

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Panacea World Health Corp. v. Alpha Equities Ltd.*,
2026 BCSC 219

Date: 20260210
Docket: S185039
Registry: Vancouver

Between:

Panacea World Health Corp.

Plaintiff

And

Alpha Equities Ltd.

Defendant

And

Bernard A. Armani and Kim Mathews

Defendants by Counterclaim

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiff and Defendant by
Counterclaim, Bernard A. Armani:

M. Killas

Counsel for the Defendant:

L.J. Mackoff
S. Horricks

No Further Appearances

Place and Date of Hearing:

Vancouver, B.C.
December 2, 2025

Place and Date of Judgment:

Vancouver, B.C.
February 10, 2026

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I. INTRODUCTION

[1] This is the defendant landlord’s application for judgment by way of summary trial on its counterclaim alleging the breach of a commercial lease.

[2] For the reasons set forth below, I find it inappropriate to resolve this aspect of the claim using the summary trial tool.

II. BACKGROUND FACTS

A. The Lease

[3] The landlord defendant/plaintiff by counterclaim Alpha Equities Ltd. (“Alpha”), and the tenant plaintiff/defendant by counterclaim Panacea World Health Corp. (“Panacea”), entered into a written lease agreement dated April 4, 2017 (the “Lease”) with respect to premises at Unit #130 - 13120 Vanier Place, Richmond, British Columbia (the “Premises”).

[4] The Lease’s relevant terms are as follows:

ARTICLE 1
BASIC TERMS

1.2 **BASIC RENT**

The Tenant will pay to the Landlord, Basic Rent ... without any set-off, deduction, compensation or abatement whatsoever, payable in advance in equal monthly instalments, at an annual basic rental rate per square foot of Area of Leased Premises as follows:

Years One (1) to Ten (10) inclusive: Eighteen Dollars and Fifty Cents (\$18.50)

...

1.3 **PERMITTED USE**

... Throughout the Term, the Tenant shall continuously, actively and diligently conduct its business in the whole of the Leased Premises.

1.4 **TERM**

1.4.1 ... the Term of the Lease shall be for Ten <10> years commencing July 1st, 2017 and ending June 30th, 2027.

...

ARTICLE 3

RENT

3.1 BASIC RENT

The Tenant shall pay to the Landlord for each and every Year of the Term, the Basic Rent specified in Article 1.2, by equal monthly instalments, each in advance on the first day of each and every month during the Term, the first of such monthly instalments to be paid on the Commencement Date.

...

3.3 ADDITIONAL RENT

The Tenant shall pay to the Landlord for each and every Lease Year or portion thereof, the Additional Rent for such Lease Year or portion thereof. The amount of Additional Rent which the Tenant is to pay in each Lease Year or portion thereof shall be estimated by the Landlord in advance and the Tenant shall pay to the Landlord such amount in equal monthly instalments in advance during such Lease Year or portion thereof ...

...

ARTICLE 4

CONSTRUCTION, DEMOLITION, FIXTURING & RELOCATION OF
LEASED PREMISES

4.1 LANDLORD'S AND TENANT'S WORK

The parties agree that any work to be done by the Landlord and the Tenant is as set out in Schedule "B" attached hereto. Any additional work shall be performed by the Tenant at the Tenant's expense ... For greater certainty, the Landlord shall not be obliged to carry out any work or complete any improvements or supply any equipment, services or utilities whatsoever for any reason, except as expressly specified in Schedule B attached hereto.

...

4.4 ACCEPTANCE OF LEASED PREMISES

The taking of possession of the Leased Premises by the Tenant to construct the Tenant's Work shall be deemed to be conclusive proof that, except for items noted in a list prepared by the Tenant during a joint inspection by the Tenant and the Landlord at the time of the taking of such possession, the Leased Premises are in the condition called for by this Lease to the extent that the Landlord is responsible therefor and that the Landlord has performed all of the Landlord's Work with respect thereto in a good and workmanlike manner ...

ARTICLE 5

CONDUCT OF BUSINESS

...

5.10 ORDINANCES AND REGULATIONS

At its sole cost, risk and expense, the Tenant shall promptly:

...

5.10.3 Carry out all modifications, alterations or changes to the Leased Premises and the Tenant's conduct of business in, or use of, the Leased Premises, which are required by such authorities as a result of the Tenant's occupation and use of the Leased Premises.

...

