retained a lawyer. He deposes to various occasions in the past where the claimant had left him and then returned to the marriage. He refers me to N.W. v. Y.W, 2023 BCSC 1843 [N.W.], where Justice Murray somewhat excused a party's failure to provide disclosure because the party was emotionally unable to process the fact that the relationship was at an end and was overwhelmed by the court process. (see paras. 33 and 52)
- [64] I do not find N.W. to be applicable to the facts before me as it did not involve an application to set aside a judgment for non-attendance. More importantly, unlike the party in N.W., I do not accept that the respondent was either overwhelmed or unable to process the fact the relationship was at an end. The respondent may, at one time, have believed that he and the claimant would reconcile, however, by January 2023, when he was served with the notice of trial, more than three years had passed since the parties separated. By this time he knew there would be no reconciliation. This knowledge would only have been reinforced by the events between January and October 2023. Accordingly, I do not accept that the respondent honestly believed there would be a reconciliation and the trial would not proceed.

- [65] The respondent says that he was honestly mistaken about whether the trial would proceed in October, given that he had advised the court he would be out of the country on September 5, 2023. I again do not accept that this was an honest belief. On September 5, 2023 he did not advise either the court or claimant's counsel that he would not be present for the trial. Moreover, nothing was said by either Justice Gibb-Carsley or claimant's counsel that could have led him to believe that the trial would not proceed. Additionally, if he did believe at the conclusion of the September 5 hearing that he was excused from attending the trial, which I do not accept, he was disabused of this belief on September 25, 2023, when a copy of the filed trial certificate was emailed to him. At that point, he could have made arrangements to return to Canada for the trial.
- [66] The respondent deposes that the reason for his trip to Iran was to see his sick mother. I do not accept that this was the reason for the trip or that there was any urgency such that the trip had to be scheduled during the trial. The lack of urgency is illustrated by the fact that the respondent booked his airline ticket on August 16, 2023 with a departure date of September 24, 2023. If there had been any urgency, he would not have waited over five weeks to depart. I also note that in his first affidavit, he deposes that his mother's condition was "not so urgent that she could die any minute". The respondent has not explained why he could not have gone to see his sick mother before the trial or after the trial. In my view, the trip to Iran was not booked because the respondent's mother was sick, rather the respondent deliberately booked the trip to coincide with the trial date so that he would have an excuse for not attending the trial.
- [67] This is sufficient to conclude that the respondent's non-attendance at the trial was wilful and deliberate.

Has the respondent established a meritorious defence or one worthy of investigation?

- [68] Much of the hearing before me was taken up with addressing whether the respondent had a defence worthy of investigation.
- [69] It is to be recalled that the property division order made was based on inferences that the respondent had assets in his name that equalled or exceeded the value of the two Pipeline Road lots and the David Avenue property. Specifically, there was evidence that the respondent had various properties in Iran, an interest in a property at 19646 Joyner Place and had monies on deposit with the City of Coquitlam. The respondent has led evidence that these properties and assets either did not exist or that they are otherwise not family property.
- [70] In respect of the Iranian properties and assets, at trial, I was advised that they consisted of a farm, an interest in two shopping malls, and a house. The respondent addresses each of these properties/assets in his affidavit.

- a) In respect of the Iranian farm, he deposes that he does not own a farm in Iran. He says that his mother owns a farm in East Alamot, Iran and attaches a deed for that property which does, in fact, show his mother as the owner;
 - b) In respect of the two shopping malls, the respondent deposes that he did have an interest in the Mansour Shopping Centre in Iran but deposes that he gave his interest to his sister in November 2019. He deposes that this was done to compensate her for caring for their parents, renovating his mother's home, paying his father's burial fees, and paying his father's debts, all of which he says were his responsibilities as the eldest son. Her further deposes he owed his sister for his brother's daughter's wedding ceremony and for charity money given to extended relatives. The respondent attaches a bill of sale to his affidavit which purports to document the transfer of his interest in the shopping centre to the sister in November 2019.
 - c) In respect of the house in Iran, the respondent deposes that his mother transferred her home into his name in December 2021 as part of her estate planning. He deposes that he holds the house in trust for his mother during her lifetime and that she can take back the home anytime during the next 50 years. He attaches a copy of the deed to the home dated December 19, 2021, showing his mother retains a lifetime interest in the home and an option of termination for 50 years.
 - d) In respect of his interest in 19646 Joyner Place, the respondent deposes that this property was purchased using the sale proceeds from Pipeline Road lots 1 and 2. He attaches documents showing the property was purchased in August 2023, after the parties separated. As such it would be excluded property.
 - e) In respect of the monies on deposit with the City of Coquitlam, the respondent deposes that this money was all used to pay invoices of contractors and others in relation to the development of the Pipeline Road lots. He attaches documentation indicating that as of November 2023, approximately \$879,000 of the \$1,233,799 security had been drawn down and used to pay contractors.
- [71] The claimant submits that the respondent's evidence is suspect and incomplete. In particular, the claimant notes that the respondent has not provided evidence of what the property division should have been but, rather, has merely dumped a large volume records designed to create confusion and uncertainty. I agree that it would have been preferable if the respondent had provided something similar to a Scott schedule with evidence of the values of the various properties alleged to be family property. However, I do not agree that this is always required to show a defence worthy of investigation.

