

# Court of King's Bench of Alberta

**Citation: 961945 Alberta Ltd. o/a ServiceMaster Restore of Edmonton v Malfar Mechanical Inc., 2026 ABKB 179**

**Date:** 20260311  
**Docket:** 2303 08859  
**Registry:** Edmonton

Between:

**961945 Alberta Ltd. o/a ServiceMaster Restore of Edmonton**

Plaintiff/Respondent

- and -

**Malfar Mechanical Inc.**

Defendant/Appellant

- and -

**PCL Construction Management Inc.**

Defendant

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**Memorandum of Decision  
of the  
Honourable Justice L.M. Angotti**

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## Introduction

[1] Should the Applications Judge's decision declining to set aside default judgment under Rule 9.15 be overturned? The answer is no, for the following reasons.

## Background

[2] This dispute centres around a condominium complex project in downtown Edmonton. PCL was a general contractor of the project. PCL subcontracted the mechanical scope of the work to Malfar.

[3] There was a policy of wrap around insurance, under which all contractors and subcontractors on the project were insureds. Malfar was an insured.

[4] ServiceMaster completed remediation work on the project, for property damage caused by water leakage. Approximately one third of its work was paid for under the wrap around insurance, as the water damage was an insured loss. ServiceMaster billed the remaining amount of its work to Malfar, through multiple invoices. Malfar did not pay the invoices.

[5] ServiceMaster filed a Statement of Claim on May 18, 2023, claiming damages in debt against Malfar and PCL for the unpaid invoices related to work completed by ServiceMaster at the request of Malfar on the condominium project.

[6] ServiceMaster served the Statement of Claim by registered mail, which was received by Malfar on June 8, 2023. Malfar did not file a statement of defence.

[7] On September 28, 2023, ServiceMaster entered default judgment of \$1,163,054.57, interest of \$4,085.03, and costs of \$1,862.85, pursuant to r 3.36.

[8] Malfar was served with a writ of enforcement on January 8, 2024.

[9] On January 26, 2024, Malfar applied to set aside the default judgment, set aside the noting in default, a stay of enforcement of the default judgment, and leave to file both a Statement of Defence and Notice against the Co-Defendant PCL. The application was dismissed by Applications Judge Smart on August 15, 2025.

[10] PCL is not a party to the application or this appeal, as the default judgment relates only to Malfar.

## Application Judge's Decision

[11] The parties agreed that AJ Smart should apply the tripartite test from *Palin v Duxbury*, 2010 ABQB 833, as cited in *Kraushar v Kraushar*, 2019 ABCA 186:

- a) Is there an arguable defence?
- b) Is there some reasonable excuse for letting the claim go into default?
- c) Upon learning of the default judgment, did the party move promptly to set it aside?

[12] Malfar presented evidence that it disputed responsibility for payment of some of the invoices for a variety of reasons, but did not identify which individual invoices were disputed and the reason(s) that applied to a particular disputed invoice. The reasons centred around

whether Malfar had contracted for the work or whether other entities were responsible to pay for the work set out in the invoice, such as insurance or condo owners.

[13] Mario Ceccanese, the general manager for Malfar responsible for day-to-day management of Malfar, deposed that he believed service by a process server was required for effective service of a statement of claim, such that service by registered mail was not valid. As a matter of practice, he did not give a document served by registered mail the same due care and attention required as if it had been served personally. Mr. Ceccanese did not provide any evidence about settlement discussions with ServiceMaster, even though another Malfar employee deposed Mr. Ceccanese was involved in the settlement discussions.

[14] In determining whether the first element of an arguable defence was met, AJ Smart found that the evidence established a “germ of arguable defence”, but it fell well short of establishing an arguable defence to the substantive level required by the test.

[15] AJ Smart considered the explanation of Mr. Ceccanese for failing to defend, to be “...at best, a very thin, if even acceptable reasonable excuse...”. Rather, Malfar made a deliberate decision to disregard the statement of claim, based on a mistaken belief as to the law of service. Therefore, the second element of the test was also not met.

