

CANADA / JUDGMENT

Digg'n 4U Contracting Ltd. v. Kharwar

2023 BCSC 715

COURT

Supreme Court of British Columbia

DECIDED

1 May 2023

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2023 BCSC 715 Digg'n 4U Contracting Ltd. v. Kharwar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Digg'n 4U Contracting Ltd. v. Kharwar,

2023 BCSC 715

Date: 20230501

Docket: S118117

Registry: Kelowna

Between:

Digg'n 4U Contracting Ltd.

Plaintiff

And

Shangara Kharwar, Sukhjit Kharwar and Kulwinder Kharwar

doing business as S.K. Orchards

Defendants

Corrected Judgment: The text of the judgment was corrected
on the face page on May 4, 2023

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment on Costs

Counsel for the Plaintiff:

L. McKenzie-Brown

Counsel for the Defendants:

M.E.A. Danielson

Place and Date of Trial/Hearing:

Kelowna, B.C.

April 11, 2023

Place and Date of Judgment:

Kelowna, B.C.

May 1, 2023

I. BACKGROUND

- [1] This action arose as a result of a contract dispute between the parties relating to the plaintiff's construction of a concrete lock-block retaining wall in 2015-2016 (the "Retaining Wall") and other work on the defendants' orchard property.
- [2] Following construction of the Retaining Wall, the plaintiff issued an invoice to the defendants in the amount of \$70,618.80 (the "Invoice"). The defendants refused to pay the Invoice, alleging faulty construction.
- [3] Both parties soon retained counsel and the ensuing negotiations throughout 2016 and 2017 were unsuccessful in resolving the dispute.
- [4] The plaintiff's counsel threatened legal action and defendants' counsel threatened a counterclaim for "the cost of replacement or repair of the retaining wall, diminution of value of the lands, and business losses attributable to the defective work". The defendants alleged that the problems with the Retaining Wall delayed the opening of their greenhouse business and that they suffered consequent losses.
- [5] On July 10, 2017, the plaintiff's counsel warned the defendants' counsel against the defendants taking any remedial steps respecting the Retaining Wall prior to inspection by the plaintiff:

"engaging another contractor or completing work on their own with respect to the retaining wall amounts to spoliation of evidence because it can no longer be determined what work was completed by whom and your clients will have effectively negated any ability to determine who was negligent, including any contributory negligence on the part of your clients."

- [6] On January 22, 2018, the plaintiff commenced this action under the fast-track rule, R. 15-1 of the Supreme Court Civil Rules [Rules], seeking judgment for the amount of the Invoice. The defendants filed a response to civil claim and counterclaim on February 28, 2018. They claimed, inter alia, that: the Invoice far exceeded the plaintiff's estimated cost for the

Retaining Wall; and the Retaining Wall was defective, deficient and was negligently constructed. The basis for the defendants' counterclaim was that they suffered unspecified damages as a consequence of the delayed completion of the project, as well as business losses, loss of enjoyment of their property and diminution of value of their property.

- [7] Unbeknownst to the plaintiff, the defendants dismantled the Retaining Wall sometime during the spring or summer of 2019, after the action had commenced.
- [8] The plaintiff conducted a two-and-a-half-hour examination for discovery of one of the defendants on March 2, 2020, followed by the defendants' discovery of the plaintiff for two hours in the afternoon of March 2, 2020. Neither counsel considered that the examinations for discovery were necessarily complete.
- [9] On March 13, 2020, the plaintiff delivered a formal offer to settle to the defendants' counsel, offering to settle the claim for \$65,000, all inclusive, in exchange for an agreed-upon release and consent dismissal order of both the action and counterclaim (the "Formal Offer"). The Formal Offer complied with R. 9-1 and automatically expired on March 20, 2020 at 12:00 p.m., unless additional time was requested and agreed upon. The defendants did not reply to the Formal Offer and accordingly, it expired on March 20, 2020. The plaintiff continued prosecuting its claim, including issuing a detailed notice to admit to the defendants on May 19, 2020. The defendants replied to the notice to admit on June 9, 2020. On September 16, 2020, the plaintiff filed a notice of trial setting the matter for a three-day trial commencing April 26, 2021.
- [10] On January 22, 2021, the plaintiff filed its trial brief confirming that three trial days would be sufficient to complete the matter. The plaintiff's trial brief noted the following issues required determination:
- a) the debt owing to the plaintiff for services rendered;
 - b) the defendants' enrichment by the plaintiff's work;
 - c) the spoliation of evidence due to the defendants' removal of the Retaining Wall;
 - d) negligence in the construction of the Retaining Wall;
 - e) whether the defendants failed to mitigate any damages claimed;
 - f) whether either party was guilty of breach of contract;
 - g) quantum meruit;
 - h) diminution of the value of the defendants' orchard property;
 - i) loss of enjoyment of use of the defendants' property; and
 - j) costs.

