

CANADA / JUDGMENT

A.W. Kennedy Construction Inc. v. Wan

2020 BCSC 2233

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

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2020 BCSC 2233 A.W. Kennedy Construction Inc. v. Wan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.W. Kennedy Construction Inc. v. Wan,

2020 BCSC 2233

Date: 20200305

Docket: S190480

Registry: Vancouver

Between:

A.W. Kennedy Construction Inc.

Plaintiff

And

Francois Veve Kwong Wan, Neal Gerard Wan Sai Cheong,

Rita Wan, Deceased, and The Estate of Rita Wan

Defendants

Before: The Honourable Mr. Justice Wilson

Oral Ruling Re Application to Strike Two Claims of Builders Lien

In Chambers

Counsel for the Plaintiff:

R. Benham-Parker

Counsel for the Defendants:

C. Philip

Place and Date of Hearing:

Vancouver, B.C.

March 5, 2020

Place and Date of Ruling:

Vancouver, B.C.

March 5, 2020

- [1] THE COURT: This is an application brought by the defendant owners to strike two claims of builders lien and the corresponding certificates of pending litigation from two properties. The defendants also seek an order for a fine under s. 45 of the Builders Lien Act and costs.

Background

- [2] The background of the matter is that the applicant, Neal Wan, who I will refer to as "Neal", is the son of Francois and Rita Wan, both of whom are now deceased. I will use the parties' first names for ease of reference. The plaintiff is a construction company, and the projects in issue are in North Vancouver.
- [3] The parties entered into a contract in November of 2015, when the plaintiff agreed to build for Francois and Rita two homes and carriage houses on a property located at 661 East 22nd Street in North Vancouver. The plan was that prior to commencement of construction, the lot would be subdivided such that there would actually be two homes and two carriage homes built on the property, a home and a carriage home on each new lot.
- [4] The subdivision took place, and the construction began. One of the properties is now owned by Neal Wan. The other is now owned by an estate on account of the fact that both of Rita and Francois have since deceased.
- [5] The work has been largely completed, as far as I can tell. Disputes have arisen, and Kennedy Construction filed the two claims of builders' lien that are at issue. Both liens are in the amount of \$231,935.41, and it is common ground that the defendants have paid the plaintiff \$2,074,081.06 on account of the contract. The defendant argues that the claims of lien were not completed properly, and that the errors are fatal.
- [6] The defendant has a number of arguments, including that the liens were filed out of time, but for the purposes of this application, I need only address the two arguments that the defendant says renders the claims of lien fatally flawed and thus invalid:
- a) Only one claim of lien should have been filed, as opposed to two separate liens; and

- b) The name and address of the lien claimant has been omitted or in the alternative, named incorrectly.
- [7] Copies of the claims of lien in issue are attached to this decision as schedules.
- 1. Are the claims of lien invalid because only one claim of lien should have been filed, as opposed to two separate liens?
- [8] It is common ground that the plaintiff seeks judgment in the amount of the claim of lien of \$231,935.41. However, two liens have been filed, each in the full amount.
- [9] As an aside, the plaintiff says that it subsequently discovered that an additional amount is owing, but the discovery was after the liens were filed and therefore that amount is not included in the claims of lien. This has no impact on this application.
- [10] I should point out that this matter has already been the subject of litigation for a period of time and that the notice of civil claim was filed in January of 2019 and that the notice of civil claim makes it clear on its face that the amount claimed is the \$231,935.41 plus the missing invoice, and not the aggregate of the two claims of lien.
- [11] The defendant's argument is advanced pursuant to s. 16 of the Builders Lien Act which reads as follows:

General lien

- 16 (1) If an owner enters into a single contract for improvements on more than one parcel of land, a lien claimant providing work or material under that contract, or under a subcontract under that contract, may choose to have the lien follow the form of the contract and be a lien against each parcel for the price of all work and material provided to all of the parcels of land.
- (2) If a lien is claimed under subsection (1) against several parcels of land, on application to the court by any person with an interest in or charge on the land, the court may apportion the lien among the parcels for the purpose of determining the lien claimant's rights as against persons having rights in particular parcels.
- [12] The defendant argues that the liens are invalid because the plaintiff did not follow the process in section 16(1) which provides that a lien claimant who operates under a single contract may file a single lien and register it against multiple parcels.
- [13] My interpretation of that section is that it may be that a single lien registered against multiple parcels is one alternative. It would certainly make things clearer if it were done that way because there would be no question about the amount claimed. While it is clear in the facts of this case because the notice of civil claim makes it clear that the amount of \$231,935.41 is only claimed once, it would not necessarily be obvious in a matter where the liens had only just been filed and an application was brought to post security and have the liens cancelled.

- [14] The plaintiff refers to this court's decision in *Coastal Building Products Div of Laurus Manufacturing and Sales Inc. v. Gill*, 2014 BCSC 339, a decision of Mr. Justice Crawford. In that case the facts were somewhat similar. The defendants had hired the plaintiff to supply doors for two properties, the contract was slightly over \$36,000 and \$27,000 had been paid. The plaintiff filed liens against both properties in the full amount of \$9,693.25. As here, the pleadings clarified that the sum claimed was the amount of the lien, and not the two claims of lien added together. The liens were not struck, notwithstanding the fact that they had been filed in that manner, albeit it is not clear the court was specifically asked to address the manner of filing.
- [15] The defendant refers to an online guide on a government website entitled "Guide for Completing Builders Liens" that provides for how one might file a single lien over multiple parcels. It suggests the process contemplated in s. 16(1) with a single lien to be filed on multiple parcels. If the process were followed, a single lien would be filed and it would be registered against both parcels.
- [16] The fact that it was not done in that manner does not, in my view, render the liens invalid. The Guide is just that, a guide, it is not legislation or a regulation. The wording of s. 16 is permissive, not mandatory. I cannot read the permissive word "may" as the mandatory "must" just because it would make things clearer, or that it might avoid problems in future cases. If the legislature required a lien claimant to file in a particular manner, it could have said so.
- [17] It may be in another matter and on different facts that a court could conclude that filing multiple liens each for the full amount, particularly in a situation whereby a party needed to apply on short notice to get liens discharged in order to allow for financing or sale, was improper or an abuse of process. One can imagine a scenario of a lien claimant filing as the plaintiff did here with the apparent effect of claiming security twice. But there is no difficulty or confusion arising from the fact that the plaintiff chose this method of registration here because any uncertainty is clarified by the notice of civil claim that makes it clear the amount is only being claimed once.
- [18] Because the language of s. 16 of the BLA is permissive not mandatory, I conclude that the claims of lien are not invalid on account of the fact that two liens were registered, each in the full amount.
- [19] I will touch briefly on the defendant's request in the alternative to discharge the lien from one property and leave the lien on the other. Any concern I could have here regarding double security could only be a question of apportionment. However, there is no basis for apportionment in this case because I have no way of knowing how much work was done on which property, nor any evidence of the equity in either of the properties. It may not be necessary to use both properties as security for the full amount if that is not necessary. However, in the absence of any evidence of either the value of either property or of the amounts owed on the charges registered against the properties, I am simply not in a position

to conclude that it would be appropriate for me to accede to the applicant's request that the lien remain on the Neal Wan property and be discharged from the Francois Wan property.

2. Are the claims of lien invalid on account of the name and address of the lien claimant?

[20] I turn now to the argument under s. 15 of the Builders Lien Act, which provides as follows:

Claim of lien to be in prescribed form

15 (1) Except as provided in section 18, a claim of lien is made by filing in the land title office a claim of lien in the prescribed form.

- (2) An agent who represents more than one lien claimant may, with respect to a particular improvement, make a single claim of lien on behalf of all of the lien claimants represented, and the prescribed form may be altered accordingly for that purpose.
- (3) The registrar must not allow a claim of lien to be filed unless satisfied that the land is adequately described.
- (4) On the filing of the claim of lien in the land title office, the registrar must endorse a memorandum of the filing on the register of title to the land or against the estate or interest in the land described in the claim of lien.