ARTICLE 6

REPAIRS

6.1 TENANT'S REPAIRS

Subject to Article 6.8, the Tenant shall at all times during the Term, at its own cost and expense, repair, maintain, operate and keep the Leased Premises, all equipment, fixtures and mechanical systems (including heating, ventilating and air-conditioning systems) within the Leased Premises or elsewhere (if such equipment, fixtures or systems are provided for the use or benefit of the Leased Premises) ... in good order, first-class condition and repair (reasonable wear and tear and repairs which are the Landlord's responsibility pursuant to Article 6.6 hereof only excepted) and shall promptly make all needed repairs and replacements thereto, and without limiting the generality of the foregoing, during the Term the Tenant shall cause such good management and care to be taken of the Leased Premises and various parts thereof that no injury to the same shall occur and all water closets, sinks, heating and air-conditioning and ventilating apparatus located in the Leased Premises shall be maintained in a state of a standard acceptable to or determined by the Landlord and shall maintain such decorating to such standards throughout the Term. The Tenant shall be responsible for all such maintenance, repairs; replacements and decorating and shall promptly with due diligence, at its sole expense, carry out any and all of the foregoing.

...

ARTICLE 10

TENANT ALTERATIONS

...

10.3 PROHIBITIONS

The Tenant, its employees, agents and representatives, are expressly prohibited from entering upon the roof of the Building or any Other Buildings for any reason whatsoever. The Tenant shall not make any repairs, openings or additions to any part of the exterior of the Leased Premises, nor place any attachments, decorations, signs or displays in or upon any Common Area or the exterior of the Leased Premises failing which the Tenant will be held responsible for all ensuing costs and damages whether to remove such items or to effect repairs needed as a result of such acts and shall pay the cost thereof to the Landlord forthwith on demand together with a supervisory fee to the Landlord of twenty (20%) percent of such cost as well as interest at the rate specified in Article 3.5 hereof on the aggregate of the foregoing from the date funds are so expended by the Landlord.

...

ARTICLE 13

LANDLORD'S RIGHTS AND REMEDIES

13.1 DEFAULT

If and whenever:

13.1.1 the Rent hereby reserved, or any part thereof, be not paid when due, or there is non-payment of any other sum which the Tenant is obligated to pay under any provisions hereof;

...

13.1.4 the Tenant shall fail to commence business actively and diligently from and on the Leased Premises within thirty (30) days after the Commencement Date;

...

13.1.10 ... then and in any of such cases, at the option of the Landlord, the full amount of the current month's rent and the next ensuing three (3) month's Rent shall immediately become due and payable as Additional Rent and the Landlord may immediately distrain for the same, together with any arrears then unpaid; and the Landlord may without notice or any form of legal process forthwith re-enter upon and take possession of the Leased Premises ...

13.2 CONSEQUENCES OF DEFAULT

If and whenever the Landlord is entitled to re-enter the Leased Premises, the Landlord may terminate this Lease and the Term by giving written notice of termination to the Tenant or by posting notice of termination in the Leased Premises, and in such event the Tenant will forthwith vacate and surrender the Leased Premises ... If the Landlord so terminates this Lease, the Tenant shall pay to the Landlord on demand therefor:

13.2.1 Basic Rent and Additional Rent accrued due up to the time of re-entry or termination, whichever is later, plus the next three (3) months Rent payable as Additional Rent as provided in Article 13.1;

13.2.2. all costs payable by the Tenant pursuant to the provisions of this Lease up until the date of re-entry or termination, whichever is later;

13.2.3. such expenses as the Landlord may incur or has incurred in connection with re-entering or terminating and re-letting, or collecting sums due or payable by the Tenant or realizing upon assets seized, including, without limitation, brokerage expenses, legal fees and disbursements determined on a full indemnity basis, and including the expense of keeping the Leased Premises in good order and repairing or maintaining the same or preparing the Leased Premises for re-letting; and

13.2.4 as liquidated damages for the loss of Rent and other income of the Landlord expected to be derived from this Lease during the period which would have constituted the unexpired portion of the Term had the Lease not been so terminated, the amount, if any, by which the

rental value of the Leased Premises for such period established by reference to the terms and provisions of this Lease exceeds the rental value of the Leased Premises for such period established by reference to the terms and provisions upon which the Landlord re-lets them, if such re-letting is accomplished within a reasonable time after termination of this Lease, and otherwise with reference to all market and other relevant circumstances. Rental value is to be computed in each case by reducing to present worth at an assumed interest rate of ten percent (10%) per annum all Rent and other amounts to become payable for such period and where the ascertainment of amounts to become payable requires the same computation, the Landlord may make estimates and assumptions of fact which will govern unless shown to be unreasonable or erroneous;

and all such obligations of the Tenant shall survive the expiration of the Term...

