

CANADA / JUDGMENT

Kang v. My Gastown Development Limited Partnership

2021 BCSC 1861

COURT

Supreme Court of British Columbia

DECIDED

23 September 2021

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 1861 Kang v. My Gastown Development Limited Partnership

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kang v. My Gastown Development Limited Partnership,

2021 BCSC 1861

Date: 20210923

Docket: 178905

Registry: New Westminster

Between:

Kuldeep Singh Kang dba Immense Construction

Plaintiff

And:

My Gastown Development Limited Partnership,

Cordova Street Projects Ltd., and

New City Contracting Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 68 on October 20, 2021

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

S. Singh

Counsel for the Defendants:

D. Volk

S. John

Place and Date of Trial:

New Westminster, B.C.

January 18-22;

August 30-31; and

September 1-3, 2021

Place and Date of Judgment:

New Westminster, B.C.

September 23, 2021

Table of Contents

Introduction. 3

The Subcontract. 3

Performance of the Work. 4

Evidence of the Coffee Shop Meeting, and Plaintiff's Invoice 7801. 6

Evidence of Part Payment of Invoice No. 7801, and Termination of the Subcontract. 10

Discussion. 13

Amounts Owed to the Plaintiff by New City. 16

Invoice No. 1004. 17

Invoice No. 7801. 17

Change Order No. 1. 18

Invoice Nos. 7802-7805. 19

Invoice No. 7806. 19

Invoice No. 7807. 19

Change Order No. 2. 20

Total of Plaintiff's Claim.. 21

Which of the Parties Repudiated the Contract?. 21

Amounts Owed to New City by the Plaintiff. 24

Deficiency Costs. 24

Drywall Completion Costs. 26

Lien Bonding Cost 26

Conclusion. 27

Introduction

- [1] The plaintiff, Mr. Kuldeep Singh Kang, also known as Jason Kang, acted as the steel stud framing and drywall subcontractor to the defendant, New City Contracting Ltd. ("New City") on a condominium development project owned by the defendant Cordova Street Projects Ltd. ("Cordova"), from August 2015 to December 2015. New City was contracted to the developer, the defendant My Gastown Development Limited Partnership ("My Gastown").
- [2] Each of the plaintiff and New City accuse the other of breach of contract.
- [3] Mr. Kang claims for unpaid invoices in respect of work he says he completed under the subcontract. New City counterclaims for costs of:
 - (a) correcting deficiencies in the plaintiff's steel stud work;
 - (b) completing the drywall work on the project after the plaintiff repudiated the subcontract; and
 - (c) a lien bond obtained as substitute security for the plaintiff's builders lien.
- [4] Mr. Kang was the only witness called in support of the plaintiff's case. The defendants called two witnesses: Mr. Graham DeClercq, who was New City's site supervisor; and, Mr. Donald Marsh, who was New City's superintendent on the project, originally assigned to assist its concrete forming sub-trade, but who later transitioned to supervising the plaintiff's crew, given the difficulties they were encountering.

The Subcontract

- [5] The subcontract between the plaintiff and New City was dated August 21, 2015, and was named as New City's Subcontract No. 3746 (the "Subcontract"). The Subcontract called for the plaintiff to supply and install steel stud framing; to supply, install, mud and tape drywall; and to supply and apply concrete fill ("confil") to ceilings and walls; all from the basement to the ninth floor. Mr. Kang was responsible for, inter alia, layout and furring, and construction of bulkheads and ceiling drops. He was also responsible for daily cleanup and removal of

scrap off-site. The Subcontract specified all must work must be completed in accordance with the general contractor's schedule. (There is no issue that rather than a general contractor, My Gastown used the services of a construction manager, Kindred Construction Ltd. ("Kindred"), who set the schedule for the project.

- [6] The contract price was \$378,000, including 5% GST. There was provision for an additional bonus of \$20,000 if the work was completed within schedule to the general contractor's satisfaction. The Subcontract included a Schedule of Values, breaking down the value per floor of ceiling and stud framing, installed; drywall installed, mud and taped; and confil. In total, the steel stud work was valued at \$164,169. The drywall work was valued at \$158,831. The confil made up the balance.
- [7] The Subcontract provided that Mr. Kang was to invoice for work as completed, and that final payment was subject to sign-off of deficiencies in his area of work. Also, New City reserved the right to bring in additional help, at the plaintiff's cost, if Mr. Kang could not meet the schedule demands.

Performance of the Work

- [8] The goal was for the steel stud work on each floor to be completed before the crew would move up to the next floor. There were myriad problems and delays in Mr. Kang's execution of the work he had contracted to perform. In giving the following description of my findings, I accept the testimony of Mr. DeClercq and Mr. Marsh. I comment below on the credibility of the witnesses.
- [9] Between the end of August and early December 2015, Mr. Kang's crew completed steel stud framing in the basement, which was partially completed when they began work on the project, and moved on to work on the first, second and third floors. Without the authorization of New City and contrary to Mr. Marsh's explicit instructions, they also began work on the fourth level. Throughout this period, they were unable to complete the steel stud installations on the schedule set by Kindred.
- [10] Mr. Kang's workers did not know how to read the architectural and design drawings or how to interpret the codes indicating what type of fire-rated assemblies were required. They were virtually unable to complete a day's work without there being errors. They repeatedly laid out framing incorrectly. They lacked the technical knowledge necessary for proper assembly, and had to be continually instructed by Mr. DeClercq and Mr. Marsh. This instruction was hampered by the fact that most of the crew members did not have strong English language skills. As Mr. Marsh described it, he had to physically demonstrate instructions, for example, how to install a clip on a door assembly. Mr. DeClercq described there being a "heavy language barrier".

