

CANADA / JUDGMENT

XY, LLC v. Zhu

2026 BCSC 602

COURT

Supreme Court of British Columbia

DECIDED

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2026 BCSC 602 XY, LLC v. Zhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

XY, LLC v. Zhu,

2026 BCSC 602

Date: 20260112

Docket: S-231427

Registry: Vancouver

Between:

XY, LLC

Plaintiff

And

Jesse Jia-Bei Zhu, John Doe, as Executor of the Estate of Shu Xi Wang

also known as Peter Wang also known as Peter Shu Xi Wang, Deceased,

Selen Zhou, and Jin Tang also known as Tang Jin

Defendants

Before: The Honourable Justice S. Morishita

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

C.S. Wilson

D.K.S. Braam

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

January 9, 2026

Place and Date of Judgment:

Vancouver, B.C.

January 12, 2026

- [1] THE COURT: These are my oral reasons for judgment. Should any party order a transcript, I reserve the right to edit them for grammar, clarity, style, brevity, and to add case citations or references. If I do make any edits, the substance of my decision will not change.

Introduction and Procedural History

- [2] This is an application to set aside default judgment.
- [3] The dispute between the parties has a long history. I need not get into significant details for the purposes of deciding the application before me, but in short, this action flows from a previous action in this Court (Action No. S-076862) where the plaintiff in this action, XY, sued a number of defendants including a defendant in this action, Mr. Jesse Jia-Bei Zhu. Action S-076862 involved allegations against the defendants of improper use of XY's proprietary information and technologies.
- [4] Action S076862 proceeded to trial before Justice Kelleher who, on March 2, 2012, granted judgment of \$8,507,891.00 plus prejudgment interest, special costs, and post-judgment interest jointly and severally against a number of defendants including Mr. Zhu.
- [5] Despite XY's efforts to collect on the judgment, most of it is still owing.
- [6] In this action, which was commenced by notice of civil claim filed March 1, 2023, XY seeks to enforce and renew the original judgment. XY was required to bring this action, as the 10-year limitation date to enforce or sue on the original judgment was set to expire.
- [7] On March 3, 2023, XY filed an amended notice of civil claim.
- [8] XY submits that it served Mr. Zhu with the amended notice of civil claim on February 21, 2024. Service on Mr. Zhu was complicated by the fact that at the time, and at present, Mr. Zhu was in custody in a jail in Fresno, California. Mr. Zhu disputes that he was served.

- [9] In any event, a response to civil claim was not filed and XY sought default judgment on January 24, 2025, which was ultimately obtained by order made March 19, 2025.
- [10] Mr. Zhu filed this application to set aside default judgment on November 14, 2025. Mr. Zhu's notice of application unilaterally set a hearing date of December 16, 2025. Neither he nor his counsel contacted counsel for XY alerting them that he intended to apply to set aside default judgment. Significantly, Mr. Zhu did not serve his application materials on XY. Instead, GNT - a company that Mr. Zhu controls - attached the application and supporting affidavit to an affidavit sworn by GNT counsel, which was filed in support of an application in a Hong Kong proceeding. That proceeding involves XY, GNT, and Mr. Zhu and is set for trial starting January 15, 2026.
- [11] On November 29, 2025, XY's counsel in British Columbia learned about Mr. Zhu's application to set aside default judgment in this action from the materials that were filed in the Hong Kong action. In other words, Mr. Zhu never properly served XY with this application. In addition, the affidavit he relies on in support of this application (i.e., Affidavit Number 1 of Mr. Zhu, sworn on November 7, 2025) was never actually filed in the registry.
- [12] After learning of the application, XY's counsel made a number of attempts to discuss the matter with Mr. Zhu's counsel of record in this action. That counsel was Mikis Manolis at Bridgehouse Law. XY delivered unfiled copies of their application response and supporting affidavits to Bridgehouse Law on November 26, 2025.
- [13] On December 4, 2025, Bridgehouse Law served on XY's counsel a notice of intention to withdraw as counsel.
- [14] On December 6, 2025, Mr. Zhu personally emailed Mr. Wilson, counsel for XY, requesting consent to adjourn the December 16, 2025 hearing, on the basis that he no longer had legal counsel and was in the process of retaining new counsel. Counsel for XY contacted Mr. Manolis, confirming whether they could communicate directly with Mr. Zhu. Mr. Manolis advised Mr. Wilson on December 8, 2025 that they no longer represented Mr. Zhu and that XY counsel could communicate directly with Mr. Zhu.
- [15] On December 12, 2025, XY counsel advised Mr. Zhu by email that if Mr. Zhu was not able to retain counsel to attend for him at the December 16 hearing, Mr. Wilson would bring the email correspondence to the attention of the judge and advise the judge that Mr. Zhu was seeking an adjournment. XY counsel further advised that XY would be taking no position on the adjournment itself apart from asking for the imposition of three conditions:
- a) that Mr. Zhu must advise XY of the source of their legal fees paid to Bridgehouse Law, Anthony Capozzi, and anyone else to whom he had paid legal fees or proposed to retain in accordance with a Mareva Order that Mr. Zhu was subject to;
 - b) that the hearing of the application to set aside default judgment would be adjourned to January 9, 2026; and

