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CANADA / JUDGMENT

## Greg Court Developments Ltd. v. Sievert

2014 BCSC 551

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COURT

Supreme Court of British Columbia

DECIDED

1 April 2014

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2014 BCSC 551 Greg Court Developments Ltd. v. Sievert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Greg Court Developments Ltd. v. Sievert,

2014 BCSC 551

Date: 20140401

Docket: 12-0471

Registry: Victoria

Between:

Greg Court Developments Ltd.

Plaintiff

And:

Cory Arthur Sievert and Brie Belle Sievert

Defendants

Before: Master Bouck

Reasons for Judgment

Counsel for the Plaintiff:

A.L. Faulkner-Killam

Counsel for the Defendants:

G.N. Rudyk

Place and Date of Hearing:

Victoria, B.C.

February 13, 2014

Written Submissions filed by the Plaintiff:

Written Submissions filed by the Defendants:

March 7, 2014

March 7, 2014

Place and Date of Judgment:

Victoria, B.C.

April 1, 2014

## Introduction

- [1] This action concerns the construction of the defendants' family home and outbuilding on lands in Metchosin, B.C. Greg Court Developments Ltd. ("GCD") was the general contractor for part of the construction and asserts a lien claim of \$350,000. In addition to the lien claim, the plaintiff seeks unspecified damages for breach of contract and negligent misrepresentation. Except as described below, the defendants reject all of the plaintiff's claims.
- [2] The trial in the action is scheduled for ten days commencing September 29, 2014.
- [3] On this application, GCD seeks various orders relating to the pre-trial discovery process.
- [4] At the commencement of the hearing, GCD's counsel advised the court that some of the relief sought would go by consent. At least, that was Ms. Faulkner-Killam's understanding based on communications with the defendants' counsel. However, both during and subsequent to the hearing, it became apparent that the parties were not in agreement on the terms of any such order. Counsel requested an opportunity to present additional submissions. As the hearing of the application had already exceeded the initial time estimate, written submissions were directed.

## Background

- [5] The events which form the basis of this lawsuit are well particularized in the amended notice of civil claim, the defendants' response and the voluminous affidavit material filed with respect to this application. For the sake of brevity, I will provide a basic summary of the facts which are most relevant to the plaintiff's application. In doing so, I recognize that the parties disagree on many of the facts which will be determinative of this lawsuit.

- [6] The plaintiff is an experienced building contractor who became acquainted with the defendants in 2009. In the summer of 2010, the plaintiff began work on the construction of the defendants' custom home. The construction of the home was carried out over the course of the next year or so, although the parties disagree on the plaintiff's precise periods of involvement. The plaintiff was also involved in the building of a boathouse (also referred to as a boat shelter/barn) on the property in 2009. However, the main issue in the lawsuit involves the home.
- [7] The defendant Cory Sievert is a commercial airline pilot and was working outside of Canada at various times during the home's construction. The defendant Brie Sievert is a homemaker and the main contact with the plaintiff during the construction period. Ms. Sievert was in regular contact with her husband during the latter's absences, the method of such communications being at the core of the plaintiff's application for disclosure orders.
- [8] The parties agree that they entered into a contract with respect to the home's construction. However, they disagree significantly on the terms of that contract.
- [9] The plaintiff says that the construction contract was partly oral and partly written as the plans for the home, including its location and height, were ever-changing. The plaintiff provided a quote which is said to be based on architectural drawings provided by the defendants. GCD believes that the drawings were prepared by Island Timberframe Ltd. ("ITL"), a company hired by the defendants to assist in the home's construction. According to the plaintiff, ITL did not perform its work satisfactorily. The defendants then asked the plaintiff to perform additional and remedial work. GCD says that the defendants agreed to pay for this additional work but have not done so, resulting in this action.
- [10] In contrast, the defendants say that GCD provided a fixed quote in July 2010 and has been paid in full for the work performed under that quote. The document containing the quote is undated and does not refer to any set of plans or drawings.
- [11] In their response, the defendants allege that the plaintiff undertook unauthorized work; performed work deficiently requiring rectification; and failed to account for payments made directly by the defendants to suppliers and sub-contractors. At best, the defendants acknowledge owing the plaintiff about \$30,000 but claim a legal and equitable set-off against that amount. Furthermore, the defendants say that GCD has never provided a final invoice for the work allegedly performed.
- [12] The parties agree that a meeting was held between them in November 2011 for the purpose of sorting out what monies, if any, were owed to the plaintiff. Before or during that meeting, various documents were reviewed, including "hand printed" notes prepared by the plaintiff in support of its claim. Greg Court, the principal of GCD, says that some documents were provided to the defendants for photocopying purposes but never returned. Mr. Court deposes that these documents would greatly assist the plaintiff in proving its claim. Mr. Sievert says that any documents provided were in fact copied and returned to the plaintiff.

