
CANADA / JUDGMENT

Shang v. Dhuu

2020 BCSC 1568

COURT

Supreme Court of British Columbia

DECIDED

23 October 2020

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2020 BCSC 1568 Shang v. Dhuu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shang v. Dhuu,

2020 BCSC 1568

Date: 20201023

Docket: S1811457

Registry: Vancouver

Between:

Ying Shang

Plaintiff

And

Melissa Dhuu

Defendant

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

Counsel for Plaintiff:

W. Zhang

(by telephone)

Counsel for Defendant:

Hao Han

(by telephone)

Place and Date of Hearing:

Vancouver, B.C.

August 10 and 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2020

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OVERVIEW

- [1] This claim arises from a promissory note signed by the parties on November 23, 2016 (the "Promissory Note"). The defendant, Melissa Dhuu, applies to set aside the December 30, 2019 default judgment obtained by the plaintiff, Ying Shang, pursuant to the Promissory Note in the amount of \$207,808.88 (the "Default Judgment") and for leave to file a response to civil claim in this action within 21 days.
- [2] The defendant says the Default Judgment ought to be set aside because:
- a) She was not properly served with the notice of civil claim (the "Claim");
 - b) She did not willfully or deliberately fail to file a response to the Claim;
 - c) She did not delay in bringing an application to set aside the Default Judgment or, alternatively, she has provided a reasonable explanation for her delay; and
 - d) She has the following defences to the Claim:
 - i. She signed the Promissory Note under duress;
 - ii. Neither she nor her agent received any funds pursuant to the Promissory Note from the plaintiff or, alternatively, the funds were wired in Chinese and not Canadian currency, contrary to the terms of the Promissory Note; and
 - iii. She has a set-off defence against the plaintiff for the payment of a real estate commission.
- [3] The plaintiff opposes this application and argues that the defendant has not established the factors relevant to setting aside a default judgment because:
- a) She was personally served with the Claim;
 - b) She willfully or deliberately failed to file a response to the Claim;
 - c) She delayed in bringing an application to set aside the Default Judgment and has provided no reasonable explanation for her delay; and
 - d) She has no defence with merit or one worthy of investigation.
- [4] The plaintiff says the defendant made no attempts, despite being notified of the various steps taken against her in these proceedings, to contact plaintiff's counsel, respond to the Claim, or challenge the Default Judgment until June 2020, after the plaintiff brought a show cause application pursuant to s. 92 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78.

THE PROMISSORY NOTE

- [5] The essential terms of the Promissory Note are as follows:

- a) The defendant, the "Borrower", promised to pay to the plaintiff, the "Lender", the sum of \$200,000 in "Canadian Dollars" (the "Principal"), together with 2% interest per annum, compounded monthly;
 - b) Within 24 hours of receipt of the "fully-signed" Promissory Note, the Lender would make the Principal available to the Borrower by wire transfer to the bank account specified by the defendant in the Promissory Note and held by the Borrower's authorised agent, Dongping Shengfeng Trade Co. Ltd. ("Dongping"); and
 - c) The defendant was required to repay the Principal, with accrued interest, on or before May 23, 2017.
- [6] Intermediary, Hong Zhao, facilitated the parties' execution of the Promissory Note. Mr. Zhao is the plaintiff's friend; the defendant is a realtor with whom he has invested. Mr. Zhao deposes as follows:
- a) He informed the plaintiff in November 2016 that the defendant was in urgent need of funds for investment purposes;
 - b) He was director of Beijing Wansha Decoration Design and Engineering Company Ltd. ("Wansha"), a Chinese company;
 - c) He directed Wansha to loan the defendant \$1,064,000 RMB (approximately \$200,000 CDN) on behalf of the plaintiff, a debt he secured with the plaintiff's personal guarantee;
 - d) He asked the defendant to provide him with bank account particulars for deposit of the Principal; he says she did so by text message dated November 12, 2016, and that this information is the same as that referenced in the Promissory Note; and
 - e) He notified the defendant once the Principal had been wired.

Mr. Zhao's affidavit appends as exhibits copies of what he says are WeChat messages he exchanged with the defendant, a wire transfer, and the defendant's acknowledgement of receipt of the Principal.

- [7] The plaintiff deposes that, after speaking to Mr. Zhao, she agreed to provide the defendant with a short-term \$200,000 bridge loan. According to the plaintiff, she borrowed money from Wansha because she did not have the entire Principal in immediately available funds. She says Wansha agreed to loan the Principal to the defendant on her behalf provided she guaranteed repayment, and that she has since repaid Wansha the \$200,000. She attached copies of Chinese wire transfers to Wansha to her affidavit to support that statement.
- [8] The plaintiff deposes that, on or about November 25, 2016, Wansha deposited the Principal into the bank account designated by the defendant. The plaintiff says she demanded repayment of the Principal in May 2017, and that the defendant failed to repay the Principal and is now in default of her obligations pursuant to the Promissory Note.

