CITATION: BANKNOTE CAPITAL INC. v. BDO, 2025 ONSC 4443
COURT FILE NO.: BK-23-00000020-0T35
DATE: 20250730

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: IN THE MATTER OF THE BANKRUPTCY OF BANKNOTE CAPITAL INC.

BEFORE: Justice Spencer Nicholson

COUNSEL: A. Raikes for Michael Dziedzic, Moving Party

I. Klaiman for the Trustee in Bankruptcy, BDO Canada Limited, Responding Party

HEARD: March 12, 2025

REASONS ON MOTION

NICHOLSON J.:

[1] Banknote Canada Inc. ("Banknote") provided financial and investment management services out of its head office in Chatham, Ontario. One of its principals was Michael Dziedzic ("Mr. Dziedzic").

[2] It has been alleged that Banknote was used for the purposes of an investment club operating a Ponzi scheme by its directors. It is further alleged that Banknote, through misrepresentations and omissions of fact, induced investors to provide it with funds. Those funds were not used by Banknote as they had represented, but rather in that scheme.

[3] On May 11, 2023, Grace J. issued a *Mareva* Injunction over all the assets of Banknote. The order was broadly worded and included assets whether or not in Banknote's name and whether solely or jointly owned. The assets included any asset which Banknote had the power, directly or indirectly, to dispose of or deal with as if it were its own.

[4] On November 20, 2023, Deputy Registrar in Bankruptcy Stevens granted an Order adjudging Banknote bankrupt and appointed BDO Canada Limited ("the Trustee") as trustee in bankruptcy.

[5] As a result of the alleged Ponzi scheme, a class action was commenced as against Banknote and its principals. McKenzie Lake Lawyer LLP ("McKenzie Lake") represents Mr. Dziedzic in the Class action.

[6] The Trustee moved to set aside the transfer of $212,329.35 made from the bank account of Banknote on April 28, 2023 by Mr. Dziedzic. Those funds were used for an investment with Futura Best Investment LLC ("Futura") into Mr. Dziedzic's own account. It is argued that this impugned transfer constitutes a transfer at undervalue within the meaning of s. 96(1)(b)(i) of the

Bankruptcy & Insolvency Act, R.S.C., 1985, c. B-3 ("*BIA*") and is therefore void as against the Trustee.

[7] Futura is a cryptocurrency company based out of Dubai, United Arab Emirates. On April 20, 2023, Mr. Dziedzic entered into a private investment agreement with Futura in the amount of $154,500USD whereby that money was invested into the FUCN Token Project. Futura would allocate FUCN Tokens equivalent to the value of the participation into Mr. Dziedzic's cryptocurrency wallet.

[8] Perfetto J., heard the Trustee's motion to declare this transaction a transfer at undervalue under s. 96(1)(b)(i) of the *BIA* and granted Judgment dated June 18, 2024 in the Trustee's favour. Mr. Dziedzic did not attend at the hearing of the motion, and it proceeded on an unopposed basis. Costs were awarded to the Trustee in the amount of $14,500.00.

[9] Mr. Dziedzic brings the within motion to set aside the Judgment of Perfetto J. dated June 18, 2024. He argues that the Trustee was aware of the fact that he had retained McKenzie Lake to act on his behalf and had been communicating with them in respect of this matter. The Trustee did not serve a copy of its motion record on McKenzie Lake, did not provide a courtesy copy of the motion record on McKenzie Lake and did not notify McKenzie Lake that it had brought the motion.

[10] Thus, Mr. Dziedzic argues that he was not aware of the motion and did not therefore respond or attend. He further argues that he and Banknote were the victims of Ryan Rumble, another director of Banknote, who was responsible for orchestrating the Ponzi scheme.

[11] It is Mr. Dziedzic's position that he spoke with some of the defrauded investors and was instructed to find an investment opportunity on their behalf to increase their prospects of recovery on their initial investment. Thus, he transferred the funds to Futura for the benefit of the investors and not his own personal benefit. From his affidavit, it appears that these funds have now disappeared as Futura has refused to return the funds.

