
CANADA / JUDGMENT

Tige Industries Ltd. v. 0763636

2019 BCSC 1423

COURT

Supreme Court of British Columbia

DECIDED

22 August 2019

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2019 BCSC 1423 Tige Industries Ltd. v. 0763636 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tige Industries Ltd. v. 0763636 B.C. Ltd.,

2019 BCSC 1423

Date: 20190822

Docket: S1610880

Registry: Vancouver

Docket S123552

Registry: New Westminster

Between:

Tige Industries Ltd.

Plaintiff

And

0763636 B.C. Ltd.

Defendant

Before: The Honourable Madam Justice MacNaughton

Corrected Judgment: The first page of this judgment was corrected
on August 27, 2019

Oral Reasons for Judgment

Counsel for the plaintiff:

B. Carpenter

Counsel for the defendant:

J. Maledy

Place and Date of Hearing:

Vancouver, B.C.

August 16, 2019

Place and Date of Judgment:

Vancouver, B.C.

August 22, 2019

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Introduction

- [1] Tige Industries Ltd. ("Tige") has commenced two actions against 0763636 B.C. Ltd. ("076"). The first action (New Westminster Registry Action No. S123552) was commenced by writ of summons and statement of claim filed on November 13, 2009. In it, Tige alleges that it is owed \$1.1 million for excavation and other land preparation work (the "Services") done on property owned by 076 (the "development lands"), and it claims a lien under the Builders Lien Act, S.B.C. 1997, c. 45. I will refer to the first action as the "Lien Action".

- [2] The second action (Vancouver Registry Action No. S1610880) was commenced by notice of civil claim filed on November 24, 2016. The plaintiffs are Tige and its principal, Lloyd McConnell ("McConnell"). The defendants are 076 and its principal, David Ferrigno ("Ferrigno"). In it, Tige and McConnell claim under a promissory note dated February 10, 2010, in the amount of \$1.1 million (the "promissory note"). I will refer to this action as the "Promissory Note Action".
- [3] Pursuant to the Promissory Note Action, Tige has registered certificates of pending litigation ("CPLs") against title to the development lands. In this application, 076 applies to have those CPLs discharged and cancelled on the basis that the registration has caused it, or is likely to cause it, hardship and inconvenience.

Background

- [4] Tige alleges that, in 2008, it performed the Services on the development lands so that 076 would be able to subdivide and develop the lands for residential housing.
- [5] It invoiced 076 for the Services. The first of Tige's invoices was paid; the next two, totalling just under \$1.1 million, were not.
- [6] On November 13, 2008, Tige filed a builders lien against title to the development lands (the "Lien"). On November 13, 2009, Tige filed the Lien Action along with a Certificate of Pending Litigation against the development lands (the "original CPL").
- [7] In the Promissory Note Action, Tige alleges that, for financing reasons and to facilitate the development of the lands, and at Ferrigno's request, it agreed to remove the original CPL in exchange for Ferrigno and 076 executing the promissory note.
- [8] McConnell says that he also agreed to put the lien action on hold. The copy of the promissory note in the record before me indicates that, at the time, there was a pending civil forfeiture action and a BC Hydro action against Tige and Mr. McConnell apparently arising from a grow operation which he was alleged to have been involved in. Ferrigno and 076 dispute the authenticity of the promissory note.
- [9] The promissory note provides:
- (a) A principal amount of \$1.1 million;
 - (b) The promissory note was repayable by 076 and Ferrigno within 180 days of Tige and McConnell providing written notice of demand for payment;
 - (c) The lien and the original CPL would be cancelled;
 - (d) The Lien Action would be "placed on hold"; and
 - (e) Ferrigno and 076 would not transfer title to the development lands without the consent of Tige and McConnell.