...

ARTICLE 19

GENERAL

19.1 COLLATERAL REPRESENTATIONS AND AGREEMENTS

The Tenant acknowledges that the Leased Premises are taken without representation of any kind on the part of the Landlord or its agent other than as set forth herein ... The Tenant further agrees that no representative of or agent of the Landlord is or shall be authorized or permitted to make any representation with reference to this Lease or to vary or modify this Lease in any way and that this Lease contains all the agreements and conditions made between the Landlord and the Tenant hereto respecting the Leased Premises. Any addition to or alteration of or change in this Lease or other agreements hereinafter made or conditions created, to be binding, must be made in writing and signed by the Landlord and Tenant.

...

ARTICLE 20

DEFINITIONS

20.1 ADDITIONAL RENT

“Additional Rent” for a Lease Year or portion thereof means, in addition to the Basic Rent, all other amounts which shall become due and payable hereunder by the Tenant, whether to the Landlord or otherwise, and includes, without limitation, the amount which is the aggregate of:

- (a) the Tenant’s Proportionate Share of the HVAC Costs,
- (b) the Tenant’s Proportionate Share of the Building Operation and Maintenance Costs,
- (c) the Tenant’s Proportionate Share of the Development Operation and Maintenance Costs,
- (d) the Tenant’s Proportionate Share of the Tax Cost, and

(e) management and administrative charges of the Landlord equal to five percent (5%) of the aggregate of Basic Rent and Additional Rent received or receivable by the Landlord in respect of the Leased Premises including without limitation such rents as would have been receivable but have been abated or reduced as a tenant inducement.

...

20.9 COMMON FACILITIES

“Common Facilities” means the electrical heating, ventilating, air conditioning, plumbing and drainage equipment, any music and public address systems, installations and any enclosures constructed therefor, fountains, service rooms, customer and service stairways, escalators, signs, lamps, standards, parking areas, public washroom facilities and all other facilities improvements, equipment and installations which are provided and designated (and which designation may be changed from time to time) by the Landlord for the common or joint use and benefit of the occupants of the Development

...

20.12 DEVELOPMENT OPERATION AND MAINTENANCE COSTS

“Development Operation and Maintenance Costs” means all of the Landlord’s costs, charges and expenses of operating, maintaining, managing, repairing, rebuilding, replacing, restoring, inspecting, insuring, securing, supervising, owning and administering the Development, other than the Building or any Other Building, including the Common Areas and the Common Facilities and include, without limiting the generality of the foregoing:

(a) the cost of lighting, heating, ventilating, air-conditioning and supplying water and other utilities to the Common Areas and Common Facilities; cleaning, janitorial services, snow and ice removal, striping, sweeping, cleaning and repairing parking areas; supervising, policing and security; painting, planting or landscaping; operating and maintaining the garbage compaction equipment, if any; the cost of maintaining, operating, repairing, replacing or leasing the pylon signs and public address, intercom, music and alarm systems; repairs, maintenance and replacements to the Development, business taxes, place of business taxes and other taxes levied in respect thereof or fairly attributable to the Common Areas or the Common Facilities; insurance premiums for any insurance required or permitted to be carried by the Landlord pursuant to the terms of this Lease (other than for the Building or any Other Building) and the cost of any deductible amounts paid by the Landlord in respect of any claim made under such insurance coverage; supplies, personnel wages, salaries, Workers’ Compensation Board contributions, payroll taxes, payroll expenses, Employment Insurance premiums, pension plan contributions, health, accident and group life insurance for employees, managers and superintendents employed by the Landlord in connection with the Building and the Development; the cost of service contracts and

independent contractors; the cost of purchase or rental of equipment used in the operation and maintenance of the Development, ...

...

20.17 HVAC COSTS

“HVAC Costs” means all of the Landlord’s costs, charges and expenses of operating, maintaining, managing, replacing, repairing and supervising the apparatus for heating, ventilating and air conditioning installed in both rentable and non-rentable portions of the Building, from time to time, (the “HVAC System”) including without limitation the cost of electricity or fuel to operate the HVAC System. HVAC Costs shall also include the amortization, at the rates determined by the Landlord, but not to exceed the maximum permitted to the Landlord from time to time under the provisions of the Income Tax Act (Canada), or any legislation substituted therefor, on the HVAC System and a carrying cost at the rate of two (2%) percent above the Prime Rate from time to time on the undepreciated portion of the HVAC System.

