

CANADA / JUDGMENT

Gillmann v. Strege

2002 BCSC 1215

COURT

Supreme Court of British Columbia

DECIDED

15 August 2002

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Source record**2002BCSC1215****Citation:** Gillmann v. Strege et al.**Date:** 20020815
2002 BCSC 1215**Docket:** 21914/23979
Registry: Kelowna
IN THE SUPREME COURT OF BRITISH COLUMBIA
21914**BETWEEN:** HANS GILLMANN
PLAINTIFF**AND:** HEINZ STREGE, RAIF FLEIHAN,
LAKE COUNTRY MOTOR INN LTD. AND RAIF HOLDINGS LTD.
DEFENDANTS
- AND -
23979**BETWEEN:** LEONARD MELNYK
PLAINTIFF**AND:** RAIF HOLDINGS LTD., HEINZ STREGE, LAKE COUNTRY MOTOR INN LTD.,
WORKERS COMPENSATION BOARD, HANS GILLMANN, AND RAIF FLEIHAN
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BROOKE

Counsel for the Plaintiff,

H. Gillmann:

C. Fraser

Appearing on his own behalf:

L. Melnyk

Counsel for the Defendants,

R. Fleihan and Raif Holdings Ltd.:

L. Turner

Date and Place of Trial:

May 28-31, 2002

Kelowna, BC

- [1] By Reasons delivered January 8, 2002 the applications of the defendants Raif Fleihan and Raif Holdings Ltd. to dismiss these actions for want of prosecution were dismissed. It was held that summary trial pursuant to Rule 18A was appropriate and it was ordered that cross examination of the deponents in chambers upon their affidavits was necessary to find the relevant facts, such that judgment could be given. For four days in the week ending May 31, 2001 some of the deponents were cross examined on their affidavits, and re-examination was permitted. These Reasons are the result.
- [2] The affidavit evidence was reviewed in the Reasons delivered January 8, 2002. No useful purpose will be served in repeating that review except where the viva voce evidence either conflicts with the affidavit evidence or is inconsistent with that evidence. I propose to address firstly the claim of Mr. Gillman and secondly the claim of Mr. Melnyk. First of all, some introductory remarks are appropriate.
- [3] In 1992 the defendant, Mr. Strege, saw an opportunity for profit when the Stetson Motel in Kelowna was offered for sale on the condition that it be removed from the site. Mr. Strege and the company that he controlled, 409728 B.C. Ltd. (now Lake Country Motor Inn Ltd.), acquired the buildings and a site for the buildings at Winfield. However, Mr. Strege was not able to move the buildings directly from Kelowna to Winfield and they were moved to an intermediate site on an Indian reserve called Duck Lake where they remained for more than

a year and a half. That temporary occupancy was brought to an end when the locatees for the band seized the buildings and offered them for sale by auction. In the meantime, the mortgage holder of the Winfield property took foreclosure proceedings. Mr. Strege's dream was becoming a nightmare. All, however, was not lost. The defendant, Mr. Fleihan, and the company that he controlled, Raif Holdings Ltd., stepped in. The mortgage and the foreclosure proceeding in respect of the Winfield property were purchased by Raif Holdings Ltd. and Raif Holdings Ltd. loaned Mr. Strege's daughter funds with which to purchase the buildings at auction. Mr. Strege and Lake Country Motor Inn Ltd. lost whatever interest they had in the Winfield property as well as whatever interest they had in the buildings at Duck Lake. At this juncture Mr. Strege was motivated to demonstrate that his dream could become a reality even though he might not profit by it. He did, however, enter into an agreement with Raif Holdings Ltd. on August 20, 1993 to move the buildings from Duck Lake to Winfield for the total sum of \$35,000.00. The movement of the buildings was undertaken between September 29, 1993 and November 2, 1993. The work to move the buildings included lifting them from their temporary location at Duck Lake, placing them on a trailer and transporting them to the Winfield property, and then lifting the buildings again to place them upon wooden blocks that had been placed on the Winfield property to support the buildings. Steel beams were used for the purpose of lifting and transporting. Some steel beams were used to support the buildings on the Winfield property. Mr. Gillmann was engaged to move the buildings to Winfield and to provide steel beams for that purpose. Mr. Melnyk had earlier provided steel beams for the movement of the buildings from Kelowna to Duck Lake. He was not involved in the lifting, transporting or placement of the buildings at Duck Lake or at the Winfield site. Mr. Gillmann seeks to be paid for his work as well as for his steel beams which he says were incorporated into the buildings at Winfield. The defendants, Mr. Fleihan and Raif Holdings Ltd., say that Mr. Gillmann was unable to complete the work and that it was necessary to hire a completion contractor. They also say that Mr. Gillmann negligently performed the work and that one of the buildings sustained damage estimated variously at \$40,000.00 or \$100,000.00 and far in excess of any monies that they might owe Mr. Gillmann. Mr. Melnyk on the other hand says that he rented steel beams to Mr. Strege and the company that he controlled, and that those steel beams have a value of more than \$45,000.00. He seeks a declaration of entitlement to a builders lien and judgment.