- [10] The agreement to put the Lien Action on hold, and that 076 and Ferrigno would not transfer the development lands, were to remain in place until the civil forfeiture and BC Hydro actions were resolved.
- [11] The lien and the original CPL were cancelled in accordance with the terms of the promissory note.
- [12] The development lands were subdivided in 2012. Since 2012, the development lands have been further subdivided in phases. A total of seven phases are planned.
- [13] On July 28, 2015, after the resolution of the civil forfeiture and B.C. Hydro actions, McConnell issued a demand to 076 and Ferrigno for payment under the promissory note.
- [14] On November 24, 2016, Tige and McConnell commenced the Promissory Note Action and a second CPL was registered against the development lands.
- [15] On November 9, 2017, 076 and Ferrigno applied to strike certain claims in the Promissory Note Action, particularly Tige's and McConnell's alternate claim of unjust enrichment, and, if successful, for an order cancelling the CPL registered against the development lands. Justice Fitzpatrick, in Reasons found at *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2017 BCSC 2218, refused to strike out the claims, but described the particulars of the claims as being "sparse". She permitted Tige and McConnell to amend their pleadings to more fully set out the alternate claim.
- [16] On February 7, 2019, Tige filed an amended notice of civil claim in the Lien Action, adding a claim for contractual interest of 24% per annum, and a claim in unjust enrichment covering the subdivided lands on the development lands. On February 7, 2019, the plaintiff filed further CPLs against the subdivided lands (the "Subdivided Lands CPLs").
- [17] On April 2, 2019, Tige and McConnell filed a further amended notice of civil claim in the Promissory Note Action. 076 and Ferrigno filed a further amended response to civil claim on April 23, 2019.
- [18] On May 30, 2019, the parties appeared before Justice Skolrood on a number of applications.
- [19] In the Lien Action, 076 applied to dismiss the claim for want of prosecution. Alternatively, 076 applied to have the Tige's claim for unjust enrichment struck on the basis that it was brought out of time. If successful, 076 also sought to have the Subdivided Lands CPLs discharged.
- [20] In the Promissory Note Action, 076 and Ferrigno applied to have the claim for breach of contract struck. The defendants denied signing the promissory note and argued, in the alternative, that the promissory note was for an illegal purpose, to hide an asset from the director of civil forfeiture and from B.C. Hydro, and, as a result, was unenforceable. 076 and Ferrigno also argued that the action to enforce the promissory note was frivolous, vexatious, and an abuse of process and that the unjust enrichment claim in the Promissory Note Action should be dismissed.

- [21] Justice Skolrood did not strike the Promissory Note Action. He determined that the circumstances leading to the execution of the promissory note were part of a complex series of interrelated dealings and that the issues surrounding its execution, and Tige and McConnell's claims thereunder, and the allegations of illegality, were unsuitable for summary determination.
- [22] In dealing with 076 and Ferrigno's alternative position that the unjust enrichment claim should be dismissed as out of time, Justice Skolrood referred to Justice Fitzpatrick's decision which determined that the unjust enrichment claim was properly framed in the alternative to the contract claim.
- [23] In his reasons, which can be found at *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2019 BCSC 1237, Justice Skolrood:
- (a) dismissed 076 and Ferrigno's application to strike the Promissory Note Action or to strike or dismiss the unjust enrichment claim, without prejudice to the right to raise the illegality defence at trial;
 - (b) dismissed 076 and Ferrigno's application to dismiss the Lien Action for want of prosecution, or to strike the unjust enrichment claim, without prejudice to the right to advance a limitation defence at trial;
 - (c) dismissed 076 and Ferrigno's applications to cancel or discharge the CPLs in both the Promissory Note Action and the Lien Action; and
 - (d) ordered that the Promissory Note Action and the Lien Action were consolidated under the Lien Action.

The Current Application

- [24] As I have said, in this application brought in the Lien Action, 076 seeks to have the Subdivided Lands CPLs registered by Tige cancelled and discharged upon 076 paying the sum of \$1.1 million into their solicitor's trust account on terms that it not be dispersed without the written agreement of the parties or further court order. 076 also seeks an order that Tige be prohibited from registering further CPLs against the development lands.

The Legal Basis

- [25] 076 accepts that Tige has an arguable case with respect to its entitlement to the Subdivided Lands CPLs. The application is brought solely on the basis that the registration of the CPLs has caused hardship and inconvenience. They apply for cancellation and discharge under ss. 256 and 257 of the Land Title Act, R.S.B.C. 1996, c. 250 [Act].
- [26] Those provisions give the court discretionary power to discharge and cancel CPLs in the following circumstances:

Cancellation of certificate of pending litigation on other grounds

s.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.

(2)An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit

(a)that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,

(b)that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and

(c)particulars of dates and times of receipt, application and registration of the owner's application and the certificate,

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

(3)An application under this section must be made to the court in which the proceeding was commenced and must be brought

(a)as an application in that proceeding, if the applicant is a party to the proceeding, or

(b)by petition, if the applicant is not a party.

Power of court to order cancellation

s. 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.
- (4) On hearing the application referred to in section 256 (2) and on being satisfied that
- (a) the facts set out in the affidavit are consistent with the records of the land title office, and
- (b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication alleges that the owner is not a purchaser in good faith and for valuable consideration,
- the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.
- (5) On receipt of an order made under subsection (4), the registrar must file it and cancel the registration of the certificate of pending litigation.