- [11] The defendants filed their trial brief on February 3, 2021, stating that they expected the trial would require four days to complete. In addition to the issues noted in the plaintiff's trial brief, the defendants' trial brief noted that the issue of who was party to the contract also required determination.
- [12] A trial management conference was held on March 2, 2021 before Master Schwartz, who raised a concern about the parties' time estimates. The defendants' counsel, Mr. Danielson, attended at the trial management conference on their behalf. Master Schwartz was assured by both parties that they believed that three days would be sufficient for the trial, notwithstanding the number of issues involved and that their time estimates exceeded three days.
- [13] The plaintiff filed an amended trial brief on March 17, 2021, confirming the issues and that it anticipated a three-day trial would be sufficient to hear the matter.
- [14] The trial commenced before me on April 26, 2021, and lasted four-and-a-half days. The defendants were self-represented, although it is apparent that Mr. Danielson assisted them behind the scenes. There was insufficient time for submissions. I ordered the parties to file written submissions, which followed after trial.
- [15] Reasons for judgment, indexed as 2021 BCSC 1027, were issued on June 1, 2021 (the "Judgment"). I awarded the plaintiff judgment against all defendants for \$69,953.67, plus Scale B costs. I also dismissed the defendants' counterclaim.
- [16] Counsel for the plaintiff prepared the formal order and forwarded it to the self-represented defendants. The defendants signed and returned the order, which was entered on June 22, 2021.
- [17] On August 20, 2021, the plaintiff applied to make submissions on costs notwithstanding the fact that the order had been entered. The defendants, now again represented by Mr. Danielsen, opposed the application on the basis that I was functus officio. Mr. Danielson formally became counsel of record again on December 2, 2021.
- [18] The application came on before me on December 8, 2021. I concluded that I was not functus officio on the issue of costs and granted the plaintiff liberty to apply to set down an application to speak to the following costs issues:
- a) whether lump-sum costs under R. 15-1 or Scale B costs should apply; and
 - b) whether the Formal Offer should be considered in determining costs.
- [19] My oral reasons for judgment, indexed as 2021 BCSC 2595, were made on December 8, 2021. In those reasons, I stated as follows:
- [3] . . . the plaintiff forwarded its bill of costs to the defendants claiming \$37,206.40 plus disbursements of \$6,744.18 as costs. Many of the costs claimed relate to double costs that the plaintiff claims pursuant to an offer to settle made in March of 2020. The plaintiff's proposed

bill of costs prompted the defendants (although represented throughout most of the litigation, were self-represented at trial) to contact their previous counsel, Mr. Danielson. Mr. Danielson took the position that the Costs Order should be appealed because costs should have been ordered pursuant to R. 15-1, the fast-track rule, not Scale B.

...