- [11] In addition there was continual turnover of Mr. Kang's personnel; Mr. DeClercq described it as a "rotating cast". There was no regular foreman for New City to communicate through, and Mr. Kang refused to hire one. Mr. Kang himself was not on site continuously; he would lead his crews when he was there, but when he left the site it became, in Mr. Marsh's words, "kind of a free-for-all".
- [12] These issues led to delays in the steel stud framing installation - delays that were exacerbated by the frequent need to disassemble the installations due to deficiencies, and re-assemble them correctly. By early December 2015, the steel stud framing work was badly behind schedule and impacting the ability of mechanical, electrical and plumbing sub-trades to do their work, slowing down the whole project. New City was coming under considerable pressure from Kindred, and to move things along and fix deficiencies had to bring on to the site its own personnel and hire other subcontractors.
- [13] Mr. Kang denied, in his testimony, any responsibility for delays in completion of the work. In his direct evidence, he testified that there were multiple issues with concrete walls having been poured incorrectly, which led to his crews furring the concrete walls with steel studs, and having to re-do that work when errors in the wall placement were detected. He also pointed to his crew's work being interfered with by foot traffic as other trades had to access the site through the areas the crew was working on; and, to delays caused by the accumulation of rain water, as the ground and upper floors were open to the elements.
- [14] Mr. Kang also testified that there were repeated delays through his crew having to perform "extras" - work outside the scope of the Subcontract - such as installing ceilings and bulkheads.
- [15] Mr. Kang testified that his workmen all spoke English and all had the necessary training. He denied that he or his crew ever had access to architectural and design drawings, and said they were therefore entirely dependent on New City for guidance as to where and how to install the studs. Mr. Kang said that he was on site every day, all day; conceding only that he might have arrived on site as late as 10:00 a.m., maybe once a week.

Evidence of the Coffee Shop Meeting, and Plaintiff's Invoice 7801

- [16] The delays in completion of the Subcontract work led to Mr. DeClercq and Mr. Marsh meeting with Mr. Kang at a coffee shop on December 18, 2015 (the "Coffee Shop Meeting"), at which they reached an agreement (the "Coffee Shop Agreement"). Mr. Kang's testimony as to how that meeting unfolded, and what agreement was reached, varied considerably from the evidence of Mr. DeClercq and Mr. Marsh, although he ultimately conceded the truth of much of Mr. DeClercq and Mr. Marsh's version of events in closing submissions.

- [17] Mr. Kang testified that during the first week of December he had a walk-through of the site with Mr. DeClercq, Mr. Marsh and Kindred's site manager, Mr. Surcess, to identify "extras" that he had done. He testified that on the basis of that walk-through he drew up his Invoice No. 7801, dated December 18, 2015 in the amount of \$41,357, plus GST, for a total of \$43,424.
- [18] Mr. Kang testified that on the morning of December 18 he went to the site and delivered that invoice personally. He testified that he was under pressure from his suppliers and from persons to whom he in turn had subcontracted out the installation work and needed to be paid. A few hours later, he said, Mr. DeClercq and Mr. Marsh asked to see him. They did another walk-through of the site, and then went to a coffee shop. The three of them sat down to have coffee, but, he testified, Mr. DeClercq and Mr. Marsh had a conversation between themselves; they did not say anything to him about deficiencies or the need to re-do any of his work. They did not talk to him and he has no idea what they were talking about.
- [19] As Mr. Marsh and Mr. DeClercq spoke to each other, Mr. Marsh made some notes. Those notes are in evidence, and Mr. Kang was cross-examined on them. Mr. Kang denied knowing what the notes said as they were being made, and testified that he was not shown the notes until they were already written. The notes had a series of figures, ending with a figure: \$41,357, plus GST. Mr. Kang said in cross-examination that he was "surprised" that the amount they had calculated was the same as the amount he had invoiced.
- [20] Mr. Kang testified that Mr. Marsh told him this was what New City could afford to pay Mr. Kang "today". Mr. Kang said Mr. Marsh and Mr. DeClercq agreed to pay the \$41,357 plus GST immediately and deduct this amount from whatever the total invoice amount was for the work Mr. Kang had done thus far; namely, work done from the basement to the fourth floor. Mr. Kang said they agreed to continue working with him for the fifth level to completion.
- [21] Mr. DeClercq and Mr. Marsh had a very different recollection of the Coffee Shop Agreement. As described by Mr. Marsh, by the first week of December it was apparent that the plaintiff was incapable of completing the steel stud work in a timely manner. The project was behind schedule. Work correcting deficiencies in the plaintiff's framing from the basement through to the third level was ongoing, as reflected in Kindred's minutes of the December 7, 2015 trade coordination meeting. Both Mr. DeClercq and Mr. Marsh had verbal discussions with Mr. Kang, in which Mr. Kang indicated that he wished to be relieved of his responsibility of completing the steel stud installation portion of the Subcontract. On December 10, 2015 New City issued a new contract to Platinum Edge Contracting Ltd. ("Platinum Edge") - one of the subcontractors that had been brought on the site to correct the plaintiff's deficiencies - for steel stud framing on levels five through nine.
- [22] On December 18, 2015 Mr. DeClercq and Mr. Marsh walked through the site with Mr. Kang, to assess the value of the work he had completed to that date. The three of them then went to the coffee shop, and negotiated the amount Mr. Kang would be paid. Mr. Marsh's notes show in detail the negotiated calculations.