Caselaw Applying Sections 256 and 257 of the Act

- [27] Two recent Court of Appeal decisions have discussed the test for discharge and cancellation of CPLs.
- [28] In *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at paras. 25-35, albeit in a somewhat different context, the Court of Appeal explained that there are express statutory requirements that must be met by an applicant under s. 256 to obtain relief under s. 257 of the Act:
- [26] The plain and ordinary meaning of the words of ss. 256(1) and 257(1) provide that an application to cancel a CPL under s. 256(1) must include an affidavit that sets out the particulars of the hardship and inconvenience experienced or likely to be experienced by the registration of the CPLs to the applicant before the application can be heard. Indeed, it is only upon "the hearing of the application referred to in section 256(1)" that the court may make an order under ss. 257(1)(a) or (b). Absent an application under s. 256(1), and absent evidence of actual or likely hardship and inconvenience caused by the CPL, there can be no remedy under ss. 257(1)(a) or (b) and the application must be dismissed. Even where the

requirements of an application under s. 256(1) are met, the court retains the discretion to refuse either of the remedial orders and may dismiss the application.

- [28] Sections 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 prejudices the land owner. The Act requires that the party registering the CPL provides the land owner with notice of the CPL. The requirement of actual or likely hardship and inconvenience caused by the CPL in order to obtain any of the remedial orders encourages an exchange of communications between the parties and some reasonable accommodation of both of their interests in order to mitigate potential losses that may be caused by the CPLs.
- [29] The court said that the hardship and inconvenience experienced, or likely to be experienced, by an applicant must be causally connected solely to the registration of the CPLs and that evidence of hardship must be more than general allegations of inconvenience but include particulars that demonstrate real hardship.
- [30] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 338, the court addressed the level of hardship that must be shown to meet the threshold requirement of ss. 256 and 257:
- [28] As a preliminary matter the applicant must show that it is experiencing or likely to experience "hardship and inconvenience" as a result of the registration of the CPL. It appears that the degree of hardship required is the subject of disagreement in the Supreme Court of British Columbia. While some judges have proceeded on the basis that the hardship need not be "significant" (see, e.g., *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.* 2007 BCSC 1379, and *0966349 B.C. Ltd. v. Shell Canada Limited*, Reasons dated February 28, 2014, New Westminster Docket S151234), others have required "severe suffering" (see, e.g., the lower court decision in *Liquor Barn Income Fund v. Mather* 2009 BCSC 1092, at para. 7.) The Shorter Oxford Dictionary (6th ed., 2007) defines "hardship" to mean "the quality of being hard to bear" or "severe suffering or privation"; "significant" to mean "important, notable; consequential"; and "insignificant" to mean "of no importance; trivial, trifling" or "meaningless". To the extent that these or other decisions of the trial court suggest that "hardship" in s. 256(1) may be met by proof of hardship that is "insignificant" or "not significant", I would disagree. I doubt that the Legislature intended the threshold under s. 256 to be surmounted by proof of hardship that is only "trifling". On the other hand, I agree that a court should not be "exacting" in its analysis of hardship and inconvenience.

The Application of the Legal Test to the Facts

The Evidence of Hardship

- [31] In this case, as set out above, the development lands are being developed in phases. According to Ferrigno's August 1, 2019 affidavit, the procedure for each phase involves:

- (a) 076 readying a portion of the development lands up to the point at which houses can be built on it;
 - (b) Applying to the land titles office to obtain property identifying numbers for the planned residential lots;
 - (c) Seeking approval from the City of Chilliwack ("Chilliwack") and entering into a servicing agreement with them;
 - (d) Filing the subdivision application with the Land Title Office to formalize the subdivision into individual lots; and
 - (e) Once the formal subdivision has been filed, commencing building the homes which are then put on the market at or before the completion of each home.
- [32] 076 does not build the homes on the lots and does not arrange for their sale. Under a contract with 076, Steele Properties Ltd. handles construction and sale.
- [33] In his affidavit, Ferrigno says that, to obtain Chilliwack's approval, and to secure the servicing agreement, 076 must provide Chilliwack with security over the lots in a particular phase, and that a CPL over the development lands means that 076 cannot provide suitable security to Chilliwack, and the subdivision will not be approved.
- [34] With respect to the nine lots remaining in phase 5 of the development:
- (a) three of the lots (PIDs: 030-196-001, 030-195-853, and 030-195-869) are under contracts of purchase and sale, all of which were entered into before registration of the Subdivided Lands CPLs;
 - (b) three (PIDs: 030-195-896, 030-195-977, and 030-195-985) are currently listed for sale on MLS; and
 - (c) three (PIDs: 030-195-918, 030-195-942, and 030-195-934) remain unlisted.
- [35] Ferrigno says that with respect to PIDs: 030-196-001, 030-195-853, and 030-195-869, the deals cannot complete. He also says that since the contracts were entered into, he has noticed that home prices have dropped significantly. If 076 is unable to transfer title to these purchasers, and the deals fall through, then it is likely that they will fetch a lower price.
- [36] Ferrigno also says that as a result of the Subdivided Lands CPLs over the development lands, 076 is unable to provide Chilliwack a sufficiently secured interest to obtain the servicing agreement and their approval of the subdivision. Without Chilliwack's approval, and servicing, phase 5 cannot continue, resulting in significant losses and delays for 076.