EVENTS FOLLOWING ALLEGED DEFAULT

- [9] On October 24, 2018, the plaintiff filed the Claim, alleging that the defendant used the Principal to maintain her West Vancouver home (the "Property") and to make mortgage payments on the Property.
- [10] On September 26, 2019, the plaintiff filed a certificate of pending litigation on title to the Property (the "CPL").
- [11] On October 17, 2019, the plaintiff says a process server personally served the defendant with the Claim.
- [12] The defendant did not file a response to civil claim. On December 30, 2019, the plaintiff obtained the Default Judgment.
- [13] On February 28, 2020, the plaintiff filed the Default Judgment on title to the Property.
- [14] On March 13, 2020, the plaintiff obtained a post-judgment garnishing order to garnish the defendant's CIBC bank account; it was served on CIBC on or about March 16, 2020.
- [15] On or about March 31, 2020, the defendant received an Xpresspost envelope containing a mailed copy of the Certificate of Judgment filed against the Property.
- [16] On April 1, 2020, CIBC paid \$271.18 into court pursuant to the garnishing order.
- [17] On or about April 7, 2020, the defendant consulted a lawyer to investigate the Certificate of Judgment; her lawyer located two affidavits of personal service and the Default Judgment after searching BC Court Services Online. The defendant admits she became aware of the Default Judgment in April 2020.
- [18] On June 8, 2020, the plaintiff served the defendant with a notice of application for a show cause hearing seeking sale of the Property to satisfy the Default Judgment. Because the Court's regular operations were then suspended due to Covid-19, the show cause hearing was scheduled to proceed by written submissions.
- [19] On June 9, 2020, the defendant sent an email to plaintiff's counsel, acknowledging her receipt on June 8, 2020 of a "letter and a file", and requesting an extension of the "repayment date" for another year at an annual interest rate of 3.5% commencing June 15, 2020. In her email, the defendant referenced "health issues" in the "past few years" that had caused her some financial hardship. She raised none of the defences she now alleges in response to the Claim.
- [20] Mr. Zhao deposes that the defendant acknowledged her indebtedness to the plaintiff on several occasions in June 2020. Appended to his affidavit are copies of WeChat messages (translated from Chinese into English) that Mr. Zhao says he exchanged with the defendant.

[21] On June 22, 2020, the defendant filed a response to the plaintiff's show cause application. On June 23, 2020, Justice Edelmann determined that the show cause hearing was not suited to the Court's Covid-19 procedure for applications by written submissions. He neither heard nor dismissed the application on its merits.

[22] On July 13, 2020, almost nine months after the plaintiff says the Claim was personally served, the defendant filed this application to set aside the Default Judgment.

THE ISSUES

[23] The following issues arise on this application:

- i. Did the plaintiff personally serve the defendant with the Claim?
- ii. Did the defendant wilfully or deliberately fail to file a response to the Claim?
- iii. Did the defendant delay in moving to set aside the Default Judgment and, if so, has she provided a reasonable explanation for her delay?
- iv. Does the defendant have a meritorious defence to the Claim or one worthy of investigation?
- v. Do the interests of justice warrant setting aside the Default Judgment?

LEGAL FRAMEWORK

Was the defendant personally served with the Claim?

[24] Rule 4-3 of the Supreme Court Civil Rules requires that a notice of civil claim be personally served. A plaintiff who wishes to obtain default judgment must file proof that the notice of civil claim was served on the defendant: Rule 3-8(2)(a).

[25] Rule 3-8(11) permits a court to set aside a default judgment. Default judgment is an extraordinary remedy. Proof of service is mandatory; otherwise, the default judgment will be set aside: *Wang v. Liu*, 2019 BCSC 1983 at para. 13. If the court is satisfied that a claim has not been served personally, the default judgment is a nullity and may be set aside as of right: *R & J Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59; *Fraser Valley Disposal Ltd. v. Cho*, 2016 BCSC 1923 at paras. 9-12.

[26] The plaintiff filed two affidavits of personal service by Dye & Durham process server, Onkar Cheema, sworn November 12, 2019 and November 20, 2019. Mr. Cheema deposes that he personally served the defendant with the Claim on October 17, 2019.

[27] Nathania Ng, a lawyer at the plaintiff's law firm, explains in her Affidavit #6, why two affidavits of personal service were filed in this case:

- a) On October 18, 2019, she learned that the Claim had been served on the defendant. Thereafter, plaintiff's counsel requested an affidavit of personal service from the process server;

- b) On or about November 22, 2019, Ms. Ng learned that an affidavit of service had been prepared; she requested a copy of it; and
- c) Instead of providing his first affidavit of service (sworn November 12, 2019 and filed November 13, 2019), the process server provided a second identical affidavit of service (sworn and filed November 20, 2019).

