CITATION: Li v. Zhu, 2023 ONSC4201
COURT FILE NO.: CV-19-621587
DATE: July 25, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Weiyan Lin v. Guangcheng Zhu also known as Scott Zhu, Geo Roofing Limited, Memel Aluminum Contracting Ltd. and Guru Constrarchit Ltd.;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Gary J. McCallum for Weiyan Li;
Michael Simaan Guangcheng Zhu also known as Scott Zhu and Guru Constrarchit Ltd.;

HEARD: July 10, 2024.

REASONS FOR DECISION

[1] Guangcheng Zhu also known as Scott Zhu ("Mr. Zhu") and Guru Constrarchit Ltd. ("Guru"), bring this motion for an order setting aside the noting in default and default judgment I signed on January 10, 2023 in this action, requiring that all money paid into court pursuant to the said default judgment be returned to these defendants, allowing these defendants to re-file their statement of defence within 10 days, and the costs of this motion. Ms. Li opposes this motion.

[2] The moving parties filed two affidavits sworn by Mr. Zhu. The plaintiff filed an affidavit sworn by Tina Zhang. Both Mr. Zhu and Ms. Zhang were cross-examined, and the transcripts of those cross-examinations were filed.

a) *Backgound*

[3] The following facts are not in dispute. Ms. Li owned a residential property located at 458 Glengarry Avenue, Toronto. Mr. Zhu is the principal of Guru. Guru was established in late July, 2017. On August 3, 2017 Mr. Zhu had Guru contract with Ms. Li to be a "project manager" in a project for the demolition of the existing house and the construction of a luxury house on the property. As Ms. Li was absent much of the time, she gave Mr. Zhu blank cheques to pay for services and materials for the project.

[4] On October 12, 2018 Ms. Li terminated the contract on account of Guru's alleged gross deficiencies and deviations from the project design. She hired engineer Martin Gerskup, who examined the property at length on November 9 and December 10, 2018. Mr. Gerskup noted a huge number of deficiencies, namely 97 exterior deficiencies and 225 interior deficiencies. These were documented in a report Mr. Gerskup authored on December 22, 2020. In November, 2018 Ms. Li also hired a quantity surveyor, Joe Pendlebury, to assess the costs of correcting the deficiencies

described by Mr. Gerskup. On January 31, 2021 Mr. Pendlebury authored a report wherein he concluded that these costs would be $740,532.

[5] On November 1, 2018 Guru registered a claim for lien in the amount of $47,136.25. Another trade named Luxury Home Landscape Construction Inc. also registered a claim for lien. Both liens were perfected.

[6] On March 14, 2019 Mr. Zhu and another man attended at the property to observe the deficiencies alleged by Ms. Li, all Ms. Li's invitation. The visit lasted an hour. There is no evidence that Mr. Zhu did anything further to prepare a defence on this issue.

[7] On June 10, 2019 Ms. Li commenced this action against Mr. Zhu. On July 31, 2019 Mr. Zhu, using the Norton Rose Fulbright firm ("NRF"), defended. One defence was that Mr. Zhu was a pure construction manager, that Ms. Li contracted directly with the trades, and that Mr. Zhu was therefore not responsible for the trades' deficiencies.

[8] As a result, Ms. Li obtained an order adding two trades as defendants and eventually commenced another civil action against several other trades. All of these trades pleaded that their contracts were with Guru, not Ms. Li. On October 25, 2021, Ms. Li obtained an order adding Guru as a defendant in this action. Guru did not defend.

[9] In the meantime, in 2019 Ms. Li hired a completion contractor and completed the project. In 2020 she sold the property with a closing in late January, 2021.

[10] On January 24, 2020 Ms. Li obtained three reference judgments and orders referring this action and the two lien actions to an associate judge for trial. Orders for trial in the two lien actions were obtained on November 27, 2020, and a notice of hearing for directions in this action was issued on December 15, 2020. I became seized of these references at the first trial management conference on January 26, 2021. Peter Choi of NRF appeared for Mr. Zhu and Guru. I made several interlocutory orders, such as the completion of pleadings, Scott Schedules and a discovery plan, and scheduled the next trial management conference for August 16, 2021.

