
CANADA / JUDGMENT

Sabihi v. Dr. Mansur Roy Inc.

2013 BCSC 1571

COURT

Supreme Court of British Columbia

DECIDED

29 August 2013

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2013 BCSC 1571 Sabihi v. Dr. Mansur Roy Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sabihi v. Dr. Mansur Roy Inc.,

2013 BCSC 1571

Date: 20130829

Docket: S130859

Registry: Vancouver

Between:

Ali Akbar Sabihi, doing business as

DPM Design and Project Management

Plaintiffs

And

Dr. Mansur Roy Inc., Mansur Roy and

West Railway Properties Ltd.

Defendants

Before: The Honourable Mr. Justice Smart

Reasons for Judgment

Counsel for the Plaintiff:

Leni T. Adriano

Counsel for the Defendants:

Tyler S. Galbraith

Place and Date of Hearing:

Vancouver, B.C.

July 26, 2013

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2013

I. INTRODUCTION

- [1] The critical question before me concerns the application of the doctrine of unjust enrichment.
- [2] The plaintiff claims against the defendant West Railway Properties Ltd. ("West Railway") for unjust enrichment, constructive trust, quantum meruit and quantum valebat.
- [3] West Railway applies to have the claims struck and dismissed pursuant to Rule 9-5 of the Supreme Court Rules on the basis that they disclose no reasonable claim, are frivolous and vexatious or are otherwise an abuse of process; or alternatively, dismissed pursuant to Rule 9-6 on the basis there is no genuine issue for trial. It also seeks to have a Certificate of Pending Litigation (the "CPL") that was filed by the plaintiff cancelled, pursuant to either the court's inherent jurisdiction or sections 256 and 257 of the Lands Title Act, R.S.B.C. 1996, c. 250.
- [4] The plaintiff opposes the application, arguing that its claims against West Railway raise bona fide triable issues that cannot and should not be resolved by way of summary judgment.
- [5] The other defendants support West Railway's application.
- [6] There is little dispute between the parties with respect to the relevant facts or the applicable legal principles. The dispute is whether, applying those facts to the law, the application should succeed.
- [7] Given the position of the parties with respect to the law and facts, I will borrow heavily from West Railway's review of both in its written submissions.

II. BACKGROUND

- [8] West Railway is the registered owner of certain land at 2190 West Railway Street, Abbotsford, British Columbia (the "Land"). It entered into a lease dated May 9, 2011 with the defendant Dr. Mansur Roy Inc. ("DMRI") of units 101 and 102 located on the Land (the "Lease").

- [9] DMRI entered into a written contract with the plaintiff dated April 24, 2012 (the "Contract") to complete a tenant improvement construction project (the "Project") in units 101 and 102. The total fixed fee was for \$320,000 plus HST.
- [10] West Railway was not a party to the Contract, had no commercial relationship with the plaintiff, did not participate in selecting the plaintiff to do the work, made no representations or assurances or guarantees to the plaintiff, and the other defendants did not act as its agent with respect to the Contract.
- [11] However, the Contract required the plaintiff to perform its work according to the expectation of West Railway (the landlord) and to work in close coordination with West Railway. A representative of West Railway provided construction guidelines to the plaintiff and regularly checked on the progress of the Project. The plaintiff sent invoices to DMRI totalling over \$100,000 including HST.
- [12] After work had commenced on the Project, DMRI sent a default notice to the plaintiff on September 11, 2012, and terminated the Contract on September 20, 2012. The plaintiff filed a claim of builders' lien on October 25, 2012 (the "Lien") and on January 18, 2013, West Railway mailed a notice to commence an action pursuant to s. 33 of the Builders Lien Act, S.B.C. 1997, c. 45 (the "Act").
- [13] The plaintiff commenced this action on February 5, 2013, but failed to file a certificate of pending litigation within the required time, as required by the Act. As a result, the Lien was extinguished and was cancelled in early March 2013.
- [14] In the original notice of civil claim the plaintiff did not plead any claim against West Railway other than that pursuant to the Act. The plaintiff amended its notice of civil claim on March 19, 2013, to allege the current claim of unjust enrichment and an interest in the lands through the remedy of a remedial constructive trust. It also filed the CPL pursuant to its amended notice.
- [15] Neither the amended notice nor the plaintiff's affidavit alleges a contract between the plaintiff and West Railway, or any representations, assurances, or guarantees by West Railway to the plaintiff.
- [16] The Lease required the tenant to obtain the landlord's approval to any leasehold improvements and the Contract required the contractor to perform work according to the expectation of the landlord and to work in close coordination with the landlord.
- [17] The plaintiff did not know of the Contract when it commenced its action against the defendant. It now does and the focus of its claim against West Railway is Clause 28.5 of the Lease, which provides for a tenant allowance from West Railway to DMRI. It states:

