

CANADA / JUDGMENT

W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership

2020 BCSC 1345

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1345 W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership,

2020 BCSC 1345

Date: 20200910

Docket: S183538

Registry: Victoria

Between:

W.O.M. Mastercraft Construction Ltd.

Plaintiff

And

TFN Meadows Development Limited Partnership, Akutan Developments General Partnership, Akutan Developments Ltd., Michael Hutchison, and Toby Baker carrying on business as Resolution Construction Systems

Defendants

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

A.L. Faulkner-Killam

Counsel for the Defendants:

D. Volk

Place and Date of Hearing:

Victoria, B.C.

August 27, 2020

Place and Date of Judgment:

Victoria, B.C.

September 10, 2020

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Overview

[1] This is construction litigation involving a mix of conventional and unconventional contractual arrangements. In essence, the plaintiff ("Mastercraft") contracted either to build or to manage the building of a townhouse development on lands forming part of an Indian Reserve. It pleads that it contracted with the defendant, Toby Baker, to provide services on

the project and that Mr. Baker diverted money paid to him in trust. Mr. Baker denies diverting funds. He further pleads that Mastercraft breached its obligations under its contract with him and counterclaims for damages. There are other defendants, but this is the nub of the dispute.

- [2] The action is to be tried together with a companion action involving the same parties. The trial is scheduled to begin on November 2, 2020, for 19 days.
- [3] The defendants seek leave to amend their response to civil claim and counterclaim. The amendments are not complicated. They introduce into the litigation allegations that Mastercraft failed to complete landscaping work and failed to correct construction deficiencies.
- [4] This application to amend is elaborately defended. Mastercraft maintains that the amendments fail to disclose a defence to the claim and a cause of action in the counterclaim, and will cause it prejudice that cannot be remedied in costs. It cross-applies to strike the amendments as an abuse of process. Alternatively, in its cross-application, it seeks summary judgment on the claim put forward in the amendments. Substantively, Mastercraft submits that the amendments fail or should be struck or dismissed on the basis of the doctrines of *res judicata*, abuse of process, and a contractual limitation period.
- [5] For the reasons that follow, I allow the application and grant the defendants leave to amend. It is not plain and obvious that the new defence and ground of counterclaim cannot succeed or that it constitutes an abuse of process. Mastercraft's claim of irremediable prejudice is not made out. Summary judgment on the issues raised by the amendments is not available to Mastercraft.
- [6] The argument on this application descended a long way into the evidence. I was invited to read lengthy affidavits tendered by Mastercraft and an expert report tendered by the defendants, and to resolve a dispute as to what was known or should have been known to the defendants at various times. This is not the court's role on a pleadings application. Contested factual issues are for trial.

Legal framework

- [7] A pleading such as a response to civil claim or a counterclaim is simply a formal statement of a party's factual allegations, the relief sought, and the legal basis of its claim or defence. As a general rule, applications for leave to amend a pleading are freely granted, unless the amendment will give rise to prejudice that cannot be compensated in costs; *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145 (C.A.) at para. 34. This rule reflects the pleading's status as a statement of position and the principle that cases should be decided on their merits, and not on technical grounds.

