

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1459534 B.C. Ltd. v. Polajzar*,
2026 BCSC 732

Date: 20260424
Docket: S257359
Registry: New Westminster

Between:

1459534 B.C. Ltd.

Plaintiff

And

Mirjana Polajzar

Defendant

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:

D. Gautam

Counsel for the Defendant:

L. Zhang

Place and Date of Hearing:

New Westminster, B.C.
November 6, 2025

Place and Date of Judgment:

New Westminster, B.C.
April 24, 2026

Overview

- [1] These are reasons on the defendant's application for the following:
- a) a declaration that the plaintiff is in breach of a contract of purchase and sale (the "CPS") and addendum (the "Addendum") for property located on 80 Avenue in Langley, B.C.;
 - b) a declaration that the defendant is entitled to retain the deposits in the total amount of \$1.150 million paid by the plaintiff under the terms of the CPS and Addendum;
 - c) an order that the notice of civil claim be dismissed, pursuant to:
 - i. Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR] with respect to the claim of breach of the duty of honest contractual performance; and
 - ii. Rule 9-6(4) and (5) of the SCCR, with respect to the claim for a purchaser's lien.

[2] The defendant is the registered owner of the property. The plaintiff was the buyer under the CPS and Addendum. The defendant alleges she was ready, willing, and able to complete the sale of the property on the completion date, but the plaintiff failed to complete. The defendant claims that pursuant to the terms of the CPS and Addendum, the plaintiff forfeited the deposit funds to her.

[3] The plaintiff opposes the orders sought and claims that the purchase did not complete due to fault of the defendant. The plaintiff's principal, Jaspreet Singh, alleges that the defendant's son and agent, Randy Polajzar, made representations that induced Mr. Singh to believe that the defendant was not intending to strictly enforce the completion date and further extensions of the completion date would be considered in good faith, or that the parties would explore a joint development opportunity. The plaintiff relied on the representations to its detriment by continuing pre-development work and refraining from securing financing. Shortly before the

completion date, and with insufficient time for the plaintiff to arrange financing, the defendant refused further extensions and ceased cooperation, thus frustrating the purchase.

[4] The plaintiff claims: (1) breach of contract, in particular breach of the duty of honest contractual performance; (2) a purchaser's lien for the deposits; and (3) specific performance of the CPS and Addendum. The notice of civil claim ("NOCC") also claims the tort of unlawful interference with economic relations, but at the hearing of this application, plaintiff's counsel advised this was no longer being pursued. During the hearing of this application, the plaintiff raised the possibility of amending its claim if the pleadings were found to be inadequate.

[5] Mr. Polajzar denies making any such alleged representations. Mr. Polajzar states that he and the defendant's counsel repeatedly told the plaintiff and its counsel that the defendant would not entertain further extensions, was not interested in a joint venture, and wanted to sell the property. Mr. Polajzar states that Mr. Singh admitted to him that the plaintiff did not have the funds to complete the purchase.

[6] The issues are:

- a) Issue 1: Breach of Contract. Does the NOCC disclose a reasonable cause of action for breach of the duty of honest performance? If not, should the plaintiff be permitted to amend the NOCC? The defendant seeks dismissal under Rule 9-5(1)(a); and
- b) Issue 2: Purchaser's Lien. Is the plaintiff's claim for a purchaser's lien bound to fail? The defendant seeks dismissal under Rule 9-6.

[7] For the reasons that follow, I conclude that the NOCC does not sufficiently plead the material facts necessary to support a claim for breach of the duty of honest contractual performance. However, the plaintiff's submissions indicate that such a claim could possibly be pleaded. I therefore dismiss the application, and grant the plaintiff leave to amend the NOCC within the next three weeks. However, I also grant the defendant leave to renew this application if the plaintiff does not amend the

NOCC and/or she feels the amended NOCC does not plead a reasonable claim for breach of the duty of honest contractual performance. I also conclude that the claim for a purchaser's lien is not bound to fail, as the evidence raises a weak but triable issue. I dismiss that aspect of the application.

Issue 1: Breach of Contract – Duty of Honest Performance

Legal Framework

Rule 9-5(1)(a)

[8] The defendant relies on Rule 9-5(1)(a) which states:

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

...

