

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arbutus Capital Leasing Ltd. v. 1265644 B.C. Ltd.*,  
2024 BCSC 1846

Date: 20241008  
Docket: S235203  
Registry: Vancouver

Between:

**Arbutus Capital Leasing Ltd.**

Plaintiff

And

**1265644 B.C. Ltd., Stonegate Resorts Ltd., Ralph Anthony Stapleton, Peter  
Geoffrey Sherba and Zhao Shanyi aka Shanyi Yi Zhao**

Defendants

Before: The Honourable Justice Chan

## Reasons for Judgment

Counsel for the Plaintiff:

S. Patel

Counsel for the Defendant, Zhao Shanyi:

K.K. Cheung

Place and Date of Hearing:

Vancouver, B.C.  
September 19, 2024

Place and Date of Judgment:

Vancouver, B.C.  
October 8, 2024

**Introduction**

[1] The defendant, Zhao Shanyi applies to set aside a default judgment granted against him on January 10, 2024, and seeks leave to file a response to civil claim in these proceedings.

[2] The underlying dispute relates to a lease agreement from November 4, 2022, where the plaintiff, Arbutus Capital Leasing Ltd. agreed to lease goods and equipment to the defendants. The period of rental was for 36 months. The defendants made some payments under the lease agreement, but stopped paying in May 2023, as they say the goods and equipment were defective. The plaintiff says the defendants are in default of the agreement and filed a notice of civil claim (“NOCC”) on July 21, 2023.

[3] The two corporate defendants were served on July 31, 2023. The two other personal defendants, Ralph Anthony Stapleton and Peter Geoffrey Sherba, were served in August 2023. The plaintiff alleges the defendant, Mr. Zhao was served on October 19, 2023. However, Mr. Zhao asserts that he has not been served. Only Mr. Stapleton has filed a response to civil claim. In January 2024, the plaintiff obtained a default judgment against the other four defendants, including Mr. Zhao.

[4] Counsel for the plaintiff sent Mr. Zhao a letter dated February 8, 2024 asking Mr. Zhao to contact him about payment of the default judgment. Mr. Zhao and Mr. Stapleton exchanged communications with counsel for the plaintiff. The plaintiff had registered the default judgment against title to real property owned by Mr. Zhao. Mr. Zhao was served with a notice of application dated April 26, 2024 to enforce the judgment. Mr. Zhao retained counsel and was advised that he could apply to set aside the default judgment. This is that application. It was filed on June 10, 2024 and originally scheduled to be heard on July 22, 2024. It was adjourned to this date by consent of the parties.

**Legal Framework**

[5] Under Rule 3-8(11) of the *Supreme Court Civil Rules*, the court may set aside or vary any default judgment granted under Rule 3-8(3).

[6] The legal test for setting aside a default judgment is set out in *Miracle Feeds v. D. & H. Enterprises Ltd.*, (1979), 10 B.C.L.R. 58 (Co. Ct.) [*Miracle Feeds*], and has been repeatedly affirmed by the British Columbia Court of Appeal: *BCI Bulkhaul Carriers Inc. v. Aujla Trucking Inc.*, 2015 BCCA 411 at para. 2. In order for a defendant to succeed on an application to set aside a default judgment, *Miracle Feeds* set out the following requirements:

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.

[7] The Court of Appeal in *Nichol v. Nichol*, 2015 BCCA 278 at para. 37 explained that the factors meant to guide the court's discretion under R. 3-8(11) are not intended to be applied as a rigid test:

[37] The factors set out in the *Miracle Feeds* decision are not meant to be applied inflexibly, nor are they immutable: see *H.M.T.Q. In Right of the Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11. The discussion by Mr. Justice Voith in *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at para. 15 in the context of the R. 17(12) of the previous Supreme Court Rules is apt:

[15] ... [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them from being successful on an application under Rule 17(12) [the rule in the previous Supreme Court Rules that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.

[8] The courts have stated that the *Miracle Feeds* test is not to be applied rigidly and the failure of a defendant to address each of the factors does not preclude them from being successful. Further, in applying the *Miracle Feeds* requirements, courts

may consider a balancing of interests and prejudice as between the parties. Ultimately, any relief “must be consistent with the overarching aim of the court to do justice between the parties”: *Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.*, 2012 BCSC 487 at paras. 52.

### **Analysis**

#### **No Deliberate Failure to File a Defence**

[9] Mr. Zhao deposed that he did not become aware of a default judgment against him until he received a letter dated February 8, 2024 from counsel for the plaintiff. Mr. Zhao deposed that he was shocked by the default judgment, as he did not believe he had been served with a NOCC. While Mr. Zhao was aware of the NOCC as Ralph Anthony Stapleton had been served, Mr. Zhao believed he had not been served. Mr. Zhao had discussed the matter with Mr. Stapleton and Mr. Zhao decided he did not need to file a response until he had been served. The plaintiff asserts that Mr. Zhao was served by a process server at his home in Kelowna on October 19, 2023. However, Mr. Zhao deposed that he was out for dinner and did not return home until after the time that the NOCC was served at 6:50 pm. On April 26, 2024, Mr. Zhao was served with a NOCC to enforce the judgment. He consulted counsel in May 2024 and was advised he could bring an application to set aside the default judgment.

