

CANADA / JUDGMENT

TDM Excavating and Contracting Ltd. v. 1046416 B.C. Ltd.

2020 BCSC 1865

COURT

Supreme Court of British Columbia

DECIDED

30 November 2020

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2020 BCSC 1865 TDM Excavating and Contracting Ltd. v. 1046416 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

TDM Excavating and Contracting Ltd. v. 1046416 B.C. Ltd.,

2020 BCSC 1865

Date: 20201130

Docket: S222350

Registry: New Westminster

Between:

TDM Excavating and Contracting Ltd.

Plaintiff

And

1046416 B.C. Ltd., Christopher Shiran Alangaramoney, Khanh Vy Ho,

Loc Nguyen, Van Luan Ngo, Erwin Rzepeka, Liaquat Ali Bajwa,

Samara Ajmal Bajwa, Ranjini Alangaramoney, Samuel Alangaramoney, and

Blueline Homes Ltd.

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

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Ranjini Alangaramoney and

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J. Hansra, Articled Student

The Defendant, Erwin Rzepka appearing own his own behalf via teleconference:

E. Rzepka

Place and Date of Hearing:

New Westminster, B.C.

October 29, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 30, 2020

Introduction

- [1] This is an application by the defendants Ranjini and Samuel Alangaramoney (together the "Alangaramoneys") to strike a third party notice issued by the defendants Liaquat Ali Bajwa, Samara Ajmal Bajwa, and Blueline Homes Ltd. (together the "Bajwa Defendants").
- [2] Rather than filing a response to the Alangaramoneys' application, the Bajwa Defendants initially filed their own application for leave to file their third party notice nunc pro tunc ("now for then"). They subsequently filed an application response outside of the time limit established by the Supreme Court Civil Rules. They also provided a copy of a proposed amended third party notice.
- [3] The defendants 1046416 B.C. Ltd. ("104"), Khanh Vy Ho, Loc Nguyen, and Christopher Alangaramoney ("Chris") support the application to strike the third party notice.

- [4] The defendant Erwin Rzepka ("Rzepka") also appeared on the application. He has issues with several of the parties but had little to say about the specific applications concerning the Bajwa Defendants' third party notice.

Background

- [5] The applications before the court relate to a property development project located in Surrey, BC.
- [6] In August 2015, Chris, who is the Alangarmoneys' son, entered into a contract with Rzepka to purchase a large piece of land in Surrey (the "Parent Parcel"). The Parent Parcel was amenable to being subdivided into six smaller lots.
- [7] The sales contract contemplated that three lots would be created on the southern portion of the Parent Parcel and sold and that municipal services would be constructed on the entirety of the Parent Parcel in contemplation of the further subdivision of the northern portion.
- [8] Prior to closing, Chris assigned the benefit of the contract to 104, a company in which he holds a 50% interest. 104 acquired title to the three lots on the southern portion of the Parent Parcel, with Rzepka retaining title to the northern portion.
- [9] Around the same time, 104 entered into a contract with the plaintiff (the "Construction Contract") pursuant to which the plaintiff agreed to install services on the Parent Parcel for a price of \$345,000. Subsequently, in February 2018, 104 entered into a Servicing Agreement with Surrey pursuant to which it agreed to construct municipal services on the entire Parent Parcel.
- [10] In 2019, 104 sold two of the lots on the southern portion of the Parent Parcel to the Bajwa Defendants. On March 14, 2019, 104 sold the third lot ("Lot 3") to the Alangarmoneys for \$910,000 and they contracted with 104 to have a house constructed on the property. The Alangarmoneys financed the purchase using some proceeds from the sale of another property and partially through mortgage financing. The Alangarmoneys subsequently entered into a contract to sell Lot 3, complete with the constructed house, to a third party.
- [11] On November 6, 2019, the plaintiff filed a lien against the three lots on the southern portion and on December 20, 2019, commenced this action. In order to have the lien removed from Lot 3, the Alangarmoneys negotiated a deal with the plaintiff that required them to pay the plaintiff approximately \$80,000. This required them to take out a second mortgage on Lot 3.
- [12] On October 13, 2020, the Bajwa Defendants filed a third party notice (the "TPN") against various parties, including the Alangarmoneys, as well as a Certificate of Pending Litigation (the "Bajwa CPL") against Lot 3.
- [13] The Alangarmoneys now apply to strike the TPN and to discharge the Bajwa CPL.

Legal Framework

[14] Rule 3-5 of the Supreme Court Civil Rules deals with third party claims. Rule 3-5(1) sets out the circumstances in which a party may issue a third party claim:

Making a third party claim

- (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
 - (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
 - (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
 - (c) a question or issue between the party and the person
 - (i) is substantially the same as a question or issue that relates to or is connected with
 - (A) relief claimed in the action, or
 - (B) the subject matter of the action, and
 - (ii) should properly be determined in the action.

[15] Rule 3-5(4) sets out the time limits for issuing a third party claim:

When leave is required

- (4) A party may file a third party notice
 - (a) at any time with leave of the court, or
 - (b) without leave of the court, within 42 days after being served with the notice of civil claim or counterclaim in which the relief referred to in subrule (1) is claimed.

