IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Guards Capital Corp. v. 1220740 BC Ltd.,* 2025 BCSC 1378

Date: 20250530
Docket: H256836
Registry: New Westminster

Between:

Guards Capital Corp.

Petitioner

And:

1220740 BC Ltd., Davinder Grewal, Talya Grewal, Jugraj Singh Barring and Jaskaran Singh Barring, the Occupants of the Property 11092 - 248 Street Maple Ridge

Respondents

Before: The Honourable Justice Underhill

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	G.H. Richards
Counsel for the Respondents 1220740 BC Ltd., Davinder Grewal, and Tayla Grewal:	M. Nied
Place and Date of Hearing:	New Westminster, B.C. May 29, 2025
Place and Date of Judgment:	New Westminster, B.C. May 30, 2025

Introduction

[1] The Respondents 1220740 BC Ltd. ("122"), Davinder Grewal, and Talya Grewal (the “Respondents”) apply pursuant to Rules 22-7(2), 22-1(3), and the inherent jurisdiction of the court to set aside or alternatively vary an order *nisi*

issued May 15, 2025, in respect of a development property in Maple Ridge, British Columbia.

[2] For the reasons that follow, I have concluded that the order should be set aside.

[3] Given the relative urgency, these reasons are brief, and I reserve the right to make minor edits for clarity, grammar, and citations if a transcript is ordered, but the substance will not change.

Background

[4] I will briefly set out the relevant background. The underlying foreclosure proceeding concerns a property owned by the respondent 122, which is located at 11092-248 Street in Maple Ridge, BC.

[5] Former counsel for the Respondents filed a relatively skeletal petition response on April 23, 2025. Paragraph 2 of part 4, factual basis, provides:

> 2) The value of the subject property significantly accedes the value of the debt alleged, and a redemption period of one day is not warranted.

[6] The reference to a one-day redemption period was an error, and in my view, was plainly meant to say "one month," the redemption period that the petitioner was consistently seeking throughout the lead-up to the issuance of the impugned order.

[7] On April 28, 2025, counsel for the petitioner sent an email to former counsel for the Respondents purporting to serve:

a) a requisition resetting the hearing of the order *nisi* application to May 15, 2025;

b) a summary of relief sought; and

c) the affidavit of Alyssa Estrada filed April 11, 2025.

[8] It is acknowledged that the email includes items (a) and (b) but not (c), the Estrada affidavit. Importantly, for purposes of this application, the Estrada affidavit contained appraisal evidence upon which the petitioner relied at the May 15, 2025

hearing. I also note the notice of hearing was served with the petition at an earlier date.

[9] From the transcript included in the record, the hearing before Associate Judge Nielsen was quite brief (under 3 minutes). Petitioner's counsel made a submission to the effect that the value of the property was less than the amounts owing, relying on the appraisal evidence in the Estrada affidavit. I do not understand it to be contested that counsel did not accurately represent the value of the property from that appraisal using, it seems, a figure from an earlier year.

[10] Associate Judge Nielsen ultimately granted the order *nisi* setting the redemption period at one month, and granted the petitioner immediate conduct of sale that it was entitled to exercise prior to the expiry of the redemption period.

Analysis

[11] The Respondents first rely on Rule 22-7(2)(b), which provides that where there has been a failure to comply with the *Supreme Court Civil Rules*, the court may set aside any step taken in the proceeding or a document or order made in the proceeding. Rule 22-7(4) provides that an application for an order under Rule 22-7(2)(b) must not be granted unless the application is made within a reasonable time and before the applicant has taken a fresh step. It is clear on the record before me the Respondents have acted in an expeditious manner in bringing on this application and have taken no other step.

[12] The Respondents say that the failure to serve the Estrada affidavit is material in that it was relied upon by the petitioner at the hearing before Associate Judge Nielsen. They also note that Rule 16-1 requires leave for service of affidavits after a notice of hearing is served, which was not sought in this case.

[13] In my view, the order *nisi* could be set aside on the basis of the failure to serve the Estrada affidavit, but I prefer to ground my decision in Rule 22-1(3), which I turn to next. However, it is my opinion that the irregularity in the service of the Estrada affidavit is properly taken into account in the exercise of my residual discretion under that Rule.

[14] Rules 22-1(2) and (3) provide that if a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed to

make an order, but may subsequently reconsider that order where the court is satisfied that "the person failing to attend was not guilty of wilful delay or default."

[15] In *Madiuk v. Armstrong*, 2015 BCSC 1782, the Court referred to the three-prong test often referred to as the *Miracle Feeds* test, which was articulated in *CMHC v. Bhalla*, 2008 BCSC 1352 ("*Bhalla*"), at paragraph 26:

> ... the applicant must not be guilty of any wilful default in respect of the non appearance; the application to set aside must have been made as soon as reasonably possible; and the applicant must show that there is a meritorious defence to the action or at least a defence worthy of investigation: *Dasmesh Holdings Ltd. v. McDonald* (1985), 1985 CanLII 345 (BC CA), 60 B.C.L.R. 80, 49 C.P.C. 187 (C.A.); *Strata Plan LMS 597 v. Camsix Development Ltd.*, 2004 BCSC 961, 43 C.L.R. (3d) 310; *Schindler v. Johnstone*, 2005 BCSC 476, 11 C.P.C. (6th) 143. The components must be proven by affidavit evidence.