- [8] An amendment may be refused on the ground that, if it were granted, the resulting pleading would be subject to being struck on one of the grounds listed in Supreme Court Civil Rule 9-5(1). As Master Wilson (now Wilson J.) observed in *Rezai v. Uddin*, 2017 BCSC 1746 at para. 18, it would be pointless and contrary to the objectives of the Rules to require two applications to deal with the same matter. Accordingly, an amendment may be opposed on the ground that it fails to state a reasonable cause of action or defence, or that it is an abuse of the process of the court. However, an amendment can only be rejected on one of these grounds (or another ground listed in R. 9-5(1)) where it is plain and obvious that the amendment is bad; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Chapman v. Canada*, 2003 BCCA 665 at paras. 12-13.
- [9] Though it makes no practical difference in this case, in my view, Mastercraft's cross-application to strike the proposed amendments is procedurally misconceived. The court cannot strike an amendment that has not yet been made. As I have indicated, Mastercraft's substantive arguments on the application to strike are properly raised in opposition to the defendants' application for leave to amend.
- [10] By R. 9-5(2), evidence is not admissible on an application to strike a pleading as failing to disclose a reasonable cause of action or defence and, as a rule, evidence is not required on an application to amend a pleading; *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 25; *Mayer v. Mayer*, 2012 BCCA 77 at para. 184. The court may consider evidence bearing on an allegation that the amendment will give rise to prejudice or constitute an abuse of process, but not to address the substance of the claim or defence in question.
- [11] There are circumstances in which the court may have to consider prejudice arising from the loss of a limitation defence in deciding whether to grant leave to amend; *KPMG Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317 at paras. 38-49 [KPMG]. In this particular instance, the courts may have to address the substance of the possible limitation defence. I address this further below in considering the limitation defence asserted by Mastercraft on this application.

Issues on this application

- [12] Having regard to the legal framework I have outlined, the issues on this application are as follows:
- (1) Is it plain and obvious that the contested amendments fail to state a reasonable defence and cause of action?
 - (2) If not, is it plain and obvious that the contested amendments constitute an abuse of process?
 - (3) Should the amendments be refused on the ground that they will cause prejudice to Mastercraft?
 - (4) If not, is Mastercraft entitled to summary judgment dismissing the new claims?

Analysis

- (1) Is it plain and obvious that the contested amendments fail to state a reasonable defence and cause of action?
- [13] The contested amendments to the response to civil claim and the counterclaim are identical. In both pleadings, Mr. Baker is defined as "RCS", the initials of the unincorporated proprietorship through which he carried on business. It is pleaded that RCS entered into an agreement with Mastercraft under which Mastercraft was to act as a construction manager to assist RCS in the construction of the development, defined as the "Project".
- [14] The amendments are as follows. Some of the proposed amendments are conceded and, for simplicity, only the contested amendments are underlined below:
10. The terms of the Construction Management Agreement included the following terms:
 - a. RCS would enter into direct contracts with subcontractors and suppliers as necessary for the construction of the Project;
 - b. Mastercraft would manage the subcontractors and suppliers on behalf of RCS, including reviewing and approving invoices for payment by RCS;
 - c. Mastercraft would present RCS with the necessary information required for RCS to make payments with subcontractors and suppliers; and
 - d. Mastercraft would receive payment of \$705,000.00 as a Builder's Margin fee to perform its construction management work.
 11. Mastercraft has breached the terms of the Construction Management Agreement in the following respects:
 - a. failing to properly manage the work of subcontractors and suppliers to complete the Project;
 - b. failing to complete the Project, including by:
 - i. failing to manage and complete required landscaping work; and
 - ii. failing to manage and oversee the correction of a large number of deficiencies in the townhouse units;
 - c. failing to provide RCS with invoices and backup documents to support payments to subcontractors and suppliers;
 - d. over-invoicing for Mastercraft's work on the Project and receiving funds in excess of those it is entitled to pursuant to the Construction Management Agreement; and
 - e. wrongfully detaining a 2015 Bobcat purchased and owned by Mr. Baker despite demand by Mr. Baker for the Bobcat to be returned.

(collectively, the "Breaches").

