IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walton v. Aspen Road Development Corp.,* 2023 BCSC 660

Date: 20230308
Docket: S223144
Registry: Vancouver

2023 BCSC 660 (CanLII)

Between:

Matthew John Walton

Plaintiff

And

Aspen Road Development Corp., Tyler Ovington and Lauren Ovington

Defendants

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. Soliman
Counsel for the Defendants:	A. Wood
Place and Date of Hearing:	Vancouver, B.C. March 6, 2023
Place and Date of Judgment:	Vancouver, B.C. March 8, 2023

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[1] **THE COURT:** The defendants apply for an order setting aside a default judgment entered on December 12, 2022. That default judgment ordered them to pay to the plaintiff the sum of $101,696.

[2] The plaintiff says that the default judgment should not be set aside. He says the defendants have not shown that they did not willfully or deliberately fail to file a response to civil claim, that they have not shown they have a meritorious defence or a defence worthy of investigation, and that it would not be in the interests of justice to set aside the default judgment.

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Facts

[3] The plaintiff, Matthew Walton, and the individual defendants, Tyler and Loren Ovington, were neighbours and friends. Given that two of the defendants have the same last name, and intending no disrespect, I will refer to the parties by their first names.

[4] Tyler and Loren were at all material times the principals of the corporate defendant, Aspen Road Development Corp. ("Aspen Road").

The Contracts

[5] The documentary record includes three contracts signed on June 8, 2018:

(a) A contract of purchase and sale by which Matthew agreed to purchase a strata lot referred to as "Unit A" from Aspen Road;

(b) A contract of purchase and sale by which Matthew agreed to purchase a strata lot referred to as "Unit E" from Aspen Road; and

(c) A separate agreement by which Matthew and Aspen Road agreed to amend the terms of the purchase contracts to limit the purchaser's liability for damages if the purchaser is unable to assign one or the other of the purchase contracts and becomes liable to the seller to complete.

[6] The third of these agreements provided that if Matthew is unable to either assign or complete on one of the two contracts of purchase and sale, Matthew's liability to Aspen Road would be limited to 50% of the deposit.

[7] Matthew paid deposits of $101,696 in respect of Unit A, and $85,396 in respect of Unit E. Those deposits were held in trust by Aspen Road's solicitors, Race & Company.

[8] Matthew was able to assign the contract for Unit E. However, he was unable to assign the contract for Unit A by the time the contract was required to be completed in March 2020.

[9] On April 14, 2020, Matthew signed a trust deposit release agreement, which authorized Race & Company to release to Aspen Road the full $101,696 held in respect of unit A.

The Action

[10] Matthew says that he felt forced to sign over the $101,696 and did so under duress. His evidence was that he spoke with Tyler and Loren in November 2021 and again in February 2022 about his concerns, and advised them that he was intending to seek legal advice.

[11] On April 13, 2022, Matthew began the present action by filing a notice of civil claim (the “NOCC”).

[12] In the NOCC, Matthew advanced claims against Aspen Road as well as Tyler and Loren. He claimed that the defendants discouraged him from seeking legal advice in respect of the three contracts. He asserted that the defendants refused to allow him to advertise the sale of the two units he had hoped to assign. He also alleged that Tyler and Loren had made misrepresentations in order to induce him to "invest" in their project.

[13] The NOCC was served on the defendants on April 24, 2022.

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After the NOCC was served

[14] Tyler in his affidavit acknowledged that it was an error for Aspen Road to have asked that the full $101,696 be repaid to it, given that it had agreed that half of the deposit would be paid to Matthew. His evidence was that it was not until he was served with the NOCC that he became aware that half of the Unit A deposit had been retained by Aspen Road in error.

[15] Tyler also deposed that on or about April 18, 2022, he entered into a verbal agreement with Matthew. He described the agreement as follows:

> I agreed to pay the plaintiff $50,848.00 in satisfaction of the 50% of the Unit A Deposit and an additional $25,152.00 as compensation for the delay. In return, the plaintiff advised that it would not be necessary to file a Response to Civil Claim …

These two numbers add up to $76,000.

[16] The date of April 18, 2022 appears to be in error. The date of service (April 24) is confirmed by an affidavit of service sworn in May 2022 by the process server. Tyler says in his affidavit that he was not even aware of the overpayment until he was served with the NOCC.

