

CANADA / JUDGMENT

Island View v. Anderson

2000 BCSC 1121

COURT

Supreme Court of British Columbia

DECIDED

20 July 2000

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2000 BCSC 1121

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2000 BCSC 1121 Docket:

00/2837

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ISLAND VIEW BEACH ESTATES CORPORATION
PLAINTIFF

AND:

J.E. ANDERSON & ASSOCIATES, A FIRM
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE QUIJANO

Counsel for the Plaintiff: Hans J. Doehring

Counsel for the Defendant: Robert T.C. Johnston, Q.C.

Date and Place of Hearing/Trial: June 20 & 22, 2000

Victoria, BC

- [1] The plaintiff seeks an order of replevin pursuant to s. 57 of the Law and Equity Act, R.S.B.C. 1996, c. 253 and Rule 46(4) of the Rules of Court, to recover from the defendant certain survey plans.

- [2] Briefly the history is that in September, 1996 John Koren, one of the principals of the plaintiff company, signed a "Work Authorization Form" which authorized the defendant to perform survey and engineering services as "specified from time to time" in connection with the development of a 25 lot strata development on Island View Road in the Municipality of Central Saanich. Subsequently, and it is not in dispute, the plaintiff company became the party with whom Anderson & Associates was dealing and accounts for services rendered were delivered to the plaintiff company from time to time. Those accounts were directed to the attention of Mr. Mark Radvan, the other principal of the plaintiff company.
- [3] Pursuant to the Work Authorization Form, Anderson & Associates provided engineering and survey services to Island View Beach Estates. In June or July 1998 Anderson & Associates produced and delivered to the plaintiff survey plans on the understanding that the plans were to be registered in the Land Title Office as a part of the project.
- [4] The survey plans had to be approved by the Municipality of Central Saanich before they could be registered at the Land Title Office. The Municipality imposed certain conditions upon the approval of the plans before they could be registered in the Land Title Office. The plaintiff objected to certain of the conditions and the matter was not ultimately resolved until December of 1999, at which point the plans were approved by the Municipality and submitted to the Land Title Office. The Land Title Office required certain amendments to be made to the plans and supporting documents before accepting them for registration.
- [5] In mid-March, 2000 the plans were submitted to the Land Title Office for registration and they were registered March 23, 2000, conditional on certain corrections being made, failing which they would be de-registered within 31 days. At that time the plaintiff asked Anderson & Associates to correct the survey plans in accordance with the requirements of the Land Title Office.
- [6] Throughout the two year period between the delivery of the plans and the request for correction, Anderson & Associates had made demands for payment of their outstanding account for survey and engineering services. In fact, in 1999 Anderson & Associates commenced an action against John Koren personally and Island View Beach Estates Corporation seeking payment of their outstanding account for the engineering and survey work provided in relation to the plaintiff's project on Island View Road. The total amount claimed to be due and owing, including interest in accordance with the interest provisions of the work authorization form, exceeds \$60,000.
- [7] The defendant says that when the plaintiff requested that they correct the plans they told the plaintiff that no further work would be provided until their outstanding accounts were paid in full.
- [8] The plaintiff says that arrangements were made with Anderson & Associates in March 2000 to do the required corrections provided that the cost for doing the corrections was paid in advance. While Anderson & Associates denies that there was any agreement that the plans would be delivered upon payment of the fees for the corrections, the cost for the

corrections, \$500, was paid directly by Mr. Radvan on April 17, 2000 and the modifications and corrections were completed on April 18, 2000. Anderson & Associates refused to deliver the corrected plans to the plaintiff until their outstanding account had been paid.

- [9] Anderson & Associates claims copyright over the plans and says that the plaintiff has no right to the use of the plans without Anderson & Associates' consent. Alternatively Anderson & Associates claims a possessory lien over the plans until their account has been paid in full.
- [10] The plaintiff denies that the defendant has any copyright over the plans, denies the defendant's right to a possessory lien and says that it owns the survey plans and the plaintiff must return them.
- [11] In the alternative the plaintiff says that, notwithstanding that Mr. Koren signed a single work authorization for both engineering and survey services, the engineering and survey services are two separate accounts and the amount owing for survey services is the only amount relevant to a determination of the question as to whether the plans are to be delivered up. Anderson & Associates takes the position that the engineering and survey services are interrelated therefore there is only one account, although it may be broken down into the two areas of service. Therefore, they say, it is the whole of the amount outstanding which is relevant to this application.
- [12] In submissions on behalf of the plaintiff I was told that the plaintiff disputes the amount owing. It was implicit in those submissions that the dispute was with respect to a significant portion of the amount claimed by the defendant to be owing for services rendered. However, in the material filed on behalf of the defendant is a copy of a typewritten memorandum from Mr. Radvan of Island View to Mr. Gericke, of Anderson & Associates, confirming a meeting which took place between Mr. Radvan and representatives of Anderson Engineering on April 12, 2000 regarding the payment of Anderson's outstanding account and the work remaining to be performed to achieve the subdivision registration. In that memorandum the defendant acknowledges that the balance owed on the account, including all outstanding work to complete, is \$60,000 and that the survey work required to be completed to obtain registration will be provided upon receipt by Anderson of certain security documents which would provide Anderson with the comfort of knowing that eventually it would receive its \$60,000.
- [13] I conclude therefore, for the purposes of this application, that the plaintiff acknowledges that it does owe the defendant \$60,000.

ISSUES

- [14] A number of issues are raised on this application.
1. Does the defendant have copyright over the plans and, if so, has the defendant consented to the plaintiff's use of the plans or was that consent withdrawn.

