IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Iraca Construction Services Corp. v. Ghorbankhani,* 2023 BCSC 855

Date: 20230519
Docket: S221778
Registry: New Westminster

Between:

Iraca Construction Services Corp.

Plaintiff

And

Alireza Haji Ghorbankhani

Defendant

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:	S.E. Streat A.A. Al-Samak
Counsel for the Defendant:	D.M. Steinbach
Place and Date of Hearing:	Vancouver, B.C. May 1, 2023
Place and Date of Judgment:	Vancouver, B.C. May 19, 2023

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Introduction

[1] This application concerns whether the plaintiff's lien ought to be discharged in exchange for the defendant paying into court a nominal amount, or an amount less than as stated in the lien claim, and whether such reduced amount is sufficient security for the purposes of s. 24 of the *Builders Lien Act*, S.B.C. 1997, c. 45 [*Act*].

[2] The defendant submits that a nominal amount provides sufficient security because the value of the defendants' counterclaim vastly exceeds the value of the plaintiff's builders' lien claim.

[3] The plaintiff submits that the defendant provides insufficient evidence to justify a reduction of the security sought to be tendered to replace the plaintiff's lien claims and the plaintiff says its right under the *Act* to a lien for work performed would be significantly and unfairly prejudiced by any reduction.

[4] For the reasons that follow, I have determined that the lien may be removed upon the defendant paying $110,824.72.

The Issue

[5] The defendant's March 17, 2023 notice of application seeks, among other things, an order that the plaintiff's claim of lien and certification of pending litigation ("CPL"), be cancelled from title to the defendant's lands upon the defendant depositing $1, or such other amount as the court determines just, to stand as security for the lien.

[6] The key issue for determination on this application is whether the court ought to cancel the lien and CPL in exchange for the defendant posting nominal or reduced security.

Background

[7] In 2017, the defendant purchased a home in West Vancouver, British Columbia. Around the time of the purchase, the defendant arranged for a home inspection. The plaintiff's principal, Mr. Ghayem, attended part of the home

inspection and he received a copy of the inspection report. The inspection report indicated that the defendant should budget for rain screen and roof replacement.

[8] On February 1, 2018, the plaintiff and defendant entered into an agreement to renovate the home (the "Renovation Agreement"). The Renovation Agreement's scope of work included a new roof with new skylights, and new house siding with rain screen. The plaintiff agreed to supply the defendant with materials and services for the improvement to be constructed on the defendant's property. The value of the Renovation Agreement was $407,270.00 plus GST.

[9] It is not disputed that while the plaintiff was stripping off the home's exterior, leaks and rotten wood were discovered in the home. The defendant instructed the plaintiff to remove all rot and fix all leaks.

[10] The plaintiff alleges that the final value of the materials and services it provided and performed, including GST, was $1,471.810.59. Despite issuing progress invoices that were payable upon receipt, and making demands, the plaintiff alleges that the defendant failed to pay it $110,824.72 in principal. The plaintiff also alleges it is owed interest of 2% per month pursuant to an implied term of the Renovation Agreement. In total, as of April 14, 2023, the plaintiff submits that the defendant owes it $314,127.56.

[11] On or about December 18, 2018, the plaintiff made a claim of lien alleging $110,824.72 was due and owing (the "Lien"). The plaintiff caused the Lien to be filed against the defendant's property in the New Westminster Land Title Office and registered against title under number CA7256568.

[12] On December 5, 2019, the plaintiff filed a notice of civil claim seeking, among other things, a declaration of entitlement to a claim of lien under the *Act* in the amount of $110,824.72 and judgment against the defendant in that amount, plus interest (the "Claim").

[13] On January 29, 2020, the defendant filed a counterclaim seeking, among other things, damages for negligence, breach of contract and breach of fiduciary duty (the "Counterclaim").

[14] The defendant alleges that the plaintiff failed to remove all the rot and fix all the leaks despite receiving payment of $1,441,797.37. The defendant alleges the plaintiff's work was negligent and despite being issued notices of the deficiencies and representing that they had been fixed, the leaking continued and deficiencies were not resolved. The plaintiff denies that it failed to remove all the rot and fix all the leaks.

[15] The defendant terminated the Renovation Agreement on June 20, 2019. The defendant retained JRS Engineering Ltd. ("JRS") to design, oversee and tender completion of the home and the correction of the plaintiff's allegedly deficient work. JRS prepared a report summarizing the work that was required including to remediate allegedly deficient work by the work and it tendered the work before awarding the contract to West Coast Restoration Ltd. ("WCRL").

[16] To date, the defendant alleges he has paid approximately $960,000 to repair and complete the property and to fix the plaintiff's deficient work. The defendant submits that approximately $122,000 of this amount is in respect of additional items that were not within the scope of the plaintiff's work.

[17] The defendant has filed the Counterclaim against the plaintiff. Under the Counterclaim, the defendants seek to recover approximately $838,000 from the plaintiff which is the amount the defendant has paid to complete and fix alleged deficiencies in the plaintiff's work under the Renovation Agreement.