Applicable Legal Principles:

[12] Section 96(1)(b)(i) of the *BIA* empowers a court to declare that a transfer at undervalue is void as against the trustee under certain conditions. These conditions include:

> (b) the party was not dealing at arm's length with the debtor and
>
> (i) The transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of bankruptcy.

[13] The *Bankruptcy and Insolvency General Rules* contain a specific rule with respect to service. Rule 6 states as follows:

6(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally or sent by mail, courier, facsimile or electronic transmission.
(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) Must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or
(b) Must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

[14] In terms of the motion before this court, the moving party relies on rule 38.11 of the *Rules of Civil Procedure* which governs setting aside an order granted on application.

[15] Under rule 38.11 where a party or other person affected by an order fails to appear on a motion through accident, mistake or insufficient notice, that person may move to set aside the order or judgment. Both rules require the person to move "forthwith" after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion to set the order aside.

[16] The Court may set aside or vary the order or judgment on such terms "as are just".

[17] In *Scaini v. Prochnicki*, 2007 ONCA 63, 85 O.R. (3d) 179, Goudge J.A. noted that there is no fixed formula in applying rule 37 (which reads the same as rule 38 in all material respects). He stressed that the key point was for the court to consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case.

[18] Strathy J., in *Ontario (Attorney General) v. 15 Johnswood Crescent*, 2009 CanLII 50751 (Ont. S.C.), at para. 34, described a five-part test as follows:

a. **Proof of accident or mistake**: The moving party must establish a failure to appear on the original motion through accident, mistake or insufficient notice. This is a precondition to relief under the rule. A party who has simply chosen not to appear on a motion cannot complain later if he or she does not like the outcome.

b. **The party must move forthwith after the order comes to his or her attention**: This is also a precondition to relief under the rule, but there is room for flexibility in the interpretation of "forthwith", depending on the circumstances.

c. **The length of the delay and the reasons for it**: In considering whether to set aside an order, the court will consider whether there has been delay in bringing the motion and the reason for it. All other things being equal, the longer an order has been in effect, particularly where parties have acquired rights or changed their positions as a result of the order, the less likely it will be that the court will set it aside.

d. **The presence or absence of prejudice**: The court should consider whether a party will be prejudiced by setting aside the order or by failing to set aside the order. There will always be prejudice if an order is made against a party without sufficient notice and there will always be some kind of prejudice to the other party if the order is set aside. Nevertheless, the exercise of the court's discretion may require an examination of the relative prejudice to the parties.

e. **The underlying merits of the moving party's case:** It may be necessary to consider the underlying merits of the moving party's case in weighing the various factors, balancing the interests of the parties, and determining what is just in the circumstances. Lengthy delay in bringing the motion may be more readily forgiven if the moving party has a very strong case on the merits. It will be less readily forgiven if the party's case appears frivolous.

[19] Strathy J. noted that the underlying purpose of the rules is to prevent an injustice or a miscarriage of justice where the order has been obtained without the affected person having been given the chance to present their case (at para. 29).

[20] In *Peralta v. Ponce*, 2020 ONSC 8138, Kimmel J. compared the above noted five-part test with the test under rule 19.08 to set aside default judgment. It was her view that steps (a) and (b) were preconditions on a motion under rules 38.11 or 37.14. I agree with her analysis given the specific wording of the latter two rules and the requirement for "accident, mistake or insufficient notice" and the specific requirement that a person move "forthwith".

[21] Mr. Dziedzic relies upon *Masood v. Silliker*, 2023 ONSC 6426. In that case, the defendant was noted in default and a default judgment was obtained. He had retained counsel prior to the noting in default, who had written plaintiff's counsel and advised them that they were being retained and asking them to refrain from taking steps to note their clients in default. Counsel sent a further email three days later to the same effect. In the face of those emails, the defendant was noted in default. I agree that the default in that situation would be readily set aside.