- [6] Firstly, for reasons that I, frankly, cannot explain, but probably because it was not brought to my attention or through oversight, I either was not aware that this was a fast-track action filed under R. 15-1 or did not turn my mind to it if it was. The fact that the action was filed under R. 15-1 was not mentioned during the trial. Having said that, given the nature and complexity of this case, my view is that this action was not one that should have been brought under R. 15-1. The purpose of the fast-track rule is the efficient and economical resolution of straightforward cases that can be prepared for trial and tried quickly. It is aimed at lowering the costs of litigating relatively straightforward and modest claims.
- [7] Some cases fit within the intended parameters of the fast-track rule, some do not. This was not a straightforward case. It was relatively complex. In my view, this action was not a R. 15-1 action and should never have been filed as such. Had I been aware or put my mind to that at the time, I would likely have ordered that the matter be removed from fast track.
- [20] The plaintiff now seeks the following orders:
- a) that the fast-track litigation rules cease to apply to this matter, pursuant to R. 15-1(6);
 - b) that the plaintiff is entitled to Scale B costs to the date it served the Formal Offer and double costs thereafter, pursuant to R. 9-1(5); and
 - c) alternatively, that it is entitled to double R. 15-1 costs due to special circumstances.
- [21] The defendants oppose these orders and maintain that the plaintiff is entitled to only lump-sum costs in accordance with R. 15-1.

II. DISCUSSION

A. Should this matter cease to be a fast-track action?

- [22] Yes.
- [23] The filing of a notice of fast-track does not turn any action into a fast-track action. Rather, a party may file such a notice only if R. 15-1 applies to the action: *Narain v. Gill*, 2012 BCSC 1468 at para. 17. Rule 15-1(1) defines the types of actions to which the fast-track rules apply, including actions where the trial can be completed within three days.

- [24] Rule 15-1(6) provides that the fast-track rule "ceases to apply to a fast track action if the court, on its own motion or the application of any party, so orders". Therefore, the Court has jurisdiction to turn a fast-track action into a regular action on its own motion. Once an action is on the fast track, the Court must exercise this discretion judicially and only if it is in the interests of justice to do so. Removal of an action from the fast track is not automatic: *Burt v. Tamesis*, 2021 BCSC 2522 at para. 21.
- [25] The claim as set out in the notice of civil claim was straightforward and met the requirements of R. 15-1(1).
- [26] Additional claims in the defendants' pleadings greatly complicated the matter. In my view, once the defendants' pleadings were filed, the matter no longer met the fast-track criteria in R. 15-1(1). The defendants' pleadings turned what might have been a straightforward debt collection action on the Invoice into a complicated construction case involving allegations of negligence, breach of contract, diminution of value and loss of enjoyment of property. The defendants did not quantify the damages sought by counterclaim and they gave no indication that they would be limited to \$100,000 as R. 15-1(1)(a) prescribes. The value of the counterclaim was unknown throughout.
- [27] It appears that neither party governed themselves within the strict parameters of R. 15-1, despite endorsing many of the pleadings and other documents with the required "Subject to Rule 15-1" endorsement. The examination for discovery of one defendant extended beyond the two-hour maximum, and discovery of the plaintiff was adjourned rather than concluded after two hours. The trial eventually took four-and-a-half days, over the three-day limit in R. 15-1, after which the parties prepared and filed comprehensive written submissions.
- [28] Neither party applied to remove the matter from R. 15-1 until after the trial was complete and judgment rendered. The plaintiff concedes that it should have applied to remove the action from fast track prior to trial, but overlooked doing so.
- [29] Although neither party was able to refer me to any case where a matter was removed from R. 15-1 after trial, I conclude that the Court has the jurisdiction to do so if the circumstances and interests of justice warrant it. Rule 15-1(6) contains no restriction on when a matter can be removed from the fast-track rules.
- [30] I exercise my jurisdiction to order that this action cease to be a fast-track action, pursuant to R. 15-1(6). Since the filing of the defendants' pleadings early in this proceeding, it has not met the criteria for fast-track actions in R. 15-1(1). More importantly, the parties do not seem to have held themselves to the limitations set under R. 15-1 at any stage of this proceeding.

[31] This Court has the power to remove a matter from the fast-track regime after the conclusion of the trial: *Lam v. Chiu*, 2013 BCSC 1281 at paras. 41-42; *Travelbea v. Henrie*, 2012 BCSC 2009 at para. 7. I have found it to be appropriate to do so in the circumstances of this case. While I note that the Court in both *Lam* and *Travelbea* elected not to remove the action from fast track and instead to vary costs under R. 15-1(16), I find that the manner in which this case was conducted is sufficient to distinguish it from those decisions.