...

20.33 RENT

“Rent” means all rent including all “Basic Rent”, all “Additional Rent” and all “Parking Rent”.

...

SCHEDULE “B”

LANDLORD’S AND TENANT’S WORK

1.0 Landlord’s Work

1.1 The Tenant agrees to accept the Leased Premises strictly on an “as is, where is” basis.

...

2.0 Tenant’s Work

The Tenant shall be responsible for any and all work, including but not limited to improvements, build-out, furniture, telephone and data cabling, server equipment and installation to current city code standards and compliance.

...

2.9 Examination of Leased Premises:

The Tenant will examine the Leased Premises before taking possession and unless the Tenant furnishes the Landlord with written notice specifying any defects within ten (10) days after taking possession, the Tenant will be deemed to have examined the Leased Premises and to have agreed that they are in good order and that all obligations of the Landlord with respect thereto have been satisfactorily fulfilled, notwithstanding that the Landlord shall be responsible for latent defects.

[5] Panacea’s Bernard Armani entered into a written indemnity agreement dated April 4, 2017 (the “Indemnity”) under which he agreed to indemnify the Landlord for any of the Tenant’s obligations under the Panacea Lease, including, without limitation, the Tenant’s obligation to pay all rent owing under the Panacea Lease. A space was provided for the other defendant by counterclaim, Kim Mathews, to sign the Indemnity, but she did not do so.

B. Pre-Lease Discussions

[6] Mr. Armani had an existing commercial relationship with Alpha in connection with another business prior to the execution of Panacea’s Lease. When Panacea needed to lease premises for its new laboratory business, Mr. Armani discussed this with Alpha’s representative, Ari Agazarian.

[7] According to Mr. Armani, before the Lease was signed, Mr. Armani and Mr. Agazarian visited the Premises approximately 4–5 times, each visit lasting 15–45 minutes. Mr. Armani saw what appeared to be new plumbing, piping, venting and wiring throughout the Premises. Pictures of the Premises do show extensive piping and wiring throughout. Mr. Armani concluded that the improvements to the mechanical and other systems, including the heating, ventilation, and air conditioning (“HVAC”) and chilled-water systems, were new, operational, and available for Panacea’s use.

[8] More importantly for present purposes, Mr. Armani alleges that Mr. Agazarian made the following representations:

Additionally, Mr. Agazarian told me and otherwise implied that the HVAC and chilled water systems were functional and would be available to Panacea.

...

Mr. Agazarian pointed to the new wiring, piping and venting on the walls and ceiling of the space at Unit #130 confirming to Mr. Armani, “You get all this” and “You get all that you see”.

Mr. Agazarian also told me that, “We will be charging you \$30 per hour for A/C after hours”.

...

... I asked Mr. Agazarian whether the equipment that I am seeing on the ceiling in Unit #130 works and he either said yes or nodded affirmatively.

(together, the “Core Misrepresentations”).

[9] Mr. Armani states that he provided Mr. Agazarian with a copy of a Panacea PowerPoint presentation that he says should have made clear that Panacea would use the Premises for a regulated healthcare laboratory, with attendant electrical and heating needs. Mr. Agazarian allegedly assured Mr. Armani that the Premises were fit for Panacea’s intended purposes. Mr. Armani says that Alpha held itself out as a specialist in laboratory facilities and warehouse space.

[10] Mr. Armani also says that Mr. Agazarian described the Premises as “top of the line” and the “best of the best” to justify the fact that the Premises were so much more expensive than Mr. Armani’s existing space for his other business in the same complex. The two spaces were roughly the same size. Mr. Armani’s other space was rented at approximately \$20,000 per month, whereas Panacea’s Premises cost approximately \$34,000 per month.

[11] Mr. Armani says he relied on the Core Misrepresentations in deciding to execute both the Lease and the Indemnity.

[12] Mr. Agazarian denies making the Core Misrepresentations, emphasizing that the Premises were leased on an “as is” basis.

C. Post-Lease Problems

[13] Panacea took control of the Premises on July 1, 2017, but alleged that it was unable to begin necessary pre-operational construction until October of that year due to permitting issues.