[28] The plaintiff says the Claim was properly served on the defendant and that Dye & Durham was given a link to the defendant's Top Vision Realty Inc. profile picture. She argues the defendant's bald assertion that she was not personally served is not credible and ought to be rejected. She relies on Mr. Cheema's two affidavits of service which indicate:

- a) He handed the Claim to the defendant personally; and
- b) The defendant positively identified herself to him.

[29] The defendant deposes as follows:

- a) In or about November 2019, she found a sealed envelope bearing her name on the welcome mat outside the front door of the Property, mixed with newspapers, leaflets, and flyers (the "Envelope");
- b) She "was under the impression" the Envelope might contain advertising brochures and accordingly did not open it; she denies meeting the person who left the Envelope outside her front door; and
- c) In about April 2020, after learning of the Default Judgment, she "sought out" the Envelope, opened it, and discovered the Claim.

[30] The defendant alleges that service of the Claim occurred under the following "suspicious circumstances":

- a) The Claim was filed on October 24, 2018, but not served until October 2019, almost one year later;
- b) Two affidavits of personal service (identical except for their dates) were obtained; and
- c) The first affidavit of service was sworn almost one month after service of the Claim.

[31] The defendant argues that the process server's affidavits of service are defective because they fail to:

- a) Exhibit a copy of the Claim, citing Wang, at paras. 16 and 36; or
- b) Articulate how he identified the defendant when he served the Claim, something the defendant describes as a "fatal flaw", citing Fraser Valley, at para. 3.

- [32] Finally, the defendant argues that where, as here, there are conflicting affidavits regarding service, her evidence (which she says is more specific than that of the process server) ought to be preferred: *Fraser Valley*, at paras. 5 and 6.
- [33] I find nothing suspicious about the plaintiff's decision to effect service of the Claim close to the end of the one-year deadline provided for in the Rules. I also find nothing suspicious about the fact the first affidavit of service was sworn about one month after service of the Claim, or that the plaintiff obtained two virtually identical affidavits of service. Plaintiff's counsel requested the first affidavit of service when it became apparent one was required. The plaintiff provided a complete explanation for the administrative error that inadvertently resulted in two affidavits of service being prepared. That evidence suggests nothing nefarious.
- [34] I find the Wang decision relied on by the defendant to be distinguishable on its facts. In that case, Master Elwood found service to be defective because:
- a) Reference in the process server's affidavit of service to the date the claim was filed was wrong; accordingly, the court could not determine with certainty what document was served (paras. 15-16); and
 - b) The supplementary affidavit, obtained to correct this mistake, was sworn by the process server's supervisor and was, therefore, inadmissible hearsay evidence (para. 23).
- [35] By contrast, the process server's affidavits in this case:
- a) Reference the Claim between the named parties;
 - b) Correctly identify the Claim as bearing a court date stamp of October 24, 2018;
 - c) Append as an exhibit plaintiff's counsel's service letter dated October 15, 2019;
 - d) Provide a time of service; and
 - e) Confirm he handed the service letter and the Claim to the defendant who identified herself.
- [36] I also find *Fraser Valley* to be distinguishable on its facts. In that case, Justice Kent found the process server's affidavit of service to be deficient because it did not specify how he identified the person being served; the defendant denied being home and produced documents to substantiate his whereabouts at the time of the alleged personal service. Those facts are not comparable to the case before me. The defendant does not account for her whereabouts on the day of service. She says she "felt confused" when she learned of the Default Judgment because she did not recall having been personally served with the Claim; that statement is not a categorical denial that she was served. In his submissions, Mr. Han admitted that the address in the process server's affidavits is the defendant's home; he suggested someone there might have impersonated the defendant on the day of service. That suggestion is wholly speculative and not corroborated by any credible evidence.

- [37] In considering the evidence regarding service of the Claim, I find the comments of Justice Gropper in *Poon v. Chen*, 2016 BCSC 2183 to be instructive:
- [9] The first question is whether Mr. Chen did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiffs' claim. I have evidence that is diametrically opposed. I have the affidavit of personal service that was provided by the process server and I have Mr. Chen's absolute denial that he was served.
- [10] I do not accept Mr. Chen's evidence. I find that it is self-serving. The process server provided an affidavit swearing to the fact that the notices of civil claim were served on Mr. Chen personally, and that Mr. Chen admitted to being the person to be served with the actions.
- [38] I do not agree that the defendant's account regarding service of the Claim is more specific than the information set out in the process server's sworn affidavits; in fact, I reach the opposite conclusion. I accept the sworn affidavit evidence of process server, Mr. Cheema, and find that he personally served the defendant with the Claim on October 17, 2019.

