SUPREME COURT OF YUKON

Citation: *Block on Block Builders Inc. v Sule,* 2025 YKSC 15

Date: 20250310
S.C. No. 23-A0067
Registry: Whitehorse

BETWEEN:

BLOCK ON BLOCK BUILDERS INC.

PLAINTIFF

AND

ABUDU SULE and CELESTINA SULE

DEFENDANT

Before Chief Justice S.M. Duncan

Appearing for the Plaintiff — Mrityunjay Singh, K. Martinez, and K. Quadir

Counsel for the Defendant — Mark E. Wallace

REASONS FOR DECISION

I. Introduction

[1] This is a dispute over the construction of a home in the Whistle Bend neighbourhood of Whitehorse, Yukon. The plaintiff Block on Block Builders Inc. ("Block on Block") are the contractors who entered into a fixed price contract with the defendant homeowners Abudu and Celestina Sule ("the Sules") for their home construction to be completed by July 30, 2022. The defendants paid $297,670 towards the construction. When the home was still not completed by the extended deadline of February 10, 2023, the Sules terminated the contract on March 14, 2023, and hired other contractors to

complete the construction, including the correction of deficiencies. This was done by September 18, 2023.

[2] Block on Block then brought a claim in breach of contract for the unpaid costs of construction plus interest in the amount of $280,634.96. The Sules counterclaimed for their costs beyond the fixed contract price of $70,501.41, as well as their expenditures for rent and electricity while waiting for the completion of the construction; mortgage interest; and an amount for repayment of a loan agreement, for a total of $98,526.04.

[3] This matter is still at the pleadings stage.

[4] On October 22, 2024, the Sules obtained a default judgment against Block on Block for failing to file their defence to the counterclaim. Further, on November 19, 2024, the Sules sought and obtained an order to dismiss the action at appearance day on Chambers Day in Court. Block on Block did not appear that day, despite evidence that the appearance day notice was delivered to their last known address.

[5] Block on Block now brings applications to set aside the default judgment and to dismiss the order dismissing the claim. Block on Block is self-represented, and three directors appeared at the hearing of these applications. Counsel for the Sules was also present.

[6] For the following reasons, I allow both applications of Block on Block. The default judgment is set aside and the order dismissing the action is dismissed.

II. Default Judgment

[7] The issue is whether Block on Block has met the test for setting aside a default judgment. In finding that they have, I considered Rule 17(16)[1] of the *Rules of Court* of

[1] The court may set aside or vary any judgment entered under this Rule.

the Supreme Court of Yukon (the "*Rules*") and the three-part test in *Evans v Bauman*, 2016 YKSC 71 at para 21 ("*Evans*"):

a) the applicant (here, Block on Block) did not wilfully or deliberately fail to file a defence to the claim (here, the counterclaim of the Sules);

b) the application to set aside the default judgment was made as soon as reasonably possible after knowledge of the default judgment; or an explanation for any delay was provided;

c) the applicant has a meritorious defence or a defence worthy of investigation; and

d) these requirements will be established to the court's satisfaction through affidavit material.

[8] This test originated in the case of *Miracle Feeds v D & H Enterprises Ltd.* (1979), 10 BCLR 58 (CoCT) at para. 5, and was applied by the Court of Appeal of Yukon in *Mills v Grunow,* [1998] YJ No 80, as well as by the Court of Appeal for British Columbia in *BCI Bulkhaul Carriers Inc. v Aujla Trucking Inc.*, 2015 BCCA 411.

[9] In this case, applying the first part of the test, I find that Block on Block did not wilfully or deliberately fail to file a defence. Their failure to do so is attributable to negligence, not wilful or deliberate inaction. It may also be attributable to a lack of knowledge of the litigation process, given the absence of litigation counsel to advise and represent them.

[10] The Sules served a counterclaim on Block on Block on May 14, 2024. They sent it by email to the address provided on the court file by Block on Block and did not receive any message that it was undeliverable. The Sules also delivered the

counterclaim by registered mail to the physical address of Block on Block provided on the court file. A card from Canada Post was provided as an affidavit exhibit by Block on Block, confirming delivery, with an indecipherable scribble in the signature block.

[11] On January 20, 2024, counsel for Block on Block had filed a notice of intention to withdraw as lawyer and provided the email address and physical address used by the Sules to deliver the counterclaim. On April 29, 2024, the same counsel had filed a notice of withdrawal of lawyer and confirmed the same physical address for Block on Block.

[12] No response or statement of defence to counterclaim was received from or filed by Block on Block. On July 15, 2024, the Sules' lawyer sent a demand letter to Block on Block by email, advising them that if they did not file their statement of defence to counterclaim by July 29, 2024, they would be noted in default. There was no indication the email was not delivered.

