

CANADA / JUDGMENT

Scandia Paving Ltd. v. Bengag

2017 BCSC 1188

COURT

Supreme Court of British Columbia

DECIDED

13 June 2017

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2017 BCSC 1188 Scandia Paving Ltd. v. Bengag

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scandia Paving Ltd. v. Bengag,

2017 BCSC 1188

Date: 20170613

Docket: S173576

Registry: New Westminster

Between:

Scandia Paving Ltd.

Plaintiff

And

Balbir Singh Bengag also known as

Balbir Bengag and Jasvir Singh Bengag

Defendants

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M.R. Blow

Counsel for the Defendants:

M.E.A. Danielson

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 12, 2017

Place and Date of Judgment:

Kelowna, B.C.

June 13, 2017

- [1] THE COURT: The defendants are the joint registered owners of property located in Keremeos, B.C., against which the plaintiff has registered a lien and a CPL. The defendants apply for an order cancelling the builder's lien and CPL on the basis that the plaintiff commenced its action in the wrong Supreme Court registry. The plaintiff cross-applies for an order transferring this matter to the Kelowna Registry for all purposes. If I do not cancel the builder's lien and CPL, then, in my view, it is appropriate to transfer the matter. Under the Builders Lien Act, S.B.C. 1997, c. 45 [BLA], this court has discretion to relieve the plaintiff of the consequences of its failure to commence this action in the correct registry.
- [2] The chronology is as follows. In May 2015, the defendants hired the plaintiff to do some paving work on their property. On the pleadings, there is a dispute about the terms of the agreement, whether there is anything further owing for the work done and materials supplied, and whether the work was deficient. Those issues are not before me on this application.
- [3] On July 23, 2015, the plaintiff filed a claim for lien against the defendants' property. The plaintiff then commenced this action by notice of civil claim filed in the New West Registry on August 28, 2015. On October 20, 2015, the defendants filed a response to civil claim and pled that the lien was invalid because the action was commenced in the wrong registry. The plaintiff did not respond to the issues raised in the response to civil claim. There were various attempts in 2016 to set dates for examination for discovery and a trial in New Westminster.
- [4] On January 11, 2017, the defendants set this application to cancel the lien and CPL for hearing on February 20, 2017 in New Westminster. The materials were served on January 13, 2017. In response, the plaintiff did not apply to transfer this proceeding, nor did it initially file any responsive materials. Rather, the plaintiff's then counsel appeared at the February 20, 2017 hearing and sought an adjournment. Justice Blok granted the adjournment on terms which included that: the plaintiff provide its responding materials on or before March 6, 2017; the application be reset for hearing in Kelowna; and the defendants have their costs thrown away in any event of the cause. The plaintiff did not strictly comply with the

adjournment terms as it did not deliver its responsive materials until March 8, 2017. At that time, the plaintiff had still not applied to transfer the proceedings.

- [5] In early April 2017, the plaintiff retained its current counsel who went on record on April 11. Both counsel agreed to reset the date for the defendants' application for June 5, 2017.
- [6] Late on May 30, 2017, the plaintiff delivered unfiled application materials seeking an order transferring this proceeding to the Kelowna Registry for all purposes and requesting that its application be heard together with the defendants' application on June 5. The required eight days' notice in the Rules was not met. No short leave was sought or obtained. The defendants refused to adjourn their application a second time or to consent to the plaintiff's application being heard with theirs on June 5.
- [7] The parties appeared on June 5 and Justice Gropper adjourned the defendants' application for a second time to allow the plaintiff's late filed application to be heard concurrently. Costs of the June 5 appearance were left to be determined as part of this application which came before me yesterday.
- [8] I turn now to the applicable law. Section 27 of the BLA provides that s. 21 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA] applies to lien proceedings in the same way that section applies to foreclosure proceedings. Specifically, as it relates to this application, s. 21 provides in s-s. (2) that:

Unless the court otherwise orders, every foreclosure proceeding on a mortgage must be commenced,

- (a) if the land that is the subject of the foreclosure proceeding is located in a municipality and there is a registry of the Supreme Court located in that municipality, at that registry, or
 - (b) if the land that is the subject of the foreclosure proceeding is not located in a municipality or, if it is located in a municipality but there is no registry of the Supreme Court located in that municipality, at any registry located in the judicial district in which the land is located ...
- [9] The effect of the incorporation of s. 21 of the LEA into s. 27 of the BLA gives the court discretion to relieve a party from the consequences of failing to commence a builder's lien action in the correct registry. Both counsel agree that this court has directly considered the discretion conferred by s. 27 of the BLA in only two cases. The first was *Keith Dahlen Construction Ltd. v. Zahara*, 2004 BCSC 686. In that case, the plaintiff filed its action in the Kamloops Registry instead of in Vernon. The lands in issue were located within the municipal boundaries of Vernon. The plaintiff promptly applied to transfer the proceeding to the proper registry and its solicitor filed an affidavit explaining that the action had been commenced in Kamloops in error. The defendants cross-applied to dismiss the lien for non-compliance with the local venue provision. This court determined that the exercise of the discretion under s. 27 of the BLA must be governed by logic and common sense and judicial authority. In granting the plaintiff's application, the court noted that the lien lands were located only a few kilometres from the border of the correct legal district. The court also

noted that there was no reason to doubt the explanation offered by the plaintiff's solicitor that the decision to commence the action in Kamloops was an error and not taken with a view to creating inordinate expense for the defendants. Finally, the court considered that the defendants had not suffered any prejudice.