Has the defendant established the factors relevant to setting aside the default judgment?

- [39] It is common ground that the factors relevant to a court's exercise of discretion in setting aside a default judgment are summarised in the frequently cited decision of *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) as follows:
- a) Was the failure to enter an appearance or file a defence wilful or deliberate?
 - b) Was the application to set aside the default judgment made as soon as reasonably possible upon learning of it, or has an explanation for the delay been given?
 - c) Is there a meritorious defence, or a defence worthy of investigation?
 - d) Has the defendant established these factors to the satisfaction of the court on filed affidavit evidence?
- [40] The defendant says she has established all these factors; the plaintiff disagrees. I consider each in turn.

Was the failure to file a response to civil claim wilful or deliberate?

- [41] The defendant denies her failure to file a response to civil claim was wilful or deliberate. She suggests that any negligence on her part for ignoring the Claim is not blameworthy, citing *Summit Leasing Corporation v. Westshore Towing Ltd.*, 2019 BCSC 1058. In that case, Justice Marzari, at para. 15, found the words "wilful" or "deliberate" in *Miracle Feeds* do not mean "unreasonable" or "negligent" but refer instead to blameworthiness. The failure to respond to an action must be wilful; negligence alone is insufficient.
- [42] The plaintiff says that, despite knowing about the Claim by late September 2019 (when the plaintiff filed the CPL against the Property), the defendant failed to file a response to the Claim after she was served on October 17, 2019.

[43] The plaintiff distinguishes Summit Leasing on its facts. In that case, the defendant had always intended to defend the claim and relied on ICBC to file a defence. In that context, Marzari J. found the defendant's failure to file a defence was not blameworthy. By contrast, the plaintiff here argues that the defendant chose not to respond to the Claim because she knew it was indefensible and did not wish to incur legal expenses. In making that argument, she relies on the defendant's June 8 to 11, 2020 WeChat exchanges with Mr. Zhao, translated into English and in evidence on this application, variously stating, in part, as follows:

- a) "I received a letter from the court, I would like you to be lenient and give me some time. I have been ill for the past three years and haven't really worked";
- b) "Could you ask Ying for more time, I can pay her more interest from now on, please! The house can't sell now, or it'll be undersold, wait until the market gets a bit better";
- c) "It seems like Ying authorized an attorney, and the attorney applied to have the court auction off the house, not sure if my understanding is correct. I don't want to hire a lawyer for this issue, lawyers all want to make a big mess, and have to pay them out";
- d) "Please help! Please tell her [following a reference to "Ying"], I can repay this money for sure, give me some time, please";
- e) "We settle this, then I don't have to find a lawyer, and save spending that money, and complicating things, right!";
- f) "I want to know if the lawyer has contacted Ying, the lawyer can't reply without Ying's consent, I am afraid that the lawyer would complicate things, so I have to reach an agreement with her the week prior to the hearing on the 23rd!" [the original date for the show cause hearing in these proceedings];
- g) "I won't be a disgrace just for 200k";
- h) "If we can't reach an agreement before the 23rd, the court will auction the house, and I will be pushed to despair, believe me I have the ability to repay"; and
- i) "I need to spend at least a thousand dollars if I go find a lawyer today".

[44] The plaintiff argues it is reasonable to infer from these exchanges that the defendant deliberately failed to file a response to the Claim. She says that, unlike Summit Leasing, there is no evidence that the defendant intended to defend the Claim, noting that when she contacted plaintiff's counsel by email on June 9, 2020, she did not dispute liability and sought only an extension of the repayment deadline. Specifically, the defendant wrote as follows:

"I received letter and a file from you yesterday and I would like to extend the repayment date for another year at annual interest rate 3.5% starting June 15th, 2020.

I have been encountering health issue in the past few years while not be able to work efficiently so as to cause my financial in hardship. I would very much appreciate if you could get in touch with Ms. Shang regarding my request!

Please give me a year to get this solved!"

[45] The plaintiff argues that the following evidence also undermines the defendant's position:

- a) On October 13, 2019, shortly after receiving a copy of the CPL, the defendant contacted Mr. Zhao;
- b) The defendant retained a lawyer after receiving the Certificate of Judgment in April 2020; and
- c) Despite doing so, the defendant maintains she did not bring an application to set aside the Default Judgment because she was "confused".