[17] Matthew has put into evidence the texts he exchanged with Tyler from October 2021 onward. There are a variety of texts beginning in April 2022 evidencing attempts to set a time when the parties could meet in Matthew's driveway and discuss the issue. The texts indicate that the initial discussion ultimately occurred on May 4, 2022. With respect to this discussion, Matthew's evidence is that Tyler openly admitted that he owed Matthew money and that he would write him a cheque if he could. Matthew's evidence indicates that in his recollection, their discussion of a specific number occurred at a further meeting on May 15, 2022.

[18] Prior to that May 15 meeting, Tyler sent two texts on May 12, 2022. In the morning he said:

> I haven't forgotten about you. I have a meeting today which will give me direction on how best to settle things up with you.

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That evening his text said:

> I haven't had time to speak with Loren yet about how best to accomplish our repayment to you. We will sit together shortly ... I (or we) will meet you tomorrow to tell you what we've come up with.

[19] A series of texts followed to set up a meeting which ultimately occurred on May 15, 2022. Matthew's evidence with respect to that meeting was that Tyler told Matthew he would be getting advice from his lawyer. Matthew said that Tyler "offered to pay me the amount of $76,500 'because it was a middle number'", but told him that at the time he had no money.

[20] Matthew's evidence, much of which is confirmed by the texts that are also in evidence, is that over the next few weeks, Tyler told him about plans to approach a Mr. Day to borrow funds and about plans to sell some shares he had in a private company. On June 10, 2022, Tyler asked to meet to discuss his plans. They met on the morning of June 12, 2022. That meeting was followed by a lengthy email on the evening of June 12. The email states:

> Further to our conversation this morning, my plan for repayment of the $76,500 that I owe you is as follows:
>
> 1. Pursue a small business loan … The details of the payment plan still need to be discussed and agreed upon.
>
> 2. We will reconcile our corporate tax returns … which should result in credits …
>
> 3. We are actively seeking a purchaser for shares that we own of a very successful private company. Once we find a buyer, we will be able to make a lump sum payment on the amount owing to you …
>
> 4. Our firewood business is growing rapidly and we expect that within the next 6-12 months it will generate sufficient cash flow to pay most or all of this debt to you.
>
> These are our plans for repayment.
>
> Please let me know if you have any questions or require clarification on any of the points above.

[21] The next day, Matthew responded by text, advising that his lawyer had recommended that a promissory note be prepared and that "an order of the NOCC be signed ... reflecting the amount of the promissory note." In an email, Matthew commented that he would "get back to you re a 'note' of some description."

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[22] The texts in evidence indicate that the parties met again on the evening of June 13, 2022. This meeting is not referenced in Tyler's affidavit. Matthew's affidavit deposes that:

> I tried to explain to Tyler that the only thing acceptable to me at that point was if he had provided a promissory note together with a letter of independent advice from a lawyer. I further explained that the way forward for me was a promissory note executed by him, and a registered order under the NOCC in lieu of a judgment. Tyler, however, did not accept registering an order under the NOCC, or at the option of registering a charge against his house as security. He stated that he did not understand what registering an order meant, or what a letter of independent legal advice was.

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[23] Matthew's evidence was that he brought up these issues again with Tyler on June 19, 2022, and that Tyler wrote down what Matthew was asking for and said he would discuss it with his lawyer.

[24] At some point in June 2022, Tyler, Loren, and their children travelled to Australia to visit Loren's parents. Tyler's evidence was that when they arrived in Australia, given the health condition of Loren's parents, they decided to extend their stay for six months. Tyler returned to Canada by the end of June to deal with their affairs here, but Loren and the children remained in Australia.

[25] Matthew followed up with Tyler by text on June 25 and 29. Tyler advised on June 30, July 2, and July 5 that he was having difficulty reaching his lawyer to discuss Matthew's proposals. On July 6, Tyler sent a text saying that he had now spoken with his lawyer and that he would send an email.

[26] Tyler's email of July 7, 2022, stated that:

> After further discussion with Loren and consultation with our lawyer, we have decided that we cannot put our personal property up as security for our debt to you. We cannot encumber this assets as it is our most valuable resource to leverage while we continue to pursue our business loan ... We would like to proceed with a promissory note and settlement for the previously agreed-upon pay out amount of $76,500. We also ask that you file the discontinuance of the claim once the promissory note and settlement agreement are completed.

[27] Matthew replied by email setting out his position that:

> … a promissory note *without security* would not be something I'm willing to discontinue the NOCC for. I believe you understood this when we talked at length on 12 June 2022.
>
> [Emphasis in original]

He also noted in his email that Tyler had not proposed a timeline for payment. He suggested that the payments be made in six equal installments, with payment in full by 1 January, 2023.

