In the Court of Appeal of Alberta

Citation: Liberty Mortgage Services Ltd v River Valley Development Corp, 2025 ABCA 346

Date: 20251027
Docket: 2401-0066AC
Registry: Calgary

Between:

Liberty Mortgage Services Ltd

Respondent

- and -

River Valley Development Corp, Shaw Capital Group Ltd, Shaw Properties Group Inc, Owen Shaw, and Natasha Shaw

Appellants

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Kevin Feth
The Honourable Justice Karan Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice B.H. Aloneissi
Dated the 15th day of February, 2024
Filed on the 19th day of March, 2024
(2024 ABKB 92, Docket: 1601-02288)

Memorandum of Judgment

The Court:

I. Overview

[1] Owen and Natasha Shaw owned and operated several companies, including River Valley Development Corp, Shaw Capital Group Ltd, and Shaw Properties Group Inc. They appeal an order dismissing their application to set aside a noting in default, and granting summary judgment on a personal guarantee of Natasha Shaw in favour of Liberty Mortgage Services. They also bring an application to admit new evidence.

[2] For the reasons below, the appeal is granted. The applications to set aside the noting in default and to grant summary judgment are returned to the Court of King's Bench for determination on the correct legal tests. The application to set aside is to be determined first, to be followed, if appropriate, by the application for summary judgment. The new evidence is left to the Court of King's Bench to address, if necessary.

II. Background

[3] On October 17, 2011, River Valley Development Corp mortgaged 21 condominium units and an 8.5-acre bare lot in Peace River to Liberty Mortgage Services, to secure a $1.25 million loan with interest at 11% per annum. On November 29, 2012, Natasha Shaw became the director and sole owner of the corporate appellants after Owen Shaw filed for bankruptcy. In January 2014, Natasha Shaw signed a commitment letter and on March 6, 2014, personally guaranteed the loan to obtain an extension on the mortgage.

[4] Between October 2012 and January 2015, several extension agreements were entered into between the parties increasing the mortgage amount to $1,545,000. On February 16, 2016, Liberty Mortgage Services filed a Statement of Claim on the mortgage indebtedness and personal guarantees. The appellants did not file a Statement of Defence or Demand for Notice. On March 2, 2017, the parties entered into a Forbearance Agreement. The mortgage was never repaid and on February 14, 2019, the appellants were noted in default.

[5] On October 10, 2019, Natasha Shaw filed an application to set aside the noting in default, claiming she did not intend to sign the guarantee in her personal capacity, she had not received proper counsel before signing it, and her and Owen Shaw's signatures on the 2017 forbearance agreement were not properly witnessed. Questioning on that application was completed on January 15, 2020.

[6] On October 21, 2021, Liberty Mortgage Services brought an application for summary judgment on the personal guarantee of Natasha Shaw. The appellants took no further action until December 16, 2021, when they filed the second set aside application at issue on this appeal.

[7] The second set aside application and the application for summary judgment were heard together on August 30, 2023. Reasons for judgment were delivered on February 15, 2024: 2024 ABKB 92.

[8] On the application to set aside the noting in default, the appellants raised the defence that the mortgage could not be enforced due to the terms of an unwritten joint venture agreement between the Shaws and Clinton Evangelista, a shareholder and partner at Liberty Mortgage Services. The chambers judge concluded this was not an arguable defence, and that was sufficient to dismiss the set aside application. He also said there was no reasonable excuse for the default and the application to have it set aside was not made promptly.

[9] On the summary judgment application, the appellants raised two additional defences: the guarantee is unenforceable because it does not comply with the statutory requirements for guarantees, and Natasha Shaw signed the guarantee without understanding it. The chambers judge found neither of the defences raised a genuine issue requiring a trial.

[10] Accordingly, the chambers judge declined to set aside the noting in default and granted summary judgment in favour of Liberty Mortgage Services, allowing it to enforce the guarantee against Natasha Shaw. The amount of the judgment is $2,588,577.26 adjusted for disbursements and receipts occurring after August 21, 2021.

[11] The appellants submit the chambers judge erred in law on the test to set aside a noting in default. They say the evidence demonstrates they have an arguable defence, and a reasonable explanation exists for the default, and the delay in applying to set it aside. Further, the appellants say the chambers judge erred in deciding the set aside application and the summary judgment application together, when he determined that in the interests of judicial economy both applications should be assessed using the “no genuine issue requiring a trial” standard for summary judgment.

[12] In addition, the appellants point out the chambers judge, while addressing the application to set aside the noting in default, continually referred to it as a default judgment and applied the test for setting aside, varying or discharging a default judgment.

III. The Legal Tests

[13] Although there may be some overlapping considerations, the tests for setting aside a noting in default, setting aside a default judgment, and granting a summary judgment, are each unique. They must not be conflated or intermixed.

