IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *First West Credit Union v. Bizarro,* 2024 BCSC 2047

Date: 20241108
Docket: H21424
Registry: Terrace

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Between:

First West Credit Union

Petitioner

And

Ryan Peter Bizarro, also known as Ryan Bizarro
Ada Maureen Rowlett, also known as Maureen Rowlett
Director of Maintenance Enforcement
Sheena Noons
Travis Sanwald

Respondents

Before: The Honourable Justice Harvey

Reasons for Judgment

Counsel for the Petitioner:	L.G. Yang
Counsel for the Respondent, A.M. Rowlett:	R. Kim
Place and Dates of Hearing:	Terrace, B.C. August 27 and 28, 2024
Place and Date of Judgment:	Terrace, B.C. November 8, 2024

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Introduction

[1] This is an application by one of the respondents, Ada Rowlett, ("the applicant") to set aside a portion of the order of Justice Mayer pronounced May 27, 2024 and, if successful, to refer the issue of her personal liability to the trial list.

[2] The application arises following an order for foreclosure against property jointly registered to the applicant and her nephew, Ryan Peter Bizarro, located at 84 Chilko Street, Kitimat, BC. I say jointly registered rather than jointly owned because of the circumstances set out in the affidavit of the applicant.

[3] The order provided that the last date for redemption was May 28, 2024, and that the amount required to redeem the mortgage was $291,971.20 together with the petitioner's costs of the proceeding to the date of hearing taxed at Scale A.

[4] The order provided for the sale of the property with the petitioner, First West Credit Union ("First West"), having exclusive conduct of sale with the property listed forthwith.

[5] The order also provided for personal judgment against both respondents for the redemption amount. The proposed sale, if allowed, results in a significant shortfall to the petitioner.

[6] Offers to purchase were subject to court approval unless otherwise agreed to by all named parties.

[7] The other respondents to the petition, Peter Ryan Bizarro, the Director of Maintenance Enforcement, and Sheena Noons and Travis Sanwald (tenants at the subject property), took no position at the hearing of the petition, nor do they advance a position as to the proposed sale.

[8] The applicant applies to set aside the provision in the order making her personally liable. Ultimately, she did not oppose the sale of the property upon the terms set forth in the petitioner's application and the order for sale was made at the conclusion of the hearing.

[9] During submissions, it became apparent that the core relief sought by the applicant was the setting aside of that portion of the order imposing personal liability upon her for the redemption amount; not the petitioner's in rem claims. The applicant, if successful in setting aside paragraph 2(a) of the order, seeks liberty to file a response and, if necessary, a counterclaim, and to refer the issue of her personal liability to the trial list.

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Background

[10] The applicant is 66 years old. Ryan Peter Bizarro, another of the respondents and co-owner with the applicant of the subject property, is her nephew.

[11] The applicant owns a separate property at 34 Kechichika Street, Kitimat, BC. In her affidavit in support of her application she deposes that Ryan Bizarro lived with her for a period of time at that address. According to the evidence before me, Mr. Bizarro had addiction issues with which he struggled during his period of cohabitation with his aunt. He is also the father of a daughter, Mila, who for a period in time after January 2021 lived with the applicant rent free in her home.

[12] The applicant deposed that by April 2021 she was uncomfortable in her own home because of her fear of Mr. Bizarro. She described his mood as erratic and that he could become threatening at times.

[13] Earlier, according to the applicant, Mr. Bizarro discussed with her his desire to buy the home at 84 Chilko Street to make a home for himself and Mila. At the time of those discussions he was employed by Rio Tinto but his credit rating was apparently not good.

[14] In or about June 2021, Mr. Bizarro advised the applicant of his intention to buy the 84 Chilko Street residence. He sought her help as a “co-signer" to enhance his credit worthiness and obtain a mortgage from the petitioner.

[15] What is alleged to have happened next, in large measure, informs the outcome of this application.

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[16] The applicant deposed that she originally contacted the manager of the petitioner's Kitimat branch, Michael Forward, who she said asked her if she understood her role “as co-signer". According to her evidence, she replied “that if Ryan is late with a payment or misses a payment or two, I am responsible and will make up the missing funds". The applicant deposed that Mr. Forward agreed with her understanding.

[17] The applicant then asked whether her home, that is her residence at 34 Kechichika Street, would be exposed to liability if her nephew defaulted, and was advised by Mr. Forward such was not the case.

[18] The applicant went on to note that near the end of May 2021, she met with Mr. Forward in person at the offices of the petitioner to review the financial information she had forwarded to him per his request. Following the meeting, at the request of Mr. Forward, the applicant sent confirmatory information as to her streams of income from old age pension, CPP and a modest pension.