[32] Therefore, I order this matter removed from the R. 15-1 fast-track regime.

B. Should the plaintiff be awarded double costs from the date of the Formal Offer?

[33] No.

[34] The rules surrounding formal offers to settle and the award of double costs where a party successfully beats an offer made to the other party are well known. Formal offers are governed by R. 9-1 of the Rules.

[35] The purpose of the R. 9-1 cost provisions are to encourage settlement of matters and penalize parties who unreasonably decline settlement offers: *Middleton v. Howard*, 2012 BCSC 1431 at para. 14, citing *Bailey v. Jang*, 2008 BCSC 1372 at paras. 15-17.

[36] Rule 9-1(6) sets out the following factors to consider when making an order for double costs because of an offer to settle:

- a) whether the offer to settle ought reasonably to have been accepted, either on the date it was served or at a later date;
- b) the relationship between the terms of the settlement offer and the final judgment;
- c) the relative financial circumstances of the parties; and
- d) any other factors the court considers appropriate.

[37] The key consideration is whether the defendants, in all the circumstances, had a reasonable time to consider and accept it: *Middleton* at para. 24. The Formal Offer was open for acceptance for less than seven days.

[38] The plaintiff asserts that when the Formal Offer was delivered, the defendants knew or should have known that the plaintiff was likely to succeed at trial and that their counterclaim was without merit. The plaintiff leans on the fact that the defendants secretly dismantled the Retaining Wall before it could be evaluated, leaving them with no chance of disproving the plaintiff's claim on the Invoice or proving their counterclaim for breach of contract and negligent construction. The plaintiff notes that the issues would have been fresh in the defendants' minds when they received the Formal Offer, because examinations for discovery of both parties occurred less than two weeks before. The plaintiff argues that the evidence given by both parties at their examinations for discovery would have made clear to the defendants that their defence and counterclaim had no chance of success.

- [39] The plaintiff submits that seven days to consider and accept the Formal Offer was reasonable in this context, especially considering it included interest and costs.
- [40] This case is factually distinguishable from Middleton, where an offer to settle was made within a week of trial and expired four days later. At that stage, both parties knew the case that had to be met. Here, the Formal Offer was issued early on in the proceedings. Discoveries had recently commenced, but had not yet completed. The defendants in this case would not yet have fully established the merits of their counterclaim.
- [41] The question of the reasonableness of the defendants' decision not to accept the Formal Offer must be assessed only during the time it was open for acceptance, namely from its delivery to defendants' counsel on March 13, 2020, at 1:25 p.m., until its expiry at noon on March 20, 2020. There is no evidence that deals with precisely when the defendants' counsel actually communicated the offer to the defendants, but I note that the weekend intervened to potentially leave only five business days.
- [42] At the time the Formal Offer was made, there were many issues outstanding regarding both the response to the plaintiff's claim and the counterclaim. Facts were yet to be admitted or determined by the parties. Indeed, weeks following the expiration of the Formal Offer, the plaintiff sent the defendants' counsel a notice to admit facts that were yet to be determined.
- [43] I conclude that the short fuse on the Formal Offer left insufficient time for the defendants to reasonably consider their options. In order to be reasonable, the Formal Offer needed to be left open for a longer period of time. Accordingly, I am not persuaded that the plaintiff is entitled to double costs from the date of the Formal Offer.

III. SUMMARY

- [44] For the reasons noted, I make the following orders:
- a) This matter is removed from the R. 15-1 fast-track regime;
 - b) The plaintiff is entitled to Scale B costs of this action to the date of the Judgment;
 - c) The plaintiff's application for double Scale B cost from and after the Formal Offer is dismissed; and
 - d) Each party shall bear their own costs of all applications made after the date of the Judgment.

"G.P. Weatherill J."

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Prepared on 26 October 2026 · Esheria