2. Whether the delivery of the survey plans to the plaintiff in the spring of 1996 terminated the possessory lien and thereafter the return of those plans to the defendant did not revive the lien but rather put the defendant in the position of a bailee, on the basis that it received the plans for the sole purpose of completing the modifications and corrections required to satisfy the Land Title Office.

ANALYSIS

Copyright

- [15] Section 2 of the Copyright Act, R.S.C. 1970, c. C-30, R.S.C. 1985, c. C-42, provides the following definition:

Definitions

2. In this Act, ...

"artistic work" <<oeuvre artistique>>

"artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works and compilations of artistic works;

- [16] There is no question that the plans in question are original works and that "plans" are covered by copyright. Therefore the defendant has the copyright over the plans as the creator of them.
- [17] It is apparent that when the defendant delivered the plans to the plaintiff in June or July of 1998 it was on the understanding that the plaintiff would be using the plans for the purposes of its subdivision project and therefore the inference to be drawn is that the defendant consented to the plaintiff's use of those plans. The issue is whether that consent amounts to consent to use of the corrected plans, if so, whether consent can be withdrawn in the circumstances and, if so, was it withdrawn.
- [18] As I have said, there is no question that the defendant has copyright in the plans and that it impliedly consented to the plaintiff's use of the plans when they were first delivered in June or July of 1998. The plans were returned by the plaintiff to the defendant earlier this year with a request that the defendant correct the plans in order to satisfy the requirements of the Land Title Office. To that time there is no evidence that the defendant gave notice to the plaintiff of any withdrawal of consent to the use of the plans. The defendant says that it has the right to withdraw its consent to the use of the plans, and that the withdrawal of consent is implicit in their refusal to return the plans to the plaintiff.
- [19] According to the case of *Koch v. Lloyd* (22 April 1985), Vancouver Registry CA002093 (B.C.C.A.) the consent can be withdrawn only if there has been no consideration for the consent given in the first place.

- [20] When the plans were returned to the defendant for the correction services an agreement was reached whereby the defendant would correct the plans to the satisfaction of the Land Title Office provided the cost for doing so was paid in advance. That cost was paid in advance and I conclude that it was a logical inference from those arrangements that once the plans were corrected the plaintiff would be entitled to file them with the Land Title Office, with the consent of the defendant.

POSSESSORY LIEN

- [21] Having concluded that the consent was not withdrawn, it is necessary to consider whether the defendant's claim of possessory lien can be maintained.
- [22] On an application for replevin the onus is on the applicant to establish that it has a better right to the goods than does the person in possession. (See *Penner v. Simpson*, [1941 Vol. 3] W.W.R. 235.)
- [23] The defendant argues that because the plaintiff has not paid the outstanding account for engineering and survey services in full, it has a continuing entitlement to a possessory lien over the plans and, therefore, it has a better right to the plans than does the plaintiff. The plaintiff says that any right to a possessory lien which the defendant may have had was relinquished when the plans were delivered to the plaintiff in June or July of 1998.
- [24] The requirements of a possessory lien are set out by Martin J.A. in *J.H. Early Motor Company v. Siekawitch*, [1931] 3 W.W.R. 521, at 521-2:

At common law the defendant had a lien for the labour, skill and expense he bestowed upon the truck until the charges for the same were satisfied. Continuous possession in the person who claims the lien is, however, essential to the continued existence of the lien, and the possession must be uninterrupted, and it appears that a temporary, voluntary relinquishment of possession and the subsequent resumption of it constitutes an abandonment of the lien.

- [25] The defendant says that it did not abandon the lien by delivery up of the plans in 1998 because it intended that the right of lien should continue. In support of that position I was referred to the decision of Macdonald J. in *Industrial Acceptance Corporation Ltd. v. Tompkins Contracting Ltd.* (1967), 60 W.W.R. 546. In that decision Macdonald J. referred to a number of earlier authorities in which the question was whether the possessory lien survived the delivery up of the subject goods.
- [26] Macdonald J. found that a feature common to those cases in which the lien was found to have survived or revived was that in each case there was an agreement between the claimant and the debtor which made it clear and obvious that it was the intention of the parties that by delivery up of possession the lien was not intended to be waived.
- [27] In this case the defendant delivered up the plans to the plaintiff in 1998 without any apparent agreement with the plaintiff that the plans were delivered subject to the defendant's common law right to a possessory lien pending payment of its account in full.

The outstanding account is the balance of a much larger account, the remainder of which has been paid. The plans remained in the possession of the plaintiff from the middle of 1998 until the plans were handed back to the defendant in April 2000. When the plans were handed back to the defendant in April 2000 it was pursuant to an agreement between the plaintiff and defendant that the defendant would provide the corrections required if the plaintiff paid the \$500 cost of the corrections in advance. The plaintiff paid the \$500, delivered the plans to the defendant and the defendant did the work.

[28] I cannot find on these facts that the possessory lien which the defendant may have had to the plans in 1998 survived the delivery of the plans at that time. Nor can I find any evidence to support a conclusion that it was the obvious intention of the parties that the lien was to continue when possession was delivered up in 1998. Nor is there any evidence that there was a common intention that upon the return of the plans to the defendant the defendant would have the right to claim of lien on them until the account was paid in full.

[29] I conclude that the defendant does not have a continuing possessory lien over the plans.

CONCLUSION

[30] I am satisfied, therefore, that the defendant must return the plans to the plaintiff.

"G.M. Quijano, J."

The Honourable Madam Justice G.M. Quijano

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