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[9] No evidence is admissible on an application under Rule 9-5(1)(a): Rule 9-5(2). However, documents which are incorporated by reference into the pleading and are integral to the factual matrix of the claim may be considered: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 67; *Del Giudice v. Thompson*, 2024 ONCA 70 at para. 18.

[10] Under Rule 9-5(1)(a), a claim will only be struck if it is “plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action”: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 [*Imperial*]. The claim must have no reasonable prospect of success. Pleadings must be assumed to be true unless they are patently unreasonable or incapable of proof: *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 23. The court's approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial: *Imperial* at para. 21.

[11] The need to appropriately draft pleadings is “foundational”. Pleadings are the parameters within which the action operates. They guide the discovery process, interlocutory applications and trial, ensure notice and fairness between the parties, and enable the parties and Court to know with precision the issues of fact and law to be decided: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, at paras. 21–23.

[12] Pleadings must plead the material facts giving rise to the claim: Rule 3-1(2). A material fact is one that is essential to formulate a complete cause of action. If a material fact is omitted, a cause of action has not been properly pleaded: *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 25. As stated at para. 22 of *Imperial*:

[22] ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[13] The principles governing pleadings must be applied functionally in the context of each case: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at paras. 39. Sufficient material facts must be pleaded to tell a defendant “who, when, where, how, and what” is alleged that gives rise to liability: *Canada (Attorney General) v. Frazier*, 2022 BCCA 379, at paras. 69-71.

[14] Rule 3-7 which governs pleadings, sets out requirements when a conversation or representation is material to a claim. Sub-paragraphs (2) and (18) state:

(2) The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the documents or conversation must not be stated, except insofar as those words are themselves material.

...

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[15] If an amendment might cure a defective pleading, a court should consider whether to allow the plaintiff to make such an amendment: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 41; *Willow v. Chong*, 2013 BCSC 1083 at para. 23.

Duty of Honest Contractual Performance

[16] An alleged breach of the duty of honest contractual performance is not a distinct cause of action, but rather a ground on which a breach of contract claim may be advanced: *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57 at paras. 77 and 82.

[17] Good faith contractual performance is a general organizing principle of the common law of contract. One of the manifestations of that organizing principle is a duty of honesty in contractual performance that applies to all contracts. This means “simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”: *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*] at paras. 33, 63-70, 73. This duty precludes “active deception”. The alleged breach must be directly linked to the performance of the contract. In determining whether an alleged breach is directly linked, the “relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly”: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [*Callow*] at paras. 5, 37, 42, 49–54.

[18] The organizing principle of good faith contractual performance does not generally extend to a duty to negotiate the terms of a new contract in good faith. *Bhasin* concerns a duty of honest performance of an existing contract and not the negotiation that leads to a contract. “Absent agreement on the essential terms of a contract, no obligation to negotiate, or to negotiate in good faith, the remaining terms of the parties’ understanding generally exists”: *Concord Pacific Acquisitions Inc. v Oei*, 2019 BCSC 1190 at paras. 370 to 373, aff’d 2022 BCCA 16, leave to appeal dismissed 2022 CanLII 74315 (SCC).

[19] In *Ralmax Properties Ltd. v. Pt. Ellice Properties Ltd.*, 2025 BCSC 814, the plaintiff alleged that the defendants had failed to negotiate in good faith. The court

dismissed the allegation, stating that “the law is clear that the duty of good faith in contractual relations only applies when a contract is found to exist” and where the impugned conduct occurs within the context of contractual performance. The court also noted that “while the law imposes a duty of good faith and honest contractual performance subsequent to contract formation, a duty to negotiate in good faith has not been recognized in Canadian law absent an underlying contractual obligation”: at paras. 221-222.

[20] I conclude from the above that to properly plead a breach of the duty of honest contractual performance, the plaintiff must plead the material facts to support how the defendant engaged in dishonesty or deception that is directly linked to the performance of the CPS and Addendum.

NOCC and Documents Incorporated by Reference

[21] On April 4, 2025, the plaintiff filed the NOCC. Paragraphs 1 to 6 identify the parties and Mr. Polajzar, allege that the parties entered into the CPS and Addendum, and that \$1.15 million in deposits were paid. There is no dispute that Mr. Polajzar was acting as the defendant’s agent and that the deposits were paid. As the CPS and Addendum are incorporated by reference into the NOCC, and are integral to the claims, I will review their pertinent terms before reviewing the portions of the NOCC which concern the allegation of breach of the duty of honest contractual performance.

