

CANADA / JUDGMENT

Dollar Tile Distributors Ltd. v. Pacific Gate Development Group Ltd.

2022 BCSC 2505

COURT

Supreme Court of British Columbia

DECIDED

6 December 2022

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2022 BCSC 2505 Dollar Tile Distributors Ltd. v. Pacific Gate Development Group Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dollar Tile Distributors Ltd. v. Pacific Gate Development Group Ltd.,

2022 BCSC 2505

Date: 20221206

Docket: S222862

Registry: Vancouver

Between:

Dollar Tile Distributors Ltd.

Plaintiff

And

Pacific Gate Development Group Ltd.,

Tom Trung Thanh Nguyen

Defendants

Before: The Honourable Mr. Justice Tindale

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S.H. Visram

Counsel for the Defendants:

W. Ryan

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 6, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 6, 2022

- [1] THE COURT: This is a notice of application brought by the plaintiff, Dollar Tile Distributors Ltd. ("Dollar Tile") seeking judgment against the defendants, Pacific Gate Development Group Ltd. ("Pacific Gate") and Tom Trung Thanh Nguyen, in the amount of \$21,181.92, as well as their costs.
- [2] The defendants, in their application response filed October 18, 2022, are opposed to this relief.
- [3] The factual basis as set out in the notice of application is that the plaintiff is in the business of supplying engineered hardwood flooring. The plaintiff, at the request of Pacific Gate, supplied hardwood flooring to 2545 West 15th Avenue in Vancouver, B.C. and charged \$8,029.11. They also supplied hardwood flooring to property at 2715 East 57th Avenue, Vancouver, B.C., and the charge for that was \$11,797.13. The defendant, Pacific Gate, did not make payments for either of those two jobs, and there is an amount that is owing of \$21,181.92.
- [4] The plaintiff in their legal basis relies on s. 10 of the Builders Lien Act, S.B.C. 1997, c. 45 [BLA] that provides:

Contract money received constitutes trust fund

10 (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

- (2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

- (3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.
- (4) Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.
- [5] The plaintiff also relies on the law of unjust enrichment and says that the defendants have derived a benefit from the payment to them by the owners of the first and second properties that they worked on to their detriment and there is no juristic reason that they should be allowed to retain the \$21,181.92, and the defendants, Mr. Nguyen and Pacific Gate, have not filed a response to the notice of civil claim, although they have filed an application response.
- [6] I have an affidavit in support of the plaintiff's application from Judy Chin, who is a businesswoman and the principal of Dollar Tile. She goes through the materials supplied and the work that was done for Pacific Gate.
- [7] There were default judgments obtained against the defendant, Pacific Gate, two different judgments, one for the amount of \$11,793.13 and one for \$8,029.11. They were obtained in the Provincial Court of British Columbia. There is judgment against that defendant.
- [8] Ms. Chin deposes that the defendant, Pacific Gate, has embezzled the monies received by it for the materials supplied by the claimant. She attaches as Exhibit C as a true copy, a letter from the Canada Revenue Agency ("CRA") with respect to its audit of the defendant, Pacific Gate.
- [9] She says Mr. Trung, who I take she means Mr. Nguyen, -- and this is where I have some difficulties with the application. There is nowhere specifically that states what relationship Mr. Nguyen has to the defendant, Pacific Gate, though there is a letter addressed apparently to him and Pacific Gate from the CRA, and on the default judgments from the Provincial Court it does reference Mr. Nguyen as an owner. That is a box that is ticked off on the form but he did not attend at any of those hearings.
- [10] What the letter from the CRA of December 6, 2019 basically deals with is unreported revenue from Pacific Gate, and it says on the first page of that letter:

PGDG provided 29 signed agreements from April 21, 2013 to April 23, 2015. The construction agreements could not be matched to the general ledger or to bank deposits. There were no progress billings or invoices in the records. Only some of the deposits on the bank statements identified a customer last name.

We identified 27 additional projects without agreements in the audit period, from our review of the building permits issued, home warranty registrations, occupancy permits issued, and invoices paid by PGDG. Some of the customers were your family members.

It appears that PGDG did jobs that was not reported in revenue, however the costs associated with these jobs were paid for and expensed by PGDG.

[]

You used the sub-contractors of PGDG and the funds in the PGDG bank account for personal jobs. Costs of goods sold included payments for projects owned by you and by related parties . . . , which did not match to any construction agreements or revenue reported by PGDG. PGDG did not charge you or the related parties for any of the projects, but claimed the purchases on the T2 returns.