[22] Strathy, in *Ontario (AG) v. Johnson, supra*, described at paras. 44-47, that "forthwith" means "immediately", or "as promptly as is reasonably possible or practicable under the circumstances".

[23] In evaluating the merits of Mr. Dziedzic's position on the transfer under value motion, it is not my role to determine what the ultimate outcome would have been or that his position would inevitably succeed. I must only determine whether his defence to that motion has an air of reality to it. It is not my function to make findings of fact and assess whether the defence will succeed (see: *Zeifman Partners Inc. v. Aiello*, 2020 ONCA 33, at paras. 30-34).

Was there adequate notice?

Communications between McKenzie Lake and the Trustee:

[24] The crux of Mr. Dziedzic's arguments is that he did not receive sufficient notice of the motion. He is not alleging that he failed to appear through accident or mistake.

[25] The evidence discloses that as early as November 30, 2023, the Trustee was advised by counsel for the plaintiffs in the class action that Mr. Dziedzic was represented by McKenzie Lake.

[26] The first direct communication between McKenzie Lake and the Trustee appears to have occurred on December 5, 2023. The Trustee provided a copy of the Order appointing it as Trustee in bankruptcy for Banknote and sought information with respect to two payments made to the law firm in April of 2023 totalling $80,000. The Trustee followed up by email dated December 15, 2023 in which it stated:

> "…we understand that you may represent Michael Dziedzic and Justin Foss personally, and the fees paid your firm may be for personal legal fees. As such, I have attached 2 demand letters that we have issued to your clients for return of the funds."

[27] Matthew Baer, lawyer at McKenzie Lake, responded on the same day, December 15, 2023, stating:

> "Mr. Dziedzic and Mr. Foss did retain Stuart Mackay of Mckenzie Lake Lawyers LLP while they were directors of Banknote. It is their position that any Banknote funds used while they were directors were properly expended in their role as directors of Banknote".

[28] The Trustee responded on December 20, 2023, as follows:

> "If you represented Mr. Dziedzic and Mr. Foss on behalf of Banknote, please send us the invoices issued in this respect. As you are aware the Trustee is entitled to all books in records of Banknote un the Bankruptcy and Insolvency Act (*sic*)."

[29] Mr. Baer responded on December 21, 2023, indicating:

> "Mr. Dziedzic and Mr. Foss retained Stuart Mackay on behalf of Banknote. Subsequent to that, they were named as defendants in a putative class action and following that I acted on their behalf in that proceeding".

[30] There was then back and forth brief emails about providing invoices. No such invoices were ever provided by McKenzie Lake.

[31] Meanwhile, the Trustee had sent a demand letter to Mr. Dziedzic on December 14, 2023 in respect of the monies that had been paid to McKenzie Lake. He did not respond to this letter. The Trustee sent a further demand letter to Mr. Dziedzic dated February 9, 2024, copied to McKenzie Lake.

[32] By letter dated February 16, 2024, McKenzie Lake responded to counsel for the Trustee enclosing a copy of their retainer and confirming that they were retained on behalf of Banknote, by Foss and Mr. Dziedzic, to address Rumble's alleged misappropriation of funds from Banknote. They had been instructed not to take any further action on behalf of Banknote and after issuance of their accounts, they still had $63,000 in trust. Those funds were subsequently paid to the Trustee.

Attempts at Service:

[33] Mr. Dziedzic has confirmed both his email address and the address of his primary residence, where he resided with his spouse and two children. On May 6, 2024, the Trustee served Dziedzic with its Motion Record via his email address and by sending a copy by regular mail to his primary residence.