[46] In *Tiamzon v. Vandt*, 2020 BCSC 587 at para. 21, Justice Sharma considered when it is appropriate for a court to infer that a party has wilfully or deliberately failed to file a defence, stating as follows:

When a defendant decides not to defend an action or chooses to simply ignore it, the court will generally infer that the party wilfully and deliberately failed to enter an appearance or file a defence. However, if there is evidence of steps taken during the time limit for filing a statement of defence, which are inconsistent with the inference that the party was simply ignoring their obligation, then the court need not draw such an inference: *Daum v. Elko*, 2009 BCSC 349 at para. 6.

I adopt that reasoning here.

[47] Although the defendant deposes that she assumed the Envelope contained junk mail and, therefore, did not open it, for reasons that are unclear, she kept it. She does not explain why, after receiving the Certificate of Judgment on or about March 31, 2020, more than five months after the process server says he effected personal service in October 2019, she thought to search for the Envelope and was able to find it. That evidence strongly suggests the defendant received the Claim, appreciated its significance, and kept it in a place where she could later retrieve it. On all the evidence, I conclude that the defendant decided to ignore the Claim and not to respond to it.

[48] The plaintiff relies on *British Columbia (Director of Civil Forfeiture) v. Doe*, 2010 BCSC 1784 at para. 44, where Justice Silverman found that the "failure to satisfy this [first] prong of the Miracle Feeds test is, in itself, fatal to the application to set aside the default judgment and a sufficient ground to dismiss the application", citing *Canadian Imperial Bank of Commerce v. Darmantchev*, 2010 BCCA 247.

[49] However, in the later decision of *Andrews v. Clay*, 2018 BCCA 50 at para. 29, Justice Hunter held that the Miracle Feeds factors are not "tests" and, while in most cases they will be the appropriate indicators of whether it is the interests of justice to set aside a default judgment, they are not intended to be either mandatory or exhaustive considerations. Justice Hunter's position is consistent with the Court of Appeal's cautionary statement in *Nichol v. Nichol*, 2015 BCCA 278 at para. 37, that the Miracle Feeds factors are neither immutable nor intended to be applied inflexibly.

[50] Accordingly, I have considered the other factors identified in *Miracle Feeds*.

Did the defendant move promptly to set aside the Default Judgment or, alternatively, has she provided a reasonable explanation for her delay?

[51] The defendant offers three explanations for her delay.

i. Alleged Medical Disabilities

[52] The defendant relies on a letter dated June 20, 2020 from her physician, Dr. Dorian Morris. In this letter, Dr. Morris states:

- a) Apparently, [the defendant] "has some problem with the court";
- b) "At her lawyer's suggestion", the defendant requested a letter "regarding her recent health concerns";
- c) "In retrospect", Dr. Morris "suspect[s]" the defendant developed a major depression about five years ago; she did not seek medical help, her condition worsened, and she stopped work in the summer 2019;
- d) This depression affected the defendant's ability to "cope with the activities of daily living and her personal affairs";
- e) Dr. Morris treated the defendant for a GI problem in September 2019, at which time the defendant said nothing about "her ongoing depression";
- f) Although Dr. Morris suspected the defendant was having emotional issues in 2019, she did not treat the defendant for those problems as the defendant did not complain about them to her; and
- g) Dr. Morris has told the defendant that he will refer her to a psychiatrist "soon".

[53] The plaintiff argues that a physician's letter is admissible in affidavit form on an interlocutory application only when the deponent's expertise and the basis for the opinions offered are set out in the affidavit. She says the letter from Dr. Morris:

- a) Is inadmissible hearsay as it is appended to the defendant's affidavit;
- b) Does not set out the doctor's qualifications or the basis for the opinions;

- c) Is based on the defendant's own self-report;
- d) Does not offer a diagnosis; and
- e) Confirms that the defendant did not seek help from Dr. Morris for any mental health issues.

[54] The letter from Dr. Morris was not served as an expert report pursuant to the Rules. It does not state Dr. Morris' professional qualifications, the factual foundation for his opinions, or any documents he reviewed. He includes no expert certification in his report and offers no medical diagnosis. Dr. Morris admits that he has not been involved in treating the defendant for any mental health problems. On its face, it appears that Dr. Morris' letter simply reproduces information reported to him by the defendant. For these reasons, I conclude the letter from Dr. Morris is not admissible as expert opinion evidence and is of limited assistance on this application.

[55] Even if the defendant was experiencing physical or mental health problems in 2019, it is unclear on the evidence why she could not have retained a lawyer to respond to the Claim on her behalf. The defendant was able to do so in April 2020. Ultimately, I am not satisfied on all the evidence that the defendant's alleged medical difficulties precluded a timely response to the Claim.

ii. Alleged Lack of Sophistication

[56] The defendant describes herself as an unsophisticated party with no litigation experience, a factor she says weighs in her favour on this application, citing *Harding v. Skidegate First Nation*, 2013 BCSC 1191 at para. 28. By contrast, the plaintiff argues that the defendant, a realtor and businessperson, was fully aware of these proceedings and chose to ignore them until confronted with the possible sale of the Property.

