

CANADA / JUDGMENT

345 Builders Ltd. v. Su

2022 BCSC 949

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 949 345 Builders Ltd. v. Su

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

345 Builders Ltd. v. Su,

2022 BCSC 949

Date: 20220608

Docket: S181673

Registry: Victoria

Between:

345 Builders Ltd.

Plaintiff

And:

Nan Su

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment on Costs

Counsel for the Plaintiff:

A.P.M. Berns

Counsel for the Defendant:

J.M. Hutchison, Q.C.

Written Submissions Received from the Plaintiff:

March 25, 2022

Written Submissions Received from the Defendant:

April 11, 2022

Place and Date of Judgment:

Victoria, B.C.

June 8, 2022

Introduction

- [1] This is a ruling on costs following a two-week trial. The underlying action arose out of a dispute concerning the construction of a new home on a waterfront property in Sooke, British Columbia. The reasons for judgment on the merits of the claim are indexed as 345 Builders Ltd. v. Su, 2021 BCSC 2509.

Factual Background

- [2] By way of background, the plaintiff 345 Builders Ltd. was the builder of the new home, and the defendant Mr. Su was the purchaser. Their dealings began with what is known as a builder's terms purchase agreement in which the plaintiff was to acquire title a bare lot, build the house, and then sell the lot together with the completed house to the defendant. At trial, I found that the builder's terms purchase agreement lapsed and was frustrated by circumstances that left both parties in a position where they were unable to fulfill their contractual obligations.
- [3] Following the lapse and frustration of the builder's terms agreement, the defendant acquired title to the lot from the plaintiff, and eventually entered into a written building contract for the plaintiff to construct the house. The building contract included a cost-plus 12% fee structure, but also specified a "total estimated price" of \$202,160, and a provision for price increases based on design changes.
- [4] The plaintiff did the construction work and the defendant made periodic payments under the building contract until the project neared completion. At that point, the defendant refused to pay more than the price specified in the contract, even though it was expressly stated to be an estimate. The plaintiff then stopped work and filed a lien against the title to the property, and the defendant arranged for the completion of the construction himself, although by that point all that was left was some minor finishing work.
- [5] The plaintiff filed a notice of civil claim seeking to enforce the lien for unpaid work in the amount of \$46,411. The defendant filed a counterclaim in the amount of \$40,448, for the costs of completion and alleged construction deficiencies.

Judgment on the Merits

- [6] In my reasons for judgment, I found that there were significant concerns with respect to the credibility and reliability of the two central witnesses in the case, the plaintiff's principal Mr. Nicholson, and the defendant Mr. Su. Both had difficulty recalling some aspects of their dealings with each other. Both gave evidence at trial that was, at least on some points, inconsistent with answers given at examination for discovery, and with their conduct and written correspondence at the time of the events in question. Both Mr. Nicholson and Mr. Su were unable to recall with any real precision many important details of their mutual dealings (which impacted on the reliability of their evidence), and both appeared to allow their interests in the case to influence their recollections (which impacted on their credibility). Ultimately, I found that the preponderance of the evidence supported the plaintiff's position on the key issue of which agreement governed.
- [7] I found that the builders terms purchase agreement had lapsed and was frustrated, and that the construction of the home was ultimately governed by the building contract. As to the nature and operation of that contract, I found that: (i) it was in the nature of a cost-plus contract, (ii) the estimated price had to be given some contractual effect as a form of rough upper limit, and (iii) the contract also allowed for price increases based on construction changes and material upgrades. I ultimately found that the actual cost of completion was somewhere between 6.7% and 10.9% in excess of the estimate, after adjustments for changes and material upgrades. Using the 15% leeway rule as a rough guideline or analytical tool, I concluded that the final contract price did not exceed the adjusted price estimate to such an extent as to amount to a breach of the terms of the contract.
- [8] I therefore found the defendant in breach of contract in failing to pay the plaintiff for the unpaid work. However, after corrections and adjustments to the invoiced amounts, and accounting for the amounts already paid by the defendant, I found that the total amount owed by the defendant for unpaid work under the contract was \$11,464, and I granted judgment to the plaintiff in that amount. I dismissed the defendant's counterclaim in its entirety.

