IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gill v. Sandhar,*
2026 BCSC 12

Date: 20260107
Docket: S215530
Registry: Vancouver

Between:

Mukhtiar Gill and Jasjit Gill

Plaintiffs

And

Harpreet Singh Sandhar and Flying Home Construction Ltd.

Defendants

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiffs:	R.W. Grant, K.C.
Counsel for the Defendants:	A. Parhar
Place and Date of Trial/Hearing:	Vancouver, B.C. April 30, 2025
Place and Date of Judgment:	Vancouver, B.C. January 7, 2026

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Introduction

[1] This action is a dispute between the plaintiffs, who are owners of a property in East Vancouver, and the defendants, who are a construction company and its representative.

[2] Justice Caldwell granted final judgment for the plaintiffs in a decision, indexed at 2024 BCSC 232, dated February 12, 2024 (the "Caldwell Order") following a summary trial application on September 7, 2023.

[3] This is an application under Rule 22-1(2)–(3) of the *Supreme Court Civil Rules* to strike the Caldwell Order. The defendants say that they mistakenly did not attend at court on September 7, 2023. They seek an order setting aside the judgment and resetting this matter to proceed through the trial process.

[4] The plaintiffs oppose the application.

Issues

[5] The issue for me to decide is whether it is in the interests of justice to set aside the Caldwell Order, having in mind the test enunciated in *Miracle Feeds v. D & H Enterprises Ltd.*, 10 B.C.L.R. 58, [1979] B.C.J. No. 1965(Co. Ct.) [*Miracle Feeds*].

Background Facts

[6] In the discussion below, I refer to the plaintiffs as the Owner and the defendants as the Builder. When discussing the litigation, I revert to the terms "plaintiffs" and "defendants".

[7] To a large extent the background facts are not in dispute. The main dispute arises from what happened at the New Westminster Law Courts on September 7, 2023.

[8] The underlying action is one based on a construction contract dated July 18, 2018 (the "Construction Contract"). In short, the Builder built a house and a laneway

house for the Owner in East Vancouver. The construction of those buildings was essentially completed in or about February 2021.

[9] As of February 2021, the house and the laneway house were built, but neither side was satisfied:

a) the Owner alleged deficiencies, delay and resulting financial loss; and

b) the Builder alleged that additional work had been performed, for which they had not been paid.

[10] A resolution to those disputes was reached on February 17, 2021, when the parties signed a document called, "the First Amendment Agreement". For simplicity, I will refer to it as the "Settlement Agreement". The Settlement Agreement attempted to resolve all of the issues between the parties.

[11] The Settlement Agreement recites that the Owner had paid the Builder $719,200, which was defined as the "Amount Paid". The Settlement Agreement provides, in part:

> 2. In consideration for the completion in full of all the Deficiencies in accordance with paragraph 1. and to fully and finally settle any and all amounts owing or potentially owing by the Owner to the Builder Parties in connection with the Contract, the Owner agrees to pay the Builder Parties (or any of them) subject to paragraph 5, an aggregate of $60,000 (inclusive of all amounts whatsoever, including for materials, supplies, labour, fees and taxes) as follows: (i) $15,000 on or about 6:00 p.m. on the day the builder commences rectifying the Deficiencies. (ii) an additional $15,000 on the day that is fifteen (15) days after the day in paragraph (i) provided the Builder in good faith is rectifying the Deficiencies in accordance with paragraph 1 (sic) (the amounts in paragraphs (i) and (ii) collectively referred to as the "Deposit") and (iii) an additional $30,000 (the "Remaining Payment") following completion by the builder of all of the Deficiencies in full.
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> 3. In consideration for entering into this Agreement, each of the Builder Parties hereby fully releases, revises and forever discharges the Owner from all matter of actions causes of action.
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> …
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> 5. The Builder Parties agree that time is of the essence hereof. The Builder agrees to use his best efforts to ensure that the deadlines set forth in Schedule "A" are strictly adhered to. Without in any way limiting the foregoing obligation, the Builder Parties agree that all of the Deficiencies shall be