- [23] Although the figures are in a somewhat different order in Mr. Marsh's notes, the credits and debits can be summarized as follows. First, Mr. Kang was to be given credit for steel studding on the main, second and third levels, at \$15,500 per floor; this was based on the Subcontract's Schedule of Values, which - under "Portion of Work" - valued the line item "Ceiling and stud framing installed" on each floor at \$15,514.07, less the value of the 10% holdback, plus 5% GST. Mr. Kang was given credit of \$8,600 for work on the fourth level; Mr. Marsh described the fourth level as a "disaster" and said they offered that amount to Mr. Kang "to sweeten the deal" - to "cut our losses and move on".
- [24] Mr. Marsh recalls that there was some steel stud and drywall left on site, though nowhere near the \$11,000 or \$11,500 the plaintiff claims. He does not recall specifically how the \$8,600 figure for the fourth level was determined, although he testified that it would "make sense" for the value of the materials left behind to have been included in that amount. (That does not make sense to me, when the expectation was that Mr. Kang would continue to do drywall and confil work, and would therefore bill for supplying and installing that drywall at a later date.)
- [25] Further, Mr. Kang was given credit of \$1,700 for change orders; \$500 for installation of window posts; \$2,160 for the increased cost of work on the main level corridor drop ceilings, caused by foot traffic of trades accessing the site through the corridor; and, \$2,187.50 for the partial installation of drywall on the main level (one-eighth the value from the Schedule of Values).
- [26] Against these amounts, Mr. Kang was charged for the costs incurred to date by New City in correcting his deficiencies: \$8,200 for work and materials provided by two hired sub-trades; and \$11,340 paid by New City to its own labourers in hourly wages. Further, there were deductions of \$450 for completing work on the main level, and \$300 for re-doing work in a mechanical room. The total figure set out in Mr. Marsh's notes was \$41,357.00, plus GST. Mr. Marsh testified that he would have intended to issue Mr. Kang with a change order reflecting the Coffee Shop Agreement. However, Mr. Kang first issued his Invoice No. 7801, in the amount agreed to, and Mr. Marsh did not get around to doing so.
- [27] It was agreed that Mr. Kang would continue to be responsible for the drywall and confil portions of the Subcontract.
- [28] Mr. Marsh's notes reflect that the deductions for the cost to New City of correcting the deficiencies in the plaintiff's work were only the costs incurred "To Date". There was no testimony offered of there having been any discussion of Mr. Kang being relieved of his contractual liability for continuing remediation costs. Mr. Marsh testified that everyone intended for Mr. Kang to proceed with the drywall work - which, under the Schedule of Values, had a value of more than \$150,000 - so he expected that the ongoing steel stud remediation costs would be deducted from the amounts eventually billed by Mr. Kang for the drywall and confil work.

- [29] Mr. Marsh testified that in addition to the amount agreed to at the coffee shop, New City would pay the holdback amounts. He testified that it was never their intention not to pay anything that was due.
- [30] As noted above, the amounts agreed to for steel stud work on the first through third floors were based on Schedule of Values figures including GST. Mr. Marsh's notes, however, clearly indicate that the total agreed-to figure was "41,357.00 + GST". Mr. Marsh did not provide any testimony explaining this discrepancy. It is possible that in the process of negotiating these items, GST on the steel stud work was double-counted. Nevertheless, that was the total amount agreed to.
- [31] Mr. Marsh and Mr. DeClercq recall that the plaintiff's Invoice No. 7801, in that amount, was received by them following the coffee shop meeting. Mr. Marsh has some recollection of approving the invoice; he was "comfortable" with it, and believes he would have given instructions it was to be paid on a rush basis.
- [32] Notwithstanding the stark differences in the testimony of Mr. Kang, on the one hand, and Mr. Marsh and Mr. DeClercq on the other, as to the scope of Invoice No. 7801 and the Coffee Shop Agreement, Mr. Kang ultimately conceded in closing submissions that at the Coffee Shop Meeting the parties concluded an agreement as to the value of the work he had performed on the first through fourth levels; that New City would pay him for that work, less the holdback; that Invoice No. 7801 was issued to reflect that agreement; and, that Mr. Kang was going to continue to work on the drywall and confil only.

Evidence of Part Payment of Invoice No. 7801, and Termination of the Subcontract

- [33] Mr. Kang testified that one or two days after the Coffee Shop Meeting, Mr. Marsh and Mr. DeClercq promised that he would be paid before Christmas. Mr. Marsh agreed, in cross-examination, that he did promise Mr. Kang he would receive the amount agreed to at the coffee shop within a certain time frame, however he could not recall the exact payment date he had agreed to.
- [34] Mr. Kang wrote to New City on December 30, 2015, asking to be paid:
- Hi Akeeka, this is the properly numbered invoice (7801). Included is the other invoice for New Westminster job in the amount of \$4,000. The amount to be paid prior to Jan. 5th is \$47,425. Please remit this on time.
- [35] As shown in New City's Paid Invoice Register, New City paid the plaintiff \$25,000 towards that invoice on January 5, 2016. The amount is encoded as being related to Invoice "7801A". There is no evidence explaining why New City only made a partial payment on that date. Mr. Marsh testified that it is New City's practice on occasion to withhold full payment of interim billings from sub-trades where there was some concern that the sub-trade may default.

- [36] Mr. Kang testified that he and his crew worked on the site January 2nd through 4th. Then, on either January 5th or 6th, Mr. Kang testified, he and his crew were at the site and Mr. DeClercq and Mr. Marsh came out to see him and told his crew to pick up their tools, as they were no longer working there. Mr. Kang said he was "shocked" that there were other workers on the job site, and that he was worried New City was not going to pay him anything.
- [37] Mr. Kang sent an email to New City's President dated January 6, 2016. It was copied to Mr. DeClercq and Mr. Marsh, New City's accountants, and, Kindred. Mr. Kang asserted that it had been agreed, following the December 18, 2015 walk-through, that New City would pay him \$43,424 by December 23, 2015. He further asserted that drywall materials costing \$11,500 had been delivered to the site by him and were still in New City's possession. He noted that the \$4,000 payment for the "New Westminster job" was still outstanding. Mr. Kang acknowledged that the total he maintained was outstanding, \$58,424, was reduced by a \$25,000 payment he received that same day, January 6. He concluded:

The balance of \$33,924 must be paid by Friday the 8th of January 2016 or Immense Construction will place Mechanics Liens on the 150 E. Cordoba St Vancouver site and also on the 670 6 St. New Westminster job site.