- [13] The plaintiff commenced this action in February 2012. A response was filed by the defendants the following month.
- [14] The defendants have delivered four lists of documents, the first in June 2012 and the fourth, shortly before this application was heard. The plaintiff has delivered seven lists of documents.
- [15] By way of a consent order, the parties have obtained documents from several third parties involved in the construction of the home, namely ITL, the District of Metchosin, McIlvaney Riley Land Surveying Inc. and J.E. Anderson & Associates.
- [16] The plaintiff has attempted to obtain documents from one Gary Streight who is purported to be the author of some of the architectural drawings used in the construction of the boathouse.
- [17] Examinations for discovery of the parties took place in mid-May 2013. The defendants were each discovered for nearly one full day. The parties agree that the examinations were adjourned. The plaintiff made a number of requests for additional information and documentation, most of which the defendants agreed to either obtain and produce or at least make efforts to do so.
- [18] Also in May, the defendants issued a demand for particulars of the plaintiff's \$350,000 lien claim. Receiving no response within the requisite time frame, an application was brought for an order requiring delivery of those particulars. In September 2013, the particulars were provided without the necessity of a court order.
- [19] In October 2013, the plaintiff amended its notice of civil claim to include, among other things, a claim for payment related to the 2009 construction of the boathouse. The claim for damages for negligent misrepresentation was also added.
- [20] In November 2013, the plaintiff issued a written demand requiring the defendants to preserve all electronic information relating to this lawsuit including the hard drives and/or servers connected to electronic devices.
- [21] The plaintiff alleges that electronic messages and other data in the possession or control of the defendants would assist in proving its claim. Those communications would be between not only the defendants personally, but also with third parties involved in the home's construction.
- [22] The defendants used various email accounts/addresses to communicate with each other and third parties during the construction period. Some of those accounts have been closed (well prior to the November 2013 notice); passwords for other accounts have been lost or forgotten. At least one email address belongs to Ms. Sievert's sister who is not involved in this lawsuit in any capacity. The defendants depose that efforts to retrieve information from these past or closed accounts have been unsuccessful.

[23] Between May and December 2013, the plaintiff followed up on the requests for information outstanding from the defendants' examinations for discovery. Some of the information has now been provided. During this same period, the parties explored the possibility of a case planning conference and went so far as to exchange informal proposals. Ultimately, the plaintiff was dissatisfied with the defendants' disclosure efforts and brought this application.

## Remedies Sought

[24] The plaintiff seeks the broadest of orders, premised on allegations that the defendants have been dilatory, obstreperous and generally uncooperative in meeting their disclosure duties. In most thorough submissions, plaintiff's counsel outlines "Badges" in the defendants' conduct which are said to prove these allegations. The Badges include the defendants' recent production of annotated plans [obtained from a third party] and the apparent piecemeal and incomplete disclosure of the electronic addresses used by each of the Sieverts during the construction period as well as corresponding electronic messages exchanged between themselves and third parties.

[25] Not surprisingly, the defendants reject any such characterization of their actions or conduct. Indeed, the defendants suggest a compromise or consent to the various remedies sought by the plaintiff as they too wish to discover the truth of the parties' dealings.

[26] Central to the relief sought by the plaintiff is a finding that the defendants have misconducted themselves with respect to their disclosure obligations. Having now reviewed the affidavit material in more detail, including transcribed portions of the defendants' examinations for discovery, I am unable to make that finding. Such a finding remains within the purview of the trial judge. However, the defendants offer plausible and reasonable explanations for the conduct or omissions criticized by the plaintiff. The veracity of the defendants' explanations will need to be tested at trial or even at the continued examinations for discovery. While it is appreciated that the disclosure sought by the plaintiff is intended for that very purpose, I have concluded that the compromise more or less along the lines suggested by the defendants will achieve the desired objective of disclosure in a proportionate manner and allow the train of inquiry to continue.