### **Standard of Review**

[16] The standard of review on appeal from an applications judge is correctness on all issues and no deference is owed to factual findings: *Bahcheli v Yorkton Securities Inc.*, 2012 ABCA 166. The parties are at liberty to introduce new evidence which was not before the Applications Judge during the initial application, which the parties have done in this case.

### **Applicable Tests**

[17] Rule 9.15(3) permits the Court to set aside a default judgment that was entered under r 3.39 and allow a party who has been noted in default to file a defence:

- (3) The Court may, on any terms the Court considers just,
  - (a) permit a defence to be filed by a party who has been noted in default,
  - (b) set aside, vary or discharge a judgment granted upon application against a defendant who was noted in default, or whose statement of defence was struck out under rule 3.37, or
  - (c) set aside, vary or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39.

[18] Malfar’s application is to set aside both a noting in default and default judgment. A review of the file shows that ServiceMaster immediately entered default judgment, as it is permitted to do under r 3.36(1)(a), and did not obtain a noting in default, which was not required to obtain default judgment in the circumstances. This is consistent with r 9.15(3)(c), that permits the court to set aside a judgment entered in default of defence, but does not mention noting in

default in contrast to r 9.15(3)(b). Therefore, the application is truly for setting aside of default judgment under r 9.15(3)(c) and permission to file a defence.

[19] The parties agree that the traditional tri-partite test for setting aside a default judgment applies to this application: *Kraushar*, at para 5; *Alberta v Fjeld*, 2008 ABQB 558 at para 16; *Palin*, at para 21). The defendant must show:

- a) they have an arguable defence;
- b) they did not deliberately let judgment go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and
- c) after learning of the default judgment, they moved promptly to open it up.

[20] The parties disagree on whether the defendant must show all three elements of the test, or whether there is an overriding discretion of the Court to grant the application even if one or more elements have not been met.

[21] Malfar argues that the fairness is the overarching consideration such that the application can be granted even if none of the three elements are met, based on historical Alberta jurisprudence.

[22] ServiceMaster argues that the Court's decision is not fully discretionary, as the recent decision of *Liberty Mortgage Services Ltd. v River Valley Development Corp.*, 2025 ABCA 346 at para 23, establishes that the three-part test is prescriptive and applied more strictly, in recognition of the presumptive finality of a judgment. Therefore, the defendant must establish all three elements, as also noted in *Palin*.

[23] Malfar replies that, while the Court in *Liberty Mortgage* overturned the lower court decision on every ground, the Court still recognized that there are more factors than just the three elements and, while the analysis applies more strictly, it did not create a higher standard for a defendant to meet on each element.

[24] The early caselaw suggests that, ordinarily, a party is expected to meet all three parts of the test: *Fjeld*, at para 17; *Palin*, at para 42. However, more recent caselaw states that the Court retains a discretion under r. 9.15(3) to grant relief where the interests of fairness require it, although merely showing a good arguable defence is insufficient to open up default judgment: *Kraushar*, at para 6, 11; *Secure Energy Services Inc. v 1331616 Alberta Ltd.*, 2024 ABKB 604 at para 8; *SFM v MRM*, 2020 ABQB 302 at para 31-32; *Kim v Choi*, 2020 ABQB 51 at para 19; *Atlantis (HS) Financial Ltd v Punjabi*, 2017 ABQB 87 at para 50-51. Although *Palin* is oft cited to stand for the requirement that all three elements must be met, Justice Poelman recognized, at para 43, that the Court has discretion to do what is fair overall and the assessment of fairness "usually" requires proof of all three elements.

[25] At least, that was the law until the Court of Appeal released its decision in *Liberty Mortgage*. While that case involved a noting in default and an application for summary judgment, but not default judgment, the Court reviewed both setting aside a noting in default and setting aside a default judgment. The unanimous panel emphasized that the tests for setting aside a noting in default and setting aside a default judgment are unique and must not be comingled: *Liberty Mortgage*, at para 13. Unlike previous Alberta caselaw that used the same test for both setting aside a noting in default and a default judgment where the defendant was properly noted in default, the Court expressed that:

- a) Setting aside a noting in default under r 9.15(3)(a) may be done on any terms the Court considers just, provided that in the circumstances it is “fair and just” to allow the defendant an opportunity to defend the claim on the merits. The Court exercises broad discretion in this regard and may consider several non-exclusive factors, but a defendant will rarely be required to show an arguable defence except in the face of significant delay: *Liberty Mortgage*, at para 21-22.
- b) Setting aside a default judgment requires the strict application of the prescriptive tri-partite test set out in *Fjeld* and *Palin: Liberty Mortgage*, at para 23.