Due to this payment breach Immense Construction will break the contract No. 3746 and will no longer perform any work on the 150 E. Cordova Street project.

- [38] I note that when cross-examined on his December 30, 2015 email to New City, Mr. Kang was unable to recall why he had written that the balance owing was to be paid by January 5, 2016. He did not provide any explanation as to how that date could be reconciled with the assertion made in his January 6 email that the agreed payment date had been December 23, 2015.
- [39] When no further payments from New City were forthcoming, Mr. Kang submitted to New City a series of invoices dated January 18, 2016, Nos. 7802-7807, in the total amount of \$93,768 plus GST. Invoices 7802 and 7803 were said to be for steel stud framing and drywall on, respectively, the main and second levels. Invoices 7804 and 7805 were also described as being for steel stud work on the second level. Mr. Kang testified that this was an error, and that those invoices were meant to cover steel stud work on the third and fourth levels. Invoice 7805 was for work that Mr. Kang considered to be "extras". Invoice No. 7807 was for \$11,000 worth of drywall board and mud the plaintiff contended had been abandoned on site. This amount was slightly lower than the \$11,500 figure Mr. Kang cited for materials delivered to the site in his January 6, 2016 email.
- [40] On February 5, 2016, Mr. Kang filed a builders lien against the project, claiming the amount of \$125,146. That amount reflected the sum of invoice No. 7801, which had been sent following the coffee shop meeting; invoices No. 7802-7807; an alleged \$6,000 balance owing on an invoice No. 1004 dated September 20, 2015, that Mr. Kang had submitted after completion of the basement work; and, a \$1,500 lien filing charge.

- [41] Neither Mr. DeClercq nor Mr. Marsh recalled knowing that only \$25,000 would be paid towards that invoice. Mr. Marsh testified that New City had a practice of withholding full payment to trades if there was some doubt that the trade would complete the work. He cannot recall if, prior to January 5, 2016 - the date of the partial \$25,000 payment - he had developed any concerns as to whether New City would complete the drywall/confil work, against which the ongoing remediation costs were to be charged.
- [42] Mr. DeClercq recalls that either before or after Mr. Kang's January 6 email, Mr. Kang and his crew came back to the site to pick up their tools. Mr. Marsh denies that there was ever a point in time, early in the new year, when the plaintiff and his crew were not allowed to enter onto the site or perform any work; there was only a standing instruction not to go up to the fourth level, because Kindred did not want work progressing on that level until the deficiencies on the lower levels had all been remedied.
- [43] Mr. Marsh recalls the plaintiff being on his site with two other individuals, packing up his tools. He recalls that Mr. Kang was extremely angry and hostile. He asked Mr. Kang what was happening, and got no answer, and Mr. Marsh retreated. Mr. Marsh denied having told Mr. Kang that he was not to do any work on the site in the new year, or that he had been replaced.
- [44] Mr. Marsh and Mr. DeClercq both testified that they understood Mr. Kang's January 6, 2016 email to mean that he was abandoning the site and quitting the project. They both testified that neither Mr. Kang nor anyone from his crew showed up at the site to work, after that date.

Discussion

- [45] I reject Mr. Kang's evidence that he prepared invoice No. 7801 in advance of the Coffee Shop Meeting. It is simply incredible that Mr. DeClercq and Mr. Marsh would have gone through a series of calculations, as reflected in Mr. Marsh's notes, that added up to the same amount as a previously submitted invoice, to the penny.
- [46] I further reject Mr. Kang's evidence that invoice No. 7801 was for "extras". The details of the work being invoiced for, as set out in the invoice, are limited to "steel stud framing" on four floors. There is no reference to "extras". There is no evidence of the plaintiff having undertaken "extras" on the project that could have amounted to a value anywhere near the amount of invoice No. 7801. Mr. Kang offered no testimony as to how the value of purported "extras" could have been calculated in that amount. I find that Mr. Kang's evidence on this point was pure invention on his part, in order to justify having included duplicate charges for steel stud framing - that is, the amounts in Invoice No. 7801 having been duplicated in the further invoices he sent on January 18, 2016 - in his lien claim.