[19] On June 7, 2021 she attended with Mr. Bizarro at the offices of the petitioner where she was shown, for the first time, the loan agreement prepared by the petitioner in respect of the proposed purchase.

[20] That loan document described the applicant not as a “co-signer", but as a borrower. In summary, the document purported to provide the applicant with a 1% interest in the home and the respondent Mr. Bizarro with the remainder. The 1% was in joint tenancy.

[21] The applicant deposed she made clear to Mr. Forward that she was neither going to live in the property nor have any financial interest in it, but Mr. Forward explained that “I was assigned 1/100 of a share of the property to ensure my responsibility to make up late or missed payments".

[22] According to her evidence, the applicant then again asked Mr. Forward “will my property at 34 Kechika Street be exposed to liability from the loan agreement.”

She deposed that “Mr. Forward confirmed that my home was not exposed to liability".

[23] Throughout the meeting, the petitioner's representative referred to the loan agreement as “Ryan’s mortgage”.

[24] Subsequent to the loan agreement being signed, both Mr. Bizarro and the applicant attended upon a notary public, Ms. Sweet, to sign the necessary conveyancing documents. In a meeting with Ms. Sweet, the applicant, in the presence of Ryan Bizarro, told the notary she was not going to be residing in the property and had no financial investment or interest in the property, and explained her understanding that she was assigned a 1/100 share of the property so that she would be able to be “Ryan's co-signer".

[25] Both the applicant and the respondent, Mr. Bizarro, signed a waiver of independent legal advice.

[26] The property was purchased and, for an unspecified time, Mr. Bizarro moved into it and resided there. He subsequently left the Kitimat area and began leasing the property. However, it is apparent from what followed he was not advancing the rent to the petitioner on account of the mortgage.

[27] The applicant began to get phone calls about missed payments and she dutifully, as she understood her obligation, made up some of the payments that had been missed.

[28] She notes First West never sent a single mortgage statement to her, nor any bank statements or tax statements. The only correspondence she received from the petitioner was correspondence advising her of Mr. Bizarro's default on his mortgage and possible legal action.

[29] After sending notice of default, the petitioner commenced this foreclosure proceeding on October 20, 2023.

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[30] The Director of Maintenance Enforcement levied a charge against the property in respect of Mr. Bizarro's obligations for spousal and/or child support.

[31] The petition was served by way of alternate service upon Mr. Bizarro. The tenants, Ms. Noons and Mr. Sanwald, were personally served and took no position, nor did the Director of Maintenance Enforcement.

[32] The applicant was personally served with the petition on November 21, 2023, the affidavit in support of it noting the default on the mortgage together with “informational notice for foreclosure proceedings".

[33] That latter document, in short, noted that this was a foreclosure proceeding and service had been affected because of potential interest in the property described in the petition. It further noted that within the proceeding the court might make orders concerning “distribution of sale proceeds that impact you.”

[34] The petition itself, at paragraph 4, sought judgment against both Mr. Bizarro and the applicant in the then amount owing on the mortgage, together with judgment against each for amounts owing on a line of credit taken out October 28, 2021 by Mr. Bizarro and co-signed by the applicant.

[35] The applicant did not file a response to the petition. Nor did any of the other parties.

[36] Although not obliged to, the petitioner served the applicant with the notice of hearing which also set out the relief claimed, including relief for personal judgment against her.

[37] She did not attend the May 27 hearing where the order was made and personal judgment was taken against her on both the outstanding amount of the mortgage, then $291,971.20, and the outstanding amount on the line of credit, $5,737.36.

[38] It was not until the applicant realized a judgment for the amounts owing had been placed upon her property that she sought legal advice.

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[39] Her affidavit material discloses various attempts to obtain counsel. Finally, her present counsel, Mr. Kim, was retained and was able to obtain an adjournment of a July application for the sale of the property so as to bring on the present application.

[40] The petitioner opposes all of the relief sought in the applicant's notice of application.

[41] At the conclusion of submissions, it was clear that the only relief that the applicant actually sought was to set aside the personal judgment contained in paragraph 2(a) of the order so as to defend the petition insofar as her personal liability.

[42] She properly acknowledged the petitioner's right to have the property sold. An order for sale was approved at a significant shortfall in part because the property had been leased and fallen into disrepair.

<u>The Legal Basis Underlying the Application</u>

[43] The applicant relies upon rule 22–1(3) of the *Supreme Court Civil Rules*, which reads as follows:

> Reconsideration of order
>
> (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.

[44] If successful in setting aside the personal judgment against her, the applicant seeks to have that issue referred to the trial list under Rule 21-7(5)(k) of the *Supreme Court Civil Rules,* noting that credibility issues will likely be engaged as to the circumstances of the utterances said to have been made by the petitioner's representative.