[26] The Court stated that the tri-partite test for setting aside a default judgment is not to be applied to setting aside a noting in default, distinguishing *Kraushar* on the basis that it dealt with a “...defendant [who] had been noted in default before the plaintiff proceeded to a default judgment”: *Liberty Mortgage*, at para 29 (emphasis in original). Thus, the Court concluded that *Kraushar* was an application of the test for setting aside a default judgment and not setting aside a noting in default in the absence of a default judgment.

[27] Unlike *Kraushar*, this case does not involve a situation where a plaintiff noted a defendant in default and then had to make a further application under r 3.37 for default judgment. ServiceMaster entered default judgment pursuant to r 3.36(1)(a) and r 3.39, without having to obtain a noting in default of Malfar. Therefore, it is not distinguishable from *Liberty Mortgage* on the same basis.

[28] The law for the type of situation before me is no longer clear, as there are at least two Court of Appeal decisions that appear to conflict with one another. In *Steinkey v First Capital Holdings (Alb) Corporation*, 2026 ABKB 51, Justice Lema recognized this apparent conflict between *Liberty Mortgage* and the line of jurisprudence followed in *Kraushar*. He provided an extensive and helpful review of caselaw that addressed the dilemma of a trial court when faced with binding appellate decisions that conflict and the basis upon which the trial court should choose which case or line of cases to follow: *Steinkey*, at para 44-51.

[29] Justice Lema ultimately determined that he did not need to choose which decision to follow as they both led to the same result. I am not in that enviable position. Rather, I must consider which of the two decisions or lines of reasoning are more applicable to the circumstances before me, or that accords with this Court’s sense of justice, as per the caselaw reviewed in *Steinkey*.

[30] *Liberty Mortgage* was not a formal reconsideration of the caselaw surrounding the tests for setting aside either noting in default or default judgment, such as *Poloma Investments Ltd. v Yuen*, 2016 ABCA 93, *Fort McKay Métis Community Association v Morin*, 2020 ABCA 311, or *Kraushar*. When setting out the test for default judgment, the Court did not mention either *Poloma* or *Kraushar*, nor the various King’s Bench decisions from 2020 to 2025 that have followed *Kraushar*. Instead, it cited Alberta caselaw from 2010 or prior. Although it is not clear from the recital of the facts in either the trial or appellate level *Liberty Mortgage* decision, the appellant was noted as stating that the appellants had only been noted in default and had not obtained a default judgment. In the appellate decision of *Liberty Mortgage*, after setting out the test for setting aside a default judgment and distinguishing it from the test for setting aside a noting in default, the Court did not have reference back to the test for setting aside a default

judgment. By contrast, *Kraushar* was a case involving a default judgment, which was the very basis upon which it was distinguished in *Liberty Mortgage*.

[31] As I am dealing only with the setting aside of a default judgment, I find that the decision in *Kraushar*, and the cases that follow it in Alberta, are more applicable to the circumstances before me. Therefore, I will apply the test from *Kraushar*, being consideration of the elements of the tri-partite test, followed by a consideration of the overall interests of fairness, in assessing whether to exercise my discretion to open up default judgment and allow the defendant to file a defence in this action.

### Arguable Defence

[32] The defendant must do more than simply assert that there is an arguable defence; it must show the defence is triable through its proposed pleadings or evidence: *Palin* at para 22, 31. This element is of significant importance. Opening up judgment and allowing a defendant to proceed in the absence of an arguable defence is illogical and would waste resources of both the parties and the court, by ultimately delaying the inevitable: *Atlantis (HS) Financial*, at para 51. However, the defendant need only show that the proposed defence is arguable or triable, not that it will ultimately be successful: *Fort McKay*, at para 14; *Utah v Zelisko*, 2025 ABKB 582 at para 83.