- c) that the January 9, 2026 hearing was peremptory on Mr. Zhu, which Mr. Wilson advised meant it could not be moved again, except in exceptional circumstances.
- [16] Bridgehouse Law's notice to withdraw was ultimately filed on December 15, 2025. Also on December 15, 2025, Mr. Zhu emailed the registry (cc'ing Mr. Wilson) with submissions requesting an adjournment of the hearing. Mr. Wilson replied all to the email, indicating that he would print the email and attachments and provide it to the judge at the hearing. In addition, Mr. Wilson reiterated the terms that XY would seek at the hearing.
- [17] As it turned out, Mr. Zhu did not file an application record within the deadlines imposed by the Rules. XY filed an application record but, unbeknownst to XY the application was removed from the hearing list, as Mr. Zhu did not file an application record.
- [18] On December 16, 2025, XY's counsel attended at court for the hearing, but learned it was removed from the hearing list. XY requested and obtained an order that the application record could be filed and that the matter would be reinstated on the hearing list.
- [19] XY's counsel appeared before Justice Basran later that day. Mr. Zhu did not attend the hearing. Justice Basran granted the adjournment on the conditions sought by XY.
- [20] On the afternoon of December 16, 2025, XY's counsel sent the entered order of Justice Basran to Mr. Zhu by email, together with XY's written submissions provided to Justice Basran earlier that day. In the email, XY's counsel emphasized the need to comply with the requirements to disclose the source of the legal fees. Mr. Zhu acknowledged receipt of this email by email sent December 22, 2025. Further, in that December 22, 2025 email, Mr. Zhu said he did not agree with XY's submissions before Justice Basran, that he currently had no legal counsel and could not attend the January 9, 2026 hearing, and that he needed more time to "collect information and evidence to prove that [he] was not served with the amended notice of [civil] claim."
- [21] In addition, Mr. Zhu said that given he was in custody, it was very difficult for him to retain counsel soon and to respond to the legal fee issue.
- [22] XY counsel responded on December 23, 2025 confirming that XY was opposed to a further adjournment and reminded Mr. Zhu that XY required strict compliance with the order of Justice Basran.
- [23] Mr. Zhu subsequently sent submissions to the court registry and scheduling on December 29 and 30, seeking an adjournment of the January 9, 2026 hearing. Counsel for XY has provided these submissions to the court by attaching them as an exhibit to an affidavit before this court. I will address these submissions later in these reasons.
- [24] Mr. Zhu did not attend court on January 9, 2026.

- [25] Although there was no formal application for an adjournment, and although neither Mr. Zhu nor anyone on his behalf attended the hearing, the court proceeded as if an application was made and reviewed and considered Mr. Zhu's unfiled submissions, along with submissions from XY.
- [26] The court also heard submissions on the application to set aside default judgment.
- [27] At the end of the hearing, the court ordered that the informal request for an adjournment was denied with reasons to follow. In these reasons, I will set out my reasons for denying the adjournment request and will provide reasons for judgment on Mr. Zhu's application to set aside default judgment.

Adjournment Request

Legal Framework

- [28] The legal principles governing the Court's discretion to grant an adjournment are summarized in the leading case of *Navarro v. Doig River First Nation*, 2015, BCSC 2173:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 1992 CanLII 1815 (BC CA), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).
- [20] Other factors or considerations include (in no particular order of priority):

- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); Sidoroff at para. 10);
 - the reasonableness of the request (Dhillon at para. 16);
 - the grounds or explanation for the adjournment (Dhillon at para. 16; Toronto-Dominion Bank at para. 38);
 - the timeliness of the request (Dhillon at para. 16);
 - the potential prejudice to each party (Dhillon at paras. 16-17);
 - the right to a fair trial (Dhillon at para. 16);
 - the proper administration of justice (Dhillon at paras. 16 and 39; Toronto-Dominion Bank at para. 36);
 - the history of the matter, including deliberate delay or misuse of the court process (Toronto-Dominion Bank at para. 38); and
 - the fact of a self-represented litigant (Toronto-Dominion Bank at para. 39).
- [21] Securing a fair trial on the merits of the action is the ultimate goal. This requires consideration of the nature of the claim. If the claim is novel, then the prospect for success is one factor to consider (*Sangha v. Azevedo*, 2005 BCCA 184 at para. 15 (*Sangha*)). However, the prospect for substantive success should not be the sole basis for refusal of an adjournment (*Toronto-Dominion Bank* at para. 41).
- [29] In determining whether to adjourn the application, I must also consider Justice Basran's order that the adjournment of the December 16, 2025 date to January 9, 2026 was peremptory on Mr. Zhu.
- [30] In *J.A.T.P. v. H.M.*, 2024 BCSC 143, Associate Judge Bilawich summarized the legal principles to consider in circumstances of a peremptory hearing:
- [43] The parties agree that a peremptory hearing does not mean "mandatory". The court retains jurisdiction or discretion to grant a further request for an adjournment, having regard to all the facts and the circumstances.
- [44] In *Law Society of Upper Canada v. Igbinosun*, 2009 ONCA 484 [*Igbinosun*] at para. 43, the Ontario Court of Appeal noted as follows:
- [43] One of the purposes of making a hearing date peremptory is to further the public interest in the administration of justice by preventing delay and wasted costs. However, judicial discretion must still be exercised depending on the facts and circumstances of each case, as the overarching purpose of marking a date peremptory is to serve the interests of justice
- [45] Also see *Re Conway*, 2016 ONCA 918 at paras. 24-25:

[24] In the case before us, the Board denied Mr. Conway's request for an adjournment to retain counsel for the sole reason that the hearing date had been designated peremptory. Refusing an adjournment for that reason alone amounted to an error in principle. Although the dictionary definition of peremptory - irreversible, binding, conclusive - suggests that a hearing marked "peremptory" must proceed, our court, sensibly, has held otherwise. In *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 96 O.R. (3d) 138, at para. 43, Weiler J.A. wrote:

One of the purposes of making a hearing date peremptory is to further the public interest in the administration of justice by preventing delay and wasted costs. However, judicial discretion must still be exercised depending on the facts and circumstances of each case, as the overarching purpose of marking a date peremptory is to serve the interests of justice. [Footnotes omitted.]

[25] In other words, peremptory in this context does not mean mandatory. It does not remove the Board's discretion. Although the peremptory designation will be an important consideration in the Board's decision, the Board must still exercise its discretion by taking into account other relevant considerations, especially any prejudice to the NCR accused from refusing an adjournment.

[46] In *Santelli v. Trinetti*, 2017 BCSC 822 [Santelli] at para. 20, Justice Sharma held that where a trial date is peremptory and an adjournment is sought, the proper analysis is to first determine whether the applicant can meet the test at common law for an adjournment, and then whether there are exceptional circumstances which warrant disregarding that the trial date was peremptory.

[31] Thus, I will first address whether an adjournment should be granted after considering the factors set out in *Navarro*. If the facts meet the test for an adjournment, I will then consider whether there are exceptional circumstances which warrant disregarding that the January 9, 2026 hearing date was peremptory on Mr. Zhu.

Analysis

[32] Counsel for XY included Mr. Zhu's submissions dated December 29, 2025 seeking a further adjournment in their application materials. In the submissions, Mr. Zhu says he seeks a further adjournment for the following reasons:

- a) He has not been able to retain new legal counsel, noting that he is currently in custody and it has been extremely difficult to secure appropriate representation in a short period of time. Mr. Zhu notes that this is also the reason why he has not been able to comply with Justice Basran's order requiring him to disclose the source of his payment of legal fees;
- b) He does not agree with XY counsel's submission to Justice Basran at the December 16, 2025 hearing and requires the opportunity to retain new counsel who can respond to the points raised in that submission;