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[28] Tyler sent a response to this on July 10, 2022, stating:

> I agree to give security with the promissory note – just not my personal home. We have a handful of other options that can be discussed if you're open to it.
>
> I understand that promissory notes can be secured against assets. We are willing to do this (as per above). We have full intention to reimburse you for the money you are owed.
>
> I intend to complete the tax reconcile by the dates specified in my original email (July 31). I am uncertain of the exact amount of tax credits it will result in. Once I have that information I'll know an exact amount of the first payment I can make to you. From there I will be able to provide you a payment plan that is realistic and achievable.
>
> The timeline you've proposed is impossible for us at the moment. I can say with confidence that this debt to you will be repaid in full no later than January 1 2024.
>
> I have absolutely no means of providing you with any monthly payments until at least November 2022.

[29] On July 13, 2022, Tyler texted Matthew advising that he had changed his flight and would be staying in Canada until September 1 so that he could "continue to make financial progress here." There then appears to have been a hiatus in communications until August 8, 2022, when Tyler texted Matthew to advise that he had been working on his corporate taxes and would report back once he had determined the outcome of his reconciliation.

[30] Tyler's evidence was that at about the end of August 2022, he and Loren decided to move to Australia indefinitely. In response to an inquiry from Matthew on August 31, Tyler responded that he had returned to Australia but would be back in Canada on September 22. He advised that:

> Paying you back in full as fast as we can is still an absolute top priority for us.

[31] Three weeks later, on September 20, 2022, Race & Company wrote to Mr. Soliman, counsel for the plaintiff in this action, as follows:

> We write to advise that we have been retained by [Aspen Road, Tyler and Loren] to conduct the defence of the above-captioned matter.
>
> Please confirm that your office agrees not to take default judgment without advising us in writing of your intention to do so.

[32] Mr. Soliman replied that same day, confirming receipt of the letter, and stating:

> We do not agree to holding back from filing for default judgment. To the contrary, we will pursue default judgment immediately. Your clients were served on April 24, 2022 …
>
> When you receive the materials from your client, you will realize that your client did communicate their admission to the full amount specified in the Notice of Civil Claim and agreed to pay that amount. Accordingly, we are willing to agree to a consent order to give effect to that agreement. Our client has also indicated his willingness to accept reasonable payment terms from your clients provided that security is in place (such as a registered mortgage).

[33] There was no further communication from Race & Company in response to this letter.

[34] On September 28, 2022, Matthew texted Tyler welcoming him back to Canada and asking for an update. Tyler responded:

> I've come back to an insane firewood rush like I've never experienced before. I don't have anything to update you on regarding your repayment. I have still two companies taxes to work on and intend to get into that later next week. I'll have caught up on all back logged the firewood deliveries by then.
>
> We had staffing issues during my last week in Aus. That resulted in many deliveries having to be rescheduled. Anyways, I'm working on it. One thing at a time. I'll let you know when I have news for you regarding a date for some payment.

[35] There followed a couple of texts that day about Australian food, but after that there appears to have been no further communication between Matthew and Tyler about payment.

[36] On October 5, 2022, Matthew's counsel submitted an application for default judgment.

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[37] At the end of October 2022, Tyler returned to Australia to join his family. Matthew's evidence is that he did so without informing Matthew that he was leaving, and without saying anything about any plan to repay Matthew.

[38] In November 2022, Loren returned to Canada for several weeks. It appears from the evidence tendered by Matthew that she used Facebook and other social media to sell most of their remaining possessions in Canada, including the equipment used for their firewood business.

[39] On December 12, 2022, default judgment was entered. A copy was sent by registered mail to the Squamish home of Tyler and Loren. On January 19, 2023, their house sitter scanned the documents and sent them to Tyler in Australia. The judgment was also registered against title to Tyler and Loren's house.

[40] At about the same time, Tyler and Loren listed their home in Squamish for sale. Although not in evidence, counsel for Matthew advised the court that he understood that an offer had been accepted just before the hearing of this application.

[41] The defendants filed this notice of application on February 2, 2023, with the hearing date initially scheduled for March 3, 2023. It was adjourned by consent to March 6, 2023.

Issue

[42] The issue on this application is whether the default judgment should be set aside.

Legal Context

[43] As noted in *Andrews v. Clay*, 2018 BCCA 50, in paras. 28-29:

> [28] The factors customarily considered on an application to set aside a default judgment are often referred to as the *Miracle Feeds* tests, as they were articulated in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) in the context of failing to file an appearance or defence. Judge Hinds (as he then was) expressed these factors in this way:

> … in order for a defendant to succeed on an application to set aside a default judgment, he must show:
>
> 1. That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
> 2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
> 3. That he has a meritorious defence or at least a defence worthy of investigation; and
> 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.
>
> [29] I have described these as factors rather than tests, as they are not intended to be either mandatory or exhaustive of the considerations that are relevant, though in most cases they will be the appropriate indicators of whether it is in the interests of justice to set aside the default judgment.