- [47] I reject Mr. Kang's evidence that the Coffee Shop Meeting consisted largely of a conversation solely between Mr. DeClercq and Mr. Marsh, that ended in them presenting him with a number. It makes no sense that they would have gone to the extent of walking through the site with him beforehand, intending to settle New City's liability for his work to date, and then failed to involve him in a process of negotiation.
- [48] In any event, as I have noted, the plaintiff conceded in closing submissions that at the Coffee Shop Meeting the parties concluded an agreement as to the value of the work he had performed on the first through fourth levels, and that he would be paid for that work, less the holdback; that Invoice No. 7801 was issued to reflect that agreement; and, that Mr. Kang was going to continue to work on the drywall and confil only.
- [49] I reject Mr. Kang's testimony that he and his crew had no architectural or design drawings and no access to the drawings. An updated copy of the drawings was kept at Kindred's office on site, and a hyperlink to an electronic copy of the drawings was embedded in every email summary of the trade coordination meetings, which Mr. Kang was copied on.
- [50] I reject Mr. Kang's evidence that he had no knowledge of other sub-trades or New City labourers working on site to correct his deficiencies. Unless Mr. Kang was entirely absent from the site - which he denies - it is inconceivable that he was unaware that others on the site were engaged in dis-assembling and re-assembling the framing his crew had installed.
- [51] I reject Mr. Kang's evidence that he was told by New City to leave the site. His email of January 6, 2016 is clear: he was not going to perform any further work under the Subcontract because he had not been paid. Had there been any other basis for him contending that New City was in breach of contract, he would have said so.
- [52] Throughout his testimony, Mr. Kang exhibited a very poor grasp of the scope of his responsibilities under the Subcontract. While his work was ongoing, he refused to take responsibility for removing his scrap from the site, despite that being an explicit term of the Subcontract. Further, despite the Subcontract explicitly providing that it included drops and bulkheads, Mr. Kang testified the Subcontract provided only that "a small bulkhead isn't extra" and that it included "only small drops, not big drops". He offered this interpretation as an explanation for why he felt entitled to claim that work covered in the scope of the Subcontract was billable as "extras".
- [53] Mr. Kang denied that there were any deficiencies in his steel stud work or that he was ever advised of deficiencies. In cross-examination he was shown a copy of the December 7, 2015 email from Mr. Surcess of Kindred, which summarized that day's trade coordination meeting and set out the schedule for the following two weeks. Mr. Kang was one of the recipients of that email. Two of the bullet point entries in that email are the following:
- Framing deficiencies completed level 2 and 3 by Monday, Dec. 14 incl P Eng review
 - Framing deficiencies completed level 1 and B by Monday, Dec. 21

Cross-examined on this document, Mr. Kang said he had no recollection of this, and he "guessed" that maybe Mr. Surcess, in referring to "deficiencies", was talking about "one or two studs". I note that Mr. Surcess ended that email with the following comment:

Similarly Steel Stud Framing is significantly delayed and will require a huge correction to keep it from derailing our completion schedule.

- [54] This email from Mr. Surcess was, in its form, typical of emails he sent to the trades, including Mr. Kang, following biweekly trade co-ordination meetings. Those meetings were attended by representatives of all trades on site, and provided a forum for discussion of schedules, sequencing of upcoming work, and target dates. Mr. Surcess' emails summarizing the results of the trade co-ordination meetings, and transmitting updated project completion schedules, served the same function as trade meeting minutes. They were business records prepared by the site construction manager in the ordinary course of business, and as such they are they are admissible for the truth of their contents; see *Foundation Co. of Canada v. United Grain Growers Ltd.* 1995 CanLII 3392 (B.C.S.C.), at paras. 561-571.
- [55] I therefore accept the December 7, 2015 email from Mr. Surcess of Kindred as reliable evidence of the truth of its contents. It is inconceivable that the completion schedule would have then been facing a risk of disruption, as Mr. Surcess warned, from problems with only "one or two studs". It is evident that, contrary to Mr. Kang's testimony, there were significant deficiencies in Mr. Kang's work, and the deficiencies posed a risk of compromising the project's completion. The email is evidence of Mr. Kang being advised of both of those facts.
- [56] Mr. Kang demonstrated in his testimony a complete lack of frankness in acknowledging the scope of the problems he and his crew created and were responsible for. When confronted with inconsistencies in his own testimony, or inconsistencies between his testimony and contemporaneous documents, he deflected and improvised rationalizations that were simply beyond belief.
- [57] Mr. DeClercq and Mr. Marsh, on the other hand, were completely frank. They acknowledged gaps in their memories - gaps which were not surprising, given the lapse of time. They responded appropriately to cross-examination questions, without embellishing or deflecting. I found their testimony completely genuine. Where there were inconsistencies between their evidence and that of Mr. Kang, I accept their evidence.
- [58] I find that by mutual agreement, the plaintiff and New City agreed prior to December 18, 2015 to reduce the scope of Mr. Kang's further obligations under the Subcontract, to performing drywall and confil work only; and, that this reduction in the scope of work was necessitated by Mr. Kang's inability to complete the steel stud framing work called for in the Subcontract. I further find that the plaintiff and New City made an agreement on December 18, 2015 as to the value of all work performed by Mr. Kang to that date, and the cost to New City of remediating Mr. Kang's deficient work to that date, save that which had been previously subject to a Change Order issued by New City or to an invoice issued by Mr. Kang.

I make further findings, below, as to what if anything was agreed to at the Coffee Shop Meeting concerning Mr. Kang's liability for ongoing remediation costs.

Amounts Owed to the Plaintiff by New City

[59] First, I set out my findings as to the amount owed by New City to the plaintiff on account of his work and supplied materials up to January 6, 2016. I make this determination first, before considering whether New City having made only partial payment towards the plaintiff's Invoice No. 7801 constituted repudiation, relieving the plaintiff of the burden of further performance of the Subcontract; and, before considering any set-offs that may arise, as alleged in New City's counterclaim.

Invoice No. 1004

[60] Under Invoice No. 1004 dated September 20, 2015, the plaintiff billed New City for completion of the basement, and for completion of the steel stud framing on the main floor. The main floor steel stud framing was not complete as of that date, however, and therefore no amount was owing for that work. The amount charged on that invoice for the basement work, \$34,020.01, reflected the amounts agreed to in the Schedule of Values, less the 10% holdback, plus 5% GST.

[61] The parties agree that New City made a payment towards this invoice, but they disagree on the amount. Mr. Kang based his builders lien calculation on \$30,000 having been received from New City towards this invoice. At trial, he could not say where this \$30,000 figure had come from.

