

CANADA / JUDGMENT

Archibald (Ivy League Developments) v. Wojtarowicz

2020 BCSC 421

COURT

Supreme Court of British Columbia

DECIDED

20 March 2020

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2020 BCSC 421 Archibald (Ivy League Developments) v. Wojtarowicz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Archibald (Ivy League Developments) v. Wojtarowicz,

2020 BCSC 421

Date: 20200320

Docket: S108851

Registry: Kelowna

Between:

Lorraine Archibald doing business as Ivy League Developments

Plaintiff

And

Sylwia Agata Wojtarowicz

Defendant

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

The Plaintiff on her own behalf:

L. Archibald

Counsel for the Defendant:

M.C. Sennott

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 30, 2020

Place and Date of Judgment:

Kelowna, B.C.

March 20, 2020

Introduction

- [1] The defendant, Sylwia Agata Wojtarowicz, hired the plaintiff, Lorraine Archibald, dba Ivy League Developments ("Ivy League"), to renovate her residential property in Kelowna, British Columbia. The parties entered into a written construction contract which set out the terms of their relationship. The defendant alleges that Ivy League breached the terms of the contract and she has refused to pay the balance of the contract price. Ivy League denies any breach of the contract and sues the defendant for the unpaid portion of the contract. The defendant counter claims for damages caused by Ivy League's breach of contract.
- [2] The defendant brings this summary trial application pursuant to Rule 9-7 for an order dismissing Ivy League's action and for judgment on her counterclaim.
- [3] Ivy League resists the application on the basis that it is not appropriate for the issues to be decided on a summary trial. In the alternative, Ivy League submits that even if the issues can be determined by summary trial, the defendant has failed to establish a breach of the contract or that she has sustained any damages.

Summary of the Evidence

- [4] The defendant and her husband own a house located at 7059 Nahanni Place, in Kelowna, British Columbia (the "Property"). In July 2015, the parties signed a contract in which Ivy League agreed to renovate the Property for a stipulated price (the "Contract").
- [5] The defendant also owns a condominium identified as Strata Lot 11, Strata Plan KAS 3430 (the "Condo"). The Contract is explicitly related to the Property. It makes no mention of the Condo.
- [6] The Contract includes the following terms that are material to the issues on this application:
 - a) the defendant agrees to pay the Contract price according to the following schedule:
 - i. 25% upon signing the Contract;
 - ii. 25% on August 7, 2015; and

- iii. the remaining 50% upon completion of the Contract;
- b) if changes are necessary during the course of construction, Ivy League will provide the defendant with a change order and the defendant will be responsible for the additional costs incurred;
 - c) the estimated date of completion is September 3, 2015;
 - d) Ivy League agrees to hold an insurance policy of \$1 million to cover equipment, materials and all employees and subcontractors; and
 - e) Ivy League agrees to obtain all necessary permits for the construction.
- [7] Ivy League established the Contract price as \$87,910.49. It established the Contract price by estimating the cost for each component of the renovation.
- [8] During the course of construction the defendant signed, or otherwise approved, the first five change orders that were presented to her. The total increase in the Contract price, as a result of the five approved change orders, is \$12,179.30.
- [9] Ivy League produced six additional change orders over and above those that were approved by the defendant. The additional change orders (change orders 6 through 11) were not signed by defendant and the defendant denies having approved any of the work described in those change orders. Ivy League claims that the work included in change orders 6 through 11 was discussed with the defendant and verbally approved by her. The total amount claimed for change orders 6 through 11 is \$13,085.30.
- [10] In addition to the change orders, Ivy League claims an additional \$106.31 for a plumber's invoice relating to work done at the Condo. Ivy League claims that it hired the plumber for the work at the Condo. Accordingly, the plumber submitted his invoice to Ivy League for payment.
- [11] The defendant does not dispute that there was plumbing work done at the Condo nor does she dispute that the work was done at her request. The defendant claims that the work at the Condo was arranged by her and that she hired the plumber directly. Therefore, the defendant has refused to pay Ivy League for the plumbing invoice but she has also not paid the plumber directly.
- [12] The defendant has paid a total of \$63,962.74 to Ivy League. The payments were made in the following instalments:
- a) \$21,977.62 on August 1, 2015;
 - b) \$21,985.12 on August 6, 2015; and
 - c) \$20,000 on August 31, 2015.