[34] On May 8, 2024, a process server retained by the Trustee attended Mr. Dziedzic's primary residence where she spoke with an adult female who showed her Mr. Dziedzic's apartment. He was not home. On May 13, 2024, the process server telephoned Mr. Dziedzic at a phone number he acknowledges belonged to him and they spoke at 10:15 am. He told her to call him back at 6:00 pm and he would meet her at the back of the building. She called him at 6:00 pm and then again at 6:33 pm. He did not answer the calls or meet her at the back of the building.

[35] On May 14, 2024, the process server called Mr. Dziedzic again and left a message. She left him a message on May 16, 2024 at 6:10 pm and tried to call again at 6:30 pm, but the phone cut out after the second ring.

[36] On May 18, 2024, a different process server attended at his house, rang his doorbell but no one answered. She attempted to phone Mr. Dziedzic but no one answered. She left a note taped to his door with her phone number on it. Later that evening, he called her and explained that he was away for the weekend but would be returning home Monday.

[37] On Monday, May 20, 2024, at approximately 3:55 pm, the second process server phoned Mr. Dziedzic and left a message that she was at his back door. She received no call back and no one opened the door.

[38] On May 24, 2024, the first process server returned to the residence and taped the Notice of Motion in a package to his door.

[39] The Trustee brought a motion for an order validating service, or, in the alternative, substitute serve of the motion record via the email address and regular mail. That motion record was emailed to Mr. Dziedzic on May 27, 2024. On the same date, a process server attended at an alternate address for Mr. Dziedzic and left a copy of the motion record in a sealed envelope with a male who refused to give his name but confirmed that he was an adult member of the same household as Mr. Dziedzic. Mr. Dziedzic is the registered owner of the alternate address, although the abstract of title shows that he transferred the property to someone else in May of 2014.

[40] Subsequent to all of these efforts, the Trustee sent a further email with the Notice of Motion to Mr. Dziedzic advising him that the motion originally returnable on May 31, 2024 would now be heard on June 14, 2024. This was also mailed to both addresses.

[41] In his affidavit, Mr. Dziedzic simply indicates that "he does not recall if he had been contacted by a process server because of the chaos resulting form the Bankrupt's bankruptcy and Ryan Rumble's misappropriation of investor funds, which saw his life uprooted". I find this explanation to ring hollow.

[42] In his supplementary affidavit, Mr. Dziedzic reiterates that he does not recall receiving the documents, he believed that the documents pertained to the class proceedings and were also being sent to his lawyers and that he understood that his lawyers had been in contact with the Trustee and assumed that anything requiring his attention would be sent to his lawyers.

Moving Promptly

[43] As noted, Perfetto J.'s order is dated June 18, 2024. This was sent to Mr. Dziedzic by letter enclosing both Justice Perfetto's endorsement and the judgment and demanding payment to both addresses by mail. The letters were not returned.

[44] Notice of Garnishment were sent to Mr. Dziedzic by letter dated July 22, 2024 by regular mail. These were not returned.

[45] Subsequent Notices of Garnishment were served on September 27, 2024 at Mr. Dziedzic's employer's address. These were mailed to Mr. Dziedzic on September 30, 2024 at both his addresses, and not returned.

[46] Mr. Dziedzic was served with a Notice of Examination in Aid of Execution on October 1, 2024 for an examination in aid of execution to be held on October 17, 2024.

[47] On October 16, 2024, the lawyers for the Trustee received a letter from McKenzie Lake indicating that they would be bringing this within motion to set aside the Judgment.

[48] Mr. Dziedzic deposes that on September 30, 2024 he received several legal documents from his secretary which included a Notice of Examination in Aid of Execution, a Notice of Examination under the BIA, and a Notice of Garnishment. He expresses surprise at receiving those documents as he had been cooperating with the class action.

[49] Problematically, the Trustee points out that the Notices of Examination were not sent out until after September 30, 2024 and that Mr. Dzeidzic is misleading the court.

