
CANADA / JUDGMENT

Yang v. Wang

2020 BCSC 1176

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Supreme Court of British Columbia

DECIDED

11 August 2020

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2020 BCSC 1176 Yang v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yang v. Wang,

2020 BCSC 1176

Date: 20200811

Docket: S151416

Registry: Vancouver

Between:

Zhongwu Yang

Plaintiff

And

Zi An Wang aka Zian Wang

Defendant

Before: The Honourable Madam Justice D. MacDonald

(Via Teleconference)

Reasons for Judgment

Counsel for the Plaintiff:

J. Jiang

The Defendant, appearing in person:

Z. Wang

Place and Date of Hearing:

Vancouver, B.C.

July 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 11, 2020

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Introduction

- [1] The defendant, Zi An Wang, seeks an order setting aside a default judgment against him. The underlying action that resulted in the default judgment was based on the plaintiff's claim that he advanced \$90,000 to Mr. Wang, Mr. Wang signed a promissory note to this effect, and Mr. Wang had not repaid him. A default judgment in the amount of \$90,000 was granted in favour of the plaintiff, Zhongwu Yang, on December 7, 2015.
- [2] The issue before me is whether the defendant had notice of the claim prior to the default judgment, and whether he delayed for an unreasonable period of time once he had notice, post-default judgment.
- [3] There is no dispute that Mr. Wang was aware of the default judgment in 2016 when the plaintiff sought to garnish his wages. In 2016, the defendant took no steps to set the default judgment aside. He asserts that he "decided to escape from responding [to] the judgment" due to his mother's depression and "mental trauma".
- [4] To date, Mr. Wang has made no payments to satisfy the default judgment.
- [5] Mr. Wang is now seeking to set aside the default judgment because he recently became aware that it affects his credit rating and his mother's depression has "stabilized".
- [6] Based on the evidence before me, I conclude Mr. Wang was properly served in 2015 and that I should not set aside the default judgment due to Mr. Wang's significant delay.

Procedural History

- [7] On June 2, 2020, Mr. Wang filed the application in this matter.
- [8] On June 19, 2020, Mr. Yang responded, opposing the order sought. He did not consent to the application proceeding on the basis of written submissions.
- [9] I agreed with the plaintiff that an application to set aside default judgment involves multiple issues and it was not appropriate to proceed by way of written submissions. I therefore ordered a telephone hearing.
- [10] On July 15, 2020, the telephone hearing commenced. Following the hearing, I reserved judgment. These are my reasons.

Parties' Positions

- [11] Mr. Wang claims he was unaware of the legal action until 2016, when he became aware of the default judgment because Mr. Yang attempted to garnish his wages. He denies being served in October 2015.

- [12] Mr. Wang does not dispute there was a monetary transfer, but disputes the amount and the reason it exists. He states he was simply the guarantor of the debt which is really owed by his former fiancé, Yang Lin.
- [13] Mr. Wang claims he was unable to defend himself in court in 2016 due to his mother's depression and his own depression caused by Ms. Lin's disappearance and her breaking off their engagement.
- [14] Mr. Wang seeks relief now because his mother's mental condition has stabilized.
- [15] Mr. Yang introduced affidavit evidence to establish that the defendant was properly served with the notice of civil claim and substituted service order by 1) email to Mr. Wang's work email address on October 19, 2015; and 2) registered mail to the office of Quadrus Securities Ltd. ("Quadrus"), Mr. Wang's place of work. Canada Post's tracking service indicates that the registered mail was received and signed for on October 20, 2015. The plaintiff argues Mr. Wang has failed to show that the default judgment should be set aside on the basis of lack of service.
- [16] In any event, Mr. Yang argues Mr. Wang did not apply to set aside the default judgment as soon as reasonably possible after learning of the default judgment in 2016. The plaintiff argues the delay was wilful and deliberate. Mr. Wang only applied to set aside the default judgment once it came to his attention that it affects his credit rating.
- [17] The plaintiff argues the defendant has no meritorious defence. Mr. Wang has provided no medical documentation regarding his mother's mental health. He has not provided a link between his mother's mental health and his failure to respond to the default judgment. Further, Mr. Wang acknowledges Mr. Yang provided some money but alleges that the monetary transfer was a repayment of debt owing by Ms. Lin to Mr. Wang's mother. The defendant has failed to provide any documentary evidence to corroborate his story.
- [18] Finally, the plaintiff argues a four-year delay is highly prejudicial to Mr. Yang.