[62] New City's Paid Invoice Register shows the total amount of \$35,721.01 having been paid towards this invoice on October 2, 2015. I accept that as evidence of payment. That is the amount of the basement portion of invoice No. 1004 - the completed work that Mr. Kang was entitled to bill for - plus 5% GST.

[63] Accordingly, I find no amount is owing under Invoice 1004.

[64] However, New City remains liable for the 10% holdback on the invoiced basement work plus GST, a total of \$3,708.

Invoice No. 7801

[65] The parties agreed at the coffee shop meeting to New City paying \$41,357.50 plus GST, which amounts to \$43,425.38. Invoice No. 7801 was issued by the plaintiff on December 18, 2015, to reflect this agreement.

[66] It is common ground that the plaintiff received \$25,000 on account of this invoice on or about January 6, 2016. This left a balance on that invoice of \$18,425.38.

- [67] In addition, there is an issue as to New City's liability for the holdback amount attributable to the work and materials covered by the Coffee Shop Agreement.
- [68] As noted above, the Coffee Shop Agreement reflected steel studding on the main, second and third levels being valued on the basis of the Subcontract's Schedule of Values' figure, which was net of the 10% holdback. I therefore infer that the values of other work of Mr. Kang covered by the Coffee Shop Agreement were also intended to be net of the holdback. Before applying the deductions Mr. Kang accepted responsibility for, the Coffee Shop Agreement valued Mr. Kang's work, less the holdback, at \$61,647. The 10% holdback amount applicable to that work is therefore \$6,749.00 $((\$61,647/.90) - \$61,647)$, plus GST.
- [69] New City submits that as the plaintiff agreed at the Coffee Shop Meeting to no longer complete the steel stud portion of the Subcontract, it also agreed to no longer be paid the holdback associated with that work, as the holdback would only become due upon completion. I cannot infer any such agreement from the evidence. Holdback amounts are security, not a completion bonus. A holdback amount may only be retained during the holdback period, pursuant to ss. 4 and 8 of the Builders Lien Act, S.B.C. 1997, c. 45 ["BLA"]. There is no evidence that the holdback period has not lapsed. There is no justification for New City retaining a security amount, when all the contractual liabilities between the respective parties are being determined in the present action. Moreover, as noted above, Mr. Marsh acknowledged in his testimony that the intent in reaching the Coffee Shop Agreement was that the holdback amounts would be paid.

Change Order No. 1

- [70] On October 22, 2015 New City had issued a change order, deducting from the plaintiff's Subcontract price the sum of \$6,060.75, on account of materials delivered to the site and left there by the subcontractor who preceded the plaintiff. Mr. Kang and New City had agreed that \$6,060.75 would be deducted from the next payment owed to them. Accordingly, New City must be given credit for this sum against the amounts owing as of January 6, 2016. Mr. Kang agreed with the validity of this charge, in cross-examination.

Invoice Nos. 7802-7805

- [71] These invoices duplicate the charges for steel stud framing and drywall that were agreed to at the coffee shop meeting and were billed under Invoice No. 7801. New City has no liability to the plaintiff in respect of these invoices.

Invoice No. 7806

- [72] This invoice was purported to be for the repair of a hole in the basement drywall (\$1,800), installation of clips on six door frames (\$900) and clean-up of spray foam on studs (\$450), for a total of \$3,100 plus GST. There is no evidence that the installation of clips on the door frames was outside the plaintiff's contracted scope of work. There is no independent evidence of the plaintiff having undertaken any spray foam clean-up work, certainly not in an amount to justify charging the work as an extra.
- [73] The plaintiff had presented New City with a quote dated October 22, 2015, for repair of holes made by other in the basement drywall; it was in the amount of \$1,500 (15 holes x \$100 per hole), not \$1,800. Mr. DeClercq testified to there having been some holes that needed attention. It appears that this "extra" was overlooked when the Coffee Shop Agreement was concluded, and I do not find that Mr. Kang is estopped from claiming for this "extra" now.
- [74] The reasonableness of the \$100 charge set out in that quote, however, is not proven. I allow \$1,000 plus GST in respect of the drywall repairs billed in this invoice.

Invoice No. 7807

- [75] This invoice presents a charge for "Material drywall borad & mud" [sic] in the amount of \$5,000, and a further, unspecified charge of \$6,000. Mr. Kang alleges this was the drywall and materials he had purchased and left on the site when he finished working there. As proof he submits an itemized list of "Product Sales by Customer" from his supplier, Coast Building Supplies. On its face the list covers the time period "January 01, 1800 to January 01, 7999", so at most it shows the whole history of that company's sales to the plaintiff. This claim is not corroborated in any way. There is no backup documentation showing delivery of this quantity of material to the site. Mr. DeClercq and Mr. Marsh were adamant that this volume of material could not have been left behind, and that there was simply no reason for that volume to have been delivered to the site at that time, given the stage the work was at. Mr. Kang was not a credible witness. In particular, his dishonest characterization of Invoice No. 7801 as being for "extras" means that his billing amounts simply cannot be trusted. The claim for materials charges is unproven, and this invoice is disallowed.

Change Order No. 2

- [76] Under a change order dated November 23, 2015, New City agreed to increases in the Subcontract price, one of which was in respect of installation of winged load corner posts on all residential floors, in the amount of \$5,946. On the basis of a handwritten annotation made by Mr. DeClercq on Mr. Marsh's calculation notes from the Coffee Shop Meeting, the plaintiff submits that this amount is owed in full. Mr. DeClercq testified that the \$5,946 amount in the change order was for 288 posts, only 20 of which were installed by the plaintiff. This was recognized in the \$500 amount for "Posts" credited to the plaintiff in the Coffee Shop Agreement. No further amount is owed.