- [13] The defendant paid the third instalment on August 31, 2015, at Ivy League's request, even though the work had not been completed.
- [14] On or about September 11, 2015, the defendant discovered that Ivy League had not obtained a building permit, an electrical permit or a plumbing permit for the renovation work. When she discovered that the required permits had not been issued, the defendant requested copies of any issued permits from Ivy League. The defendant subsequently received a copy of a plumbing permit, issued on September 11, 2015, and a copy of a receipt for the payment of an electrical permit dated September 9, 2015. However, the defendant did not receive a building permit until the City issued it to her on September 14, 2015.
- [15] Ivy League alleges that it could not apply for the permits required because the defendant either neglected or refused to sign the documents necessary to make application for the permits.
- [16] The defendant has identified numerous deficiencies in Ivy League's construction work. The defendant brought those deficiencies to the attention of Ivy League on September 8, 2015. The deficiencies included problems with the tiling in various locations in the house and deficiencies with respect to the electrical work, the plumbing, the furnace and the shower insert.
- [17] The defendant produced an electrical inspection report dated October 8, 2015, that declares many aspects of the electrical work to be "unapproved", "not compliant" or "unsafe".
- [18] Ivy League agrees that there were deficiencies in some of the work that it performed. However, Ivy League claims that the defendant did not give it an opportunity to correct those deficiencies.
- [19] During the litigation process, the defendant also discovered that Ivy League did not carry the insurance coverage that was required by the Contract. In response to this allegation, Ivy League claims that its subcontractors had insurance.
- [20] The defendant claims that Ivy League breached the Contract by:
- a) failing to have and maintain a policy of insurance as required by the Contract;
 - b) failing to obtain the necessary permits for the construction work; and
 - c) failing to perform the construction work to a reasonable standard.
- [21] In response, Ivy League claims that it did not breach the Contract because:
- a) the subcontractors had their own policies of insurance;
 - b) it could not obtain the necessary permits because the defendant would not sign the necessary application forms; and
 - c) it was not given an opportunity to correct the deficiencies.

[22] By an email dated September 14, 2015, the defendant notified Ivy League as follows:

These breaches, and in particular the failure to pull permits, constitute breaches which entitle us to treat the contract as repudiated. We accept the breaches and the builder's repudiation and elect to terminate the contract.

We will take steps to complete the outstanding work and correct the deficiencies and reserve the right to sue for any damages that have resulted from the builder's breaches of the contract.

[23] Ivy League delivered its final invoice to the defendant on September 17, 2015. The final invoice included the costs for all 11 change orders and the work performed by the plumber at the Condo. The total amount claimed in the invoice is \$54,209.16.

[24] After Ivy League commenced this action, it registered a certificate of pending litigation against the Property and the Condo to enforce a builders lien under the Builders Lien Act, S.B.C. 1997, c. 45

Analysis

Suitability of the summary trial

[25] The first question that I must decide is whether the issues raised in this application are suitable for disposition by summary trial. This question should be considered in the context of the goals and objectives of the Supreme Court Civil Rules. Rule 1-3 provides that the object of the Rules is to secure a just, speedy and inexpensive determination of every proceeding on its merits.

[26] Similarly, the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 at para. 2, recognized the need to simplify pretrial procedures and to move away from the conventional trial toward proportional procedures tailored to meet the needs of a particular case. The court saw the summary trial procedure as one way to provide litigants with affordable access to the civil justice system.

