

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Diamant Cleaning Vancouver Inc. v.  
Kindred Construction Ltd.*,  
2024 BCSC 2439

Date: 20241211  
Docket: S241701  
Registry: Vancouver

Between:

**Diamant Cleaning Vancouver Inc.**

Plaintiff

And

**Kindred Construction Ltd.**

Defendant

And

**Ouran Li**

Third Party

Before: The Honourable Justice Thomas

## Oral Ruling

The Plaintiff, appearing in person:

I. Martinez

Counsel for the Defendant:

D.K. Plunkett

Counsel for the Third Party:

L.L. Seneviratne

Place and Date of Trial/Hearing:

Vancouver, B.C.  
December 11, 2024

Place and Date of Judgment:

Vancouver, B.C.  
December 11, 2024

[1] **THE COURT:** This is an application for a summary trial by all three parties.

[2] The dispute arises from a cleaning contract that Ms. Martinez's company, Diamant Cleaning Vancouver Inc., had with Kindred Construction Ltd. ("Kindred"). There was a dispute over the amount of the contract, and Ms. Martinez took out a builder's lien against Kindred. Kindred subsequently paid money into court to remove the lien.

[3] The dispute initially proceeded to a summary trial before Justice Fitzpatrick. That summary trial focused on the nature of the contract and whether extras could be billed pursuant to the contract. Justice Fitzpatrick dismissed Ms. Martinez's claim and awarded costs to Kindred. In addition, Justice Fitzpatrick ordered a payout of funds that had been paid into court. Approximately \$22,000 was to be paid out to Ms. Martinez with the balance to be paid out to Kindred.

[4] Several months passed, and in August, Kindred received back the signed order made by Justice Fitzpatrick and obtained a payout of funds owed to them from the court. Ms. Martinez had written to Kindred asking how she could get money owed to her paid out of court. Kindred did not respond.

[5] Approximately three business days after Kindred had received the signed order back from the registry, Ms. Martinez retained counsel. This counsel subsequently obtained the money that had been paid into court for Ms. Martinez through a requisition. Ms. Martinez could have filed this requisition at any time after the judgment had been filed.

[6] I note Justice Fitzpatrick did indicate orally at the hearing that since Ms. Martinez was unrepresented, Kindred could provide her with some assistance as to how to obtain funds owed to her from the court. Although Kindred did not provide Ms. Martinez with such assistance, in my view, this is inconsequential since it only was a period of days after the order had been obtained that Ms. Martinez retained counsel and received her funds.

[7] Ms. Martinez appealed Justice Fitzpatrick's order, and Kindred subsequently sought security for costs for the appeal. Ms. Martinez, through the assistance of Mr. Li, her counsel, successfully opposed the application for security for costs. Costs for the security for costs hearing were to be assessed at the appeal.

[8] On the day of the security for costs hearing, Ms. Martinez had some discussions with her counsel, Mr. Li. As a result of those discussions, Mr. Li entered into settlement discussions with Kindred, and a settlement was achieved in exchange for a waiver of Kindred's costs and the payment of \$1. Ms. Martinez was required to withdraw her appeal and sign a mutual release. The terms of the release were negotiated by both Kindred's and Ms. Martinez's lawyers.

[9] Ms. Martinez subsequently signed the release and withdrew her appeal. Sometime later, after discussions with one of her cleaning clients, Ms. Martinez attempted to resuscitate her appeal. When she did so, the Court of Appeal advised her that she would have to set aside the release, and if she set aside the release, she could then pursue her appeal.

[10] This prompted Ms. Martinez to commence this action against Kindred and her former counsel, Mr. Li.

[11] The action against Kindred was based on the fact that they put what they viewed to be the appropriate contract into the trial that occurred before Justice Fitzpatrick, whereas Ms. Martinez said the contract was much broader than that suggested by Kindred or that perhaps a different contract governed the transaction. This issue was dealt with by Justice Fitzpatrick and formed much of the basis of Ms. Martinez's appeal.

[12] Ms. Martinez also objected to the fact that both Kindred's counsel and her counsel jointly worked to draft the release. Ms. Martinez says this is suspicious and indicative of a conspiracy against her. I reject this assertion. It is common practice for counsel who have agreed to enter into a settlement to work together to draft an appropriate release. This is simply a misunderstanding on Ms. Martinez's behalf.

[13] Ms. Martinez argues that Kindred was required to assist her in obtaining her money out of court. In my view, there was only a three-day period where Kindred could have assisted her before she obtained counsel. I see no basis for overturning a settlement on those grounds. I note that this did not form part of the settlement agreement.

[14] The real issue is that Ms. Martinez wants more money; either payment of money that was dismissed pursuant to the order of Justice Fitzpatrick or with respect to the time she has had to spend on her appeal, and then pursuing this action against Kindred to have the release set aside.

[15] In my view, Mr. Li was clearly acting as counsel with full ostensible authority to settle the matter on Ms. Martinez's behalf. I find the release that she signed with Kindred is a valid release and extinguishes any action that she can bring against Kindred, including this action.

