

CANADA / JUDGMENT

Can-West Development Ltd. v. Parmar

2020 BCSC 439

COURT

Supreme Court of British Columbia

DECIDED

28 February 2020

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2020 BCSC 439 Can-West Development Ltd. v. Parmar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Can-West Development Ltd. v. Parmar,

2020 BCSC 439

Date: 20200228

Docket: S177387

Registry: Vancouver

Between:

Can-West Development Ltd.

Plaintiff

And:

Devinder Singh Parmar and Anju Parmar

Defendants

Before: The Honourable Madam Justice Choi

Oral Reasons for Judgment on Costs

In Chambers

Counsel for the Plaintiff and for the Defendant by Counterclaim, Jagjiwan Singh Ranauta:

W. McLachlan

D. Garand

Counsel for the Defendants:

M. Williams

C. Leung

Place and Date of Hearing:

Vancouver, B.C.

February 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2020

- [1] THE COURT: All parties seek costs of the trial respecting my reasons indexed as Can-West Development Ltd. v. Parmar, 2019 BCSC 1573. Mr. and Ms. Parmar, the defendants, seek costs at Scale B. Can-West, the plaintiff and defendant by counterclaim, also seeks costs at Scale B. Mr. Ranauta, a defendant by counterclaim, seeks special costs. Both Mr. and Ms. Parmar and Can-West claim they were substantially successful at trial. Mr. Ranauta seeks special costs because the allegations against him personally were dismissed.
- [2] The actions respected the building of a duplex and infill home at 5475, 5477, and 5479 Wales Street, Vancouver, by Mr. Ranauta's company Can-West for the homeowners Mr. and Ms. Parmar. Can-West sought \$351,530 against the defendants for payment of the development. Mr. and Ms. Parmar disagreed with the amount owing under the contract and sought an order in their counterclaim for \$217,968 for construction deficiencies.
- [3] I found that Can-West breached the contract and owed the defendants \$137,250 pursuant to the counterclaim. I found that Can-West was also entitled to damages for breach of contract, which resulted in a set-off of \$80,718 owing by the defendants to Can-West. At para. 191 of the reasons, I held that the defendants owed Can-West \$80,718 plus GST. Can-West argues that because the defendants have to pay pursuant to the judgment, Can-West was substantially successful at trial.

Clarification Items

- [4] Before I turn to the issue of which party was substantially successful, I will address the clarification items sought by the parties respecting the reasons for judgment. Mr. and Ms. Parmar seek clarification on the following items:
- 1) whether the deficiencies award of \$137,250 at para. 186 of the reasons should have actually been less, being \$135,113;

- 2) whether the figures in paras. 8, 48(e), 65(d), 66, and 187 of the reasons should have included GST because para. 11 states that the total construction cost was \$803,250 inclusive of GST; and
 - 3) whether the general requirements, overhead of 5%, and management fees of 10% on the deficiencies awarded, plus GST on these amounts, was to be included in the judgment.
- [5] Can-West seeks to clarify whether pre- and post-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 was awarded to it. For the reasons that follow, I agree that all items sought by the parties are granted:
- 1) I accept the defendants' submission that the total value of the deficiencies is actually \$135,113, not \$137,250, as set out in the reasons for judgment. I commend the defendants for bringing to the court's attention that their award was less than actually set out in the reasons for judgment.
 - 2) Paragraphs 8, 48(e), 65(d), 66, and 187 of the reasons incorrectly state that the figures were exclusive of GST. These amounts were inclusive of GST. This means that the amount owed by Mr. and Ms. Parmar to Can-West is inclusive of GST. To be clear, however, para. 8(b) is correct, but para. 8(g) is incorrect when it states that the total cost was \$803,250 plus GST.
 - 3) I agree that the general requirements, overhead, management fees, and GST formed part of Mr. Craxton's expert report and that the amount awarded on the deficiencies to Mr. and Ms. Parmar is exclusive of these amounts. I, therefore, agree that the sums in Schedule B of the defendants' notice of application are correct. Schedule B shows that the total award for the defendants' claim is \$151,781.90:
 - 4) I agree that pre- and post-judgment interest pursuant to the Court Order Interest Act is payable on the amounts owing by Mr. and Ms. Parmar to Can-West.
- [6] I note commendably that none of the opposing parties opposed the clarification items sought by the other except that Can-West argues that the amounts owing by Mr. and Ms. Parmar respecting the deficiencies should be exclusive of GST. This argument is rejected because it was clear that the total construction price was \$803,250 including GST.