[27] Whether a case is suitable for disposition by summary trial arises in Rules 9-7(11)(b) and 9-7(15)(a) of the Supreme Court Civil Rules.

Rule 9-7(11)(b)

[28] Rule 9-7(11)(b) provides as follows:

(11) On an application heard before or at the same time as the hearing of a summary trial application, the court may

(a) adjourn the summary trial application, or

(b) dismiss the summary trial application on the ground that

- (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
 - (ii) the summary trial application will not assist the efficient resolution of the proceeding.
- [29] Rule 9-7(11)(b) allows the court to dismiss a summary trial application if the issues are not suitable for disposition by summary trial or if the summary trial will not assist in the efficient resolution of the proceeding.
- [30] Rule 9-7 does not provide any guidance for the interpretation of the term "suitable" as it is used in Rule 9-7(11)(b). I have also not been given any authorities on how that term should be interpreted. However, in deciding the question of suitability for disposition by summary trial under Rule 9-7(11)(b) I have considered the following factors:
- a) the complexity of the issues;
 - b) the impact of conflicting affidavit evidence;
 - c) whether the determination of the issues in the application is likely to result in the resolution of the proceedings; and
 - d) whether there are any procedural or disclosure issues that have not been addressed which will prejudice the respondent on the summary trial.
- [31] The issues in this case are not complex. The parties agree that they have a Contract. The Contract is in writing so that the terms are relatively clear. The disagreement is about whether Ivy League breached the terms of the Contract.
- [32] Ivy League submits that this case is not suitable for determination by summary trial because there are conflicting affidavits. However, the evidence relating to the breach of contract is either admitted or not denied by Ivy League. In particular:
- a) Ivy League admits that it cannot provide proof of insurance and seeks to justify the lack of insurance by asserting that its subcontractors hold their own insurance policies;
 - b) Ivy League admits that it did not obtain a building permit from the City of Kelowna as required by the Contract but blames the defendant for not completing the required forms; and
 - c) Ivy League admits that aspects of the construction work were deficient but claims that it was not given an opportunity to remedy the deficiencies.
- [33] Therefore, the conflicting affidavits do not make this case unsuitable for disposition by summary trial.

- [34] The summary trial application, if successful, will finally dispose of this action. The defendant seeks judgment on all issues raised in Ivy League's claim and in her counter claim. This is not a case where a final determination on the summary trial will require other issues to be tried in any event.
- [35] Ivy League has not raised any procedural or disclosure issues that would prejudice its position on this application.
- [36] Based on the foregoing analysis, I conclude that the summary trial application should not be dismissed on either of the grounds set out in Rule 9-7(11)(b).

Rule 9-7(15)(a)

- [37] The question of suitability for summary trial is also raised by Rule 9-7(15)(a) which provides that in a summary trial application, the court may grant judgment in favour of a party unless:
- a) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law; or
 - b) the court is of the opinion that it would be unjust to decide the issues on the application.
- [38] Although the evidence in a summary trial is adduced by affidavit, it is still a trial at which the parties must prove their cases through admissible evidence. The applicant must present sufficient evidence to prove its case on a balance of probabilities. In response, the respondent must adduce the evidence to refute the allegations of fact made by the applicant. It is not sufficient for the respondent to simply insist on a full trial and not present the evidence that is necessary to defend against the allegations.
- [39] In *Gichuru v. Pallai*, 2013 BCCA 60, Smith J.A. describes the summary trial in this way:
- [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:
- [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The

same is true of a plaintiff where the defence has brought the R. 18A motion.

[Emphasis in original.]

[40] Having in mind the comments of Smith J.A. cited above and for the reasons that follow, I have concluded that the evidence adduced in this application allows me to make the findings necessary to decide the issues on a summary trial.

