IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Klippenstein Development Corp. v. Van Den Brink,* 2023 BCSC 961

Date: 20230606
Docket: S222624
Registry: Victoria

Between:

Klippenstein Development Corp. dba Blueprint Custom Homes

Plaintiff

And:

Jenna Louise Van Den Brink and Nathan Richard Van Den Brink

Defendants

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Plaintiff:	M. R. Waghray and C. Potter, Articled Student
Counsel for the Defendant:	R. E. Butler
Place and Dates of Trial/Hearing:	Victoria, B.C. March 27, 2023 and April 24, 2023
Place and Date of Judgment:	Victoria, B.C. June 6, 2023

The Application

[1] Jenna Van Den Brink and Nathan Van Den Brink (the "defendants" or "owners"), have applied for an order extinguishing a claim of lien (the "Lien") from their property (the "Property"), pursuant to s. 22 of the *Builders Lien Act*, S.B.C. 1997, c. 45 [*BLA*], and for costs in the cause.

[2] This is the defendants' second application. In December 2022, the defendants applied for the cancellation of the claim of lien upon payment of security, pursuant to s. 24 of the *BLA*. In oral reasons given on December 15, 2022, I dismissed that application and granted the defendants leave to bring this application under s. 22 of the *BLA*. I did not extinguish the Lien until the defendants had an opportunity to bring this application.

[3] On January 6, 2023, the parties entered into a lien security agreement, wherein the plaintiff, Klippenstein Development Corp. dba Blueprint Custom Homes ("KDC"), agreed to remove the Lien from the Property upon payment of $58,000 into the trust account of the defendants' solicitor (the "security"). That lien security agreement provided:

> Nothing in the security arrangement will affect the rights of the Defendants to claim that the Lien is improper or defective, or will otherwise affect any of the rights of the Defendants under the *Builders Lien Act*, including the right to make application to the Supreme Court of British Columbia relating to the further disposition of the Security Funds.

[4] Technically, this application is to release the security held by the defendants' solicitor, since the Lien has been released and the Certificate of Pending Litigation on file has been cancelled. The security is posted in place of the Lien. If I find that the Lien was invalid and should be extinguished, then there will be no basis to hold the security.

Background Facts

[5] The defendants own the Property at issue. They hired "Blueprint Custom Homes c/o Scott Klippenstein" to act as contractor to build a custom residential home on the Property. Scott Klippenstein prepared a residential construction

agreement (the "Contract") without legal assistance, using a "CCDC 5B 'Construction Management Contract – for Services and Construction'" as a template, and naming "Blueprint Custom Homes c/o Scott Klippenstein" as the construction manager.

[6] Construction began in December 2020. On or about November 19, 2021, KDC delivered an invoice to the defendants in the amount of $167,047.52, and demanded that the defendants agree to increase the agreed stipulated price to $730,000. On November 22, 2021, KDC filed the Lien against the Property for $167,047.52.

[7] The defendants say they never contracted with KDC, and they were never invoiced by that company. They say all money owed was to Mr. Klippenstein doing business as Blueprint Custom Homes.

[8] This case is unusual because it appears that the Lien was filed by the correct legal entity, but the Contract did not name the proper legal entity as the construction manager.

The Defendants' Submissions

[9] The defendants submit that where a person signs a contract as an agent for a limited liability company, they bear the onus of advising the third party of this fact or run the risk of being personally liable: *Pageant Media Ltd. v. Piche*, 2013 BCCA 537 at para. 41.

[10] At para. 45 of *Pageant Media Ltd.*, Justice Bennett noted the following passage from G.H.L. Fridman, Q.C., in *Canadian Agency Law*, 2nd ed (Markham: LexisNexis, 2012) at 151:

> An agent who in his own name enters into a written contract, not under seal, on behalf of a principal, will be personally liable on such contract unless "he indicates to the party with whom he is dealing that he is in fact acting only as agent for another". The onus is on the agent to indicate that he is contracting as an agent. If the agent fails to make this clear, he will be personally liable.

[11] The defendants argue that when Mr. Klippenstein signed the Contract, he did not indicate he was acting as an agent for KDC.

[12] The defendants submit that the symbol “c/o” is an abbreviation for the words “in care of”, citing *McLennan Estate (Re)*, [1940] 1 W.W.R. 465 at 470, 1940 CanLII 169 (Sask. Surr. Ct.).