12. As a result of the Breaches, RCS has and continues to suffer damage and loss, in particular:
- a. RCS incurred substantial costs and expenses to manage and complete the required landscaping work at the Project;
 - b. RCS incurred substantial costs and expenses to manage and oversee the correction of deficiencies at the Project;
 - c. RCS paid Mastercraft and its principals over \$2,810,000, well in excess of the \$705,000 Builder's Margin fee; and
 - d. RCS has been deprived of the use of the 2015 Bobcat.
- [15] In summary, the contested amendments to paragraph 11 add a plea that, in addition to failing to properly manage the work of subcontractors and suppliers, Mastercraft failed to complete the Project both by failing to manage and complete landscaping work that was required, and by failing to manage and oversee the correction of deficiencies in the townhouse units. The contested amendments to paragraph 12 provide particulars of a pre-existing plea of damage and loss. They again reference the landscaping work and the alleged deficiencies, and also the amount paid to Mastercraft in excess of its fee.
- [16] Mastercraft submits that the amendments are internally inconsistent because they plead, on the one hand, that Mastercraft was "only" a construction manager and, on the other, that it was responsible to complete the landscaping and correct deficiencies. It submits that completing the Project is the responsibility of a builder, not a construction manager. It argues that "the amendments in 12(a) assert that Mastercraft was both required to perform landscaping work and to 'manage' it".
- [17] I do not agree that the amended pleading is internally inconsistent. It is not plain and obvious that a construction manager might not be contractually responsible to see that the Project was completed. The nature and scope of Mastercraft's contractual responsibility is a question for trial.
- [18] The contested amendments plead breaches of the Construction Management Agreement and provide particulars of the loss and damage allegedly suffered by RCS in consequence of the breaches. In law, they state a reasonable counterclaim that is also fairly raised in defence of Mastercraft's claim.
- (2) Is it plain and obvious that the contested amendments constitute an abuse of process?
- [19] Mastercraft submits that the contested amendments constitute an abuse of process on three substantive grounds: *res judicata*, abuse of process, and a contractual limitation defence. In civil procedure, abuse of process is a flexible doctrine by which the court exercises its inherent power "to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute"; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 40.

[20] The arguments of res judicata and abuse of process are linked. It is easiest to deal with the limitation argument first.

Limitation issue

[21] Mastercraft maintains that that claims that its work was deficient are barred by provisions in its contract with Mr. Baker. It submits that:

The contractual limitations in this case are as follows:

- a. Claims for deficiencies or incomplete work during the currency of the contract must be brought or notice in writing of an unequivocal intention to claim provided on or before the 11th calendar day before the expiry of the lien period [as per CCA Contract s. 12.2.3.1]. This occurred on September 7, 2018.
- b. Claims for warranty must be brought or notice in writing of an unequivocal intention to claim provided on or before one year from the date of substantial completion [as per CCA Contract s. 12.3.1]. This occurred on July 23, 2019.
- c. Claims not already waived that arise after substantial completion must be brought or notice in writing of an unequivocal intention to claim provided on or before 390 days from the date of substantial completion [as per CCA Contract s. 12.2.5]. This occurred on August 17, 2019.

[22] The terms of the contract are not disputed. Mr. Baker is the "Contractor". Mastercraft is the "Subcontractor". Sections 12.2.3 and 12.2.5 provide in part as follows:

12.2.3

Subject to any lien legislation applicable to the Place of the Work, as of the 10th calendar day before the expiry of the lien period provided by the lien legislation applicable at the Place of the Work, the Contractor waives and releases the Subcontractor from all claims which the Contractor has or reasonably ought to have knowledge of that could be advanced by the Contractor against the Subcontractor arising from the Contractor's involvement in the Subcontract Work, including, without limitation, those arising from negligence or breach of contract in respect to which the cause of action is based upon acts or omissions which occurred prior to or on the date of Substantial Performance of the Work, except as follows:

12.2.5

The Contractor waives and releases the Subcontractor from all claims referenced in paragraphs 12.2.3.6 except for those referred in paragraph 12.2.3.2, 12.2.3.3 and those arising under SCC 12.3 - WARRANTY and claims for which Notice in Writing has been received by the Subcontractor from the Contractor within 390 calendar days following the date of Substantial Performance of the Work.

[Underlining added.]

