

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wen v. Tong*,
2026 BCSC 120

Date: 20260128
Docket: S241045
Registry: Vancouver

Between:

Xingshun Wen

Plaintiff

And

Duke Tong and Duke Dynamics Inc.

Defendants

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the Plaintiff:

S. Xu

Counsel for the Defendants:

C. Dolfo-Smith

Place and Date of Hearing:

Vancouver, B.C.
January 5, 2026

Place and Date of Judgment:

Vancouver, B.C.
January 28, 2026

Table of Contents

INTRODUCTION 3

CHRONOLOGY OF EVENTS..... 3

ISSUES..... 5

DISCUSSION..... 5

 Legal principles 5

 Application to the circumstances of this case 6

 Were the notice of civil claim and amended notice of civil claim property served?
 6

 The Miracle Feeds criteria 7

 Discussion specific to DDI 9

CONCLUSION AND COSTS..... 10

Introduction

[1] This is an application to set aside a judgment as well as other orders of this Court, on the basis that the defendants were never validly served with the originating pleadings or with subsequent application materials.

[2] The case is somewhat unusual in that it does not involve a judgment taken in default. A response to civil claim was filed, but the defendants deny that it was filed by them.

Chronology of events

[3] The plaintiff Xingshun Wen and the individual defendant, Duke Tong, had business dealings with each other involving cryptocurrency, starting in about 2017. Mr. Tong is the owner of the corporate defendant, Duke Dynamics Inc. (“DDI”)

[4] The notice of civil claim was filed on February 13, 2024. It seeks an order requiring the repayment of a debt allegedly owed by the defendants to the plaintiff in the amount of approximately \$65,000.

[5] Land title records show Mr. Tong to be the owner of a property at 2523 East 4th Avenue in Vancouver (the “Property”). Those records list the Property’s address as Mr. Tong’s mailing address. Further, corporate records show that the Property is the registered and records office of the corporate defendant.

[6] A process server deposes that on February 20, 2024, he served a person with the notice of civil claim at the Property. He attached to the affidavit of service a blurry photo and deposed that this photo was a “true likeness of the person I was asked to serve”. The process server does not say that the photo was a true likeness of the person that he actually served.

[7] On or about June 18, 2024, the plaintiff filed an amended notice of civil claim. The process server deposes that in August 2024, he attempted five times to serve the defendants with the amended notice of civil claim. He deposes that he could not

locate Mr. Tong, that there was no answer at the Property, and that he could not reach Mr. Tong or locate him at the Property.

[8] Relying in part on affidavits of service made by the process server regarding the August service attempts, the plaintiff sought and obtained by requisition an order for substituted service dated December 9, 2024, permitting him to serve the amended notice of civil claim on the defendants by leaving a copy in the mailbox of the Property.

[9] Service was affected pursuant to this order on December 27, 2024.

[10] On or about January 27, 2025, a response to civil claim was filed. The defendants deny filing this response and note that the signature on this document does not resemble Mr. Tong's signature on other documents. The response to civil claim refers to an address in Vietnam which Mr. Tong deposes is unknown to him.

[11] The plaintiff then sought and obtained by requisition an order for substituted service permitting him to serve any further documents in the proceeding on the defendants by leaving copies in the Property's mailbox. This substitutional service order was granted by Associate Judge Robertson (the "Robertson Order"). In support of his application for this order, the plaintiff deposed that the defendants had filed a response to civil claim after being served with the amended notice of civil claim at the Property.

[12] Subsequently, the plaintiff filed an application for the production of the defendants' list of documents and an application for summary judgment. The motion materials were served pursuant to the Robertson Order. Neither application was defended. On July 21, 2025, Justice Veenstra granted judgment in favour of the plaintiff in the amount of approximately \$66,000 together with prejudgment interest.

[13] Mr. Tong deposes that he resides in Vietnam, and that his mother lives at the Property. He also deposes that his mother does not speak English and does not open mail addressed to Mr. Tong.

[14] He deposes that he attended at the Property in August 2025 but did not open the mail received from the plaintiff until October 2025. Subsequently, upon reviewing the legal documents delivered to the Property by the plaintiff, he promptly sought legal assistance.

Issues

[15] The defendants seek an order setting aside all of the orders made against them in this proceeding. They submit that they did not have no notice of any applications or pleadings in this proceeding until October 2025.

