
CANADA / JUDGMENT

Tiamzon v. Vandt

2020 BCSC 587

COURT

Supreme Court of British Columbia

DECIDED

17 April 2020

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

2020 BCSC 587 Tiamzon v. Vandt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tiamzon v. Vandt,

2020 BCSC 587

Date: 20200417

Docket: S121738

Registry: Vancouver

Between:

Edgardo Santos Tiamzon

Plaintiff

And

Nelita Aday Vandt

Defendant

Before: The Honourable Madam Justice Sharma

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:

J.W. Ryan

Counsel for the Defendant:

G.W.D. Abrams

Place and Date of Hearing:

Vancouver, B.C.

January 29, 2020

March 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 17, 2020

- [1] This judgment addresses two applications. One application is brought by the defendant, Nelita Vandt, and seeks an order setting aside a default judgment that was granted in favour of the plaintiff, Edgardo Tiamzon. The outcome of her application dictates the outcome of the other application brought by the plaintiff. In it, the plaintiff seeks an order that money paid into court to the credit of this action be paid out to him on the basis of the default judgment. If the defendant succeeds on her application, the second application will be moot since the default judgment will have been set aside. Alternatively, if the defendant is not successful in setting aside the default judgment, she does not oppose the plaintiff's application.

BACKGROUND

- [2] The parties have a relatively long history, the general aspects of which are not in dispute. The parties' relationship evolved from a business arrangement to a friendship and further to a romantic relationship.
- [3] The parties lived together in a romantic relationship for approximately five years, roughly between 2007 and 2012. The parties lived in the defendant's home, which she purchased shortly before they began living together. Despite the nature of their relationship, both parties appear to have kept track of money provided to the other, either in the form of direct loans, outstanding financial obligations or payments to third parties. One such financial obligation is at issue in these applications.
- [4] The defendant executed a promissory note dated November 22, 2010, payable to the plaintiff in the amount of \$114,000. The promissory note states it is "[p]ayable upon availability of the [funds] or sale of [the defendant's property]." The plaintiff's evidence is that the promissory note relates to loans he made to the defendant for various expenses.
- [5] The promissory note is internally inconsistent with regard to the amount owing. It lists a series of amounts that total \$113,600, but states elsewhere the amount owing is \$114,600. The defendant concedes nothing turns on this minor discrepancy and arithmetic error.

- [6] On March 7, 2012, the plaintiff filed a notice of civil claim, and registered a certificate of pending litigation against the property on March 8, 2012. The defendant was served with the notice of civil claim on May 6, 2012.
- [7] On January 9, 2014, a default judgment was entered against the defendant in the amount of \$114,000 together with interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79, in the amount of \$1,949.49 and costs in the amount of \$1,140.87.
- [8] The defendant filed an application to set aside the default judgment on February 6, 2014. This application did not proceed. It appears that following the filing of that application, the defendant agreed to a consent order to pay \$150,000 into court to the credit of this action, but there is no record that the consent order was entered.
- [9] On September 2, 2014, the defendant filed another application. This application sought to convert the action into a family law action, strike the portions of the notice of civil claim that referred to the promissory note and vary the amount she would consent to pay into court from \$150,000 to \$50,000. This application also did not proceed. Instead, the parties agreed to a new consent order, under which the defendant would pay \$114,000 into court to the credit of this action. This consent order was entered on October 10, 2014.
- [10] The parties agree that the consent order was made to facilitate the removal of the certificate of pending litigation so the defendant could complete the sale of her property. The defendant paid the money into court, the certificate of pending litigation was removed and the property was sold.
- [11] Both parties have changed lawyers during this course of this litigation, and for a time, the defendant was self-represented. On May 8, 2015, she filed a notice of intention to proceed. The plaintiff also filed at least one notice of intention to proceed on November 27, 2019. He also set his claim down for trial in late March 2020, which his counsel conceded was an error.
- [12] The plaintiff filed his application seeking payment out of court of the \$114,000 on January 15, 2020. The defendant filed a response to that application, along with her application to set aside the default judgment on January 17, 2020.

Summary of the Parties' Positions

- [13] The defendant submits the default judgment should be set aside for three reasons:
- a) The default judgment has been entered for relief not claimed. The notice of civil claim did not specifically seek in Part 2, relief in the amount of the promissory note. Instead, it sought only damages and special damages.