[10] The process server Vernin Williams deposed that he attended at Mr. Zhao’s residence on October 19, 2023 at 12:45 pm. At that time, there was no answer at the door. The process server left a note attached to the front door with his name and telephone number, for Mr. Zhao to contact him. The process server returned to the residence at 6:50 pm. The note was gone. An adult male with dark hair and of Asian descent answered the door. The process server asked if he was Zhao Shanyi, and the male stated he was. The process server asked the male to confirm his name which he did. The male was served with the NOCC.

[11] In response, Mr. Zhao deposed he later found a note dated October 19 requesting that he contact “Vern” regarding court documents. Mr. Zhao did not call him that day. Mr. Zhao deposed that he was not home on October 19, 2023, but his

friend might have been staying with him at the time. Mr. Zhao believes his friend may have been the person who answered the door and was served with the documents.

[12] In my view, I find the evidence falls short of proving that Mr. Zhao was served with the NOCC on October 19, 2023. The evidence of the process server does not prove that it was Mr. Zhao who was served; the evidence only goes so far as to prove someone who responded to the name Zhao Shanyi was served at the residence. Mr. Zhao has deposed that it was not him who answered the door, and it might have been a friend staying with him at the time. The process server did not ask to see photo identification and did not verify the person's identity. Self identification is not as reliable a method of ascertaining identity as other means of identity verification: *Dhaliwal v. Dhaliwal*, 2022 BCSC 1902 at para. 16.

[13] Further, after Mr. Zhao was served with a notice of application dated April 26, 2024 to enforce the judgment, he began looking for a lawyer. This was the first time Mr. Zhao was properly served with any documents relating to the litigation. He deposed that he consulted with counsel at the beginning of May. This supports the interpretation that Mr. Zhao was not ignoring the legal process; he was waiting until he was properly served before taking next steps. In my view, while Mr. Zhao may have been aware of the NOCC through his discussions with Mr. Stapleton, he is entitled to wait until after he had been properly served to respond.

[14] I accept that Mr. Zhao was not properly served with the NOCC and he did not wilfully fail to file a defence.

**Make Application to Set Aside the Default Judgment as soon as Reasonably Possible**

[15] Mr. Zhao consulted counsel for the first time on this matter in May 2024 when he was served with a notice of application to enforce the default judgment. He did not become aware that he could apply to set aside the default judgment until he consulted counsel at the beginning of May 2024. This application to set aside was filed June 10, 2024. I am advised that counsel consented to adjourning the hearing from July to September, 2024.

[16] In these circumstances, I find Mr. Zhao acted relatively quickly once he was made aware of the consequences of a default judgment. The application to set aside the default judgment was made as soon as reasonably possible.

### **A Meritorious Defence**

[17] Mr. Zhao argues he has a defence worthy of investigation: *Yang v. Wang*, 2020 BCSC 1176 at para. 63. Mr. Zhao argues the equipment never properly functioned, and was unfit for the purpose for which it was rented. Mr. Zhao advances a defence of breach of contract. Alternatively, he argues the contract was frustrated as the defective equipment rendered the contract radically different from what was agreed between the parties. He also wishes to argue the contract was not a commercially reasonable contract or was unconscionable.

[18] The plaintiff's position is that the defence is weak. The plaintiff was never in possession of the equipment, and only financed the rental. The contract stated the equipment was provided to the defendants on an as is basis, and the plaintiff argues it did not make any representations about the quality of the equipment.

[19] In my view, Mr. Zhao has a defence worthy of investigation. He may be able to show the plaintiff as both the financier and the owner of the property owes some duty to him in regards to the functionality of the equipment, either on the terms of the contract or pursuant to consumer protection legislation.

[20] I find Mr. Zhao has a defence worthy of investigation.

### **Supporting Affidavit Material**

[21] Mr. Zhao has filed affidavit materials to support each of these factors.

### **Late Filed Affidavits of the Plaintiff**

[22] Mr. Zhao objected to the admissibility of two affidavits of the plaintiff: a third affidavit from the process server and an affidavit from the portfolio manager of the plaintiff. I have admitted and considered these affidavits, in an effort to reach a just result.

**Conclusion**

[23] In my view, the interests of justice favour Mr. Zhao being able to set aside the default judgment and file a response to civil claim, so the matter can be determined on the merits.

[24] I conclude that the default judgment should be set aside. Mr. Zhao has leave to file a defence to the action.

[25] Costs of this application will be in the cause.

"Chan J."