

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tympanum Construction and Project Management Ltd. v. White Square Development Inc.*,
2023 BCSC 653

Date: 20230424
Docket: S135625
Registry: Kelowna

Between:

Tympanum Construction and Project Management Ltd.

Plaintiff

And

White Square Development Inc.

Defendant

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Appearing on behalf of the Plaintiff:

T. Hugi
B. Puskas

Counsel for the Defendant:

A. Cathcart

Place and Date of Trial/Hearing:

Kelowna, B.C.
March 31, 2023

Place and Date of Judgment:

Kelowna, B.C.
April 24, 2023

I. INTRODUCTION

[1] The plaintiff, Tympanum Construction and Project Management Ltd. (“Tympanum”), applies for judgment against the defendant for \$100,000 plus interest and costs arising from monies it advanced as evidenced by a loan agreement entered into between the parties.

[2] The defendant, White Square Development Inc. (“White Square”), opposes the application on several fronts. First, it denies having signed the loan agreement; Second, if it did sign the Loan Agreement, it says it did not understand the document to be a loan agreement. Third, it says that there is no proof of the existence of a Loan Agreement. Fourth, it says that to the extent Tympanum may have paid monies to White Square or on White Square’s behalf, those monies were in the nature of an investment in White Square and not a loan. It seeks to have the action dismissed in its entirety. In the alternative, it maintains that the matter is not suitable for summary determination because of conflicts in the affidavits and credibility issues. It seeks to have the matter referred to the trial list.

[3] For the reasons that follow, the plaintiff’s claim is allowed. Tympanum is entitled to judgment against White Square for \$100,000 plus costs.

II. BACKGROUND

A. The Parties

[4] Tympanum was incorporated on March 15, 2021. Its principals and owners are Mr. Tamas Hugyi and his wife, Ms. Bernadette Puskas, who immigrated to Canada from Hungary in 2014 and to the Okanagan area in 2015. English is neither Mr. Hugyi’s, nor Ms. Puskas’s, first language. Mr. Hugyi has an engineering degree obtained in Hungary.

[5] White Square is a residential exterior cladding sub-contractor incorporated on August 7, 2018. Its president, director and primary shareholder is Mr. Valeri Kantelashvili, who immigrated to Canada from eastern Europe in 2003. English is also not his first language.

[6] Mr. Sarbjot Hayer, a Kelowna businessman, and his wife Ms. Kiran Hayer (the “Hayers”), met Mr. Kantelashvili on a construction project. The Hayers became involved as business partners in White Square in August 2020.

[7] At all material times, Mr. Hugyi’s primary employment was as a project estimator for Interior Roofing Ltd. In the summer of 2020, he met Mr. Kantelashvili on a construction site and the two decided to enter into a loose business arrangement together (the “Agreement”). Mr. Hugyi’s role was to obtain sub-contracts for White Square by estimating and bidding on prospective construction projects during his off-work hours from Interior Roofing. Tympanum was incorporated months afterward in order to invoice White Square for Mr. Hugyi’s estimating services. In addition to projects obtained through Mr. Hugyi’s estimates, White Square was engaged in numerous other projects and business activities.

[8] In accordance with the Agreement, throughout 2020, Mr. Hugyi estimated and bid on approximately 25 projects across the province. White Square was the successful bidder on eight of those projects, some of which were worth substantially over \$2 million (the “Projects”).

B. White Square’s Cash Flow Troubles

[9] In construction projects, it is typical for the owner or general contractor to keep a builder’s lien holdback of 10 percent. The holdbacks on the Projects reduced the cash flow into White Square, leaving it unable to pay its suppliers and labourers.

[10] Mr. Hugyi says that in late 2020 or early 2021, Mr. Kantelashvili told him that White Square did not have the financial resources to continue financing the Projects. He stated that he was in discussions with the Hayers, who he hoped would provide financial assistance by investing in White Square. In case the Hayers did not invest, Mr. Kantelashvili asked Mr. Hugyi to lend funds to White Square so that it could pay suppliers and labourers pending receipt of progress payments and the release of the holdback monies on the Projects. He stated that he did not expect to receive all monies due to White Square for approximately six months. Mr. Kantelashvili made it clear that without an injection of funds, White Square would be unable to pay

accounts as they became due and thus would be unable to fund any further projects. Initially, Mr. Kantelashvili stated that White Square would need between \$20,000 and \$30,000 to carry it through. By February 2021, he had increased the required amount to \$100,000.