[44] With respect to the question of whether there is a defence that is worthy of investigation, in *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341, at paras. 27-31, Voith J.A. summarized the applicable law as follows:

> [27] In *Schmid v. Lacey* (1991), 7 B.C.A.C. 77 at para. 10 (B.C.C.A.), Locke J.A. said:
>
> > The leading case in setting aside a default judgment is that of *Bank of Montréal 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.
>
> See also *Andrews* at para. 44; *Rangi v. Rangi*, 2007 BCCA 352 at para. 81.
>
> [28] Further guidance is found in *Brar v. Sahota* (1998), 61 B.C.L.R. (3d) 194 (C.A.). The chambers judge had refused to set aside a default judgment because he considered that there was inadequate evidence of the defence that was to be advanced. On appeal, the Court concluded, at para. 11: "In my judgment, the averments of Mr. Sahota in his affidavit are sufficient to raise a defence that is worthy of investigation." The Court then said:
>
> > [12] It is not, in my view, necessary for a person seeking to set aside the default judgment to swear to all the evidence that he believes might support his defence. When it is a simple cause of action, and I do not say that to diminish the claim, but when it is a simple cause of action like an assault, it is sufficient, in my view, to plead that the defendant did not assault the plaintiff and he did not participate in any way in the assault.

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> There could be particulars, and there could, of course, be discovery to add flesh to those allegations, but I think that that would be a defence that would withstand an application to have it struck out as being insufficient.
>
> See also *Klonarakis Estate*, 2013 BCCA 481 at paras. 35–36.
>
> [29] It is thus necessary for a defendant who seeks to set aside a default judgment to file some evidence that supports the defence it wishes to advance. In some straightforward or simple cases, a denial, in affidavit form, of the allegations in the notice of civil claim may be sufficient. In other cases, more may be required.
>
> [30] In neither instance does the chambers judge engage in a searching, extended, or detailed weighing of the evidence. The threshold the applicant must meet is, as the words "worthy of investigation" suggest, not onerous.
>
> [31] In *Klonarakis*, the Court asked whether the appellant had "an arguable claim" and whether there was a "live issue": at paras. 34 and 36 respectively. In *Brar*, the Court concluded at para. 13 that "although the case is close to the line, there was enough" to set aside the default judgment. In *Miracle Feeds* itself, the chambers judge concluded at 62 that the applicant had a defence "which may well be meritorious." Recently, in *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.*, 2018 BCSC 234 at para. 59, the chambers judge concluded that all the applicant was required to show was that it had "an arguable defence" and that there were "triable issues."

[45] In the present case, there is no issue as to the delay between January 19, 2023, when the defendants became aware that the default judgment had been issued, and February 2, 2023, when the notice of application was filed. Rather, submissions focused on:

a) The circumstances surrounding the failure to file a response to civil claim;

b) The defendants' allegations that there was a settlement such that they were not required to respond to the claim, or at least that this alleged settlement provided a defence to the action; and

c) Whether it is in the interests of justice to set aside the default judgment.

Positions of the Parties

[46] The defendants argue that their failure to file a response to civil claim was not wilful or deliberate. Rather, they contacted the plaintiff to negotiate, once served with pleadings, reached a verbal agreement and then went about arranging financing.

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Their ability to deal with the action was impacted by their travel to Australia, as well as what is said to be depression and significant issues in their personal lives.

[47] The defendants say that they acted quickly once they learned that a default judgment had been taken, and that the evidence they have tendered as to a settlement for an amount lesser than the full judgment amount establishes a defence worthy of investigation.

[48] The plaintiff says that the vague references in Tyler's affidavit to depression are not sufficient to establish that as a reasonable excuse for the defendants' failure to act. The plaintiff says that the defendants acknowledge they owe substantial funds to the plaintiff but have refused to commit to any sort of timeline to repay the money. The plaintiff denies that an actual agreement was reached but says that negotiations ended without resolution.

[49] The plaintiff says that in circumstances in which the defendants have been selling off all of their realizable assets in British Columbia, it would not be in the interests of justice to set aside the default judgment. The plaintiff notes that the defendants have not proposed any sort of term by which the judgment would remain in place with the lesser amount they acknowledge. Rather, their application simply seeks to have the judgment set aside in circumstances in which what appears to be their final remaining exigible asset of substance in British Columbia is in the process of being sold.