- [4] It is not inappropriate at this juncture to observe that these are not the first actions against these defendants for the use of steel beams. Supreme House Movers Ltd. claimed a builders lien and judgment pursuant to a contract made in January 1992 with Mr. Strege and the company he controls. The buildings were moved to Duck Lake and the work was billed and paid for in February 1992. However, the steel beams were not returned and in December 1993 and June 1994 builders liens were filed against the Winfield property to which the buildings had, by that time, been removed. By Reasons for Judgment delivered January 30, 1997 (*Supreme House Movers Ltd. v. Strege* (1997) 38 B.C.L.R.(3d) 126), the claim of lien was dismissed with leave given to the plaintiff to amend its statement of claim to plead and prove a claim in quantum meruit. The steel beams as appears by these Reasons for Judgment were

eventually recovered by the plaintiff.

- [5] I now turn to the Gillmann action. The amended statement of claim alleges that Mr. Gillmann moved the buildings to Winfield and rendered an invoice for the cost of the move in accordance with an oral agreement upon which \$16,160.00 remains outstanding. The plaintiff alleges that he provided equipment including steel and wood beams that had not been returned to him and seeks possession of that equipment, or alternatively damages. By their defence the defendants, Mr. Fleihan and the company that he controls, say that the agreement with Mr. Gillmann for the movement of twelve buildings was for a fixed price of \$560.00 for each lift from Duck Lake, transport to Winfield, and lowering at Winfield. In all, they say that the total contemplated cost was \$20,160.00. These defendants say that \$8,201.83 was paid to, or upon the direction of, Mr. Gillmann, that his trucks and crane were seized on October 21, 1993, and that he finally left the job on November 2, 1993. It is alleged that these defendants suffered damages as a result of delay and negligent performance of the contract and that it was necessary for them to engage completion contractors. That summarizes the pleadings.
- [6] In his affidavit filed October 22, 1998, Mr. Gillmann agrees that he was to be paid \$560.00 for each segment of the move, multiplied by twelve units, for a total of \$20,160.00. However, in cross examination he steadfastly denied that and asserted that he was to be paid \$30.00 per hour for his own services and the use of his equipment, and the defendants were to be responsible to pay his employees. Moreover, he denies that the balance owing to him is \$16,160.00 as alleged in the statement of claim and he denies that he ever delivered an invoice as alleged in the statement of claim. When confronted with paragraph 13 of his affidavit of October 22, 1998 where he alleges rendering an invoice for in excess of \$20,000.00 Mr. Gillmann said that was "absolutely wrong". Mr. Gillmann also denied that he authorized third party payments as alleged by the defendants, Mr. Fleihan and the company he controls, but did admit that the receipts exhibited to Mr. Fleihan's affidavit of April 22, 1998 contained signatures that looked like his own. When asked to look at photographs of the Winfield site and identify steel beams shown lying there as his own, Mr. Gillmann said "how would I know". To say that I found the evidence of Mr. Gillmann to be unsatisfactory would be an understatement. He contradicted material allegations in his pleadings, and he contradicted his evidence given by affidavit. Moreover, when asked why he did not provide banking and income tax documents as demanded by the defendants, Mr. Fleihan and his company, he answered "I didn't think it was any of their business". It does not, however, end there. In re-examination Mr. Gillmann said it was not part of his agreement to load the buildings for transport at Duck Lake and to unload them at Winfield. His job, he says, was just to transport the buildings.
- [7] In the result, I am unable to accept much of Mr. Gillmann's evidence. I find that the agreement was that Mr. Gillmann would load, transport and unload each unit at a price of \$560.00 for each segment, and a total price of \$20,160.00. I find that Mr. Gillmann was paid \$8,201.83 (less a hold back of \$820.00) for a net payment of \$7,381.83 (the affidavit of Raif

Fleihan filed April 22, 1994). I find that the defendants, Mr. Fleihan and his company, paid the completion contractor \$3,967.56 (the affidavit of Paul Harder filed January 20, 1999). Of the contract price of \$20,160.00 then, I find that the monies paid to or on behalf of Mr. Gillmann of \$12,169.33, including the cost of completion, results in a balance owing of \$7,990.67. I am not satisfied that Mr. Gillmann was responsible for the delay, nor am I satisfied that the defendants, Mr. Fleihan and his company, have made out that Mr. Gillmann was negligent. Even if he was negligent, there is no satisfactory proof of the damage. In the result, the plaintiff, Mr. Gillmann, will have judgment for \$7,990.67 together with court order interest from November 2, 1993. The plaintiff is also entitled to a lien pursuant to the provisions of the Builders Lien Act and amendments thereto.