[13] The defendants submit that KDC is not a contractor as defined by s. 1 of the *BLA* because KDC was not “engaged” by an owner to perform or provide work, or supply material.

[14] The defendants say Form 5 and the *BLA* require the lien claimant to identify the person who engaged the lien claimant, or to whom the lien claimant supplied material, and who is or who will become indebted to that lien claimant.

[15] In *Chandler v. Champion Enterprises (Canada) Ltd.*, 2013 BCSC 1518, the plaintiff had no agreement with the defendant, and no dealings with it.

[16] It is the defendants’ position that in the present case, KDC has no relationship with the owners of the Property. They submit the Contract was between Mr. Klippenstein, doing business as Blueprint Custom Homes, and the defendants.

[17] The defendants say the *BLA* creates a right to security for the claimant. The threshold of entitlement requires strict construction. They submit that strict construction is necessary because the *BLA* provides the extraordinary right of prejudgment security. Because the *BLA* creates new rights, the threshold question of entitlement is strictly construed; it is only once entitlement is established that the *BLA* is to be construed liberally and with consideration to its remedial purpose: *Bank of Montreal v. Peri Formwork Systems Inc.*, at para. 62, additional reasons 2012 BCCA 252, leave to SCC ref’d, 34958 (24 January 2013).

[18] The defendants also rely on *581582 B.C. Ltd. v. Habib*, 2013 BCSC 378 [*Habib*], and *A.W. Kennedy Construction Inc. v. Wan*, 2021 BCCA 175.

[19] In *Habib*, the lien was extinguished under s. 22 of the *BLA* because it did not accurately describe the party entitled to claim a lien. The lien in that case was filed under the name “ANE Consulting Ltd.”, and there was no such legal entity. Similar to the case at bar, the parties had contracted with ANE Consulting, which was an unincorporated business. The legal entity that allegedly carried out the work on the property was the numbered company 581582 B.C. Ltd. At para. 8, Justice Rogers found it was settled law that the lien claimant must strictly comply with the requirements of the *BLA*, citing *Nita Lake Lodge Corp. v. Conpact Systems (2004) Ltd.*, 2006 BCSC 885 [*Nita Lake*].

[20] In *A.W. Kennedy Construction Inc.* at paras. 26-27, the Court of Appeal found that the defects in the lien form did not affect the substance of the form. The Court relied on s. 28 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 to remedy the defect by finding that the error was a deviation not affecting the substance of the form, and was not calculated to mislead.

[21] The defendants submit that the errors in the completion of this Lien *do* alter the substance of the rights by substituting a new party who is a stranger to the Contract. They say that misnaming a lien claimant constitutes a defect in the manner of filing a lien, relying on *Omnique Construction Inc. v. Xu*, 2017 BCSC 208 at para. 42.

[22] The defendants submit that an undisclosed principal to a construction contract cannot enforce a builder’s lien. The principal must be “engaged” by an owner to perform work or to supply material.

[23] Justice Steeves looked at the meaning of the term “engaged” in *Chandler*. He found that the term “engaged” included “employed”, or when a person “is being occupied, taking part or being involved in something or committed to an undertaking”: para. 33.

[24] The defendants submit that an undisclosed principal may be able to be sued in common law, but not under the *BLA*. They argue that the *BLA* requires strict

compliance. It is the position of the defendants that one cannot have a stranger to the property filing a lien. They say the onus is on the agent to disclose the existence of a principal.

The Plaintiff's Submissions

[25] The plaintiff submits that the Lien properly names KDC as the entity that provided the supplies and worked on the Property.

[26] KDC was incorporated in 2016, and the business name of "Blueprint Custom Homes" was registered. Mr. Klippenstein is a shareholder and director of KDC.

[27] KDC holds third-party liability insurance policies pertinent to the business of residential home construction and New Home Warranty Coverage.

[28] It is the plaintiff's position that, when Mr. Klippenstein added the words "c/o Scott Klippenstein" to the Contract, he did not mean he was operating a sole proprietorship, but that he was the authorized representative for dealings with the construction.

[29] The plaintiff submits it was KDC that performed the work and supplied material for the benefit of the defendants, and therefore it is KDC who is entitled to file a lien pursuant to s. 2 of the *BLA*. According to the plaintiff, it would be an error to name Blueprint Custom Homes on the Lien, as Blueprint Custom Homes is a trade name and not a legal entity.