[57] I am not persuaded that the defendant, a real estate agent with investment experience, is an unsophisticated party or that her alleged lack of litigation experience explains her delay in moving to set aside the Default Judgment.

iii. Covid-19

[58] Finally, the defendant argues that, because the Court suspended its regular operations in March 2020 due to the Covid-19 pandemic, she was unable to move promptly to set aside the Default Judgment. She says she did not learn about the Default Judgment until March 31, 2020, and that she gave notice of her intention to apply to set it aside in June 2020, when she responded to the plaintiff's enforcement application to sell the Property.

- [59] The defendant deposes that she experienced "severe hardship" hiring a lawyer and taking steps to move promptly to set aside the Default Judgment due to the current pandemic. She admits she sought legal advice and retained counsel on or about April 7, 2020. It is unclear why that lawyer took no steps on her behalf to set aside the Default Judgment. The defendant retained her current lawyer on June 15, 2020; it is unclear why he did not file this application until July 13, 2020.
- [60] The plaintiff argues that the defendant deliberately and wilfully ignored these proceedings until she received notice of the show cause hearing brought to sell the Property. She relies on *James v. Male*, 2011 BCCA 81 at paras. 14 - 15, where the Court of Appeal upheld a decision dismissing the defendant's application to set aside a default judgment based on his delay in responding to the claim. In that case, the delay extended from April 23 to June 11 (or 49 days). In the case before me, the defendant delayed from October 17, 2019 (the date I have found she was personally served with the Claim) to July 13, 2020 (or 269 days).
- [61] It is unclear on the evidence why the defendant did not approach plaintiff's counsel earlier to explain her alleged difficulties, to challenge the Default Judgment, or to communicate her intention to apply to set it aside. There were procedures in place permitting litigants to make requests for urgent hearings by email after the Court shutdown in March 2020 and before the Court resumed its operations on June 8, 2020.
- [62] In the circumstances and on all the evidence, I am not satisfied that the plaintiff moved promptly to set aside the Default Judgment or that she has provided a reasonable explanation for her delay.

Is there a meritorious defence or one worthy of investigation?

- [63] The burden is on the defendant to present evidence to suggest that, if there were to be a trial, the plaintiff might not succeed: *BC Director of Civil Forfeiture*, at para. 18. Such a defence must have a degree of plausibility: *Hawkins v. Fernie One Outfitters Ltd.*, 2012 BCSC 84 at para. 25.
- [64] The defendant concedes the authorities establish that a defence "worthy of investigation" requires more than bare assertions, allegations, or mere denials: *Summit Leasing* at para. 40; *Hawkins*, at paras. 22 and 25. She says she has at least three meritorious defences to this claim or, alternatively, defences that are worthy of investigation.
- [65] The plaintiff describes the defendant's alleged defences as bald assertions that are wholly lacking in merit and inconsistent with the contemporaneous documentary evidence. She accuses the defendant of a "flagrant disregard for the truth" in her affidavit evidence, and says her allegations of fraud, conspiracy to defraud, and international money laundering are unsupported by any credible evidence. The defendant makes comparable allegations against the plaintiff, accusing her of lying to the Court. Neither party sought an order permitting cross-examinations on the filed affidavits.

i. Duress

- [66] The defendant argues that duress renders the Promissory Note voidable, citing *Dairy Queen Canada, Inc. v. M.Y. Sundae Inc.*, 2017 BCCA 442 at paras. 48-49.
- [67] She offers a convoluted explanation for why she allegedly signed the Promissory Note under duress. Specifically, she deposes that Mr. Zhao, her former romantic partner, borrowed \$257,000 from her (the "Loan"). She attaches a bank draft, debiting \$135,000 from her account, payable to Royal LePage Northshore, to her Affidavit #2 to support this assertion. However, Mr. Zhao's name does not appear on it; the bank draft is for \$135,000 and not \$257,000. The defendant says Mr. Zhao agreed to repay the Loan only if she signed the Promissory Note, failing which she alleges he threatened to "disappear" or "return to China" and the Loan would never be repaid. According to the defendant, Mr. Zhao assured her that execution of the Promissory Note was "just a formality" and he "would not use it against [her]". The defendant asserts she had "no choice" but to sign the Promissory Note and that she "did not adequately understand the nature or consequences of the Promissory Note" due to "duress" and "mental disabilities".
- [68] The defendant says she obtained no independent legal advice before signing the Promissory Note. However, there is no evidence that she was precluded from doing so.
- [69] The plaintiff argues the contemporaneous documentation in evidence does not support duress. She notes that, despite making serious allegations against Mr. Zhao (who is not a party to this action), the defendant has taken no steps to add him as a third party or to commence an independent claim against him.
- [70] In his responding affidavit, Mr. Zhao expressly denies:
- a) Being indebted to the defendant;
 - b) Pressuring the defendant "in any manner" to borrow funds from the plaintiff or to sign the Promissory Note;
 - c) Threatening the defendant in any manner (noting that he resides in Canada and spends most of his time here); or
 - d) Assuring the defendant that the Promissory Note was a mere "formality".
- [71] Mr. Zhao admits he advanced the equivalent of \$200,000 in Canadian dollars to the defendant in or about March 2015 for her use as follows:
- a) \$135,000 to close his purchase of a Vancouver property for his son, to be forwarded by the defendant to Royal LePage on his behalf; and
 - b) \$65,000 for the defendant's own property purchase.