[11] In April, 2021 Mr. Zhu sold two of his three Toronto properties. In May, 2021 Mr. Zhu left on a trip to China. He has not disclosed the reason for this trip. He said in his first affidavit that he left his Gmail address, canbridgebuild@gmail.com, with his lawyers so that they could keep in contact with him. He said in his affidavit that he did not expect this action to proceed quickly as, according to him, it had just finished pleadings and "very little appeared to be progressing with it."

[12] Mr. Zhu said that this trip was then "unexpectedly" lengthened because of China's Covid-19 shutdowns and his meeting with and engagement and marriage to his wife. He said that he lost contact with his lawyers because China blocked his Gmail access.

[13] On October 25, 2021 NRF brought a motion before me for an order removing themselves as lawyers of record for Mr. Zhu and Guru. Their material indicated that there had been a breakdown in the lawyer-client relationship. NRF lost contact with Mr. Zhu. I granted the order. The order contained the required notice that Mr. Zhu hire a lawyer or serve a notice of intention to act in person within 30 days after service, failing which Ms. Li could move to strike his defence. The

order contained the required notice for Guru as well. The order was sent by NRF to Mr. Zhu though his canbridgebuild@gmail.com address.

[14] Mr. Zhu did not comply with the removal order. He did not appoint a lawyer or serve a notice of intention to act in person. Guru also did not comply. As a result, at the sixth trial management conference on February 28, 2022 and at the request of Ms. Li, I scheduled a motion by her, returnable March 28, 2022, for an order striking Mr. Zhu's defence and crossclaim and noting Mr. Zhu and Guru in default. The motion also sought a dismissal of the Guru lien action. The motion material was prepared and served on Mr. Zhu on March 8, 2022 by email at his canbridgebuild@gmail.com address.

[15] It is undisputed that Mr. Zhu received this motion material. On March 27, 2022, the day before the motion, using his canbridgebuild@gmail.com address, Mr. Zhu emailed Mr. McCallum twice within one minute stating the following: "I have been in China and I have been trying to contact my lawyer Peter choi, which I could not get hold of him, China has VON controls, I can't be sure when I will be able to check my email again. Just want to confirm that I will not be able to attend to the court day tomorrow, I require delays, thanks;" "I will not be able to attend, I have been in China since last year may, I can't get a hold of my lawyer."

[16] Mr Zhu did not appear on March 28, 2022. In light of these emails from Mr. Zhu to Mr. McCallum, I adjourned the motion for two months to May 30, 2022. I made an endorsement wherein I expressly stated that this was Mr. Zhu's "last chance." In my endorsement, I specified that by May 30, 2022 Guru and Mr. Zhu had to hire a lawyer or in the case of Mr. Zhu serve a notice of intention to act in person or in the case of Guru get an order granting it leave to be represented by a non-lawyer, and deliver responding motion material. I specified that if Mr. Zhu failed to comply with this order, the motion would proceed. I ordered that Mr. McCallum email this endorsement to Mr. Zhu at his canbridgebuild@gmail.com address forthwith. For Mr. Zhu's benefit, I included in my endorsement the information I obtained from counsel as to Mr. Choi's then work address and phone number. The next day, on March 29, 2022 at 14:03, Mr. McCallum emailed this endorsement to Mr. Zhu at his canbridgebuild@gmail.com address.

[17] On May 30, 2022 neither Mr. Zhu nor any representative of Mr. Zhu and Guru appeared. I granted the requested order striking the Zhu defence and crossclaim and noting him and Guru in default. I also dismissed the actions against the other defendants on consent.

[18] On October 3, 2022 Ms. Li followed this up with a motion for default judgment against Mr. Zhu and Guru. She filed affidavits affirmed and sworn by Ms. Zhang, Mr. Gerskup, Mr. Pendlebury and real estate broker, Vicki Chou.

[19] On January 2, 2023 I released my Reasons for Default Judgment. I granted much, but not all, of the requested relief. I found that Guru was a project manager "at risk," namely a contractor. I ordered that Guru and Mr. Zhu jointly and severally pay Ms. Li damages for breach of contract and warranties in the amount of $509,599.94, damages for conversion and breach of trust in the amount of $74,628.58, punitive damages in the amount of $25,000, costs in the amount of $140,000, and post-judgment interest. This all totaled $749,229.52. I signed a default judgment for these amounts on January 10, 2023.

