

CANADA / JUDGMENT

Douglas R. Johnson, Architect Ltd. v. 0998823 B.C. Ltd.

2025 BCSC 774

COURT

Supreme Court of British Columbia

DECIDED

25 April 2025

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2025 BCSC 774 Douglas R. Johnson, Architect Ltd. v. 0998823 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Douglas R. Johnson, Architect Ltd. v. 0998823 B.C. Ltd.,

2025 BCSC 774

Date: 20250425

Docket: S251917

Registry: New Westminster

Between:

Douglas R. Johnson, Architect Ltd.

Plaintiff

And

0998823 B.C. Ltd. and Mann Development (Main St) Inc.

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

C.B. Elder

B. Nguyen

Counsel for the Defendants:

M. Magaril

Place and Date of Hearing:

New Westminster, B.C.

April 9, 2025

Place and Date of Judgment:

New Westminster, B.C.

April 25, 2025

I. Introduction

- [1] The plaintiff commenced this action on December 15, 2023, seeking to recover on unpaid accounts for architectural services provided to the defendants. Just days after the claim was filed, and before the defendants had responded to it, the parties reached a settlement. The settlement agreement contemplated that the defendants would pay part of the amount claimed in exchange for the plaintiff's promise to discontinue the action and release its associated liens and certificates of pending litigation ("CPLs") filed on title to the defendants' lands.
- [2] In carrying out the settlement, the defendants paid the agreed upon amount and the plaintiff released the liens and CPLs. However, due to an oversight, the notice of discontinuance was drafted and signed but never filed.
- [3] No further steps were taken in the action until November 4, 2024, almost one year later, when the defendants filed a response to the claim and a counterclaim seeking damages flowing from alleged deficiencies in the architectural services that the plaintiff had provided.
- [4] The plaintiff now applies for a declaration that the action has been settled and an order to enforce the settlement by way of a stay of these proceedings. In the alternative, the plaintiff seeks an order deeming the notice of discontinuance to have been filed on December 22, 2023, nunc pro tunc, and striking the defendants' response and counterclaim as an abuse of process.
- [5] The defendants oppose the application, arguing that the settlement agreement did not provide for a release of any claims that the defendants might have had against the plaintiff. In addition, the defendants say that the plaintiff is not entitled to the relief it seeks because it does not come to court with clean hands, having breached an undertaking to file the notice of discontinuance after receiving the settlement funds.

- [6] For the reasons that follow, I have concluded that, in filing the response and counterclaim in those circumstances, the defendants have abused the court's process and that the plaintiff is therefore entitled to a stay of these proceedings.

II. Background Facts

- [7] The origin of this dispute lies in two contracts between the parties, both of which called for the plaintiff to provide architectural services to improve lands belonging to the defendants. The plaintiff, believing those services had been provided as called for by the contracts, rendered a series of invoices in 2021. The defendants failed to pay those invoices in full and, according to the plaintiff, the amount of \$465,382.88 remained outstanding.
- [8] After its collection efforts proved unfruitful, the plaintiff, represented at the time by another law firm, commenced this action on December 15, 2023, seeking payment of the balance claimed. At the same time, plaintiff's former counsel also filed two builders lien claims and caused two CPLs to be placed on title to each of the two affected properties.
- [9] Four days later, on December 19, 2023, the defendants' former counsel wrote to the plaintiff's former counsel offering to settle those claims for \$237,396.93 in exchange for the discharge of the lien claims and CPLs.
- [10] The two lawyers spoke on the telephone on December 21, 2023. Counsel for the plaintiff advised that he would respond to the offer after receipt of the settlement funds, which would be held in trust.
- [11] Later that day, counsel for the defendants sent the settlement funds to counsel for the plaintiff. The accompanying letter stated as follows:

Further to the above captioned claims by your client, Douglas R. Johnson Architect Ltd. and out telephone discussions earlier today, please see attached the following:

1.A copy of our trust cheque in the amount of \$237,396.93 made payable to your firm in trust (the "Settlement Funds");

2.A copy of the deposit slip confirming direct deposit of the Settlement Funds in your trust account.

The Settlement Funds are sent to you on the basis of our undertakings that you will deliver to us before noon tomorrow the following:

1.A release of all claims of builders liens registered on behalf of your client as against the property in the ownership of the Mann group to include the properties registered in the name of 0998823 B.C. Ltd. and Mann Development (Main St.) Inc.;

2.A release of the CPL's registered against properties which are subject to your clients claims of builders lien;

3. You will provide your written confirmation that your office will attend to a dismissal of all actions commenced by your client with respect to the claims made.

The Settlement Funds are paid in full settlement of your client's claims as against the Mann group and we look forward to receiving the required deliverables set out above as soon as possible.

[12] On the following day, December 22, 2023, counsel for the plaintiff sent counsel for the defendants an email stating as follows:

I've received instructions from my client to accept the offer and authority to execute the attached releases of builders liens and certificate of pending litigation on its behalf. I've also attached an endorsed consent dismissal order which I will submit for entry.