[13] The Sules and their counsel continued to hear nothing from Block on Block. As a result, on October 22, 2024, they noted Block on Block in default for failure to file their statement of defence to counterclaim.

[14] Block on Block stated in their affidavit that during the period after their lawyer withdrew, they were trying unsuccessfully to find another lawyer to represent them; and at the same time, they were experiencing extreme financial strain and facing continual creditor calls. At the hearing, they did not deny receiving the email with the counterclaim, but said they may have missed it because of the many other emails they were receiving as a result of their chaotic financial situation. Their email address was cancelled due to lack of payment some time in the summer of 2024.

[15] Block on Block confirmed that the address to which the counterclaim was delivered was correct. However, they say they did not receive it. The initials in the signature portion of the delivery card were not written by them, they said at the hearing. Their affidavit evidence states the information they received from the Canada Post office was that an investigation and/or GPS tracking information should be requested by the sender as it appeared the proper delivery process was not followed. No further explanation was provided by Block on Block.

[16] I accept that the emails from the Sules' lawyer delivering the counterclaim and notifying Block on Block of the deadline before notice of default judgment were received but may have been missed or misunderstood, given Block on Block did not have litigation counsel at that time. It is unclear what occurred with the Canada Post registered mail delivery of the counterclaim but, if received, without the benefit of litigation counsel, the requirement to respond may not have been well understood. More effort should have been made by Block on Block to review, understand, and address these documents. Their failure to do so was negligent, even given the pressing circumstances of that period. However, the presence of the three directors in Court on March 3, 2025, and their evidence setting out the above facts persuades me that this was not a deliberate and wilful failure, but one borne out of carelessness and misunderstanding.

[17] Turning to the second part of the test, there is no dispute that Block on Block brought their application to set aside the default judgment as soon as possible. The directors came to the Court Registry on December 6, 2024, to file their notice of self-

representation. They learned or understood for the first time the existence of the default judgment and its impact. They brought these applications on December 19, 2024.

[18] Applying the third part of the test, Block on Block has set out in their affidavits a defence worthy of investigation. They dispute the accuracy of the Sules' assessment of the value of the work done at the time the contract was terminated. They dispute the costs necessary to complete the house construction. They say they offered to correct the deficiencies, and the contract was cancelled unfairly and precipitously.

[19] This Court in *Evans* accepted that the burden on the applicant seeking to set aside a default judgment to establish a defence worthy of investigation is a low one, and the court must consider all the circumstances and grant relief "consistent with the overarching aim … to do justice as between the parties" (at para. 28, quoting *Irving v Irving* (1982), 38 BCLR 318 at para. 52). 'Worthy of investigation' has been described as more than an allegation and requiring sufficient detail to enable the judge to exercise their mind as to whether there is such a defence (*Director of Civil Forfeiture v Doe*, 2010 BCSC 1784 at para. 21).

[20] In this case, Block and Block has raised enough arguments in their affidavit to meet the low bar of a defence worthy of investigation. The Sules' counterclaim repeats much of what was in their statement of defence, and adds specific monetary amounts claimed. Block on Block's assertions in their affidavit that the construction had advanced further than the Sules say it had, including a breakdown of the monies they spent and for what purpose, as well as the amount of work left to be completed at the time the contract was terminated, support a defence to the counterclaim that is worthy of investigation. Block on Block may also argue that the costs claimed by the Sules were

unnecessary, either because the contract should not have been terminated when it was, or the costs to complete the construction by the other contractors were over-inflated.

III. Dismissal of the Order Dismissing the Action

[21] The issues are first, whether I can reconsider an order I made, and second, assuming I can do so, whether Block on Block has met the test for reconsideration of an order. I find that I can reconsider this order because Rule 50(5) applies. I further find that Block on Block has met the test for reconsideration.

[22] Rule 50(5) of the *Rules* says that if the court has proceeded to hear an application where a party has failed to attend, the proceeding shall not be reconsidered unless the court is satisfied that the party failing to attend was not guilty of wilful delay or default.

[23] Rule 50 applies to chambers applications. Although this was not a formal application, it was an appearance day attendance on Chambers Day, in Chambers. As a result, I find that Rule 50 applies in this case. The question is whether Block on Block was guilty of wilful delay or default.

[24] The Sules' lawyer delivered an appearance day notice to Block on Block accompanied by an affidavit requesting the certificate of pending litigation be discharged and their statement of claim be dismissed. Block on Block did not appear in court that day and the order was granted.