> completed in full no later than March 31, 2021 (the "Outside Date") provided that in the event that all such Deficiencies are not completed by the Outside Date, then no Remaining Payment shall be payable by the Owner to the Builder Parties hereunder and the Builder Parties shall irrevocably and fully refund without any setoff or deduction whatsoever the entirety of the Deposit paid within three (3) business days of the Outside Date (notwithstanding any work completed by the Builder prior thereto, provided the Owner may, in his sole discretion, acting reasonably, determine that the Builder Parties may retain certain of the Deposit for Deficiencies already completed prior thereto).
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> 6. The Builder Parties acknowledge and agree that the Owner alleges he has been significantly overcharged by the Builder Parties in connection with the performance under the Contract (the "Contract Breach"), and that the Owner has a right of recourse against the Builder Parties in connection therewith. The Builder Parties agree that if the Builder fails to complete all of the Deficiencies in full by the Outside Date or otherwise materially breaches its obligations hereunder (the "Deficiencies Breach" and with the Contract Breach the "Builder Breach"), the Builder Parties (or any of them) shall pay to the Owner an amount equal to fifteen percent of the amount paid, provided that, for greater certainty, any amount of the Amount Paid provided that, for greater certainty, any amount actually refunded or repaid by the Builder Parties to the Owner pursuant to Section 7 of the Contract shall be deducted from the Amount Paid prior to the calculation hereof (the "Liquidated Damages"). The parties intend that the Liquidated Damages constitute compensation and not a penalty. The parties further acknowledge and agree that the harm caused by the Builder Breach would be impossible or very difficult to accurately estimate as at the date hereof, and that the Liquidated Damages are a reasonable estimate of the anticipated or actual harm that has and might arise from the Builder Breach. The Builder Parties (sic) payment of the Liquidated Damages (together with a refund of the Deposit pursuant to paragraph 5) is the Builder Parties (sic) sole liability and entire obligation and the Owner's exclusive remedy for the Builder Breach. …

[12] In short:

a) The Builder released all claims against the Owner;

b) Starting on or about February 17, 2021, the Owner agreed to pay installments to the Builder, in exchange for the Builder completing the work on the deficiencies, provided the Builder was, in good faith, rectifying the deficiencies;

c) If the deficiencies were not completed by March 31, 2021, then the Owner would have a claim for liquidated damages.

[13] It is not disputed that the Owner paid the first amount of $15,000.

[14] It is also not disputed that the Owner did not pay the second amount of $15,000. The Owner says that he was trying to contact the Builder, and he was getting no reply. Hence, the Owner says that the Builder was not rectifying the deficiencies in good faith, as required in clause 2.

[15] The deficiencies were not completed by March 31, 2021.

[16] The Owner commenced this action on June 9, 2021, thus becoming the plaintiffs.

[17] The Builder did not file a response to civil claim.

[18] On September 27, 2021, the plaintiffs applied for and obtained default judgment.

[19] The Builder sought to set aside the default judgment. On the application of the defendants, the default judgement was set aside by Justice Mayer (as he then was): 2022 BCSC 255.

[20] On March 10, 2022, the Builder filed a response to civil claim then becoming the defendants. They also filed a counterclaim seeking damages of $175,000 under the original Construction Contract.

[21] On November 16, 2022, the plaintiffs delivered their list of documents. On April 4, 2023, the plaintiffs requested the defendants' list of documents. That list was delivered on April 21, 2023.

[22] On May 4, 2023, the plaintiffs advised the defendants' counsel that they intended to proceed with a summary trial and requested defence counsel's availability. I am informed that there were no dates provided by defence counsel. Then, on June 23, 2023, the plaintiffs received a notice of withdrawal of the defendants' counsel.

[23] On June 29, 2023, the plaintiffs, again, sought available dates from the self-represented defendants. The plaintiffs received no response.