Total of Plaintiff's Claim

[77] I assess the amount owed to the plaintiff by New City, without calculating New City's counter-claims, as follows:

Holdback + GST on Work Billed in Invoice No.1004 (Basement)

\$3,708.00

Balance Owing on Invoice No. 7801

\$18,425.38

Holdback + GST on Work Billed in Invoice No. 7801

\$7,086.45

Drywall Repair + GST (Invoice No. 7806)

\$1,050.00

Less Change Order #1 (\$6,060.75)

(\$6,060.75)

TOTAL:

\$24,209.08

Which of the Parties Repudiated the Contract?

[78] I do not accept Mr. Kang's evidence that he was told in early January 2016 to leave the site, nor that it was otherwise communicated to him in any way that his services were no longer required. As noted above, New City contracted with Platinum Edge on December 10, 2015, for steel stud framing on levels five through nine. However, New City did not solicit a quote from Platinum Edge for the drywall work on the project until January 27, 2016 - after Mr. Kang had sent his January 6 notice that he would no longer perform any work. Other than Mr. Kang's own testimony - which I give no weight - there is simply no evidence that New City wanted to replace Mr. Kang or explicitly communicated to him that his subcontract for drywall work was being repudiated.

[79] I accept the evidence of Mr. Marsh and Mr. DeClercq that they had verbally agreed with Mr. Kang prior to the Coffee Shop Meeting that he would no longer do steel stud work, but would continue to act as the drywall subcontractor. I further accept Mr. Marsh's testimony that it was in Mr. Kang's interest to remedy the deficiencies in his steel stud work. The site was not ready for drywall in early January, but if there was no drywall work to be done on any given date, Mr. Kang's crew could have worked on deficiencies.

- [80] In closing submissions, the plaintiff argued that New City was in breach of contract in two respects: first, by interfering with Mr. Kang's ability to do the contract work by bringing other workers onto the site to deal with that work, and doing so without notifying Mr. Kang of any deficiencies in his work; and second, by failing to pay the amount agreed at the Coffee Shop Meeting, by December 23, 2015.
- [81] There is no evidence that New City "interfered" with Mr. Kang's work. Mr. Kang did not testify to that effect. Further, as discussed above, Mr. Kang was well aware that his work on the steel studs was deficient, and he agreed at the Coffee Shop Meeting with New City's claim of its costs to date in remedying those deficiencies.
- [82] Mr. Kang's January 6 email was clear. He considered New City to have repudiated the Subcontract not because he was told to leave the site, and not because his work was being "interfered" with, but because New City had not paid Invoice No. 7801 in full and owed a small sum on the "New Westminster job". The email also referred to \$11,500 worth of drywall allegedly left on the site; but Mr. Kang had not invoiced New City for that amount - the Subcontract made no provision for interim payment of materials costs until work was completed - and there was no "balance owing" in that respect.
- [83] The plaintiff submits that New City's failure to make timely payment was a breach of contract. In *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349, Mr. Justice Wallace stated:
- [23] The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract, thereby entitling the innocent party to be relieved from future performance.
- [24] The non-payment of a relatively minor portion of the consideration to be paid for services which are to be performed over a prolonged time period would not by itself usually meet such criteria and hence would not qualify as a fundamental breach. Damages could be expected to afford a complete remedy: see *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.*, *supra* (default in payment of an instalment payment). Accordingly, one must ascertain if there are special circumstances in the present case which warrant this particular breach of contract being characterized as a fundamental breach amounting to a repudiation of the contract.

Although Wallace J.A. used the phrase "fundamental breach", I note that "substantial breach" is now the preferred term for conduct essential to a finding of repudiation: see *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, [2015] 1 SCR 500, at para. 35.

- [84] As of January 6, 2016, Mr. Kang remained under contract with New City to perform the drywall and confil work on levels 1 to 9. Under the Schedule of Values, that work had a value, inclusive of GST, of \$185,059.35; with Mr. Kang already having been paid for some drywall on level one, under the Coffee Shop Agreement, the Subcontract still had a gross value of approximately \$183,000.
- [85] The amount of New City's outstanding indebtedness to Mr. Kang on the subject project as of January 6, 2015 was, at most, \$18,425. This was, to use the words of Wallace J.A., only a "relatively minor portion" of the total consideration Mr. Kang stood to be paid if he completed the Subcontract, as modified.
- [86] In the circumstances of the present case, I cannot find that New City having made only a partial payment of Invoice No. 1708 could reasonably be interpreted as an intention no longer to be bound by the contract. It is understandable that Mr. Kang felt frustrated, and it is unfortunate that there was no clearer communication between him and New City. I also accept that Mr. Kang may have been under pressure himself from his suppliers and workers to be paid. However, those problems were largely of his own making, as a result of his obligation to make good on the extensive deficiencies in his steel stud framing work - and, perhaps, as a result of him having under-bid on the Subcontract. His decision to renounce the Subcontract unilaterally, on the heels of a substantial partial payment and only one day after the deadline he had set for full payment, was not justifiable. There was no basis for him to maintain that New City was in breach of contract. Mr. Kang chose to walk away from his obligation, and he is responsible for the consequences.

Amounts Owed to New City by the Plaintiff

- [87] New City counterclaims for costs of:
- (a) correcting deficiencies in the plaintiff's steel stud work;
 - (b) completing the drywall and confil work on the project after the plaintiff repudiated the subcontract; and
 - (c) a lien bond obtained as substitute security for the plaintiff's builders lien.
- [88] As I have found, New City issued a contract to Platinum Edge on December 10, 2015, for steel stud framing on levels five through nine, following discussions with Mr. Kang in which he had indicated he did not wish to complete that work. Platinum Edge's contract price for that work was \$98,000 plus GST, or an average of \$19,600 per floor. This was higher than the Statement of Values in Mr. Kang's Subcontract, which valued that work at \$16,417 per floor. Nevertheless, New City is not counterclaiming for the increased cost. New City accepts that the Coffee Shop Agreement included Mr. Kang being relieved of that portion of the Subcontract.

