

CANADA / JUDGMENT

V.I. Camelot Homes Ltd. v. Eberwein

2024 BCSC 966

COURT

Supreme Court of British Columbia

DECIDED

16 April 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 966 V.I. Camelot Homes Ltd. v. Eberwein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

V.I. Camelot Homes Ltd. v. Eberwein,

2024 BCSC 966

Date: 20240416

Docket: S-246262

Registry: Victoria

Between:

V.I. Camelot Homes Ltd.

Plaintiff

And:

Parker Eberwein

Defendant

Before: The Honourable Justice Jackson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by videoconference:

G. Allen

N.V. Chan

Counsel for the Defendant:

M.N. Peirce

Place and Date of Hearing:

Victoria, B.C.

April 15, 2024

Place and Date of Judgment:

Victoria, B.C.

April 16, 2024

NOTE TO READER: These Oral Reasons were delivered in court. The Reasons have since been edited for publication without changing the substance.

- [1] THE COURT: There are three matters before me for determination in relation to this action. These are my oral reasons for judgment with respect to those matters. If a transcript is ordered, I may make changes for style or grammar or to add reference to the authorities, but the substance of my reasons will not change.
- [2] The issues are:
- 1) whether to exercise my discretion to admit Affidavit #2 of Jamie Fretz made April 10, 2024 (the "Fretz #2 Affidavit"), which was not included in the application record;
 - 2) whether to make an order sealing the Affidavit #1 of Kelsey Gilker made March 20, 2024 (the "Gilker Affidavit"), which attaches transcripts of the cross-examinations of each of Jamie Fretz and Daniel McLeod on affidavits filed in this action, but which occurred in the course of an arbitration; and
 - 3) whether to reduce the amount of security for a lien under the Builders Lien Act, S.B.C. 1997, c. 45, either completely, on the basis that there is no basis for the lien, or in part.
1. Should I admit the Fretz #2 Affidavit?
- [3] No authorities on the admissibility of late affidavits were provided by the parties. R. 8-1 of the Supreme Court Civil Rules addresses applications and provides:
- (14) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (7), (9) and (13).
- [4] The Fretz #2 Affidavit was not served under subrules (7), (9), or (13).
- [5] The defendant applicant opposes the admission of the Fretz #2 Affidavit.

- [6] The object of the Rules is to ensure the just, speedy, and inexpensive determination of every proceeding on its merits, which includes, so far as is practicable, conducting the proceeding in ways that are proportionate to the amount involved in the proceedings, the importance of the issues in dispute, and the complexity of the proceeding: R. 1-3. I have borne these objectives in mind in considering the application with respect to the Fretz #2 Affidavit.
- [7] The Court has the discretion to admit late-filed affidavits but should exercise that discretion sparingly and only in clearly meritorious cases where to exclude the evidence would result in a substantial injustice: *Quigg v. Quigg*, 2019 BCSC 628 at para. 20, citing *Ivarson v. Lloyd's M.J. Oppenheim Attorney In Fact In Canada for Lloyd's Underwriters*, 2002 BCSC 1627 at para. 25.
- [8] The Court's discretion to allow a party to file an application affidavit late is analogous to the Court's discretion to permit the introduction of evidence at trial for which notice was not given in accordance with the Rules, which was addressed by Justice Griffin (then of this Court) in *Fu v. Zhu*, 2017 BCSC 754 at para. 63.
- [9] The discretion should be exercised considering all relevant factors, including:
- a) whether the prejudice to the opposing party is due to the lack of notice of the information;
 - b) is there a reasonable explanation for the delay in the notice of the evidence being provided;
 - c) will precluding the admission of the late-produced evidence prevent determination of the case on its merits; and/or
 - d) in the circumstances of the case, do the interests of justice weigh in favour of allowing the evidence to be admitted?
- [10] The defendant could not identify any prejudice arising from the lack of notice. Although there was no explanation for the delay, the application, once scheduled, did proceed quickly with the defendant making the affidavit to which the Fretz #2 Affidavit responds only on April 2, 2024. While precluding the Fretz Affidavit #2 may not prevent determination of the application on its merits, it does contain important information, including context, which is helpful for the Court and will enhance the ability of the Court to determine the matter and the interests of justice are favoured by its admission. I have determined that the affidavit will be admitted.
2. Should the Gilker Affidavit be sealed?
- [11] The plaintiff does not argue the Gilker Affidavit is not admissible, but seeks an order that it be sealed. The defendant opposes.
- [12] Court proceedings are presumptively open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 37. In *Sherman Estate* at para. 38, the Supreme Court of Canada summarized that a person seeking an exception to the open court principle, including an applicant seeking a sealing order, must establish three things:

- 1) court openness poses a serious risk to an important public interest;
 - 2) the order sought is necessary to prevent this serious risk to the identified interest, because reasonably alternative measures will not prevent this risk; and
 - 3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
- [13] The plaintiff argues the important public interest at issue here to which court openness poses a serious risk is the commercial interest in maintaining the confidentiality of various aspects of how it conducts business.
- [14] The Court of Appeal of British Columbia recently summarized the law with respect to whether a commercial interest will qualify as an important public interest in *Dempsey v. Pagefreezer Software Inc.*, 2023 BCCA 179:
- [25] The term "important interest" includes the general commercial interest in preserving confidential information: *Sherman Estate* at para. 41. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 59, the Supreme Court of Canada held that the preservation of confidential information constitutes a sufficiently important commercial interest provided certain criteria are met. These criteria are that the information has been treated at all relevant times as confidential, the applicant's commercial interests could reasonably be harmed by its disclosure, and it has been accumulated with a reasonable expectation that it will be kept confidential: *Sierra Club* at para. 60.
- [15] The Court may only properly order a discretionary limit on openness, including a sealing order, where all three of these prerequisites have been met: *Sherman Estate* at para. 38.
- (a) Does court openness pose a serious risk to an important public interest in this case?
- [16] As Justice Masuhara observed in *Fibreco Export Inc. v. AG Growth International Inc.*, 2023 BCSC 1719:
- [34] To meet the first step of the *Sherman Estate* test, a party must also establish that court openness poses a "serious risk" to the identified public interest. Justice Frankel noted in *NHK Spring Co., Ltd. v. Cheung*, 2023 BCCA 230 ... this is a high evidentiary burden that a party cannot meet simply by providing generic and conclusory statements about the potential risk of public disclosure. The risk must be real and substantial, grounded in evidence that meets a "demanding evidentiary standard": at para. 26, citing *Out-of-Home Marketing Association of Canada v. Toronto (City)*, 2012 ONCA 212. Justice Frankel said in the case before him:
- [27] The evidence with respect to the alleged risk here is in Affidavit #2, which I reproduce again for ease of reference:
6. Public dissemination and disclosure of the Confidential Business Information would prejudice and cause harm to Celestica because it would:

- (a) provide an unfair advantage to Celestica's competitors;
 - (b) threaten Celestica's business interests and agreements; and
 - (c) harm Celestica's relationships with suppliers or customers who might reconsider engaging in business with Celestica, including for fear that their commercial agreements might also become public.
- [28] All of the above statements are generic and conclusory. They provide no real insight into how or why disclosure would adversely affect Celestica's business or a basis on which to determine the degree to which that business would be put at risk.
- [17] The protection of information covered by contractual confidentiality obligations and settlement privilege has been recognized as being an important general commercial interest that can constitute important public interest: see *Dempsey v. Pagefreezer Software Inc.*, 2023 BCCA 179 at para. 31.
- [18] However, no case was brought to my attention in which general business operations were recognized as being an important interest sufficient to warrant a sealing order and infringe upon the open court principle. In addition, even if the plaintiff could establish the nature of the commercial interest constituted an important interest, there is no evidence to establish the three criteria required to elevate the plaintiff's commercial interest to an important interest sufficient to satisfy the first Sherman Estate criterion.
- [19] The plaintiff relies on Affidavit #1 of Danielle White made April 10, 2024, in support of its application. However, that affidavit contains no such evidence to satisfy the criteria. Further, the submissions made in favour of the sealing order in this case were general in nature, very much in line with the types of statements described by Justice Frankel in *NHK Spring Co., Ltd. v. Cheung*, 2023 BCCA 230, which were generic and conclusory in nature. They provided no real insight into how or why disclosure would adversely affect the business of the plaintiff or a basis on which to determine the degree to which that business would be put at risk.
- [20] As a result of my conclusion, it is not necessary for me to address the parties' submissions with respect to the proper interpretation and meaning required in s. 63(3)(b) of the Arbitration Act, S.B.C. 2020, c. 20, and I decline to do so. I simply add that given that the plaintiff initiated a claim in the B.C. Supreme Court dealing with the exact subject matter of a commercial dealing which is at issue in the arbitration, in my view the plaintiff would also not be able to substantiate or satisfy the other criteria outlined in Sherman Estate with respect to the confidentiality of the information.
- [21] I turn to the last issue.
3. Should the amount of the security be cancelled or reduced?
- [22] The defendant applies for an order that the lien be cancelled under s. 25(2) of the Builders Lien Act which provides:

An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

- (a) the claim of lien does not relate to the land against which it is filed, or
- (b) the claim of lien is vexatious, frivolous or an abuse of process.