[20] Ms. Li then resolved her claims against the trades. Given her recourse against Mr. Zhu and Guru in the default judgment, Ms. Li believed she no longer needed to pursue these claims. All were resolved with dismissals or discontinuances with prejudice and without costs. In three cases, Ms. Li had to pay costs totaling $14,000 to resolve these claims.

[21] Meanwhile, Mr. Zhu remained for the most part in China. In March, 2023 Mr. Zhu spent 34 days in Indonesia (namely outside of China and its firewall) without making any effort to contact his former lawyers in Canada to determine the status of this action.

[22] In his initial affidavit Mr. Zhu said he returned to Canada "in or about May, 2023." In answer to a cross-examination undertaking, Mr. Zhu said he returned to Canada on April 6, 2023. On April 18, 2023 Ms. Li had notices of garnishment served on the Royal Bank of Canada ("RBC"). This caused RBC to freeze Mr. Zhu's accounts.

[23] Ms. Zhu hired Mr. Simaan. On June 9, 2023 Mr. Simaan wrote me a letter seeking a trial management conference to schedule this motion. I scheduled that trial management conference for July 18, 2023 at which time I scheduled this motion. I also ordered that Mr. Zhu pay the full amount of the default judgment plus interest, $756,773.17, into court. He did so.

b) Applicable test

[24] Rule 19.08(2) specifies that default judgments "may be set aside or varied by a judge on such terms as are just." This is a discretionary jurisdiction. While I am an Associate Justice, I have the power of a judge under the Dow order of reference to make such an order. My jurisdiction in this regard was not in issue.

[25] In exercising the discretion as to what is "just" on such a motion, the court has established factors to be considered. They are apply described by the Court of Appeal in *Paul's Transport Inc. v. Immediate Logistics Limited*, 2022 ONCA 573 (CanLII) are paragraph 53 as follows:

a) Whether the motion was brought promptly after the defendant learned of the default judgment;

b) Whether there was a plausible excuse or explanation for the defendant's default in complying with the *Rules*;

c) Whether the facts establish that defendant has an arguable defence on the merits;

d) The potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should be motion be allowed;

e) The effect of any order the motion judge may make on the overall integrity of the administration of justice.

[26] The onus to proving that the default judgment should be set aside rests on the moving party; see *Paul's Transport Inc., supra,* at paragraph 67. These factors must not be applied rigidly, but only as to assist the court in its determination as to what is just in the circumstances.

c) Motion brought promptly

[27] This factor was not seriously contested by Ms. Li. Mr. Zhu indeed brought this motion as soon as possible after he learned about the default judgment in May, 2023. I find that he brought this motion promptly after learning of the default judgment.

d) Plausible explanation for the default

[28] This is a most contentious issue. The defendant must provide an explanation for the default that is "plausible," namely one that is reasonably credible.

[29] Furthermore, it is well established that a "conscious decision" by the defendant not to participate in the proceeding bars consideration of a defence on the merits, even if one exists; see *Sunlife Assurance Company of Canada v. Premier Financial Group Incorporated (Premier Financial)*, 2013 ONCA 151 (CanLII) at paragraph 1. Indeed, it bars the motion in its entirety; see *Schill & Beninger Plumbing & Heating Ltd. v. Gallagher Estate*, 2001 CanLII 24134 (ONCA) at paragraph 11.

[30] The default in this case happened at three stages: the failure by Mr. Zhu to appear on the motion by his then lawyers, NRF, on October 25, 2021 for an order removing NRF as lawyers of record for Mr. Zhu and Guru; the failure by Mr. Zhu and Guru to hire a new lawyer and the failure by Mr Zhu to serve a notice of intention to act in person and the failure by Guru to get an order granting it leave to be represented by a non-lawyer, all within 30 days of the service of the removal order; and, most importantly, the failure by Mr. Zhu to appear on the follow-up motion by Ms. Li on May 30, 2022 seeking an order striking Mr. Zhu's defence and noting him and Guru in default due to their failures to comply with the removal order.

[31] Mr. Zhu in his first affidavit on this motion stated that he always had an intention to defend this action on behalf of Guru and himself. I find his evidence in support of this statement lacking in credibility.

[32] Mr. Zhu's evidence as to the default is inconsistent. In his first affidavit, he asserts that he was unaware of his previous lawyers' removal motion and the fact that his defence was struck due to his failure to appoint a lawyer within a specified time, and that he became so aware no sooner than his return to Canada "in or around May, 2023." He asserts that this was due to China's blockage of his Gmail communication. He makes no mention of the emails he sent to Mr. McCallum through his canbridgebuild@gmail.com account on March 27, 2022 wherein he acknowledged being aware of the striking motion the next day.