[16] A third party notice filed without leave after the 42 days described in R. 3-5(4)(b) above is considered a nullity, despite R. 22-7(1): *Ari v. Insurance Corporation of British Columbia*, 2020 BCSC 1087 at para. 26, citing *Hendrix v. Handa Travel Student Trip*, 2016 BCSC 620. However, the court may, at its discretion, preserve a late-filed third party notice by granting leave nunc pro tunc.

[17] Section 215(1) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] provides for the filing of a CPL:

215 (1) A person who has commenced or is a party to a proceeding, and who is

- (a) claiming an estate or interest in land, or
- (b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.

[18] Sections 256 and 257 deal with the cancellation of a CPL:

Cancellation of certificate of pending litigation on other grounds

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

Power of court to order cancellation

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
 - (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking must be settled by the registrar of the court.

(3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[19] Numerous authorities have considered the relationship of ss. 215 and 256 and the jurisdiction of the court to cancel a CPL under one or the other section. In *Bilin v. Sidhu*, 2017 BCCA 429, the Court of Appeal provided some clarity on this issue.

[20] There, the chambers judge found the pleadings in the action underlying the CPL did not disclose a claim to an interest in land and the judge accordingly ordered that the CPL be discharged.

[21] On appeal, the appellant argued that a CPL cannot be cancelled except in accordance with ss. 256 and 257 of the LTA. The respondent submitted the judge was correct in first considering whether there was a claim to an interest in land sufficient to support the filing of a CPL under s. 215(1).

[22] Madam Justice Kirkpatrick framed the central issue on the appeal at para. 36:

The first issue is thus whether the court is entitled to cancel or remove a CPL on the basis that it fails to satisfy the threshold of being "properly based on a proprietary claim against the defendant's lands", as required by s. 215(1) of the Land Title Act.

[23] Justice Kirkpatrick then reviewed various decisions considering the relationship of ss. 215 and 256. She noted that the case law addresses two similar but distinguishable situations. The first is where the pleadings do disclose a claim to an interest in land, but the claim has no merit and does not disclose a triable issue. In that scenario, according to Kirkpatrick J.A., the proper course of action is to apply to dismiss the claim under R. 9-6(4). If that application is successful, a further application may be brought to cancel the CPL in accordance with s. 254 of the LTA. Section 254 deals specifically with cases in which the underlying action has been dismissed.

[24] The second situation is where the pleadings filed in support of the CPL are incapable of supporting a claim to an interest in land. Justice Kirkpatrick described this situation in paras. 55-58:

[55] In this situation, the existence of a validly registered CPL, as demonstrated by pleadings that support an interest in land, must be a threshold criterion for its continued registration. In other words, CPLs that fail to meet the "pre-condition" set out in s. 215(1) may be cancelled for that reason: *RCG Forex*. This approach mirrors the one taken by Justice Saunders in *Ravnyshyn v. Drys*, 2006 BCCA 20. In that case, the appellants had filed a fresh CPL on the basis of their notice of appeal. In chambers, Justice Saunders held that an appeal was not a "proceeding" as required by s. 215; for that reason, the CPL at issue was found to be a nullity and ordered cancelled.

- [56] In this circumstance, hardship - while a mandatory criterion to applications made under s. 256 - need not be shown. As this Court recognized in *Liquor Barn Income Fund* at para. 28, "[s]ections 256(1) and 257(1) create a statutory code for balancing the rights of the parties where adverse consequences caused by the registration of the CPL prejudice the land owner." However, this balance of rights is not engaged when the registering party has no right to a CPL at all.
- [57] As can be seen, nothing in the wording of ss. 256 and 257 of the Land Title Act purports to delineate or exhaust the court's power to cancel CPL's. Section 256 provides certain persons with the ability to apply to cancel a CPL in a specific circumstance. Section 257 explains what a court may do when such an application is made. These sections create a new procedural avenue for those persons; their text does not foreclose the court from cancelling CPL's in a manner observant of the other provisions of the Land Title Act.
- [58] Perhaps more importantly, the Legislature has expressly contemplated the pre-conditions to the valid registration of a CPL and set them out in s. 215(1) of the Land Title Act. Ensuring consistency with s. 215(1) must be the court's function.
- [25] She went on to note at para. 62 that CPLs are to be assessed from the point in time they were filed with the Registrar of Land Titles. The applicable analysis rests on the pleadings filed in support of the CPL at that time and not on the pleadings as they might be amended.
- [26] The analysis in *Bilin* was subsequently confirmed by the Court of Appeal in *Berthin v. Berthin*, 2018 BCCA 57 at paras. 40-41.

Discussion

- [27] I will deal with the applications of the Alangaramoneys and the Bajwa Defendants together as they largely deal with the same issues.

The TPN

- [28] There is no issue that the TPN was not filed in accordance with R. 3-5(4) as it was not filed within 42 days of the Bajwa Defendants being served with the notice of civil claim nor was leave of the court obtained. As such, it is a nullity: *Ari* at para. 26.
- [29] The Bajwa Defendants seek to remedy this by way of their application for leave to file the TPN nunc pro tunc.
- [30] They submit that the delay in filing the TPN was due to the failure of the defendants Chris Alangaramoney and 104 to have the liens filed by the plaintiff against their properties removed.
- [31] Leaving aside the fact that this explanation--even if accepted--would not support the order sought by the Bajwa Defendants, this underscores the fundamental flaw in the Bajwa Defendants' third party claim against the Alangaramoneys.