[23] The defendant argues the lien is an abuse of process because it vastly exceeds the guaranteed maximum price (the "GMAX Price") to which, the defendant argues, the parties agreed to in the contract dated January 26, 2021, because it includes interest, and because it includes the cost of a hot water heater which was removed either by or on the direction of the plaintiff.

[24] The underlying contractual dispute is complex. In addition, a primary issue in the dispute is whether a GMAX Price was agreed to by the parties. That issue, by agreement of the parties, was referred to arbitration. The arbitration hearing has been held and the evidence before me is that a decision on that issue is imminent. In those circumstances, I am reluctant to engage in and make a determination with respect to whether a lien, premised on there not being a GMAX Price, constitutes an abuse of process, and for that reason I would dismiss the relief sought in the application with respect to s. 25(2) of the Builders Lien Act.

[25] In the alternative, the defendant seeks to have the amount of the security standing in place of the lien reduced under s. 24 of the Builders Lien Act, which provides:

- (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.
- (2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
- (3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.
- (4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.
- (5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

[26] Justice Macintosh summarized the principles underlying an application under s. 24 of the Builders Lien Act in *Atlas Painting & Restorations Ltd. v. 501 Robson Residential Partnership*, 2016 BCSC 2472:

[13] ... Our Court of Appeal established a two-part test for determining the security to be posted under s. 24. A court should examine what claims should be taken into account and then what amount of security is appropriate on those claims. See *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366, at paras. 56 and 57:

Under s. 24 there is a two-prong test. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. In summary:

- the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a prima facie case will suffice;
- any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
- looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate security;
- that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
- the amount of security may be less than the amount claimed under the lien.

Counsel for the appellants asserts that the result of judges reducing security is effectively to eliminate a portion of a lien. That is so, but this always has been the case. If the quarrel is with the discretion afforded to judges by s. 24(2) and (3), that is a matter for the Legislature.

[27] Given that (i) the lion's share of the lien claim is premised on the contract not containing a GMAX Price, (ii) the GMAX Price issue is being determined by an arbitrator by consent of the parties, and (iii) the plaintiff need only show a prima facie case for their claim, which is a low bar, I cannot say it is plain and obvious that their claim will not succeed with respect to the matters which are claimed as part of the non-GMAX prices.

[28] However, the parties are in agreement that interest cannot form part of the builders' lien: *Horsman Brothers Holdings Ltd. (c.o.b. E.B. Horsman & Son) v. Lee*, 12 C.L.R. 145, [1985] B.C.J. No. 2269 at paras. 11-14 (C.A.).

[29] The Fretz Affidavit #2, which I have ruled admissible, confirms the evidence of Mr. McLeod, the president of the plaintiff, that the original lien amount of \$413,686.35 included interest. The Fretz #2 Affidavit states the amount of the interest was two amounts, one being \$9,531.14 and one being \$164.86. Accordingly, the maximum outstanding lien claim that could be claimable by the plaintiff would be \$403,990.35.

- [30] While the affiant deposes in the Fretz Affidavit #2 that the hot water heater was never paid for, they do not depose it was not included in the invoice amounts, which underlie the amount of the lien the plaintiff claims. The absence of such an assertion supports the inference that costs of the hot water heater were included in the invoice amounts.
- [31] Further, it appears to me that the hot water heater was removed from the property after it had been installed, because there is a reference in the Fretz #2 Affidavit that the plaintiff would "reinstall the hot water heater". It would surprise me if the installation work had been done but no invoice had been sent out. Therefore, I am prepared to infer that part of the invoices supporting the lien were for the installation of the hot water heater which was removed, either by, or on the direction of, or with the participation of the plaintiff. Of course, that is just a prima facie view; I am not making a finding on that because a final determination on that issue is not before me. Accordingly, in my view, some amount of the security should be reduced for that purpose.
- [32] I note also that the defendant applicant was arguing that there was prejudice to him because of the amount of interest accruing with respect to the security payment. However, as I understand it, it was the defendant's request to post the security in lieu of the lien and so, in my view, it is not appropriate now to take that into account.
- [33] Further, I am not satisfied that just because those interest payments are being made they constitute a hardship to the defendant. If there is a hardship, I am not satisfied it is because of the security posted for the lien.
- [34] In my view, taking into account all of the evidence and the legal framework, it is appropriate to reduce the amount of security given for the lien by \$20,000 and I so order.
- [35] Costs of the applications will be in the cause.
- [36] I wish to thank all counsel for their submissions which were very helpful.
- "V. Jackson J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/09/2024BCSC0966.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/v-i-camelot-homes-ltd-v-eberwein-2024>

Prepared on 28 October 2026 · Esheria