[30] The plaintiff argues that s. 3(1) of the *BLA* provides a remedy to KDC. This section says that an improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

[31] The plaintiff submits that the defendants were aware of the work that was being done on the Property by an entity known as Blueprint Custom Homes. Whether there was an improper naming of the parties to the Contract, the plaintiff would still be entitled to a claim of lien for providing the work and materials for the benefit of the owners with their prior knowledge.

[32] The defendants respond that you cannot have a stranger filing a lien, and that knowledge of an improvement is not knowledge of the improver. They say the defendants had the right to know who was doing the work and who is claiming the Lien. They further submit it is clear that the defendants thought they were dealing with a proprietorship.

[33] The defendants further respond that the onus is on the contractor to advise of who they are acting for; if they do not disclose the principal, they have run the risk of becoming personally liable.

Analysis

Governing legislation

[34] Section 1 of the *BLA* defines "contractor" as follows:

> "contractor" means a person engaged by an owner to do one or more of the following in relation to an improvement:
>
> (a) perform or provide work;
>
> (b) supply material;
>
> but does not include a worker;

[35] The following is the definition of "subcontractor" found in s. 1 of the *BLA*:

> "subcontractor" means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:
>
> (a) perform or provide work;
>
> (b) supply material;
>
> but does not include a worker or a person engaged by an architect, an engineer or a material supplier;

[36] Sections 2 and 3 of the *BLA* provide:

> **Lien for work and material**
>
> **2** (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,
>
> (a) performs or provides work,
>
> (b) supplies material, or

> (c) does any combination of those things referred to in paragraphs (a) and (b)
>
> has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
>
> (d) the interest of the owner in the improvement;
>
> (e) the improvement itself;
>
> (f) the land in, on or under which the improvement is located;
>
> (g) the material delivered to or placed on the land.
>
> (2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.
>
> **Deemed authorization**
>
> **3** (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.
>
> (2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.
>
> (3) Subsection (1) does not apply to an improvement on land owned by the government.

[37] I accept that the work was performed and materials were supplied to the Property, and that the defendants have benefited. I also accept that it was KDC who performed the work and supplied the materials. However, the owners did not "engage" KDC; the construction manager named on the Contract is "Blueprint Custom Homes c/o Scott Klippenstein". Therefore, KDC was not a "contractor" as defined by the *BLA*. Since Blueprint Custom Homes is a trade name, the contractor under the *BLA* is Scott Klippenstein.

[38] To be a subcontractor, KDC would have to have been "engaged by a contractor or another subcontractor": *BLA*, s. 1.

[39] In *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2022 BCCA 81 [*JVD*], leave to appeal to SCC ref'd, 40172 (9 February 2023), one of the issues the Court of Appeal dealt with, in a case involving complex contractual relationships, was whether a subcontractor ("JVD") could file a lien because it had subcontracted with IDL Projects Inc. ("IDL"), which did the work. The Court stated as follows:

> [35] In order for a subcontractor to be entitled to a builder's lien, it must be a “subcontractor” under the statute: it must be able to trace the construction that it is working on to a request or a deemed request by an owner.
>
> [36] It is apparent that the then-owner of the fee simple in the transmission line land had prior knowledge of the construction of the transmission line. Therefore, under s. 3(1) of the statute, the owner was deemed to have requested it. Equally, it is apparent that the owner of the statutory right of way actually requested construction of the transmission line. Therefore, if the subcontractor on the transmission line had been unpaid for its work, it would have had a right to file a lien against both the fee simple interest and the statutory right of way.

[40] At para. 42 of *JVD*, the Court referenced the purpose of similar legislation, as articulated in a passage from *Hickey v*. *Stalker*, [1924] 1 D.L.R. 440 at 441, 1923 CanLII 494 (Ont. C.A.):

> Speaking generally, the object of the *Mechanics' Lien Act* is to prevent owners of the land getting the benefit of buildings erected and work done at their instance on their land without paying for them.

[41] The trial court in *JVD* (2020 BCSC 374) concluded at para. 44 that JVD did have a right to claim a lien because the *BLA* does not require a lien claimant to personally perform work in relation to an improvement. Entitlement to a lien will arise if the claimant “provides” work. In that case, JVD performed its contractual obligation by subcontracting that work to IDL. The Court of Appeal accepted this analysis at para. 62.