- [72] I accept that the respondent has provided sufficient evidence that he did not own a farm in Iran, that his interest in the home in Iran is a contingent interest, that 19646 Joyner Place was purchased after the parties separated, and that the majority of the funds on deposit with the City of Coquitlam were used to pay for expenses relating to the development of Pipeline Road.
- [73] However, I have difficulties with the respondent's evidence concerning the alleged sale of his admitted interest in the Mansour Shopping Centre.
- [74] The claimant submits that the sale of the respondent's interest in the shopping centre is suspect in that the transfer occurred one month before the parties separated and there is no evidence of either the value of the respondent's interest in the shopping centre or the value of the debts allegedly owed to the sister. I agree that the date of the bill of sale raises suspicions and further agree that the respondent has failed to provide any evidence of the value of his interest in the shopping centre or the value of the debts allegedly owed to the sister.
- [75] I further find the alleged sale of the respondent's interest in the Mansour Shopping Centre to his sister to be suspicious in that, although the respondent deposed the transfer was to satisfy debts owed to his sister, in fact, the bill of sale states that the sale was a cash transaction in the amount of IRR 100 Billion. The respondent has wholly failed to explain this discrepancy. Moreover, if he did receive IRR 100 Billion in the transaction, he should have explained what he did with that money.
- [76] Regrettably, I was not provided with the Canadian dollar equivalency of IRR 100 Billion. However, I take judicial notice that at current exchange rates, this amount is equivalent to approximately CDN\$3.2 million. This is a substantial amount of money. In the circumstances, the respondent should have provided a much more fulsome explanation of the transaction. In particular, it seems highly unlikely, if not impossible, that he could have owed debts in this amount to his sister.
- [77] Notwithstanding the suspicious circumstances surrounding the transfer of the respondent's interest in the Mansour Shopping Centre to his sister, I am satisfied that there is, at least, a defence to the property division order that is worthy of investigation.

Any other Circumstances?

- [78] The respondent additionally submits that a factor I should take into account is that the amended notice of civil claim was not properly served on the respondent.
- [79] It will be recalled that the amended notice of civil claim was provided to Mr. Pippard under cover of a letter dated June 15, 2021, wherein he was requested to confirm that he had been retained by the respondent. Mr. Pippard responded on August 30, 2021, advising that he had not been retained. Notwithstanding this advice, the claimant took no other steps to serve the respondent with the amended notice of civil claim.

- [80] It is clear that the amended notice of civil claim was not properly served on the respondent as is required by the Rule 8-1(4) of the SCFR. However, as I have indicated, the amendments to the notice of family claim were minor in that they merely addressed the fact that Pipeline Road had been subdivided into multiple lots. In the circumstances, I do not consider that the failure to properly serve the respondent is a factor of any importance in the determination of what is interests of justice.