[27] I will now address each of the orders sought by the plaintiff in its notice of application.

1. That the Defendants, Cory Arthur Sievert and Brie Belle Sievert, shall produce forthwith all documents within their possession or control pertaining to the construction of residential premises on 255 Pearson College Drive, including but not limited to those documents set out on the attached Schedule "A" (the "Defendants' Documents").
2. That the Defendants, Cory Arthur Sievert and Brie Belle Sievert, shall produce passwords for all hosted email accounts used or controlled by them to their counsel forthwith.

- [28] Schedule "A" refers to "any and all documentation created or recorded in paper or electronic form pertaining to the facts and matters in issue" and more specifically, the hard drives of the defendants' personal and laptop computers and the contents of all hosted personal email accounts used by the defendants between August 2009 and November 2011. Other categories of documents are also particularized.
- [29] This proposed order would allow the plaintiff an unrestricted search of the defendants' electronic devices, including the hardware. The purpose of the order is to retrieve not only readily available electronic information, but also the content of any deleted email accounts.
- [30] The compromise suggested by the defendants is as follows:
- (a) The Defendants deliver up their personal computers (two laptops) to a jointly retained expert;
  - (b) the expert then:
    - (i) make a copy of the computers' hard drives;
    - (ii) make a copy on compact disc of "all user-generated data files, e-mail and instant messaging communications which may pertain to any activities which may be related to the construction of the residential premises and the boatshed/barn at 255 Pearson College Drive, Metchosin, B.C, covering the period of time from January 1, 2010 through November 25, 2011, inclusive".;
    - (iii) make a list of the files so copied;
    - (iv) provide the compact disc and file list to the solicitor for the Defendants and
    - (v) provide a copy of the computer file list to the solicitor for the Plaintiff.
  - (c) upon receipt of the information from the expert, the solicitor for the Defendants, within 21 days of receipt:
    - (i) provide a further list of documents disclosing all relevant computer documents so obtained and
    - (ii) provide a copy of all such documents other than those over which privilege might be claimed.
- [31] The defendants also agree to solely bear the cost of retaining the expert.
- [32] The plaintiff submits that the defendants' proposal achieves nothing more than what has occurred to date. A broader search will allow the recovery of information "notionally deleted but recoverable by a professional". Further, the plaintiff says that the defendants' methodology might result in the destruction of metadata particular to a specific files' creation.
- [33] In their submissions, the defendants suggest that deleted files can indeed be recovered.

- [34] This aspect of the plaintiff's application requires the court to balance the objective of proper disclosure with an individual's privacy rights: *Desgagne v. Yuen*, 2006 BCSC 955; *Park v. Mullin*, 2005 BCSC 1813; *Ireland v. Low*, 2006 BCSC 393; *Privest Properties Ltd. v. W.R. Grace & Co.* (1992), 74 B.C.L.R. (2d) 353 (C.A.); *Bishop v. Minichiello*, (2009) BCSC 358.
- [35] In my view, there is neither the factual nor legal foundation for making the broad order proposed by the plaintiff. The terms of that order are akin to the "authorization to search" prohibited by the court: *Park v. Mullin*; *Desgagne v. Yuen* at para. 20; *Privest Properties Ltd.* at paras. 39 and 40. The proposed order fails to address (let alone protect) the privacy rights of the defendants, not to mention those individuals who may have access to these devices, such as the defendants' minor children and third parties who have communicated with the defendants on matters completely unrelated to this lawsuit.
- [36] Also, as a matter of proportionality, the search parameters suggested by the defendants ought to proceed before the court even considers additional searches of metadata and closed email accounts.
- [37] As an aside, on any future application, there might also be an expectation by the court for expert evidence on what can be accomplished with additional searches proposed by the plaintiff. Here, the plaintiff's evidence is based on the information received from counsel who obviously has a sophisticated understanding of the electronic world. Mr. Court certainly could not be cross-examined on his evidence in that regard. The defendants, at least in their written submissions, appear to contradict some of the technological information put forward by the plaintiff.
- [38] While the disclosure of electronic information has become commonplace in litigation, the workings of electronic devices are not quite at a level of notoriety to allow the court to take judicial notice of these devices' functions, operations and abilities.
- [39] In the result, the order will go in the terms proposed by the defendants, with the following modifications:
- a. the search parameters will be between August 2009 and November 2011. Documents relating to the parties' dealings from August 2009 onwards are relevant to the plaintiff's claims as pled in the amended notice of civil claim; and
  - b. paragraph (a) should state that the defendants deliver up their two personal computers and any data enabled phones in their possession and control and in use between August 2009 and November 2011 to the jointly retained expert; and
  - c. the plaintiff is at liberty to apply for a further order regarding disclosure of electronic information after this term of the order is complied with, or in any event, after June 30, 2014.
3. That the Defendants, Cory Arthur Sievert and Brie Belle Sievert, shall serve a solicitor's affidavit verifying their list of documents within 28 days of the date of this Order.

