

CANADA / JUDGMENT

Bosa Properties (White Rock) Inc. v. Michl

2009 BCSC 1564

COURT

Supreme Court of British Columbia

DECIDED

16 November 2009

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2009 BCSC 1564 Bosa Properties (White Rock) Inc. v. Michl IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bosa Properties (White Rock) Inc. v. Michl, 2009 BCSC 1564 Date: 20091116 Docket: S092492 Registry: Vancouver Between: Bosa Properties (White Rock) Inc. Plaintiff And Zdenek Michl and Iva Kolda Defendants And Iva Kolda Third Party Before: Master Taylor Reasons for Judgment Counsel for Plaintiff: A.C. Zappavigna Counsel for Defendant, Michl: E.G. Wong Place and Date of Hearing: Vancouver, B.C. November 5, 2009 Place and Date of Judgment: Vancouver, B.C. November 16, 2009

- [1] This is an application by the defendant, Michl, for the following relief as set out in his notice of motion dated October 16, 2009:
1. The Third Party, Ms. Kolda, not having filed an Appearance to the Third Party Notice in this action and the time for doing so having expired,
 - a. pay to Mr. Michl the sum of \$71,526.95 (the "Travelers Damages");
 - b. pay to Mr. Michl interest on the Travelers Damages from June 2, 2009 pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79;
 - c. pay to Mr. Michl the balance of damages to be assessed at trial of the proceeding (the "Bosa Damages"); and
 2. costs of this application be paid by Ms. Kolda to Mr. Michl.
- [2] The underlying action in the main proceeding involves a purchase and sale agreement concerning a strata property in White Rock, where the defendants, Michl and Kolda agreed to purchase the property from the plaintiff, Bosa Properties (White Rock) Inc.
- [3] Apparently the defendants had a contract as between themselves to finance, in equal shares, the joint purchase of the property.

- [4] Mr. Michl alleges Ms. Kolda breached her obligations to him under this separate contract by failing to contribute her share of a third deposit payable to the vendor. The payment of a portion of the third deposit was secured by a bond issued by Travelers Guarantee Company of Canada ("Travelers"). As a result of Ms. Kolda's failure to pay her share of the deposit, Travelers was required to pay a sum against the third deposit. Travelers later obtained judgment against Michl for that sum (the "Travelers Damages").
- [5] As well, Kolda failed to contribute her share of the balance owing on the purchase price of the property. Accordingly, the defendants did not complete the purchase. Bosa Properties has claimed forfeiture of deposit monies, and has sued both Michl and Kolda for damages arising from their breach of the purchase agreement. Michl, then, issued a third party notice to Ms. Kolda.
- [6] Bosa Properties does not object to the defendant, Michl, obtaining judgment against Kolda by way of the third party proceedings in paragraphs 1(a) and (b) of the notice of motion, but takes issue with Michl's right to obtain default judgment on liability for breach of contract in paragraph 1(c) through an order that damages be assessed at trial of the main proceeding. An order was made at the hearing for the relief sought by the defendant, Michl, in paragraphs 1(a) and (b) of the notice of motion. These reasons deal with the relief sought in paragraph 1(c).
- [7] Bosa's objection to the defendant receiving the relief sought in paragraph 1(c) is due to the fact that the plaintiff says Michl's claim in this instance is for contribution and indemnity and dependent on the outcome of the main action, and since dependent on it cannot be dealt with at the same time as the main action.
- [8] In the prayer for relief in the third party notice, Mr. Michl claims against Ms. Kolda as follows:
- a) Contribution or indemnity in respect of the claims made against Mr. Michl by the plaintiff;
 - b) Further or alternatively, damages for breach of contract, including damages for (i.) Mr. Michl's contributions to the deposits forfeit to the plaintiff as a result of Ms. Kolda's breach of duty, and (ii.) Mr. Michl's liability to Travelers Guarantee company of Canada;
 - c) such further relief of which Mr. Michl may advise;
 - d) prejudgment Interest under the Court Order Interest Act;
 - e) costs; and
 - f) such further and other relief as to the Honourable Court deem just.
- [9] Rule 22 of the Rules of Court deals with Third Party procedure. I set out the applicable portions of the Rule herein: 22(1) A party of record who is not a plaintiff may file a third party notice in Form 17 if the party of record alleges against any person (in this rule called "the third party"), whether or not the third party is a party to the action, that

- (a) the party is entitled to contribution or indemnity from the third party in respect of a claim made against the party in the action,
 - (b) the party is entitled to any relief against the third party relating to or connected with the original subject matter of the action, or
 - (c) a question or issue relating to or connected with any relief claimed in the action or with the original subject matter of the action is substantially the same as a question or issue between the party and the third party and should properly be determined in the action.
- (10) If a third party has not entered an appearance to a third party notice and the time for doing so has expired, the party who filed the third party notice may apply for judgment in default of appearance against the third party and notice of that application shall be delivered to each other party of record. ...
- (12) On an application under subrule (10) or (11), the court may grant any or all of the relief claimed in the third party notice. ...
- (18) The court may impose terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by the plaintiff as a result of that third party procedure.
- [10] Under paragraph 1(c) of the notice of motion, the defendant, Michl, seeks default judgment against Ms. Kolda for her liability for breach of contract arising from her failure to pay her share of the balance of a purchase price due on completion.
- [11] Mr. Michl's position in regard to this portion of his application is that unlike his claim for contribution and indemnity under section 53(3) of the Law and Equity Act which requires an order against him and that he also satisfy the order, his claim for breach of contract does not depend on any finding in the main proceeding.
- [12] It is submitted on behalf of the defendant, Michl, a cause of action for breach of contract will exist the moment a breach occurs even if damages have not yet been suffered. Thus, says the defendant, even if actual damages remain to be assessed, the absence of a trial in the main action does not make judgment on liability for breach of contract premature in any way.
- [13] Mr. Wong on behalf of the defendant submits that Michl should be entitled to obtain default judgment on his breach of contract claim insofar as it relates to Kolda's failure to contribute to the balance of a purchase price. He further submits that the default judgment should take the form of an order that Kolda pay damages to be assessed at the trial of the main proceeding, by analogy to Rules 17(5) and (8), which apply to any ordinary (non-third-party) proceeding.
- [14] The applicable rules, according to Mr. Wong, are as follows:

- (5) Where the plaintiff's claim against a defendant is solely for unliquidated damages, the plaintiff may enter judgment in Form 86 against that defendant for damages to be assessed and costs, and may proceed with the action against any other defendant.
- (8) Where a plaintiff has obtained judgment for damages or value to be assessed, the plaintiff may set the assessment down for trial but, unless the court otherwise orders, it shall be tried at the same time as the trial of the action or issues against any other defendant. (Mr. Wong's emphasis)
- [15] Based on the above, the defendant submits that he seeks to do no more than if he had commenced or were to commence, an action against Ms. Kolda through a separate proceeding rather than through a third party notice.
- [16] Bosa does not take issue with the proposition that a claim for breach of contract does not include damages as a requisite element of the claim, however, Bosa says this proposition does not assist the defendant on an application for default in relation to a third party claim.
- [17] Specifically, Bosa says that if the defendant had commenced a separate action against Kolda for breach of contract he could obtain default judgment against her for failure to file an appearance. But, submits Bosa, in the context of the defendant's third party claim, the "Bosa Damages" are entirely dependent on the outcome in the main action. Bosa further submits the law is clear that default judgment will not be granted where the plaintiff in the main action has not yet obtained judgment against the defendant. No authority was cited for this proposition.
- [18] One of the claims against the defendants by the plaintiff in the main action is damages for breach of the purchase agreement and this has yet to be determined. This is essentially the same claim as made by the defendant, Michl, against the third party, Kolda, in paragraph 1(c) of the Third Party Notice, i.e. the "Bosa Damages".
- [19] The main thrust of Mr. Wong's argument on behalf of the defendant, Michl, is based on the new version of Rule 22(10), enacted in 1996, and the annotation in McLachlin & Taylor regarding Rule 22(10) at pages 22-28 and 22-29 as follows: Default Judgment not Available until Judgment Granted in Main Action There is no express requirement under the current R. 22(10) that judgment first be given against the party who issued the third party notice before default judgment can be taken out against the third party, but an application brought in advance of the outcome in the main proceedings where the claim in the third party proceedings was for contribution or indemnity would be premature, and would be refused. The court would undoubtedly hold that as a matter of principle, a default judgment in respect to a claim for indemnity or contribution cannot be granted until judgment is granted against the defendant in the main action. The court might invoke the discretion conferred by R. 22(12) "to grant any or all of the relief" claimed on an application for default judgment, which by necessary intendment includes the discretion to refuse any relief, although given that the issue appears to be one of principle rather than discretion, the court might not rely on R. 22(12). Default judgments in relation to other types of third party claims (those

authorized by R. 22(1)(b) or (c)) may be granted in advance of the trial of the main action, however. In *Hollingworth v. Herron Estate*, [2005] B.C.J. No. 772, 2005 BCSC 518, at para. 12 (Master), the master observed that if "a plaintiff has not obtained judgment it would likely be inappropriate to grant a defendant default judgment for indemnification, even if the judgment is only declaratory in nature". The stated reason (at para. 16) why default judgment against the third parties would be inappropriate is that it would likely be premature at a time when the plaintiff had not obtained judgment against the defendant.

- [20] As indicated above, the defendant, Michl, says his claim against the third party is for damages for breach of contract, not for indemnity or contribution. Thus, he says, there is nothing in Rule 22 which prevents the defendant from taking default judgment with respect to those portions of the third party claim independent of the main matter, i.e., those portions not involving contribution or indemnity. He goes on to submit that since nothing in the main action between Bosa and Michl can affect whether Ms. Kolda breached her contract with Mr. Michl, default judgment in this case will not be premature in any sense.
- [21] The key to the resolution of the issue, in my view, is to be found in the wording of paragraph 1(c) of the Notice of Motion. The Notice of Motion does not ask for default judgment against Ms. Kolda for breach of contract, with damages to be assessed, rather it says "pay to Mr. Michl the balance of damages to be assessed at trial of the proceeding (the "Bosa Damages"). (my emphasis). It would appear, therefore, that until such time as the details of the damages have been determined, Mr. Michl cannot be granted the order he seeks. Accordingly, I take the view that what the defendant is seeking, is in fact, a contribution or indemnity from Ms. Kolda. Thus, to grant the order the defendant seeks would be premature. The application for relief in paragraph 1(c) is therefore dismissed.
- [22] Since each party was successful in certain aspects of the notice of motion, it would be best if each party bore its own costs. "Master G. Taylor"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/09/15/2009BCSC1564.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bosa-properties-white-rock-inc-v-michl-2009>

Prepared on 29 October 2026 · Esheria