

CANADA / JUDGMENT

Zhang v. Cute-Go Novelty Inc.

2015 BCSC 2443

COURT

Supreme Court of British Columbia

DECIDED

24 December 2015

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2015 BCSC 2443 Zhang v. Cute-Go Novelty Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang v. Cute-Go Novelty Inc.,

2015 BCSC 2443

Date: 20151224

Docket: S131135

Registry: Vancouver

Between:

Ai Yang Zhang and Jian Zhong Ren

Plaintiffs

And

Cute-Go Novelty Inc. (BC0723467) dba

Grand East Development and

De Liu also known as Victor Liu

Defendants

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiffs:

B.C.Y. Lau

Counsel for the Defendants:

M. Katsionis

C. Ferguson, A/S

Place and Date of Trial:

Vancouver, B.C.

December 14-16, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2015

- [1] The plaintiff, Ai Yang Zhang, is the wife of the plaintiff Jian Zhong Ren. They own real property in Vancouver on which a laneway house ("the House") has been built. This trial involved the allegations of the plaintiffs that they contracted with the defendant Victor Liu to construct the House and, because of lengthy delays in the construction caused by Mr. Liu, the plaintiffs have lost rental income that they expected to receive. They also allege fraudulent misrepresentation by Mr. Liu regarding the defendants' "builder's license status with the Homeowner Protection Office". The plaintiffs seek general, special, aggravated and punitive damages. Apart from aggravated and punitive damages the damage claim is for \$34,321.57 from each defendant. Those damages are not meant to be cumulative.
- [2] With more particularity the plaintiffs' second further amended notice of civil claim alleges:
- a) Mr. Liu contracted with them through Grand East Development Inc., which is not a corporation but a proprietorship through which the defendant Cute-Go Novelty Inc. conducts business;
 - b) there was a "guaranteed" completion date of January 31, 2012, beyond which Mr. Liu would be obliged to pay \$83 for each day the completion of the House was delayed;
 - c) Mr. Liu was informed by the plaintiffs that once the House was completed they intended to rent it to tenants but, because of the delay in construction, the plaintiffs have lost \$2,000 rent for each month of that delay. In argument, the plaintiffs agreed the payment of the penalty of \$83 per day was in the alternative to their claim for \$2,000 for each month of lost rent;
 - d) the contract required Mr. Liu to pay for all materials to construct the House but the plaintiffs paid \$1,821.57 for materials which they seek to recover as damages;

- e) the defendants were not licensed with the Homeowners Protection Office but "unlawfully induced" a licensed builder, Universe Construction Rennovation Ltd. (sic) to obtain new home warranty insurance for the plaintiffs and to insert that company's name as the licensed builder in the completion certificate, even though that company did not contract to build the House;
 - f) the defendants fraudulently or negligently misrepresented "their builder's license status with the Homeowners Protection Office";
 - g) the defendants, through either fraudulent or negligent misrepresentation, contributed to the delay of the construction of the House by virtue of their:
 - (i) failure to obtain the requisite license with the Homeowner Protection Office prior to construction of the House;
 - (ii) unsuccessful application to obtain a license with the Homeowner Protection Office subsequent to commencing construction of the House;
 - (iii) failure to construct the House to the standard expected of a professional builder to meet the licensing requirements of the Homeowner Protection Office;
 - (iv) failure to possess the skills necessary to construct the House in a workmanlike manner as expected of a licensed builder, resulting in multiple failures of the City of Vancouver inspections, leading to delay in completion of the House.
 - h) the defendants, by unlawfully constructing the House without a valid and proper license with the Homeowner Protection Office, are in breach of the Homeowner Protection Act, S.B.C. 1998, c. 31 and the Homeowner Protection Act Regulation, B.C. Reg. 33/2015. The plaintiffs take the position that the Act gives them a private right of action against Mr. Liu
- [3] The contract to build the House was drafted by Mr. Liu. It was signed on April 22, 2010 only by the plaintiff Ai Yang Zhang as the "owner", but the position of all parties to this lawsuit is that both plaintiffs are parties to the contract.
- [4] The "contractor" is described as Grand East Development Inc. Section 24 of the Business Corporations Act, S.B.C. 2002, c. 57 prohibits the use of "incorporated" or its abbreviation by a person who is not entitled to its use. Mr. Liu contravened that provision when he contracted to build the House under the name Grand East Development Inc. Nevertheless, the parties have agreed that Mr. Liu was the person obliged to perform the contract and is himself liable if damages are awarded.

Analysis

A. The improper use of the name Grand East Development Inc.

- [5] Mr. Liu's improper use of the name Grand East Development Inc. is of no moment in this action. It might have been if the use of that name by Mr. Liu had induced the plaintiffs to enter into the contract. The plaintiffs do not allege that they were induced to enter into the contract by Mr. Liu's use of what purported to be a corporate name. The plaintiffs' pleading is that Mr. Liu represented to them that he was "a licensed builder with extensive experience" and that Mr. Liu had "executed all agreements with the plaintiffs in his personal capacity". Mr. Liu's improper use of a corporate name has had no consequences for the plaintiffs.