[23] As appears from these provisions, Mastercraft's limitation defence is a defence that, by the terms of the contract, Mr. Baker has released it from liability for the claims in question. The applicability and ambit of the release depends upon factual questions, including:

- a) When the claims in question were discoverable by Mr. Baker;
- b) The extent of Mr. Baker's involvement in the work in question; and
- c) The date of substantial performance of the work.

[24] Limitation defences often engage the first question of when certain facts were known or discoverable by the plaintiff. In this context, the courts have repeatedly cautioned against attempting to resolve the substantive question of the availability of the limitation defence in the context of an application to strike a pleading, Speaking for the Court and referring to the limitation defence under the former Limitation Act, R.S.B.C. 1996, c. 266 (under which the discoverability issue was characterized as a question of "postponement"), Justice Goepel made this point among others in *Jensen v. Ross*, 2014 BCCA 173, where he stated:

[42] There are numerous cases which have held that Rule 9-5 is not the appropriate mechanism to determine a limitation issue. The cases include: *Canadian Pacific Ltd. v. British Columbia Hydro and Power Authority* (1979), 10 B.C.L.R. P 6 (S.C.); *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784; *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325 [Fuoco]; *Border Enterprises Ltd. v. Beazer East, Inc.*, 2003 BCSC 49; *Rain Coast Water Corp. v. British Columbia*, 2008 BCSC 1182; *Mattson v. Remus*, 2009 BCSC 836; and *Hughes v. Hughes*, 2011 BCSC 1569.

[43] In *Fuocu* this Court noted at para. 15:

[15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a), standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitations is a defence pleading. It is an issue that does not arise until it is pleaded in defence. ...

[44] Those words resonate in this case. The notice of civil claim, in and of itself, does not raise a limitation issue. The limitation issue only arises if it is pleaded in defence. Even then, the issue cannot be resolved in an evidentiary vacuum. The Limitation Act contains provisions pursuant to which the running of time is postponed. Pursuant to s. 8(1)(c) of the Limitation Act the ultimate postponement is 30 years from the date on which the right to bring the action arose.

[Emphasis added.]

- [25] While Mastercraft may well have a defence to some or even all of the claims advanced through the proposed amendments, it is not plain and obvious that all the claims were known or ought to have been known to Mr. Baker and that he was involved in the work in question at the relevant times. The date of substantial performance is also contested. It follows that the availability of the limitation defence is not a matter that can be resolved on this application.
- [26] Mastercraft relies upon *Thom v. Laird Custom Homes Ltd.*, 2017 BCSC 1577, in which Justice Williams upheld a Master's decision refusing to allow the addition of new claims and parties because a contractual limitation defence had accrued. The limitation defence in that case did not engage a question of discoverability. In other words, it did not depend on what the plaintiff knew or should have known of the claim. Justice Williams reasoned that the applicability of the limitation defence was clear (at para. 56). That is not this case. In this case, the reasoning I have quoted from Jensen at para. 44 is applicable.
- [27] Even where a limitation period has apparently accrued, there are circumstances in which the court may sometimes grant leave to amend to advance a claim to which the limitation period applies. The court does so in the exercise of a statutory discretion conferred by s. 4(1) and (4) of the former Limitation Act or s. 22(5) of the current Limitation Act, S.B.C. 2012, c. 13. The effect is that the benefit of the statutory limitation period may be lost to the defendant. In argument, the parties referred to some of the many cases addressing the exercise of this statutory discretion, including *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (Ed) 282 (C.A.) [Teal], *Letvad v. Fenwick*, 2000 BCCA 630, *KPMG*, and *Thom*.
- [28] While the courts held that the statutory discretion afforded under the former Limitation Act was broad enough to apply to at least some limitation periods conferred by contract, the discretion under s. 22(5) of the current statute is narrower. It is targeted specifically to limitation periods arising under the statute. I do not see that it applies to contractual limitation periods. Accordingly, the analytical framework developed in the line of authority stemming from *Teal* is not engaged and I have not applied it in coming to my decision in this case.
- [29] I should add that permitting the amendment in this case does not deprive Mastercraft of its ability to rely on the release contained in ss. 12.2.3 and 12.2.5 of the contract. The problem to which the analytical framework in *Teal* is directed is different.
- [30] In short, I conclude that it will not effect an abuse to process to permit the amendments in the face of the limitation defence that will be raised by Mastercraft in opposition to the counterclaim. The availability of the limitation defence turns on factual issues that cannot be resolved on a pleadings application. Mastercraft will not be deprived of the benefit of the defence at trial. The defence is not a reason to refuse the defendants leave to amend.