- b) In any event, the promissory note itself does not qualify as such because it was stated to be payable on the availability of the funds or sale of the defendant's property, neither of which the defendant submits are specified events that are certain to happen. Therefore, the note is inconsistent with s. 23(b) of the Bills of Exchange Act, R.S.C. 1985, c. B-4.
 - c) Additionally, the defendant submits the promissory note was signed under duress, and therefore not legally enforceable.
- [14] The plaintiff submits that the defendant has not met her burden with respect to setting aside the default judgment, as set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.). In particular, the plaintiff submits that: the defendant's delay was wilful and deliberate; the defendant has not provided a sufficient, or any, excuse to explain her delay in bringing her current application, and; the defendant does not have a meritorious defence.

Legal Principles

- [15] The governing rule is Rule 3-8 of the Supreme Court Civil Rules, which addresses default judgments. Rule 3-8(3) and (11) are particularly relevant to the defendant's application.
- (3) If the plaintiff's action against a defendant includes a claim for recovery of money in a specified or ascertainable amount, the plaintiff may
 - (a) on that claim, obtain judgment in Form 8 against that defendant for an amount not exceeding the total of
 - (i) the amount claimed,
 - (ii) the interest, if any, to which the plaintiff is entitled, and
 - (iii) costs, and
 - (b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).
 - (11) The court may set aside or vary any judgment granted under this rule.
- [16] With respect to setting aside a default judgment, the test enunciated in *Miracle Feeds* has been repeatedly affirmed by the Court of Appeal: *BCI Bulkhaul Carriers Inc. v. Aujla Trucking Inc.*, 2015 BCCA 411 at para. 3. As quoted in *BCI* at para. 2, the test is:
1. That he did not wilfully or deliberately fail 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 brought;

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.

[17] Although generally referred to as a test, the Court of Appeal has clarified that these are factors meant to guide the court's discretion under R. 3-8(11). In *Nichol v. Nichol*, 2015 BCCA 278 at para. 37, the Court of Appeal stated:

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 factors must not be rigidly applied and "relative strength in one or more of the relevant factors may overcome a relative weakness in another": *BCI* at para. 3; *McEvoy v. McEachnie*, 2008 BCSC 1273 at para. 14.
- [19] Further, the *Miracle Feeds* factors are non-exhaustive and additional factors may be relevant in specific circumstances: *McEvoy* at para. 13; *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at para. 15. The court in *Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.*, 2012 BCSC 487 at paras. 52-57, considered one such additional factor. The decision to set aside a default judgment "must be consistent with the overarching aim of the court to do justice as between the parties". In this regard, the court may need to consider prejudice as between the parties if the default judgment were to be set aside (see also *Bickert v. Sorci Industries Inc.*, 2005 BCCA 313 at paras. 12, 15).
- [20] In the circumstances of this application, it is worth reiterating that the burden rests on the defendant to show the default judgment should be set aside: *Miracle Feeds* at 61; *Bickert* at paras. 10, 14.

- [21] When a defendant decides not to defend an action or chooses to simply ignore it, the court will generally infer that the party willfully 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.
- [22] The delay does not need to be prompted by bad faith to be deemed wilful or deliberate. It "suffices if the served defendant has deliberated on the matter and has chosen not to respond". Relevant considerations may include the defendant's sophistication and experience with legal matters: *Harding v. Skidegate First Nation*, 2013 BCSC 1191 at para. 27.
- [23] A defense is worthy of investigation if there is a "degree of plausibility": *Hawkins v. Fernie One Outfitters Ltd.*, 2012 BCSC 84 at para. 25. This requires more than merely making an allegation. The evidence in support of the application to set aside the default judgment must be sufficiently detailed to enable the court to correctly inquire as to whether there is indeed such a defence. The defendant's burden in this regard is low, but it is the defendant's burden: the plaintiff need not prove anything: *Director of Civil Forfeiture v. Doe*, 2010 BCSC 1784 at paras. 18-21; *Al Boom* at para. 48.
- [24] However, "a person named as a defendant in a notice of civil claim who makes a decision not to defend and thereby allows judgment in default cannot later reasonably come to court asking that judgment be set aside so that he can raise defences to the action on the merits": *North Vernon Properties Limited Partnership v. Astor & York Retail BC Ltd.*, 2015 BCSC 327 at para. 18. In other words, a defence worthy of investigation is not necessarily sufficient to set aside a default judgment, in the absence of evidence addressing the other *Miracle Feeds* factors.

Procedural Irregularity

- [25] As noted above, the defendant submits the default judgment should not have been granted because the plaintiff did not specifically identify the promissory note as the source of relief sought in Part 2 of the notice of civil claim. On this issue, the defendant appears to be suggesting that the default judgment should be set aside as an irregularity. This position relies on the absence of a reference to the promissory note in Part 2 even though it is pleaded in Part 1 Statement of Facts. The relief sought in Part 2 only mentions "damages" and "special damages".
- [26] I do not find that is an irregularity that deprives the plaintiff of the ability to claim default judgment when no response was entered. Nor did the defendant cite any case authority in support of this position.