Legal Principles

Service of Notice of Civil Claim

- [19] Rule 4-4(1) of the Supreme Court Civil Rules [Rules] permits this Court to order substituted service. Rule 4-7(1) allows this Court to set aside a judgment if the defendant can show a plausible explanation for their lack of knowledge of the proceedings.
- [20] 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. The factors in *Miracle Feeds v. D. & H. Enterprises Ltd.*, [1979] B.C.J. No. 1965 (Co. Ct.) [Miracle Feeds], do not apply to applications to set aside default judgments where proper service was not effected: *Fraser Valley Disposal Ltd. v. Cho*, 2016 BCSC 1923 at para. 9; *Bajwa v. Deol*, 2017 BCSC 1673 at para. 19.

Court's Discretion to Set Aside Default Judgment

[21] Rule 3-8 governs this Court's discretion to set aside a default judgment where the applicant did not file a response to civil claim. Rule 3-8(11) provides:

Court may set aside or vary default judgment

(11) The court may set aside or vary any judgment granted under this rule.

[22] A defendant seeking an order pursuant to Rule 3-8(11) must satisfy the Miracle Feeds test. The Miracle Feeds test has been repeatedly affirmed by the Court of Appeal. The test was explained in *BCI Bulkhaul Carriers Inc. v. Aujla Trucking Inc.*, 2015 BCCA 411 at paras. 2-3 [BCI Bulkhaul]. The defendant must establish:

1. [They] did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
2. [They] made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
3. [They have] a meritorious defence or at least a defence worthy of investigation; and
4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.

[23] The Court of Appeal has stated that the Miracle Feeds test is not to be rigidly applied. As stated in *Nichol v. Nichol*, 2015 BCCA 278 at para. 37 [Nichol]: "The factors set out in the Miracle Feeds decision are not meant to be applied inflexibly, nor are they immutable". In *McEvoy v. McEachnie*, 2008 BCSC 1273, Justice Rogers helpfully explained how the factors are to be applied:

[12] The defendant's position comes down to this: they say that Miracle Feeds comprises an immutable list of the factors that the court must consider on an application to set aside a judgment. They say that if the application misses on one of the factors, then the application must fail.

[13] The flaw in the defendants' position is that it takes too narrow a view of the scope of the court's discretion in these matters. Whether to set a default judgment aside is an exercise of discretion, and the Miracle Feeds criteria are nothing more than a non-exhaustive set of factors to be taken into account when considering whether to exercise that discretion. That this is so was established by the Court of Appeal in *H.M.T.Q. In Right of the Province of British Columbia v. Ismail*, 2007 BCCA 55.

[24] The failure of a defendant to address each of the various requirements set out in Miracle Feeds does not preclude them from being successful: *Nichol* at para. 37; *British Columbia (Director of Civil Forfeiture) v. John Doe*, 2010 BCSC 940 at para. 15. The factors are not mandatory or exhaustive: *Andrews v. Clay (c.o.b. Travel Specifics)*, 2018 BCCA 50 at para. 29

[Andrews]. However, the court must be persuaded, based on the factors taken together along with any other relevant considerations, it is in the interests of justice to set aside the judgment.

[25] With respect the fourth factor, Justice Hunter in Andrews stated:

[32] Finally, I note Judge Hinds' statement in Miracle Feeds that the first three factors must be "established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant". By this I do not understand him to mean that the defendant cannot rely on evidence unless it is contained in affidavit material filed by or on behalf of the defendant. Rather the emphasis in my view is on evidence established by affidavit. The defendant can rely on any affidavit evidence, but cannot establish that there is a meritorious defence simply by asserting it.

Analysis

Service of Notice of Civil Claim

[26] In this case, I am satisfied that service was effected on Mr. Wang in October 2015.

[27] The plaintiff's uncontradicted evidence is that he obtained a substituted service order pursuant to R. 4-4(1) of the Rules. On October 19, 2015, he served the notice of civil claim upon Mr. Wang in accordance with the order for substituted service of Master Taylor dated October 16, 2015. In particular, the plaintiff sent a copy of the notice of civil claim and the substituted service order to Mr. Wang's work email. Mr. Wang also sent it by registered mail to Mr. Wang's employer, Quadrus. On October 20, 2015, the registered mail was received and signed for by an individual who appeared to be Mr. Wang's assistant at Quadrus.