[24] In the face of receiving no response, the plaintiffs set down the summary trial application for September 7, 2023. The plaintiffs wrote to the defendants on July 24, 2023, advising them of the summary trial date and urging them to seek independent legal advice. The defendants did not respond.

[25] On August 16, 2023, the plaintiffs filed their summary trial application materials. No materials were received in response.

[26] The parties attended at the New Westminster Law Courts on September 7, 2023. Ms. Zhang was acting as counsel for the plaintiffs. Mr. Sandhar attended on his own behalf and as representative of Flying Home. They waited in regular chambers for judge to become available through the morning sitting.

[27] There is a dispute on the facts as to what happened at approximately 12:30 p.m.

[28] Ms. Zhang, sworn an affidavit. She says that she and Mr. Sandhar went to the registry counter at New Westminster Law Courts and the following occurred:

a) The registry staff indicated:

   i. there likely would not be a judge available to hear the summary trial application in New Westminster; but

   ii. there was a judge available at the Abbotsford courthouse at 2 p.m.

b) Ms. Zhang informed the registry and Mr. Sandhar that the plaintiffs wished to be referred to Abbotsford.

c) Mr. Sandhar stated that he had to work that day and did not think he would go to the Abbotsford courthouse.

[29] Mr. Sandhar has filed his own affidavit. In answer to Ms. Zhang's version of the events, he states that he did not understand that he needed to file written material in response to a summary trial application. His affidavit continues:

> 18. I attended court in New Westminster on September 7, 2023, to seek an adjournment. I intended to explain to the presiding judge that Flying Home and I did not have counsel for the hearing, and we were not in a position to proceed with the summary trial application. I was also going to note that we had counsel available for subsequent date in the event the summary trial application was adjourned.
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> 19. Upon checking in at approximately 10 AM with the registry we were informed that we needed to wait because there were not enough judges available to hear the summary trial application.
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> 20. Before the lunch break at approximately 12:30 P.M., we were informed by the registry that the summary trial application would not be heard. I believed we were free to leave, and the summary trial application would not occur.
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> 21. I was unaware that the summary trial application was moved to the Abbotsford law courts. The plaintiffs' counsel never informed me of this change. I never stated to the plaintiff's counsel that I could not attend the summary trial application due to work.
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> 22. If I had known about the proceeding being moved, then I would have attended the Abbotsford law courts and explained that I required an adjournment.

[30] Given the apparent dispute over the events at the registry, the plaintiffs requested the records of the New Westminster registry. The registry notes that were sent to the Abbotsford scheduling office indicate that "one side will not be attending". That statement was, objectively, true.

[31] Ms. Zhang appeared before Justice Caldwell in Abbotsford in the afternoon of September 7, 2023. Justice Caldwell reserved judgement until February 12, 2024. In short, he granted the plaintiffs judgment against the defendants in the amount of $154,629.50 (being 15% of the Amount Paid) plus the return of the $15,000 deposit, plus $26,749.50 as damages for the lien filed by a subcontractor, and $5,000 for the legal fees necessary to discharge that lien. Those terms were reflected in the Caldwell Order.

[32] I am informed that following the release of the reasons, the plaintiffs garnisheed the defendants and recovered as substantial portion of the judgment amount. Those funds have been paid into court.

[33] Upon learning of the judgment, the defendants retained counsel. They initially pursued an appeal of the Caldwell Order but then pursued this application under

Rule 22-1. That mis-step accounts for the matter taking some time to get to this Court.

Legal Basis

[34] The defendants apply under Rule 22-1 which addresses orders that were granted in the absence of the parties. Rule 22-1(2) provides:

> **Failure of party to attend**
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> (2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.
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> **Reconsideration of order**
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> (3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

[35] The parties agree that the test to be applied is similar to the one applied on default judgments (*Miracle Feeds*; and *Cho v. Kim*, 2023 BCSC 780 at para. 20). The test has three components. The defendants must show that they:

a) did not wilfully or deliberately failed to enter an appearance or file a defence;

b) made application to set aside the default judgement as soon as reasonably possible after learning of it, or there is a reasonable explanation of the delay; and

c) have a meritorious defence or at least one worthy of investigation.