- c) He submits that it is his lawful right to retain new counsel to appear on his behalf and that proceeding in the absence of himself or his legal counsel would be unfair and prejudicial; and
 - d) He needs additional time to gather information and evidence on the issue of whether he was served with the amended notice of civil claim or not.
- [33] Mr. Zhu sent these submissions to Supreme Court Scheduling by email on December 31, 2025 at 4:47 p.m. The next morning at 8:59 a.m., Scheduling advised the parties by email that the submissions must be attached as a PDF and must be filed in accordance with Practice Direction 69.
- [34] On Saturday January 3, 2026, Mr. Zhu sent an email to Scheduling stating that he is in custody and is unable to appear on January 9, 2026, and that he is unable to retain legal counsel to represent him on that date.
- [35] On Monday January 5, 2026, at 2:20 p.m., Scheduling sent the parties an email asking them if they would like to attend remotely or adjourn the matter. Mr. Wilson responded, advising that the matter would proceed and that he would bring Mr. Zhu's position to the judge's attention along with any correspondence. In response, Mr. Zhu again advised by email that day that he is unable to attend the hearing and requested that it be adjourned. Mr. Zhu did not address Scheduling's offer for remote attendance.
- [36] Scheduling responded to Mr. Zhu's email on January 6, 2026, advising that Scheduling had no authority to adjourn hearings without directions from the judge or without consent of the other party. Scheduling indicated that any contested application to adjourn had to be made to the presider at the outset of the hearing. There was no further correspondence on this issue from Mr. Zhu.
- [37] After considering the factors set out in Navarro, I am not satisfied that it is in the interests of justice to adjourn the hearing. I reach this conclusion for the following reasons:
- a) Mr. Zhu's main basis for the adjournment is that he does not have counsel. He says that he has been unable to retain counsel in a timely manner due to his incarceration in California. Nevertheless, Mr. Zhu has provided no details about the steps that he has taken to try and retain new counsel. He simply states generally that he has been unable to due to him being incarcerated. I note that despite being incarcerated, Mr. Zhu has been able to retain and instruct counsel in California relating to a dispute he has there. He was able to instruct that counsel to quickly draft and issue a subpoena for video footage in the jail where he is incarcerated. Further, a company that he controls has been able to instruct counsel in the Hong Kong proceeding. The evidence indicates that Mr. Zhu has access to a telephone and mail at the jail, and he has been able to read and respond to emails in this proceeding fairly quickly. I further note that Mr. Zhu appears to have not had much difficulty retaining Bridgehouse Law. His notice of application indicates that he first became aware of the default judgment "in or around April 2025", and that he contacted Ritchie Clark, KC, at

Bridgehouse on or about May 8, 2025. Bridgehouse Law served on XY counsel a notice of intention to withdraw on December 4, 2025. The December 16, 2025, hearing was adjourned because Mr. Zhu did not have counsel. It was adjourned to January 9 on a peremptory basis, which Mr. Wilson told Mr. Zhu meant that the next hearing would not be adjourned unless there were exceptional circumstances. There is no evidence or indication that after the December 16, 2025 adjournment, Mr. Zhu took any steps to try and retain counsel, let alone double up his efforts given the looming deadline.

- b) Granting the adjournment is detrimental to the expeditious and speedy resolution of the matters on their merits. The underlying dispute is very straightforward. The action seeks to enforce and renew the original judgment. As indicated, there is a proceeding in Hong Kong where XY seeks to collect on its judgments against Mr. Zhu's company there. The evidence before me indicates that uncertainty about the default judgment in this action complicates the Hong Kong action. Mr. Zhu sought to adjourn the Hong Kong trial, which is scheduled to start on January 15, 2026, on the basis that he was seeking to set aside default judgment in this action. In other words, adjourning the application before this court would be strategically advantageous to his application to adjourn the Hong Kong trial, because any complication in this action contributes to complication in the Hong Kong action. Mr. Zhu's adjournment application in the Hong Kong action was recently heard and dismissed, which reduces the prejudice associated with adjourning this application. Nevertheless, as I understand it, any uncertainty about the default judgment granted by this court potentially complicates XY's position in the Hong Kong action. Accordingly, it is important that Mr. Zhu's application to set aside default judgment is heard without further delay to ensure not only the expeditious and speedy resolution of this matter on its merits, but also related matters in another jurisdiction.
- c) Similarly, the potential prejudice to XY, which I have just addressed, is greater than that of Mr. Zhu. If an adjournment is not granted, the hearing will proceed without Mr. Zhu or his counsel making oral submissions. However, that prejudice is mitigated by the fact that Mr. Zhu, through his previous counsel, did file a notice of application. Further, he has also sworn an affidavit which is before the court (although I note that it was not filed). In addition, XY counsel has ensured that any submissions and emails of Mr. Zhu are before the court and properly included in filed affidavits. Mr. Zhu was also offered the opportunity to appear at the hearing remotely. In addition, I note that Mr. Zhu did not provide any alternative dates or provide any indication of when, if an adjournment was granted, he would be able to retain counsel by. This lack of uncertainty of dates and timelines is also prejudicial to XY.
- d) Consideration of the nature of the claim also weighs against an adjournment. The claim being addressed is an application to set aside default judgment. As indicated, Mr. Zhu's application materials were drafted by his counsel while he was represented. In his submissions, he indicates that he needs more time to gather information and evidence on the issue of whether he was served with the amended notice of civil claim or not. Mr. Zhu