[14] Panacea argues that the Premises were not fit for its purposes. Most notably, substantial portions of the Premises lacked the necessary heat, air conditioning, or ventilation. The extensive mechanical systems observed during the pre-contractual walkthroughs were not operational.

[15] Alpha reports incurring approximately \$17,000 in repairs and maintenance for certain HVAC equipment serving the Premises prior to the start of the Lease. Alpha alleges that Panacea was aware that the other systems at issue were not operational. It notes that Panacea raised no issue with the HVAC for an extended period after the commencement of the Lease.

[16] There was some discussion between the parties about the mechanical systems over the summer of 2017. On June 1, 2017, Mr. Agazarian sent an email to Panacea stating:

Hi Bernard,

Further to our meeting yesterday, due to our relationship and as a courtesy to you as a valued Tenant, we have decided to provide Panacea the following final concessions for Unit #130, 13120 Vanier Place:

- 1.) \$14,542.59 total maximum rent credit for your installation of new Kraus Rhone & VCT tile flooring in the man level areas as noted by the designer (see attached quote) in colors chosen by the Tenant; and
- 2.) An additional One (1) month gross (Basic & Additional) free rent for July, 2017.

Please note, in addition to the above, Alpha is also spending a substantial amount of money to upgrade the HVAC units servicing the office areas of your suite. If required, Panacea will be responsible for heating and cooling for the lab and warehouse areas, which we understand does not exist in the warehouse at this time.

Also attached is a quote to upgrade your flooring per the designer's original specifications in case you choose to add this as part of your construction.

We would like to remind you that Kim Mathews' signature is still required as noted on Schedule "D" of the Lease (last page). Please forward this at your earliest convenience, (a scanned copy is sufficient).

We wish you good luck in successful completion of the construction project at your premises.

Regards,

Ara Agazarian

[Emphasis added.]

[17] Notwithstanding that this letter referenced an understanding that heating and cooling did "not exist" in various areas, Mr. Armani responded later that day stating:

I thank you very much for your support!

You are the Best.

Bernard

[18] On August 1, 2017, Mr. Agazarian sent an email to Panacea stating:

Hi Bernard,

I'm writing after a telephone call I had with Marie this morning. She mentioned you have been facing some challenges with the Panacea construction project and would like to meet me again.

The construction climate in Vancouver is among the busiest in the world. Good contractors are very difficult to find and city hall is not only behind schedule, but requiring for more and more engineered details with each permit submission.

I did mention the last time we met, that the city would likely require engineered drawings for the alterations you are planning to build lab space. I also reiterated that there was no existing HVAC in the warehouse area and if lab space was to be built, it would require HVAC, among other work.

You have explained to me in the past, your years of experience building office and lab spaces for your companies throughout your career. I understand you also own a construction company for your commercial ventures. You recently finished alterations to the Deserving Health space at 13160 Vanier Place. You seem to have a good understanding of the construction process, from contracting to dealing with the city, surely you knew what to expect with the renovations for Panacea.

This is not a joint venture between Alpha and Panacea. The space was leased "as-is" and we made no warranties, representations or promises outside of the Lease. Actually, we did give you an extra month of gross free rent (July 2017), plus an allowance for new flooring after our last meeting, in addition to April, May and June 2017 gross rent free for early occupancy, a total saving of over \$130,000!

You will remember Alpha had an offer for Unit #130 (13120 Vanier Place) from a well established multinational publicly traded German company, who was very keen on the space, but at the eleventh hour and after your insistence, we decided to give you first priority.

Absolutely no other landlord would have shown this much courtesy, given so much assistance, or given this much to a tenant, especially after the lease was done.

This being said, I remain willing to meet to provide more advice, guidance and assistance where possible, as a courtesy to you, but I will not be providing any further financial concessions.

Yours truly,

Ara Agazarian

[Emphasis added.]

[19] Mr. Armani responded later that day, stating:

Ara,

I will get back to you by tomorrow. In [*sic*] not absolute sure what Marta said but I will see her in the morning and clarify.

Have a nice evening,

Bernie

[20] On November 2, 2017, Panacea raised concerns about the state of the heating in the warehouse component of the Premises. An individual, Mathias Woch, apparently employed by another of Mr. Armani's companies, sent an email to Alpha with the subject line "URGENT: Status of the heater," in which he stated:

What is the status regarding the heating equipment in the warehouse at 130-13120 Vanier Place. We have freezing temperature coming soon.

