

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harkirat Construction Ltd. v. Boora*,
2025 BCSC 926

Date: 20250520
Docket: S50077
Registry: Penticton

Between:

Harkirat Construction Ltd.

Plaintiff

And

Anvir Singh Boora

Defendant

Before: The Honourable Justice Hewson

Reasons for Judgment

Counsel for the Plaintiff:

Monique Patterson, agent for
Michael Patterson
H. Sahli, Articled Student
I. Chawna, Articled Student

Counsel for the Defendant:

M.A. McLeod, agent for
S.R. Srivastava

Place and Date of Hearing:

Penticton, B.C.
May 14, 2025

Place and Date of Judgment:

Penticton, B.C.
May 20, 2025

Nature of the Case

[1] This is an application to set aside a default judgment.

Parties

[2] The applicant is Anvir Singh Boora. He is the defendant in a claim arising out of the construction of a fruit stand and three-bedroom unit on a property that Mr. Boora owned near Keremeos, BC.

[3] The respondent on this application, and the claimant on the notice of civil claim, is Harkirat Construction Ltd. (“Harkirat”). Harkirat is a construction company in Cawston, BC.

[4] The notice of civil claim was filed on August 8, 2024. Mr. Boora, although served, failed to file a response within the time allowed. Harkirat applied for an order under Rule 3-8(1), and obtained an order for default judgment on January 15, 2025.

General Outline

[5] I will review briefly the factual background, the issue raised, the applicable law, my analysis and my conclusion.

Background

[6] Mr. Boora owns property at 5216 Highway 3, Keremeos BC. On February 2, 2023 he signed a contract with Harkirat. The contract was for the construction of two-storey building for a fruit stand below and three two-bedroom units above. The contract called for payment of the total cost of \$526,000, plus additional charges for any additional work.

[7] The project proceeded immediately. In the weeks that followed, additional work was requested. In August 2023, Harkirat requested payment of an additional \$339,150, over and above the originally contracted price. Mr. Boora did not pay the additional amount. Harkirat retained a lawyer (“Plaintiff’s Counsel”).

[8] On the instructions of Harkirat, Plaintiff's Counsel filed a notice of civil claim on August 8, 2024.

[9] The notice of civil claim was personally served on Mr. Boora on August 29, 2024.

[10] Mr. Boora met with a lawyer on September 6, 2024 to discuss the civil claim ("Defendant's Counsel").

[11] On September 10, 2024, Defendant's Counsel sent an email to Plaintiff's Counsel. The email said:

We have been contacted by the Defendant in the above-noted matter and we are in the process of being retained. We request that you do not take any actions in default against the Defendant without providing sufficient notice.

[12] Plaintiff's Counsel did not respond to that email.

[13] Defendant's Counsel did not file a response to civil claim within 21 days, as required by Rule 3-3(3) of the *Supreme Court Civil Rules*.

[14] On January 2, 2025, Defendant's Counsel sent a second email to Plaintiff's Counsel. That email began, "We are hoping to file a response at the earliest." The email went on to request certain documents, including invoices, time logs and communications regarding the claims.

[15] Plaintiff's Counsel did not respond to the second email.

[16] On January 15, 2025, Plaintiff's Counsel filed an application for default judgment on behalf of Harkirat. The order was issued the same day.

[17] On January 17, 2025, Defendant's Counsel sent a third email. This email had a letter attached, dated January 16, 2025. The letter requested the same information requested in the email sent on January 2, 2025.

[18] Plaintiff's Counsel did not respond to the third email.

[19] On January 20, 2025, a legal assistant from Defendant's Counsel walked two blocks up Main Street in Penticton and hand-delivered a copy of the letter dated January 16, 2025.

[20] The following day, January 21, 2025, Mr. Boora was personally served with a copy of the order for default judgment. That same day, Defendant's Counsel called Plaintiff's Counsel's office on the telephone. He spoke to an articling student. The articling student acknowledged receiving the emails sent to Plaintiff's Counsel on September 10, 2024 and on January 2, 2025.

[21] Mr. Boora promptly brought an application to set aside the default judgment. Harkirat was opposed to the application.

[22] The hearing of the application was adjourned for reasons outside the applicant's control, and eventually heard during the assize in Penticton on May 14, 2025. Defendant's Counsel attended, although Mr. Boora retained Ms. McLeod to speak to the application. Plaintiff's Counsel was represented by an agent on behalf of Harkirat.

Issue

[23] Should the default judgment be set aside?

Law

[24] There is little dispute with respect to the law. Rule 3-8(11) provides that the court may set aside or vary a default judgment.

