IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Soucie Construction Ltd. v. Progressive Ventures Construction Ltd.,* 2025 BCSC 1135

Date: 20250618
Docket: S140995
Registry: Kelowna

Between:

Soucie Construction Ltd.

Plaintiff

And

Progressive Ventures Construction Ltd. and Newcrest Red Chris Mining Ltd.

Defendants

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	C.K. Wendell
Counsel for the Defendant, Progressive Ventures Construction Ltd.:	M. Robinson
Place and Date of Hearing:	Kelowna, B.C. June 9, 2025
Place and Date of Judgment:	Kelowna, B.C. June 18, 2025

Introduction

[1] The defendant Progressive Ventures Construction Ltd. ("PVC") applies to set aside the default judgment obtained by the plaintiff Soucie Construction Ltd. ("Soucie") on October 30, 2024 ("Default Judgment"), with leave to file a response to civil claim.

[2] For the reasons that follow, the application is dismissed.

Background

[3] Soucie's claim against PVC arises from the supply of concrete aggregate to the Newcrest Red Chris Mine Ltd. ("Red Chris Mine") in northern British Columbia. Soucie says that PVC contracted with it to supply aggregate to a batch plant owned and operated by Northlink Supply Ltd. ("Northlink") for which PVC has not been paid. Northlink is now in receivership.

[4] While admitting that it contracted with Soucie for the supply of other aggregate under various purchase orders, including an open purchase order, PVC says that it paid Soucie for all aggregate it contracted to purchase and denies owing any further monies to Soucie, or alternatively, owes much less than Soucie's claim. It says that the aggregate which is the subject of Soucie's claim ("Aggregate") relates to a contract Soucie entered into directly with Northlink for which Soucie invoiced Northlink directly. It says it is Northlink that is indebted to Soucie for the Aggregate, not PVC.

[5] Soucie commenced this action on July 22, 2024, and, as it was entitled to do, served PVC by mailing the notice of civil claim ("NOCC") along with a garnishing order to PVC's bank ("Garnishing Order") to its registered and records office by registered mail on July 26, 2024.

[6] PVC's registered and records office is PVC's head office which it shares with several other companies owned and operated by the PVC's owner, many of which have names beginning with "Progressive Ventures". Although acknowledging receipt of the NOCC by registered mail, PVC says that it somehow must have been

inadvertently misplaced or overlooked and was never received by the appropriate person within PVC to act on it. As a result, no steps were taken to file a response to the NOCC.

[7] Without further discussion or notice, Soucie took default judgment on October 30, 2024. The Default Judgement is for $219,803.73 plus court order interest of $20,741.35 plus costs to be assessed.

[8] On November 5, 2024, PVC become aware of the Default Judgment, retained counsel who contacted Soucie's counsel requesting that the Default Judgment be set aside by consent. The request was declined.

PVC's Position

[9] Relying on *Supreme Court Civil Rules* 3-8 and 4-7(1), PVC applies to set aside the Default Judgment on the basis that the NOCC simply fell through the cracks, that it did not intentionally fail to file a response, that it has a meritorious defence and that it does not owe any money to Soucie.

[10] PVC contends that the Default Judgment should be set aside because:

a) Even though the NOCC was properly served, it did not come to the attention of the person or persons who could act on it until after the Default Judgment was obtained; and

b) Had it been made aware of the NOCC, it would have filed a response because Northlink contracted with Soucie to purchase the Aggregate, not PVC.

[11] Specifically, PVC's president Mr. Dacey McKeown ("Mr. McKeown") says that he did not become aware of the NOCC until approximately October 31, 2024, when, during the process of bidding on an unrelated mining project, he was informed that PVC had been "blacklisted" because of a pending claim against it. Upon asking one of PVC's employees to investigate the matter, he was surprised to learn of the Default Judgment. He asserts that he was completely unaware of and surprised by

the fact that PVC had been served with the NOCC and was not wilfully blind to the fact of the lawsuit.

[12] Further, he notes that neither Soucie nor its lawyers made any effort to reach out to anyone at PVC to inquire whether it intended to respond to the NOCC.