Disposition:

[50] In my view, this case falls squarely within the situation described by Strathy J. in *15 Johnswood, supra* with respect to whether the person failed to attend due to mistake, accident or insufficient notice. A party who chooses to ignore notices of motion and fails to respond or attend

court faces significant risk that a court will proceed in his or her absence and cannot thereafter expect sympathy from the court (see also *Derenzis v. Scoburgh*, 2023 ONSC 1691, at paras. 39-44).

[51] I do not accept Mr. Dziedzic's explanation as set out in his affidavit that he did not recall being contacted by the process server due to the chaos going on. He has not explained his failure to notice the material that was emailed to him. As the Trustee points out, his affidavit material contains a significant inconsistency, given that he deposed that he was given the Notice of Examination as early as September 30, 2024.

[52] From the material, I find that Mr. Dziedzic evaded the Trustee's attempts at service. I also find that he did receive but ignored the emails, mail and postings upon his door.

[53] It was incumbent upon Mr. Dziedzic to contact McKenzie Lake when he received legal documents. It would have simply taken a phone call or email. The *Masood* case does not stand for the proposition that counsel must, in addition to serving a party, also notify their lawyer of the proceedings. Rather, I take from Masood that when a lawyer for a defendant or responding party asks for an indulgence, ignoring such a request may result in the setting aside of the resulting judgment.

[54] Penny J. in Gomes v. Poulos, 2015 ONSC 5355, stated as follows at paras. 53-54:

> [53] The corollary to the right to notice, however, is the responsibility to act on that notice and appear, responsibly, to exercise the right to be heard. Here, the failure to appear was deliberate. The defendant knew, or deliberately prevented himself from knowing, that the trial of the action against him would proceed on September 22, 2014. If he had a problem with that date, it was incumbent on the defendant to take steps to have the date changed.
>
> [54] The defendant ignored all of the notices. Whether he read them or not is not the issue. He knew these were important legal documents which he would ignore at his own peril. In litigation, as in life, choices have consequences. Our system would collapse under its own weight if a litigant were permitted deliberately to ignore all notices of proceedings, allow the court and other parties to proceed in his absence and then come back, when the process had run its course, to set aside the result claiming he was unaware of the trial because of his deliberate refusal to read the material served.

[55] In my view, the same sentiments apply to the case before me. My findings with respect to service and Mr. Dziedzic's evasion of service are sufficient to dispose of this motion.

[56] However, I accept that once McKenzie Lake was advised of the examination under oath steps were taken promptly to set aside the judgment. nevertheless, there was, in my view, delay by Mr. Dziedzic from advising his counsel of the judgment when he received it and the Notices of Garnishment in June and July. Again, I can only conclude that Mr. Dziedzic once again put his head in the sand and ignored those documents until he could no longer do so. He accordingly did not move "forthwith" as required by the rules.

[57] The delay in bringing this motion, however, is not very long and not so long that had I been persuaded that Mr. Dziedzic did not have sufficient notice of the hearing that the delay in moving to set aside the judgment would not have been fatal. I refer to his inaction when receiving the judgment and Notices of Garnishment as going to his general attitude in (not) dealing with this matter.

[58] Accordingly, the first pre-requisite for setting aside the judgment under rules 38 or 37 has not been met. This is not a case where it would be unfair to Mr. Dziedzic not to allow him to defend the Trustee's motion. He was given every opportunity to do so, and I find chose to avoid dealing with the situation.

[59] For those Reasons, Mr. Dziedzic's motion is dismissed. The interests of justice in this case do not demand that I exercise my discretion in Mr. Dziedzic's favour.

[60] If the parties cannot agree on costs of the motion, the Trustee shall serve and file through the London trial coordinator written submissions for costs, no longer than three pages in length double-spaced, by September 5, 2025. Mr. Dziedzic shall serve and file responding submissions by September 12, 2025 within the same parameters.

Justice Spencer Nicholson

Date: July 30, 2025

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Nicholson J.

Released: July 30, 2025