[21] The precedent claim of lien form is a prescribed form and is available online for someone wishing to register a claim.

[22] The defendant says that strict compliance is required and that the Builders Lien Act provides for an extraordinary remedy, see *Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd.*, 2006 BCSC 885 and others. In *Nita Lake*, the name of the contracting party was misdescribed, and the court concluded that in the absence of a curative position, a provision which had been present in the former legislation, the court had no option but to declare the lien invalid.

[23] The claims of lien filed in this case include in handwriting "Andrew Kennedy of A.W. Kennedy Construction Inc. 258 East 1st Street, North Vancouver, BC" in the preamble part of the form. However, Mr. Kennedy did not go on to restate that information in the enumerated paragraph 1. The defendant says that paragraph 1 requires that the lien claimant insert the name of the lien claimant and the address of the lien claimant and the error is fatal to the claims.

[24] The plaintiff refers me to s. 28(1) of the Interpretation Act. Section 28(1) of the Interpretation Act reads:

28. (1) Where a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

[25] This is a prescribed form, and therefore in my view that section would apply. The question, then, is whether the substance is affected, or is it calculated to mislead. In my opinion it is not.

- [26] In this case, the identity of the lien claimant notwithstanding the submissions of counsel, is, in my view, clear. It is set out in the preamble preceding the first numbered paragraph, and includes both the name of the agent making the declaration and also the name of the party claiming the lien.
- [27] In 581582 B.C. Ltd. v. Habib, 2013 BCSC 378, a decision of Mr. Justice Rogers, the claim of lien that was filed in that case referred to a corporate entity that did not exist. The party claiming the lien was ANE Consulting Ltd. However, ANE Consulting Ltd. did not exist; rather, ANE Consulting was the business name of 581582 B.C. Ltd.
- [28] In Habib, the plaintiff also argued s. 28(1) of the Interpretation Act. At paragraph 10, Mr. Justice Rogers held that that section did not help the plaintiff and he stated as follows:
- The fatal flaw in 581582 B.C. Ltd.'s position is that the error in question did not have to do with a deviation from the lien form. A deviation from the lien form would involve something like inadvertently putting the date money comes due in the space allotted for sum claimed and putting the sum claimed in the where the date ought to be. It is not a deviation from the prescribed form to describe the lien claimant as something other than the actual claimant. For that reason, s. 28 of the Interpretation Act is of no assistance to the application respondent.
- [29] In my view this circumstance is akin to the exception that is described by Mr. Justice Rogers. This is not a case where the lien has been claimed by a party that does not exist. Rather, what has happened here is that the person who completed the form, presumably Mr. Kennedy, has written the name of the lien claimant and he has written the address of the lien claimant in the preamble portion of the form, but he did not repeat the same information in paragraph 1. Should he have done so? Yes. Is it material or misleading? In my view it is not. It does not affect the substance of the lien. It does not assert a lien on the part of an entity that does not exist, which was the case both in the Habib decision and also in the case Framing Aces Inc. v. 0733961 B.C. Ltd., 2009 BCSC 389, where the corporate lien claimant was not incorporated until after the work had been completed.
- [30] As such I do not consider the form of the plaintiff's claim of lien, while imperfect to the extent that the information should perhaps have been repeated, to be misleading or to deviate from the substance of what is required. The claim of builders lien form must identify the name of the lien claimant. The address of the lien claimant must be identified along with the other information. The mandatory information is present here, even though it was not duplicated in paragraph 1.
- [31] I conclude that the lien is not invalid based upon the failure of the plaintiff to repeat the name of the lien claimant and its address in paragraph 1.

Disposition

- [32] The application to strike the claims of builder's lien and the corresponding certificates of pending litigation is dismissed.

(SUBMISSIONS ON COSTS)

[33] THE COURT: Costs are in the cause.

"Wilson J."

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