Provided that:

- (a) the Tenant has executed and delivered this Lease;

- (b) the Tenant has duly and punctually paid the Rent as the times required and has duly and punctually observed and performed each of its other obligations to the Landlord pursuant to this Lease;
- (c) the Tenant and the Landlord have mutually agreed upon the specifications for leasehold improvements which are to be made to the Premises (such leasehold improvements so mutually agreed upon by the "Tenant's Leasehold Improvements")

then the Landlord shall pay to the Tenant on account of the Tenant's Leasehold Improvements an allowance equal to the lesser of (i) amount expended by the Tenant on account of the Tenant's Leasehold improvements, and (ii) and amount equal to \$24.00 multiplied by the Rentable Area of the Premises in square feet, (such lesser amount the "Tenant Allowance Amount") plus GST/HST thereon which amount shall be paid by the Landlord on behalf of the Tenant in the following manner:

- (i) in instalments on behalf of the tenant, direct to the contractor (the "Contractor") retained to perform the Tenant's Leasehold Improvements, each instalment being due within fourteen (14) days after receipt of an invoice by the Landlord supported by the Contractor's invoice duly confirmed by the Contractor and the consultants appointed by the Tenant that the specified work to be paid has been carried out and is in place; to a maximum of 90% of the Tenant Allowance amount;

[18] The balance of the tenant allowance is payable on certain other conditions being met. Given the square footage of units 101 and 102, the total amount of the tenant allowance is approximately \$53,352 plus HST.

III. APPLICABLE LEGAL PRINCIPLES

Rule 9-5

[19] The test on a motion to strike pleadings under Rule 9-5(1)(a) as disclosing no reasonable claim is that it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Put differently, the claim has no reasonable prospect of success. Where there is a reasonable prospect of success, the matter should proceed to trial: *Buchan v. Rome*, 2011 BCSC 1206 at para. 29.

[20] Justice Cullen (as he then was) summarized the legal test to apply under Rule 9-5 in *Woolsey v. Dawson Creek (City)*, 2011 BCSC 751 at para. 29. He quoted from *Poirier v. Community Futures Development Corp.*, 2005 BCCA 169, which quoted from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, where Madam Justice Wilson considered the predecessor Rule 19(24)(a) at p. 980:

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C.O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, it is 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in

England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[21] Justice Cullen also quoted with approval from Justice Romilly's decision in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.) at para. 34:

In other words, as long as the pleadings disclose a triable issue, either as it exists, or as it may be amended, then the issue should go to trial. The mere fact that the case is weak or not likely to succeed is no ground for striking it out under the provisions of Rule 19(24).

Rule 9-6

[22] An application under Rule 9-6 requires the court to examine the pleaded facts to determine which causes of action they may support, identify the essential elements to be proved at trial in order to succeed on each cause of action, and determine if sufficient facts have been pleaded to support each element of a given cause of action.

[23] If insufficient material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant will have met the onus to negative the existence of a genuine issue for trial.

[24] If sufficient facts have been pleaded to support every element of a cause of action, the court is not to weigh the evidence. Its function is limited to the determination of whether there is a genuine issue for trial on the material before it, applying the relevant law. If a judge must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 10-12.

Unjust Enrichment

[25] The three elements that must be found to exist in order for a claim for unjust enrichment to succeed are:

1. enrichment to the defendant;
2. the corresponding deprivation of the plaintiff; and
3. the absence of an juristic reason for the enrichment.

Pettkus v. Becker, [1980] 2 S.C.R. 834 at p. 848

- [26] The key to the correct interpretation and application of the test in the context of a business relationship is to focus on the "unjust" element of unjust enrichment. That is because honest dealing, not equal dealing, should set the standard of fairness. The concept of the injustice of the enrichment as being against sound commercial conscience must guide the application of the test: *Atlas Cabinets and Furniture Ltd. v. National Trust Co.*, 68 D.L.R. (4th) 161 (BCCA).
- [27] The proper approach to the juristic reason analysis has two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories that can constitute juristic reasons include a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. If the plaintiff does establish there is no juristic reason to deny recovery, then the analysis moves to the second part during which the burden falls on the defendant to show there is another reason to deny recovery and why the enrichment should be retained: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at paras. 44 and 45.
- [28] In *Garland*, the court emphasized that the test for unjust enrichment is relatively new to Canadian jurisprudence and requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable.
- [29] The law of unjust enrichment in Canada was again considered by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10. Justice Cromwell explained the underlying purpose of the doctrine at para. 31:

At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason.