[25] The decision about whether to set aside a default judgment is guided by the factors set out in *Miracle Feeds v. D. & H. Enterprises Limited* (1979), 10 B.C.L.R. 58 (Co. Ct.), at para 5:

5 ... in order for a defendant to succeed on an application to set aside a default judgment, he must show:

1. That he did not wilfully or deliberately failed 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 the satisfaction of the court through affidavit material filed by or on behalf of the defendant.

[26] The factors set out in *Miracle Feeds* are not meant to be applied inflexibly. They are a non-exhaustive set of factors to be considered when deciding whether to exercise the discretion to set aside the default judgment. Ultimately, the question is whether it is in the interests of justice to set aside the default judgment: *Albo v. Haines*, 2021 BCSC 2200 and the cases cited by Madam Justice Lyster at paras. 12 through 15.

Analysis

[27] In response to the application, Harkirat does not argue that Mr. Boora did not make this application as soon as reasonably possible after obtaining knowledge of the default judgment. Instead, counsel for Harkirat focused on whether there was a meritorious defence or at least a defence worthy of investigation, and on the failure to file a response to the civil claim between August 29, 2024 when he was served, and January 15, 2025 when the order for default judgment was obtained.

[28] In an application to set aside a default order, the burden of establishing that there was a meritorious defence or at least a defence worthy of investigation is low. The British Columbia Court of Appeal has described it as “not onerous”: *Forgotten Treasures International Inc. v. Lloyd’s Underwriters*, 2020 BCCA 341 at paras. 29 and 30.

[29] Mr. Boora filed an affidavit on February 10, 2025. In his affidavit, he asserts that some of the work that Harkirat claims was in addition to the original contract was actually part of the contract, and that therefore there was no justification for the additional costs. He asserts further that the quality of the construction fell below the

standard contracted for, and that as a result he had to spend additional money to remedy the faults.

[30] I am satisfied on the basis of his affidavit that Mr. Boora has, at least, a defence worthy of investigation.

[31] With respect to the failure to file a response, the evidence is clear that after Mr. Boora was served in the summer of 2024, no response was filed. However, the evidence also establishes that Mr. Boora always intended to defend the claim. He consulted a lawyer within days of being served. That lawyer sent Plaintiff's Counsel an email to advise him that Mr. Boora was in the process of retaining him, and to request that no further steps be taken without notice.

[32] Mr. Boora's failure to file a response could be said to have been wilful and deliberate. He was aware of the need to respond, and he and his counsel could have acted with greater dispatch. After retaining counsel, he delayed while gathering information on which to base his response. Without wishing to excuse the delay, I would say that after informing Plaintiff's Counsel of his involvement it was not unreasonable for Defendant's Counsel to delay the response and investigate the circumstances, while assuming that he could expect professional courtesy from opposing counsel.

[33] In *Forgotten Treasures*, the Court of Appeal noted:

[14] Rule 3-8(1) can, in appropriate circumstances, serve a useful purpose. However, reliance on R. 3-8(1), once counsel for the plaintiff becomes aware that the defendant in an action has retained counsel, becomes constrained. The authors of *McLachlin & Taylor, British Columbia Practice*, 3d ed., loose-leaf (consulted on November 9, 2020), (Markham: LexisNexis Canada Inc., 2006) at 3-138 state:

As a matter of professional courtesy, counsel for a plaintiff should not take out default judgment without warning the defendant or defendant's counsel of his intention to do so unless a notice of response is filed and served within a stated time.

[15] Furthermore, R. 7.2-1, commentary 5 of The Law Society of British Columbia, *Code of Professional Conduct*, 2013, provides:

A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

[34] In an Ontario ruling on an application to set aside a default judgment arising out of similar circumstances, Justice Gomery decided, “If I dismiss this motion, other counsel may see this as an invitation to disregard the prohibition against sharp practice”: *2437021 Ontario Inc. v. Axim Centre Inc. et al.*, 2017 ONSC 7054 at para. 27. I share her concern.

[35] Ultimately, after considering all of the circumstances, the question comes down to whether it is in the interest of justice to set aside the default order. In my view, it clearly is. Declining to set aside the default order in a case like this could appear to condone similar practice in the future. It is in the interests of justice that cases be determined on their merits to the extent possible, and that outcomes not turn on technical points of procedure in the absence of prejudice.

Order

[36] I order that the default judgment be set aside.

[37] Mr. Boora must file his response to civil claim within 21 days from the release of this ruling.

[38] Mr. Boora is entitled to his costs.

“Hewson J.”