cannot split his case. His application materials address the issue of whether he was served or not. He cannot then obtain additional evidence unless it is truly responsive evidence. I note that Mr. Zhu had his California lawyer issue a subpoena against the City of Fresno, or the city that operates the jail, in order to obtain video surveillance footage, with the hope that it would show whether or not the process server attended the jail at the relevant time. The evidence establishes that the subpoena was issued improperly and that Mr. Zhu would not be entitled to obtain such evidence in the action in which the subpoena was issued. Mr. Zhu's California counsel has indicated that the subpoena will be withdrawn. In any event, I also note that the application to set aside default judgment is not novel and, as I will set out further in my reasons, the prospect for substantive success is low.

- e) Mr. Zhu is self-represented, which weighs in favour of an adjournment. Nevertheless, the evidence before me indicates that Mr. Zhu has been involved in many proceedings over the past decade and longer. Moreover, the submissions before me show that he has a level of familiarity with litigation. In my view, this is not a situation where the court is dealing with an unsophisticated litigant that has limited knowledge about the law and legal proceedings.
 - f) Last, in my view, the evidence supports an inference that Mr. Zhu is using this application to deliberately delay the Hong Kong trial and to misuse the court process. I have addressed the issue regarding the Hong Kong trial earlier in these reasons. In addition, I reiterate that Mr. Zhu filed the notice of application but never actually served it on XY in accordance with the Rules. Instead, it was included in filings in the Hong Kong action to support his application to adjourn the trial there. In the notice of application, he includes his first affidavit as material he is relying on. Nevertheless, he never filed that affidavit, nor did he serve it on XY counsel. Yet the unfiled copy was also included in the Hong Kong application materials. I note that these application materials were produced while Mr. Zhu had experienced counsel here in B.C. I have difficulty believing that experienced commercial litigation counsel in B.C. would not properly file and serve application materials, particularly in an application to set aside default judgment, where time is of the essence. Thus, the inference I make is that not properly filing and serving the application materials here was a deliberate decision made by Mr. Zhu, and that the main purpose of the application was to assist him in the Hong Kong case. Mr. Zhu's application to adjourn the hearing is all part of a larger misuse of the court process.
- [38] Even if Mr. Zhu was able to satisfy the court that an adjournment was warranted under the Navarro framework, I am not satisfied that exceptional circumstances exist to disregard that the hearing was set on a peremptory basis. In essence, Mr. Zhu asks for a further adjournment in order to retain counsel and to try and obtain further evidence to support his main application. In the circumstances, neither reason constitutes exceptional circumstances. Mr. Zhu did not have counsel at the December 16, 2025 hearing. He did not attend that hearing nor did he provide any alternative dates other than the one Mr. Wilson said he would be seeking (i.e., January 9, 2026). Nothing unexpected on this issue has arisen since the December 16, 2025 hearing. Rather, Mr. Zhu indicates that he continues to be

unable to retain new counsel. This is not an exceptional circumstance.

[39] Further, the issue of the potential for additional evidence also does not constitute an exceptional circumstance. There is a possibility that there is surveillance evidence and a possibility that there could be evidence that supports Mr. Zhu's position. Nevertheless, that prospect is speculative and does not constitute an exceptional circumstance.

[40] The informal application to adjourn the hearing is denied.

Application to Set Aside Default Judgment

[41] In determining whether to set aside default judgment, the fundamental consideration is whether it is in the interests of justice to do so. In assessing what are the interests of justice, the court should consider the factors set out in *Miracle Feeds v. D.&H. Enterprises* (1979), 10 B.C.L.R. 58 (Co. Ct.). The Miracle Feeds factors are as follows:

- a) Did the defendant wilfully or deliberately fail to file its response?
- b) Did the defendant apply to set aside as soon as reasonably possible upon learning of the default or provide an explanation for any delay?
- c) Is there a meritorious defence or a defence worthy of investigation?

[42] The Miracle Feeds factors are not exhaustive and additional factors may be relevant: *Andrews v. Clay*, 2018 BCCA 50 at paras. 28- 30.

[43] Further, the relative strength of one or more factors may overcome the relative weakness of another: *BCI Bulkhaul Carriers Inc. v. Aujla Trucking Inc.*, 2015 BCCA 411 at para. 3.

[44] Before I turn to the Miracle Feeds analysis, I must address a threshold issue of whether Mr. Zhu was served with the amended notice of civil claim. If service was not effected on Mr. Zhu, then any subsequent default judgment is a nullity and Mr. Zhu is entitled to have the order set aside: *Kaur v. Virk*, 2022 BCSC 173 at paras. 48- 49.