- [10] The second case was *Proform Management Systems Ltd. v. Tuscan Villas Ltd.*, 2010 BCSC 381. There, the plaintiff applied to transfer a builder's lien action from the New Westminster Registry to the Kelowna Registry. The defendant applied under what was then Rule 18A for an order dismissing the lien. At paragraph 10 of *Proform*, the court referred to the *Dahlen* case and set out the following factors which informed its exercise of discretion not to dismiss the lien claim:
- a) the statement of defence did not allege that the builder's lien action was commenced in the wrong registry;
 - b) a change of venue had been requested by the plaintiff and refused by counsel for the defendant; and
 - c) the plaintiff brought its motion to transfer the action to the proper registry immediately upon learning of its error.
- [11] Both *Dahlen* and *Proform* were referred to by the Court of Appeal in *Island Savings Credit Union, v. Brunner*, 2014 BCCA 449. In that case, which arose in a foreclosure action and on a different issue, the Court of Appeal said this about the wording in s. 21 of the LEA:
- s. 21(2) of the Law and Equity Act, specifically the words, "unless the court otherwise orders" must be given a liberal remedial interpretation that accords with its purpose, which includes the correction of jurisdictional irregularities when it is in the interests of justice to do so.

Conclusion

- [12] For the following reasons, I have concluded that it is not appropriate, in all the circumstances of this case, to exercise my discretion to transfer this proceeding to the Kelowna Registry. I grant the order sought by the defendants and cancel the claim for lien and the registration of the CPL against title to the defendants' land.
- [13] First, the plaintiff has known about the jurisdictional issue since the response to civil claim was filed in October 2015. Unlike the lien claimants in *Dahlen* and *Proform*, the plaintiff did not act swiftly to address the issue. Rather, it ignored it for more than 14 months until the defendants' January 2017 application to cancel the lien. Thereafter, the plaintiff continued to ignore the issue and obtained an adjournment of the defendants' application on February 20, 2017, in order to file responding materials, not so that it could apply to transfer the action. The order was granted on terms which the plaintiff then did not comply with. The plaintiff's counsel came on record on April 11, 2017 and only applied to transfer this action to Kelowna on May 31, more than a month later.

- [14] As the Court of Appeal said in *Lebon Construction Ltd. v. Wiebe*, (1995), 10 B.C.L.R. (3d) 102 (C.A.), in the context of an application to strike a claim for lien for want of prosecution, builders' liens are a special statutory class of cases because the BLA affords a lien claimant the extraordinary remedy of securing its claim before it is proven. As such, there is an expectation of expediency in builders' liens enforcement actions. The expectation of expediency is a factor which the court must consider in the exercise of its discretion under s. 27. This action has not proceeded expediently. It was commenced in August 2015 and the only steps taken have been to exchange lists of documents and an exchange of correspondence about discovery and trial dates. The application to transfer the proceedings has also not proceeded expediently.
- [15] Secondly, cancelling the lien and the resultant CPL will only impact the plaintiff's security for the claim and not the claim itself as there is privity of contract between the plaintiff and the defendants. The plaintiff was not a subcontractor, but contracted directly with the defendants.
- [16] Third, the plaintiff's materials in response to this application were initially silent on the issue of whether filing action in New Westminster was an error or a tactical decision. In each of *Dahlen* and *Proform*, the reason for the error was explained and swiftly addressed. Here, the plaintiff's representative, Mr. Kular only says that, "I filed the above-noted claim in the New West Registry. I now have been advised that the claim should have been filed in the Kelowna Registry." He does not say who advised him or when. Mr. Aggarwal, the plaintiff's former counsel, has not filed an affidavit. Mr. Kular, in his second affidavit filed in support of his application to transfer the action, blames Mr. Aggarwal for the error. Mr. Kular does not say whether and when he or any other representative of the plaintiff received a copy of the response to civil claim. He says that Mr. Aggarwal eventually provided him with the defendants' application materials, but not when. He says that it became clear to him on March 6, 2017 that things were not proceeding smoothly with the litigation despite Mr. Aggarwal's assurances and that he terminated Mr. Aggarwal's retainer.
- [17] Despite it becoming clear on March 6, the plaintiff took more than a further month to retain new counsel and then, despite agreeing to a date of June 5 for the defendants' application to be heard, waited until May 31 before serving an application to transfer the proceeding. This delay and course of events is not as a result of any action or inaction on the part of the defendants. To the extent it is the fault of the plaintiff's original counsel, and to the extent the plaintiff suffers damage as a result, the plaintiff may have recourse against him. As I have said, the order I make does not prevent the plaintiff's action proceeding against the defendants.
- [18] Finally, on the issue of prejudice, I accept that this decision has the effect of removing the plaintiff's security for its lien claim which may prejudice its recovery. That is yet to be seen. On the other hand, the defendants' land has been encumbered by a lien since July 2015 and a CPL since August 2015. According to Mr. Bengag's affidavit, the lien and CPL has caused him serious problems because, when they were registered, he was in the process of obtaining an

agricultural loan from Farm Credit Canada to finance his business operations and Farm Credit Canada withheld, and continues to withhold, \$43,000 from its advance under the loan as security as against the lien. In all the circumstances, the prejudice to the defendants outweighs the prejudice to the plaintiff.

[19] As a result, the lien is cancelled and both it and the CPL are to be removed from title to the defendants' property.

[20] It is left for me to consider whether the defendants should be entitled to their costs of this appearance and the one before Justice Gropper.

[SUBMISSIONS RE COSTS]

[21] THE COURT: In light of the ultimate result on this application, the defendants are entitled to their costs of both appearances on Scale B.

"MacNaughton, J."

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