[33] Malfar also submits that, in assessing this element, the Court may simply consider whether the defence would be successful if the facts asserted by the Defendant were found to be true, relying upon *Goulet v Da Silva*, 2002 ABQB 369 at para 74-75.

[34] I disagree that the threshold is that low. This is not similar to an application under r 3.68(2)(b), where the Court can only consider the pleading and must assume the facts alleged in it are true, to determine whether a pleading discloses no reasonable defence to a claim. In an application to set aside default judgment, a defendant must do more than assert a defence; a defendant must establish that there is an arguable or triable defence. This requires something more than just a pleading setting out facts relied upon; it requires some evidence to support the facts and defence set out in the pleading.

[35] In *Goulet*, the applicant had entered an affidavit, setting out evidence to show that she had a triable defence. Justice Watson (as he then was) was not suggesting that it is enough to simply consider whether there is a defence, if the facts asserted by the Defendant were in fact true. However, in making an assessment as to whether the defendant has an arguable defence, the Court may have regard to the difficulties a party may face in proving a negative, that the party did not do what it is alleged to have done.

[36] Malfar submits that it has several defences in this action:

- a) Malfar was not the party that contracted with ServiceMaster for the provision of remediation work, as Malfar did not issue any work authorizations or purchase orders to ServiceMaster;
- b) ServiceMaster's claim is outside of the limitation period, as any invoices issued for work completed prior to April 17, 2021 are more than two years prior to the filing of the Statement of Claim;

- c) Malfar did not benefit directly from the work completed by ServiceMaster, such that no claim exists in *quantum meruit*;
- d) Malfar is not responsible for the remediation work, as the water leaks may have been caused by one or more of seventeen tortfeasors, other than Malfar, all of whom are named parties in one or more legal actions arising from loss caused by the water leaks;
- e) The remediation work was performed in respect of insured losses, so that if Malfar was identified as the insured, Malfar was only responsible for the deductible; and
- f) The multiple overlapping actions involving many different parties gives rise to the possibility of inconsistent verdicts, which is contrary to the administration of justice.

[37] ServiceMaster submits that:

- a) Malfar's initial position that it has no contract with ServiceMaster has shifted to retaining ServiceMaster for certain work, but not for the work set out in the invoices. There is evidence that Malfar did contract with and pay ServiceMaster for remediation work related to water loss, including claims involving the insurer. This alleged defence lacks a coherent and credible evidentiary foundation to show an arguable defence, as the evidence is inconsistent and while greater in volume, has resulted in less clarity;
- b) There is no evidence to assess the accuracy of the dates of loss as determined by Malfar;
- c) The claim for unjust enrichment is abandoned, as it fails where a contract is exists;
- d) Any dispute regarding responsibility for the underlying water loss is a matter between Malfar, the insurer, and any third parties who may have caused the damage; it does not negate Malfar's obligation to pay ServiceMaster for work performed;
- e) The existence of insurance coverage, and the insurer's involvement, does not relieve Malfar of its primary obligation as the debtor to pay amounts owing to ServiceMaster, which Malfar has done at the direction of the insurer; and
- f) ServiceMaster is not a party in any of the other legal actions and the issue of who was ultimately responsible for causing the damage that ServiceMaster was hired to fix does not involve ServiceMaster nor absolve Malfar of its obligations to ServiceMaster.

[38] I agree with ServiceMaster that Malfar's defences set out in d), e), and f) above are not valid defences. There is evidence that Malfar contracted with ServiceMaster to perform remediation work. Malfar remains obligated to make any payments arising from such a contract, regardless of whether Malfar, the insurer, or another person is responsible for the loss in some

fashion. Malfar may have third party claims against the insurer or other entities, but that is not a defence to a contract claim by ServiceMaster.

[39] This leaves consideration of the defences that a) the parties did not have contract for the remediation work set out in the disputed invoices and b) the Statement of Claim was filed outside of the limitation period.