[36] Although those are three separate factors, the parties agree that the ultimate test is whether the interests of justice call for setting the judgment aside. Hence, in the right circumstances, it is possible that one factor could be sufficient.

[37] The plaintiffs' argument focuses on a) and c) and puts less emphasis on b).

[38] I will explore each factor in order:

a) The defendants did not wilfully or deliberately faile to enter an appearance or file a defence

[39] The defendants say that there was no deliberate failure on its part. Mr. Sandhar says:

a) the defendants did not have counsel at the time;

b) he was mistaken about the need to file a response to the summary trial application;

c) they had arranged with their prior counsel to act on the matter again if the summary trial application was adjourned;

d) he attended at the New Westminster Law Courts intending to ask for an adjournment.

[40] Mr. Sandhar further says that he was not aware that the matter had been moved to Abbotsford.

[41] In response to Mr. Sandhar's affidavit, the plaintiffs note the following factual discrepancies, relying on Ms. Zhang's affidavit:

a) Before the lunch break at approximately 12:30 p.m., the parties were informed by the registry that the summary trial application would not be heard. Mr. Sandhar's affidavit says that he was unaware that the summary trial application was moved to the Abbotsford Law Courts and that the plaintiffs' counsel never informed him of this change. However, Ms. Zhang's affidavit states that the registry staff told Mr. Sandhar that the matter was moved to Abbotsford. Mr. Sandhar does not address this allegation in his affidavit.

b) The registry note indicates that "one side will not be attending". That note suggests that the registry knew that Mr. Sandhar had decided not to attend.

c) There is a direct conflict on the evidence between

i. Ms. Zhang's statement that Mr. Sandhar stated that he had to work that day and did not think he would go to the Abbotsford courthouse, and

ii. Mr. Sandhar's statement that "I believed we were free to leave, and the summary trial application would not occur." He further denies stating he could not attend the summary trial application due to work.

[42] I am not in a position to make finding of fact, but on this issue the evidence, and thus the balance of probabilities, favour the plaintiffs. In my opinion:

a) the note from the registry suggests that they had information indicating that Mr. Sandhar would not be attending at Abbotsford;

b) that evidence is consistent with Ms. Zhang's evidence;

c) the note from the registry was objectively true;

d) hence, either Mr. Sandhar or Ms. Zhang must have informed the registry;

e) the only possible fact scenario wherein Mr. Sandhar did not convey the information that he would not be attending at Abbotsford would require:

i. Ms. Zhang to hide the Abbotsford referral from Mr. Sandhar,

ii. and then lie to the registry about his attendance.

[43] I view the latter fact scenario as extremely unlikely.

[44] I also consider the context of this summary trial application. All of these events occurred after the plaintiffs took, and then defendants overturned, default judgement. I would have expected the defendants to be extra vigilant about the possibility of judgment being taken.

b) Did the defendants make application to set aside the default judgment as soon as reasonably possible after learning of it, or is there a reasonable explanation of the delay?

[45] The second consideration is somewhat complex based upon certain procedural decisions made by counsel for the defendants. To be clear, however, the plaintiffs do not put any specific weight on this factor.

[46] As noted above, defence counsel pursued an appeal of the Caldwell Order. He did so despite the fact that he was advised by the plaintiffs' counsel that the proper application will be under Rule 22–1 (in this Court).

[47] The plaintiffs do not hold counsel's decisions against the defendants.

[48] I consider this to be a neutral factor. It does not favour either party.

c) Do the defendants have a meritorious defence or at least one worthy of investigation?

[49] The defendants submit that the most important factor is the determination of whether the defence puts forward a meritorious defence to the action.

[50] The defence position is:

a) This matter was not suited for a summary trial given the fact that the parties were relying on arrangements that were partly oral in nature.

b) The matter required *viva voce* evidence so that credibility and reliability could be properly assessed. The ultimate decision would have been based upon one party's version of events versus the other. At a minimum this defence to the summary trial application is worthy of investigation.

c) On the underlying substantive claim, the defence says that the plaintiffs failed to abide by the construction contract and the Settlement Agreement. As a result, the defendants are entitled to damages. At minimum this defence is worthy of investigation.