[28] According to a representative from Quadrus, Mr. Wang was employed by Quadrus until November 6, 2015. Mr. Wang stated in oral submissions that he worked for Freedom 55 Securities until October 2017. Freedom 55 Securities is a company that merged with Quadrus. The two companies have the same physical address and telephone numbers on their business cards. I find this is evidence that they are related. Further, a business card from Quadrus and a business card from Freedom 55 were both issued in the name of the defendant, Charles Zi An Wang. Mr. Wang's work email address contained "f55" in the address and it also contained his name. This email appears on both business cards.

[29] Mr. Wang states in his response to the application response that the "potential reason" he did not receive the notice of civil claim in 2015 was that he only attends at his office five to ten times in a year. In his oral submissions he stated he went to headquarters three to four times a year. He says did not notice the document in his mail slot. In terms of the service by email, he states his email address is shared. He hired part-time assistants in 2015 to clear and supervise his email because he did not have time to view the emails himself. Mr. Wang claims the assistants never forwarded the emails to his attention.

- [30] The above assertions are not sworn statements. Even if they were, I would not find that they provide a plausible explanation as to why service was not effected. One cannot assert service was not properly effected by not checking their mail.
- [31] Mr. Wang has not met his burden under R. 4-7(1) to establish that the notice of civil claim and notice of substituted service were not served on him. Therefore, I will go on to determine whether I should exercise my discretion to set aside the default judgment.

Court's Discretion to Set Aside Default Judgment

- [32] Based on an overall assessment of the factors set out in *Miracle Feeds*, I am not persuaded that it is appropriate for me to exercise my discretion to set aside the default judgment.

First Factor: the defendant did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim

- [33] When a defendant decides not to defend an action or, as here, simply chooses to ignore it, the court will generally infer that the defendant wilfully and deliberately failed to defend the claim: *Tiamzon v. Vandt*, 2020 BCSC 587 at para. 21 [*Tiamzon*].
- [34] When the default judgment came to Mr. Wang's attention in early 2016, he took no steps to defend the action. He submits his non-action was not wilful or deliberate. Mr. Wang relies on *Chelin Agencies (1995) Ltd. v. Tiger Mondial Inc.* (2013), Provincial Court File No. 12-38597 at para. 23 [*Chelin*]. Paragraph 23 quotes *Kleinfelder v. Stoy*, [1994] B.C.J. No. 2823 (Prov. Ct.), on the meaning of "wilfully" and "deliberately":

33 The words "wilfully" and "deliberately" used by Mr. Justice Hinds suggest to me that he had in mind the defendant whose inaction was at the least conscious, and coloured by knowledge of the attendant risks. His language would include, as well, that defendant who is contemptuous of the process of the court, or who otherwise intends to frustrate the process of the court. The word "wilfully" I would assume to include the kind or degree of recklessness which is so extreme or unjustifiable as to amount to wilfulness. His language would not seem to include, however, that person whose failure is "innocent" in some broad sense of that word.

- [35] *Chelin* says inaction may be "characterized as being contemptuous of the process of the court." While I agree that Mr. Wang's inaction may not rise to the level of contemptuous, it is "coloured by knowledge of the attendant risks."
- [36] A closer reading of the case confirms the defendant in *Chelin* was far more diligent than Mr. Wang but was ultimately unsuccessful.
- [37] In *Chelin*, the defendant sought to set aside a default order granted November 5, 2012. Upon learning of the default order, in early November 2012 the defendant immediately retained counsel who tried three times in the weeks that followed to set down an application to set aside the order. Unfortunately, counsel for the defendant were in Québec and were unable to navigate the BC court procedures. After being made aware that the application materials

were defective and rejected in December 2012, the defendant's counsel chose to do nothing until prompted by the defendant in late February 2013. By that point a garnishing order had been issued.

- [38] In these circumstances, based on inaction over several months, Associate Chief Judge Phillips (as she then was) determined that it was "impossible to conclude from such inaction that Tiger Mondial [the defendant] applied to set aside the default judgment as soon as reasonably possible": para. 29. The court reasoned that while court procedures may be difficult for litigants to understand, the defendant was represented by counsel. The defendant was a national sales business person and was not an unsophisticated litigant. Further, the delay of several months in that case was "not in keeping with s. 2(1) of the Small Claims Act which exhorts that claims in this court should be resolved in a speedy, just, inexpensive, and simple manner": para. 36. The court concluded the defendant's actions, which included inadvertence and missteps, were "deliberate" and "culpable." The defendant did not satisfy the court that justice would be served by setting aside the default order.
- [39] I note that Mr. Wang worked for a securities company shortly before the time he became aware of the default judgment. According to his oral submissions, he was a securities advisor with Freedom 55 between 2013 or 2014 and 2017. Although he was not represented by counsel, Mr. Wang is not a typical unsophisticated litigant regarding financial matters. Further, similar to the defendant in *Chelin* who was prompted by a garnishing order, Mr. Wang only applied to set aside the default judgment once it came to his attention that the debt affects his credit rating. The earlier garnishing order did not prompt Mr. Wang, presumably because it was not acted upon. In 2016, his former employer, Quadrus, advised that Mr. Wang no longer worked for the company.

