

CANADA / JUDGMENT

D. Kendall & Son Contracting Ltd. v. Pineault Welding & Fabricating Ltd.

2019 BCSC 541

COURT

Supreme Court of British Columbia

DECIDED

10 April 2019

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2019 BCSC 541 D. Kendall & Son Contracting Ltd. v. Pineault Welding & Fabricating Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: D. Kendall & Son Contracting Ltd. v. Pineault Welding & Fabricating Ltd. , 2019 BCSC 541 Date: 20190410 Docket: S169716 Registry: Vancouver Between: D. Kendall & Son Contracting Ltd. and Daniel Kendall Plaintiffs And Pineault Welding & Fabricating Ltd. and Jean Pierre Pineault Defendants Before: The Honourable Mr. Justice Macintosh Reasons for Judgment Addressing Costs Counsel for the Plaintiffs: Paul A. Kressock Appearing in Person: Jean Pierre Pineault Plaintiffs' written submissions: March 11, 2019 Defendants' written submissions from A.J. Turton: March 25, 2019 Plaintiffs' reply submissions: March 26, 2019 Place and Date of Judgment: Vancouver, B.C. April 10, 2019

- [1] At para. 81 of my Reasons indexed at 2019 BCSC 301, I wrote as follows regarding costs: In addition, the corporate Plaintiff is entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79. If either of the Plaintiffs seek costs, they will make written submissions of no more than five pages, plus any authorities they rely on. Costs submissions should address whether one or both Plaintiffs are entitled to costs, by whom costs are payable, and what measure of costs should be awarded. The Defendants will have two weeks after receiving the Plaintiffs' submissions to respond, with submissions of the same length, addressing the same topics. Also, the Defendants may make submissions addressing whether Mr. Pineault is entitled to costs. The Plaintiffs may briefly reply to the Defendants within one week of receiving the Defendants' submissions.
- [2] I have now received and considered written costs submissions from the Plaintiffs, written submissions in rebuttal from counsel for the Defendants, and brief written reply submissions from the Plaintiffs.
- [3] In my view, the Plaintiffs are entitled to special costs, payable by both Defendants, jointly and severally.

- [4] In accordance with Supreme Court Rule 14-1(9), costs ordinarily follow the event, and are awarded to the successful party (parties) at trial. Clearly, the Plaintiffs were successful before me. In particular, I found as follows at para. 80 of my earlier Reasons: Accordingly, and in conclusion, I find that the Plaintiff, D. Kendall & Son Contracting Ltd., is entitled to payment from the Defendant, Pineault Welding & Fabricating Ltd., in the amount of \$53,628.25, being:
- (1) \$30,000 of the unpaid contract price under the written agreement;
 - (2) \$18,100 in GST payable under the written agreement; and
 - (3) \$5,528.25 for additional work (inclusive of GST). The Plaintiffs' claim against Mr. Pineault is dismissed.
- [5] Special costs, which are contemplated by Supreme Court Rule 14-1(1)(b), may be assessed when a litigant has engaged in conduct that is reprehensible. See, *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 at para. 7 (C.A.); *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 8-11; and *0932053 B.C. Ltd. v. TBM Holdco Ltd.*, 2018 BCSC 973 at paras. 11-14.
- [6] The Defendants pleaded that the written agreement was a forgery and procured by fraud. They further pleaded that the Plaintiff Daniel Kendall made violent threats toward the Defendant Jean Pierre Pineault at the time the written agreement was signed.
- [7] A party who makes serious allegations of misconduct which are not proved faces the risk of special costs. That is not to say that special costs follow automatically. There have been circumstances in other cases where it was not unreasonable to have pleaded serious allegations of misconduct even when such allegations were not made out. However, in this case, there was no reasonable basis for making the allegations of forgery and fraud, to which the Plaintiffs were subjected from the time of pleading to the conclusion of trial. In this case, the only forgery that occurred was that of Mr. Pineault, when he created and tendered a forged version of the agreement between the parties.
- [8] In summary, the allegations of fraud and forgery against the Plaintiffs, and the commission of forgery by Mr. Pineault, constitute reprehensible conduct, within the meaning of the authorities addressing costs, and subject the Defendants to an award of special costs against them, jointly and severally. See *Gichuru v. Smith*, 2014 BCCA 414 at para. 79; *DeCotiis v. Petromin Resources Ltd.*, 2016 BCSC 364 at para. 19; *Wei v. Mei*, 2018 BCSC 1057 at para. 63; and *Chan Estate v. Hwang*, [1999] B.C.J. No. 875 (S.C.) at paras. 7-8.
- [9] If I had not ordered special costs, I would have awarded the Plaintiffs double costs given their formal offers to settle pursuant to Supreme Court Rule 9-1(5)(b). On July 13, 2017, two weeks after receiving the Response to Civil Claim, and one year before trial, the Plaintiffs served a formal offer to settle for "the all inclusive sum of \$44,000". That offer was stated to be open until the first day of trial, unless withdrawn earlier. It was left open for approximately 10 ½ months, without acceptance or other response. The Defendants had

counsel throughout that time. On May 25, 2018, eight weeks before trial, the Plaintiffs withdraw their existing offer, and served another formal offer, this time for "\$44,000, plus our client's taxable costs at Scale B up to the time of acceptance", and those costs were estimated at \$5,000. That offer was stated to be open until the first day of trial, unless withdrawn earlier. The offer was not accepted and lapsed on the first day of trial. The Defendants had counsel from the time the offer was made until June 7, 2018.

- [10] Both offers summarized above were reasonable and were made in an attempt to resolve the matter early and avoid the costs of trial. The amount awarded at trial, exclusive of costs, was \$53,628.25, which exceeds the amount of the formal offers by approximately 20%. On that basis, I would, in the alternative, have awarded double costs.
- [11] As a further alternative, I would have granted the Plaintiffs' increased costs pursuant to Supreme Court Rule 7-7(4), based on the Defendants' unreasonable refusal to admit facts, keeping in mind the substantial additional efforts placed on the Plaintiffs' shoulders to prove those facts. This unnecessary fact-finding exercise had to do with the proof of the authenticity of the written agreement and the rebuttal of the forgery allegations made against the Plaintiffs.
- [12] The Court has the inherent jurisdiction to punish misconduct by awarding costs, including special costs, against any party, against officers and directors of corporate parties, and even against non parties: see *Sound Contracting Ltd. v. Comox-Strathcona (Regional District)*, 2005 BCCA 167 at para. 15; and *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.
- [13] The misconduct in the defence of this case, particularly in preparing and submitting a forged written agreement, was the work of Mr. Pineault. In my view, that amounts to serious misconduct.
- [14] Accordingly, in my view, the special costs must be awarded against both Defendants, jointly and severally. "MACINTOSH J."

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