The test for setting aside an order made where one party fails to attend

[45] The test for reconsideration under Rule 22-1(3) is essentially the same as that for setting aside a default judgment as described in *Miracle Feeds v. D. & H.*

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Enterprises Ltd. (1979), 10 B.C.L.R. 58 (Co. Ct.): *B2B Bank v. Sinnarajah,* 2021 BCSC 1475 at paras. 42–43.

[46] That test is as follows:

a) the applicant must not be guilty of any willful default in respect of the nonappearance;

b) the application to set aside must have been made as soon as reasonably possible; and

c) the applicant must show there is a meritorious defence to the action or at least a defence worthy of investigation.

[47] Importantly, notwithstanding those factors, a judgment may still be set aside if it can be shown that a serious miscarriage of justice would result if the application was not allowed. In the final analysis, the interests of justice are the principal consideration to be addressed: *Cretu v. Cretu*, 2022 BCSC 305 at paras. 10—11.

Application of that test to the facts

[48] With respect to the first part of the *Miracle Feeds* test, as described in the authorities, willful delay or default carries with it a sense of blameworthiness rather than simple neglect. The penalty for blameworthiness is that the application is not heard on its merits. Matters of neglect are capable of being dealt with through the vehicle of costs.

[49] Thus, when considering a willful delay or default, the parties non-attendance must be blameworthy. The non-attendance may be deliberate but, in the circumstances, not blameworthy.

[50] I agree with the submission of the applicant that the terms “willful" or “deliberate" as used in *Miracle Feeds* do not include negligence: *Pasanen v. Pasanen Estate,* 2021 BCSC 950 at para. 31.

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[51] Here, while the default was undoubtedly negligent and remiss, it was not, in my view, blameworthy given the applicant's lack of legal sophistication and her stated reliance on her understanding of the extent of her legal exposure.

[52] The second part of the *Miracle Feeds* test is that the application must be made "as soon as reasonably possible". That needs to be assessed in light of the circumstances of each case. Here, I accept for the purposes of this application that the applicant learned of the impact of her neglect when an order for personal judgment against her was registered against her home. That occurred sometime after entry of the order.

[53] Thereafter, with the assistance of her brother, the applicant moved with reasonable dispatch to craft the application that is now before the court. She succeeded in obtaining an adjournment of the petitioner's original application to sell the home in late July so as to allow her application to be heard at the same time.

[54] Her application was heard approximately two months following her discovery of the judgment against her home. Given the circumstances of an assize system in Terrace, that in my view is reasonable.

[55] To satisfy the third part of the test in *Miracle Feeds*, the applicant needs to show by way of facts or law that there is a meritorious defence to the claim or, at the very least, a defence worthy of investigation; not that the defence will succeed.

[56] The application needs to contain sufficient detail in the affidavit material to enable the presider to correctly exercise his or her mind upon whether there is indeed an available defence. It is not necessary for a person seeking to set aside a default judgment to swear, in the affidavit material, to all of the evidence he or she believes might support the defence: see e.g. *The Toronto-Dominion Bank v Buchholz*, 2022 BCSC 313 at para. 20.

[57] The petitioner argues even if I conclude that the applicant's conduct in failing to attend the hearing was not blameworthy and that she moved to set aside the judgment against her as soon as was reasonable, she has raised no viable defence

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which would defeat the petitioner's claim for judgment against her on her covenant to pay.

[58] The applicant relies upon a number of defences including *non est factum*, negligent misrepresentation, unconscionability, undue influence, equitable estoppel, unilateral mistake, and a lack of consideration.

[59] In assessing the various defences advanced, I am in large measure in agreement with the petitioner that some do not rise to the level of providing a defence worthy of investigation. However, the applicant needs only establish one such defence; not that all of the proposed defences are worthy of investigation.

[60] I am satisfied, for the reasons that follow, that the issue of the alleged misrepresentation is worthy of investigation.

[61] The written communications between the petitioner and the applicant speak to the applicant “co-signing" or becoming a “co-signer” of her nephew's loan application. All agree that “co-sign" or “co-signer" has no legal meaning.

[62] The petitioner's own documentation describes signatories as either borrowers, which the applicant signed on as, or as guarantor.

[63] I agree with the petitioner that both designations would lead to liability for any shortfall on the mortgage but, as a guarantor, it is likely that the petitioner would have been obliged to refer the applicant for independent legal advice and, given the different exposure, the applicant would, according to her evidence, not have agreed to sign as borrower or guarantor if she had not been assured, as she states she was, that her residence was not at risk under the agreement proffered her. Instead, having been assured as such, she chose not to get independent legal advice when signing before the notary.

[64] The petitioners argue, relying on *Domain Mortgage Corp. v. Movassaghi,* 2023 BCSC 1973 at para. 17, that such an alleged misrepresentation is not a

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defence but rather an independent claim for damages and, as such, cannot be the basis to set aside the order *nisi*.

