

CANADA / JUDGMENT

RS Coastal Designs Inc. v. Li

2021 BCSC 1075

COURT

Supreme Court of British Columbia

DECIDED

4 June 2021

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2021 BCSC 1075 RS Coastal Designs Inc. v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

RS Coastal Designs Inc. v. Li,

2021 BCSC 1075

Date: 20210604

Docket: S197053

Registry: New Westminster

Between:

RS Coastal Designs Inc.

Plaintiff

And

Rui Li

Defendant

Before: Master Robertson

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

N.A. Mulholland

Counsel for the Defendant:

D.A. Solimano

Place and Date of Hearing:

New Westminster, B.C.

April 7, 2021

Place and Date of Judgment:

New Westminster, B.C.

June 4, 2021

[1] This is an application that a certificate of lien be cancelled pursuant to s. 25(1)(a) of the Builders Lien Act, S.B.C. 1997, c. 45 (the "BLA") and ancillary relief on the basis that it was not filed in accordance with the BLA.

Background

[2] By way of background, the defendant is the registered owner of lands located at 13617 - 24 Avenue, Surrey, B.C. (the "Lands").

[3] It is not disputed that on or about February 5, 2015 the plaintiff and the defendant entered into a contract (the "Agreement") whereby the plaintiff was engaged to perform specific work on the Lands with respect to the construction of a house, and that such work meets the definition of Improvements under the BLA (the "Improvements").

[4] Mr. Ryan Stajcer was the director and responsible party for the plaintiff. Mr. Fearon and Mrs. Fearon, the defendant's mother, acted as the defendant's agent with respect to the Agreement and the Improvements.

[5] The defendant is not resident in Canada, and as such used Mr. and Mrs. Fearon as agents in respect of these dealings.

[6] The defendant's evidence is that:

- a) on July 19, 2016, Mr. Stajcer texted Mr. Fearon stating that he would have "the final invoice ready for Friday", that being July 22, 2016 with respect to the Agreement;
- b) on July 20, 2016, the plaintiff tendered an invoice relating to the Agreement which indicates that it is for the costs from June 21, 2016 to July 20, 2016 (the "July 20 Invoice");
- c) the July 20 Invoice was presented to the defendant on July 22, 2016 and, the defendant says, the Head Contract was terminated on that date;
- d) on July 23, 2016, Mr. Stajcer sent an email to Mr. Fearon in which it was written "don't forget you will have a 10% holdback for 55 days from yesterday's date witch [sic] was the last invoice";

- e) despite the indication of the July 20 Invoice being a "last" invoice, the plaintiff issued further invoices dated August 11, 2016, October 24, 2016, November 14, 2016 and November 30, 2016, which are not fully particularized; however, the defendant submits, only relate to other parties work or costs undertaken prior to the time limit for the filing of the lien. In particular, the latest invoice, that being the one dated November 30, 2016, is only in relation to "costs incurred by the Plaintiff from October 18 to October 28, 2016" and a 12% management fee charged on those costs;
 - f) on September 10, 2016, Mr. Stajcer sent an email to Mr. Fearon in which it was written "This week will be 55 days from when we terminated the contract" and a text message that "This Friday is 55 days from when you guys terminated the contract with us. Can I we [sic] please meet to get are [sic] final payment"; and
 - g) the certificate of lien was filed against the Lands on January 3, 2017.
- [7] That the Agreement was terminated on July 22, 2016 seems to be acknowledged by the plaintiff in the above-noted emails and texts. Using that date the time limit for the filing of the certificate of lien would have expired 45 days thereafter, i.e., on or about September 5, 2016. As noted, it was filed on January 3, 2017, some 65 days after that date. Accordingly, the defendant argues, the lien was clearly filed out of time.
- [8] In the alternative, even if it was not terminated on that particular date the defendant says it was completed well before November 18, 2016, which would be latest possible date for the January 3, 2017 filing to have met the timing requirements of the BLA. As noted, the last reference to any work being done in the invoices issued after the purported termination date is October 28, 2016.