[33] After Ms. Zhang raised this evidence in her affidavit, Mr. Zhu addressed it in his supplementary affidavit. He said here he suddenly recalled this incident. He said he was able to use his Gmail address on "one occasion" while at a party with friends. He said he found the McCallum emails containing the striking motion material "puzzling" since there was "apparent urgency" to them and they were sent directly to him and not his lawyers. Then he said curiously that he waited to let his lawyers respond.

[34] This makes no sense. Mr. Zhu reads English. That is not disputed. Indeed, NRF communicated with Mr. Zhu in English. There is no explanation from Mr. Zhu as to why he waited

to let his lawyers respond when the material he admitted receiving contained the removal order (confirming Mr. Zhu had no lawyers) and the motion for a striking order and he knew there was "apparent urgency." Mr. Zhu did not deny receiving Mr. McCallum's follow-up email of March 29, 2022 which contained my "last chance" endorsement. He did not explain as to whether he availed himself of the Peter Choi contact information that was in my endorsement, and if he did not, why not given the "apparent urgency." He did not explain as to what he did to avail himself of the "last chance" I gave him to appear other than by giving the incredible statement that he waited for his lawyer to respond. I do not accept that explanation. The only reasonable explanation is that Mr. Zhu consciously chose not to attend on May 30, 2022. That is what I find.

[35] Other evidence on this motion, or absence of evidence, supports that conclusion. There is no evidence from Mr. Zhu that he did anything to address the "apparent urgency" of the striking motion after March, 2022. Given the onus on Mr. Zhu to prove this point, I draw the conclusion from this absence that Mr. Zhu made no effort to contact Mr. Choi or anyone else in this regard. Indeed, there is positive evidence in support of this conclusion. Mr. Zhu admitted in cross-examination that he spent 34 days in Indonesia in March, 2023, namely outside the Chinese firewall, and made no effort during that time to contact his former lawyer or ascertain the status of this matter, a matter that he admits he knew a year earlier had "apparent urgency."

[36] Against this evidence was the backdrop of what I found to be Mr. Zhu's general lack of credibility on this issue. His evidence lacked detail and corroboration and was contradictory. For instance, he gave no explanation for his trip to China other than to suggest that it was short and to say that he did not expect this action to move forward expeditiously in the meantime. This assertion was undermined in cross-examination. Here Mr. Zhu maintained initially that NRF did not send him my TMC#1 directions of January 26, 2021, which contained several orders for interlocutory steps and a scheduled re-attendance in mid-August, 2021; but then he equivocated and said he was not sure. The fact that Mr. Zhu sold two of his three Toronto properties in the month before he left imposed, in my view, an onus on him to give a robust explanation for this trip to avoid the natural inference that he was making himself judgment-proof and fleeing this action and the jurisdiction. He did not give such an explanation.

[37] There were other issues. For instance, Mr. Zhu's insistence that his trip was lengthened in part by China's Covid-19 shutdowns was not substantiated in his affidavits. In cross-examination, he finally purported to give details, but these in the end explained only 115 days out of the over 700 days of his two-year stay in China. Furthermore, Mr. Zhu's other explanation for delaying his stay in China, namely his unexpected engagement and marriage, was entirely uncorroborated.

[38] Also, plaintiff's counsel went to some length to show that Mr. Zhu's insistence on the effectiveness of the Chinese firewall in blocking his communications with his lawyers and others in Canada was not credible. There were means other than Gmail that could have been used, such as a VPN and WeChat. There was also the glaring fact that Mr. Zhu admitted establishing Gmail contact with Canada in March, 2022, and there was no explanation from him as to why he could not, and did not, do so again.

[39] Also, there was the contradictory evidence as to the date of his return to Canada. In his initial affidavit, Mr. Zhu said it was "in or about May, 2023." This is important because that is about a month after the date the plaintiff served notices of garnishment on Mr. Zhu's Canadian bank, the

Royal Bank of Canada, namely April 18, 2023. This created the inference that it was the freezing of his bank accounts that caused Mr. Zhu to return. Then, in answer to an undertaking given at his cross-examination to specify the "exact date" of his return to Canada, Mr. Zhu conveniently stated that the exact return date was "April 6, 2023." There was no corroboration for this answer, thereby rendering the evidence self-serving.