[16] In *Bhalla,* Madam Justice Martinson went on to say that those prongs are not prerequisites, and the court:

> ... must still exercise its discretion. Even if Ms. Bhalla fails to establish the three components, the court must still be satisfied on a balance of probabilities that permitting the order to stand would not constitute a miscarriage of justice: *Lin v. Tang* (1997), 1997 CanLII 2675 (BC CA), 147 D.L.R. (4th) 577, 37 B.C.L.R. (3d) 325 (B.C.C.A.); *Sharma v. Sharma*, 2007 BCSC 1185.

[17] With respect to the first prong of the test - no wilful default - the Respondents provided affidavit evidence to the effect that they were out of the country and instructed their former counsel to defend them in the proceeding, and they were surprised to learn that she had not attended the hearing. They expressly confirmed they did not instruct her to intentionally miss the hearing. In addition, hearsay evidence, which I can consider on an application of this kind, was provided regarding the inadvertent failure of former counsel to diarize the hearing.

[18] For its part, the petitioner first took the position in its application response that the order *nisi* was granted on an "uncontested basis", and that "the terms of the order had been agreed between counsel." However, no affidavit evidence was provided to support those assertions. In a written argument handed up at the hearing, and in oral submissions, the petitioner's position shifted to the effect that I should draw an adverse inference from the failure of the respondent's former counsel to provide an affidavit addressing the failure to attend the hearing.

[19] I am somewhat troubled by this shift in position of the petitioner, and the failure to adduce any evidence in support of its initial position that there was an agreement between counsel. I am not prepared to draw any adverse inference given the record before me, including the direct evidence from the Respondents themselves, the hearsay evidence from their former counsel, and the position taken in the petition response. I do not impute any wilful default on the part of the Respondents or their counsel, particularly taking into account how fast the Respondents have brought this application before the court at no doubt significant expense.

[20] On the latter point, I do not understand the petitioner to dispute the fact that the second prong of the test is satisfied.

[21] With respect to the final prong of the test, the issue here is whether there is at least a defence worthy of investigation as to whether the redemption period should be less than the normal six months (see *CIBC Mortgage Corp. v. Gomez*, 1997 CanLII 1823 (BC SC), at paragraph 4). The issue is not whether there is a general defence to the foreclosure as the petitioner submitted.

[22] On this prong, counsel for the Respondents ably canvassed a number of potential issues with the appraisal appended to the Estrada affidavit, and juxtaposed it with an appraisal commissioned by the Respondents, which on the evidence before me at least, was provided to their formal counsel, but not put forward in the foreclosure proceeding. The Respondents' appraisal from the fall of 2024 values the property at $14 million, well over the amounts owing. It was also pointed out that the assessed value of the property, which I understand was not put before Associate Judge Nielsen, reveals that there is at least a small amount of equity in the property.

[23] In its written argument, the petitioner referred to the Respondents' appraisal evidence as fresh evidence which should not be considered on this application. I do not believe the concept of fresh evidence applies in this context. The Respondents are simply trying to establish that they have a defence worthy of investigation in respect of the shortening of the redemption period, which turns in part on whether the mortgagor has any equity or has suffered a loss.

[24] I am therefore satisfied that the third prong of the test is met, which brings me to the final exercise of discretion to ensure there is no miscarriage of justice. As I noted earlier, it is in my view appropriate to bring in the petitioner's failure to comply with the Rules with respect to the service of the Estrada affidavit in that exercise of discretion. I also agree with the Respondents that I need to layer in the well-known principle that a party should not be deprived of rights by reason of an error of counsel where the consequences can be rectified without injustice to the other side: *Phui v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 791, at paragraph 3. Taking into account all of the circumstances, I am satisfied on a balance of probabilities that it would be a miscarriage of justice to allow the order *nisi* to stand.

Conclusion

[25] I have concluded that allowing the *nisi* order to stand would constitute a miscarriage of justice, and I therefore set it aside.

[26] In the ordinary course, this might have been an application where the parties should bear their own costs or the petitioner might be entitled to its costs. However, given the positions taken by the petitioner in the face of the evidence assembled by the Respondents, I am exercising my discretion to award costs of this application to the Respondents at Scale B. This is, in my view, a matter that ought to have been resolved at least by the outset of the hearing and ended up occupying a significant amount of court time.

[27] I understand there may be further submissions on costs, which I will hear now. That concludes my judgment.

“Underhill, J.”