Preliminary Issue as to Appropriateness of Matter Coming on for Hearing

- [9] In November 2020, the defendant brought a previous application to have the lien cancelled.
- [10] At that application, the plaintiff took the position that the application was premature, as the discoveries had not, in its view, been completed. The Order that was pronounced at that application has not yet been entered but a draft provided. There is an inconsistency between the draft and the clerk's notes.
- [11] The clerk's notes indicate that the order made was that the defendant was to attend a continuation of his examination for discovery on a date to be agreed to by counsel and the witness, no later than February 12, 2021, unless the parties otherwise agreed and that it would be done remotely by video/zoom. A further term was that the defendant would abide by the Supreme Court Civil Rules in preparing for his examination for discovery. Finally, costs were to be determined by the next presider.
- [12] The inconsistent term is an addition that this application is to be adjourned until discoveries have been concluded. That term is not in the clerk's notes.

- [13] I am advised by counsel for the plaintiff that the basis on which the November 2020 order was made is that the defendant had previously failed to attend discoveries when scheduled, with the defendant indicating that that was due to being out of the country. When the defendant did ultimately attend he did not provide any substantive answers to questions and admitted that he had not reviewed any file materials or sought any assistance from the relevant parties involved to understand them. The discovery was therefore adjourned after only 19 minutes.
- [14] The November 2020 application for the cancellation of the lien was then brought, with result being as noted.
- [15] Since that order was made a continuation of the discovery has taken place. However, the plaintiff says that while the continued discovery took place the defendant did not comply with the Rules, specifically, Rule 7-2(22), which requires a person being examined to inform him or herself as necessary to conduct the examination in accordance with Rule 7-2(18) and (22), which read as follows:

Scope of Examination

- (18) Unless the court otherwise orders, a person being examined for discovery
- (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and
 - (b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

Person must inform self

- (22) In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that purpose.
- [16] The plaintiff's position is that until the defendant has informed himself fully as to all matters, he will not have complied with the November 2020 order and the application cannot come back on for hearing.
- [17] During submissions I questioned the plaintiff's counsel if, at either of the discoveries, the questions that he wanted answered were put to the witness on record, such that he could indicate if he was able to answer, and if not, the appropriate outstanding request made. Otherwise, I noted, the defendant would be in a position that he would not know the specifics of everything that he was to inform himself about. While some things ought to be obvious, particularly with proper preparation from counsel, there could be a back and forth with multiple continuations if such specificity was not made on the record. Plaintiff's counsel indicated that it was obvious to him that the defendant had not informed himself again so he did not do that. Instead, he said, he simply ended the discovery.

[18] The transcripts were not before the court. Accordingly, after submissions were made I reserved judgment, subject to having those transcripts put into evidence and provided to the court so as to determine what took place at the discovery.

[19] I have now had an opportunity to review those transcripts.

[20] I note that at both discoveries an interpreter was required. This is relevant given that at the first discovery one of the issues that the defendant noted that he had with preparing was his limited use of English, which is the language in which all documents and correspondence are written.

[21] In any event, at the continuation, the defendant testified:

- a) that he had not signed the Agreement, and that the signature on it was not his, but that he had given his mother, Ms. Fearon, a power of attorney to act on his behalf.
- b) he had spoken with both his mother and Mr. Fearon about the progress of the building of the home and issues that led to the lawsuit to prepare for the discovery.
- c) he had reviewed the invoices, but had not had specific discussions with his mother or Mr. Fearon as to why they did not pay the invoices.
- d) the plaintiff's counsel "should ask my mother", upon being asked about the allegation that the work performed was deficient, and particulars of that, saying "She said this person did not do a good job. I trusted her, so I agreed. I didn't ask for the specifics", with a similar statement being given in response to the question of whether or not anyone was hired to remedy or fix any deficiency, or if he was unable to get new home warranty protection, among other things.
- e) while he reviewed the documents, given his limited knowledge of English, he did not understand them fully - just the basics.