Interests of Justice

- [81] As indicated, I am satisfied that the respondent's failure to attend trial was wilful and deliberate and, although there are suspicious circumstances surrounding the transfer of the respondent's interest in the Mansour Shopping Centre to his sister, I am also satisfied that there is a defence worthy of investigation. I must now weigh the various factors and circumstances to determine whether it is in the interests of justice that the property division aspects of my Final Order be set aside.
- [82] The respondent says that the property aspects of my Final Order should be set aside because, given that there is a defence worthy of investigation, it would be a miscarriage of justice to do otherwise. The respondent refers me to *Aquiline Resources Inc. et al. v. Wilson et al.*, 2005 BCSC 1461 [Aquiline], for a definition of "miscarriage of justice". In *Aqualine*, at para. 12, in the context of an application for reconsideration of an order, Justice N. Smith wrote:
- [12] It is clear from *Cheema* and the cases cited there that British Columbia law does not limit re-opening to cases where the court has been deliberately misled. However, it is equally clear from the authorities that "miscarriage of justice" means something far beyond the possibility that a different result might have been reached. Rather, it means 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. [Emphasis added.]
- [83] I agree that "interests of justice" means more than a different result might have been reached. I further agree that a result regarded as shocking or unconscionable by a reasonable person is not a result that could be considered in the interests of justice. However, in my view, the term "interests of justice" should not be confined to a narrow meaning such that it takes into account only the result as between the parties. It is a very broad and flexible term. It encompasses not only the result from the perspective of the parties but also involves broader considerations including misuse and abuse of the court's processes and procedures.
- [84] It may be that the claimant received a greater share of the family property than she was entitled to in the Final Order. This does not by itself compel the setting aside of the order on the grounds that it is not in the interests of justice. Similarly, that the respondent wilfully and deliberately failed to attend the trial, does not by itself compel a dismissal of the application to set aside the order.

- [85] However, in my view, the respondent's conduct throughout this matter has been such that it is not in the interests of justice to set aside any part of the Final Order.
- [86] As I have indicated, the respondent has, for the most part, refused to participate in the proceedings. He failed to file a response to the notice of family claim, despite being asked to do so on several occasions. He failed to provide a list of documents as required by the SCFR. He failed to provide the documents upon which he intended to rely at trial, as directed at the trial management conference held on September 7, 2023. He failed to provide a financial statement as required by the SCFR and as directed at the trial management conference held on September 7, 2023. He ignored all advice to obtain legal counsel. He booked a trip to Iran knowing he would be away for the scheduled trial. Finally, despite receiving the trial certificate on September 25, 2023, which clearly notified him the trial would proceed, he made no effort to return from Iran to attend the trial.
- [87] The respondent also failed to produce the multiple categories of documents he was ordered to produce on September 5, 2023. He produced only four documents saying the rest were "N/A", by which I presume he meant the other documents were "not available". It is noteworthy, however, that the respondent has attached many of the documents that were ordered to be produced to his affidavit made on February 15, 2024, including, for both the respondent and his company, banking records, credit card statements, tax returns, and corporate financial statements. These documents were clearly available to the respondent and could have been produced as ordered. That they were not produced as ordered shows the respondent deliberately and intentionally failed to comply with the order made on September 5, 2023.
- [88] The respondent's repeated failures to participate might be excused if he truly did not understand what was occurring or otherwise was unable to fully and properly participate. However, that is not the case. He both understood what was occurring and had the knowledge, sophistication and resources to participate. He simply chose not to do so where he perceived it was not to his advantage. In contrast, where it was to his advantage he did participate. For example, he contacted claimant's counsel in relation to the removal of CPLs on the Pipeline Road lots that were to be sold. He also retained legal counsel to arrange for the removal of the CPLs, indicating that he knows the importance of obtaining legal advice and retaining legal counsel. Further, he clearly had the financial resources required to obtain legal counsel. He received \$631,000 from the sale of lots 1 and 2 in December 2022 or early January 2023. He could have used a portion of those funds to retain counsel in this matter, if he so chose.
- [89] I also note that when the respondent was told his compliance with the production order made on September 5, 2023, was incomplete, he replied that he would be out of the country for an indeterminate period of time and wrote "Play with yourself lots till then. I will call you when I return". Further, when served with the certificate of trial. He replied "I am out of country now, Do not disturb me again." These replies indicate an arrogant contempt for this entire proceeding.

- [90] The respondent's repeated failures to comply with the SCFR and court orders was deliberate and intentional. It was designed and intended to frustrate the claimant's efforts to obtain justice and to forestall this court in the administration of justice. To now set aside the Final Order would be to reward or condone such behaviour.
- [91] In the circumstances, any reasonable person would regard the setting aside of any part of the Final Order as shocking and unconscionable.
- [92] Accordingly, it is not in the interests of justice that any part of the Final Order be set aside.

Stay of Execution

- [93] I note that the respondent also requested a stay of execution of the Final Order in his notice of application. The parties made no submissions on this aspect of the application and I will therefore not address it.

Order

- [94] The application is dismissed.
- [95] The parties may speak to me regarding the issue costs, if they cannot otherwise agree.

"Giaschi J."

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