[22] On January 9, 2024, the parties entered into the CPS, which includes the following terms:

- a) the purchase price of the property is \$11,500,000 (clause 1);
- b) the plaintiff will pay a deposit of \$750,000 (clause 2);
- c) the completion date is July 17, 2024 (clause 4);
- d) time will be of the essence, and unless the balance of the payment is paid and such formal agreements to pay the balance as may be necessary are

entered into on or before the completion date, the seller may, at the seller's option, terminate the contract and in such event, the amount paid by the buyer will be non-refundable and absolutely forfeited to the seller on account of damages, without prejudice to the seller's other remedies (clause 12); and

- e) there are no representations, warranties, guarantees, promises or agreements other than those set out in the CPS, all of which will survive the completion of the sale (clause 18).

[23] Through clause 3, the CPS incorporates an "Appendix A: Terms and Conditions", which includes the following terms:

- a) all deposits under the CPS are deemed to be non-refundable and will be immediately payable to the seller upon receipt. In the event of cancellation of the CPS by the buyer, for any reason, the buyer agrees that the deposits shall be retained by the seller as liquidated damages and not as a penalty and shall not limit the seller's rights to other remedies;
- b) if the buyer fails to complete the purchase of the property in accordance with the CPS, or is in breach of the terms of the CPS, the seller may terminate the contract, and all the terms, conditions and provisions of the CPS shall become null and void; and
- c) the buyer is obligated to deliver all due cheques to the seller's lawyer prior to 5:00 pm on the respective due dates as a prerequisite to the successful completion of the transaction.

[24] On June 14, 2024, the parties agreed to the Addendum to the CPS, which includes the following terms:

- a) the completion date is changed from July 17, 2024, to March 15, 2025;
- b) the purchase price is increased from \$11,500,000 to \$12,500,000;

- c) on or before July 14, 2024, the buyer will provide an additional deposit of \$400,000 directly to the seller's lawyer, in trust subject to the terms and conditions in clause 3 of the CPS (this is Appendix A);
- d) the buyer will provide the seller in writing with monthly progress updates for the development application(s) for the property submitted by the buyer to the applicable local government, with the first update to be provided by June 30, 2024; and
- e) all the other terms and conditions contained in the CPS including Appendix A remain the same and in full force and effect, and that "time shall remain of the essence."

[25] Having reviewed the terms of the CPS and Addendum, I return to the review of the relevant portions of the NOCC. Paragraphs 7-12 of the NOCC state:

7. In or around February 2025, Plaintiff engaged in discussions with the Defendant's appointed attorney (Randy Polajzar), during which the Plaintiff was led to believe that:

- a) Further extensions will be entertained in good faith; or
- b) The parties would pursue a joint or collaborative development opportunity. (the "Representations")

8. In reliance on the Representations, the Plaintiff continued to invest in pre-development processes and refrained from exercising other contractual remedies or seeking alternative financing.

9. Contrary to those discussions, three weeks before the Completion Date the Defendant refused further extensions, ceased all cooperation, and directly contacted the Plaintiff's architect and consultants in an effort to appropriate the Plaintiff's development plans.

10. The Defendant's conduct constitutes a breach of the duty of good faith and honest contractual performance and amounts to unlawful interference with the Plaintiff's economic relations.

11. At all material times, the Plaintiff acted in good faith and in accordance with its contractual obligations. The transaction did not close solely due to the Defendant's conduct in unilaterally terminating discussions and failing to cooperate in good faith to work on a new completion date or discussing the proposed joint development of the Property.

12. The Plaintiff has worked to secure alternative financing and will be ready, willing, and able to complete the transaction on or before July 15, 2025, and now seeks specific performance of the Amended Contract.

[26] Although contained in the section of Part 1 of the NOCC under the title “Purchaser’s Lien”, the NOCC also pleads at paras. 16-17:

16. At all material times, the Plaintiff would have been ready, willing, and able to complete the transaction but for the Representations and was actively pursuing development steps required under the Addendum, including engaging an architect and development consultant, submitting a development proposal, and providing ongoing updates.