Please give me an urgent feedback.

Yours Sincerely

Mathias Woch

[21] The following day an employee of Alpha sent the following response to Mr. Woch's correspondence:

Hi Mathias;

Our staff and contractors are not able to help any further on this matter. We suggest you call a HVAC company ...

[22] The following week Mr. Armani sent another email to Alpha concerning the HVAC:

Urgent!!

In unit 130 we had to stop construction because of no functional Heater [*sic*] in the Warehouse!

The temperature is close to [z]ero and belo[w] [z]ero.

It is impossible for our construction worker to work under does [*sic*] condition [*sic*] and they put a STOP TO WORK in place !

As well we have to take out all the sensitive Raw material and machinery until conditions are restored to normal.

I ask you to repair the Heater System which we are paying

for every month a lot of money for. As i understand, the Heater System did never worked for a long time.

I don't want to pay lots of money for time lost because

If [*sic*] such incidents.

Thank you for you [*sic*] attention, and please keep us updated.

Regards

Bernard Armani

[23] At some point in November 2017, after Panacea raised the heating issue, Alpha offered to install new heaters at an estimated cost of \$14,875.49, payable by Panacea. On November 22, 2017, Panacea asked for time to respond to this offer. The work never proceeded.

[24] At approximately this time, Panacea stopped paying the entirety of the rent due.

[25] On January 31, 2018, and again on March 20, 2018, Alpha demanded payment of all outstanding rent under the Lease.

[26] Panacea stopped paying any rent in February 2018.

[27] On March 29, 2018, Alpha provided further notice of the breaches of the Lease to Panacea. On April 16, 2018, Alpha sent Panacea a Notice of Re-Entry and Termination.

[28] Panacea removed its movable property from the Premises on April 23, 2018.

[29] Alpha secured a new tenant for the Premises effective August 12, 2020, but on terms that were not equivalent to those under the Lease.

D. The Litigation

[30] Panacea commenced the present action on April 20, 2018. In the action, Panacea alleges that Alpha made fraudulent and negligent misrepresentations, which caused them substantial costs to improve the Premises and, when that proved uneconomic, to relocate.

[31] Alpha responded by asserting a counterclaim for past and future rent, and for enforcement of the Indemnity. Alpha says that its total claim is in the range of \$3 million.

[32] The matter has not yet been set for trial. Counsel for Panacea estimates that a full trial would take approximately five days. An earlier Notice of Trial estimated 10 days.

III. ANALYSIS

A. The Applicable Legal Principles

[33] Alpha relies on Rule 9-7(2) and (15) of the *Supreme Court Civil Rules* [*Rules*] in seeking an order dismissing Panacea’s action and giving judgment in its favour on the counterclaim:

(2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:

(a) an action in which a response to civil claim has been filed

...

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

[34] Panacea accepts that it bears the onus to demonstrate that the matter is not suitable for summary trial.

[35] I recently surveyed the principles applicable to the assessment of suitability for a summary trial in *Blann v. Blann*, 2024 BCSC 868:

[24] In *Canadian Western Bank v. D.K. Heli-Cropper Int'l Ltd.*, 2020 BCSC 1352 [*Heli-Cropper*], Justice Marzari discussed the principles that apply in determining whether a matter should go to trial instead of allowing a summary judgment application to proceed:

[26] The critical question facing the court when hearing a summary trial application is whether the court can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily, *by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, the cost of taking the matter forward to a conventional trial, the course of the proceedings, and any other matters which arise for consideration*: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 1989 CanLII 229 (BC CA), 36 B.C.L.R. (2d) 202 (C.A.) at 211, 215 and *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 30-31.

[27] Summary procedures are important and serve the public interest in deciding cases where there is no issue requiring conventional trial. Summary trial and judgment rules are to be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: See *Hryniak v. Mauldin*, 2014 SCC 7 and *VFS Canada Inc. v. Shas Tut Contracting Ltd.*, 2015 BCSC 2015 at paras. 33 and 34.

[28] Cases may be decided summarily if the court is able to find the necessary facts, even if there are disputed issues of fact and law, provided that the court does not find it is unjust to do so.