[16] Therefore the action commenced against Kindred is dismissed.

[17] With respect to the actions that have been commenced against Mr. Li, there is a clear, direct conflict in the evidence contained in Ms. Martinez's affidavit #4 where Ms. Martinez says she did not receive any advice from Mr. Li with respect to the release and that she did not provide Mr. Li with any instructions to settle her claim against Kindred on her behalf.

[18] Ms. Martinez has also provided some explanation for the e-mails and for her signature on the release.

[19] I understand her evidence to be at odds with Mr. Li's affidavit evidence, although I have not reviewed it in detail. I am concerned that resolving this fundamental issue on affidavit evidence alone, especially in light of Ms. Martinez's poor command of written English, would not be appropriate.

[20] However, it does appear to me that the issue of whether Mr. Li was provided instructions to settle the action and provide advice to Ms. Martinez with respect to

the implications of the settlement and signing the release is a discrete issue whose resolution would considerably advance the litigation.

[21] Therefore, I am not going to dismiss Mr. Li's application for a summary trial. Rather, I am going to adjourn it generally and provide leave for Mr. Li to conduct a cross-examination of Ms. Martinez. Ms. Martinez has indicated that she does not wish to ask Mr. Li any questions. Therefore, no order will be made to cross-examine Mr. Li.

[22] I am not making any factual findings that would impact the determination of Mr. Li's representation with Ms. Martinez. I merely confirm that during this application Mr. Li confirmed his view that he was acting with full authority of Ms. Martinez and that that is how he conducted himself with respect to Kindred.

[23] This concession is fundamental to the resolution of the action against Kindred; Mr. Li was acting with ostensible authority to settle Ms. Martinez's action in his dealings with Kindred. Therefore, although the release is binding against Kindred, Ms. Martinez remains free to pursue her claim against Mr. Li. It may be that the parties wish to formally add Mr. Li as a defendant as opposed to a third party. I note the notice of claim appears to contemplate an action against Mr. Li by Ms. Martinez.

[24] I am not going to seize myself of this matter. With respect to the time limits and conduct of the subsequent summary trial, I will leave that to counsel and Ms. Martinez.

[25] The final issue is an application for special costs by Kindred against Ms. Martinez. Kindred says that they executed a release in good conscience in exchange for a waiver of cost to put the matter behind them. However, since executing the release, Ms. Martinez attempted to revitalize her appeal and then subsequently commenced an action against them in this court. Kindred has cited three authorities showing that litigants who have resolved a matter with a release

have been assessed a penalty for continuing to pursue their claims through special costs.

[26] Special costs are a discretionary remedy. In my view, there has not been sufficient malfeasance on Ms. Martinez's part to meet the threshold of special costs. She has been very persistent in pursuing her claim. But in my view, given her lack of legal training, naming both her lawyer and Kindred in an attempt to set aside the release, which she says was obtained without her instructions, is not sufficient misconduct to attract a special costs penalty against her.

[27] However, Kindred is entitled to all the costs for the action commenced against them, and that is not simply the costs for this hearing, although those will be included; rather it is for all costs associated with defending this action, including but not limiting, attendance for prior hearings and for all preparations they have done.

[28] THE COURT: Ms. Martinez; to be clear, I have dismissed the claim against Kindred, and the reason for that, is that when Kindred was dealing with your lawyer they had no reason to believe that he did not have authority to settle your action, they settled the action with your lawyer and were provided a release that you signed. This makes the settlement and the release valid. There is no basis for any action against Kindred.

[29] However, you may have a potential action against your lawyer Mr. Li. This will require you to prove that Mr. Li entered into the settlement without your authority. Given the number of emails and circumstances surrounding the settlement, it may be difficult for you to prove that Mr. Li did not have authority to settle your claim and/or explain the ramifications of the settlement to you.

[30] It appears from the materials that I have reviewed that this will require an assessment of credibility. That is why I have ordered a cross-examination. This will likely occur during Mr. Li's summary trial. You have indicated that you do not wish to ask Mr. Li any questions.

[31] It will be important for you to review and perhaps even obtain some assistance in preparing your affidavit material to ensure that everything is required to establish that Mr. Li did not have authority to settle the claim on your behalf and did not explain the implications of the settlement with you. So all information that you have on those issues will have to be written down in your affidavit. You will not be able to expand on your evidence in the manner that you did in today's hearing. Okay?

[32] I. MARTINEZ: Okay.

[33] I. MARTINEZ: I have a question. So which costs you are going to charge me?

[34] THE COURT: The costs that have been incurred by the defendant, Kindred Construction Limited.

[35] I. MARTINEZ: Yeah. And how much is this?

[36] THE COURT: Well, that I don't know. I asked counsel if he had an idea, and he did not, so what he will do is he's going to send you a bill of costs and disbursement, and if you disagree with the amount, it will have to be resolved by a registrar. It's not just the cost of this hearing. It's the cost of the entire litigation.

[37] I. MARTINEZ: Okay.

"Thomas J."