[40] Therefore, I have concluded that Mr. Zhu has not given a plausible explanation for the default. Indeed, I go further and conclude that, based on the evidence, Mr. Zhu made a conscious choice not to participate in the proceeding and only did so when his bank accounts were frozen.

e) Arguable defence on the merits

[41] In my Reasons for Default Judgment I found the following: (a) that Guru and Mr. Zhu were jointly and severally liable to pay Ms. Li $509,599.94 in damages for breach of contract and warranty; (b) that Guru and Mr. Zhu were jointly and severally liable to pay Ms. Li $74,628.58 in damages for conversion of project monies and in breach of trust; (c) that Guru and Mr. Zhu were to pay Ms. Li $25,000 in punitive damage, and (d) that Guru and Mr. Zhu were to pay Ms. Li $140,000 in costs. Mr. Zhu asserts that he has an arguable defences to each of these issues.

e.1) Breach of contract damages

[42] In my Reasons for Default Judgment I made the following findings based on the deemed facts and the evidence presented: that Guru was a "contractor;" that Guru was responsible for deficiencies to the extent that amounted to a fundamental breach of the contract thereby justifying Ms. Li's termination of the contract without notice; and that the proper measure of Ms. Li's damages for breach of contract was the diminution in property value in the amount of $509,599.94.

[43] The finding that Guru was a "contractor" was not seriously challenged. Concerning the issue of deficiencies, Mr. Zhu's evidence in his affidavits was that the deficiencies were "wildly exaggerated." He gave no corroboration for this statement. He said he could not respond to this allegation because the property was sold, and he could not examine the property with his own expert. But he had no response when it was pointed out to him in cross-examination that he had been given an opportunity to examine the alleged deficiencies in March, 2019 and in fact attended at the property with a person on March 14, 2019 to examine these deficiencies. Mr. Simaan conceded in oral argument that Guru probably had no arguable defence to this claim given these circumstances.

[44] I find that Guru has no arguable defence to this claim.

e.2) Personal liability of Mr. Zhu

[45] In my Reasons for Default Judgment I found that Mr. Zhu was personally liable along with Guru for the above noted damages. The key findings behind this ruling were that Guru was a single-purpose entity that was dominated by Mr. Zhu and that was established to insulate him from liability arising from his inexperience in high-end home building and his eventual misuse of Ms. Li's project monies.

[46] Mr. Zhu in this motion maintained that he has an arguable defence to these findngs. He asserted that Guru was not a single-purpose entity as he used the company for other projects. The problem with this position is that Mr. Zhu presented no credible supporting evidence for his assertions. He showed pictures of other houses Mr. Zhu said he built, but only one had a mark containing Guru's name and in that one case the picture also had Mr. Zhu's mark. There were no signed contracts or invoices concerning other projects with Guru's name on them, namely the usual corroboration for work on other projects. I have already expressed my reservations about Mr. Zhu's general credibility. I am, therefore, not prepared to accept his uncorroborated evidence on this point. I note as well that there was evidence that several trades on this project rendered their invoices to Mr. Zhu personally and not Guru, which further undermines Mr. Zhu's credibility on this point

[47] Mr. Zhu also asserted that he had considerable personal experience with high-end residential home construction at the time of the contract. He referred to three projects in particular: 62 Yorkview Drive; 166 Munro Blvd.; and 101 Munro Blvd. He attached as proof several photographs of clearly high-end homes. However, Mr. Zhu did not indicate when these projects took place and did not provide corroboration for his assertion that he managed them. I describe this evidence, therefore, as equivocal at best.

[48] I will comment separately on the issue of the alleged misuse of project monies. Suffice it to say here that I find the above noted Zhu evidence against "piercing the corporate veil" dubious and not enough to establish an arguable defence for Mr. Zhu concerning his personal liability. Mr. Simaan accused Ms. Li of misrepresentations, an accusation I do not agree with given Ms. Zhu's evidence.

e.3) Conversion and breach of trust

[49] In my Reasons for Default Judgment I found that Guru and Mr. Zhu were liable for conversion and breach of trust in the total amount of $74,628.58 as I found there was sufficient evidence that they had diverted project monies to other projects. It is undisputed that Ms. Li entrusted Guru and Mr. Zhu with blank cheques and cash to pay for ongoing project costs, and that Guru and Mr. Zhu were trustees and fiduciaries for these monies.

