

CANADA / JUDGMENT

Dolden v. Vancouver General Contractors Inc.

2020 BCSC 492

COURT

Supreme Court of British Columbia

DECIDED

1 April 2020

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2020 BCSC 492 Dolden v. VGC Vancouver General Contractors Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Dolden v. VGC Vancouver General Contractors Inc., 2020 BCSC 492 Date: 20200401 Docket: S188760 Registry: Vancouver Between: Hugh Dolden Plaintiff And VGC Vancouver General Contractors Inc., doing business as Vancouver General Contractors Defendant And Hugh Dolden Defendant by Way of Counterclaim Before: Master Elwood (In Chambers) Reasons for Judgment Counsel for the Plaintiff: No appearance Counsel for Defendant: C. Mann Counsel for the Proposed Third Party, Puzzle Developments Ltd.: S. Abramson Place and Date of Hearing: Vancouver, B.C. February 25, 2020 Place and Date of Judgment: Vancouver, B.C. April 1, 2020 I. INTRODUCTION

- [1] The defendant VGC Vancouver General Contractors Inc. ("VGC") applies for leave to issue a third party notice against Puzzle Developments Ltd. ("Puzzle"). II. BACKGROUND
- [2] This action arises from a home renovation project. VGC is a general contractor. The plaintiff hired VGC to renovate his house. VGC sub-contracted with Puzzle to complete various aspects of the project, including the supply of labour and materials for the foundation and rebar work.
- [3] The plaintiff filed the notice of civil claim on August 9, 2018, and substantially amended the claim on January 8, 2019. The amended notice of civil claim alleges that VGC breached the terms of an architectural plan agreement and construction contract. The plaintiff also alleges misrepresentation, deceit and negligence against VGC.
- [4] With particular relevance to this application, the plaintiff alleged in the original notice of civil claim that "VGC laid a poured foundation which was completely defective and did not comply with the British Columbia Building Code".
- [5] The plaintiff issued a notice of trial on April 25, 2019, setting the trial for 19 days commencing September 8, 2020. III. ANALYSIS

- [6] Rule 3-5(4) of the Supreme Court Civil Rules provides that a party may file a third party notice within 42 days after being served with the notice of civil claim or "at any time with leave of the court". The courts have established a number of factors to guide the exercise of discretion under Rule 3-5(4), as summarized by Mr. Justice Voith in *Canfor Pulp Limited Partnership v. Siemens Building Technologies*, 2016 BCSC 2089:
- [36] These various considerations have since been synthesized and crystallized so that courts now, in exercising their discretion to grant leave, focus on the following discrete factors:
- a) prejudice to the parties;
 - b) expiration of the limitation period;
 - c) the merits of the proposed claim;
 - d) any delay in proceedings; and
 - e) the timeliness of the application. See *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.*, 2003 BCSC 1573 at para. 9; and *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at paras. 16-17.
- [7] The fundamental question the court must consider is whether there is a greater injustice and inconvenience in permitting the third party claim to proceed as part of the existing action, or for it to proceed separately at a later date: *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192, at paragraph 90.
- [8] There is no limitation issue in this case. For the purposes of this application, Puzzle also acknowledges that the third party claim as pleaded has merit. The real issues are delay, timeliness of the application and prejudice to the parties. A. Delay and Timeliness of the Application
- [9] This application was filed on January 20, 2020, 17 months after the action was commenced and nine months after the notice of trial was issued. VGC maintains that the delay is neither significant nor inordinate.
- [10] This is a complicated construction case, VGC argues. The document production has been extensive. The plaintiff produced his amended list of documents on September 5, 2019. It was only after a review of the documents and an investigation of the plaintiff's claims, VGC says, that it was in a position to determine Puzzle should be named as a third party.
- [11] *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Ltd.*, 2013 BCSC 1741, also concerned a complex construction case (a significantly more complex case, involving the design and construction of a hydroelectric facility). Mr. Justice Goepel dismissed an application to add a third party that was brought on roughly the same timeframe as the application in this case:

- [65] While I accept KWL's comments that there has not been inordinate delay in bringing its application, delay in the context of this application must be measured in the context of issuance of the notice of trial and the trial date itself. KWL has known of the proposed trial date since August 2012 yet waited more than nine months to bring its application. By the time the application was heard the trial was but little more than seven months from commencement.
- [12] Likewise, in this case, VGC has known of the current trial date since April 2019, but did not bring the application to add Puzzle until January 2020. The parties are now less than six months away from the scheduled start of a 19-day trial.
- [13] In addition, VGC has not fully explained why it took so long to determine that a claim for contribution or indemnity could be brought against Puzzle. Although the notice of civil claim was amended and expanded in January 2019, the plaintiff's allegation that the foundation was defective was part of the original pleading. It would have been clear to VGC from the outset of the action that Puzzle was involved in the work on the foundation. VGC contracted with Puzzle for the work, and Puzzle invoiced VGC for the work. I have difficulty understanding in these circumstances why it was necessary for VGC to consider the plaintiff's documents for some five months before it brought this application.
- [14] It is incumbent on a defendant who does not file a third party notice within the 42 day deadline in Rule 3-5(4)(b) to bring an application for leave under sub-rule (a) as soon as possible or else provide a complete explanation for the delay: *Tyson Creek (S.C.)*, at para. 66; *Hadland v. Reems*, 2015 BCSC 115, at para. 27.
- [15] In my view, VGC's delay was substantial in the circumstances of this case, and not adequately explained to justify granting leave at this stage of the proceeding. B. Prejudice
- [16] VGC argues that it will be prejudiced if it is required to commence a separate action, which will add to the time and expense to obtain contribution or indemnity from Puzzle. The court should prefer a single action, VGC argues, in which all of the issues relating to the renovation project and the apportionment of liability can be decided between the various parties at fault for the plaintiff's losses.
- [17] The purpose of third party proceedings is to avoid a multiplicity of proceedings. That purpose is an important factor in an application for leave to issue a third party notice. It is not, however, determinative and must be weighed against other factors, including prejudice to other parties: *Tyson Creek (C.A.)*, at para.24.
- [18] In my view, Puzzle will be prejudiced if it is added to the action at this stage of the proceedings. Puzzle will be rushed to review the documents, conduct discoveries and meet the deadline for expert reports for a trial in early September.

- [19] VGC acknowledges that the trial may need to be adjourned if Puzzle is added as a third party. On the other hand, VGC argues, the current trial date was set by the plaintiff on an ambitious timetable, and the case is still in the early stages of development. VGC points out that the plaintiff did not file a response opposing this application.
- [20] I do not think an adjournment should be presumed so as to allow a late-filed third party notice to proceed. Although the plaintiff did not file a response, I am told that he opposes an adjournment. Prejudice to the plaintiff is presumed if the trial is adjourned. The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. This action was set last April for a trial this coming September. Adding Puzzle at this late date will complicate and delay the proceedings. Moreover, Puzzle says it will issue its own third party notice, naming the subcontractor which supplied and installed the rebar, further complicating the existing proceeding.
- [21] While VGC will suffer some prejudice if it is required to bring a separate action for contribution or indemnity, in the circumstances of this case, I find that this prejudice is outweighed by the prejudice to the plaintiff and the inconvenience in permitting the third party claim to proceed as part of the existing action. IV. CONCLUSION
- [22] The application by VGC for leave to file a third party notice is dismissed with costs to Puzzle. "Master Elwood"

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Prepared on 29 October 2026 · Esheria