[22] The continuation of the discovery included the following exchange specific to the efforts taken by the defendant to inform himself as to these matters:

Q. So if I understand you correctly, the only preparation you've done for this discovery is to ask your Mom whether you owed any money to the plaintiff and her response was no, he owes us money, and that was the extent of your conversation?

A. She also show me the invoices, those invoices, and also some documents in this case.

Q. Did you discuss any other details of this case with your mother?

A. No.

Q. I see. You're aware, sir, that you are - that this discovery today is proceeding as a result of a court order that was pronounced on November 13th of this year? You're aware of that?

A. I understand.

Q. Right. You're also aware that one of the terms of that order required you to prepare for today's discovery.

A. I did prepare.

Q. By having a chat with your Mom where you asked her if you owed the plaintiff money and she said no, and you looked at the invoices and you asked no other questions, is that how you prepared, sir?

A. What else do I have to prepare for?

Q. So, I take it you didn't do anything else then, is that correct?

A. What is - what else is there to be done?

Q. So, how long was this conversation with your mother, sir, where you say you prepared for today's examination? Five minutes? Ten minutes? Less?

A. I don't remember exactly how long, but it's definitely not as short as five or ten minutes.

Q. Less than hour, sir?

A. More than one hour.

Q. I see. You don't know anything about what you say was deficient work even though you've claimed that the work was deficient in a court document that your lawyer filed on your behalf, you didn't bother to have a conversation about that?

A. She show me all the documents and as she explained she told me that every document was in relation to the property and that every document was paid.

[23] What is clear, is that in preparing for the continuation the defendant did not get any particulars from his mother on the specific allegations made in the response filed on his behalf. Nonetheless, he did review the documents that have been disclosed, and discuss those with her.

[24] Accordingly, while I do have concern with respect to the defendant's effort in informing himself as to all matters, he generally met his obligations to make reasonable efforts. In this respect, it is clear that his knowledge of matters is limited, which explains why his discussions were not as detailed as one would prefer. His discussions were meant to inform him as the background of the dispute based on the documents disclosed in the litigation, which he made the effort of going over with his mother.

[25] As to the limits of informing himself of other matters, I also have concern as to the plaintiff's efforts to set the stage for the discoveries in the context where it was clear, even before the first discovery, that the defendant does not have first hand knowledge of any of the matters in issue.

- [26] I also note that, as shown in the transcript of the discovery of the plaintiff the plaintiff similarly did not inform himself in advance of his discovery of many of the issues with the accounting and back up invoices, referencing his bookkeeper as having that information, such that the defendant's counsel had to ultimately make outstanding requests for that information to be obtained. That is not unusual in discoveries. Witnesses cannot anticipate or be expected to have informed themselves of all questions that may be asked.
- [27] While the defendant arguably could have taken greater steps than he did, there was no reasonable ability for him to inform himself as to all potential matters.
- [28] In this case, his lack of knowledge appears to be as a result of his failure to also review the pleadings, as drafted by his counsel, so as to understand the allegations being made and anticipate exactly what would be asked under a theory of a case that someone without personal knowledge would not likely have, so that he could then seek specific particulars in advance.
- [29] While I do not diminish the obligation of witnesses to make reasonable efforts to inform themselves, where there is no direct knowledge whatsoever such as is the case here, by not putting the specific questions on the record so that the defendant could so inform himself beyond what he did, the plaintiff, in essence, is proceeding on the basis that there will be a series of continuations effectively using Rule 7-2(22) as a tool to prolong a determination of this threshold issue. I am not suggesting that that must be done in every case. However, there is a concern that there was a litigation strategy to not do so in these circumstances.
- [30] Further, even if the defendant had been able to answer these questions, given no personal knowledge his evidence would be hearsay and of limited value in any event.
- [31] Despite that, the plaintiff chose to not conduct an examination of Ms. Fearon or seek an order to do so if her evidence was not voluntarily provided, as could be done under Rule 7-5, or to cross examine her on the affidavit she swore on September 25, 2020, in support of this application.
- [32] In this respect, I note that by letter of July 24 2018, counsel for the defendant advised that they would make the defendant's mother available for discovery, although there appears to have been some confusion as to her last name referring to her with the defendant's surname.
- [33] By letter of August 14 2018, counsel for the plaintiff agreed and sent an appointment to do so on December 10 2018. Unfortunately, a dispute then arose as to what the defendant characterized as a failure of the plaintiff to substantiate the claim and amount stated to be due and owing, resulting in a refusal to attend at that discovery until such disclosure was made. Regardless, for some reason after that the plaintiff chose to proceed with a discovery of the defendant only and not Ms. Fearon.