[45] In his affidavit sworn November 7, 2025, Mr. Zhu deposes to the following:

- a) That he was never served with the notice of civil claim or the amended notice of civil claim.
- b) That the evidence that the process server, Joseph Cassinero, served him on February 21, 2024 is not accurate and that he did not meet Mr. Cassinero on that date or on any other date. Further, Mr. Zhu deposes that no other person at the Fresno County Jail handed him or served him with a copy of the amended notice of civil claim at any time.
- c) That a printout from the Fresno County Sheriff's office indicates that starting from January 1, 2024, the Civil Unit of the Sheriff's office is tasked with serving those in custody after a mandated request form has been submitted by the party seeking to serve someone in custody.

- [46] In essence, Mr. Zhu says that he was not served with the amended notice of civil claim by Mr. Cassinero. He denies meeting with Mr. Cassinero and being served with any documents by him. Further, he argues that it was not possible for Mr. Cassinero to serve him because, as of January 1, 2024, only the Civil Unit of the Sheriff's office could do so, and only after a form had been submitted to them. Because no one from that office handed him the amended notice of civil claim at any time, Mr. Zhu says that he could not have been served.
- [47] Two affidavits of the process server, Mr. Cassinero, are before the Court. The first was made on March 4, 2024. I say "made" because the jurat says "sworn (or affirmed)". I will return to this issue shortly. In the first affidavit, Mr. Cassinero said he served the amended notice of civil claim on Mr. Zhu at the Fresno County jail on February 21, 2024, at 2:36 p.m. by leaving it with Mr. Zhu.
- [48] In response to Mr. Zhu's affidavit, Mr. Cassinero affirmed a second affidavit on November 25, 2025. In that affidavit, Mr. Cassinero deposed to the following:
- a) That he is a registered process server;
 - b) He attached a copy of his registered process server identification card which is issued by the county clerk of the County of Fresno, along with a copy of his jail pass identification card issued by the Fresno County Sheriff;
 - c) That as indicated on the back of his jail pass, he has access to inmates at Fresno County Sheriff Detention Facilities which includes the Fresno County jail where Mr. Zhu was located;
 - d) The pass indicates that he is permitted to meet with inmates only in the presence of legal counsel or a law enforcement officer;
 - e) He remembers this particular service because, although he is a full-time process server, it is uncommon for him to serve legal documents from Canada; and
 - f) He confirms that on February 21, 2024, he personally met with Mr. Zhu in a holding cell, that he was escorted at all times with a sheriff while at the jail, and while meeting with Mr. Zhu there he asked Mr. Zhu for his name and ID and Mr. Zhu showed him his bracelet identifying his name (David He), as well as his person ID and booking number, and that he personally handed Mr. Zhu a copy of the amended notice of civil claim. I note that Mr. Zhu has deposed that he also goes by the name David He.
- [49] In addition, Mr. Cassinero included in his second affidavit a true copy of a declaration of Anthony P. Capozzi filed in a California proceeding indicating that Mr. Capozzi acts for Mr. He and attached pictures that Mr. Capozzi took of Mr. He at the Fresno County jail.
- [50] Mr. Cassinero deposes that the photo of Mr. He in the Capozzi declaration depict the inmate named David He that he met and served on February 21, 2024, at the Fresno County jail.

