

CANADA / JUDGMENT

Yang v. Wang

2021 BCCA 56

COURT

British Columbia Court of Appeal

DECIDED

3 February 2021

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2021 BCCA 56 Yang v. Wang COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Yang v. Wang, 2021 BCCA 56 Date: 20210203 Docket: CA47038 Between: Zhongwu Yang Respondent (Plaintiff) And Zi An Wang aka Zian Wang Appellant (Defendant) Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Groberman The Honourable Madam Justice Stromberg-Stein On appeal from: An order of the Supreme Court of British Columbia, dated August 11, 2020 (Yang v. Wang, 2020 BCSC 1176, Vancouver Docket S151416). Oral Reasons for Judgment The Appellant, appearing in person (via videoconference): Z. Wang Counsel for the Respondent (via videoconference): J. Jiang Place and Date of Hearing: Vancouver, British Columbia February 3, 2021 Place and Date of Judgment: Vancouver, British Columbia February 3, 2021 Summary: The appellant applied to a Supreme Court judge to set aside a default judgment on a promissory note. The default judgment was granted on December 7, 2015. The appellant claims not to have known of the judgment, or of the action against him, until after a garnishing order was entered on February 22, 2016. Even after becoming aware of the judgment, however, he delayed bringing an application to set it aside for four years. The judge refused to set aside the default judgment, finding that he met none of the criteria for such an order. On appeal, the appellant seeks to file additional evidence. Held: Application to adduce additional evidence denied; appeal dismissed. The appellant provides no adequate reason for his failure to adduce the evidence at first instance, and it is, in any event, only tangentially relevant to the application. The chambers judge applied the correct test to setting aside a default judgment, and made no errors in her findings.

- [1] GROBERMAN J.A.: This is an appeal from a refusal by a judge of the Supreme Court to set aside a default judgment. There is, along with the appeal, an application to adduce fresh evidence.
- [2] The underlying proceeding was commenced in February 2015. It alleged that the respondent lent the appellant \$90,000, and that the appellant gave the respondent a promissory note in December 2013, undertaking to repay the loan by the end of 2014. The entire balance of the loan remained unpaid at the date the action was commenced.

- [3] The respondent made several attempts to serve the plaintiff with the notice of civil claim, both at his residence and at his place of work. It appears that the appellant was evading service. On October 16, 2015, a master granted an order for substitutional service, requiring the respondent to serve the appellant at his work email address, and by registered mail to a business address.
- [4] On December 7, 2015, after finding that the appellant had failed to file an appearance within the time limited following substitutional service, default judgment was entered. A garnishing order followed on February 22, 2016. The appellant became aware of the garnishing order by March 4, 2016. He did not apply to set aside the default judgment for over four years, filing his notice of application on June 2, 2020.
- [5] The appellant's explanation for his delay relates to his mother's mental condition. Without any details or medical evidence, he states that his mother suffered a recurrence of depression in 2014, and that the depression lasted for a considerable length of time. In his affidavit, he says: [When] I receive[d] the default judgment [in] this case[,] I hesitated and chose not [to respond to] the judgment. It was only because of my worry [about] my mother's mental condition.
- [6] In his oral submissions today, the appellant also made reference to his youth and the fact that he had not grown up in Canada, suggesting that his naivety with respect to the court system was also an important factor.
- [7] In her comprehensive reasons for judgment, the judge set out the history of the case, and applied the factors in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 at 61 (Co. Ct.) to decide whether to exercise her discretion to set aside the judgment. It has long been accepted in this Province that those are the correct factors to consider on an application to set aside a default judgment.
- [8] The judge found that the appellant had been properly served with the civil claim. Although she did not say so in terms, it is clear that she concluded that he was either aware of the civil action in 2015, before default judgment was issued, or, if he was unaware of it, it was through deliberate efforts on his part to avoid receipt of the notice of civil claim.
- [9] She found that when he became aware of the default judgment in 2016, he failed to move expeditiously to set it aside, and that his failure was wilful and deliberate. The mere statement that his mother was depressed had little evidentiary value, and did not serve, in any way, to explain why he could not have moved to set the judgment aside.
- [10] The judge also found that the affidavit material filed by the appellant did not establish that there was a defence worthy of investigation, let alone a meritorious defence to the action. She noted, as well, that many of the appellant's allegations were not supported by affidavit evidence.

- [11] Finally, she found that the passage of time served to prejudice the respondent in his ability to prove his case.
- [12] I can detect no error in the judge's approach or analysis.
- [13] The application to this Court to adduce fresh evidence seeks to introduce some banking records and includes other documents that provide some support for certain aspects of the appellant's version of the facts surrounding his financial dealings with the respondent. The material does not meet the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. There is no adequate explanation as to why the evidence could not, with due diligence, have been adduced in the court below. The evidence is, in any event, tangential to the issues in the case, and far from conclusive on any issue that is critical to the claim.
- [14] None of the arguments or characterizations of fact presented today cast doubt on the judge's findings. In particular, it is apparent that the appellant wilfully failed to respond to the notice of civil claim, and then unreasonably delayed in moving to set aside the default judgment. He still does not present any meritorious defence to the respondent's claim.
- [15] I would affirm the judgment below and dismiss the appeal.
- [16] SAUNDERS J.A.: I agree.
- [17] STROMBERG-STEIN J.A.: I agree.
- [18] SAUNDERS J.A.: The appeal is dismissed. "The Honourable Mr. Justice Groberman"

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