- [30] He then addressed the third element - the absence of juristic reason - at paras. 40-44 and concluded by reiterating the need for flexibility:

To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of

the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract" (Peel, at p. 803).

In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied .

Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990). [Emphasis added]

[31] Three judges of this Court in different commercial cases considered the doctrine of unjust enrichment and held that where there has been enrichment and a corresponding deprivation in the circumstances of a non-contracting owner, a juristic reason for the enrichment of the non-contracting owner exists where there is a contract between the non-contracting owner and the party the plaintiff contracted with: see *Elbee Development Corp. v. A & D Masonry Ltd.*, 49 C.L.R. (2d) 214 (B.C.S.C.); *Pacific National Exhibition v. Alpine Stone Ltd.*, 2003 BCSC 852; *Park v. K.S. Mechanical Ltd.*, 2012 BCSC 1751.

IV. POSITIONS OF THE PARTIES

West Railway

[32] West Railway argues that if there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[33] In the construction context, as a matter of law, an owner does not have an in-person liability to a contractor that it did not contract with for the contract price for the value of the improvements. The Common law gave no remedy to a contractor except against those entities it contracted with; hence, the enactment of the Act, which permits an in rem claim against the owner's land.

- [34] West Railway refers to Elbee Development Corp., Pacific National Exhibition, and Park, and submits that this Court has consistently held that if there has been an enrichment and a corresponding deprivation in the circumstances of a non-contracting owner in the construction context, a juristic reason exists; namely, the contract between the non-contracting owner and the party the plaintiff contracted with. It says that where a non-contracting owner does not urge a contractor to carry out or complete its work, or makes no representations or guarantees that it will ensure payment to the contractor with respect to its work, a claim of unjust enrichment will not arise between the non-contracting owner and contractor.
- [35] It says in the builders' lien context, three further factors negate the contractor's claim against the non-contracting owner. First, the legislature has chosen to intervene to give protection to contractors through the enactment of the Act. Second, the injustice of the enrichment must be "against sound commercial conscience". Third, the benefit to the owner must not be a secondary collateral benefit.
- [36] West Railway submits that the plaintiff's unjust enrichment and constructive trust claim has no chance of success on the law and/or on the facts and should be struck and dismissed pursuant to Rule 9-5 or Rule 9-6, and the CPL should be cancelled based on the court's inherent jurisdiction, as it is frivolous, a nuisance, and an abuse of process or has no chance of success.
- [37] Similarly, it submits that the plaintiff's claim of quantum meruit or quantum valebat have no chance of success because in order to be entitled to either remedy the plaintiff must first establish that an unjust enrichment occurred.
- [38] Finally, it argues for special costs on the basis that a wrongful filing of a CPL is an abuse of the court's process. It says that despite being provided with the relevant authorities on point, the plaintiff maintained the CPL and in the circumstances its conduct is reprehensible and deserving of reproof and rebuke.

The Plaintiff

- [39] The plaintiff argues that West Railway's representative gave the plaintiff detailed instructions or guidelines on how to conduct the construction work and throughout the project checked up on the progress on an almost daily basis. It also included West Railway as a beneficiary in its insurance certificate.
- [40] The plaintiff points to Clause 28.5 of the Lease and says it is not aware of any reason why DMRI would not submit the plaintiff's invoices to West Railway.

- [41] The plaintiff argues that the Act does not bar the right of a contractor to claim in quantum meruit against the owner and was never intended as a complete code excluding all other common law or equitable actions. The plaintiff refers the court to *Man-Shield (Alta.) Construction Inc. v. 1117398 Alberta Ltd.*, 2007 ABQB 603, *Glenko Enterprises Ltd. v. Keller*, 2000 MBCA 7, and *Litemoor Distributors (Edmonton) Ltd. v. Midwest Furnishings and Supplies Ltd. (c.o.b. Midwest Developments)*, 2007 ABQB 23.
- [42] The plaintiff points to the case law that establishes that unjust enrichment is an evolving area of the law. It says there is a triable issue and the interests of justice will be best served if the trial is held so as to fully explore the facts and circumstances of the case. It says that any doubt on the plain and obvious test must be resolved in favour of permitting the pleadings to stand. It reminds the court that a chambers judge is not to decide questions of fact or law on an application under this Rule as he or she would do on trial. The judge's function is to determine whether there is a bona fide triable issue. If there is, he or she must dismiss the application.
- [43] The plaintiff highlights that when it commenced its civil action it was not aware of the Lease and only amended its notice of civil claim after it learned of the existence of the Lease and a contractual obligation West Railway had to DMRI to pay tenant improvements.
- [44] It also points out that, in a good faith gesture to allow West Railway to proceed with certain refinancing pending the dispute, it offered to release the CPL only for the purpose of permitting the financing to proceed.