[13] PVC argues that through inadvertence the registered letter that contained the NOCC was never received by a person with the authority or ability to act on it. It asserts that this case falls within the ambit of Rule 4-7 because the NOCC did not come to its attention and therefore no response was filed. It says it has a meritorious defence and so this is an appropriate case for the court to set aside the Default Judgment.

[14] Respecting what it says is its meritorious defence and contrary to the allegations in the NOCC, PVC asserts that Northlink purchased the Aggregate directly from Soucie for the production and supply of concrete to others involved at the Red Chris Mine. It says that Soucie incorrectly invoiced PVC for the Aggregate, that PVC had Soucie correct the mistake, that Soucie redirected the invoice and future invoices to Northlink directly, and that Northlink made payment on account of those invoices. PVC says it agreed to reimburse Northlink for some of the Aggregate but the cost split between them could not be agreed upon. It says Soucie was aware of this disagreement. In short, PVC denies contracting with Soucie for the Aggregate.

[15] Finally, PVC says that to the extent it engaged the plaintiff for the supply of other labour, equipment and material at the Red Chris Mine, it has paid the associated invoices in full.

Soucie's Position

[16] Soucie argues that on July 26, 2024, it properly served PVC with the NOCC and Garnishing Order by registered mail. It says that the principals of PVC were aware of the NOCC and simply chose to ignore it, likely because the Garnishing Order was unsuccessful in having any funds paid into court.

[17] Soucie argues that PVC, a sophisticated party who has been involved in other litigation, has provided no reasonable explanation as to why it failed to file a response to civil claim.

[18] It notes that on July 24, 2024, PVC's president, Mr. McKeown, was notified by Mr. Ron Burton ("Mr. Burton"), PVC's CFO, via email, that PVC's bank had been served with the Garnishing Order. That email stated:

> Hey Soucie just garnished our account for $220k

[19] Mr. Burton's email to Mr. McKeown also attached a file containing both the Garnishing Order and the NOCC. Soucie notes that Mr. McKeown states only that he *doesn't recall* if he opened the file attached to Mr. Burton's email and doesn't specifically deny that he did so. Soucie argues that it would be highly unusual and unlikely for the president of a company who had just been notified of a garnishing order coming out of the blue for significant funds not to investigate further. Soucie says that it is more probable that PVC simply turned a blind eye to the NOCC and chose to ignore it.

[20] Further, Soucie argues that the evidence filed in the application does not support that PVC has a meritorious defence. Consistent with common business practice in the resource industry, it had an open purchase order (PO#33984) with PVC that contemplated that Soucie would provide services and materials on an ongoing basis as requests were made by PVC's representatives. It says the open purchase order set out the contractual relationship between the parties and specifically authorized Soucie to supply the Aggregate to the Red Chris Mine. It maintains that it had no contractual relationship with Northlink during the relevant time. It claims that PVC has repeatedly acknowledged a joint liability for the Aggregate with Northlink and has only disagreed with how the invoice should be split.

[21] Specifically, Soucie says that PVC's project manager at Red Chris Mine, Mr. David Cullinan ("Mr. Cullinan"), requested the Aggregate be delivered to the Red Chris Mine at an agreed upon price and at no point did anyone from PVC suggest

the deliveries were for any other party nor that PVC was not responsible for payment.

Discussion

[22] Rule 3-8(11) provides that the court may set aside or vary a default judgment. To succeed in setting aside a default judgment, the defendant should show that:

a) the failure to file a response was not wilful or deliberate;

b) the application to set aside the default judgment was made as soon as reasonably possible after learning of it, or an explanation for the delay is given;

c) there is a meritorious defence, or at least a defence worthy of investigation; and

d) all requirements are established through affidavit evidence filed on behalf of the defendant

(*Miracle Feeds. v. D & H Enterprises Ltd.* (1979), 10 B.C.L.R. 58 at p. 61, 1979 CarswellBC 48) [*Miracle Feeds*].