[40] I do not accept that Malfar never had a contract with ServiceMaster for remediation work or that, for such a contract to exist, a work authorization was required. There is evidence that Malfar retained ServiceMaster to perform remediation work. ServiceMaster performed work that was covered by insurance, where Malfar was the insured, and ServiceMaster performed work for which Malfar paid ServiceMaster directly. However, there is an absence of evidence of a formal written contract, or documents such as quotes, purchase orders, work authorizations, or other documents, in relation to the disputed invoices. It is not clear whether the invoices relate to work that was already paid for by the insurer. Therefore, I am satisfied that Malfar has an arguable defence that it did not contract with ServiceMaster for some of the work set out in the invoices or that some of the invoices are duplicative of amounts already paid by Malfar.

[41] I also accept that there is an arguable limitation defence for some invoices. In making this assessment, I do not rely on the “Date of Loss” set out in many invoices. The dates of the invoices fall within the limitation period. However, on some invoices, the dates of the work performed fall outside of the limitation period. For example, there are multiple invoices that list labour performed only in January 2021, even though the invoices are dated in May 2022. Such work was performed several months before the two year limitation date.

### **Reasonable Excuse**

[42] This element consists of two parts. First, did the defendant deliberately let judgment go by default? Second, did the defendant have a reasonable excuse for failing to defend?

[43] Malfar puts forward three reasons why it had a reasonable excuse for not defending: 1) it was engaging in settlement discussions with ServiceMaster; 2) Malfar reasonably assumed that the insurer had paid ServiceMaster’s invoices; and 3) its general manager believed that effective service had not occurred, as it was not personally served as required by Ontario law. The latter is equivalent to solicitor negligence, which is a potential reasonable excuse. Malfar argues that the requisite intention is not established simply by the defendant’s knowledge that a statement of claim has been served or received, or by the defendant’s failure to respond to a statement of claim, or by an unexplained or negligent failure to defend. Instead, it submits that a failure to defend will only bar the setting aside of a default judgment where there is evidence of a deliberate failure to defend or the plaintiff has suffered prejudice. Therefore, once the defendant provides a reasonable excuse and evidence of an intention to defend, the burden shifts to the plaintiff to establish wilful default by the defendant or irreparable harm that may not be cured by costs.

[44] ServiceMaster submits that none of Malfar’s explanations for the failure to defend, alone or in combination, establish either a reasonable excuse for the default or an intention to defend sufficient to meet this element of the test. First, Malfar has simply made a bald and unsubstantiated claim about settlement discussions taking place, without providing evidence from those directly involved in the settlement discussions, even in the supplemental evidence on appeal. There is no evidence as to why Malfar might reasonably have assumed or concluded the

settlement discussions, which occurred nine months before the statement of claim was served, meant the legal action was not proceeding. Second, the evidence is contradictory to the position that Malfar believed the insurer had paid the invoices, as Malfar did not communicate with the insurer regarding any disputes and Malfar was required to make some payment as directed by the insurer. Third, Malfar acknowledged receipt of the Statement of Claim. Despite already being involved in other Alberta lawsuits, its deliberate choice to do nothing about the Statement of Claim, even as little as determining whether it was properly served, is a deliberate decision not to defend, rather than a reasonable excuse.

[45] The Applications Judge found the explanations offered by Malfar to be "...at best, a very thin, if even acceptable reasonable excuse for failing to defend...", because Malfar's explanations involved a mistake of law and there was a lack of evidence from Mr. Ceccanese around the settlement discussions in which he was said to be directly involved.

[46] In its brief, Malfar states that its "...excuse for not defending is simple: its contracts administrator, for the Project, Ms. [Nanthakumar], believed that senior employees were engaged in settlement discussions with ServiceMaster." This is a non-sensical explanation. Ms. Nanthakumar did not have the authority to deal with the Statement of Claim or make decisions on behalf of Malfar related to legal actions. She is not the contract administrator; her position is credit manager and she was responsible for dealing with invoices. Her belief on settlement discussions is completely irrelevant. If senior employees were engaged in the settlement discussions, their belief as to the impact of the settlement discussions on the legal action would be of more assistance to the Court, but even their evidence is minimal.

[47] I put little weight on the evidence of Ms. Nanthakumar. She deposed that she was told settlement discussions were occurring from Summer 2022 to Winter 2022, but she was not involved and did not know any of the details of such discussions. On questioning, she testified that she had been told in January 2024, when the judgment was received, that the parties were still discussing the invoices, but this is contrary to both her affidavit evidence and the evidence of Mr. Ceccanese.