[11] Mr. Hugyi agreed to assist. Neither he nor Ms. Puskas had money available to lend White Square, so they arranged to borrow money from Mr. Gabor Gyenes, a friend in Edmonton, Alberta, with financial resources. On February 25, 2021, Mr. Hugyi borrowed \$100,000 at 10 percent interest from Mr. Gyenes, with the intention of lending that money to White Square (the “Gyenes Loan”). The Gyenes Loan is evidenced by a loan agreement dated February 25, 2021.

[12] By early March 2021, Mr. Hugyi had used the proceeds of the Gyenes Loan on White Square’s behalf to pay approximately \$63,000 in invoices owed by White Square directly to its suppliers on the Projects.

[13] In defence of Tympanum’s claim, both Mr. Hayer and Mr. Kantelashvili say that Mr. Hugyi agreed to invest \$100,000 in White Square and become a one-third business partner with them. They say that the plan was for Mr. Hugyi to estimate and bid on projects, Mr. Kantelashvili to carry out the projects obtained, and Mr. Hayer to provide business experience and financial backing.

[14] Mr. Hugyi denies ever agreeing to become an investor or shareholder in White Square, although he admits he had some discussions with Mr. Kantelashvili and Mr. Hayer where they asked him to do so.

[15] Mr. Hayer says that it was in the ordinary course of White Square’s business for Mr. Hugyi to personally pay its expenses and White Square to reimburse him later. He says that White Square would typically pay Mr. Hugyi first, then Mr. Kantelashvili and last himself. He says these reimbursements would be based on White Square’s draws and overall profitability in individual projects.

C. The Loan Agreement

[16] On March 15, 2021, Mr. Hugyi and Ms. Puskas incorporated Tympanum. On the same day, Tympanum and White Square entered into a written loan agreement, drafted by Ms. Puskas without legal assistance by adapting a precedent she had found online. The Loan Agreement contains the following terms:

- a) Tympanum will lend \$100,000 to White Square, without interest, which will be repayable within one year of Tympanum providing White Square with written notice of demand;
- b) No security for the loan would be provided; and
- c) The loan agreement is the entire agreement between the parties and there are no further terms or provisions, either oral or otherwise,

(the “Loan Agreement”).

[17] Around the time the Loan Agreement was signed, Mr. Hugyi, Ms. Puskas, Mr. Kantelashvili and Mr. Hayer met. At this meeting, both Mr. Kantelashvili and Mr. Hayer requested that Tympanum continue to pay White Square’s suppliers directly. Mr. Hugyi advanced the balance of the \$100,000 from the Gyenes Loan through Tympanum to White Square or to others on its behalf for that purpose.

[18] The parties continued to operate as before, with Mr. Hugyi estimating exterior cladding projects and White Square completing the projects it was awarded. However, the parties have since had a falling out. It is evident that White Square has lost significant money on its projects and the finger pointing between the parties has begun.

D. The Demand for Repayment

[19] On March 14, 2022, Tympanum made a formal written demand for repayment under the Loan Agreement. The demand stated:

Subject: requesting payment of loan \$100,000 CAD

Dear Valeri Kantelashvili,

This letter serves as a reminder for you/ White Square Development Inc. to make the payment of your loan of \$100,000 CAD that our company loaned you March 15, 2021 for a year. We are sorry but not considering extending the 1-year term.

We request you to please make the payment of the entire amount by April 1st, 2022.

[20] Tympanum says that White Square has made no payment on the Tympanum loan since this demand and that the amount of \$100,000 remains due and owing.