- [40] In these circumstances, I find Mr. Wang's inaction to be wilful and deliberate.

Second Factor: the defendant made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or gave an explanation for the delay in the application being brought

- [41] On February 22, 2016, Mr. Yang obtained the garnishing order after judgment with Quadrus as the garnishee. Mr. Wang acknowledged the garnishing order in an email to CNS Law Corporation (which acted for Mr. Yang) dated March 4, 2016. He also deposed in his affidavit #1 that he received the default judgment in 2016.
- [42] I find that Mr. Wang did not apply to set aside the default judgment as soon as was reasonably possible after learning of it. He waited four years before seeking to set it aside. In *Labadie v. Hegel*, 2017 BCSC 909 at para. 39, aff'd 2017 BCCA 446, Justice Church found a six month delay "inordinate".

- [43] In terms of whether there was a reasonable explanation for the delay, Mr. Wang deposed that in 2016 he "hesitated and chose not [to respond to] the judgment." He explained it was because of his mother's mental condition. In his notice of application, he stated he felt he was put into a "debt trap" by Ms. Lin and Mr. Yang and he did not want the trouble he put his family through from 2014 to 2015 to happen again. He further stated "I decided to escape from responding [to] the judgment" because he wanted his mother's recovery to continue.
- [44] I agree with the plaintiff that there is no link between responding to the default judgment and Mr. Wang's assertion that his mother was depressed. He provided no documentary evidence to support the existence of his mother's depression or any other mental health issues. Although Mr. Wang argues his mother's depression was caused by Ms. Lin leaving him, he provided no evidence of this connection. Even accepting that his mother was depressed, there was nothing in evidence to link her depression to the loan or the default judgment.
- [45] Importantly, Mr. Wang wrote a memorandum on March 4, 2016 concerning the debt details. This evidence is unsworn and amounts to no more than a self-serving declaration. As such, it cannot be relied upon for proof of its contents. However, I note that in this memorandum written much closer in time to the actual events, Mr. Wang makes no mention of his mother's depression or of the effect of the situation on her.
- [46] In addition, there was no explanation as to why Mr. Wang's mother would know about the loan if he defended it in 2016, or why attempting to relieve himself of a debt would affect her depression. Even if I accept that Mr. Wang's mother was depressed because he incurred the debt for Ms. Lin who then left him, this does not explain why she would not want Mr. Wang to defend a judgment against him.
- [47] Finally, Mr. Wang decided to tell his mother about the default judgment when he found out it affected his credit rating. He states in his application that he advised his mother about the default judgment and she was "able to [respond] to the case in the normal way." He does not explain why his mother could suddenly handle the information in 2020 when she could not in 2016.
- [48] I am not persuaded by Mr. Wang's explanation as to why he did not take steps in 2016 to attempt to set aside the default judgment.

Third Factor: the defendant has a meritorious defence or at least a defence worthy of investigation

- [49] The plaintiff relies upon a promissory note dated December 31, 2013. It is written in Chinese, but the translation states that Mr. Wang borrowed \$90,000 CAD from Mr. Yang. It states Mr. Wang will repay the loan in full before the end of 2014.