The Arguments on Costs

- [9] Against this backdrop, the plaintiff seeks an order for special costs against the defendant. The plaintiff says the defendant's actions both before and during the proceedings qualify as reprehensible conduct within the meaning of the jurisprudence, and such conduct is deserving of rebuke by way of special costs.
- [10] For his part, the defendant says there is no basis in the record for ordering him to pay special costs. He denies anything approaching reprehensible conduct in the course of the litigation. The defendant says he should not be required to pay any costs, or minimal costs, considering that the damages awarded to the plaintiff were only \$11,464.

Analysis

(i) Whether the Plaintiff is Entitled to More than Minimal Costs

- [11] I will deal firstly with the defendant's argument that the plaintiff, even though successful, should receive no costs, or minimal costs, or at most costs limited to \$11,000 plus disbursements, given that the plaintiff was only awarded \$11,464 in damages. In support of this position, the defendant relies on Rule 14-1(1)(f), and Rule 14-1(10) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].
- [12] Rule 14-1(10) provides that a plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act, R.S.B.C. 1996, c. 430 [Small Claims Act] is not entitled to costs (other than disbursements), unless the court finds that there was sufficient reason for bringing proceedings in Supreme Court. In this case, the plaintiff obtained judgment in the amount of \$11,464, which is well below the monetary limit in the Small Claims Act.
- [13] The defendant cites *Gehlen v. Rana*, 2011 BCCA 219 at para. 37, for two propositions. First, the burden is on the party seeking to avoid the effect of what is now Rule 14-1(10) to identify "persuasive and compelling" circumstances for commencing the action in Supreme Court rather than Provincial Court. Second, the quantum of the claim is "perhaps the most important factor", although it is not the only factor in the analysis.
- [14] However, as the plaintiff points out, this case involved a lien under the Builders Lien Act, S.B.C. 1997, c. 45 [Builders Lien Act]. Under s. 2, s. 22, and s. 27 of that statute, an action to enforce a builder's lien is properly brought in the Supreme Court. The full range of procedures and remedies available under the Act can only be effectively pursued in a Supreme Court action. If that were not enough on its own to justify bringing and continuing the matter in Supreme Court, there are other factors to support the plaintiff's decision to do so, including the defendant's counterclaim, the relative complexity of the issues, and the importance of full document discovery and examination for discovery given the factual disputes and credibility issues at play in the case. I appreciate that the quantum of the plaintiff's claim was within the monetary jurisdiction of the Provincial Court under the Small Claims Act, which is an important factor in the analysis under Rule 14-1(10). Nevertheless, I conclude that in the circumstances of this case, the plaintiff had sufficient reason for commencing and continuing its case in the Supreme Court.
- [15] That brings me to Rule 14-1(1)(f). Subparagraph (i) of that Rule provides that where the only relief granted is money, a builder's lien, or an interest in property, and the total value of the relief does not exceed \$100,000, then the costs rules for fast track cases as set out in Rule 15-1(15) to (17) apply, "unless the court otherwise orders". Under Rule 15-1(15), costs for a trial that lasts more than two days are capped at \$11,000, plus disbursements.

- [16] In the case at bar, the only relief granted was a declaration of the plaintiff's lien, and a monetary judgment in the amount of \$11,464, which is well below the \$100,000 limit provided for in Rule 14-1(1)(f)(i). I therefore find that the Rule is engaged, and the operative question is whether the court should exercise its discretion to order otherwise. In more precise terms, the question is whether the court should exercise its discretion under Rule 14-1(1)(f) to consider an award of party and party costs in accordance with Appendix B of the Rules, notwithstanding that this was a builder's lien case where the value of the judgment did not exceed \$100,000.
- [17] As a starting point in deciding whether to exercise that discretion, it is important to consider the overall objective of securing the "just, speedy and inexpensive determination of every proceeding on its merits" as provided for in Rule 1-3(1). An assessment of what constitutes just, speedy, and inexpensive resolution often involves consideration of the concept of proportionality, taking into account (a) the amount involved, (b) the importance of the issues, and (c) the complexity of the proceedings as set out in Rule 1-3(2). I consider these factors to be useful guideposts or metrics for an assessment of whether it is appropriate to exercise the discretion to award party and party costs in this case, despite the presumption against that outcome for cases falling under Rule 14-1(1)(f).
- [18] I will first address the amount in issue in the case. The plaintiff obtained judgment in the amount of \$11,464, well below the \$100,000 limit that triggers Rule 14-1(f). Indeed, the amount of the judgment obtained by the plaintiff in this case is more or less equal to the maximum costs award of \$11,000 available for fast track cases under Rule 15-1(15). That is a highly relevant factor, weighing against the exercise of the court's discretion to award party and party costs. All other things being equal, it does not seem proportionate for the costs awarded to the successful party to be roughly equal to the amount of the judgment itself. Such outcomes should generally be avoided as a means of discouraging parties from pressing forward to trial on claims where the litigation costs will likely exceed the amount of the claim itself. However, I also find it relevant that while the plaintiff only obtained judgment in the amount of \$11,464, the amounts in issue were more than that. As originally pled, the case involved both the plaintiff's claim for a builder's lien in the amount of \$46,411 (which could only have been brought in the Supreme Court), and the defendant's counterclaim in the amount of \$40,488. Still, even the global amount in issue was less than the \$100,000 limit in Rule 14-1(f)(i). Overall, a consideration of both the amount of the judgment, and the total amount in issue favours the default position, under which costs would be capped at \$11,000 plus disbursements by virtue of the combined operation of Rule 14-1(1)(f) and Rule 15-1(15).
- [19] With regard to the importance of the issues in the litigation, at the end of the day this was a case arising out of a construction dispute. The case was largely about dollars and cents, with no overriding issue of public policy at stake. That is not to say it was unimportant to the parties. Both parties were clearly invested in their positions, financially and morally. Both were concerned about their reputations. This is probably of particular concern to the