[18] In short, the pleadings assert that the defendant paid the plaintiff $1,441,797.37 under the Renovation Agreement and the plaintiff asserts it is owed a further $110,824.72, plus interest. Meanwhile, the defendant asserts the plaintiff owes him in excess of $838,000 for the cost of fixing the plaintiff's negligent work.

The Legal Framework

[19] Section 24 of the *Act* authorizes the cancellation of a claim of lien by giving security, stating in relevant part:

> **24** (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.
>
> (2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
>
> (3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.
>
> …

[20] In *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366 [*Q West*], our Court of Appeal explains that s. 24 of the *Act* involves the application of a multi-prong test:

> [56] Under s. 24 there is a two-prong test. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. In summary:
>
> - the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a *prima facie* case will suffice;
> - any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
> - looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate security;
> - that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
> - the amount of security may be less than the amount claimed under the lien.

[21] In *M.H. Rent-a-Rod Ltd. v. Cooper*, 2016 BCSC 927 [*Cooper*] at para. 15, the court provides some additional principles to apply under s. 24 of the *Act*:

> [15] Certain other considerations and principles are relevant:

a) a court can consider a counterclaim as a "relevant circumstance" under s. 24(2); *Q West* at para. 18;

b) the security fixed by a court is to be based on the materials before the court; *Q West* at para. 39;

c) the court is not to make formal findings of fact on the evidence before it. In *M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd., et al*, 2005 BCSC 1375, Johnston J. said:

> [59] In considering the amount to be paid or posted in return for cancellation of a claim of lien, I should not attempt to make findings that could cause difficulty for the judge who will hear the trial of these issues, but should instead attempt, with the evidence available, to fix a sum that fairly represents my view, based on the evidence tendered on this application, of an amount that will do justice between the parties under s. 24.

See also *Mailey Developments v. Impact Demolition*, 2003 BCSC 808 at para. 19.

d) the evidence required of the lien claimant to support the lien is of a *prima facie* nature. It is not necessary to give evidence that would support judgment at trial; *The Owners, Strata Plan LMS 2262 v. Belgrove Construction Ltd*., 2003 BCSC 535 at para. 2; see also *Pleasantview Homes Ltd. v. Hari Chand et al.*, 2005 BCSC 1235 at para. 31; and *W Redevelopment Group, Inc. v. Allan Window Technologies Inc*., 2010 BCSC 1601 at para. 92; and

e) the solvency of an owner is also a relevant consideration; *Tran v. De Weerdt*, 2005 BCSC 732 at paras. 16-18.

Analysis

[22] In my view, both the Claim and Counterclaim must be considered in applying s. 24 of the *Act*. As mentioned, the plaintiff's Claim seeks a principal amount of $110,824.72. The Claim asserts that the defendant failed to make payments for services and materials ordered and supplied by the plaintiff.

[23] In the Counterclaim, the defendant alleges the plaintiff is liable for approximately $838,000 that he paid to complete and fix the plaintiff's deficient work under the Renovation Agreement. In response to the Claim, the defendant denies any liability for services or materials ordered and supplied and he disagrees that interest is payable as an express or implied term. In the defendant's view, the plaintiff's work under the Renovation Agreement was wholly deficient.

[24] The plaintiff asserts that the materials and services it supplied increased the value of the defendant's property and as such, it is entitled to a Lien. In response to the Counterclaim, the plaintiff denies liability for the remedial work and it disputes the quantum of the Counterclaim. The plaintiff asserts that costs claimed by the defendant are excessive and for work falling outside the scope of the Renovation Agreement. The plaintiff also says the defendant failed to provide it sufficient notice or opportunity to remediate the alleged deficiencies.

[25] The defendant attests to ongoing leaks at the property, numerous messages to notify the plaintiff of the leaks and many unsuccessful attempts by the plaintiff to fix the leaks. The defendant's evidence includes photographs allegedly taken after the Lien was filed that show the plaintiff's employees attempting to fix the leaks.

[26] When the leaks and rotten wood issues were not resolved, the defendant hired JRS and a remediation company, West Coast Restoration ("West Coast"), to fix the deficiencies. The defendant provides a number of change orders from West Coast to fix deficiencies such as rotten structural beams, insufficient roof venting and other building envelope issues.

[27] The defendant acknowledges that some of the work performed by West Coast falls outside the scope of the Renovation Agreement. He further acknowledges that there may be some additional instances of repair work performed by West Coast that falls outside the scope. However, he says "the bulk" of West Coast's work involved fixing deficiencies in the plaintiff's scope of work.

[28] The defendant states that if the Claim succeeds, he would have no difficulty paying the plaintiff the amount that is owed. The defendant owns the property that is subject to the Lien and he estimates there is in excess of $3 million in equity available. The defendant owns a second property and he estimates there is in excess of $3.8 million in equity available in his second property. The defendant is unwilling to disclose other details regarding his total financial assets. In terms of liabilities, beyond the mortgages registered on the two properties and some automobile loans, the defendant says he has no significant liabilities.