[72] The plaintiff also relies on the affidavit evidence of Dorothee Xing who drafted the Promissory Note at Mr. Zhao's request and met with the defendant to witness her signature on it. Ms. Xing deposes that the defendant met with her alone, reviewed the Promissory Note before signing it, appeared to understand its contents, and was neither confused nor in an altered mental state when she signed it.

ii. No Funds Advanced by Plaintiff/No Payment in Canadian Funds

[73] The defendant says the Promissory Note clearly defines the Principal sum in Canadian currency. She argues that the plaintiff breached the terms of the Promissory Note by wiring the Principal in Chinese funds, and that Dongping acted outside the scope of its authority by receiving Chinese currency from third party, Wansha. The defendant denies she is bound by Dongping's receipt of wired Chinese funds and deposes that neither she nor Dongping received the Principal from the plaintiff. Notably, she does not expressly deny receiving the Principal from Wansha on the plaintiff's behalf.

[74] The defendant suggests Chinese currency is "not legal tender of payment of money in accordance with the Promissory Note", citing s. 13(1) of the Currency Act, R.S.C. 1985 c. C-52 which provides as follows:

13 (1) Every contract, sale, payment, bill, note, instrument and security for money and every transaction, dealing, matter and thing relating to money or involving the payment of or the liability to pay money shall be made, executed, entered into, done or carried out in the currency of Canada, unless it is made, executed, entered into, done or carried out in

- (a) the currency of a country other than Canada; or
- (b) a unit of account that is defined in terms of the currencies of two or more countries.

[75] The defendant notes that Wansha provided no evidence on this application. She suggests Mr. Zhao had sold his shares in Wansha and resigned as its director by 2013, and that the Principal might represent an investment by Mr. Zhao, in the name of the plaintiff as a "puppet lender".

ii. Set-Off

[76] Finally, the defendant alleges a set-off defence, deposing as follows:

- a) The plaintiff authorised Mr. Zhao to sign an agreement for the sale of her Vancouver home (the "Marine Drive Property");
- b) The defendant introduced a buyer to the plaintiff who entered into a sale contract and paid a deposit; and
- c) The plaintiff failed to complete this sale and subsequently paid the buyer \$100,000 in damages for breach of contract.

[77] Based on the terms of the February 29, 2016 listing agreement for the sale of the Marine Drive Property, the defendant argues she became entitled to real estate commission once the buyer and seller entered into a legally binding contract of sale. Accordingly, she alleges the plaintiff owes her \$143,325 in unpaid commission.

[78] The plaintiff denies owing any commission to the defendant and deposes as follows:

- a) The Marine Drive Property is the plaintiff's West Vancouver home;
- b) It was never sold and she still owns it;
- c) The defendant has filed no claim to recover any real estate commission allegedly owed by the plaintiff;
- d) Such a claim would now be statute-barred; and
- e) Affidavit #4 of the defendant, sworn July 28, 2020, is the first time the plaintiff learned of the defendant's allegation that she is owed commission.

[79] In assessing the defendant's alleged defences, I find it significant that she raised none of them between October 17, 2019 (when she was personally served with the Claim) and July 13, 2020 (when she brought this application to set aside the Default Judgment). Notably, she said nothing about having any defence to the Claim in her June 9, 2020 email to plaintiff's counsel. She specifically referenced "repayment", a statement I conclude is reasonably construed as an admission that she received the Principal. It is clear that the defendant's June 9, 2020 email was sent in response to the Claim, the Default Judgment, and the plaintiff's notice of application for a show cause hearing for sale of the Property.

Have the Miracle Feeds factors been met on affidavit evidence?