Res judicata and abuse of process

- [31] Mr. Baker contracted with subcontractors on this development and, at some point, he stopped paying them. They sued him: he was named as a defendant in small claims actions, actions before the Civil Resolution Tribunal, and at least one action in this Court. In each of these proceedings, Mr. Baker defended the subcontractor's claim and issued a third party notice to Mastercraft. Mastercraft defended the third party claim.
- [32] The subcontractors' claims are now all resolved. Mr. Baker settled with the subcontractors. Mastercraft made no payments. Mastercraft maintains that the claims were resolved in such a way that the claim now advanced by the defendants is res judicata or an abuse of process.
- [33] The deficiency claims advanced in the proposed amendments are not res judicata. The defence of res judicata prevents a litigant from calling into question something that has already been decided between the parties; *Town of Grandview v. Doering*, [1976] 2 S.C.R. 621 at 635-638. There has not been a judicial determination between Mr. Baker and Mastercraft.
- [34] I turn to Mastercraft's submission that, in light of what has taken place, the claim now advanced by Mr. Baker is itself an abuse of process. The subcontractors' claims were resolved variously, as follows.
- [35] On March 26, 2019, Judge McKim of the Provincial Court ordered Mr. Baker to pay the claim of Cooke Enterprises Ltd., a subcontractor, on the basis that Mr. Baker's defence to the claim raised no triable issue.
- [36] In the fall of 2019, Mr. Baker negotiated settlements with each of the other subcontractors. The evidence before me does not disclose to what extent the claims were compromised.
- [37] On November 26, 2019, a consent order was entered in this Court dismissing a claim brought by Westcoast Appliance Centre 2014 Ltd., a subcontractor. It provides:

The third-party proceedings are dismissed without costs. Such dismissal shall have no effect on the matters in issue between the third parties in other court proceedings relating to the same or similar subject matter, which for greater certainty includes the matters in issue in actions VIC-S-S-183538 and VIC-S-S-185563.

- [38] On November 28, 2019, the defendants forwarded and sought Mastercraft's consent to the proposed amendments.
- [39] On December 6, 2019, Mr. Baker's counsel advised Mastercraft's counsel that the remaining claims of the subcontractors had been resolved and forwarded notices of withdrawal.
- [40] A settlement conference in the Provincial Court was pending on December 11, 2019, and Mastercraft insisted on proceeding with it to address the outstanding third party claims. At the settlement conference, most of the remaining third party claims against Mastercraft was discontinued "without prejudice to any parties' rights" in this action and its companion action. Mr. Baker was ordered to pay Mastercraft's costs in the Provincial Court, without

prejudice to Mastercraft's right to seek costs in this action. I am advised that those costs have not yet been paid.

[41] Mastercraft's principal, Mr. Andrews, swears as follows:

Mastercraft would have objected to the withdrawal of the Supplier Claims, or would not have supported the subcontractors seeking full payment in those actions (which would be outstanding at this time) if it had been alerted to any credible deficiency allegation in their work.