17. The Plaintiffs deposit payments were made in reliance on the continued enforceability of the Contract and the Defendant’s representations that the parties would continue to work toward completion or a joint venture arrangement. The deposits were not returned, and the transaction failed to complete solely due to the Defendant’s conduct.

[27] Under Part 3, the Legal Basis section, the NOCC pleads:

1. The Plaintiff relies on the principles established in *Bhasin v. Hrynew*, 2014 SCC 71 and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, which recognize an overarching duty of good faith and honest performance in contractual dealings. The Defendant breached this duty by inducing the Plaintiff into reliance, then unilaterally ceasing cooperation and seeking to appropriate the Plaintiff’s development interests.

Positions of Parties

[28] The defendant argues that although the plaintiff alleges a breach of the duty of honest contractual performance, the plaintiff is actually advancing a claim for failure to negotiate a new agreement. That is not a recognized claim in law. The NOCC alleges that the transaction did not close due to the defendant’s conduct in unilaterally terminating discussions and failing to cooperate in good faith to work on a new completion date or to discuss a proposed joint development of the property. In the alternative, even if the pleading is not characterized as a claim for failure to negotiate, the claim of alleged representations inducing reliance, is not directly linked to and has nothing to do with the defendant’s performance of its obligations or rights under the CPS and Addendum. In other words, the defendant submits that if the plaintiff’s intention is to plead a breach of the duty of honest performance, then the plaintiff has failed to plead material facts in support of this claim. The pleadings do not identify the contractual obligation or right and how the defendant dishonestly exercised that obligation or right.

[29] The plaintiff argues that the NOCC pleads a viable cause of action for breach of the duty of honest contractual performance. The representations alleged to have been made by Mr. Polajzar were directly linked to the CPS and Addendum, as they were part of the exercise of the right to completion on a certain date. The plaintiff alleges that the defendant's conduct prevented the plaintiff from completing on the completion date. The plaintiff alleges that Mr. Polajzar's representations led Mr. Singh into a false sense of security that the time of essence clause would not be strictly enforced. When the defendant changed her mind, the plaintiff was not advised in sufficient time to arrange for financing. Counsel referred to negligent misrepresentation and estoppel, although those are not pleaded. The plaintiff submits the defendant's abrupt cessation of communication and refusal to engage in good faith discussions toward completion frustrated the plaintiff's reasonable expectation that the defendant would cooperate in completing the transaction or, at minimum, communicate any change in position in a forthright and timely manner. But for the representations, the plaintiff would have been able to tender the purchase funds on the completion date.

Analysis

[30] There are two difficulties that permeate this aspect of the application: first, the imprecise pleadings which can be read two ways; and second, the lack of sufficient material facts. The defendant interprets the NOCC narrowly as an allegation that the defendant refused to negotiate a new agreement. The plaintiff submits that its claim is not so limited and interprets the NOCC more broadly.

[31] I agree with the defendant that if the NOCC is interpreted narrowly – that the defendant refused to negotiate a new agreement – the NOCC would not disclose a reasonable cause of action as there is no duty to negotiate a new agreement. However, the pleadings can be read more broadly as outlined in the oral submissions of plaintiff's counsel at this application.

[32] The greater difficulty is that the pleadings do not set out the material facts, except by implication and they are not sufficient. For example, para. 7 pleads that

representations were made and pleads Mr. Singh's subjective beliefs arising from them but does not state what the representations actually were that led to those beliefs, how those representations were dishonest, and how they are directly linked to a right or obligation of the defendant under the CPS and Addendum. The NOCC implies that they are representations that led Mr. Singh to believe that the time of the essence clause would not be enforced, but implication is not sufficient. Rule 3-7(2) states that if words of a conversation are material, they must be pleaded. Rule 3-7(18) states that if a misrepresentation or fraud is pleaded full particulars, with dates and items if applicable, must be stated in the pleading.

[33] In summary, there are not sufficient material facts pleaded of what the alleged representations are and how the defendant engaged in active dishonesty or deception that is directly related to the performance of the CPS and Addendum.