[16] The issue to be determined by this Court is whether the orders made in this proceeding ought to be set aside and whether the defendants ought to be granted leave to file a response to civil claim.

Discussion

Legal principles

[17] The defendants cite the decision in *Ming Sun Benevolent Society v. Philippine Women Centre of B.C.*, 2021 BCCA 240 [*Ming Sun*] at para. 2 for the proposition that if a proceeding in which judgment was obtained was not properly served, the judgment cannot stand and must be treated as a nullity.

[18] In this case, the originating pleading was required to be personally served under R. 6-1(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[19] On the other hand, the plaintiff submits that the defendants must meet the criteria set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) wherein the Court set out factors to be considered when determining whether to exercise the court's discretion to set aside a default judgment. These are whether:

- a) the defendant wilfully or deliberately failed to respond to the claim;

- b) the defendant applied to set aside the default judgment as soon as reasonably possible after learning of it;
- c) the defendant has a meritorious defence to the claim (or at least one worthy of investigation); and
- d) the above have been satisfactorily established by evidence.

[20] Neither side has cited any authority which is directly on point with respect to this unusual situation, wherein a response to civil claim has been filed without authority on behalf of the defendants.

Application to the circumstances of this case

Were the notice of civil claim and amended notice of civil claim properly served?

[21] In my view, this case turns on two factual elements.

[22] The first is the purported original service on Mr. Tong. I am persuaded that he was not personally served by the process server on February 20, 2024. He has proffered copies of his passport which show that he was in the Philippines on the date on which he was purportedly served. In my view, that evidence is conclusive of the issue. The plaintiff argues that there are no numbers or other identifying markings on the pages exhibited to Mr. Tong's affidavit, but Mr. Tong deposes that the pages are from his passport.

[23] Second, I find that the response to civil claim was not filed by the defendants. Although no expert handwriting evidence was advanced by either party, it is evident that the signature on the response to civil claim is not at all similar to Mr. Tong's signature on his driver's license or his affidavits. Mr. Tong deposes that he did not file or sign the response, and that he does not know anything about the address for service set out in the response to civil claim which, contrary to the *Rules*, is an address in Vietnam. It seems unlikely that the plaintiff would have filed the response yet not responded to any of the further application pleadings.

[24] I note that I am not making a finding that the plaintiff had anything to do with the filing of the response. It is difficult to see what advantage could have been gained by him in doing so. Given the defendants' apparent failure to respond to the originally served notice of civil claim, or the amended notice of civil claim served in accordance with the first substitutional order made on December 9, 2024, it would have made little sense for him to have fraudulently filed a response rather than simply filing for default.

[25] Regardless of why the response was filed or by whom, the fact that the response to civil claim was filed, apparently in response to the amended notice of civil claim, bolstered the plaintiff's position in seeking the Robertson substituted service order, which in turn led to the other orders made against the plaintiff.

[26] I have concluded, on the authority of the principle set out in *Ming Sun*, that the judgment and the other orders made in this case ought to be set aside as nullities because the originating pleading was not properly served and because the Robertson Order was obtained at least in part on the false premise that the defendants had filed a response to civil claim after being substitutionally served at the Property.

[27] In my view, that is the end of this matter.

The Miracle Feeds criteria

[28] However, in case the *Miracle Feeds* criteria apply, I will address them in turn. As will be seen, it is my view that the judgment and the other orders made in this case ought to be set aside, regardless of which legal test is applied.

[29] As to whether a defendant wilfully or deliberately failed to respond to a claim, Justice Tucker held as follows in *Lee v. Zhou*, 2022 BCSC 172:

[64] The onus is on [the set aside applicant] to establish that notwithstanding the substitutional service and other steps taken by the plaintiffs she first learned of the existence of the proceeding [recently], and that her lack of awareness was not willful or deliberate.

[30] The plaintiff herein relies on the result in *Lee* wherein the default judgment was not set aside, but that case is distinguishable on the basis that Justice Tucker found the defendant Xiao Ji Zhou not to be credible for several reasons. By contrast, in this case, I have accepted that the defendants did not receive the claim nor file the response. I am satisfied based on the foregoing that the willful and deliberate test is not made out.