[42] The substance of Mr. Andrews' objection is that Mastercraft would have dealt with the subcontractors differently, had it been given notice of "any credible deficiency allegation" at an earlier stage. There were at least some communications from Mr. Baker to Mastercraft concerning alleged deficiencies. Mr. Andrews says they fell short of credible allegations. Again, this is not the kind of question that can be resolved on a pleadings application. What Mastercraft could and would have done differently is also a factual issue.

[43] In my opinion, it is not plain and obvious that to allow the amendments will effect an abuse of process. It is far from plain and obvious that Mr. Baker has misused court procedures. It was not manifestly unfair for Mr. Baker to settle with the subcontractors before advancing the claims now put forward. All of the third party proceedings have been dismissed or discontinued without prejudice to the positions of Mastercraft and the defendants in this action. Mastercraft had no basis to stop the settlements from going forward and was aware of the proposed amendments when the settlement conference of December 11, 2019, took place. To allow the contested amendments does not bring the administration of justice into disrepute.

[44] I conclude that leave to amend should not be refused on the ground that the proposed amendments are res judicata or an abuse of process.

(3) Should the amendments be refused on the ground that they will cause prejudice to Mastercraft?

[45] Mastercraft says that the expansion of the issues brought about by the amendments will necessitate substantial additional document discovery. It forecasts that it will not be able to maintain the existing trial date in November 2020.

[46] To put this in context, Mastercraft estimates that its claims in the two companion actions exceed \$2 million. The defendants put forward the amendments in November 2019, well in advance of the trial. Mastercraft did not respond to the defendants' request that it consent to the amendments until March 25, 2020, at which point its counsel asked to see "evidence to support the pleadings you are seeking to make". This initial position was not one supported by the authorities. The defendants filed motion materials seeking leave to amend on May 11, 2020, and the subsequent delay in dealing with the application was at least partially attributable to the vigour and breadth of Mastercraft's arguments in opposition.

[47] In short, if the trial date is lost by reason of the amendments, it is to a substantial degree a consequence of the positions taken by Mastercraft, and not the fault of the defendants.

[48] In any event, the kinds of prejudice raised by Mastercraft are not grounds to refuse leave to amend. They are matters that may be addressed in costs at the end of the day.

(4) Is Mastercraft entitled to summary judgment dismissing the new claims?

[49] Mastercraft seeks an order that:

the amendments to the Response to Civil Claim and Counterclaim sought to be filed by the defendants by application filed May 11, 2020 are struck pursuant to Supreme Court Civil Rule 9-6.

[50] Rule 9-6 is the summary judgment rule. In contrast to an application on pleadings, an application for summary judgment is an application on the evidence to address the substance of a claim. There are limits on the court's ability to address contentious question of fact on a summary judgment application. The more immediate problem, however, is that Rule 9-6 only contemplates judgment on a claim, not judgment on an issue; *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at paras. 40-46. Speaking for the Court in *Century Services*, Justice Saunders stated:

[46] I consider that Rule 9-6 is not intended to provide an avenue for a plaintiff to obtain a decision on only one defence in circumstances in which other defences are asserted that may provide an answer to the whole of the claim; the simple dismissal of this defence, as sought, is not available under Rule 9-6.

[51] Obtaining judgment on particular issues - that is, the issues raised by the amendments - is exactly what Mastercraft is attempting in this case. If Mastercraft were to obtain the order sought, both claim and counterclaim would remain to be tried. It follows that the order sought by Mastercraft is not relief available under Rule 9-6. It is relief potentially available in a summary trial under Rule 9-7, but that is not the application Mastercraft has brought.

[52] Mastercraft's application for summary judgment is dismissed.

Disposition

[53] For these reasons, the defendants are granted leave to amend the response to civil claim and counterclaim in the form set out in schedules A and B to their notice of application filed on May 11, 2020. Mastercraft's cross-application is dismissed.

[54] The costs of the defendants' application are reserved to the trial judge. The defendants will have the costs of Mastercraft's application in any event of the cause, but not payable forthwith.

"Gomery J."

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