[80] The defendant says she has established the Miracle Feeds factors on affidavit evidence. The plaintiff disagrees, arguing the defendant's affidavits are vague, deficient, and unsupported by contemporaneous documentation, citing BC Director of Forfeiture, at para. 22. She notes that the defendant does not deny:

- a) Exchanging with Mr. Zhao the text messages attached to his affidavit; or
- b) Receiving an amount equal to \$200,000 CDN on or about November 24, 2016, pursuant to the Promissory Note.

[81] The burden is on the defendant to present evidence that suggests, if there were to be a trial, the plaintiff might not succeed. This requires sufficient detail to enable the judge to determine whether there is a defence and more than mere allegations: Andrews at paras. 44-45.

[82] The defendant objects to the plaintiff's use of hearsay evidence on this application, arguing that she has attempted to convert this application into a trial on the merits. In particular, the defendant objects to the plaintiff relying on texts, WeChat messages, and email

correspondence for the truth of their contents including, in particular, to prove the defendant's acknowledgment of her receipt of the Principal. The defendant argues that, if her application to set aside the Default Judgment is dismissed, the resulting order will be final and hearsay evidence is therefore inadmissible, citing *H.M.T.Q. In Right of The Province of British Columbia v. Ismail*, 2007 BCCA 55 at paras. 5 and 6. However, the defendant maintains it is open to her to introduce hearsay evidence to support setting aside the Default Judgment because such an order would be interlocutory.

[83] An application for default judgment is an application that seeks a final order: Wang, at para. 23. Accordingly, hearsay evidence would have been inadmissible on the plaintiff's application to obtain the Default Judgment. An affidavit may contain statements as to information and belief, provided the source of the information and belief is identified and the affidavit is made "in respect of an application that does not seek a final order": Rule 22-2(13). This is an application that seeks to set aside the Default Judgment and to have the action continue. Accordingly, I conclude it is not one that seeks a final order and that hearsay evidence is therefore admissible, provided the requirements of Rule 22-2(13) are met.

[84] However, in reaching my decision, I have not found it necessary to rely on the WeChat exchanges appended to Mr. Zhao's affidavit, or the defendant's June 9, 2020 email to plaintiff's counsel, for the truth of their contents. I have relied on the defendant's June 9, 2020 email as evidence of what she communicated to plaintiff's counsel that day. The defendant does not deny sending this email in any of her five affidavits filed on this application. I find it significant that the defendant sent this email the day after she was served with the plaintiff's notice of application for a show cause hearing to sell the Property, and that she proposed an extension of the "repayment" deadline. I also find this email to be notable for its omissions including, in particular, reference to any defence to the Claim.

Would it be just to set aside the Default Judgment?

[85] Finally, the defendant argues that this court ought to exercise its discretion to set aside the default judgment, citing Nichol, at para. 37. In that case, the court found the defendants' failure to address each of the factors set out in *Miracle Feeds* did not preclude them from succeeding on an application to set aside default judgment and that a defendant's failure to address a particular factor in *Miracle Feeds* is not necessarily fatal.

[86] The defendant says it is open to this Court to set aside the Default Judgment if, in all the circumstances, it would be just to do so, citing *McEvoy v. McEachnie*, 2008 BCSC 1273 at para. 14. She argues that it would be just to do so here because:

- a) She suffers from a medical disability;
- b) The Default Judgment potentially affects the rights of third parties not named in this action including Wansha, citing *Hightime Investment Property Ltd. v. Bromley*, 2008 BCSC 1353;

- c) She is exposed to substantial damages if the Default Judgment is not set aside and will likely lose the Property, citing Fraser Valley, at para. 8; and
- d) Enforcing the Default Judgment will place this Court at risk of being "used as a tool for fraud and as a conduit for international money laundering".

[87] The plaintiff takes the opposite view. She says the defendant makes serious unsubstantiated allegations, suggesting she might have colluded with her lawyer "to rig the sale process [for the Property] in this court". The meaning of, and basis for, that statement are unclear. The plaintiff says she is simply seeking to enforce the Default Judgment obtained after the defendant failed to respond to the Claim within the required time.

[88] I have addressed the plaintiff's alleged medical disability. I am not persuaded on the evidence that the rights of third parties are affected by the parties' execution of the Promissory Note. I conclude that the defendant's potential exposure to enforcement proceedings as a consequence of incurring a debt is not a relevant consideration in determining whether or not to set aside a default judgment. There is no credible evidentiary foundation for the defendant's statement that the Court is at risk of "being used as a tool for fraud or as a conduit for international money laundering" if the Default Judgment is enforced.

SUMMARY

[89] On all the evidence, having regard to the Miracle Feeds factors, the relevant authorities, the parties' submissions, and the interests of justice, I exercise my discretion against setting aside the Default Judgment.

[90] The defendant's application is dismissed with costs to the plaintiff on Scale B.

"Douglas J."

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Prepared on 26 October 2026 · Esheria