[40] The court may order a party to serve an affidavit verifying a list of documents: Rule 7-1(8) of the Supreme Court Civil Rules ("SCCR"). In *Copithorne v. Benoit*, 2010 BCSC 130, Schultes J. summarized the law applicable to this relief:

[11] Rule 26(3) of the Rules of Court provides that a court may order that a party provide an affidavit verifying a list of documents. A useful authority on this issue is the decision of Mr. Justice Legg (as he then was) in *Foundation Co. of Canada Ltd. v. Burnaby (District)*, [1978] B.C.J. No. 557 (S.C.) at para. 7:

When some documents which are significant to the defence or claim of one party, have, for whatever reason, been omitted from any list delivered under Rule 26(1), in the absence of any adequate explanation or reason for such omission, an order directing the delinquent party to deliver an affidavit verifying the list of discovered documents ought, in my view, to be made.

[12] In addition to responding to the omission of significant documents, such an order may also be necessary when a party has shown a "dilatory and casual attitude to production of documents" giving the other party "reasonable cause to suspect that either deliberately or by wilful indifference relevant documents may be hidden from them." Such an order tells the dilatory party in effect "no more missing documents." Those principles are drawn from *Synergy Management Group Ltd. v. Walker Systems Corp.*, [1992] B.C.J. No. 2109 (S.C.).

[13] On the other hand Mr. Justice Smith of this court has recognized in *Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd.* (2007), 74 B.C.L.R. (4d) 139 at para. 39 that a more nuanced application of Rule 26(3) may be appropriate in large scale cases.

In large and complex cases like this one, document production tends to be a lengthy and ongoing process. The volume of documents involved is such that, no matter how diligent the original search, documents can be overlooked and come to light later in the process. Issues tend to develop and/or clarify as the case goes on, which may lead to altered views about what is or is not relevant.

This case obviously involves thousands of documents covering a lengthy period. Thousands of documents have already been produced and more are apparently forthcoming. In the circumstances, I am not satisfied that, to this point, there has been inadequate or dilatory production sufficient to require an order for an affidavit verifying the lists of documents.

[Emphasis added.]

[14] Rule 26(3) should not be followed slavishly in a case involving massive numbers of documents: *Privest Properties v. Foundation Co. of Canada* (1991), 64 B.C.L.R. (2d) 41. The evidence must show that relevant documents have been omitted or that the disclosure thus far has been inadequate: *Bank of Nova Scotia v. Imperial Freeholds*, [1989] B.C.J. No. 118 (S.C.).

[41] Rule 26(3) of the Rules of Court is identical in language to Rule 7-1(8).