[65] As to that submission, I note that even if an alleged misrepresentation cannot be characterised as a 'defence' so as to fit cleanly within the third part of the *Miracle Feeds* test, the judgment may still be set aside if it can be shown that a serious miscarriage of justice would result if the application was not allowed: *Cretu* at paras. 10—11; *Kiefer v. Kiefer*, 2018 BCSC 2282 at para. 6.

[66] If nothing else, the alleged representation, if in fact made, would, in my view, lead to a potential miscarriage of justice if the personal judgment against the applicant were allowed to stand absent an opportunity to raise, either by way of defence or counterclaim, the alleged representations of the petitioner's representative that signing as a borrower would not place her home in jeopardy despite the change in her status from co-signer (guarantor) to borrower.

[67] In support of that conclusion, I note that the factors set out in *Miracle Feeds* are not intended to handcuff the presider at a hearing to reconsider an order; they are a non-exhaustive list of factors to be considered.

[68] In *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940, Justice Voith noted the flexible nature of this inquiry as follows:

> [13] The plaintiff seeks to attach an inflexibility to the conditions set out in *Miracle Feeds* which is not supported by the relevant authorities. In *H.M.T.Q. In Right Of The Province of British Columbia v. Ismail*, 2007 BCCA 55, 235 B.C.A.C. 299, Smith J.A. said:
>
> > [11] In my view the items enumerated in the *Miracle Feeds* test are not conditions that must be satisfied by an applicant. Rather, they are relevant factors to be taken into account by a chambers judge in exercising the discretion conferred by Rule 17(12). I find support for this view in the remarks of Madam Justice Saunders in *Deline v. Whittle*, where she said,
> >
> > > [12] On the merits, I observe that the order appealed involves the exercise of discretion. Although Mr. Deline vigorously contends that the Miracle Feeds test was not met, and thus there is sufficient merit in the appeal to warrant leave being granted, I do not agree. There are, necessarily, aspects of judgment that must be applied by a chambers judge in the exercise of discretion under Rule 25(15). That this is so is

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> clear when one adds to the mix Rule 1(5) of the Rules of Court which states:
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> > The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
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> [13] Rule 1(5) should always be in a chambers judge's mind when considering whether to exercise the discretion afforded to grant or not, an application such as this. In this case, I think the nature of the action and the course of conduct between the parties which included an ongoing contest between the parties, tended to mitigate against maintenance of the default judgment.

> [14] More recently, Mr. Justice Rogers, in *McEvoy v. McEachnie*, 2008 BCSC 1273, 87 B.C.L.R. (4th) 149, said:
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> > [12] The defendant's position comes down to this: they say that *Miracle Feeds* comprises an immutable list of the factors that the court must consider on an application to set aside a judgment. They say that if the application misses on one of the factors, then the application must fail.
> >
> > [13] The flaw in the defendants' position is that it takes too narrow a view of the scope of the court's discretion in these matters. Whether to set a default judgment aside is an exercise of discretion, and the *Miracle Feeds* criteria are nothing more than a non-exhaustive set of factors to be taken into account when considering whether to exercise that discretion. That this is so was established by the Court of Appeal in *H.MT.Q. In Right of the Province of British Columbia v. Ismail*, 2007 BCCA 55.
>
> [15] Thus, it 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 …

[69] Here, there is such an 'ongoing contest' between the parties which militates against maintenance of the default judgment. In my view, it is not proportionate to allow the judgment to stand and require the applicant to commence a separate action based upon the alleged misrepresentation in fear that, in the meantime, the petitioner would execute on the judgment against her.

[70] I would also note that, were I of the opposite opinion that there was no basis on which to set the default judgment aside, I would have, instead, ordered the judgement against the applicant stayed for 45 days to allow the applicant to file a response and counterclaim, and if filed, then stayed execution of the judgement until the matter was heard and decided on its merits.

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[71] As to the application to move them matter to the trial list, it is, in my view, premature in view of the Court of Appeal's decision in *Cepuran v. Carlton,* 2022 BCCA 76.

[72] Until responsive material is filed by Mr. Forward putting in issue the factual assertions deposed to by the applicant, there are no credibility issues arising and the matter might be determined summarily on affidavit material.

[73] If additional materials are filed which raise credibility issues, I would expect the parties would acknowledge and appropriately agree to have the matter placed on the trial list for determination with *viva voce* evidence.

[74] Despite her success, costs of the applicant, Ms. Rowlett, will be to the petitioner in the cause given the application was occasioned by the applicant's negligence in failing to respond to the petition in accordance with the *Rules*.

[75] The petitioners are entitled to costs, at Scale B, of the application to approve the sale of the subject property as against the respondent Mr. Bizarro.

"Harvey J."

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