business interests of the plaintiff 345 Builders Ltd. and its principal Mr. Nicholson, because the business is engaged principally if not entirely in residential construction. Overall, I consider the importance of the proceedings to be neutral in the analysis. The principal concern was money, but both parties also had a desire for justice. They both had an interest in a speedy and inexpensive resolution of the case, but not at the expense of a fair and just outcome.

- [20] That brings me to the complexity of the proceedings. In my view, this was not a straightforward builder's lien action involving a determination of damages for breach of contract or restitution for unpaid construction work. The history of property ownership and the circumstances in which the property was transferred by its original owner, to a third-party development company, then to the plaintiff, and finally to the defendant, were factually and legally complex. There were a number of real estate transactions, and significant amounts of money changed hands between the original land owners, the plaintiff, and the defendant, over the course of several years. The circumstances surrounding the commencement of the building contract were also factually complex. There were credibility and reliability challenges with respect to both the plaintiff's case and the defendant's case. There was also a significant amount of documentary evidence, including extensive texts and emails between the parties, which were helpful if not essential to a proper determination of the merits of the case. In my view, the complexity of the proceedings is a factor weighing against the application of the general rule against party and party costs for cases falling under Rule 14-1(1)(f).
- [21] I also find it important to consider the length of the trial itself. The trial lasted 11 days. Most if not all of that time was put to good use in presenting the evidence and advancing the arguments. My recollection is that there were a total of eight witnesses, and hundreds if not thousands of pages of documentary evidence, much of which had to be reviewed with various witnesses in the course of their testimony. The defendant testified through an interpreter, which also required additional time. My sense is that this case could not have been tried in much less than ten days even with the most efficient of trial plans. The effect of Rule 15-1(15)(c) is to effectively cap the costs of a "fast track" trial at three days. The successful party cannot recover costs of any more than \$11,000 (other than disbursements) for a trial that lasts longer than three days. The effect of Rule 14-1(1)(f) is to presumptively extend that limit to builder's lien cases where the total monetary value of the judgment does not exceed \$100,000. There may be sound policy reasons for imposing such a presumptive limit, in the interests of proportionality. However, there are some cases that simply cannot be tried in three days or less. This case is one of them. This feature of this particular case weighs heavily against an application of the presumptive rule capping costs at \$11,000 under the combined operation of Rule 14-1(1)(f) and Rule 15-1(15).
- [22] Weighing up and balancing all of the factors I have just reviewed, I conclude that this is an appropriate case for the court to exercise its discretion against applying the costs limits set out in the combined operation of Rule 14-1(1)(f) and Rule 15-1(15). The amount of the

judgment awarded to the plaintiff is well below the \$100,000, and an award of party and party costs is likely to significantly exceed the value of the judgment itself. This is a highly relevant factor. However, the complexity of the proceedings, and the duration of the trial both weigh in the opposite direction. This case is close to the line, but in the end I conclude that the plaintiff's costs should not be capped by the limits governing fast track litigation. Pursuant to Rule 14-1(1)(f), I exercise my discretion to order that the limits in Rule 15-1(15) to (17) do not apply in this case.