- [27] In *James v. Male*, 2011 BCCA 81 at para. 12, the Court of Appeal commented on an irregularity in the context of issuing a default judgment. It concluded that an error in an affidavit was not material to the issuance of the default judgment and therefore not a basis to set it aside.
- [28] The affidavit in *James* was related to service of the writ of summons. The defendant alleged the affidavit of service contained an error with respect to the specificity of the address at which service took place, and on that basis the court could not be satisfied that he had been served with the writ before the default judgment.
- [29] I note if the court is satisfied the defendant was not properly served, the default judgment is a nullity and may be set aside as of right, without recourse to the factors in *Miracle Feed* (see also *Fraser Valley Disposal Ltd. v. Cho*, 2016 BCSC 1923 at para. 9 and *Bajwa v. Deol*, 2017 BCSC 1673 at para. 19). Despite that, in *James*, the Court of Appeal was not satisfied that an error in the affidavit of service amounted to an irregularity. In my view, the alleged irregularity in that case was potentially more serious than on the facts before me.
- [30] In any event, dealing specifically with R. 3-8(3), a default judgment is appropriate if the pleadings or evidence supports the position that there is a liquidated demand of a specific sum of money due and payable pursuant to an agreement, or for an amount that is "capable of being ascertained as a mere matter of arithmetic": *Primus Electric Inc. v. Ryken Construction Inc.*, 2014 BCSC 421 at paras. 32, citing *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78, at para. 8. Although the court in *Primus* concluded that claiming a specific amount did not convert the damages to a liquidated debt, that was because the agreement pleaded was not sufficient to conclude there was a specified amount, as required by R. 3-8(3) (at paras. 36).
- [31] On the facts of this case, the notice of civil claim pleaded the promissory note, and the amount due under it was certain. Accordingly, I do not find the failure to specifically identify the promissory note in Part 2 of the notice of civil claim to be an irregularity.

Setting Aside a Default Judgment

- [32] Although not entirely clear, the defendant also seems to take the position that the default judgment cannot stand because the notice of civil claim identified more than one possible basis for relief. However, a plain reading of R. 3-8(3) appears to provide a complete answer to that position. It provides that if the notice of civil claim "includes a claim for recovery of money in a specified or ascertainable amount" the plaintiff was able to obtain default judgment "on that claim" (emphasis added). A plaintiff may obtain default judgment for a portion of the relief claimed, provided the conditions of R. 3-8(3)(a) are satisfied for that specific claim. This is consistent with the proposition that a default judgment is possible even if the claim is coupled with a claim in the alternative: *Trustees of the Interior Lumbermen's Pension Plan v. Moore*, 2016 BCSC 89 at paras. 2-3.

- [33] The defendant has provided no authority that suggests a different interpretation. In contrast, the plaintiff acknowledged that he could only get default judgment pursuant to R. 3-8(3) for the amount of the promissory note, as all other damages sought in the notice of civil claim were not specified or for ascertainable amounts.
- [34] I find the defendant's position is an overly technical approach to the pleadings in this case. I did not take the defendant as submitting that the promissory note itself was not for a specified or ascertainable amount such that it was an inappropriate basis for a default judgment pursuant to R. 3-8(3). The amount of the promissory note was capable of being ascertained on its face. In fact, it was specified, despite the minor inconsistency and arithmetic error within the note itself: (see above paras. 5, 30).
- [35] Even if the pleadings were problematic in the way the defendant suggests (a finding which I do not make), the issue raised with respect to the promissory note does not appear to have mislead the defendant: *Bank of Montreal v. McCulloch* (1982), 33 C.P.C. 76 at 78 (B.C.C.A.). The defendant has not provided any evidence with respect to the effect of this issue on her ability to defend the plaintiff's claim.
- [36] If the defendant is suggesting the notice of civil claim lacked clarity on this point, that would be contrary to the position she took in her application filed on September 4, 2014. The defendant confirmed in that application that the notice of civil claim sought "[p]ayment of the Promissory Note for \$114,000.00". Although that application did not concede it was a valid claim, it is clear she had notice of the debt claim.

Delay

- [37] Turning the Miracle Feeds factors, the plaintiff submits the court should infer from the lack of evidence to the contrary that the defendant's delay was wilful and deliberate.
- [38] The defendant claims her initial failure to respond to the notice of civil claim was based on her reliance on the plaintiff's assurance that she did not need to consult a lawyer. The plaintiff denies this. I need not resolve that issue because once she first had notice of the default judgment, the defendant filed her first application to set it aside less than one month later on February 6, 2014. At that point, she was acting without delay.
- [39] However, from 2014 until her current application, the defendant took no substantive steps to set aside the default judgment. The onus is on the defendant to provide evidence that her inaction during that period was not wilful and deliberate. In my view, merely saying she was "unaware" that the default judgment had not been set aside is not sufficient to meet that burden.