- [51] Last, Mr. Cassinero attaches a copy of an email from senior correctional officer Juan Guadian of the Fresno County Sheriff's Office. This email was sent by Mr. Guadian to Mr. Wilson, counsel for XY. The email indicates that Mr. Cassinero has jail access/jail clearance to the Fresno County jail facilities located in Fresno, that Mr. Cassinero's clearance access is labelled as "no contact", which means that he has no contact with people in custody unless accompanied by legal counsel or by a law enforcement officer.
- [52] Mr. Guadian further says that on February 21, 2024, Mr. Cassinero attended at the Fresno County jail at approximately 2:30 p.m. and was accompanied by a law enforcement officer to serve Mr. He. The email further states that Mr. Cassinero was required to confirm the incarcerated person's ID by checking that person's wristband which has the individual's personal information, such as last name, first name, personal ID number, and booking number.
- [53] Mr. Guadian's email is potentially hearsay depending on what use XY is seeking to make of it. While hearsay evidence is permissible on an interlocutory application, given the nature of this application, I will give this evidence limited weight. Specifically, I will not consider this evidence for the proof that Mr. Cassinero served Mr. Zhu. I note that XY counsel was not seeking to admit the evidence for that purpose. However, I will use this out-of-court statement for the limited purpose of rebutting Mr. Zhu's assertion that only members of the sheriffs' office can serve people in custody at Fresno jail.
- [54] I am satisfied, based on Mr. Cassinero's evidence, that he served Mr. Zhu on February 21, 2024 with the amended notice of civil claim. Mr. Cassinero's evidence, and in particular his second affidavit, is very detailed. More specifically, I accept his evidence that he is permitted to serve individuals in custody at Fresno jail and that he served Mr. Zhu that day. Mr. Cassinero said the service stood out for him because he was serving Canadian documents, which was uncommon for him. Further, he attached a photo of Mr. Zhu that was taken by Mr. Zhu's counsel and filed in a court proceeding by that counsel confirming that the person depicted in the photo was Mr. He/Mr. Zhu. Mr. Cassinero confirmed that the person he served on February 21, 2024, was the person in the photo, in addition to checking the ID bracelet.
- [55] I note that I would reach this conclusion even if the email from Mr. Guadian was not in evidence.
- [56] Mr. Zhu's affidavit says that he was not served. Based on the evidence before me, including multiple negative findings by this Court in the past on Mr. Zhu's credibility, and the fact that his evidence included what was essentially argument as to whether Mr. Cassinero could indeed serve him, and Mr. Zhu's misuse of the court process in this application, I have concerns about Mr. Zhu's credibility and reliability and, faced with evidence from Mr. Cassinero that is detailed, credible, and reliable, I prefer Mr. Cassinero's evidence.

- [57] The next issue is whether Mr. Cassinero's first affidavit is defective and, as such, is inadmissible.
- [58] As indicated, the jurat of the first affidavit says, "sworn or affirmed". The court has criticized the use of the term "sworn/affirmed" in affidavits and has held such affidavits to be inadmissible: see Justice Crerar's decision in *P.K.S. v. A.N.R.*, 2024 BCSC 2110, as well as Chief Justice Hinkson's decision in *British Columbia v. Adamson*, 2016 BCSC 584.
- [59] However, the court retains the discretion to receive an affidavit, despite a defect in the jurat, especially where the affidavit is sworn in a foreign jurisdiction: *Harbin Ding Culture v. Newman*, 2004 BCSC 107.
- [60] Further, the defect does not make the affidavit a nullity but rather serves as an irregularity. I note that Supreme Court Civil Rules 22-2(14) allow for an affidavit to be used in evidence despite an irregularity in its form. Moreover, s. 67 of the Evidence Act also permits the court to receive an affidavit with a defect in the jurat. The key question is whether admitting such affidavit evidence gives rise to an injustice.
- [61] I am satisfied that the first affidavit of Mr. Cassinero should be admitted into evidence, despite the defect in the jurat. In my view, doing so does not give rise to an injustice. In particular, I note that the affidavit was made by someone in a foreign jurisdiction. Further, I am satisfied that no injustice would result from the admission of this evidence, as I accept Mr. Cassinero's evidence in his second affidavit that when he made the first affidavit, he was under an oath declaring the evidence to be true under penalty of perjury.
- [62] I am satisfied that when Mr. Cassinero made the oath in making the first affidavit, he understood the gravity and solemnity of making the oath and giving his evidence in that affidavit.
- [63] Moving onto the Miracle Feeds test.

Did the defendant wilfully or deliberately fail to file its response?

- [64] I have found that Mr. Zhu was personally served with the amended notice of civil claim on February 21, 2024. He filed his application to set aside default judgment on November 14, 2025. Thus, it was not filed until just under one year and nine months after he was served with the amended notice of civil claim.
- [65] Mr. Zhu deposes that it is his intention and has been his intention to defend the claim since he became aware of the matter. I note that my finding is that he became aware of the matter on February 24, 2024, but in any event the notice of application states that on or around April 25, 2025, he became aware of this proceeding and that default judgment had been obtained. Mr. Zhu's affidavit does not note this or address how he became aware of this proceeding or that default judgment had been obtained. Nevertheless, the affidavit does state that around May 8, 2025, he contacted legal counsel, that being Mr. Ritchie, KC, at Bridgehouse Law. Mr. Zhu then states he became aware of the specific content of the notice

of civil claim and amended notice of civil claim on July 18, 2025, after a friend obtained copies of the pleadings from Court Services Online.