[34] Finally, the defendant's submissions were that this matter can be resolved on the documents before the court. Quite simply, if the plaintiff had evidence to establish that either:

- a) the Agreement was not terminated on July 22, 2016, or
- b) work was undertaken after November 18, 2016,

that evidence could, and should be, before the court on this application. As the defendant's evidence is that the Agreement was terminated on July 22, 2016, that contrary evidence would not be for the defendant to give.

[35] I agree and, based upon the clerk's notes of the order made by Master Cameron, I see no impediment in proceeding with the application.

Release of the Lien

[36] As noted, the relief being sought is under s. 25(1)(a) of the BLA, which provides the court with the jurisdiction to cancel a lien if satisfied that the lien is extinguished under s. 22 or 33.

[37] A lien is extinguished under s. 22 if it was not filed "in the manner and within the time provided" in the BLA. Under s. 20, a lien claimant must file a lien within 45 days of the head contract being completed, abandoned or terminated if there is a head contract, or if no head contract, 45 days after the improvement is completed or abandoned.

[38] As noted above, the correspondence sent by the plaintiff's representative clearly made reference to the "final" invoice being the July 20 invoice, and referenced the contract being "terminated" in the context of the 55 day hold back period expiring 55 days after July 22, 2016.

[39] The subsequent invoices lack any particularity as to the work to which they relate. They do not reference any date after October 28, 2016. The invoices have the following descriptions written on them:

Aug 11, 2016

Costs July 21 - July 28, 2016

12% management fee

Oct 24, 2016

Star Rental Invoice

12% management fee

Nov 14, 2016

Costs to date on Job 7 - 13617 & 13637 24th Avenue

12% management fee

Nov 30, 2016

Costs October 18 to October 28

12% management fee

- [40] Ms. Fearon deposes that these are "improper invoices" but does not actually depose as to the last date of work, or supplies being delivered, from her perspective.
- [41] She does, however, depose that on July 22, 2016, "we terminated the Head Contract" as a result of the plaintiff's breaches. The email and text evidence of September 10 2016 in which Mr. Stajcer referenced the upcoming "55 days from when we terminated the contract" is compelling evidence that the plaintiff accepted that termination on July 22, 2016.
- [42] Surprisingly, the plaintiff has not tendered any direct sworn evidence in response to this application.
- [43] Instead, the affidavits being relied upon are of the plaintiff's counsel's paralegal who attached documents and deposed to various facts regarding the contract despite that these facts are clearly not within her information and belief, without identifying the source. The Court of Appeal has stated that affidavits such as these are inadmissible, even on interlocutory applications: *L.M.U. v. R.L.U.*, 2004 BCSC 95 at paras. 31-39.
- [44] Regardless, despite counsel for the plaintiff saying in his submissions that the question of the date of the head contract's termination is "very much in dispute" the only evidence before the court from the plaintiff is:
- a) The paralegal's unattributed statement, and argument, that on "or before" November 30, 2016 the plaintiff completed the work, and that the plaintiff "has complied with the provisions of the Act and is entitled to a Builders' Lien on the Property";
 - b) The transcript of the examination of the plaintiff at which Mr. Stajcer deposed that the contract was terminated, although he says on a "mutual" basis, at which time a statement was given. He confirmed that he went back on site after that date, but just to "wrap up a few things that we were responsible for" such as picking up tools and leaving a clean site, and a few deliveries still that were "already charged", but specifically, that he did not start anything new. He also confirmed that he had never dealt with the defendant.
- [45] During submissions, I asked counsel for the authority as to who bears the onus to establish that the lien was valid in an application for the release of a lien. Counsel for the defendant noted that the onus to establish that a lien was filed on time, generally, was on the defendant and subsequently provided the court with the case reference of *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 262 in that regard.