[51] In response to this submission, the plaintiffs submit the following:

a) It is not a defence to the action to argue that a summary trial is not suitable.

b) The defendants make bold assertions about a defence but put forward no specifics and no evidence of that defence.

[52] The plaintiffs rely on the decision of the Court of Appeal in *Rangi v. Rangi*, 2007 BCCA 352 at paras. 80–81. In that case the court was considering whether the respondent was able to satisfy the test for a meritorious defence. Chief Justice Finch wrote:

> [80] The matters relied upon by the respondent Kumikker are mere allegations dependent entirely on an assessment of his credibility. There is no documentary, or other independent evidence, to support any of these assertions. The only evidence the respondent Kumikker ever produced in answer to the petition was before the Registrar when she made the accounting.
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> [81] In my respectful opinion there is insufficient particularity in Kumikker's allegations to show that there is a meritorious defence or one worthy of investigation: see ***Schmid v. Lacey*** (1991), 7 B.C.A.C. 77. In that case Mr. Justice Locke, with the other judges concurring, said:
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> > 10 …. The leading case in setting aside a default judgment is that of *Bank of Montreal v. Erickson* (1984), 57 B.C.L.R. 72, a case in this Court. The phrase was used in there as to the third ground that the applicant "has a meritorious defence, or at least a defence worthy of investigation". In my opinion, the phrase "worthy of investigation" does not mean that one is merely entitled to make the allegation. One must, I think, descend to details such as to enable the judge to correctly exercise his mind upon whether there is indeed such a defence. …

[53] The plaintiffs say that the defendants have an obligation on this application to "descend to details". The plaintiffs say the defendants have done nothing of the sort.

[54] I note that when this matter was before Justice Mayer, as he then was, on the default judgement application, the main focus of his reasons was his finding (at para. 23) that "the prerequisites for issuance of the Default Judgement Order were

not established". The prerequisites he was referring to were the lack of the liquidated sum.

[55] Justice Mayer did go on to say regarding the merits of the defence:

> [26] Second, with respect to the merits of the defence, I find that the defendants have a meritorious defence – at least with respect to the claim advanced for security for builders' liens, since the requirement for an indemnity has not been determined at this time. It is not necessary for me to address the merits of the defence concerning the claims for liquidated damages or return of the deposit.

[56] That was the basis to set aside the default judgment. A different test applied on the unopposed summary trial. I do not find any assistance in Justice Mayer's decision.

[57] Ultimately, Justice Caldwell found:

> [21] The plaintiffs are granted judgment against the defendants jointly and severally in the amount of $154,629.50, plus pre-judgment and post-judgment interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. The amount of $154,629.50 is 15% of the $719,200 that had been paid by the plaintiffs for construction before the Settlement was signed, plus the return of the $15,000 deposit paid by the plaintiffs pursuant to the Settlement, plus $26,749.50 as damages for the lien filed by HPA Construction Ltd. for which the defendants are liable to indemnify the plaintiffs, and $5,000 as reasonable legal fees to discharge the HPA lien and the second lien filed on the property.

[58] I accept the submission of the plaintiffs that the defendants put forward assertions of a defence, without explaining the nature or specifics of that defence. I find that the third factor from *Miracle Feeds* weighs in favour of the plaintiffs.

Conclusion

[59] In my opinion, it is not in the interests of justice to set aside the Caldwell Order. I find that factors a) and c) favour the plaintiffs and not the defendants. Factor b) is neutral.

[60] I am considering all of the factors in the context of what is in the interests of justice. In my opinion the defendants have failed to satisfy me that it would be in the interests of justice to set aside the Caldwell Order.

[61] The defendants' application is dismissed. The plaintiffs are entitled to their costs.

"A. Ross J."