[29] It is incumbent upon parties in summary trial proceedings to “put their best foot forward” in terms of the evidence they lead, and not to assume that the matter is not amenable to summary trial, or that other parties will submit key evidence upon which they seek to rely. All parties to an action must come to a summary trial hearing prepared to prove their claim or defence. Parties are obliged to take every reasonable step to put themselves in the best position possible. A party cannot, by failing to take such steps, frustrate the benefits of the summary trial process: *Gichuru* at para. 32.

[Emphasis added.]

[25] Beyond the factors outlined in para. 26 above, cases have considered whether credibility is a critical factor in the dispute, whether the summary trial may create unnecessary complexity and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369; *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31.

[26] A conflict in evidence that raises credibility issues is not necessarily a bar to proceeding by way of summary trial; however, a summary trial is generally not suitable when dealing with head-on contradictions in the evidence on an important issue: *Axion Ventures Inc. v. Bonner*, 2021 BCSC 2644 at paras. 49-54. As stated in *Randhawa v. Khaira*, 2020 BCSC 1257:

[9] Where there are conflicting affidavits on a summary trial application, judges may be able to make findings of fact, however this depends on the nature and quality of the material before the court: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 1985 CanLII 147 (BC CA), 67 B.C.L.R. 366 (C.A.) at 386, cited in *Inspiration Mgmt.* at para. 42. If there is a conflict in the evidence on a critical issue, the court may not be able to assess credibility and determine the necessary facts under the summary trial rule: *HP and OM Enterprises Ltd. v. Badesha Enterprises Ltd.*, 2009 BCSC 1429 at paras. 37-38; see also *Urban Holdings Ltd. v. MacDuff*, 2007 BCSC 631. The inability to find the necessary facts may be most acute where credibility lies at the heart of a case, in which case proceeding by way of summary trial is not appropriate: *Mayer* at para. 93.

[27] When there is a “heads on” conflict in the evidence regarding an important issue and the court either cannot resolve the issues without assessing the component’s credibility, it will not be suitable for summary determination. A court cannot sidestep conflicts by relying on only a portion of the record, assuming certain facts or taking the plaintiff’s case at its highest: *Saran v. Cartonio Inc.*, 2020 BCSC 556 at para. 34.

[28] A court may decline to proceed with a summary trial when it is unjust to decide the case summarily, even if the facts can be found on the whole of the evidence: *Saran* at para. 31.

[36] Given Panacea’s effort to rely on pre-contractual representations to found its cause of action, it is important to review when and how a party can avoid the application of an “entire agreement clause” such as that found in the Lease. In *Sanghera v. Danger Figure Centre (Burnaby) Ltd.*, 2007 BCSC 1308, the Court stated:

[15] In summary, the applicable legal principles provide that an oral fraudulent misrepresentation can be used to nullify a written contract even if the written contract contains a clause stipulating that no terms other than those in the written contract are to be considered. When a fraudulent representation is made to induce the other party to enter the contract, the contract cannot then be used as protection for the fraudulent party. Moreover, although parol evidence is generally not admissible to contradict the terms of a written contract, in the case of fraudulent misrepresentations parol evidence is not used to determine the terms of the contract, rather, it is used to determine the intentions of the parties and why they entered into the contract. This deals with the validity of the contract as a whole. An oral statement as to future intentions may also be found to be a fraudulent misrepresentation if the defendant is proven to have falsely stated his future intention.

See also *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2020 BCSC 1089 at paras 97–98.

[37] As noted, Panacea does plead that fraudulent misrepresentations occurred in this case.

[38] As discussed below, there is also an issue in this case as to the proper construction of the entire agreement clause. In other words, does the dispute come within the four corners of the clause? Entire agreement clauses are strictly construed against the party looking to invoke them, to ensure that they are not applied more broadly than the precise language allows: *Feldstein v. 364 Northern Development Corporation*, 2017 BCCA 174 at para. 59.

B. Application of the Suitability Test

[39] Applying the principles set out above, I find that the following factors weigh heavily against this matter being determined by way of a summary trial:

- a) The value of the claim: The fact that the counterclaim seeks a sum in the range of \$3 million weighs against resolving the case without the range of evidence that would be available to the Court through a full trial.
- b) The credibility battle: There is a material “head-on” credibility issue between the parties that I am unable to resolve on the present record.

Mr. Armani alleges that he was enticed to enter the Lease by Core Misrepresentations.

The fact that Mr. Armani uses the somewhat ambiguous phrase “told me and otherwise implied” to describe the communication of the Core Representations in his affidavit is somewhat problematic. Did Mr. Agazarian actually use the offending words with Mr. Armani or didn't he? That said, I accept that the language raises the prospect that Mr. Agazarian used those exact words, and that this contest is very difficult to resolve without the benefit of live testimony.