Analysis

[50] In my view, the evidence as to the reasons for the defendants' failure to respond to the civil claim are vague. Tyler said in his affidavit that when he returned to Canada for the summer of 2022, he "became depressed." He said that his wife had been struggling with depression and anxiety for many years. He references the death of his mother in December 2022, some three months after the September 2022 letter from counsel insisting upon a response to civil claim being filed. He then states that:

> Due to my personal life circumstances, I was unable to properly instruct my lawyer.

There is no evidence, again, with respect to any medical diagnosis or treatment.

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[51] It is significant that, at the same time as the defendants were said to be unable to instruct counsel, they were actively liquidating their remaining exigible assets in Canada. The plaintiff gave evidence of a garage sale held by Loren where "everything was priced to go", as well as Facebook Marketplace postings listing for sale Tyler's firewood processor, two 40-foot shipping containers, a steel roof structure, a hydraulic dump trailer and some quads. On the post listing the quads for sale, Tyler wrote:

> We are planning to move to a new country, so the quads must go.

[52] Finally, the evidence includes the MLS listing of Tyler and Loren's home.

[53] No responsive materials have been filed to this evidence of the plaintiff. I take from that that the defendants do not dispute what is said about the ongoing disposition of their Canadian assets.

[54] In my view, having reviewed the evidence as to an alleged agreement by which the plaintiff is said to have compromised the claim in return for payment of $76,500, it seems to me that Matthew's evidence is consistent with the overall documentary evidence and is inconsistent with the conclusion that an agreement had actually been reached.

[55] The evidence in Tyler's affidavit is quite limited and read on its own might leaves some doubt as to whether an agreement was reached. Matthew acknowledges these communications but has provided information as to a number of other meetings and, significantly, of a number of other electronic communications that, in my view, are inconsistent with there having been an agreement as to all the necessary terms.

[56] Again, the failure of Tyler to respond to that evidence, or to contest that the texts and additional emails provided by Matthew were, in fact, sent, means that Matthew's evidence as to those additional meetings and additional electronic communications is uncontested.

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[57] In reviewing the evidence as a whole, I conclude that while there was discussion of a settlement as to which the number of $76,500 was one element, it seems clear that the terms of payment were never resolved. In particular, it seems clear that Tyler and Loren did not have the immediate ability to pay any amount and would require time to do so. Matthew wanted the amounts to be paid quickly, while Tyler and Loren wanted a long time for payment. The question of when the funds were due was never resolved.

[58] As well, it seems clear that Matthew's willingness to agree to an amount was dependent on there being agreement as to terms that would adequately protect him, including the provision of security. It appears from the documents that the security was particularly important to Matthew, given the long time for payment.

[59] It is clear on the documents I have seen that the parties never reached agreement on the essential terms of a compromise of the plaintiff's claim. Rather, the negotiations appear to have reached a stalemate in July 2022 after which the communications effectively tailed off.

[60] Two months after those negotiations tailed off, there was clear notice in September 2022 of an intention to seek default judgment. Following the exchange of letters between counsel on September 20, 2022, there is nothing in the record to show any real intention to address this matter.

[61] It is significant when I consider whether an order setting aside a default judgment would be just in all the circumstances that the difference between the amount the defendants acknowledge, and the amount of the judgment is only $30,000. I have significant concerns about whether it would be just and equitable to expose the plaintiff to the loss of his judgment in circumstances in which the

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defendants appear to be taking steps that would likely render them effectively judgment-proof here in Canada, in order to permit the defendants to advance a doubtful claim that the plaintiff agreed to compromise his claim.

[62] More significantly, I have concerns generally about whether it would be just to set aside a default judgment in circumstances where the judgment has been registered against what appears to be the last remaining asset, and that asset is about to be sold and the parties who own that asset have left the country and now reside in a different country that is a long way away.

[63] While I accept that the defendants moved quickly once they were aware of the default judgment, in my view the other factors set out in the traditional test in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. P 58. [1080] B.C.J. No. 1965 (Co. Ct.), as refined in *Andrews v. Clay*, are not met.

Conclusion

[64] In all of the circumstances, I conclude that it would not be just and equitable to set aside the default judgment in this matter. The application is dismissed.

[SUBMISSIONS]

[65] THE COURT: On the default judgment, the plaintiff is entitled to the usual costs under the tariff for its default judgment. As the successful party on this application, the plaintiff is entitled to the costs of this application. I think Scale B is probably reasonable.

"Veenstra J."