Which Party Was Substantially Successful?

- [7] I now turn to the issue of which party was substantially successful. Mr. and Ms. Parmar argue that the determination of success is not so simplistic under the case law as submitted by Can-West. It relies on a variety of cases including *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.); *Gichuru v. Purewal*, 2019 BCSC 951; *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282; *Roy v. 1216393 Ontario Inc.*, 2013 BCSC 1036. Rule 14-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 provides, "Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders."

[8] Subrule (12) relates to costs of applications. The principles of costs awards are set out in the authorities cited by the defendants and are not in dispute. The application of these principles to this case is in dispute. The purpose of costs is set out at para. 74 of *Giles*, which reads as follows:

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[9] In *Gichuru*, the court set out some of the principles in determining substantial success at paras. 12-15. In determining substantial success, the court need not descend into a meticulous mathematical examination of the matters in dispute: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45; *Gagne v. Sharpe*, 2015 BCSC 154 at paras. 22 and 34. As stated in *Gichuru* at para. 13, the court ought to:

[13]

1. Focus on the matters in dispute, which may or may not include issues mentioned explicitly in the pleadings;
2. Assess the weight or importance of these matters to the parties;
3. Globally determine which party substantially succeeded overall; and
4. Where one party achieved substantial success, consider whether there are reasons to "otherwise order".

See *Fotheringham* at paragraph 46; *Vazzaz v. Vazzaz*, 2006 BCSC 1146, at paragraph 35; *Gagne* at paragraph 22.

[10] There are many reasons why a court may deny a substantially successful party their costs. These include misconduct in the course of litigation and the substantially successful party failing on one or more issues that took a discrete amount of time at trial: *Loft v. Nat*, 2014 BCCA 108 at para. 49. Of course, in any costs application, it is important to keep in mind the purpose of the costs rule, including encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect: *Giles* at para. 74; *Gagne* at para. 33.

[11] For the reasons that follow, I find that the defendants were substantially successful in this proceeding:

1. They were successful on the major issues of high weight or importance, including whether the signed document was the agreement between the parties, and if so, whether it encompassed a duplex or a duplex plus infill home. Another issue of high importance was whether the written contract was amended orally, and if so, to what extent. The defendants were also largely successful on their claim respecting the value and extent of the deficient construction items, particularly in the context of the defendants by counterclaim's positions on those items.
2. I reject the plaintiff's argument that they were the successful party because the defendants must make any payment to them. The plaintiff sought payment of \$351,530. The reasons for judgment awarded the plaintiff \$80,718. That amount will now change somewhat based on the clarification orders I have made. However, it will not change substantially and will remain far less than the quantum sought by the plaintiff. The plaintiff's argument on substantial success rests on the premise that it is successful if any payment is owed to it. I disagree. No case law was cited in support of this analysis, and I agree with the defendants that this assessment of substantial success is contrary to the principles in the cases cited by the defendants.
3. The plaintiff argues that I ought to consider without-prejudice communications respecting settlement that were not formal offers to settle. This argument is without legal foundation, and I will not consider it further.
4. The defendants succeeded in the four applications that were heard, three of which were heard in the first week of trial and the fourth after the trial was concluded. All applications were commenced by Can-West and Mr. Ranauta, and three of them related to the new home warranty program insurance and report. The applications spanned the first week of trial plus half a day after the trial concluded.
5. The defendants were successful in excluding all parts of the plaintiff's expert report that they sought to have excluded, rendering little of the report admissible.
6. The trial greatly exceeded all parties' estimates in their trial briefs, and each called witnesses that were not listed in their trial management conference ("TMC") brief. Can-West and Mr. Ranauta greatly exceeded their estimates in the TMC brief. The plaintiff's brief

dated June 19, 2018, estimated five days for a trial, listing only Mr. Ranauta as a witness for five hours in direct examination. At trial, Mr. Ranauta was examined for almost two and a half days in direct alone, and then the plaintiff called four more witnesses that took almost another four days. I am not aware of any circumstances after the TMC that should have caused such an elongation in the plaintiff's case. In making this finding, I have considered the plaintiff's argument that at the time of the TMC, they had not commissioned the ConEcon Report and dismiss that as a reason while the trial was lengthening so substantially. There was little in that report that was not already known to the parties. I also note that some of the plaintiff's witnesses could not speak English. Yet, no interpreter had been arranged. Further trial time was lost as a result.