[50] I found in my Reasons that there was sufficient evidence to make the following findings: that Guru and Mr. Zhu paid Erano Construction Inc. $55,000 when it did not work on the project; that Guru and Mr. Zhu held on to $13,575.58 of unused project monies without returning it to Ms. Li; and that Guru and Mr. Zhu overpaid Guru Ramdas Construction $6,045 for the work done by it and its subcontractor, Abone Cartage. These figures composed the $74,628.58.

[51] Mr. Zhu maintained that he has an arguable defence to these findings. Concerning Erano, he stated that Erano was hired to do the framing, that it subcontracted its entire scope to Bebe Construction, and that Bebe was paid the $55,000 directly, not Erano. Mr. Zhu produced what he called his accounting summary for the project which showed payments to Bebe totaling $55,000. There was, however, no evidence from Erano and Bebe confirming Mr. Zhu's evidence. Also, Ms. Zhang produced a suspicious invoice from Bebe to Guru showing a different project. But Mr. Zhu asserted that this was a mistake. Indeed, he wrote Ms. Li's project onto the invoice at the time it was

rendered. I find in the end that this was Mr. Zhu's strongest evidence on this motion as there appeared finally to be some corroboration for his position.

[52] Concerning the other two points, Mr. Zhu essentially conceded that he held on to the unused $13,575.58 since Guru had not been paid in full, which led to the Guru claim for lien. I was not shown evidence that Guru's contract with Mr. Li allowed it to hold on to trust money that was subject to a Guru claim for payment. Nevertheless, this does show that this money was not used on other projects. As for the $6,045 alleged overpayment to Guru Ramdas, Mr. Zhu asserted that this was a payment for unbilled extra concrete work in the basement of the project. Again, there was no evidence from Guru Ramdas confirming this evidence. Given the onus on Guru and Mr. Zhi to prove an arguable defence to the alleged breaches of trust and conversion, I find the evidence on these last two points uneven as to whether there is such an arguable defence.

[53] On balance, however, I find that Guru and Mr. Zhu have met their onus of proving an arguable defence as to the allegation of conversion and misappropriation of project monies.

e.4) Punitive damages

[54] In my Reasons for Default Judgment I found Guru and Mr. Zhu liable to Ms. Li for $25,000 in punitive damages. This stemmed primarily from my findings on conversion and breach of trust. Having found that Guru and Mr. Zhu have arguable defences to those findings, I find here that they have an arguable defence to the punitive damages judgment.

e.5) Costs award

[55] Mr. Simaan argued that Ms. Li should only get $115,000 in costs given what he described as her "misrepresentations" leading to my finding of Mr. Zhu's personal liability. As stated above, I do not find that Ms. Li made such misrepresentations given Mr. Zhu's evidence.

[56] In my view, the costs order should remain at $140,000. I found only some of the Zhu and Guru defences arguable. Furthermore, I note that I did not grant Ms. Li's claim of substantial indemnity costs. My order was close to what Ms. Li claimed in partial indemnity costs, and was made considering the stage of the litigation, the work that Ms. Li did, and the result as compared to what she claimed. I find that this rationale remains even with an adjustment in the default judgment.

f) Balance of prejudice

[57] There is the question of the balance of prejudice. On the one hand, Guru and Mr. Zhu argued that they would be prejudiced by a dismissal of the motion as they would lose the ability to pursue an arguable defence on the merits. As indicated in my previous analysis, I find that this prejudice really pertains only to the judgments about conversion, breach of trust and punitive damages totaling $99,628.58. I have found that Guru and Mr. Zhu have not established an arguable defence in the merits concerning the remainder of the default judgment.

[58] On the other hand, Ms. Li argued that setting the entire default judgment aside would prejudice her. After obtaining the default judgment with a finding that Guru was a contractor, she settled her claims against the trades without compensation and with prejudice. Indeed, in three cases, she had to pay a total of $14,000 in costs to do so. Setting aside the entire default judgment, she

argued, would mean that she would have no recourse against these trades in the event Guru is found to be a pure project manager and her contracts were with the trades. Mr. Simaan argued that this was prejudice Ms. Li brought on herself, as the settlements were precipitous and unnecessary since she had pleaded tort remedies against the trades.

