

CANADA / JUDGMENT

Lu v. 421688 B.C. Ltd.

2020 BCSC 1001

COURT

Supreme Court of British Columbia

DECIDED

6 July 2020

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2020 BCSC 1001 Lu v. 421688 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lu v. 421688 B.C. Ltd.,

2020 BCSC 1001

Date: 20200706

Docket: S180123

Registry: New Westminster

Between:

Yuyang Lu

Plaintiff

And

421688 B.C. Ltd., Nancy Suk Ling Chuck, Jimmy Cheong Man

Chuck also known as Jim Choul, and John Doe also known as Jim Choul

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment on Costs

Counsel for the Plaintiff (appearing by teleconference):

P.A. Kressock

Counsel for the Defendants (appearing by teleconference):

S.C. Hu

Place and Date of Hearing:

New Westminster, B.C.

May 14, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 6, 2020

- [1] Reasons for Judgment following a ten day trial of this matter were issued on January 27, 2020, and have been indexed at 2020 BCSC 93. The parties being unable to agree on costs following issuance of the Reasons for Judgment, delivered written submissions and a hearing by telephone was conducted on May 14, 2020. These are my reasons on costs.
- [2] As the facts are summarized in the Reasons for Judgment following trial, I will provide only a brief summary for the purposes of assessing costs.
- [3] The plaintiff, Mr. Lu, owns a residential lot in Vancouver and purported to enter into a construction contract in June 2014 with 421688 B.C. Ltd. ("421") under which 421 would design and build a residence for Mr. Lu and his family.
- [4] There were two versions of the contract, one in English and one in Chinese, both prepared by the defendants, and which contained significantly different terms, those differences being identified in the Reasons for Judgment at trial. In my Reasons for Judgment, I found that there had not been a meeting of the minds on the terms of a contract.
- [5] The proposed residence which was to be the subject of an agreement between the parties was never built. The defendant and the designer of the home had prepared drawings for a building permit, had met with the owner, Mr. Lu, on many occasions and had submitted plans to the City of Vancouver, hoping the City would issue a building permit, which never arrived before the purported contract was terminated by the plaintiff. As well, the defendants and the designer had met with the proposed contractor and others and had attempted to negotiate with the City over compliance required with the City Building Code.
- [6] Delays encountered included time required for the City to process and approve the plans and a separation and divorce of the plaintiff and his wife which included the plaintiff's wife temporarily emptying the plaintiff's bank account in Canada.
- [7] The plaintiff had, during the course of dealings with the defendants, paid the sum of \$375,000 in deposits to the defendants, 421 and Mr. Chuck.
- [8] The claim brought against the defendants included the following from the Closing Submissions of the Plaintiff:

- a) Damages in the amount of the misappropriated deposits of \$375,000;
 - b) Consequential damages of \$86,259.64;
 - c) Mental distress damages of \$30,000;
 - d) An accounting of the profits made by the defendants in connection with their misappropriation and use of the deposits;
 - e) Punitive damages of \$50,000; and
 - f) Interest.
- [9] In their Closing Submissions, the defendants sought:
- a) The plaintiff's claims be dismissed;
 - b) Forfeiture of the \$375,000 deposit;
 - c) In the alternative, an award of damages for breach of contract in the amount of \$270,000;
 - d) Special damages in the amount of \$127,000;
 - e) In the alternative, an award of damages for unjust enrichment in the amount of \$350,000; and
 - f) The certificate of pending litigation with number BB3039658 registered on title against the defendants' properties be removed and funds held in trust pursuant to the order of Madam Justice B. Brown made October 4, 2016, be released to the defendants.
- [10] The judgment at trial in favour of the plaintiff was in an amount of \$208,547 which was the net amount remaining of the deposits, less payments made by the defendants to the contractor for deposits, the designer and other expenses the defendants had incurred during the time they were attempting to obtain a building permit. I also ordered the defendant 421 to be entitled to \$40,000 on a quantum meruit basis for their efforts to advance the project. Effectively, Mr. Lu was entitled to a judgment for the amount of the deposits less a set off for payments made by 421 to others advancing the project and the award of quantum meruit.
- [11] In the Reasons for Judgment, I found a lack of credibility on the part of the plaintiff, particulars of which are in the Reasons for Judgment at trial.
- [12] Mr. Lu was most concerned that no work in the field ever proceeded on his project, however, the reasons for the same included delays brought about by Mr. Lu's lack of direction as to whether to proceed during a time he was negotiating and litigating with his spouse who was a joint owner of the West 34th Avenue property. Mr. Lu also instructed changes to the draft drawings and due to the odd shape of the property and trees the owner wished to have removed, resulted in further delays in dealings with the City for a demolition and building permit. The City had also been overwhelmed with applications for building permits in December of 2014 as a new Building Code was about to come into force in January 2015,

which would have added cost to the work.