7. Can-West and Mr. Ranauta made a number of evidentiary objections, citing *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.). The court directed that the *Browne v. Dunn* actions be communicated in writing by the plaintiff's counsel to the defendants' counsel. The result was a letter dated November 13, 2018, setting out the objections. The defendants then prepared an extensive response with specific references to the evidence, and oral arguments were made. After hearing the defendants' oral argument on the *Browne v. Dunn* issue, the plaintiff's objections were rightfully withdrawn. However, by this point, not only was some trial time taken up by this issue, but also much more time would have been taken to prepare such a detailed response by the defendants' counsel. In my view, the objection ought not to have been made in the first place and particularly with such vigour.
8. I find, accordingly, that much of the elongation of the trial was due to the manner in which Can-West and Mr. Ranauta pursued the litigation. Further, some of the evidence and submissions advanced by the plaintiff and Mr. Ranauta were contradictory and confusing, lengthening the evidence and submissions even further.

Special Costs

[12] I now turn to Mr. Ranauta's claim for special costs, because he was personally added as a defendant by counterclaim and the claims against him were dismissed. The counterclaim sought the following relief:

- 1) Judgment against Can-West and/or Mr. Ranauta in favour of the Parmars for damages for breach of contract, negligence and/or wrongful conversion, which includes but not limited to:
 - A) the construction expenses;
 - B) expenses to remedy the deficient work;
 - C) the delay expenses; and
 - D) the wrongful conversion expenses.

- [13] The counterclaim was not amended. Mr. Ranauta argues that it was only in the defendants' closing argument that the claim against him was limited to one of conversion for refusing to provide the keys to the development to Ms. Parmar, resulting in the defendants incurring \$871 to change the locks.
- [14] The defendants argue that they advised Mr. Ranauta of the claims advanced against him as early as September 13, 2017. In a letter of that date between counsel, they set out their claim against Mr. Ranauta as being one in which he acted outside of his capacity as a director or officer of Can-West when "he intentionally stole the keys to the residence from our clients. In doing so, Mr. Ranauta committed the tort of conversion."
- [15] The defendants rely on this letter to argue that the plaintiff and Mr. Ranauta were well aware that the claims against Mr. Ranauta were limited to the lock-changing expenses.
- [16] In hindsight, it is clear that amending the counterclaim to clarify the claims sought against Mr. Ranauta personally would have been preferable. However, for the reasons that follow, I agree with the defendants that Mr. Ranauta is not entitled to special costs or any costs:
1. None of the defendants' conduct can be characterized as reprehensible, as defined by case law: *Garcia; Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.
 2. The evidence and submissions advanced on behalf of Mr. Ranauta personally would have been advanced in any case on Can-West's behalf. In *St. George Transportation Ltd. v. Sawicky and Sawicky*, 2004 BCSC 1488, the court held at paras. 3-4:
- [3] Counsel for the plaintiff submits that no additional costs were incurred by the defendants as a result of Mrs. Sawicky being included in the action.
- [4] Rule 57(9) provides that costs follow the event unless the Court orders otherwise. In this case, I do not find that Mrs. Sawicky is entitled to her costs. Both defendants were represented by the same counsel, who filed a joint statement of defence. The primary issue on the summary trial application was whether Mr. Sawicky was liable for the transportation of the family's chattels because he had signed the Bill of Lading. There were no separate documents or discoveries undertaken on behalf of Mrs. Sawicky. It is likely that she would have filed an affidavit setting out her knowledge of the relevant circumstances in any event.
- [17] The above comments are equally applicable to the case at bar. Both Can-West and Mr. Ranauta were represented by the same counsel, who filed a joint response to counterclaim. There were no separate documents or discoveries on Mr. Ranauta's behalf. He would have provided the same evidence on Can-West's behalf, a company for which he was the sole director, shareholder, and officer, even if he was not named personally. The same legal issues would have arisen, and the same submissions would have been made.

- [18] I also agree with the defendants that pursuant to *Stelmaschuk v. The College of Dental Surgeons of British Columbia*, 2017 BCSC 806, there is no requirement to set out a claim for costs in the notice of application in order to be awarded costs. Accordingly, I dismiss Can-West's application for costs at Scale B and Mr. Ranauta's application for special costs or costs at Scale B. I grant costs to Mr. and Ms. Parmar for the trial and for the four applications plus the costs hearing, all at Scale B.
- [19] If the parties cannot agree on the reconciliation of the amounts to be paid from one to the other pursuant to these reasons, they are directed to appear before the Registrar for an inquiry and accounting as to what amounts are due from one party to the other.

"Choi J."

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