[14] A noting in default is a purely procedural step of officially documenting a defendant's failure to respond to an originating document, usually a statement of claim. It merely prevents the party so noted from participating further, including by filing of a statement of defence, without court permission. On the other hand, a default judgment is a final legal ruling granting the plaintiff a remedy without a trial due to the defendant's delinquency. In many cases, a noting in default is the first action taken when a defendant has delayed filing an appropriate response document to an originating document, and a default judgment is a later consequence of that failure to respond, allowing the plaintiff to pursue enforcement.

[15] A plaintiff may apply to enter a default judgment directly in the case of a claim for debt, liquidated demand or liquidated damages; if damages are unliquidated, a plaintiff cannot immediately apply for default judgment. Rather, the plaintiff must note the recalcitrant party in default and then apply to the court to determine damages and any other remedy. When noted in default, a defaulting party may no longer contest liability, without permission from the court, but continues to be entitled to contest damages in the case of an unliquidated claim.

[16] This distinction between a noting in default and a default judgment is set out clearly in the *Alberta Rules of Court*, AR 124/2010, rr 3.36 to 3.42. If a defendant has not filed a statement of defence or demand for notice under r 3.30, r 3.36 provides the plaintiff with two remedies: to apply for judgment if the statement of claim includes a claim for the recovery of property, r 3.38, or includes a claim for debt, liquidated demand, or liquidated damages, r 3.39; or to "require the court clerk to enter in the court file ... a note to the effect that the defendant has not filed a statement of defence or a demand for notice and consequently is noted in default", r 3.36(1)(b).

[17] When default is noted, there might never be an application for judgment or an order for the payment of money. Once a party has been noted in default, the noting party may apply for judgment pursuant to r 3.37(1)(a) of the *Rules of Court*. And the court may take a variety of steps including pronouncing a judgment, directing a determination of damages, ordering additional evidence to be provided, dismissing the claim or part of it, or directing the claim to trial, r 3.37(3).

[18] This distinction was described in detail in ***Agriculture Financial Services Corporation v Zaborski***, 2013 ABCA 277, paras 13-19, 556 AR 180. This Court said, para 13:

> A Praecipe to Note in Default is not a judgment or an order for payment of money. A praecipe is nothing more than a direction to the clerk of the court signed by a party or his lawyer (as in this case) requesting that a notation be made on the court file that the defendant is delinquent in some respect... . The Praecipe to Note in default [is] nothing more than a request addressed to the Clerk of the Court that a notation be made on the court file.

[19] The Court went on to say, para 15:

> The Praecipe to Note in Default in this case did nothing other than note the default. The default might have been cured on application by the appellant had he had a good excuse [for his default].

[20] A noting in default triggers nothing to be enforced: it is only the later judgment—default, summary, or after trial—which is capable of enforcement.

[21] An application may be made to set aside a noting in default "on any terms the Court considers just", r 9.15(3)(a). The test to be met was set out in ***Al-Ghamdi v Alberta***, 2017 ABCA 208, para 11:

> Broadly speaking, there are two bases on which a noting in default can be set aside:
>
> (a) In circumstances where the defendant should not have been noted in default in the first place, usually because there was not good service of the statement of claim; and
>
> (b) In circumstances where the defendant was properly noted in default, but in the circumstances it is fair and just to allow that defendant an opportunity to defend the claim on the merits.

This appeal engages the latter of the two bases for setting aside a noting in default.

[22] The court emphasized that the decision to set aside a noting in default "is a discretionary matter", para 13. The test is flexible and allows a court to consider a variety of factors with a view to determining whether it is fair and just to grant relief. A court is required to assess the context and factual situation. Although there are no specified elements to that analysis, some courts have considered such non-exclusive factors as the behaviour of the parties, length of the defendant's delay, reason for delay, complexity and value of the claim, and prejudice to the parties: ***Intact Insurance Company v Kisel***, 2015 ONCA 205, paras 12, 13, 383 DLR (4th) 130; ***Gauthier v Malik***, 2025 ONSC 5332, paras 16 – 21. Courts will rarely require a defendant who has been noted

in default to show an arguable defence on the merits, but a court may require that where there has been a significant delay: ***Franchetti v Huggins***, 2022 ONCA 111, paras 8 – 10.

[23] The test for setting aside a default judgment is prescriptive, applied more strictly than the test for setting aside a noting in default, and recognizes the presumptive finality of a judgment. The tri-partite test consists of the following elements:

> (a) does the applicant have an arguable defence;
>
> (b) did they not deliberately let the judgment go by default, and have they some excuse for the default; and
>
> (c) after learning of the default judgment, did they move promptly to open it up.

See ***Graylake Holsteins Ltd v Kzam Farms Ltd***, 2004 ABQB 828, para 19, 49 Alta LR (4th) 103; ***Alberta v Fjeld***, 2008 ABQB 558, para 16, 459 AR 272; ***Palin v Duxbury***, 2010 ABQB 833, para 21, 15 CPC (7th) 191.

[24] While some elements of the test for setting aside a default judgment may inform whether it would be fair and just to set aside a noting in default, those elements are not generally required. Instead, as discussed, the court retains broad discretion and may consider a variety of factors when determining whether to open up a noting in default. Critically, the tests must not be conflated.