Deficiency Costs

- [89] Mr. Kang, however, remained contractually liable for the cost of correcting deficiencies in the steel stud work he undertook. Mr. Marsh's notes of the Coffee Shop Agreement clearly indicate that the deficiency costs were only being accounted for "to date". There was no agreement to cap Mr. Kang's liability at that amount, and there is no principle of law which would impose any such cap.
- [90] Further, the Subcontract specifically entitled New City to bring in additional help and reduce the original purchase order if Mr. Kang could not meet the schedule.
- [91] To correct deficiencies, New City hired a subcontractor by the name of Paul Witt, doing business as Witt's End Contracting, and Platinum Edge. Mr. Witt issued two invoices to New City for removing and replacing deficient stud work on the second and third levels, covering the time period December 7, 2015 to January 29, 2015, totalling \$12,521.25, inclusive of GST.
- [92] Platinum Edge issued two invoices that covered work from December 10 to January 15. There was a third invoice, for other work done in the month of January. It was in part for work on the second and third levels, but the majority was for work on the fourth level. New City agrees that as Mr. Kang had been relieved of his obligation to complete the fourth level work, he is not liable for the cost to complete level four, and their claim in respect of that invoice is reduced accordingly. The total of Platinum Edge's invoices work labour and materials on the second and third levels is \$17,549.39, inclusive of GST.
- [93] New City put into evidence a series of five invoices from its materials supplier for materials supplied to correct deficiencies in the plaintiff's work. The invoices total \$9,838.41, inclusive of GST. In addition, New City performed some of the deficiency corrections with its own labour. The documented cost of that labour totalled \$3,783.75.
- [94] The total of those costs is \$43,692.80.
- [95] However, a portion of those costs - \$19,540 - was already accounted for in the "to date" deficiency work deductions that went into the Coffee Shop Agreement. New City agrees that Mr. Kang must be credited with that amount. New City's claim for deficiency correction work is therefore quantified at \$24,152.80, including GST.
- [96] I find Mr. Kang is liable for that amount.

Drywall Completion Costs

- [97] It was agreed at the Coffee Shop Meeting that Mr. Kang would continue with the outstanding drywall and confil work. As discussed above, under the Statement of Values this remaining work had a value of \$185,059.35.
- [98] Platinum Edge's contract price for completing the drywall and confil work was \$318,675.00.

- [99] Ultimately it cost more than that for the work to be completed, as Platinum Edge encountered difficulties towards the end of the project, and New City had to bring in other third parties to complete. New City, however, does not hold Mr. Kang responsible for those unforeseen additional costs; their claim is limited to the amount charged by Platinum Edge to complete the work the plaintiff abandoned.
- [100] I do not find Platinum Edge's contract price excessive or inflated. I accept Mr. Marsh's evidence that it made sense to contract with them as they were available, familiar with the site, and New City had to move quickly to find a replacement. That was what New City had to pay, and did pay. The onus to prove the amount was unreasonable lies with the plaintiff, and there is no evidence on which such a finding could be made.
- [101] Accordingly, Mr. Kang is liable for the difference between his contract price, and Platinum Edge's contract price, for the abandoned work: \$133,615.65.

Lien Bonding Cost

- [102] The plaintiff filed a claim of lien in the amount of \$125,146. To have the lien claim removed from title, New City was obliged to obtain a lien bond, which it has had to maintain since 2016 at an annual cost of \$2,503.
- [103] The lien claim was grossly in excess of the amount that was owed to Mr. Kang before accounting for any set-off amounts. New City submits that the claim was wrongfully filed within the meaning of s. 19 of the BLA, and claims the carrying costs thereunder.
- [104] Section 19 reads:

A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

- [105] The scope of this section was recently considered by Madam Justice Iyer, in *JVD Installations Inc. v Skookum Creek Power Partnership*, 2020 BCSC 374. In that case, a lien claim of more than \$5.5 million was ultimately reduced to just less than \$3.7 million, and the defendant claimed they should be entitled to recover the cost of maintaining a lien bond in excess of the latter amount. At para. 148, Iyer J. said:

Section 19 does not apply here. It is about invalid liens, which do not attach to the land, not to inflated liens, which do (albeit in a lesser amount) .

- [106] There is no issue here as to the "validity" of the lien in that sense. Title to the lands on which the project was built was lienable. Section 19 does not assist New City.

[107] New City further points to s.45 of the BLA, which creates an offence when a person knowingly files a claim of lien containing a false statement. That provision of the statute, however, does not explicitly create a category of civil liability. Given that s. 19 does explicitly create civil liability, but limits it to situations involving invalid liens only, I cannot infer that civil liability arises when a s. 45 offence is committed. This claim is disallowed.

Conclusion

[108] New City's contractual liability to the plaintiff for unpaid work is assessed at \$24,209.80.

[109] That amount is set off against New City's counterclaim, which is assessed at \$157,768.45.

[110] The difference is \$133,558.65. New City will have judgement against the plaintiff in that amount.

[111] The claims against the defendants My Gastown and Cordova are dismissed.

[112] New City is presumptively entitled to its costs at Scale B. If there are issues concerning costs I am unaware of, the parties are at liberty to apply.

"A. Saunders J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/18/2021BCSC1861cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kang-v-my-gastown-development-limited-partnership-2021>

Prepared on 27 October 2026 · Esheria