B. The issue of delay

- [6] The question of whether there was a delay in the construction project because of a breach of contract or some other breach of duty by Mr. Liu is central to the resolution of the main damage claim in this lawsuit. In an addendum to the contract signed on March 30, 2011, under the heading "Completion Date", the parties agreed that "the completion of the Project is to be 120 working days, excluding Sundays and public holidays, from the date of excavation and to pass final inspection by the City. The commencement date will be no later than April 12, 2011. There will be a \$83 per day penalty to the contractor if the project time is delayed after the guaranteed completion date."
- [7] In another version of the addendum the phrase "and to pass final inspection by the city" reads "and subject [emphasis added] to pass final inspection by the city". I cannot detect a difference in meaning between the two versions except that the use of the word "subject" reinforces the intention of the parties that the penalty could not begin to be imposed until the final inspection had been successful.
- [8] As I understand the plaintiffs' submission, it is that the penalty of \$83 per day would be calculated beginning 120 working days from the date of excavation, which was April 12, 2011, and it was contemplated that within the 120 days from the date of excavation the final inspection by the City would have occurred.
- [9] Mr. Liu's submission is that the meaning to be given to the "Completion Date" clause is that the daily penalty would not begin to be calculated until the final inspection by the City had occurred, whenever that was.
- [10] The party's choice of language for the "completion date" clause is far from clear but the phrases "and to pass final inspection by the city" or "and subject to pass final inspection by the city" must be given a meaning. If the penalty begins to apply 120 working days plus Sundays and public holidays from April 12, 2011, irrespective of any other event, those phrases have no meaning. In my opinion the purpose of the "completion date" clause is that the daily penalty would accrue after the City had made its final inspection and if Mr. Liu had not entirely finished the House in accordance with his contract. Mr. Liu might not yet have completed work such as floor coverings or painting in which the City had no interest.

- [11] The plaintiffs allege the home was not completed until October 31, 2012 and therefore there should be a substantial penalty payable from the end of January 2012. Alternatively, they submit they entered into a rental agreement with tenants on October 31, 2012, which would have happened much earlier if Mr. Liu had met the completion date. In my view, the delay cannot attract the penalty because the final inspection took place contemporaneously with completion. I doubt if the construction contract can properly be interpreted to mean that Mr. Liu had guaranteed to pay a market rent if there was delay but I need not decide that issue.
- [12] I also accept Mr. Liu's evidence and submission that even if there had been a delay in completion, it should not be attributed to any fault of his. Part of the delay the plaintiffs rely on was caused by the slow pace of inspections by the City building inspectors which the plaintiffs attribute to Mr. Liu's failure "to possess the skills necessary to construct [the House] as expected of a licensed builder." The evidence does not support that contention. Mr. Edward Loney, the City building inspector responsible for the House, testified that the inspection schedule and any delays associated with that schedule were consistent with normal practice.
- [13] Mr. Liu also testified that part of the delay in completion arose from the failure of the plaintiffs to pay him in a timely fashion, thereby limiting his means to purchase materials and hire sub-trades. I accept the plaintiffs were slow in paying and in particular failed to pay the last \$11,310. It has not yet been paid. I also accept Mr. Liu's evidence that he left the plaintiffs' building project for a time to take up other work to enable him to earn sufficient money to pay for materials and sub-trades to finish the House. I believe the plaintiffs were aware Mr. Liu needed to be paid in a timely way if he was to complete the construction of the House on time.

C. The allegation of fraudulent misrepresentation

- [14] The allegation that Mr. Liu acted fraudulently should not have been made. His use of the name Grand East Enterprises Inc. was a mistake, but was of no consequence. His misrepresentation to the plaintiffs of his "status with the Homeowner Protection Office" was not truthful, but was essentially irrelevant to the formation of the contract. The plaintiffs were induced to contract with Mr. Liu because of the low cost he offered. Furthermore, Mr. Liu believed he could persuade a friend with Universe Construction Rennovation Inc. to substitute its name for him with the Homeowner Protection Office. This was foolish, but it was meant to benefit the plaintiffs, not to defraud them. Importantly, it has not caused, and is unlikely to cause, any loss to the plaintiffs.

- [15] The evidence is unchallenged that the House was well constructed. The plaintiffs suggest some defect eventually may turn up in the future and they may suffer damage if the House was not properly registered with the Homeowner Protection Office. No evidence was offered of such a potential problem. It is entirely speculative. I need not make a finding about whether the plaintiffs have a private right of action pursuant to the Homeowner Protection Act. I doubt there is such a right but it is a question that is hypothetical in this case.

D. The counterclaim

- [16] In their amended counterclaim the defendants seek damages "against the plaintiff Ai Yang Zhang for breach of contract in the amount of \$26,432.48", or alternatively a declaration that "the Plaintiffs have been unjustly enriched" and the defendants are entitled "to an [sic] constructive trust over the Lands, to the extent of the Judgment".
- [17] The counterclaim is in part for \$11,310 of the contract price which the plaintiffs failed to pay. There is also a claim for work done on "two crawl spaces", and lastly for the cost of landscaping which Mr. Liu alleges he paid for and for which he has not been reimbursed. The evidence about the landscaping is unsatisfactory, but I am persuaded that landscaping work was done the cost of which has not been paid. I award \$3,000 for both the landscaping and for the extra work done on the crawlspaces. The plaintiffs have received the benefit of that work although they did not authorize it in writing. They knew the work was being done and took no steps to stop Mr. Liu from that work. They could not expect he was doing the work gratuitously.
- [18] Mr. Liu is entitled to an award of damages on the counterclaim of \$14,310. Set off against that sum will be \$1,821 which the plaintiffs paid for materials which were Mr. Liu's responsibility. The result is a judgment against the plaintiffs for \$12,489.

Costs

- [19] If the parties wish to address costs they may file written submissions. Neither should be longer than 3 pages. The defendants have been successful and will file their submission first and no later than by January 15, 2016. The plaintiffs will have one week to respond by January 22, 2016, and the defendants until January 29, 2016 to reply.

"Affleck J."

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