- [13] Following the last day of evidence at trial, I was advised by letter from counsel for the plaintiff of conduct on the part of Mr. Chuck, a defendant and principal of the defendant 421 that included an attempt to influence the testimony of two witnesses called for the defence, being the designer and the contractor. While sitting in the gallery during the testimony, Mr. Chuck held up what appeared to be notes or prompts intended for the witnesses while they were under direct and cross-examination.
- [14] The actions of Mr. Chuck were captured on security video maintained in the courtroom. I, counsel and the parties subsequently observed the video recordings.

Offers to Settle

- [15] The defendants delivered two Offers to Settle this proceeding. The first offer was made January 16, 2019, in which the defendants offered to pay \$150,000, inclusive of costs. The second offer was made January 28, 2019, one week before the commencement of trial and included an offer to pay \$195,000, inclusive of costs. Neither offer precipitated a written response from the plaintiff.

Submissions of the Plaintiff

- [16] Mr. Lu seeks costs against the defendants, jointly and severally, assessed as special costs, or alternatively, as party and party costs at scale B. Mr. Lu submits he was the "successful party" and thereby entitled to costs under the Supreme Court Civil Rules, B.C. Reg. 168/2009, R. 14-1(9), which very simply states:

Costs to follow event

- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [17] Regarding the standard for "success" under Rule 14-1 (9), the plaintiff relies upon the authority of *Loft v. Nat*, 2014 BCCA 108, submitting that Mr. Lu was the successful party in that he obtained a judgment and secured a dismissal of the counterclaim of the defendants.
- [18] In *Loft*, the following paragraphs are of significance in this case:
- [46] Pursuant to Rule 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. At its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Service Corporation International (Canada) Ltd. (Graham Funeral Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 1588, 42 C.P.C. (7th) 416.

- [47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs: 3464920 Canada Inc. v. Strother, 2010 BCCA 328, 320 D.L.R. (4th) 637.
- [49] The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: Brown v. Lowe, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): Lee v. Jarvie, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases...
- [19] In his written submission, the plaintiff further submits that the action was "focused on recovering the \$375,000 in construction deposits . . ." and "[w]hile there may have been multiple causes of action in a technical sense, they amounted to overlapping or alternative basis for resolving the main issue in the case, namely whether the plaintiff was entitled to recover the Deposits".

Submissions of the Defendants

- [20] The defendants seek "all or a portion of their costs of the action at Scale B or, alternatively, their costs of the action from January 16, 2019, at Scale B or in the further alternative, that the parties bear their own costs".
- [21] The defendants submit they were the successful party under Rule 14-1 (9), however, the defendants rely upon a different decision regarding a standard for "success", i.e., Fotheringham v. Fotheringham, 2001 BCSC 1321. Leave to appeal the Supreme Court decision in Fotheringham was refused at 2002 BCCA 454.
- [22] At para. 46, Bouck J. referred to the "Gold" principle, from the decision of Gold v. Gold (1993), 82 B.C.L.R. (2d) 180 (B.C.C.A.), regarding "success":

46 Based upon the above interpretation of Rules 57(9), 57(15) and Gold, a decision to award or not award costs after a trial might follow a four step inquiry.

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
2. Second, by assessing the weight or importance of those "matters" to the parties.

3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded", overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded", a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [23] The Fotheringham approach has been applied for many years, most often in family law cases where there are usually several distinct issues at trial, be they child or spousal support, property division and parenting issues which make family cases more amenable to considering "substantial success" on a multi-issue basis.
- [24] The defendants submit that they were substantially successful in defending the plaintiff's claims for breach of contract, conversion, breach of trust, consequential damages, a constructive trust, an equitable interest in three properties owned by the defendants, tracing, non-pecuniary damages and punitive damages.
- [25] The defendant 421 also references that although its counterclaim was dismissed, it was successful in a claim for quantum meruit.
- [26] The defendants also advance an argument based on their offers to settle, referring to R. 9-1, which provides that the court may consider offers to settle in exercising its discretion in relation to costs and the principles articulated in *Hartshorne v. Hartshorne*, 2011 BCCA 29.