- [32] On review of the TPN, it is clear that the Bajwa Defendants' disputes are with i) the plaintiff that filed the liens against their properties and ii) Chris and/or 104 who failed to pay the plaintiff for work done under the Construction Contract.
- [33] The TPN does not disclose any dispute between the Bajwa Defendants and the Alangaramoneys, nor does it plead any facts that would support a cause of action against the Alangaramoneys, let alone one that would give rise to an interest in land.
- [34] The paragraphs of the TPN referring to the Alangaramoneys allege as follows:
24. In the further alternative, Bajwa Defendants and Blueline state that Defendant 104 and Defendant Christopher have wrongfully used the funds from the proceeds of the sale of Lot 1 and Lot 4, which it was required to pay for the improvements caused by the Plaintiff on the Lots, to provide the purchasers with the lots clear and free from all financial encumbrances pursuant to the Lot 1 Contract and Lot 4 Contract respectively. The Bajwa Defendants and Blueline further state that Defendant 104 has wrongfully used the funds, which it was required to pay to the Plaintiff for the improvements, to cause the construction of a new house on Lot 3 for Defendants Alangaramoney.
25. In the further alternative, Defendants Alangaramoney have been unjustly enriched by the receipt of the funds from Defendant 104, which Defendant 104 was required to pay to the Plaintiff for the improvements on the Lots. Bajwa Defendants and Blueline would suffer a corresponding deprivation in the event they have to pay the Plaintiff for the Liens. There is no juristic reason for the Defendants Alangaramoney to be unjustly enriched at the cost and detriment of the Bajwa Defendants and Blueline.
- [35] In the Relief Sought section of the TPN, the Bajwa Defendants seek contribution and indemnity from all of the proposed third parties, as well as an order imposing a constructive trust in their favour over Lot 3.
- [36] There are some obvious flaws in these pleadings as they relate to the Alangaramoneys.
- [37] First, consistent with the balance of the TPN, the allegation in para. 24 above is that Chris/104 somehow misused funds from the sale of lots to the Bajwa Defendants that should have gone towards paying the plaintiff. This is not an allegation of wrongdoing on the part of the Alangaramoneys.
- [38] Second, while para. 25 attempts to plead a claim of unjust enrichment, it does not plead material facts that would support such a claim against the Alangaramoneys. Most notably, it does not allege that the Alangaramoneys were enriched by anything done by the Bajwa Defendants; rather, the alleged enrichment was due to payments made by 104. There is no direct connection alleged between the claimed enrichment and the Bajwa Defendant's alleged deprivation: see *Kerr v. Baranow*, 2011 SCC 10 at paras. 38-39.

- [39] The claim for contribution and indemnity similarly lacks any factual foundation. Likewise, the claim for a constructive trust over the Alangaramoney's property cannot stand absent a proper claim that would support an interest in the property.
- [40] The courts have identified a number of factors to consider on an application for leave to file a third party notice: see for example, *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd.*, 2016 BCSC 2089 at para. 36. One of the factors is the merits of the proposed claim.
- [41] Here, I have found the TPN discloses no cause of action against the Alangaramoneys. Thus, there is no basis to grant leave to file the TPN, either nunc pro tunc or effective now.
- [42] As I indicated at the outset, the Bajwa Defendants produced a proposed amended TPN at the hearing. The proposed amended pleading does not impact on my findings as set out above because i) there was no notice of application seeking leave to file the amended TPN, and ii) in any event, the proposed amendments do not cure the flaws I have identified in the current TPN. Specifically, the amended pleading still fails to plead material facts that would establish a cause of action against the Alangaramoneys, including any cause of action that would support an interest in land.
- [43] For all of these reasons, the Alangaramoneys' application to strike the TPN is granted and the Bajwa Defendants' application for leave to file the TPN is dismissed.

The CPL

- [44] That brings me to the Bajwa CPL. In my view, this case falls within the category of cases identified by Kirkpatrick J.A. in *Bilin* in which the underlying pleadings do not support the filing of a CPL. At the time the CPL was registered in the land title office, there was no valid underlying pleading, as the TPN was filed in breach of R. 3-5(4). However, even if the TPN was valid, it did not satisfy the threshold requirement of s. 215(1) of the LTA of pleading a valid interest in land.
- [45] I therefore order that the Bajwa CPL be cancelled. In light of this finding, it is not necessary to consider whether the Alangaramoneys are also entitled to cancellation of the Bajwa CPL for reasons of hardship pursuant to s. 256 of the LTA.

Conclusion

- [46] I order that the third party notice filed by the Bajwa Defendants on October 13, 2020 be struck as against the Alangaramoneys and that the Bajwa CPL be cancelled.
- [47] The Alangaramoneys are entitled to their costs from the Bajwa Defendants.

"Skolrood J."

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