Panacea's delay in raising the HVAC functionality problems also casts some doubt on Mr. Armani's version of events, but not to an extent that

would allow me to conclude at this stage that the Core Misrepresentations were not made. There are potential explanations for the delay in the issue becoming pressing for Panacea, including permitting issues, summer weather, and Panacea's reluctance to deter Alpha's constructive engagement on other issues.

It is true that Mr. Armani did not object to Mr. Agazarian's June 1, 2017, email, but rather seemed pleased by its contents. Alpha argues that this serves as a clear acknowledgement by Panacea that the visible HVAC system was not intended or understood to be operational. However, in my view, Mr. Armani's response may simply have been expressing pleasure with the financial concessions made in the first part of Mr. Agazarian's email, rather than focusing on (or conceding) the subsidiary HVAC issues discussed later in the correspondence.

Further, there were aspects of the evidence that call Mr. Agazarian's credibility into question as well. In particular, Alpha's decision to spend \$17,000 on certain HVAC upgrades is difficult to square with Alpha's position that it had no HVAC responsibilities. It was not clear from the record whether this work was undertaken as a purely, voluntary goodwill measure or because Alpha accepted a legal obligation to provide at least some HVAC services. If Alpha agreed that there was some legal obligation to provide HVAC services, it is not clear at what level that commitment was made. In particular, did that commitment arguably extend to the HVAC systems observed in the Premises by Mr. Armani before he signed the Lease? These are difficult issues that are not resolved on the present record.

In terms of resolving the clear credibility dispute, I find that insufficient admissible evidence exists to allow me to prefer one party's evidence over the other. There is at least a triable issue as to whether Mr. Armani can establish that he was fraudulently advised of the Core Misrepresentations.

It would be unjust in the circumstances to attempt to make such a finding now.

I find that, as in *Castellan v. Muncey (Estate)*, 2004 BCCA 128, the “heart of [the] case lay in the credibility of the witnesses and of their evidence”: at para. 9. Oral testimony at trial, including in-person cross-examination, will make the determination of this key credibility issue easier to resolve.

- c) The alternative contractual argument: It appears there may be a contractual interpretation argument available to Panacea, even if it fails to establish a fraudulent misrepresentation. As the Alberta Court of Appeal stated in *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 at para. 124, leave to appeal ref’d [2017] S.C.C.A. No. 303 (S.C.C.):

[124] The mere existence of an “entire agreement” provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties’ objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear – when it is not.

In the present case, paragraph 20.17 of the Lease indicates that Panacea would be charged for the provision of HVAC services. This raises a question whether, as a matter of contractual interpretation, Alpha was required to provide HVAC services to the warehouse, notwithstanding the “as is” term in the Lease and the entire agreement clause. In particular, is the piping shown to Panacea properly included within the definition of “apparatus” in this clause?

At the hearing, counsel for Alpha suggested that the Lease only required Alpha to supply “base building HVAC”, but not the more sophisticated HVAC system that Panacea is suggesting should have been operational

based on the visible piping. This argument raises a further triable issue as to where the line should be drawn between the “base building HVAC” that Alpha may have agreed to provide, and the more enhanced HVAC services Alpha suggests are excluded by operation of the entire agreement and “as is” clauses.

I note that “base building HVAC” is not a defined term in the Lease, and hence such an argument may open the door to broader parol evidence in order to “dispel ambiguities”: *Gallen v. Butterley*, [1984] B.C.J. No 1621, 1984 CanLII 752 (B.C.C.A.) at paras. 33–35. This, in turn, is not the type of issue that can easily be resolved based on affidavit evidence alone.

- d) Urgency/Prejudice: This matter is a pure commercial dispute. The projected trial length is not so long that declining to grant summary judgment on this application should result in an intolerable delay before the matter can be brought to trial.

IV. CONCLUSION

[40] The landlord Alpha’s application for judgment is dismissed.

[41] In relation to costs, I would award costs to Panacea in the cause, unless either party seeks to make further representations on this point: *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1734 at paras. 8–11. If either party wishes to make further submissions on costs, they must deliver their written argument within 30 days of this judgment. The other party may respond within 30 days. The initial party will have a right of reply 10 days thereafter.

“The Honourable Mr. Justice Branch”