Discussion

- [27] While the claim of Mr. Lu for return of the \$375,000 in deposits was foremost in the action, the claims of the plaintiff went far beyond return of the deposits.
- [28] At trial Mr. Lu testified as to how he had purchased a house in Abbotsford, B.C. in late 2015 to be closer to his daughter who resided in Abbotsford. Evidence relating to the Abbotsford home included how Mr. Lu granted a mortgage of \$700,000 with monthly payments of \$3,167 and had paid \$62,699 in interest on the mortgage since 2015. He was seeking damages for the interest he had paid out on the mortgage for the Abbotsford home.
- [29] Mr. Lu also claimed for reimbursement of property tax paid on the West 34th Avenue property from 2015 amounting to \$28,549. The older residence on that lot remained unoccupied other than squatters who had moved into the home which was to have been demolished.
- [30] Mr. Lu also claimed reimbursement for vacancy tax paid on the West 34th Avenue property in 2018, amounting to \$45,161, as well as for reimbursement of property taxes paid on the Abbotsford home since 2015, amounting to \$23,560.

- [31] As mentioned above, Mr. Lu sought non-pecuniary damages, referring to evidence that he could not enjoy his new home which was never built, his "entire family plan had been ruined", his son was unable to attend a school of their choice in Vancouver, his older brother in China had become too ill to move to Vancouver and share the West 34 Avenue home, he lost weight, was depressed, on medicine and was "living in a world of deceit". In support of this claim, Mr. Lu referred to six authorities and sought \$30,000 in non-pecuniary damages.
- [32] Mr. Lu also advanced a claim under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, saying the building contract was subject to that Act which was not successful.
- [33] Mr. Lu advanced claims for personal liability of the principals of 421, i.e., Mr. and Ms. Chuck, for conversion and breach of trust and for the disgorgement of profits made by Mr. Chuck which allegedly were earned with the deposits which had been paid by Mr. Lu. Mr. Lu referred to four specific projects in the Lower Mainland in which Mr. Chuck had allegedly made profits and sought an accounting. Those claims were also dismissed.
- [34] Mr. Lu says in written submissions on costs that "[w]hile there were multiple overlapping causes of action advanced at trial - breach of contract, conversion, breach of trust and unjust enrichment - they were all directed toward recovery of the deposits". Contrary to the submissions of Mr. Lu, he was in pursuit of multiple other claims beyond return of the deposits which considerably added to the evidence and submissions at trial. He was not successful on any of those claims and only partially successful in the claim for return of the deposit funds.
- [35] The defendants did establish a set off for payments made to the designer, the contractor, an arborist and others all of whom undertook considerable effort to move the project forward. Similarly, Mr. Chuck attended many meetings with Mr. Lu and the designer, prepared documentation which, although incomplete and confusing, took time and effort. The efforts of Mr. Chuck resulted in a quantum meruit award of \$40,000.
- [36] I conclude there was some minor success on the part of both parties, however, the frustrations of both far exceeded any degree of success.
- [37] To conclude, Mr. Lu was only marginally successful in his claims if one were to rely only on the Loft description of success.
- [38] I now turn to the issue of "substantial success" as defined in the Fotheringham context. I note that while the concept of substantial success is generally employed in family law cases, it may also be employed in other areas, per the comments of the Court of Appeal in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346:

- [91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [92] While the "substantial success" formula is particularly well suited to family cases when the court has to wrestle with several separate and distinct causes of action, the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action.
- [39] Several of Mr. Lu's claims were not successful and overall, I find he was not substantially successful.
- [40] Regarding the claims made by the defendants, I refer also to the case of *Litt v. Gill*, 2016 BCCA 288. The underlying dispute in *Litt* was similar to the case at bar; it involved the interpretation of an agreement for the sale of a subdivided parcel of land and the construction of a house on the two subdivided lots (para. 1). The trial judge made a number of findings leading to the conclusion the agreement was unenforceable. On appeal, the Court set out the applicable costs approach where there is a claim and counterclaim:
- [55] Ordinarily, the action should be treated as if it stood alone, and the counterclaim should bear the amounts by which it increases the costs of proceedings: *Trinh v. Chan*, [1998] B.C.J. No. 720 at para. 5 (S.C.). Where a defendant successfully defends an action, but a plaintiff successfully defends a counterclaim, the usual practice is to award the defendant the costs of the action and the plaintiff the costs of the counterclaim, to be set off against each other. See, e.g., *Manita Investments Ltd v. T.T.D. Management Services Ltd.*, [1997] B.C.J. No. 2586 (S.C.), *aff'd* 2001 BCCA 334; *Brown v. Boyar*, 2009 BCSC 1603 at paras. 5-7.
- [56] In *M.A. Concrete Ltd. v. Truter*, 2016 BCCA 138 at para. 37, this Court held that the trial judge erred in principle in failing to craft a costs award that took into account the defendants' success on a counterclaim. The plaintiffs had successfully advanced claims for damages relating to a breach of fiduciary duty, while the defendants successfully advanced a counterclaim. As a result, the plaintiffs obtained a net award of approximately \$1,815.93, and the defendants an award of approximately \$25,000. The trial judge considered the case to be an appropriate one for apportionment of costs under R 14-1(15), awarding the corporate plaintiff 75% of its costs in the main action, and no costs to the defendants on the counterclaim. Noting that neither party was substantially in the right or wrong, this Court left the costs award in the main action intact, but awarded the defendants 75% of their costs

on the counterclaim.

- [41] Just as the plaintiff was not substantially successful in his claims, the defendants were not substantially successful in theirs. This is not a case in which "a defendant successfully defends an action, but a plaintiff successfully defends a counterclaim" (Litt at para. 55); both parties had some, mixed success.
- [42] Therefore, applying my discretion on applications for costs, I find neither party was successful so as to be entitled to an award of costs.
- [43] Similarly, based on all the above, I decline to exercise my discretion to make a costs award on the basis of the defendants' Offers to Settle.

Conduct of the Parties - Special Costs

- [44] I am in agreement with the plaintiff that the conduct of Mr. Chuck, in particular, in attempting to influence the testimony of witnesses at trial was conduct which deserves serious rebuke. Mr. Chuck had to have been aware that his conduct was inappropriate in that he clearly made attempts to conceal his efforts to influence witnesses. Conduct of that nature shows disrespect for the court which cannot be tolerated.
- [45] Mr. Lu submits that the conduct of Mr. Chuck went "over the line" and that the standard for special costs to be awarded against Mr. Chuck have been met.
- [46] The defendants acknowledge in written submissions on costs that although Mr. Chuck's conduct:

. . . may have been wrong, it did not amount to an abuse of process and was not a persistent breach of the rules of professional conduct of rules or court aimed at prejudicing the plaintiff. Furthermore, there was no evidence of improper motive or an intention to mislead the court on the part of Mr. Chuck.

- [47] I do not agree. It was readily apparent that Mr. Chuck was attempting to influence the evidence of two witnesses by surreptitiously opening a binder with notes towards the witnesses out of view of me or counsel. Mr. Chuck was clearly attempting to influence the testimony of those witnesses.
- [48] In *Coulter v. Ball*, 2003 BCSC 1186, Justice Ross stated:
- [23] I do not agree that in order to conclude that there has been reprehensible conduct in relation to a witness's evidence in the context of an application for special costs the Court must conclude that the witness has actually altered his or her evidence as a result of the actions of the party or the party's agent. In my view, the proper focus is on the conduct of the party or the agent of the party. The question is - is that conduct worthy of rebuke? An effort to contaminate the evidence of a witness is, in my view, conduct worthy of rebuke and remains so whether or not the effort met with success.

- [49] Whether or not the witnesses in this case were influenced by the conduct of Mr. Chuck is irrelevant. Mr. Chuck clearly intended to influence those witnesses and knew his conduct was wrong or would not have attempted to conceal his actions.
- [50] Accordingly, I exercise my discretion and award special costs to the plaintiff relating to additional preparation for submissions which were postponed for a considerable period of time due to Mr. Chuck's actions, the cost of attending to observe security video of Mr. Chuck's actions and the cost of preparing submissions in writing and for oral submissions to the court, such costs to be taxed before the Registrar.

Summary

- [51] In summary, the parties will bear their own costs, except as those costs relate to steps arising as a result of Mr. Chuck's inappropriate conduct (as described above). The plaintiff is awarded special costs in relation to those steps.

"Jenkins J."

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