[31] Regarding the second factor—whether the defendant applied to set aside the default judgment as soon as reasonably possible after learning of it—Mr. Tong has deposed that he was overseas from June to August of 2024. When he returned, he eventually saw the materials and promptly contacted counsel.

[32] Therefore, I find that the second factor in *Miracle Feeds* is satisfied.

[33] The third factor—whether the defendants have a defence to the claim at least worthy of investigation—has not been addressed by the defendants on this application at all. In most cases, their failure to do so would be fatal to their set aside application. However, the Court of Appeal has remarked that the *Miracle Feeds* criteria are "factors rather than tests". They are appropriate indicators of whether it is in the interests of justice to set aside the default judgment but are not mandatory or exhaustive of the relevant considerations: *Ming Sun* at para. 34, citing *Andrews v. Clay*, 2018 BCCA 50 at paras. 29–31.

[34] Further, even where the *Miracle Feeds* factors are not met, an order may be set aside if the court is satisfied that allowing it to stand would be a miscarriage of justice: *Lee* at para. 89.

[35] To summarize, I have found that no documents filed in this proceeding came to the attention of the defendants prior to the order granting summary judgment. The case proceeded on the premise that the defendants had been personally served with the original notice of civil claim, and that they had filed a response to the amended notice of civil claim, and neither of those premises were correct.

[36] On the facts of this particular case, given the plaintiff's failure to successfully serve the defendants at first instance, and the unauthorized filing of a response in the name of the defendants, it is my view that the service of subsequent pleadings in accordance with the Robertson Order cannot validly be relied upon by the plaintiff, and that allowing the orders made against the defendants by this Court to stand would result in a miscarriage of justice.

Discussion specific to DDI

[37] I note that most of the submissions and evidence at the hearing of this application focussed on the individual defendant Mr. Tong as opposed to the corporate defendant DDI.

[38] It appears that the initial originating pleadings were actually served properly on DDI by the process server on February 20, 2024, as he delivered the pleadings to the Property which was the registered and records office of DDI. Section 9 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [BCA] provides in part that:

Service of records in legal proceedings

9 (1) Without limiting any other enactment, a record may be served on a company

(a) unless the company's registered office has been eliminated under section 40, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the registered office of the company in the corporate register,

...

[39] No default judgment was taken against the company as a result of the company's failure to respond to the originating claim. Shortly after the service of the originating pleading, on February 26, 2024, the company was dissolved by the Registrar of Companies for failure to file.

[40] Thereafter, s. 346 of the *BCA* applied:

Dissolved companies deemed to continue for litigation purposes

346 (1) Despite the dissolution of a company under this Act,

(a) a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and

(b) a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved.

(2) Unless the court orders otherwise, records related to a legal proceeding referred to in subsection (1) may be

(a) delivered to the company at its address for delivery in the legal proceeding, or

(b) if the company does not have an address for delivery in the legal proceeding, served on the company

(i) by personal service of those records on any individual who was a director or senior officer of the company immediately before the company was dissolved, or

(ii) in the manner ordered by the court.

[41] After the company was dissolved, the plaintiff was obliged to serve the amended notice of civil claim in accordance with s. 346(2)(b). There was no personal service on Mr. Tong. Although the amended notice of civil claim and all subsequent documents were purportedly served on DDI pursuant to the Robertson Order, that service was invalid for the same reasons, stated above, regarding the service pursuant to the Robertson Order upon Mr. Tong.

Conclusion and costs

[42] I have concluded that the orders made in this proceeding ought to be set aside, and that the defendants ought to be granted leave to file responses to civil claim, within 21 days of these reasons.

[43] Regarding costs, I have not found that the plaintiff did anything improper either with respect to either the original service, or with respect to the filing of the response to civil claim. He was entitled to rely upon the process server to serve the original notice of civil claim and, as stated, I have made no finding about who filed the response to civil claim.

[44] All of the subsequent steps in the proceeding, while based on the incorrect assumption that those first two steps were valid, were not unreasonably taken given that assumption. Further, as stated, the merits of the claim have not been addressed, and it remains possible that the defendants have no valid defence to the claim.

[45] For these reasons, although the defendants have been successful on this application, I am not prepared to order costs in their favour. Costs of this application shall await the ultimate outcome of this action and shall be payable in the cause.

“Loo J.”