- [66] In any event, I have found that Mr. Zhu was served with the amended notice of civil claim on February 21, 2024. Mr. Zhu did not file a response to the amended notice of civil claim, and on March 19, 2025, XY obtained default judgment.
- [67] If a party waits one year and nine months to take any steps to defend a proceeding, it is difficult to see how such conduct is not deliberate. Moreover, as indicated, I earlier made the finding that Mr. Zhu's failure to file and failure to serve this notice of application on XY counsel in B.C. was not an inadvertent omission, but rather a deliberate action.
- [68] I find that that factual finding also further supports a finding that Mr. Zhu deliberately failed to file a defence in this action.
- [69] Last, I also note my finding that Mr. Zhu has brought this application primarily to assist his attempts to adjourn and complicate the Hong Kong action.
- [70] As such, in my view, Mr. Zhu wilfully and deliberately failed to file a response to the amended notice of civil claim.

Did the defendant apply to set aside as soon as reasonably possible upon learning of the default or provide an explanation for any delay?

- [71] Mr. Zhu did not apply as soon as reasonably possible upon learning of the default. Again, the notice of application indicates that Mr. Zhu learned of the default judgment in or around April 2025, and he deposed in his affidavit that he contacted Mr. Clark on May 8, 2025, with a view of seeking his help to defend him in this matter and setting aside default judgment. Nevertheless, it was not until over six months later that Mr. Zhu filed this application.
- [72] I again note that this application was not properly served, nor was a supporting affidavit filed. Mr. Zhu's explanation for this delay is that he is in custody, which has created some challenges, and that Mr. Clark was in the course of retiring and that his retirement had led to some delay in his efforts to set aside the default judgment, as he had to transfer conduct of this matter to others at Bridgehouse Law.
- [73] In my view, while these reasons may explain some delay, they do not explain or justify a delay of over six months. I reiterate my finding above that, despite being in custody, Mr. Zhu has been able to retain and instruct counsel in California, and a company that he controls has been able to instruct counsel in Hong Kong. Further, there is no evidence about any difficulty that he had in instructing Mr. Clark or other lawyers at Bridgehouse Law, other than his evidence that Mr. Clark's pending retirement has contributed in some way to the delay.
- [74] In short, Mr. Zhu's evidence does not adequately explain the six-month delay to bring this application, nor does it explain why he did not serve this application on XY.

Is there a meritorious defence or a defence worthy of investigation?

- [75] The onus is on Mr. Zhu to establish the factors justifying setting aside the default judgment order. Mr. Zhu has provided no evidence in support of an argument that he has a meritorious defence or a defence worthy of investigation. His affidavit is silent on this issue.
- [76] Similarly, the notice of application does not set out any defences, except some reference to the underlying action being an abuse of process. This, as noted in XY's submission, is inconsistent with the law which states that it cannot be an abuse of process merely by seeking to commence a second action with an object of renewing an earlier judgment: *Young v. Verigin*, 2007 BCCA 551 at paras. 14, 15, and 17.
- [77] In my view, Mr. Zhu has not met his onus of showing there is a meritorious defence or a defence worthy of investigation. Simply put, there is almost zero evidence or submissions in Mr. Zhu's materials on this issue.
- [78] Based on the foregoing, I conclude that it is not in the interests of justice to set aside default judgment.

Conclusion and costs

- [79] I have already ordered on January 9, 2026 that the adjournment application is dismissed and I have given the reasons for that order today.
- [80] Mr. Zhu's application to set aside default judgment is dismissed.
- [81] Costs will be to the plaintiff in any event of the cause, payable forthwith.
- [82] I will also exercise my discretion to summarily assess and fix those costs under Rule 14-1(15). Pursuant to Schedule 3 of Appendix B of the Supreme Court Civil Rules, I will award base costs of \$1,980, which reflects that XY counsel has been in court for two full days. Part of that has been waiting for an available judge, which is reasonable to take into account.
- [83] Further, the circumstances of this case warrant uplift costs at 1.5x at Scale B. An award of uplift costs requires two things, unusual circumstances and that awarding costs at a fixed scale would be grossly inadequate or unjust: *Ding v. Canam Super Vacation Inc.*, 2024 BCCA 102 at para. 211. As indicated in *Ding*, a party's conduct may constitute unusual circumstances where it warrants some form of rebuke, although not to the level required for special costs.
- [84] In my view, Mr. Zhu's misuse of the court process, which I set out above, warrants some form of rebuke, though not to the level of special costs.

[85] In addition, and in the alternative, it is clear from the evidence that XY had to go through considerable steps in order to have this matter actually heard. The evidence also established deliberate delay on the part of Mr. Zhu, all of which resulted in considerable increase of costs to XY and, as such, unusual circumstances exist and awarding costs at a fixed scale would be grossly inadequate or unjust. So again, I am ordering that XY is entitled to uplift costs of 1.5x at Scale B, which amounts to \$2,970 in costs.

[86] In addition, I will fix disbursements at \$120, which is pursuant to the amount set out in Schedule 3.

"Morishita J."

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