

CANADA / JUDGMENT

Manjit International Development Ltd. v. Ng

2009 BCCA 429

COURT

British Columbia Court of Appeal

DECIDED

7 October 2009

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2009 BCCA 429 Manjit International Development Ltd. v. Ng COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Manjit International Development Ltd. v. Ng, 2009 BCCA 429 Date: 20091007 Docket: CA036993 Between: Manjit International Development Ltd. Respondent (Plaintiff) And Richard Ng Appellant (Defendant) Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Tysoe The Honourable Madam Justice Bennett On appeal from Supreme Court of British Columbia, March 31, 2009 (Manjit International Development Ltd. v. Ng, Vancouver Reg. S083456) Oral Reasons for Judgment Appellant appearing In Person: Appearing as agent for the Respondent: S. Parmar Place and Date of Hearing: Vancouver, British Columbia October 2, 2009 Place and Date of Judgment: Vancouver, British Columbia October 7, 2009

- [1] TYSOE J.A.: The appellant, Richard Ng, appeals from the order of the trial judge dated March 31, 2009, awarding judgment to the respondent, Manjit International Development Ltd. ("Manjit International"), and dismissing his counterclaim.
- [2] On March 27, 2007, Mr. Ng entered into a residential construction agreement with Manjit International to build a house on the East Side of Vancouver. Although there remains disagreement between the parties over exactly what was included in the price, the trial judge found that the agreed price for the construction was \$125 per square foot multiplied by the total floor area, which was estimated to be 3,200 square feet, resulting in an estimated contract price of \$400,000.
- [3] Differences arose between the parties, and Manjit International commenced the action against Mr. Ng. In its statement of claim, Manjit International pleaded that the contract price was \$400,000 and that a balance of \$100,000 remained unpaid. Mr. Ng counterclaimed, alleging breach of contract by Manjit International, and sought to recover damages for the cost of repairing certain deficiencies, and damages for breach of contract and for his inability to sell the home in its present condition. Mr. Ng also started a separate action against Manjit International alleging that he had overpaid the company in the amount of \$120,000.00.

- [4] Following a 10-day trial, the judge ruled in favour of Manjit International and granted judgment against Mr. Ng. She dismissed Mr. Ng's counterclaim, and awarded costs of the action to Manjit International. She also dismissed any claim based on the alleged overpayment. All but one of the issues before her depended upon her findings of fact, and she concluded that Mr. Ng's evidence lacked credibility on many central issues.
- [5] Based on the agreement of the parties at a settlement conference that the total area of the building was 3,166 square feet, the trial judge held that the contract price was \$395,750. After taking into account two additional items agreed upon between the parties, she found that the adjusted contract price was \$406,292. The parties had also agreed that Mr. Ng had paid \$325,000 on account of the purchase price and that Mr. Ng was entitled to further credits of \$31,096.94. That meant that the balance owing by Mr. Ng before resolving the disputed items was \$50,195.06.
- [6] The disputed items related to certain deficiencies claimed by Mr. Ng, appliances that Manjit International was obliged under the contract to supply and the detached garage constructed by Manjit International. The trial judge gave Mr. Ng a credit of \$12,000 in respect of the deficiencies that Mr. Ng had claimed were rectified at a cost of \$55,000, and she also gave him a credit of \$8,000 in respect of the appliances. She also awarded Manjit International the sum of \$29,610 for the construction of the garage. The judge concluded that the wording of the contract precluded the area of the garage from being included in the total square footage of construction, but awarded the \$29,610 sum on a quantum meruit basis because Mr. Ng could not realistically expect the garage to be constructed for him free of cost. After taking these items into account, the judge granted judgment in the amount of \$59,805.06. The entered order contains the incorrect figure of \$56,805.06
- [7] The trial judge dismissed Mr. Ng's counterclaim because she concluded that there had not been a bona fide purchaser of the house and the deficiencies did not compromise Mr. Ng's ability to sell the property, that the delay of Manjit Development in completing the construction was outside of its control and that the alleged \$120,000 overpayment had not been made.
- [8] Mr. Ng claims on appeal that the trial judge misapprehended the evidence and that she erred in making her findings on a great number of factual issues. He seeks to have this Court set aside the judgment and allow his counterclaim.
- [9] In his factums and at the hearing of the appeal, Mr. Ng reviewed the evidence supporting his position. His submissions for the most part amount to an allegation that the trial judge misapprehended the evidence by failing to find that he was a credible witness and that her findings of fact were based on this erroneous conclusion about his credibility.

- [10] The role of this Court is not to retry the case. This Court is a court of review and of error correction. It does not receive evidence or hear witnesses. That is the role of the trial court. Consequently, this Court will not interfere with findings of fact by a trial judge, absent palpable and overriding error "plainly seen": *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As stated by the majority in that case:
- [22] [Although] it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
- [11] That is the same standard of review applicable to a trial judge's findings of fact based on the credibility of a witness. In *Lu v. Mao*, 2007 BCCA 609, Madam Justice Saunders stated as follows:
- [12] this Court does not interfere lightly with findings of credibility. It is the trial judge who is in the best position to assess credibility. Only if the assessment of credibility is based upon a significant misapprehension of evidence or displays an error in principle will this Court interfere. Hence, this Court cannot interfere with the trial judge's findings on credibility and findings of fact unless it is demonstrated that she made an obvious error that affected the outcome of the decision.
- [12] With one exception, all the grounds of appeal raised by Mr. Ng relate to findings of fact made by the trial judge. Mr. Ng endeavours to persuade us that the judge's adverse finding regarding his credibility was based on her alleged misapprehension of the evidence as to whether Mr. Parmar of Manjit International was aware that building plans had already been submitted to City Hall before the construction contract was signed. There was evidence to support her finding of fact in that regard, and there were several other examples of evidence which supported her conclusion about Mr. Ng's credibility generally. After hearing the testimony of both Mr. Ng and Mr. Parmar and receiving all of the documentary evidence, the trial judge was entitled to prefer the evidence of Mr. Parmar over that of Mr. Ng. The appellant has failed to demonstrate any palpable and overriding error in the findings made by the trial judge, and there is no basis for this Court to interfere with her findings.
- [13] The exception to which I have referred relates to the garage. In its statement of claim, Manjit International alleged that it was to be paid the sum of \$400,000 for the construction. It did not make a separate claim for damages for the cost of building the garage. In my opinion, it was not open to the trial judge to make a separate award for the cost of building the garage on a quantum meruit basis when there was no pleading upon which such an award could be based. I also note that the contract clearly contemplated the construction of a garage and

that the contract provided that there were not to be any changes to the work or the price unless the parties agreed in writing.

[14] I would allow the appeal, set aside the judgment in the amount of \$59,805.06 plus costs at Scale B and substitute in its place a judgment in the amount of \$30,195.06 plus costs at Scale B. As success on this appeal has been divided, I would order that each party bear their own costs of this appeal.

[15] SAUNDERS J.A.: I agree.

[16] BENNETT J.A.: I agree.

[17] SAUNDERS J.A.: The appeal is allowed and the judgment in the Supreme Court of British Columbia is set aside and in its place a judgment in the amount of \$30,195.06 plus costs on Scale B shall be ordered, and there shall be no costs to either party on this appeal. "The Honourable Mr. Justice Tysoe"

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Prepared on 29 October 2026 · Esheria