

CANADA / JUDGMENT

Dead Level Construction Ltd. v. Ritchie

2018 BCSC 119

COURT

Supreme Court of British Columbia

DECIDED

25 January 2018

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2018 BCSC 119 Dead Level Construction Ltd. v. Ritchie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dead Level Construction Ltd. v. Ritchie,

2018 BCSC 119

Date: 20180125

Docket: S171472

Registry: New Westminster

Between:

Dead Level Construction Ltd.

Plaintiff

And

Thomas Rae Ritchie, Anna Kristine Ritchie, Raechel Derrien, Roslyn Ritchie-Derrien and John Costain

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment in Chambers

Counsel for the Plaintiff:

W. Anderson

(As a Director)

Counsel for Raechel Derrien and Roslyn-Ritchie Derrien:

J. Kwong

Place and Date of Hearing:

New Westminster, B.C.

October 24, 2017

Place and Date of Judgment:

New Westminster, B.C.

January 25, 2018

- [1] In this action, the plaintiff has made claims against all defendants for monies owing for the cost of renovations to a house owned by the defendants and located in South Surrey, BC.
- [2] The application before me is that of the defendants, Raechel Derrien and Roslyn Ritchie-Derrien (the "Derrien Defendants"). The Derrien Defendants are requesting leave to file a counterclaim against the plaintiff under Rules 3-4(1) and 22-(4) of the Supreme Court Civil Rules [the "Rules"]. An odd chain of events has led the parties to this application.

Factual Background

- [3] This action was commenced on June 15, 2015. At all times, the plaintiff has been represented by Walter Anderson ("Mr. Anderson"), an owner and director of the plaintiff.
- [4] Former counsel for the Derrien Defendants and John Costain ("Mr. Costain") has deposed that she was retained by the defendants to represent them in this action on or about June 23, 2015. On June 24, 2015, former counsel wrote to the plaintiff by way of email and delivery to advise of her retainer by the Derrien Defendants and Mr. Costain, who had not yet been served with the notice of civil claim. Former counsel also stated she would file a response to civil claim by no later than July 15, 2015.
- [5] On October 20, 2015, the plaintiff took default judgment against the Derrien Defendants after those defendants had failed to file a response to civil claim.
- [6] On or about November 19, 2015, the Derrien Defendants were advised that the plaintiff had entered a default judgment against them which resulted in an independent counsel being retained to pursue an application to set aside the default judgment and for leave to file a counterclaim.
- [7] On December 15, 2015, Harvey J. ordered that the default judgment be set aside and granted leave for the applicants to file a response to civil claim and counterclaim within twenty-one days of the order.

- [8] A response to civil claim was filed the next day, ie. December 16, 2015, however, former counsel for the applicants failed to file the counterclaim within the 21 days as ordered by Harvey J.
- [9] Former counsel for the applicants has deposed that the failure to file the counterclaim in a timely manner was due to her "inadvertence, and not wilful or deliberate neglect by either myself or the Defendants". Former counsel further deposed that an unfiled version of the counterclaim "was included as Exhibit F in my first affidavit, which was provided to Mr. Anderson on or about December 1, 2015".
- [10] The Rules applicable to this application are Rules 3-4(1) and 22-4(2) which state:

Counterclaim

3-4(1) - A defendant in an action who wishes to pursue a claim within that action against the plaintiff must, within the time set out for the filing of a response to civil claim under Rule 3-3 (3), file a counterclaim in Form 3 that accords with Rule 3-7.

Time

22-4(2) - The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

- [11] Former counsel for the Derrien Defendants has deposed that at all material times, the Derrien Defendants intended to pursue their counterclaim against the plaintiff. The Derrien Defendants submit that the plaintiff was aware of their intention. They knew the Darrien Defendants obtained the order of Harvey J. to extend the time to file a response to civil claim and a counterclaim and they received received an unfiled copy of a counterclaim.. As such, they submit there would be no prejudice to the plaintiff if the court agrees to a further extension of time to file the same.
- [12] Apparently no one realized that the counterclaim had not been filed as permitted by the order of Harvey J. of December 15, 2015.
- [13] There is a dearth of content in the various affidavits as to the progress of this action during 2016, and the first nine months of 2017, save for correspondence attempting to arrange examinations for discovery.
- [14] Former counsel for the Derrien Defendants realized this further oversight almost two years after the order of Harvey J. The second affidavit of former counsel filed October 2, 2017, includes the following statements:

10. On or about September 20, 2017, in reviewing the file, I learned that I had inadvertently failed to file the Counterclaim with the Response to Civil Claim on December 16, 2015. I understood that at all times the Defendants intended to pursue a counterclaim against the Plaintiff.
- [15] Not surprisingly, Mr. Anderson, on behalf of the plaintiff, refused to consent to a further order extending the time within which the Derrien Defendants could file their counterclaim.
- [16] In support of the present application, former counsel for the Derrien Defendants has filed a third affidavit attached to which are: the filed response to civil claim; an unfiled copy of the proposed counterclaim; and correspondence and documents from 2015. These latter documents include references to the costs of completing deficient and incomplete work which they allege give rise to the proposed counterclaim.
- [17] The Derrien Defendants have also brought to the attention of the court the provisions of s. 22 of the Limitations Act, [SBC 2012] c. 13 [the "Act"]:

Counterclaim or other claim or proceeding

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;

. . . .

- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.

[18] The parties do not disagree with the outline of the law interpreting R. 22-4(2) as submitted by the Derrien Defendants in their notice of application which states as follows:

6. The following factors are considered when deciding whether to extend the time for filing a Counterclaim after the time has expired:
- a) Is the claim in the proposed counterclaim "related to or connected with the subject matter of" the plaintiff's claim?
- b) Should the court exercise its discretion to extend the period for issuance of the counterclaim?

Smith v. British Columbia, 2010 BCSC 928 at para. 15

Raven v. A & W Ranching Ltd. 2014 BCSC 1359 at para. 29

7. In relation to the second of the above-noted factors, the following sub-factors are relevant when considering whether the court should exercise its discretion to extend the time to permit a counterclaim to be filed:
- a) What was the length of the delay between receiving the statement of claim and proposing the draft counterclaim?
 - b) What were the reasons for the delay?
 - c) Whether the Counterclaim would be time barred but for section 4(1) of the former Limitation Act (now section 22 of the current Limitations Act);
 - d) The connection between the proposed counterclaim and the plaintiff's claim;
 - e) Whether there will be prejudice to the defendant, such as would arise if denial of the application to file a counterclaim would prevent the defendant from making full answer and defence to the claim brought against it; and
 - f) Whether there will be prejudice to the plaintiff by permitting the proposed counterclaim such as if the counterclaim would require additional investigation and potentially delay the trial of the matter.

Squamish Indian Band v. Canadian Pacific Ltd.,

[1998] B.C.J. No. 1276 (S.C.)

Smith v. British Columbia, *supra* at para. 19

Raven v. A & W Ranching Ltd., *supra* at para. 31

[19] Considering the sub-factors enumerated in the preceding paragraph:

- a) The relevant time period in this case is the time between receiving the notice of civil claim and the draft counterclaim proposal, and the date the defendants applied for the order eventually granted by Mr. Justice Harvey. This period was between July 17, 2015, and November 30, 2015. It was not a significantly lengthy period. However, the plaintiff could not have anticipated that these defendants would make a second application for the same relief in order to proceed with their counterclaim due to the failure to file the counterclaim as ordered by Harvey J. This second application has resulted in a significant delay. Even though the defendants brought the present application promptly after realizing their solicitors had failed to file the counterclaim as ordered by Harvey J., the delay from December 2015 to October 2017, when this application was filed was inordinate.

- b) The reasons for delay were essentially inadvertence, which would appear to be supported by the Derrien Defendants having applied in November 2015, for an extension of time to file both a response to civil claim and a counterclaim. At that time, the defendants obviously intended to file a counterclaim or they would not have applied for an order extending the time to do so.
 - c) If the Derrien Defendants are permitted to file the Counterclaim, that claim would not be time barred but for s. 22 of the Act.
 - d) The connection between the proposed counterclaim and the plaintiff's claim is readily apparent as both claims relate to the work performed by the plaintiff in renovating the residence of the defendants.
 - e) The evidence before me does not support a finding that the defendant would suffer prejudice if the counterclaim does not proceed. The Derrien Defendants will still be able to respond to the plaintiff's claims with their arguments relating to the plaintiff's failure to perform its obligations under the construction contract and their claims for set-off against the plaintiff's claims for the cost of correcting deficiencies and completing unfinished work.
 - f) If the counterclaim is permitted, the plaintiff could potentially be prejudiced in that the trial length could be extended to the point where the trial needs be scheduled at a later date. The material before me does not disclose if a trial date has been scheduled. Examinations for discovery had not been held by the time of this application and so no additional examinations for discovery would be required.
- [20] Considering all of the factors and the evidence, I find that the prejudice to the Derrien Defendants, should I not grant the order, would exceed any prejudice to the plaintiff. The plaintiff has been aware of the intentions of the Darrien Defendants to file a counterclaim for over two years--although the plaintiff may have doubted the sincerity of the defendant's intentions after not having received a filed counterclaim. The trial, should it proceed, had not been set for hearing at the time of this application, therefore any delay in obtaining a trial date resulting from this counterclaim appears to be minimal.
- [21] Accordingly, I grant leave to the Derrien Defendants to file the counterclaim within 14 days of the issuance of these reasons for decision.
- [22] As this application has been necessitated by the neglect on the part of the Derrien Defendants, I hereby order costs of this application in an amount of \$500 to be paid to the plaintiff within 10 days of these reasons for decision.

"Jenkins J."

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Prepared on 28 October 2026 · Esheria