[8] I now turn to Mr. Gillmann's claim for the value of the steel beams he alleges to be incorporated into the buildings at Winfield. Mr. Gillmann says that some of those beams he acquired for \$26,000.00 in May of 1988 (affidavit of Hans Gillmann filed October 22, 1998). However, Mr. Gillmann neglected to acknowledge that included within that purchase was a truck and crane, nor is the equipment otherwise specified. In addition, Mr. Gillmann says that he acquired steel beams and blocks from the defendant, Mr. Strege, as payment for a related building movement that does not form part of this action. I note, however, that Mr. Gillmann, who says he was given beams and blocks by Mr. Strege, never took possession of them nor exercised any ownership of them, nor was there any evidence of this equipment being taken into the business as might have appeared in his income tax or financial statements. Despite the unsatisfactory nature of Mr. Gillmann's evidence generally, which I have already referred to, Mr. Gillmann also relies upon the affidavits of two workers, Teddy Allan Jones (who was cross examined in chambers) and Gary Awenose (each of them depose to having attended at the Winfield site where Mr. Gillmann's equipment was seen being used to support the buildings). However, in contradiction to that evidence, Monty Veregen deposes that the beams that were under the buildings at Duck Lake were the same beams that were placed under the buildings at Winfield; and by necessary implication that those were not beams that belonged to Mr. Gillmann. Mr. Veregen was not cross examined on his affidavit. In the result, I am not satisfied that Mr. Gillmann has made out a case for conversion. He has the burden of proof and he has not discharged that burden. Had there been a written agreement or had there been an invoice there might have been some evidence to support Mr. Gillmann's claim. Had he complied with the demand for discovery of documents, disclosure might have supported his claim. In the circumstances, this claim must be dismissed.

[9] I now turn to Mr. Melnyk's claim. Mr. Melnyk says that he rented certain equipment to the defendant, Mr. Strege, in January 1992. The "rental" was not documented at the time by listing the equipment rented or the rental rate for the equipment. The first document generated by Mr. Melnyk was on the stationery of Can-Pro Diving Services Ltd. and dated November 12, 1993. In the twenty-two month interval between the supply of the equipment and the invoice, the buildings had been moved to Duck Lake, sold at auction and moved by the ultimate purchaser, the defendant, Raif Holdings Ltd., to Winfield. The invoice of

November 12, 1993 is addressed to the defendant Heinz Strege. Mr. Melnyk does not allege any agreement with the defendant Raif Holdings Ltd.

- [10] Mr. Melnyk says that the rental value of the equipment for twenty-three months is \$27,600.00, while the replacement value of that same equipment is little more than \$14,000.00. The builders lien and the amount claimed in the statement of claim and the motion for summary trial and judgment is \$45,038.70.
- [11] In cross examination Mr. Melnyk represented himself. He was asked why there was no rental agreement, and responded "that's a good question". He was then asked, having regard to what he says was Mr. Strege's financial frailty, whether he asked for payment in advance and replied "I don't remember". By these slender threads rests Mr. Melnyk's claim.
- [12] In its defence the defendant Raif Holdings Ltd. said simply it had no contract with Mr. Melnyk, that the equipment allegedly supplied is not an improvement, and that the plaintiff is neither a material man, contractor or sub-contractor and in the result the claim of lien is bad. It is also alleged that the lien was in any event filed out of time. Raif Holdings Ltd. also delivered a counterclaim seeking damages for the wrongful filing of the claim of lien.
- [13] I find it curious first of all that Mr. Melnyk did not in any way document his dealings with Mr. Strege. In his cross examination Mr. Melnyk acknowledged that he did not consider Mr. Strege was credit worthy; and yet he not only provided him with equipment without any payment or security but also never delivered any invoices or other claim for money or monies worth. The claim of lien in the aggregate of \$45,038.70 is in respect of equipment and work provided in respect of the movement from Kelowna to Duck Lake. None of the work documented in paragraphs 3 to 24 of the invoice can be seen as within the scope of a builders lien against the Winfield property.
- [14] Mr. Melnyk relies in part upon the affidavit of Gary Britsky who was not cross examined. Mr. Britsky says that the steel beams were obtained from Mr. Melnyk as a rental. He says that Mr. Melnyk purchased wood blocking for Mr. Strege and he also says he knew Maurice Skuba was involved with Mr. Strege but that Mr. Skuba had nothing to do with arrangements to obtain the use of the beams and equipment from Mr. Melnyk. Mr. Skuba, who was not cross examined either, says to the contrary. By his affidavit filed in the Gillmann action November 26, 1998 Mr. Skuba says he purchased material from Mr. Melnyk comprised of steel beams and wood blocking and exhibited to his affidavit are copies of invoices and cheques to support that. Moreover, Mr. Skuba says that the steel beams and wood blocking (the "Material") was used to support the buildings at Duck Lake and that he saw them used for the same purpose at Winfield. The cheques and receipts exhibited to Mr. Skuba's affidavit are all referable to either blocks, lumber and timber on the one hand, or beams and steel beams on the other hand. These purchases were made between January 28, 1992 and February 13, 1992. Some payments were by cash and some by cheque. The payments referable to beams or steel beams are by cash in the amount of \$3,000.00 on February 5, 1992 and cash in a like amount on February 12, 1992. Mr. Skuba seemingly wrote cheques payable