[48] In June 2021, ServiceMaster provided the owner of Malfar a binder enclosing numerous invoices and requested payment of \$1.4 million. Mr. Ceccanese deposed that on July 20, 2022, Malfar sent an email to ServiceMaster, taking the position that it was not responsible to pay for any of the work described in the invoices. A meeting then occurred between Malfar's project manager and representatives of ServiceMaster in September 2022, where Malfar maintained its position. No further settlement discussions occurred. It is a stretch to consider such communications to be serious settlement discussions.

[49] When asked at the hearing how settlement discussions support a reason for not defending, Malfar submitted that engaging in settlement discussions is an excuse by itself. In some cases, settlement discussions are raised as an excuse for not defending, usually on the basis that the defendant believed that the settlement discussions meant that litigation would not be pursued, at least without some further notice. But this does not assist Malfar, because Malfar does not even make that suggestion. If the mere existence of settlement discussions was sufficient to be a reasonable excuse, this would create a very low threshold to meet this element. Such a view is not supported by the authorities. There needs to be more than just settlement discussions.

[50] The Statement of Claim was served nine months after the last settlement discussion between the parties and there is no evidence that Malfar believed litigation would not be pursued

due to the settlement discussions. No connection has been established between the settlement discussions and the decision to not file a defence. This is not a reasonable excuse.

[51] Malfar has suggested that a detailed explanation is not required, relying upon *SFM*. In that case, the defendant suffered from significant addictions that he said prevented him from registering the importance of the legal proceedings, even upon service of the statement of claim. On the issue of reasonable excuse, the judge stated that "...it would have been preferable to have more detailed evidence..." from the defendant and there were doubts about the defendant's evidence, but his "core account" was accepted: *SFM*, at para 24. This is not authority supporting that a detailed explanation is not required; to the contrary, it was preferred. Further, the evidence that was accepted was not simply a bare assertion of an excuse.

[52] While a contextual analysis is appropriate when considering if a reasonable excuse has been established, the onus remains on the defendant to establish that they did not deliberately fail to defend the action and that they had a reasonable excuse for failing to defend. To meet this onus, the defendant needs to provide sufficient detail to satisfy the Court that this element is met on a balance of probabilities: *Fjeld*, at para 27.

[53] I accept that there was an insurer who was dealing with at least some of the damage caused by water leaks, for which ServiceMaster was providing remediation. However, even for remediation work that the insurer paid for, Malfar was responsible to pay the \$25,000 deductible. Further, Malfar did not present any evidence that it had made the insurer aware of ServiceMaster's \$1.4 million claim for unpaid work. There was no indication or evidence that ServiceMaster would be required to pursue its claim for unpaid work against the insurer. As the plaintiff is not party to a contract with the insurer, the plaintiff must pursue its claim against the insured, who would then have a claim against its insurer.

[54] I do not accept that this was a reasonable excuse for a failure to defend. At most, it would provide Malfar a defence to the claim, to the extent that a disputed invoice had already been paid by the insurer. If that was Malfar's position, it was not a reason to not defend. To the contrary, it would be a reason for Malfar to defend, as it would absolve Malfar of responsibility for at least part of the claim.

[55] Malfar received the Statement of Claim by registered mail on June 8, 2023. Mr. Ceccanese stated that he believed the Statement of Claim was not properly served, based on his understanding of Ontario's civil procedure rules. Despite Malfar's involvement in other litigation in Alberta, he did not take any steps to determine if the same rules applied in Alberta or to follow the clear language in the Statement of Claim setting out Malfar's obligations to file a defence, similar to *Palin*, at para 35-37. The adage "ignorance of the law is no excuse" applies here. It was not until after the judgment and writ of enforcement were served, that Malfar took the legal claim seriously and engaged with legal counsel.