- [50] Mr. Yang deposed that Mr. Wang signed the promissory note in front of the camera. He did notice a discrepancy in the date. The promissory note is dated December 31, 2013; Mr. Yang remembers the video conference meeting taking place on an earlier day in December. The defendant stated in oral submissions that he is pretty sure that it is not his signature on the promissory note. He stated he signs in English. The above statements by Mr. Wang are not contained in an affidavit. Many of his statements were simply questions about the promissory note rather than denials that he signed it.
- [51] Even if Mr. Wang did not sign the promissory note, he acknowledged that he is the guarantor of the loan. Mr. Wang stated that he is just a debtor in name. He stated in his application that his fiancé owed the money to his mother for various treatments for which his mother had paid. He stated Ms. Lin could not borrow the money she required from her father so Mr. Wang borrowed it on her behalf. In his affidavit #1 at para. 8 he deposed: "Lin used my name to borrow 85000 CAD from her father." He asserted Ms. Lin received the money and never paid any of it to him. In his notice of application, Mr. Wang stated "I agreed to help her last time to cover her debt of 85000 CAD by raising fund from Yang Zhong Wu."
- [52] Mr. Yang agrees he asked his daughter, Ms. Lin, for assistance in advancing the funds to Mr. Wang.
- [53] Mr. Wang stated in his application that he thought he and Ms. Lin were getting married and that the debt would be "a family internal issue."
- [54] Even if Ms. Lin received the money and paid Mr. Wang's mother, it does not answer why Mr. Wang is not responsible for the debt to Mr. Yang. Mr. Yang's sworn evidence is that the loan was to assist Mr. Wang in addressing financial difficulties he had with his company. Any arrangement regarding the debt between Mr. Wang and Ms. Lin was not brought to the attention of Mr. Yang.
- [55] If Mr. Wang never received the benefit of the money, that is an issue between himself and Ms. Lin. Mr. Wang admitted at para. 6 of his application that the responsibility for the debt was an internal matter between Ms. Lin and himself. He states:
- By considering we were going to [get] married at the time I agreed to help her last time to cover her debt of 85000 CAD by raising fund from Yang Zhong Wu. My original thought was that it would be a family internal issue after Lin and I married.
- [56] If Ms. Lin took advantage of Mr. Wang that is very unfortunate. However, the evidence before me points to Mr. Wang being responsible for the debt.
- [57] The facts do not establish a meritorious defence or even a defence worthy of investigation. I say more about this conclusion in the next section.

Fourth Factor: the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant

- [58] Apart from his unsworn assertions, Mr. Wang provided no evidence of indebtedness between himself and Ms. Lin or between Ms. Lin and his mother. The appendices to his response to the application response are not attached to an affidavit.
- [59] The emails in Mr. Wang's appendices, even if they were admissible, are not sufficient to establish such a debt. The other documents attached to Mr. Wang's application response do not show the money trail Mr. Wang attempts to establish.
- [60] Mr. Wang wrote a memorandum on March 4, 2016 concerning the debt details. The memorandum is contained in the appendices to his response to the application response. This document acknowledges there is a debt, but tries to explain that it was a loan for Ms. Lin using his name. As stated earlier, this memorandum is unsworn and self-serving; it cannot be relied upon for proof of its contents. However, I note that Mr. Wang mentions the debt is "90,000 CAD". This amount contradicts his statement in his application and affidavit that only "80,000 CAD" was paid.
- [61] Further, Mr. Wang deposed that Mr. Yang only paid \$80,000 CAD and "Ms. Lin paid to my mother's account directly only 80,000 CAD." In his oral submissions he stated he wants access to Ms. Lin's HSBC account to establish how she spent the money. He further stated Ms. Lin only paid his mother back \$30,000 to \$40,000 and that she borrowed money from other friends.
- [62] The evidence tendered by Mr. Wang is full of contradictions.
- [63] The evidence relied upon to set aside a default judgment must be accurate and persuasive. As stated in Andrews:
- [43] . A party seeking to set aside a default judgment must provide sufficient evidence for the court to conclude that the asserted defence is meritorious or at least worthy of investigation.
- [44] In Schmid v. Lacy (1991), 7 B.C.A.C. 77, Justice Locke, with the other members of the Division concurring, stated:

in my opinion, the phrase "worthy of investigation" does not mean that one is merely entitled to make the allegation. One must, I think, descend to details such as to enable the judge to correctly exercise his mind upon whether there is indeed such a defence

- [64] I do not find that Mr. Wang has provided this Court with sufficient evidence to raise a meritorious defence, or even a defence worthy of investigation.

Prejudice

- [65] Lastly, I accept the plaintiff's position that Mr. Yang will suffer prejudice if the default judgment is set aside four and a half years after it was obtained and he is forced to prosecute his claim at this late date.

[66] During his oral submissions, Mr. Wang advised me several times that it was difficult for him to remember details. This is precisely the reason delay cannot be countenanced. Memories fade; it is highly prejudicial to Mr. Yang to have to re-litigate the debt when the details are no longer fresh in the litigants' minds.

[67] The comments of Justice Sharma in *Tiamzon* are helpful:

[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).

[Emphasis added.]

Conclusion

[68] The defendant bears the burden to show that default judgment should be set aside: *Miracle Feeds* at para. 61. Mr. Wang has not met his burden.

[69] Mr. Wang's application to set aside the default judgment is dismissed.

"D. MacDonald J."

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