[11] Then it gives some examples. It talks about a laneway house that was constructed at 3646 Tanner Street during 2015-2016, a property at 3454 Worthington Drive, properties at 3329 Trutch Street and at 3195 East Broadway Avenue.

[12] The argument, as I understand it from the plaintiff, is that Mr. Nguyen used in effect funds that were owed to the plaintiff for personal reasons. So, either pursuant to s. 10 of the BLA, these monies were to have been held in trust such that Mr. Nguyen would be liable for them, or that there was unjust enrichment with regard to Mr. Nguyen and Pacific Gate, though I am more focussed on Mr. Nguyen because there is already judgment against Pacific Gate.

[13] Those are the arguments. The difficulty I am having is I have no dates on these materials in the sense of when this work was completed or done. I have an affidavit in support of the defendants' position from Barbara Jean Ryan that attaches an occupancy permit that has a date in 2018, with the inference that could be drawn the job was completed in 2018. I do not have any specific dates as to when this work was completed or even done, and so the difficulty I am having is drawing the connection between the work that was done, the materials supplied by the plaintiff to Pacific Gate, and the funds that are referred to in the Canada Revenue Agency letter as being used for personal reasons or projects of Mr. Nguyen.

[14] Setting aside the other arguments, I am not seeing how these funds match the funds being referred to in the CRA letter. That is a significant difficulty I am having, is how I get to the point of saying that these monies included monies owed to Dollar Tile. I just do not see the connection because I do not have any dates on any of the materials of when the work was done. I do not know if it was done in 2015, 2016 or 2018, which makes the letter from the CRA of little consequence in this application in the sense that I would have to draw the inference that the monies that the CRA is talking about being used for personal projects and Mr. Nguyen includes the monies owed to the plaintiff without any dates to show that those materials were expended in the period of April 21, 2013 to April 23, 2015.

[15] Further, there is an argument by the defendants that s. 14 of the BLA, which reads:

Limitation period

14 An action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after

- (a) the head contract is completed, abandoned or terminated, or
- (b) if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available.
- [16] On the limited materials I have for dates, it would appear that the action pursuant to s. 10 is statute barred by the BLA. The plaintiff did say there would be an argument for postponement because they did not receive the letter from the CRA until -- or even 2021 when there was a payment hearing. Again, I am having difficulties connecting that the CRA letter relates to any of the monies owed to the plaintiff.
- [17] I am having a difficulty there. I just do not see the connection that I can say these were in fact trust funds that the CRA is referring to that included money from Dollar Tile, and that goes to the arguments with regard to unjust enrichment on behalf of Mr. Nguyen or even tracing because I just do not have the material before me to as I colloquially said connect the dots between the monies owing to the plaintiff and whether or not those were monies that were, I suppose, in Ms. Chin's words, embezzled by Mr. Nguyen from the plaintiff as opposed to other companies or people.
- [18] I am not satisfied that, on the evidence I have before me, that I can conclude that Mr. Tom Nguyen, the defendant/respondent, used monies which were owed to Dollar Tile, trust monies, for his own personal reasons based solely on the affidavit of Ms. Chin and the CRA letter, and for that reason I am not prepared to find that Mr. Tom Nguyen personally would be indebted to Dollar Tile for the \$21,181.92.
- [19] There is evidence, as I said already, that Pacific Gate already has an order against them that they owe the \$21,181.92 to Dollar Tile. I am not inclined to make a second duplicate order in that regard.
- [20] For those reasons I am dismissing the notice of application.
- [21] CNSL W. RYAN: I believe the application was an application for just summary judgment, is that correct?
- [22] THE COURT: Given the nature of the relief, you would think so but I do not think it specifically says that.
- [23] CNSL W. RYAN: So obviously our position is, is that the action should be dismissed with costs to the defendant. That is the action.
- [24] CNSL S. VISRAM: Justice, this was not an application for a summary trial pursuant to Rule 9-7 of the Rules of Court. Essentially it is an application in the nature of a default judgment in the sense that there was no response to civil claim that was filed. In my respectful submission, the consequence of the court's ruling is that as far as the default judgment is concerned the court has declined to grant that but that does not stop my client from not proceeding to trial and providing additional evidence in that regard.

[25] THE COURT: As I said, the notice of application does not specifically say it is there for a summary trial and it does say on the third page, the matters within the jurisdiction of a judge as the plaintiff is seeking default judgment against the defendant, Tom Thanh Nguyen.

[26] I am not, based on the evidence and submissions, inclined to dismiss the notice of civil claim. I am dismissing the notice of application.

[27] Costs to the defendant.

[28] CNSL W. RYAN: Thank you.

[29] CNSL S. VISRAM: Thank you.

"The Honourable Mr. Justice Tindale"

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