- [46] Here, the plaintiff has put no evidence before this court to dispute or contradict the evidence of the defendant that the contract was terminated on July 22, 2016, which is the sworn evidence supported by the documentary evidence that is before the court, that being the correspondence from the plaintiff itself in which there is an acknowledgement of the termination on July 22, 2016.
- [47] While one or two invoices may, although with no evidence before the court to say this to be the case, relate to deliveries or supplies after that date it is not clear if they are part of the original Agreement at all, or something else entirely. Regardless, the last referenced date in the description are more than 45 days before the lien filing.
- [48] The fact that one invoice is dated November 30, 2016, is not relevant. The time limits in the BLA are in no way based upon the dates of invoicing, only the date of the contract being terminated or completed. As such, the subsequent invoices are of little assistance as they do not provide any particularity or evidence for context from which the court can determine that any work was done after July 22, 2016, so as to support an argument that the contract was not terminated on that date, or was completed after November 18, 2016 (the latest date for the lien to be valid). Even if admissible, the evidence of the paralegal is insufficient.
- [49] There is no evidence before the court to support that the Agreement was terminated after November 8, 2016, as would be required to find that the certificate of lien filed January 3, 2017 was filed within the time required under the BLA.
- [50] The plaintiff made no submissions that the lien was in fact valid and filed in time.
- [51] It is well settled that the BLA must be interpreted strictly. Further, because the lien is a creature of statute, the court has no discretion to depart from the statutory requirements: *Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd.*, 2006 BCSC 885 at para. 9.
- [52] As such, if the lien was not filed within 45 days of its termination it is extinguished as a matter of law, with the court having no discretion to find otherwise.
- [53] Accordingly, I find that the lien has been extinguished and, in accordance with s. 22 of the BLA, is to be discharged from title to the Lands. Similarly, the certificate of pending litigation must be cancelled, as the effect of the extinguishment of the lien is that there is no longer an interest in the Lands. Unless there is an interest in land, a certificate of pending litigation should be cancelled: *0861695 B.C. Ltd. v. Meola*, 2013 BCSC 121 at paras. 7-8.
- [54] Accordingly, I make the orders as sought in paras. 1-3 of the Notice of Application, including a direction to the Registrar of Land Titles to discharge the lien and certificate of pending litigation.
- [55] As to para. 4 of the relied sought in the Notice of Application, I agree with the plaintiff's counsel that there is no basis on which the court can make a declaration that there can be no further claims against the defendant relating to the work.

- [56] The findings today are in no way a final determination of the plaintiff's claims under the Agreement but only whether the lien and certificate of pending litigation ought to be discharged from title by virtue of the lien being extinguished.
- [57] As to costs, counsel for the defendant sought costs on a special costs basis. This is not a matter where it would be appropriate to use the remedy of special costs, which are to "punish and deter reprehensible conduct": *Rana v. Nagra*, 2013 BCSC 184, at para. 11. There was no indication of any such conduct.
- [58] Cost for this application shall be to the defendant in any event of the cause.
- [59] As to the costs for the original November 2020 application, at which court ordered that costs shall be determined by the final presider of the application, the costs of that first appearance will be in the cause.

"Master Robertson"

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