[23] The *Miracle Feeds* factors, while applicable, are neither mandatory nor exhaustive: *Andrews v. Clay*, 2018 BCCA 50 at para. 29-31:

> [29] I have described these as factors rather than tests, as they are not intended to be either mandatory or exhaustive of the considerations that are relevant, though in most cases they will be the appropriate indicators of whether it is in the interests of justice to set aside the default judgment.
>
> [30] In *H.M.T.Q. in right of the Province of British Columbia v. Ismail*, 2007 BCCA 55 (Chambers), for instance, Smith J.A. considered *Miracle Feeds* in the context of a default judgment in the Supreme Court of British Columbia and made these comments:
>
> > [11] In my view the items enumerated in the *Miracle Feeds* test are not conditions that must be satisfied by an applicant. Rather, they are relevant factors to be taken into account by a chambers judge in exercising the discretion conferred by Rule 17(12). I find support for this view in the remarks of Madam Justice Saunders in *Deline v. Whittle*, [2002 BCCA 662] where she said,

> [12] On the merits, I observe that the order appealed involves the exercise of discretion. Although Mr. Deline vigorously contends that the Miracle Feeds test was not met, and thus there is sufficient merit in the appeal to warrant leave being granted, I do not agree. There are, necessarily, aspects of judgment that must be applied by a chambers judge in the exercise of discretion under Rule 25(15).
>
> …
>
> [31] In *Nichol v. Nichol*, 2015 BCCA 278, this Court cautioned against an inflexible application of the *Miracle Feeds* factors:
>
> > [37] 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.

[24] In short, the *Miracle Feeds* factors are not conditions that an applicant must satisfy but they are relevant considerations to be taken into account in exercising the Court's discretion regarding whether to set aside a default judgment: *H.M.T.Q. In Right Of The Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11.

[25] Also relevant is Rule 1-3(1), which states, "the object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

[26] Rule 4-7(1), reproduced below, provides for relief if a document that was duly served did not come to a person's attention:

> 4-7(1) If a document has been served in accordance with this Part but a person can show that the document
>
> (a) did not come to the person's notice,

> (b) came to the person's notice later than when it was served, …
>
> the court may set aside an order, extend time, order an adjournment or make such other order as it considers will further the object of these Supreme Court Civil Rules.

[27] An application under Rule 4-7 involves different considerations than does an application to set aside a default judgment. Importantly, it does not involve a consideration of the merits: *Schlieper v. The Owners, Strata Plan VR59*, 2022 BCCA 375, aff'g 2021 BCSC 1997 [*Schlieper*].

i. The First Factor - failure to file a response was not wilful or deliberate

[28] Under Rule 4-7(1), the onus is on an applicant to establish that, despite the document having been properly served, they were not aware of the document. The applicant must provide a plausible explanation for his or her lack of knowledge of the proceedings or that they did not wilfully or deliberately fail to respond: *Wang v. Liu*, 2019 BCSC 1983 at para. 39; *Al-Marzouq v. Nafissah*, 2019 BCSC 1759 at para. 60.

[29] Given the similarities between the test under Rule 4-7(1) and the first *Miracle Feeds* factor, I will address both together.

[30] Clearly, a defendant who decides not to file a response to an action, or chooses to ignore it, fails to meet the first of the *Miracle Feeds* factors.

[31] Mr. McKeown's explanation that "*I don't recall if I even opened the file attached to [Mr. Burton's] email*" defies credulity. He had just been informed of the Garnishing Order seeking to attach $220,000; it was attached to Mr. Burton's email along with the NOCC and he suggests, in effect, that he didn't investigate further. He states:

> I understood from Ron's email that Soucie Construction Ltd. had taken over $200,000 from our bank account without prior notice to us. It wasn't clear to me why this had been done or how this could have happened. I was very upset at the thought that a significant quantity of money had been taken from one of PVC's accounts without any sort of notice. I was not familiar with the concept of garnishment at that time.

[32] He admits that shortly after becoming aware of the Garnishing Order, and while driving through Terrace, he recognized a principal of Soucie, Mr. Roland Soucie, and followed him for a few blocks while giving him the middle finger.

[33] It is difficult to imagine that the president of PVC being aware of and admittedly being upset by the Garnishing Order and who went to the extent of making offensive gestures to Mr. Soucie, would have taken no steps to get to the bottom of the matter. Instead, his evidence is silent on events between July 26, 2024 and October 30, 2024.

[34] In short, PVC's assertions that it was not aware of the NOCC until after the Default Judgment was entered is weak. I conclude that PVC has not discharged its onus of showing that its conduct was not blameworthy. Rather, the evidence suggests that, with full knowledge of the action, PVC simply chose to ignore it. Mr. McKeown would have been fully aware that PVC was being sued by July 26, 2024, and that he needed to take action to defend it.