- [23] The defendant also relies on the principle of proportionality to argue that the court should exercise its broad discretion on matters of costs to deny the plaintiff any costs, other than disbursements. The general principle as provided for in Rule 14-1(9) is that a successful party is entitled to its costs. There is broad discretion to deny a successful litigant its costs, but that discretion must be exercised judicially: *British Columbia v. Worthington (Can.) Inc.* (1988), 29 B.C.L.R. (2d) 145 (C.A.). In the case at bar, there are other components of Rule 14-1 to consider, which I have addressed above to reach the conclusion that this is an appropriate case for the court to exercise its discretion in favour of awarding party and party costs to the plaintiff, despite the modest amount of the judgment.
- [24] Finally, the defendant suggests that if party and party costs are to be awarded to the plaintiff, the scale of costs should be reduced in light of the relatively inconsequential amount of the judgment. However, for the reasons already given I find that even though the amount of the judgment awarded to the plaintiff was modest, the case was not a simple one. I am not prepared to hold that it was a case of such procedural, factual, or legal complexity as to fall into Scale C under the Appendix B to the Rules (see Appendix B, s. 2(2)(c), matters of "more than ordinary difficulty"), but I do not accept the defendant's submission that the matter was so straightforward as to warrant classification under Scale A (see Appendix B, s. 2(2)(a), matters of "little or less than ordinary difficulty").

(ii) Whether the Defendant Should be Required to Pay Special Costs

- [25] The court has authority to award special costs under R. 14-1(1) of the Rules and also as an aspect of the court's inherent jurisdiction to control its own process: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea] at paras. 25-26. In either case, such a remedy is reserved for "exceptional cases": *Westsea* at para. 34.
- [26] The threshold for awarding special costs is "reprehensible conduct" on the part of one of the parties. The concept of "reprehensible conduct" is said to encompass not only "scandalous or outrageous" conduct, but also "milder" forms of misconduct that are "deserving of rebuke": *Smithies Holdings Ltd. v. RVC Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57, applying *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) [Garcia] at p. 249. Special costs are intended to be "punitive in nature", hence the reference to conduct that is "deserving of rebuke": *Rana v. Nagra*, 2013 BCSC 184 at para. 11, citing *Garcia*.

- [27] In the case at bar, the plaintiff submits that the following aspects of the defendant's conduct before and during the litigation were reprehensible: (a) during the construction, the defendant repeatedly cited the price in the building contract as an upper limit, then refused to pay any more only when the work was substantially complete and he was able to move in, and eventually took the inconsistent position that the parties were bound by the original builder's terms purchase agreement, rather than the building contract, (b) in the course of the litigation, the defendant improperly added Mr. Nicholson as a party, (c) the defendant caused delay and added to the overall cost of the proceedings by changing counsel three times prior to the trial, (d) the defendant gave evidence at trial that was not believed, with the result that both his defence to the plaintiff's claim and his counterclaim were wholly rejected, (e) the defendant's counterclaim was without merit and the alleged deficiencies were never proven, owing at least in part to his reliance on an expert report much of which was ruled inadmissible and was in any event entirely lacking in any evidence as to the relevant standard of care expected of a prudent builder.
- [28] Having considered these points, I find that none of them, either individually or taken together, rise to the level of reprehensible conduct warranting rebuke by an order of special costs.
- [29] I do not consider the defendant's pre-litigation actions to involve anything that would qualify as reprehensible conduct within the meaning of the costs jurisprudence. Special costs should generally only be awarded to punish reprehensible conduct during the litigation itself. It is not appropriate to award special costs on the basis of "pre-litigation conduct" which is the very subject matter of the legal dispute between the parties and which can be censured by an award of aggravated or punitive damages: *Smithies* at paras. 111-114, 133-134; *Klein v. Sun*, 2018 BCSC 1965 [Klein] at paras. 26-27; *Chapman v. Chapman*, 2020 BCSC 1896 at paras. 5; 21.
- [30] The fact that key aspects of the defendant's trial testimony were found not to be credible does not, without more, qualify as a form of reprehensible conduct warranting rebuke by way of special costs: *Klein* at para. 31; 0981352 B.C. Ltd. v. Sarpal, 2021 BCSC 417 at para. 32; *Wang v. Jiang*, 2020 BCSC 1759 at para. 19. The matter before me is clearly distinguishable from cases such as *Unternaher v. Wheat Sheaf Inn Ltd.* (1998), 114 B.C.A.C. 299 at paras. 10-12, and *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at paras. 69-74, where the defendant knowingly presented false testimony or concocted evidence with the intention of deceiving the court or depriving the plaintiff of a just result.
- [31] The balance of the conduct complained of by the plaintiff, while clearly not conducive to the most efficient and inexpensive resolution of the proceedings, does not rise to the level of reprehensible conduct. For example, the fact that the trial had to be adjourned on multiple occasions for the defendant to obtain new counsel unquestionably delayed and complicated the proceedings, I cannot say that this action was undertaken with the deliberate attempt to frustrate the process or increase the costs to the plaintiff. Similarly, the defendant's counterclaim lacked merit and failed for lack of proof, but I cannot say that it was brought