[41] I have also concluded that it would not be unjust to decide the issues in this proceeding by summary trial. In Gichuru, Smith J.A. enumerated the following factors to consider when deciding whether it would be unjust to proceed summarily:

- a) the amount involved;
- b) the complexity of the matter;
- c) its urgency;
- d) any prejudice likely to arise by reasons of delay;
- e) the cost of taking the case forward to a conventional trial in relation to the amount involved (proportionality);
- f) the course of proceedings;
- g) whether credibility is a critical factor in the determination;
- h) whether the summary trial could create an unnecessary complexity in the resolution of the dispute; and
- i) whether the summary trial would result in litigating in slices.

[42] In this case the amounts involved are relatively small. Ivy League's claim is for \$54,209.16. The defendant's counterclaim is in the amount of \$42,005.72.

[43] On the other hand, the evidence from the defendant suggests that she has already spent \$20,000 in defending Ivy League's claim and in prosecuting her counterclaim. Ivy League is self-represented so it is not incurring any legal fees. However, there is a significant cost in time which Ivy League could use to pursue more productive activities. Therefore, the principle of proportionality favours a decision by summary trial.

[44] As I have stated earlier in these reasons, the issues in this case are not complex and the conflicts in the affidavit evidence are not an impediment to deciding the issues summarily.

[45] The disagreement between the parties has been outstanding and unresolved since September 2015. This action was commenced on October 13, 2015, and is still awaiting a final determination. The parties have not proceeded expeditiously with this action but the length of time that it has been left unresolved favours a decision by summary trial rather than a decision following a future trial.

- [46] Accordingly, it is my view that the issues raised in this application are suitable for disposition by summary trial because I am able to find the facts necessary to decide the issues and it would not be unjust to do so.

Breach of the Contract

- [47] As I indicated earlier in these reasons, the evidence that Ivy League breached the terms of the Contract is either admitted or not denied by Ivy League. The explanations presented by Ivy League for failing to comply with the terms of the Contract do not excuse its failures.
- [48] The Contract required Ivy League to have a \$1 million policy of insurance. The insurance requirement is not satisfied by policies held by the subcontractors. Even if the insurance requirement could be satisfied by the subcontractors' insurance, there is no evidence that the subcontractors' policies extended coverage to Ivy League.
- [49] The Contract required Ivy League to obtain the necessary permits for the construction but it failed to obtain a building permit before commencing construction as required by the building bylaw. Ivy League cannot rely upon the defendant's failure to sign the appropriate application forms. Ivy League has not given any evidence about the steps it took, if any, to secure the defendant's signature or to bring that requirement to her attention. Further, when Ivy League commenced construction it would be reasonable for the defendant to assume that all necessary permits were in place.
- [50] Ivy League admits that the work performed by it was deficient but it submits that the deficient work is not a breach of the Contract because it was not given an opportunity to correct the deficiencies. However, I have been given no factual or legal basis to establish that the Contract required that Ivy League be given an opportunity to correct deficiencies.
- [51] Therefore, I find that Ivy League breached the terms of the Contract.

Defendant's counterclaim for damages

- [52] Ivy League's breach of contract entitles the defendant to damages. The damages for breach of contract are awarded to place the innocent party in the same position that it would have been in had the contract been performed (BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] S.C.R. 12 at para. 12).
- [53] The damages to which the defendant is entitled are the costs to remedy the plaintiff's breach of contract. The damages are the costs of the remedial work undertaken by the defendant. The defendant claims the sum of \$42,005.72. However, this amount includes \$25 for a land title search and \$41.44 for photographs which should not be included in the remedial costs. Therefore, the total damages claimed must be modified to \$41,939.28.
- [54] Also included in the defendant's claim for damages are the costs required to complete the work contemplated by the Contract. The evidence does not clearly separate the costs incurred for remedial work from the costs incurred to complete the project. Therefore, in

order to place the defendant in the position she would have been in had the Contract been performed, the defendant must credit Ivy League for the amount that she would have had to pay to Ivy League had the Contract been performed. The costs required to complete the project are not losses sustained by the defendant because those costs were not paid to Ivy League under the Contract.