[59] I am not convinced of Ms. Li's argument about prejudice. The claims against the trades were anchored in the alleged deficiencies. It is an open question, in my view, as to whether any claims against them (in contract or tort) on this issue would have succeeded. I was given no evidence that the trades were put on timely notice (by either Ms. Li or Mr. Zhu) of the deficiency claims against them and given an opportunity to investigate the claims before the project was completed and the property sold. The trades in short would have had a strong defence of spoliation.

[60] This analysis satisfied me that the prejudice I should be mindful of is the one noted above caused to Guru and Mr. Zhu by a complete dismissal of this motion. I will weigh this prejudice in making my final determination.

g) Integrity of the administration of justice

[61] In exercising my overall discretion as to what is just in this case and what would preserve the integrity of the administration of justice, I have concluded that only that portion of the default judgment concerning conversion, breach of trust and punitive damages, totaling $99,628.58, should be set aside. Here are my reasons:

a) Mr. Zhu and Guru have disqualified themselves from being entitled to defend the claim of damages due to fundamental breach of contract, "contractor status," deficiency correction costs and Mr. Zhu's personal liability for same and the claim for costs, all on account of what I have found to be the failure by Guru and Mr. Zhu to give a plausible explanation for their default, their conscious decision not to participate in this proceeding, and the lack of evidence of an arguable defence on the merits.

b) On the other hand, I have found that there appears to be an arguable defence on the merits of the claims for conversion, breach of trust and punitive damages. These are serious allegations of misconduct on the part of Guru and Mr. Zhu. Since I have found that they have established an arguable defence on the merits of these claims, they should be allowed to "clear their name" accordingly. To uphold this aspect of the judgment in the face of what appear to be arguable defences to such allegations of misconduct would, in my view, be an affront to the integrity of the administration of justice.

[62] In oral argument Mr. Simaan maintained that Ms. Li violated the rule in *Browne v. Dunn,* 1893 CanLII 65 (FOREP), (1894) 6 R. 67 (H.L.) by not putting the deficiencies in Mr. Zhu's evidence to him in cross-examination. The rule in *Browne v. Dunn* is a rule of fairness that prevents a witness from being "ambushed" by not giving the witness an opportunity to state his or her position on later evidence that contradicts the witness on a substantial point and is meant to undermine the witness's credibility. The rule requires that this later evidence be put to the witness in cross-examination; see *R. v. Verney (M.),* 1993 CanLII 14688 (ONCA*)* at page 376. There was no such "later evidence" in this case, as the identified deficiencies are in Mr. Zhu's own evidence on points that he has the onus of proving. I do not find that the rule in *Browne v. Dunn* was violated by Ms. Li.

h) Conclusion

[63] What this means in the end is that the portion of the default judgment concerning the issues of conversion, breach of trust and punitive damages, totaling damages in the amount of $99,628.58, must be aside. The remainder of the default judgment remains and should be paid, with accrued interest, from the monies in court.

[64] I am prepared to consider submissions in the written submission on costs as to whether the above-noted $99,628.58 of the monies in court should remain in court or be released to Mr. Zhu at this time. I am prepared to make an order in this regard as a part of my costs order.

[65] The parties filed costs outlines for the costs of this motion. The costs outline of Mr. Zhu and Guru shows actual costs of $69,740.72, substantial indemnity costs of $63,120.56, and partial indemnity costs of $43,260.07. Ms. Li's costs outline shows actual costs of $40,813, substantial indemnity costs of 33,943.40 and partial indemnity costs of $27,062.20.

[66] I encourage the parties to resolve the issue of costs between them. It appears that Ms. Li was on balance the more successful party. If the parties fail to do so, I order that Ms. Li serve and file written submissions on costs of no more than three (3) pages on before August 5, 2024, that the moving parties, Mr. Zhu and Guru, serve and file responding written submissions on costs of no more than three (3) pages on or before August 15, 2024, and that Ms. Li serve and file any reply written submissions on costs of no more than one (1) page on or before August 18, 2024.

[67] I propose holding the next trial management conference virtually on either October 7, 2024 at 10 a.m. or October 15, 2024 at 10 a.m. or 12 noon. The parties must confer as soon as possible and advise my Assistant Trial Coordinator as to which time slot they pick.

DATE: July 25, 2024

_____

ASSOCIATE JUSTICE C. WIEBE