to himself but noted the purpose for the money on the cheques. One receipt was obtained for \$5,000.00 from Mr. Melnyk's brother. In the result, while there is no evidence of how many beams were acquired from Mr. Melnyk or what their dimensions were, there is some evidence to support the purchase of beams from Mr. Melnyk, all of which he denies.

- [15] Mr. Melnyk has the burden of proof. For whatever reason, he did not document what, on the basis of his evidence, was a transaction for an undetermined price with an unreliable contractor. Moreover, despite knowing that the buildings were moved to Duck Lake where they were sold at auction, Mr. Melnyk did not assert a claim to the beams. It was not until the buildings were moved to Winfield that a claim was asserted. In fairness to Mr. Melnyk, based upon the affidavit of the auctioneer John Ritchie, it was made clear to prospective bidders that the steel beams were not included in the buildings being sold by auction. However, Mr. Melnyk took no action to bring his claim to the attention of Mr. Fleihan or to seek any confirmation of that claim from Mr. Strege. I am not satisfied on all of the evidence that Mr. Melnyk or any company of which he had control had any interest in the beams that were used to transport the buildings to Duck Lake and ultimately to Winfield. Even if he did have such a claim he could not look to Mr. Fleihan or Raif Holdings Ltd. without establishing that they knew, or should have known, of his interest. Still less could Mr. Melnyk file a lien for services performed in moving the buildings to Duck Lake and clearly he had no involvement in the movement of those buildings to Winfield. In the result, Mr. Melnyk's claim against Raif Holdings Ltd. is dismissed. Despite my finding that the plaintiff's claim of builders lien was ill founded, I do not find that it was filed with the intent to put wrongful pressure on the defendant Raif Holdings Ltd. It was not only Mr. Melnyk's claim of lien which clouded the title of Raif Holdings Ltd. There was as well Mr. Gillmann's claim and Superior House Movers' claim, as well as a judgment in favour of the Workers' Compensation Board. In any event, no evidence was led that it was the wrongful filing of Mr. Melnyk's claim that frustrated the financing and development of the Winfield property. I mention too that Raif Holdings Ltd. could have (had it had the money) obtained a release and discharge of the claim of builders lien and certificate of pending litigation on payment of security for the lien and costs into court. Accordingly, the counterclaim is dismissed.

CONCLUSION

- [16] The long and convoluted path of these proceedings contains some salutary lessons. First of all, the importance of an agreement and the equal importance of a written agreement. Secondly, the importance of defining the terms of the agreement, i.e. what specifically is the subject of the agreement and what is the price of performance. Thirdly, the importance of contemporaneous records of performance and payment. In order to make a decision a court must find the relevant facts. The relevant facts depend upon the evidence. If the state of the evidence is ambiguous or uncertain, the court may not be able to find the facts necessary to give judgment for the claimant upon whom the burden of proof rests. This applies to summary trials as well as conventional trials. In such cases the result may be seen as unsatisfactory. Such may be the case here. In all of the circumstances of these unhappy

actions, and unless there are offers to settle under Rule 37, I am convinced that each party must bear his or their own costs. In denying Mr. Gillmann costs against Mr. Fleihan and Raif Holdings Ltd., I am mindful of his wilful refusal to comply with the demand for documents. I also wish to add that the claims that I have dealt with are those by Mr. Gillmann and Mr. Melnyk against Raif Holdings Ltd. and Raif Fleihan. The filing of the claim of builders lien and certificate of pending litigation by Mr. Melnyk must be cancelled.

"T.R Brooke, J."

The Honourable Mr. Justice T.R. Brooke

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