- [55] Ivy League claims that the balance owing to it under the Contract is \$54,209.16. However, this amount includes 11 change orders, some of which are in dispute. The defendant accepts the additional costs in the first five change orders. She rejects change orders 6 through 11 because they were not signed by her as required by the Contract and because she says they were not changes to the Contract.
- [56] After reviewing change orders 6 through 11, I am satisfied that change orders 6, 7, 9 and 11 were not approved by the defendant. I am also of the view that these change orders do not represent changes to the Contract. The work described in these change orders is work that was included in the scope of the Contract.
- [57] Change order 8 represents work required as a result of the defendant changing her mind about the floor coverings in the recreational room after installation. Therefore, I find that change order 8, in the amount of \$701.40, is an appropriate extra to be added to the Contract price. Once the work is done, the defendant cannot change her mind and expect Ivy League to bear the cost.
- [58] Change order 10 is for the installation of a new furnace and hot water tank. The defendant admits that this work was done by the subcontractor, Mint Mechanical Ltd., and that it was outside the scope of the Contract. Mint Mechanical issued its invoice for this work to Ivy League because it was a subcontractor to Ivy League on this project. The defendant admits that she has not paid Ivy League or Mint Mechanical for this work. The defendant must pay for the supply and installation of the furnace and hot water tank. It should make no difference whether she pays Ivy League or Mint Mechanical. Mint Mechanical agrees that the payment for this work should be made to Ivy League. Therefore, I find that change order 10, in the amount of \$5,323.50, is an appropriate extra to the Contract.
- [59] Similarly, I find that the additional \$106.31 for work completed by the plumber at the Condo should be paid by the defendant. The defendant has not paid for this work and it should make no difference whether the payment is made to Ivy League or to the plumber directly.
- [60] I find that the amount that would have been payable by the defendant under the Contract, had it not been terminated, is as follows:

Contract price:

\$87,910.49

Change Orders 1-5:

12,179.30

Change Orders 8 and 10:

6,024.90

Work at the Condo:

106.31

Subtotal:

\$106,221.00

Less payments:

63,962.74

TOTAL:

\$42,258.26

[61] The amount payable by the defendant to complete the Contract would have been \$42,258.26. The amount paid by the defendant to remedy the deficiencies and to complete the project is \$41,939.28. Therefore, the defendant's cost to remedy the deficiencies and complete the construction is less than she would have had to pay to Ivy League to complete the work. Accordingly, the defendant has sustained no damages as a result of Ivy League's breach of contract.

[62] Accordingly, Ivy League's action and the defendant's counterclaim are dismissed.

Cancellation of the Certificate of Pending Litigation

[63] Section 254 the Land Title Act, R.S.B.C. 1996, c. 250, sets out the procedure that is to be followed if the action forming the basis for a certificate of pending litigation ("CPL") is dismissed. In *Berthin v. Berthin*, 2018 BCCA 57, at para. 40, the Court of Appeal held that where a claim to an interest in land is dismissed, the registration of the CPL may only be cancelled in conformity with s. 254 of the Land Title Act. Section 254 provides:

254 If an action in respect of which a certificate of pending litigation is registered has been dismissed, the registrar must cancel the registration as provided in the regulations, or, on

- (a) application, and
- (b) production of a certificate of the registrar of the court that issued the certificate of pending litigation, endorsed by the registrar of the Court of Appeal, certifying that
- (i) the action has been dismissed and that the time limited for appeal has expired and no notice of an appeal has been filed with the registrar of the Court of Appeal, or

(ii) a notice of appeal has been filed and has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada.

[64] Therefore, the defendant must apply to the registrar of land titles to cancel the registration of the CPL registered against the Property.

Costs

[65] The parties have requested an opportunity to make submissions on the issue of costs after I have decided the issues on this application. Therefore, the parties are at liberty to address the issue of costs by further submissions. Arrangements for those submissions are to be made within 30 days.

"Hori J."

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