V. ANALYSIS

- [45] It is the third element of the doctrine of unjust enrichment that is in question on this application - a juristic reason for West Railway's enrichment and the plaintiff's detriment.
- [46] In *Pacific National Exhibition*, Sigurdson J. heard an appeal from a decision of a Provincial Court Judge who had found a claim of unjust enrichment against the Pacific National Exhibition (the "PNE") for work done by a sub-contractor on the PNE prize home. The PNE had contracted with Castlerock Homes Systems Inc. to build the display home. The sub-contractor had been hired to do stone masonry work on the display home by someone associated with Castlerock.
- [47] Justice Sigurdson allowed the appeal by the PNE, adopting the reasoning in *Elbee Development Corp.* At para. 17 he summarized his reasons:

The case under appeal does not suggest any injustice that would render the appellant liable under the principle of unjust enrichment. There were no urgings or representations from the owner to the respondent that it would ensure payment, let alone any communication at all between the owner and the respondent. The PNE has paid its contractor for this work as part of the contract work. The respondent apparently did not exercise any lien rights it may have had. If there was an enrichment, there was a juristic reason for that enrichment. That was the contract between the

PNE and Castlerock.

[48] This interpretation of the law of unjust enrichment in the commercial construction context was recently reaffirmed by Kelleher J. in *Park*. He followed *Pacific National Exhibition and Elbee Development Corp.* and summarized the law at paras. 39 and 40 of his decision:

Courts rarely find unjust enrichment in circumstances like the present. A subcontractor on a construction project has remedies in contract against the person with whom he or she contracts. The legislature has recognized these remedies to be inadequate and has enacted the Builders Lien Act. Thus, the subcontractor has remedies against the property as long as the subcontractor acts within the time limits imposed by the Act.

Except in unusual circumstances, that is the extent of a subcontractor's remedies.

[49] In the present case, the juristic reason is the Contract between the plaintiff and DMRI. But what is the legal effect of the Lease on the doctrine of unjust enrichment? Is that an unusual circumstance that should expand the reach of the doctrine, as occurred in *Atlas Cabinets & Furniture Ltd.*?

[50] The Lease is a contract between DMRI and West Railway independent from any contractual relationship between the plaintiff and DMRI. The Lease requires West Railway to pay up to \$24.00 per square foot plus taxes for tenant improvements, upon receipt of approved invoices from DMRI. This agreement is for the benefit of DMRI, not the plaintiff. The plaintiff says it does not know why DMRI has not provided the plaintiff's invoices to West Railway for payment. DMRI has cancelled its Contract with the plaintiff as it takes issue with the work performed on its tenant improvements. In my view, it is not surprising that it has not tendered invoices to the landlord for payment to the plaintiff.

[51] If the plaintiff is successful in its action against DMRI, DMRI may be ordered to pay for some or all of the work done. If it is, and seeks partial payment of the tenant improvements pursuant to the Lease, and West Railway does not pay the plaintiff in accordance with the Lease, it is DMRI that may have a claim against West Railway, not the plaintiff.

[52] I recognize that the Supreme Court of Canada has said that the test for unjust enrichment is relatively new to Canadian jurisprudence and requires flexibility for courts to expand the categories of juristic reasons as circumstances require and where to deny recovery would be inequitable. However, in my view, the circumstances in the present case are outside the reach of a claim of unjust enrichment by the plaintiff against West Railway.

[53] I agree with the position of West Railway for the reasons it has advanced.

VI. CONCLUSION

- [54] I allow the application and order that the plaintiff's claims against West Railway for unjust enrichment, constructive trust, quantum meruit and quantum valebat be struck and dismissed, and the CPL filed on the Land be cancelled pursuant to the court's inherent jurisdiction.
- [55] West Railway shall have its costs but I decline its request for special costs. The plaintiff took the position that it had valid claim against West Railway for unjust enrichment and amended its notice of civil claim accordingly. While I have not found in its favour, I do not find the plaintiff's conduct as deserving of rebuke or reproof notwithstanding it proceeded with its claim after receiving West Railway's case authorities.

"SMART J."

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