[25] The Sules sent the notice for appearance day of November 19, 2024, and supporting affidavit by email on November 8, 2024, to the email address on the court file and as above. This email was returned as undeliverable; the email address that had been provided to the Court could not be found, consistent with the Block on Block

evidence that their email was cancelled in the summer of 2024. The Sules also sent the notice by registered mail on November 12, 2024, to the same address as was on the court file and as above. The Canada Post delivery card included in the Block on Block affidavit showed a scribble in the signature portion of the card, very different from the signature on the first delivery card, and appearing to be B.B. Block on Block blamed Canada Post for not properly delivering the documents and say Canada Post confirmed this when they called to inquire. They denied the initials on the delivery card were written by them, as they said they always used BOB (for Block on Block) and not B. B.

[26] Whatever occurred with the Canada Post delivery is not clear. As with the first delivery card, the signatory had requested that the signature not be displayed on the website of Canada Post. Block on Block provided the card with signature in its affidavit, while saying at the same time that the signature was not theirs. This suggests some irregularities with the delivery process. Further, Block on Block was still unrepresented by litigation counsel at that time. Soon after they attended at the Court Registry to file their notice of self-representation in early December, they brought this application. They also said at the hearing, responding to counsel for the Sules who noted they received no communication from them at any time after their lawyer withdrew, that they did not realize in the adversarial process they could speak with opposing counsel, which is why they made no attempt to contact counsel for the defendants. In all of these circumstances, I find that Block and Block did not act wilfully or deliberately in failing to appear at appearance day.

[27] This finding means that I can reconsider the order made, pursuant to Rule 50(5).

[28] In the Yukon, this Rule has not been judicially considered. However, Rule 22-1(3) of the British Columbia *Supreme Court Civil Rules*, BC Reg 168/2009, as amended, is very similar to Rule 50(5):

> 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 willful delay or default.

[29] In *First West Credit Union v Bizarro*, 2024 BCSC 2047 ("*First West Credit Union*") at paras. 45-46, the court set out the test to be met by the applicant seeking to have an order reconsidered:

> a) the applicant must not be guilty of any wilful default in respect of the nonappearance;
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> b) the application to set aside must have been made as soon as reasonably possible; and
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> c) the applicant must show there is a meritorious defence to the action or at least a defence worthy of investigation.

[30] This test is virtually identical to the test for setting aside a default judgment.

[31] A further consideration is that a judgment may be set aside if a serious miscarriage of justice would result if the application were not permitted (*First West Credit Union* at para. 47).

[32] Applying the first part of the test, I have already found that Block on Block's non-appearance was not wilful.

[33] Secondly, there is no dispute that Block on Block brought the application as soon as reasonably possible.

[34] Thirdly, the claim is worthy of investigation. The issue of whether the contract was terminated prematurely or improperly, and without consideration of the costs of all

the work done by Block on Block is more than an allegation and is worthy of investigation. Mitigation of the defendants' losses may also be a live issue as Block on Block states they offered to correct the deficiencies and wanted to assess the value of the work completed on the home, to support its claim for further monies.

[35] Finally, I find there would be a miscarriage of justice if Block and Block were not permitted to pursue their claim. This in and of itself is sufficient to set aside the dismissal order, without the necessity of meeting the three-part test. No cases were provided by counsel for the Sules in which an order to set aside is brought after the court has dismissed a statement of claim - orders of dismissal to be set aside usually relate to the failure of a defendant to file a defence. Although dismissal of a proceeding of any kind at an appearance day by a judge is possible under Rule 1(9), it is an unusual remedy, and this was not a court driven appearance day notice as contemplated under Rule 1(9). The remedies possible under Rule 1(10), where an appearance day notice is initiated by counsel for a party, as it was here, include any order that can be made in Case Management under Rule 36. Rule 36 does not include a dismissal of a proceeding. However, in this case, the Sules or their counsel had received no correspondence from Block on Block for almost a year, other than notice of their counsel withdrawing, and no one from Block on Block was present at appearance day despite having appeared to have been properly notified. Seeking to dismiss a proceeding for want of prosecution, supported by an apparent abandonment of the claim, was justifiable on the basis of the facts before the Court at that time. Now that Block on Block has brought this application, has appeared in court in person through three of its directors, has provided affidavit evidence setting out arguments in support of

its claim, and has done so as soon as reasonably possible after discovering their claim had been dismissed, they must have an opportunity to pursue their claim, to prevent a serious miscarriage of justice. The dismissal order is set aside.

[36] I direct the parties to request a Case Management Conference through the Trial Coordinator at a mutually convenient time to discuss next steps in this proceeding.

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DUNCAN C.J.