- [37] Finally, Ferrigno says that all the necessary application materials have been provided to Chilliwack, and that 076 has been advised that removal of the Subdivided Lands CPLs is the last step required before Chilliwack will enter into the servicing agreement, and give its approval. In support of this statement, Ferrigno attaches to his affidavit a March 26, 2019 letter from 076's solicitor to Chilliwack, providing the application to deposit the Phase 6 subdivision plans.

Assessment of the Evidence of Hardship

- [38] I am not satisfied, on the evidence before me, that 076 has established hardship and inconvenience as a result of the registration of the Subdivided Lands CPLs. I reach that conclusion, in large measure, because Mr. Ferrigno's affidavit contains very little in the way of actual evidence of hardship. He makes bald statements about hardship without supporting evidence.
- [39] For example, he does not say who advised 076 that the removal of the Subdivided Lands CPLs is the last step before Chilliwack will enter into the servicing agreement, and give their approval. He does not set out a basis for his information and belief. It is a requirement for an affiant to provide the source of the information on which they rely in reaching their sworn conclusion. In this case, Ferrigno has not provided a response from Chilliwack to 076's solicitor's application to deposit the subdivision plan. This is despite the five months that have elapsed since it was first filed. He does not say that his solicitor, or someone in the Chilliwack planning department, advised him that the CPLs are a block to further processing of the subdivision application or the servicing agreement.
- [40] Further, there is no evidence about the form of security that Chilliwack requires to enter into the servicing agreement and to give their subdivision approval, or that the Subdivided Lands CPLs are preventing 076 from providing that security. I have no evidence about what Chilliwack required as security with respect to the servicing and approval of the first five phases of the development project. For example, I do not know, whether Chilliwack required a bond to be deposited, which cannot be obtained without the CPLs being lifted. I am not told whether a cash deposit is all that is required and whether 076 is financially able to make a cash deposit without the CPLs being lifted. I am also not told whether Chilliwack requires that something be registered on title to the development lands in priority to the CPLs.
- [41] With respect to the three homes that are currently under contracts of purchase and sale, two of those sales have closed in escrow and there is no evidence that the purchasers are dissatisfied with the current escrow arrangement, or that it is otherwise causing hardship to 076.

- [42] The closing date for the third home has been extended twice, and is now scheduled to close on August 29, 2019. There is no evidence that the purchasers of that property have been approached about a further extension and will not agree, or that they will not agree to close in escrow as the two other purchasers did.
- [43] With respect to the three homes that are currently listed on MLS, there is no evidence that marketing of those homes is being hindered or interfered with by the fact that the Subdivided Lands CPLs are registered against the development lands. 076 cannot create hardship by listing properties for sale. There is no evidence about what hardship would to 076 if the homes had not been listed which, in any event, might not amount to hardship resulting from the registration of the CPLs.
- [44] With respect to the three homes that are not yet listed for sale, there is no evidence that Steele Properties Ltd., who markets the homes on behalf of 076, wishes to list them for sale imminently.
- [45] Finally, I have no evidence from Ferrigno to support his statement that home prices in Chilliwack have dropped significantly.

Conclusion

- [46] On the evidence before me, I conclude that 076 has not established that it is experiencing, or is likely to experience, hardship and inconvenience because of the registration of the Subdivided Lands CPLs.
- [47] As I said at the hearing, if the situation changes, and 076 is able to establish actual or likely hardship, it is not foreclosed from bringing a further application for cancellation of the CPLs.

Costs

- [48] As 076 has been unsuccessful in this application, Tige is entitled to its costs in any event of the cause.

"MacNaughton J."

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Prepared on 29 October 2026 · Esheria