[29] Mr. Ghayem, the principal of the plaintiff, attests to having supplied the defendant with numerous reports including, progress and final, reports as well as deficiency reports throughout 2018. Mr. Ghayem states that the defendant failed to pay invoices dating from February to December 2018.

[30] Mr. Ghayem states that the plaintiff quoted $44,000 for roof work while expending approximately $46,000 for that work. Mr. Ghayem points out that even if the plaintiff's roof work had to be redone, the defendant's claim of approximately $166,358 related to roof work is unreasonable, including because it exceeds JRS's roof work estimate.

[31] Mr. Ghayem states that the defendant is claiming costs for items that are outside the scope of work under the Renovation Agreement, such as structural beam replacement. He also states that many items in the JRS quote and invoices appear to be inflated and inappropriate.

[32] For example, counsel for the plaintiff took me to assurances to the District from the structural engineer regarding the structural and architectural building envelope status of the property. Counsel also took me to a May 2018 inspection memo from the engineer stating that the internal framing for the property was completed in accordance with the B.C. Building Code, specifications and site recommendations.

[33] Mr. Ghayem attaches various invoices to his affidavit stating that they are related to the plaintiff's work under the Renovation Agreement. However, the defendant points out that some of the invoices refer to an address that is not the defendant's property.

[34] Mr. Ghayem says that the plaintiff will require the opportunity to cross examine the defendant's relevant witnesses about the costs he claims and to respond to any expert report that may ultimately be supplied by the defendant. At this point, neither party has tendered an expert report to support their respective claims.

[35] The defendant submits that even if the court accepts the plaintiff's evidence, the amount of the Lien is excessive. That is because Mr. Ghayem states that the final value of the materials and services provided and performed by the plaintiff under the Renovation Agreement is $1,471,810.59 and the defendant paid the plaintiff $1,441,769.37. The difference between these two numbers is $30,041.22, not $110,824.72.

[36] Mr. Ghayem attaches the unpaid invoices to his affidavit. However, he goes on to state: "… the remaining amounts making up the lien amount reflect payments made for which we do not have an invoice available but are referenced in Deficiency Report-2 dated December 7, 2018." Mr. Ghayem also states the defendant requested additional work "relating to finishing work and preparation for the final inspection" for $23,653.50 reflected in the December 7, 2018 progress report and, "…there may have been some additional charges incurred relating to the pool" requested by the defendant for which the subcontractor billed the plaintiff directly.

[37] Therefore, when Mr. Ghayem refers to the final value of the materials and services provided under the Renovation Agreement, it is unclear whether that includes or excludes the additional amounts he mentions in paragraphs 20 to 22 of his affidavit. In summary, it is not clear on the evidence before me that the amount of Lien is excessive as alleged by the defendant.

[38] Regarding the applicable test, the defendant concedes that the Claim meets the *prima facie* test. In other words, the defendant agrees that it is not plain and obvious that the Claim will fail. However, the defendants submits that since the value of the Counterclaim vastly exceeds the value of the Claim, the court ought to order the discharge of the lien and CPL in exchange for the defendant posting $1.00 security.

[39] For its part, the plaintiff asserts that the defendant's evidence is insufficient to allow the court to assess the validity of the Counterclaim and to effectively deny the plaintiff security for the Lien.

[40] The plaintiff referred me to *Troico Home Solutions & Manufacturing Inc. v. Kandakou*, 2022 BCSC 1172, as support for its position that there is insufficient evidence related to the Counterclaim, even on a *prima facie* basis. For that reason, the plaintiff says security ought to be fixed in the full amount of the Lien.

[41] As stated in *Q West*, the court must assess the relevant evidence before it and take into account the objectives of the legislation which are to protect those who supply work and materials to a construction project so long as the owner is not prejudiced. The court also urges caution in approaching the s. 24 inquiry to avoid injustice to the lien claimants who are generally entitled to have their claims "fully adjudicated at trial": *Q West*, para. 40.

[42] Considering the whole of the evidence, and keeping in mind the applicable test under s. 24 and the statutory objectives, I do not find it would be appropriate to fix nominal security, or security that is less than the amount of the Lien.

[43] While I am aware that there is a significant disparity in the alleged values of the Claim and the Counterclaim, I am concerned that it would be unjust to disregard the many live issues between the parties as to the correctness of their respective positions and the significant conflicts in the evidence regarding quantum.

[44] I have concluded, based on my review of the law and the available evidence, that the amount that will do justice between the parties under s. 24 of the *Act* is $110,824.72. In my view, the circumstances before me differ from those at issue in *Cooper*, including because the Claim has not been dormant for a long period of time and the plaintiff has meaningfully responded to allegations that it is liable to the defendant for the remediation costs. In other words, this is not a situation where the defendant's evidence about, for example, the presence of deficiencies is wholly uncontradicted.

Disposition

[45] The orders sought in part 1 of the defendant's March 17, 2023 notice of application are granted, except that terms 1 and 3, shall specify that the amount the defendant is required to deposit is $110,824.72, and not $1.

[46] The costs of this application shall be in the cause.

"E. McDonald J."