[21] In response, White Square says that:

- a) This is not just a case about a loan between the parties, but rather about a complicated business arrangement that included Mr. Hugyi agreeing to invest in White Square as an owner. This business arrangement cannot be untangled on conflicting affidavit evidence.
- b) This matter is not suitable for summary trial because of the significant conflict in the affidavits and the credibility issues that arise.
- c) The \$100,000 referred to in the Loan Agreement was not a loan but an investment by Mr. Hugyi into White Square.
- d) The Loan Agreement is not proof of the existence of the loan because, although Mr. Kantelashvili does not dispute that his initials appear on each page of the Loan Agreement including the signature page, he denies intending to sign it as a binding agreement. If he did initial it, he claims not to have understood what he was signing because he does not read English very well.
- e) Approximately \$63,000 of the money Tympanum claims to be owing by White Square was paid out prior to Tympanum's incorporation. In any event, \$90,169 of the monies referred to in the Loan Agreement alleged to be owing was repaid as follows: \$56,169 on November 20, 2021, and

\$34,000 on February 4, 2022, as is evidenced by banking transactions on those dates.

[22] Tympanum and Ms. Puskas have other outstanding debt claims against White Square. These claims relate to additional monies advanced by Tympanum to White Square or on White Square's behalf, and to unpaid office and bookkeeping work performed by Ms. Puskas. These claims are the subject of actions in the British Columbia Provincial Court and I will not address them further here.

III. DISCUSSION

A. The Audio Recordings

[23] The affidavit material is voluminous and there is no doubt that many of the background facts are in conflict. As part of its supporting material, Tympanum relies on recorded telephone conversations between Mr. Hugyi and Ms. Puskas on one side, and Mr. Kantelashvili on the other. Transcripts of the relevant portions of these audio recordings are also in evidence. The telephone conversations were conducted in English.

[24] Some of the recordings were difficult to decipher. However, what was clear from them was that Mr. Kantelashvili did not deny the debt when confronted with the \$100,000 alleged to be owing under the Loan Agreement, but rather left the distinct impression that he knew the money was owing. Much of the discussion was about setting up a schedule of repayment because he needed more time to pay. Mr. Kantelashvili attempted to persuade Mr. Hugyi and Ms. Puskas that money from other projects would soon be available to pay the debt, if they gave him more time. Indeed, he promised repayment on a number of occasions during the audio recordings.

[25] I conclude that, when placed in the context of the entire business dealings between the parties, the audio recordings confirm that Mr. Kantelashvili knows that White Square continues to owe Tympanum \$100,000 under the Loan Agreement.

B. Summary Judgment and Summary Trial Applications

[26] The plaintiff's notice of application is unclear as to whether it seeks summary judgment under Rule 9-6 or summary trial under Rule 9-7 of the *Supreme Court Civil Rules*. The defendant's application response addresses only summary trial under R. 9-7. At the hearing, it was obvious that both parties treated the application as the plaintiff seeking summary determination of its claim. Because the notice of application is unclear and the defendants responded on the basis that it was under R. 9-7 for a summary trial, I will consider the application under both the R. 9-6 summary judgment and R. 9-7 summary trial rules.

[27] The purpose of summary judgment proceedings under R. 9-6 is to dispose of claims that are straightforward and therefore should not burden the court or the parties with the time, expense and delay of a conventional trial. Summary judgment works to efficiently dispose of unmeritorious claims or defences: *Cepuran v. Carlton*, 2022 BCCA 76 at paras. 145–46, citing *Progressive Const. Ltd. v. Newton* (1980), 25 B.C.L.R. 330 at 333, 1980 CanLII 493 (S.C.). The test is whether there is a bona fide triable issue: R. 9-6(5). Each party is to put their best foot forward.

Fundamentally, the summary judgment process should encompass the objects of the *Rules* set out in R. 1-3, as well as the fundamental principles of judicial economy and consideration of the interests of justice.

[28] The test involved in a R. 9-7 summary trial application is different. Simply put, the test is whether the court is able find the necessary facts to determine the case summarily and whether it would be unjust to do so. Whether to grant or dismiss a summary trial application under R. 9-7 is discretionary. Factors include: the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise from delay, the cost of taking the matter forward to a conventional trial in relation to the amount involved, the course of the proceedings and whether the evidence presented is sufficient to resolve the dispute: *Cepuran* at paras. 149–50, citing *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.).

C. Determination

[29] I am persuaded that this matter ought to be determined by way of summary trial because I am able to find the facts necessary to dispose of this case. I conclude that the Loan Agreement was signed by Mr. Kantelashvili as an authorized representative of White Square and that he knew he was acknowledging a debt of \$100,000 owing to Tympanum.