[13] Later that day, counsel for the plaintiff confirmed that the lien claims and CPLs had indeed been discharged. The lawyers then had another telephone call. During that call, counsel for the plaintiff expressed the concern that the consent dismissal order may not be accepted for filing in the court registry because the defendants had yet to file a response to the claim. The lawyers therefore agreed that counsel for the plaintiff would simply file a notice of discontinuance instead. Counsel for the plaintiff then prepared and endorsed a notice of discontinuance and instructed his office to file it, but, due to an oversight, it was never filed.

[14] Nearly a year later, on November 4, 2024, the defendants, now represented by their current counsel, filed a response and counterclaim seeking damages for negligence, negligent misrepresentation, breach of contract and restitution, all in relation to the same architectural services for which the plaintiff had been seeking payment in the notice of civil claim. There is no suggestion in the evidence adduced on this application that the defendants were unaware of the facts giving rise to the counterclaim when the settlement was reached the year before.

[15] On November 27, 2024, counsel for the plaintiff, also newly appointed, wrote to counsel for the defendants to object to the filing of the response and counterclaim, asserting that those filings were in breach of the settlement, and, as such, an abuse of process. The letter offered to resolve the issue by way of a consent dismissal of the plaintiff's claim and a confirmation by the defendants that the plaintiff's limitation defences, accrued as of November 4, 2024, were preserved. The letter concluded by stating that if the offer is not accepted, then the plaintiff would be bringing an application to enforce the settlement agreement and to have the response and counterclaim struck.

[16] Counsel for the defendants did not respond for several months, despite being prompted for a response on February 6, 2025. Then, by email sent March 3, 2025 (a Monday), counsel for the defendants rejected that offer and demanded that the plaintiff file a response to the counterclaim by the following Friday, failing which the defendants would seek default judgment.

[17] Counsel for the plaintiff responded by email on the following day, March 4, 2025, stating as follows:

As advised in our letter of November 27, 2024, failing your clients' acceptance of our client's proposal, our instructions are to bring an application to enforce the settlement agreement and to strike the response and counterclaim which were improperly filed. We will obviously not be filing a response to a counterclaim which we are going to seek to have struck.

I expect we will have our materials to you by March 13, 2025. Please provide us your availability for the hearing on the following days: April 2-3 or 9-11. If we have not heard from you by the time we are ready to file our materials we will set it down unilaterally on one of those dates.

Should you receive instructions to seek default I trust you will advise the Court that have heard from counsel to [the plaintiff] and that we have advised of our intention to bring this application.

Finally, I am sure you are aware of the law which supports an award of special costs when a party is required to petition the court to enforce a settlement agreement and therefore this is your clients' notice that we will be seeking special costs.

[18] The plaintiff filed this application on March 14, 2025. Prior to the hearing before me, defendants' counsel sought and obtained a default judgment on the counterclaim.

III. Discussion

[19] Counsel were unable to find any authority directly on point. However, both sides argue that the outcome turns on settled principles of law. I agree.

[20] As the defendants note, the settlement agreement did not include a release of any claims they may have had against the plaintiff. However, it did contemplate, and indeed was predicated upon, this action being brought promptly to an end upon payment of the settlement funds. That was originally supposed to occur by way of a consent dismissal order but, due apparently to a mutual legal error by the lawyers who were then representing the parties, they ultimately agreed to achieve that goal by way of a notice of discontinuance. Regardless, the parties did not intend for this action to survive beyond the completion of the settlement.

[21] The only reason this action did survive into 2024 and beyond was the inadvertent failure to file the notice of discontinuance as promised. However, the defendants were not prejudiced by that failure. There was never any suggestion that the plaintiff had deliberately chosen not to file the notice of discontinuance in order to be in a position proceed with the claim after the settlement was reached.

[22] For their part, the defendants never insisted in the year that followed that the plaintiff fulfill its promise to bring the action formally to an end. Instead, they opted almost a year later to take advantage of the oversight by responding to the claim, although already settled, so that they could also file, at the same time, a counterclaim. It appears to be common ground that

the cause of action advanced in the counterclaim would have been statute-barred had it been filed as a separate action at that time. The defendants' objective in proceeding in that manner appears to have been to use the "existing" claim of the plaintiff to circumvent that expired limitation period.

- [23] I agree with the plaintiff that the defendants' conduct in doing so amounted to an abuse of process. In particular, the defendants had no right to respond to a claim which the parties had already settled, let alone to seek, by way of counterclaim, to claw back some or all of the funds they had paid the year before pursuant to that settlement.
- [24] The doctrine of abuse of process confers a broad jurisdiction on the court: *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5. The jurisdiction has been held to include the power to stay litigation brought to circumvent or undermine a settlement agreement previously entered into: *Daum v. Borsuk*, 2020 BCSC 2013. The court may enforce a settlement agreement by staying proceedings brought in contravention of its terms: *Hutton v. Hutton*, 2020 BCSC 2046.
- [25] I have concluded that these proceedings should be stayed to remedy the defendants' abuse of process.

IV. Disposition

- [26] The application is allowed. I am ordering these proceedings stayed.
- [27] As the successful party, the plaintiff is entitled to its costs. Moreover, I agree with the plaintiff that those costs should be payable as special costs. Not only have I found that the defendants abused the process of the court by filing the response and counterclaim as and when they did, the defendants' conduct in obtaining default judgment on the counterclaim knowing that this application was pending, and in the face of plaintiff counsel's email of March 4, 2025, is also deserving of rebuke.

"Milman J."

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