- [42] The parties' discovery obligations are ongoing, particularly given the order made above. As already stated, I am unable to find on the evidence that the defendants have been dilatory or indifferent towards document disclosure. Further disclosure may well be forthcoming. It makes more sense for the discovery process to be as complete as possible before the court considers whether a verifying affidavit from either the defendants or their solicitor is required.
- [43] Nonetheless, the parties ought to be pursuing and providing the further disclosure in an expeditious manner so that this matter is ready to proceed to trial in September. The documents produced or not produced henceforth may provide the plaintiff with additional evidence to support the affidavit requirement.
- [44] In order to address these objectives, the relief sought in paragraph 3 of the notice of application is adjourned generally but with liberty to re-set this aspect of the application after June 30, 2014, and with leave to provide additional affidavit material in support.
4. That Gary Streight, within 21 days of receipt of this Order, shall produce to the Plaintiff and Defendants certified true copies of the documents in his possession or control pertaining to 255 Pearson. College Drive, together with an account for the production of the same, including but not limited those documents set out on the attached Schedule "B" (the "Streight Documents").
- [45] Plaintiff's counsel advises that Mr. Streight was served with this application on January 23, 2014. No response has been filed by Mr. Streight, nor has counsel received any communications from this gentleman. The defendants take no position on the order sought. Mr. Streight was allegedly involved in the design and construction of the boathouse and may have had further involvement in the home design and construction. In May 2013, the plaintiff sent a written request for document production (along with proposed draft order) to Mr. Streight's home but received no reply. I am satisfied that the documents which may be in Mr. Streight's possession or control are relevant and material to the issues raised in the pleadings. Accordingly, the order sought in paragraph 4 of the notice of application is granted.
5. That the Defendants, Cory Arthur Sievert and Brie Belle Sievert, shall respond to the requests outstanding from their respective examination for discovery held on May 15th and 16th, 2013, respectively as set out in the attached Schedule "C" and such responses shall be produced within 10 days of the date of this order.
- [46] This order is granted with the defendants' consent.
6. That the Defendants, Cory Arthur Sievert and Brie Belle Sievert, shall make themselves available and attend for an additional two days of discovery, each to take place no later than May 15th, 2014, or such other date as may be agreed upon by counsel.

7. Costs of the discoveries held on May 15th and 16th, 2013, shall be payable by the Defendants to the Plaintiff in any event of the cause, forthwith.
- [47] The plaintiff says that both of the defendants were evasive and unresponsive in their answers to questions posed at their respective examinations for discovery. There is also the suggestion that the defendants did not properly prepare themselves for discovery and thus frustrated the process.
- [48] The defendants are willing to be examined by the plaintiff for another full day (5 hours) each but on the condition that Greg Court also submits to a further full day of examination.
- [49] As earlier stated, I am unable to find that the defendants' misconducted themselves at their respective examinations. This is not a situation where counsel repeatedly intervened with objections or provided answers that ought to have come from the party being examined. Defence counsel did involve himself in the examinations from time to time but that is not the plaintiff's complaint. The court is not being asked to determine whether specific questions ought to have been answered despite objections raised by counsel or the examinee.
- [50] The plaintiff suggests that the defendants' feigned memory loss or, at best, did not take their preparation for the examination seriously.
- [51] A witness is not evasive or unresponsive simply because the answer to a question is either "I don't know" or "I don't remember", unless that is the pervading theme of the evidence. Based on the transcribed portions of the examinations, I find that the defendants attempted to answer the questions posed to the best of their ability at that time. The Sieverts each agreed to inform themselves and thus perhaps later provide more fulsome evidence.
- [52] I agree that a party is obliged to review documents and otherwise be prepared for an examination for discovery: *Gardner v. Viridis Energy Inc.*, 2012 BCSC 1816 at para. 80. However, I am unable to find on the evidence that either Mr. or Mrs. Sievert arrived unprepared or exhibited a casual attitude towards the examination discovery process.
- [53] Nor am I persuaded that the examinations held in May 2013 were essentially useless and thus entitle the plaintiff to costs related to this process.
- [54] Costs relating to the examinations for discovery held on May 15 and 16, 2013, shall be in the cause, subject to the trial judge's discretion.
- [55] The defendants' proposal for a further one full day examination was premised on the plaintiff also being subjected to another full day examination. There is no application brought by the defendants seeking this relief. While Rule 22-1(7) (a) of the SCCR might provide the court with the authority to make this order, I decline to do so. The parties should be able to agree that further discovery is necessary, particularly to address the amendments to the notice of civil claim.

- [56] I will order that the each of the defendants submit to a further five hours of examination for discovery.
- [57] In its written submissions, the plaintiff proposes that the examinations be continued by no later than May 9, 2014; the notice of application suggests by no later than May 15th, unless otherwise agreed. No date restrictions will be placed on the timing of the continued examinations as counsel will be in the best position to determine when the examinations will be most productive.

#### Costs

- [58] Costs of the application will be in the cause.

"C.P. Bouck"

Master C.P. Bouck

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