[30] I do not accept White Square's position that Mr. Kantelashvili did not intend to sign the Loan Agreement, because he only initialled it. I also do not accept White Square's suggestion that Mr. Kantelashvili did not know what he was signing because he does not read or understand English. The documents in evidence show that he routinely signed his name to important legal documents written in English in the same fashion as he did the Loan Agreement. As a businessman, he should know that he will be bound by the terms of a document if he affixes his signature or initials to it, barring fraud, misrepresentation, undue influence or other legal defences. He has not proven that any of these defences are available to him in this case.

[31] Tympanum has met the onus of proving that the Loan Agreement exists and that White Square owes \$100,000 to Tympanum. I have found the following facts in support of my decision:

- a) The evidence clearly shows that Mr. Kantelashvili is proficient in using the English language. The telephone recordings and text messages in evidence show that Mr. Kantelashvili can speak, read, write and understand English. They also show that he conducts his business dealings in the province in English. It is apparent that all communications between the parties were in English. Additionally, it is clear that he dealt with site supervisors, engineers and project managers in English while carrying out White Square's contracts.
- b) As White Square's authorized representative, Mr. Kantelashvili accepted and agreed to the terms of the Loan Agreement. Mr. Hugi and

Tympanum advanced \$100,000 over time and in various amounts to White Square or its suppliers and labourers. The Loan Agreement documents the loan and was signed by Mr. Kantelashvili on March 15, 2021.

- c) The \$100,000 principal of the loan remains due and owing by White Square to Tympanum.
- d) To the extent that Mr. Hugyi paid White Square's suppliers and labourers directly on White Square's behalf prior to Tympanum being incorporated on March 15, 2021, he did so on the basis that the money would be repaid to Tympanum as agreed by the parties. By implication, Mr. Hugyi assigned his interest in funds advanced personally to or on behalf of White Square to Tympanum upon its incorporation.
- e) The Loan Agreement is straightforward and can be treated in isolation, separate from whatever other business arrangements existed between the parties. Tympanum lent White Square \$100,000 for one year on a type of revolving loan arrangement that both parties agreed upon.
- f) White Square denies the debt solely because, as Mr. Kantelashvili admits and I find, White Square is not doing well financially.
- g) Mr. Kantelashvili and Mr. Hayer's attempts to characterize the \$100,000 loan as an investment are not persuasive, as is their suggestion that the Loan Agreement is backdated. The fact remains that Mr. Kantelashvili signed the Loan Agreement as an authorized representative of White Square, thus confirming it was a loan, not an investment.
- h) In the months following the execution of the Loan Agreement, Mr. Kantelashvili and Mr. Hayer attempted to persuade Mr. Hugyi and Ms. Puskas to become business partners in White Square with them and convert the Tympanum loan into an investment. Indeed, on March 17, 2022, Mr. Hayer went to the extent of instructing White Square's corporate

solicitors to prepare the necessary documents to make Mr. Hugi a shareholder. However, he retracted those instructions shortly afterwards because Mr. Hugi was not interested in their proposal. However, Mr. Hugi, Ms. Puskas or Tympanum were never shareholders, directors or officers of White Square. To the extent there may have been discussions to that effect, those discussions did not result in an agreement.

- i) While the evidence confirms that White Square paid \$56,169 to Tympanum on November 20, 2021 and \$34,000 on February 4, 2022, I conclude that those payments relate to other monies owed by White Square to Tympanum. They do not relate to the \$100,000 advanced under the Loan Agreement.

IV. CONCLUSION

[32] I am persuaded that the \$100,000 loan evidenced by the Loan Agreement is due and owing by White Square. It serves no purpose to force the parties to an expensive conventional trial only to delay what I consider to be an inevitable result.

[33] Accordingly, the plaintiff is entitled to judgment against White Square for \$100,000.

[34] Tympanum is not entitled to interest of 10 percent as claimed because there is no agreement in writing to pay interest. Indeed, the Loan Agreement specifically says no interest is payable.

[35] However, Tympanum is entitled to court order interest, pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, on \$100,000 from April 1, 2022, the date the monies became due, to the date of these reasons.

[36] Tympanum is also entitled to Scale B costs.

“G.P. Weatherill J.”