[34] Having found the pleadings are insufficient regarding this claim, the issue is whether the pleadings should be struck or the plaintiff given an opportunity to amend. Amendments to pleadings are usually liberally granted provided there is no non-compensable prejudice to the other party: *Kwikwetlem First Nation v. British Columbia*, 2021 BCSC 436 at para. 48, app. dismissed. 2021 BCCA 311. No such prejudice was identified here, although understandably the defendant wishes to have the property sold as soon as possible. The defendant is stated to be elderly. I have considered striking specific paragraphs, but they are intermingled with the allegations concerning the claim for the purchaser's lien. A notice of trial has not been filed, and the defendant may amend once prior to then. In the circumstances, I dismiss the application and order that the plaintiff has leave to amend the NOCC within three weeks from the date of this order. If the plaintiff does not do so, or the defendant feels that the amended pleadings still do not plead a reasonable cause of action, the defendant has leave to renew this application.

Issue 2: Purchaser's Lien

Legal Framework

Rule 9-6

[35] The defendant relies on Rule 9-6 – the summary judgment rule – to dismiss the claim for a purchaser's lien. The relevant portions of that Rule state:

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

...

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[36] A defendant can succeed on such an application by “showing that the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case”: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48. If the plaintiff submits evidence “contradicting the defendant's evidence in some material respect, or if the defendant's evidence in support of the application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed”: *Beach Estate* at para. 48.

[37] The lack of a genuine issue for trial must be “manifestly clear” or “beyond doubt” that the other party is bound to lose. The onus of establishing this is on the applicant: *Beach Estate* at para. 65; *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 [*Sakwi*] at paras. 24-25.

[38] There is an important difference between a summary trial and a summary judgment application under Rule 9-6. On a summary judgment application, the court does not weigh evidence except where it is incontrovertible, nor does it choose between conflicting versions of events. Any further weighing may only be done in a

trial: *Beach Estate* at para. 49; *Lyons v. Canadian Imperial Bank of Commerce*, 2025 BCCA 22 at para. 2; *Sakwi* at paras. 24-25.

Purchaser's Lien

[39] In *1332404 B.C. Ltd. v. 1266685 B.C. Ltd.*, 2025 BCCA 46, at paras. 5-11, the Court described the nature of a purchaser's lien. It is an equitable remedy. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides the purchaser with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs. The purchaser's lien arises from the moment money is advanced by a purchaser to a vendor. This also gives rise to an equitable interest in land, which continues even if specific performance cannot be granted or the contract is lawfully rescinded by the purchaser. No lien arises where the money is paid to a stakeholder. The lien continues so long as the failure to complete was not due to the purchaser's default. The lien provides a security interest in the land. It subsists even if damages would otherwise be an adequate remedy.

[40] A purchaser's lien is properly pleaded when supported by material facts of the existence of a valid contract of purchase and sale between the parties, the payment of funds pursuant to that contract by the purchaser to the vendor, and the contract having gone off through no fault of the purchaser.

Evidence

Mr. Singh

[41] Mr. Singh, the director of the plaintiff, states that the plaintiff "at all times remained ready, willing, and able to complete the transaction." On March 11, 2025, he had an "approximately 28-minute telephone conversation" with Mr. Polajzar, who was acting as the defendant's agent. He attaches the call log for his phone, showing a call for 28 minutes and a number he identifies as Mr. Polajzar's telephone number. Mr. Singh states:

7. During that call, Randy indicated that the Defendant was open to discussing a potential joint venture with the Plaintiff for the future development of the Property, rather than proceeding strictly by way of an outright sale. I understood this to mean that the Defendant was still considering collaborative options with the Plaintiff and that discussions concerning completion remained ongoing in good faith.

[42] Mr. Singh states that on March 12, 2025, following the above conversation, he texted Mr. Polajzar the contact information for the Langley senior planner with whom he had been communicating about development requirements for the property. He states that he “sent this information because Randy had expressed interest in exploring a joint-venture arrangement and had requested details of the planning process and municipal contacts.”

[43] Mr. Singh attaches the text messages had with Mr. Polajzar the following morning which provided the name of the Langley city planner. Mr. Singh then states:

9. Based on my conversation with Randy, I understood that the Defendant was not intending to strictly enforce the completion date of March 15, 2025. I was led to believe that we would continue working collaboratively toward a potential joint-venture arrangement to develop the Property. In reliance on that understanding, I did not take immediate steps to finalize financing before the March 15, 2025 completion date, as I believed the parties were still cooperating toward a mutually beneficial arrangement concerning the Property.

10. Shortly thereafter, Randy abruptly advised that no further discussions or extensions would be entertained and that Mirjana intended to complete the Amended Contract on March 15, 2025.