[25] Finally, we turn to the test for determining whether to grant summary judgment, which is addressed in rr 7.2 and 7.3 of the *Rules of Court*. Rule 7.3(1)(a) in particular, provides that a court may grant summary judgment "in respect of all or part of a claim" where "there is no defence to a claim or part of it". If the application is successful "with respect to all or part of a claim", the court may "give judgment for or in respect of all or part of the claim" and, if judgment is given "for part of the claim", refer the balance to trial, r 7.3(3)(a) and (c). The court has jurisdiction to address a claim on a summary basis, in whole or in part.

[26] In ***Hryniak v Mauldin***, 2014 SCC 7, paras 23-25, 28, 34, 49, [2014] 1 SCR 87, the Supreme Court called for a "shift in culture" in favour of "a fair process that results in a just adjudication of disputes", which permits "a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found" in a proceeding which is "accessible - proportionate, timely and affordable". One of those processes is summary judgment.

[27] ***Hryniak*** set out a three-part test on when summary judgment is appropriate, para 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This

> will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

See also ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108, para 14, 94 Alta (5th) 301; ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49, paras 15-21, 442 DLR (4th) 9.

[28] ***Weir-Jones*** set out the principles for the grant of summary judgment. The Court said, para 47:

> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record, or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level, the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

See also ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343, paras 12, 13, 144-151, 454 DLR (4th) 202, leave to appeal denied 2021 CanLII 20326 (SCC); ***Calgary Co-operative Association Limited v Federated Co-operatives Limited***, 2025 ABCA 142, paras 20-25.

IV. Analysis

[29] In the present case, the chambers judge quoted the tri-partite test to set aside a default judgment, but applied it to an application to set aside a noting in default. In doing so, he cited

Kraushar v Kraushar, 2019 ABCA 186, para 5, 88 Alta LR (6th) 69. However, ***Kraushar*** was a case where the defendant had been noted in default *before* the plaintiff proceeded to a default judgment. The test, therefore, reflected the test for setting aside a default judgment, not the test for setting aside only a noting in default that had not yet progressed to default judgment. ***Kraushar*** does not set the applicable test for setting aside a noting in default in the absence of a default judgment.

[30] The chambers judge conflated the tests for setting aside a noting in default and setting aside a default judgment, applying the stricter test for setting aside a default judgment, when the matter before him was to be determined on the less onerous "fair and just" standard. Compounding matters, the chambers judge then substituted the summary judgment standard of "no genuine issue requiring a trial" in applying the test for setting aside a default judgment. The record indicates the chambers judge was trying to pursue efficiency for the parties and a pragmatic approach to the applications. However, the effect was to confuse three separate and distinct tests, and to improperly constrain his exercise of discretion in determining whether to set aside the noting in default. That is an error of law.

[31] The proper procedure to be followed when there are competing applications for setting aside a noting in default and for summary judgment takes guidance from this Court's decisions in respect of concurrent applications to amend pleadings and for summary judgment. In the usual case, the pleadings should be settled through the determination of the amendment application prior to the consideration of the summary judgment application: ***Farm Credit Canada v Chan***, 2021 ABCA 168, para 17 and ***Elbow River Marketing v Canada Clean Fuels Inc***, 2011 ABCA 258, paras 2-4, 56 Alta LR (5th) 222. Similarly, where applications for setting aside a noting in default and for summary judgment are both pending, the court should first determine whether the noting in default should be set aside and if so, whether a statement of defence should be entered and any other steps in the litigation completed before the summary judgment application proceeds. Defences and evidence responsive to the summary judgment application can then be adequately canvassed. A procedural order or litigation plan can address concerns about delay.

[32] Applying the incorrect test for setting aside the noting in default prejudiced the appellants because they were denied fair process. They lost the opportunity to file a Statement of Defence, putting a defence formally into issue, and in this matter a proposed Counterclaim for equitable set-off, file an updated affidavit to provide evidence for that defence and counterclaim, advance that defence and counterclaim in submissions, and as this Court has said on many occasions, "put their best foot forward".

[33] Given the determination that this matter must be returned to the Court of King's Bench to proceed in the proper order and on the bases of the proper legal tests, we do not address the

extensive new evidence proposed to be admitted by the appellants. We leave that evidence to be considered by the Court of King's Bench.

V. Conclusion

[34] The appeal is allowed. The matter is returned to the Court of King's Bench to proceed on the setting aside of the noting in default application and then the summary judgment application based upon the proper legal tests for those applications, and in the proper order. The question of new evidence is left to the Court of King's Bench.

[35] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting judgment.

Appeal heard on October 10, 2025

Memorandum filed at Calgary, Alberta
this 27th day of October, 2025

Feehan J.A.

Feth J.A.

Shaner J.A.

Appearances:

P. Anic
for the Respondent

Appellant, River Valley Development Corp (No appearance)

Appellant, Shaw Capital Group Ltd (No appearance)

Appellant, Shaw Properties Group Inc (No appearance)

Appellants O. Shaw and N. Shaw