[56] Courts are cautious to allow a party to suffer due to the failures of their lawyer, such as where the failure to defend arises from a lawyer's mistake. But Mr. Ceccanese's actions are not the equivalent of solicitor negligence. A corporation acts through its directing minds, such that the action and intention of an employee who is a directing mind is considered the action and intention of the corporation: *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 SCR 662. A lawyer retained by a corporation, absent some other involvement, is not a directing mind of a corporation. Mr. Ceccanese was a directing mind, as the general manager responsible for day-to-day operations. Mr. Ceccanese's actions in this legal action are the actions of Malfar.

[57] While neglect was found to be a reasonable excuse in *Syncrude Canada Ltd. v. Highland Consulting Group Inc.*, 2013 ABQB 594 at para 55-57, it has been considered an inadequate excuse in other cases: *Secure Energy* at para 13. Further, there is a difference between accident and mistake, which contain the element of inadvertence, and lack of due diligence, which is not inadvertent. The former give rise to a reasonable excuse; the latter does not: *Secure Energy*, at para 14.

[58] Malfar knew, in June 2021, that ServiceMaster was seeking \$1.4 million in unpaid invoices for remediation work. It knew, in June 2023, that ServiceMaster had commenced litigation to recover \$1.16 million for unpaid remediation work. I am struck by Mr. Ceccanese's comment that, because he assumed service was not properly done, he did not give a statement of claim "the same due care and attention required as if it had been served personally". I find that Malfar deliberately and intentionally failed to defend the action and has not provided a reasonable excuse for that failure.

### **Moved Promptly to Set Aside**

[59] This element is not in dispute. Malfar moved promptly to set aside the default judgment, as its application to set aside was filed within 18 days of becoming aware of the default judgment against it.

### **Overall Fairness**

[60] Even if a defendant fails to meet one or more of the elements of the tri-partite test, the Court has a discretion under r 9.15(3) to set aside the default judgment to achieve a fair result. When deciding whether to exercise that discretion, the Court may engage in a comparison of the potential prejudice to each party or the effect of granting relief on the overall integrity of the administration of justice: *Utah*, at para 109-110; *SFM*, at para 32. Prejudice to either party is not presumed; rather, it must be supported by evidence: *Poloma Investments*, at para 6.

[61] Malfar submits that ServiceMaster has not provided any evidence of prejudice if default judgment is set aside. Malfar argues that it will suffer prejudice if default judgment is not set aside, because it will not have an appropriate opportunity to contest the allegations against it, despite having numerous defences, and it faces the jeopardy of owing a judgment of \$1,169,187.91, which has not been proven and for which it may not have any liability.

[62] ServiceMaster argues that it is prejudiced by Malfar's disregard for the Alberta legal process and its limited ability to enforce any judgment against Malfar within Alberta.

[63] Malfar counters that security for costs has been ordered in this action.

[64] The material filed demonstrates that, despite Malfar receiving a comprehensive demand for money, supported by documentation, months prior to the commencement of legal action and taking the position that it was not responsible for any portion of the claim, Malfar did not exercise any due diligence or take any significant action. Malfar never seriously engaged in the merits of the claim and certainly did not take the Statement of Claim seriously when it was served, despite knowing the significant monetary amount claimed. Malfar only became invested in the litigation when it was faced with a default judgment and writ of enforcement. Any prejudice that it may suffer, if default judgment is not set aside, is a prejudice of its own making,

by its wilful and deliberate failure to defend. In these circumstances, fairness considerations align with the need for certainty in the litigation process: *Secure Energy*, at para 17.

**Conclusion**

[65] Malfar did not meet all elements of the test. No overriding factor supports the exercise of my discretion in Malfar’s favour. Despite the additional evidence filed on appeal, I decline to depart from the decision of the Application’s Judge. The appeal is dismissed.

[66] The respondents are entitled to the reasonable costs of the appeal, assessed on Column 3, and reasonable disbursements. If the parties are unable to agree on the level of costs within 45 days of these reasons, they may seek further advice and direction of the Court.

Heard on the 13<sup>th</sup> day of January, 2026.

**Dated** at the City of Edmonton, Alberta this 11<sup>th</sup> day of March, 2026.

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**L.M. Angotti**  
**J.C.K.B.A.**

**Appearances:**

Ola Cislik,  
for the Plaintiff/Respondent

Michelle Andresen,  
for the Defendant/Appellant