[42] This case is consistent with *JVD* and *Chandler*, and distinguishable from *Habib* and *Nita Lake*.

[43] In *Chandler*, Justice Steeves interpreted the word “engaged” found in ss. 2 and 3 of the *BLA* to include a person being occupied, taking part in or being committed to an undertaking, without the requirement of a formal contract or consideration between the two persons: para. 33. He concluded that the plaintiff was a subcontractor for the purposes of the *BLA*. Justice Steeves noted at para. 37 that it is the nature of a subcontractor to be engaged by a contractor and to have minimal or even no dealings with the owner; the fact that the subcontractor is not known to the owner is not a bar to the claim of lien.

[44] In this case, Form 5 was correctly completed because KDC performed the work and supplied the materials. That distinguishes this case from *Habib*, where the Form 5 named an entity that did not exist.

[45] In *Habib*, the contractor was identified in the claim of lien by a trade name rather than the contractor's correct corporate name. Justice Rogers clarified that an immaterial error from the lien form "would involve something like inadvertently putting the date money comes due in the space allotted for sum claimed and putting the sum claimed in ... where the date ought to be": para. 10. Justice Rogers found that the lien was not filed as required by the *BLA*, that the error in question was not an immaterial deviation from the prescribed form, and that the lien must be extinguished pursuant to s. 22 of the *BLA*.

[46] In *Nita Lake*, the claim of lien incorrectly identified the corporation that engaged the claimant, and incorrectly stated that corporation was or would become indebted to the claimant. The named corporation did not have a contractual relationship with the claimant, and was not the party that engaged the claimant. The lien named an agent with whom the claimant had no contract. Justice Pitfield found that the claim of lien failed to satisfy the requirements of the *BLA*, and extinguished it pursuant to s. 22. In coming to this conclusion, Pitfield J. found that the failure to describe the contracting parties was fatal to the lien claim: para. 11.

[47] Nita Lake was distinguished in *K.A. Ray Limited v. UPA Group Canada Limited Partnership*, 2007 BCSC 1881 [*K.A. Ray*], leave to appeal to BCCA ref'd 2007 BCCA 607. In *K.A. Ray*, similar to this case, the liens were filed by subcontractors against the owner of the property, rather than the contractor. Justice Beames accepted the subcontractor's submission that Form 5 permits the naming of either the contractor or a party "to whom a lien claimant supplies material and who is or will become indebted to the main claimant": *K.A. Ray* at paras. 8-9.

[48] Justice Beames pointed out that, in *Nita Lake*, the property owner directly contracted with the lien claimant, and the claim of lien incorrectly named a general management company as a party. The general management company had no

interest in the land and no contractual relationship with the lien claimant: *K.A. Ray* at para. 9.

[49] In *Chandler*, Steeves J. relied on *K.A. Ray* and found that the lien was against the land, not the contractor. Champion was the owner of the land and was or would become indebted to the plaintiff Chandler by operation of the *BLA*: para. 43.

[50] I rely on *JVD*, *Chandler* and *K.A. Ray*. I find that Scott Klippenstein is the contractor under the *BLA*, since Blueprint Custom Homes is not a legal person. Scott Klippenstein engaged KDC to perform the work and supply the material to the Property. That makes KDC a subcontractor. Although the defendants were not aware of the existence of KDC, they were aware that work was being done at their request on the Property. According to s. 3(1) of the *BLA*, an improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

[51] Section 3 of the *BLA* requires that the owner has knowledge of the work, not of the identity of the person performing the work. Accordingly, a stranger to the owner can file a lien because, having worked on or supplied material to the property, that person is not a stranger to the property. Knowledge of the improvement is required, not knowledge of the improver.

[52] I am mindful that the purpose of the *BLA* is to prevent owners of the land from getting the benefit of buildings erected and work done at their request, on their land, without paying for them.

Conclusion

[53] I conclude that the Lien filed by KDC was properly filed, and the security paid pursuant to the security agreement should remain in place until this matter is resolved either at trial or by consent of the parties.

Costs

[54] The plaintiffs are entitled to their costs of both applications at Scale B.

"B. M. Young, J."
The Honourable Madam Justice Young