- [40] I also find it difficult to accept the veracity of her claim of being unaware in light of the fact that the defendant had legal representation in 2014, entered a consent order to pay money into court, and paid money into court as required by that order to facilitate the sale of her property. If she believed that the default judgment had been set aside and/or that she had a meritorious defence to the plaintiff's claim, it is difficult to understand why she would not seek to recover the money she paid into court.
- [41] Overall, I find her experience with this litigation is not so limited as to excuse a delay of more than five years between the consent order and bringing her current application to set aside the default judgment based solely on her unawareness.
- [42] The defendant submits the court should not infer she acted wilfully or deliberately, and that the opposite should be inferred. Counsel has not pointed me to a case that supports that approach, and that is significant because such an approach would conflict with *Miracle Feeds*. The court states in that case that the factors be "established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant" (see above, para. 16).
- [43] Apart from any inference I could draw, I find other aspects of the defendant's evidence about delay to be problematic.
- [44] As just discussed, the plaintiff, in her January 16, 2020 affidavit, says she was unaware until 2019 that the default judgment had not set aside. In addition, the defendant says she continued to receive notices of intention to proceed with respect to the notice of civil claim. Her awareness of those notices could be consistent with her belief that there was no default judgment. However, her affidavit does not make that precise point.
- [45] In any event, even if those circumstances could amount to a reasonable excuse for the entire five-year delay (a finding which I do not make), there was further delay. The defendant deposed:
- I was unaware, until 2019, that the default judgment had not been set aside. [My former lawyer] ceased to act for me shortly after the [certificate of pending litigation] was removed [in 2014], and I did not obtain legal advice until speaking briefly to Mr. Abrams, my present lawyer, until January, 2019. I did not retain Mr. Abrams to address the default judgment (and the outstanding dispute with [the plaintiff] generally) until early December, 2019.
- [46] On her own evidence, the defendant admits to knowing the default judgment had not been set aside in January 2019, yet took no action to address it until December 2019. She has failed to explain this year long delay in any way.
- [47] The plaintiff emphasized that the circumstances of this case present a delay in the magnitude of years, not merely months like most applications of this nature. The plaintiff relies on *Labadie v. Hegel*, 2017 BCSC 909, in which Justice Church referred to a delay of more than six months as "inordinate" in the circumstances (at paras. 28-32, 39). I agree this is a significant factor.

[48] Because I am not satisfied that the defendant has provided evidence to counter the inference that her delay was wilful between 2014 and 2019, and no explanation is provided of the additional year-long delay, I agree with the plaintiff that the delay in this case is inordinately lengthy. I also find that the defendant has failed to provide a reasonable explanation.

Defences Worthy of Investigation

[49] The defendant submits there are two defenses to the plaintiff's claim that are worthy of investigation. First, the promissory note is not enforceable as such because it does not comply with s. 23(b) of the Bills of Exchange Act. Second, the promissory note is not enforceable because it was signed under duress.

[50] Even though the defendant bears the burden on this issue (see above, para. 23), the plaintiff has answered these arguments. The plaintiff counters the defendant's position with respect to the Bills of Exchange Act, demonstrating that the plaintiff's position is arguable. He also pointed to problems and inconsistencies with respect to the defendant's evidence of duress. The plaintiff's submission on this point is compelling. However, the defendant's burden is only to show a defense worthy of investigation, not to prove it.

[51] As noted above, however, no one factor is determinative and the strength of one may outweigh the others (see above para. 18). In my view, even if one or both defenses are worthy of investigation, they do not outweigh the lengthy delay, and what I have found to be the defendant's insufficient explanation for that delay.

[52] I add that the veracity of the defendant's claim that she was unaware until January 2019 that the default judgment was not set aside is difficult to reconcile with her taking no action with respect to the money she paid into court. At the very least, her failure to recover that money is more consistent with an implied acknowledgement that she did owe the plaintiff a significant sum of money. In my view, this weighs in favour of the plaintiff's position.

[53] Finally, I also accept the plaintiff's submission that he would suffer prejudice if the default judgment was set aside and he was forced to prosecute his claim at this point.

CONCLUSION

[54] For all those reasons, the defendant's application to set aside the default judgment is dismissed, and the plaintiff's application for payment of the \$114,000 out of court is granted.

"Sharma 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/20/05/2020BCSC0587.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/tiamzon-v-vandt-2020-bcsc-587>

Prepared on 25 October 2026 · Esheria