[35] I find that PVC's materials fall short of a satisfactory explanation for failing to file a response to the NOCC in a timely manner.

[36] Given this, the Default Judgment cannot be set aside under Rule 4-7(1). Further, this factor militates in favour of not setting aside the Default Judgment under Rule 3-8(11).

ii. The Second Factor - the application to set aside the default judgment was made as soon as reasonably possible, or an explanation for the delay is given.

[37] Upon becoming aware of the Default Judgment on November 4, 2024, PVC had its lawyers contact Soucie's lawyers unsuccessfully requesting that it consent to setting it aside. It took some time for PVC's lawyers to gather the affidavit evidence it required and the notice of application was filed on January 17, 2025, which I consider was within a reasonable time.

[38] This factor militates in favour of setting aside the Default Judgment.

iii. The Third Factor – Demonstrating a meritorious defence, or at least a defence worthy of investigation

[39] The affidavit evidence PVC has produced respecting what it says is a meritorious defence is unsatisfactory. It is replete with hearsay. Glaringly, there is no affidavit from PVC's project manager at the Red Chris Mine, Mr. Cullinan, who was the person directly involved with Soucie and Northlink and who would have been able to provide direct evidence on the points in contention, namely whether he contracted with Soucie for the Aggregate on PVC's behalf or whether the Aggregate was purchased by Northlink directly. PVC says only that Mr. Cullinan is no longer employed by PVC. It fails to give any explanation as to why he still could not have provided an affidavit regardless of his employment status. On the other hand, the uncontroverted evidence from Soucie is that Soucie dealt directly with Mr. Cullinan during the relevant time period and at no point did Mr. McKeown have any dealings with Soucie respecting the Aggregate.

[40] Nor does PVC provide any evidence from a representative of either Northlink or Mr. John Brick, PVC's superintendent at the Red Chris Mine, both of whom presumably would have knowledge of relevant dealings between Soucie and PVC.

[41] Instead, PVC presents an affidavit from Mr. Vincent Giesinger, its Director of Projects, comprising mostly hearsay. Mr. Giesinger was not directly involved in discussions related to the Aggregate or Soucie's claim for non-payment. Further, his affidavit contains argument and conclusions not supported by the evidence. For example, he asserts that there was no agreement between PVC and Soucie for the Aggregate which appears to be contradicted by the evidence.

[42] In short, the merits of PVC's supposed defence are difficult to assess on the basis of the admissible evidence. While Mr. McKeown's two affidavits contain evidence that is mostly admissible, their focus is on explaining why PVC did not file a response to the NOCC and do not much address PVC's meritorious defence. Mr. Giesinger's two affidavits attempt to address PVC's meritorious defence but, as previously noted, contain inadmissible hearsay, argument and conclusions. Indeed,

he admits that he was not directly involved in the day-to-day operations on the Red Chris Mine project other than playing an oversight role and receiving updates from others. His hands-on involvement did not begin until the project was winding down and he was sorting out aging accounts including Soucie's accounts by looking at emails between Mr. Cullinan and Soucie and trying to reconstruct what happened. Indeed, he admits that there could have been agreements made between Soucie, Northlink and PVC to which he is unaware.

[43] This factor militates in favour of not setting aside the Default Judgment.

iv. The Fourth Factor - all requirements are established through affidavit evidence filed on behalf of the defendant.

[44] I have already commented on my concerns respecting the affidavit evidence filed in support of PVC's application.

[45] This factor militates in favour of not setting aside the Default Judgment.

Summary

[46] Considering the *Miracle Feeds* factors in the circumstances of this case, and on balance, I find that PVC has failed to justify why the Default Judgment should be set aside and I conclude it would not be in the interests of justice to do so: *Schlieper* at para. 22; *Andrews* at paras. 28-29.

[47] Further, the general objects of Rule 1-3(1), the just, speedy and inexpensive determination of every proceeding on its merits, weigh in favour of not setting aside the Default Judgment.

[48] PVC's application is dismissed with Scale B costs.

"G.P. Weatherill J."