...

14. The allegations of bad-faith conduct, reliance, and good-faith representations are founded upon the communications set out in this affidavit and the contemporaneous exhibits attached.

Mr. Polajzar

[44] Mr. Polajzar states that on March 8, 2025, the plaintiff’s realtor, Mr. Jimmy Saro, asked him if he was willing to meet Mr. Singh in person. Mr. Polajzar told Mr. Saro he was not willing to meet. He had not spoken to Mr. Singh at any time prior to the call with Mr. Saro on March 8, 2025. Mr. Polajzar states that Mr. Singh called him several times on the week of March 10, 2025. He did not answer several

of his calls, although he did speak with him on March 13, 2025, two days before the completion date. Mr. Polajzar states:

4. I took notes of the phone calls I had with Mr. Singh. Mr. Singh asked for an extension to the Completion Date several times, including on the March 13, 2025 call. Each time, I re-iterated that I was not interested in providing a further extension to the Completion Date.

5. When Mr. Singh asked me about a joint venture, I told him that we (my mother and I) just want the money from the sale of the Property. I told Mr. Singh that my mother was elderly, and that I wanted her to benefit from the sale before she dies.

6. Mr. Singh did not propose, at any time, any terms of a joint venture. He only used the loose language of “joint venture” without providing any detail. I did not ask for detail. I did not want any detail, because I did not want a joint venture. I wanted only to sell the Property to Mr. Singh, pursuant to our sales contract.

7. Mr. Singh responded by saying that he did not have the funds to complete, but that he could get the funds if I granted him an extension. I told him I would not extend the completion date again.

8. The Defendant was ready, willing and able to complete and the same was communicated to the Plaintiff, multiple times.

[45] Mr. Polajzar states that defendant was ready, willing, and able to complete and the same was communicated to the plaintiff multiple times.

Correspondence between Counsel

[46] The following email correspondence between counsel for the parties took place:

- a) On March 3, 2025, counsel for the plaintiff forwarded a communication marked without prejudice to counsel for the defendant. The content of that correspondence (and all other correspondence marked without prejudice) was not disclosed in the affidavit evidence. However, the subsequent exchange indicates that at least part of the communication concerned an extension;
- b) On March 5, 2025, at 2:55 pm, counsel for the defendant responded with the following message:

My client declines your client's without prejudice offers for extensions. My client wishes to note that neither proposal makes commercial sense. My client has no counter offer.

My client remains ready will and able to complete on the completion date.

c) On March 5, 2025 at 3:15 pm, counsel for the plaintiff sent further without prejudice communication to counsel for the defendant;

d) On March 5, 2025 at 3:27 pm, counsel for the defendant responded with the following message:

I should note all deposits have been released already per the terms of the CPS.

e) Following this, between March 10 and 14, 2025, the email messages between counsel indicate that they exchanged at least voicemail messages;

f) On March 14, 2025 at 3:46 pm, counsel for the defendant wrote to counsel for the plaintiff, stating:

My client has no counter. He is ready to complete.

g) On March 14, 2025 at 4:08 pm, counsel for the plaintiff sent further without prejudice communication to counsel for the defendant; and

h) On March 15, 2025 at 5:11 pm, counsel for the defendant emailed counsel for the plaintiff stating:

As it is now past 5:00 pm on the closing day of this contract of purchase and sale, and the buyer has not tendered the customary completion documents for execution by my client, and the buyer has not tendered the purchase price, the seller will now treat the CPS as having been breached. The seller will assess their options with respect to the breach and advise you of same.

[47] I note that para. 7 of the NOCC alleges "in or around February 2025, Plaintiff engaged in discussions" with Mr. Polajzar in which the alleged representations were made. However, Mr. Singh's affidavit refers to one conversation with Mr. Polajzar on March 11, 2025.

Positions of Parties

[48] The defendant submits that it is plain and obvious that the claim for a purchaser's lien is bound to fail and therefore this claim must be dismissed under Rule 9-6(5)(a). The defendant submits that her evidence is "incontrovertible."