maliciously or for some improper purpose, or that it was so lacking in merit that the very fact of bringing it forward to trial amounted to reprehensible conduct.

- [32] For all of these reasons, I would not give effect to the plaintiff's request for an order of specials costs against the defendant.

(iii) Plaintiff's Request for Approval of the Bill of Costs

- [33] Plaintiff's counsel has submitted a bill of costs and asked the court to fix the amount under Rule 14-1(15), but I am not prepared to wade into that. Party and party costs are generally to be assessed by the registrar, as provided for in Rule 14-1(1), (2), and (4). Thus, the court determines the liability for costs and related issues of scale and entitlement, but the specific amount is either agreed to by the parties or fixed by the registrar, who then issues a certificate under Rule 14-1(27). The court has the discretion to depart from the normal procedure by fixing costs in a specified amount under Rule 14-1(15), but that discretion is to be used "sparingly": *Hobbs v. Warner*, 2020 BCSC 1180 at paras. 31-32, citing *Gichuru v. Smith*, 2014 BCCA 414 at paras. 99, 106.
- [34] In *Gichuru*, Justices Harris and Goepel explained at para. 106 that there is "good reason" for the court to exercise its discretion to assess costs "sparingly", as the registrar is usually in the best position to determine if fees billed by a lawyer are reasonable based on "extensive knowledge and experience in assessing legal bills". I see no compelling reason to depart from the normal procedure in this case. Assuming the plaintiff's draft bill of costs is disputed, there is no reason to believe I would be a better position than the registrar to assess costs in this case.

(iv) Removal of the Lien and/or Associated Certificate of Pending Litigation

- [35] There appears to be a continuing dispute between the parties as to the status of the original builder's lien, and/or a related certificate of pending litigation ("CPL") that the plaintiff has registered against the title to the defendant's property. The defendant says the amount of the judgment has been paid and the lien and CPL should be removed, but the plaintiff refuses to do so until the question of costs is resolved and the costs are paid.[1] This may raise a legal question as to whether the costs required to enforce a lien are properly included within the lien claim itself.[2] However, at present there is no formal application before me for cancellation of the lien and/or the associated CPL. Although I can appreciate that timing may be a concern for the defendant as I understand that the property may now be for sale, I am unable to rule on the matter without a formal application and full submissions from the parties. I would be prepared to do that on an expedited basis on the filing of an application together with a request to appear through Supreme Court Scheduling.

Conclusion

- [36] The plaintiff is awarded party and party costs for the action, to be assessed at Scale B.

"Riley J."

- [1] In my reasons for judgment, I considered and rejected the plaintiff's request for a conditional order for sale of the defendant's property under s. 31(2) of the Builders Lien Act in the event that the judgment amount is not paid. In doing so, I noted that the power to grant a conditional order for sale is discretionary, and in this particular case the amount of the plaintiff's lien as proven at trial was quite small by comparison to the apparent or likely value of the defendant's property. I gave the plaintiff leave to re-apply if the amount of the judgment plus interest was not paid within three months of the date of judgment. All of this is effectively the opposite side of the coin from the ongoing dispute, which is not whether the property should be ordered sold to pay the judgment, but rather whether the lien (and/or the associated CPL) should be removed upon payment of the judgment, but before costs are settled.
- [2] The one case I was able to find on this issue is *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*, 2002 BCSC 1460 at paras. 1172-1183, although the reasoning in that case may or may not be applicable in the matter before me, and it may or may not be the sole or final authority on the topic.

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