[49] The defendant submits that the plaintiff does not meet the requirements for a purchaser's lien because the transaction did not "go off" without any fault on the part of the plaintiff. To the contrary, the transaction collapsed due to the unilateral fault of the plaintiff. The communications with Mr. Singh and through counsel made clear to the plaintiff that there would be no negotiation for any extensions to the completion date, that all the plaintiff's offers were denied, and that no counteroffer would be forthcoming. The defendant was ready, willing, and able to complete the sale of the property on the completion date, and the plaintiff failed to tender the balance of the purchase price and the customary completion documents. The defendant argues that the plaintiff does not claim breaches of the CPS or the Addendum on the part of the defendant in the NOCC.

[50] In the alternative, the defendant submits that the "clean hands" doctrine should be used to deny the plaintiff equitable relief since the plaintiff's conduct had "an immediate and necessary relationship to the subject matter of the claim" [emphasis in original]: *Dehydration Research LLC v. EnWave Corporation*, 2022 BCCA 347 at para. 62. The defendant also points to other breaches by the plaintiff of not paying the lawyer's fees and property tax credit required by the Addendum.

[51] The plaintiff submits that the defendant has not demonstrated that the plaintiff's claim is bound to fail. There is evidence to satisfy each element of a purchaser's lien. The transaction did not go off through any fault of the plaintiff. Based on his conversation with Mr. Polajzar, Mr. Singh understood the defendant was not intending to strictly enforce the completion date, and the parties would continue working collaboratively toward a potential joint-venture arrangement to develop the property. In reliance on that understanding, he did not take immediate steps to finalize financing before the completion date, as he believed the parties were still cooperating toward a mutually beneficial arrangement concerning the

property. Shortly thereafter, Mr. Polajzar abruptly advised that no further discussions or extensions would be entertained and that his mother intended to complete on March 15, 2025.

[52] The plaintiff argues there is a credibility issue that cannot be resolved summarily on affidavit evidence. The conflicting evidence raises material questions of fact that must be tested through *viva voce* evidence and cross-examination. For example, the plaintiff argues that Mr. Polajzar's affidavit refers to conversations (plural) that he had with Mr. Singh and states that he took notes of those conversations. None of those notes have been produced. The plaintiff wants those produced and to examine Mr. Polajzar regarding the conversations and those notes. Further, the plaintiff submits there have been no lists of documents produced and no discoveries. A trial date has not been taken out. The plaintiff submits that these issues are inherently fact-driven and can only be determined at trial – not on a summary judgment application.

Analysis

[53] In my view, although the essential elements for a purchaser's lien are different than those for breach of duty of honest contractual performance, the pleadings in relation to the purchaser's lien are arguably deficient for similar reasons. Notably, the pleadings only disclose Mr. Singh's subjective beliefs as to why the agreement "went off" rather than what was allegedly represented by Mr. Polajzar. While Mr. Singh's evidence is closer to stating what Mr. Polajzar said, but is still infused with his subjective beliefs. However, the defendant did not argue the insufficiency of this pleading and instead focused on the evidence. Accordingly, I will address those arguments.

[54] For the reasons below, I am persuaded that Mr. Singh's evidence, along with other evidence and gaps in the evidence, raises triable issues that cannot be decided on a summary judgment application.

[55] I do not agree with the defendant that its version of events is "incontrovertible" because this argument relies on and accepts only the evidence of Mr. Polajzar. The

argument ignores the conflicting evidence of Mr. Singh. While the communications between counsel support the defendant's case and Mr. Singh's affidavit is sparse, Mr. Polajzar's affidavit indicates there was more than one conversation, and he has not produced the notes he states he took of those conversations.

[56] The court cannot engage in this type of weighing of the evidence on Rule 9-6 application. The plaintiff's case appears weak, particularly upon consideration of the correspondence between counsel, but I cannot conclude that it is bound to fail. The parties' conflicting evidence raises a triable issue that cannot be resolved on a summary judgment application. The application under Rule 9-6 is dismissed.

Orders

[57] The defendant's Rule 9-5(1)(a) application to strike paragraphs in the NOCC that concern a claim for breach of the duty of honest contractual performance is dismissed. The plaintiff has leave to amend its pleadings within three weeks of the date of this order. If the plaintiff does not do so, or the defendant feels the amended pleadings still do not plead a reasonable cause of action, the plaintiff has leave to renew this application.

[58] The defendant's Rule 9-6 application to dismiss the claim for a purchaser's lien is dismissed.

[59] Costs of this application shall be in the cause.

"Norell J."