IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *TDM Excavating & Contracting Ltd. v. 1046416 B.C. Ltd.,* 2023 BCSC 944

Date: 20230602
Docket: S222350
Registry: New Westminster

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Between:

TDM Excavating & Contracting Ltd.

Plaintiff

And

1046416 B.C. Ltd., Christopher Shiran Alangaramoney, Khanh Vy Ho, Loc Nguyen, Van Luan Ngo, Erwin Rzepka, Liaqat Ali Bajwa, Samara Ajmal Bajwa, Ranjini Alangaramoney, Samuel Alangaramoney, and Blueline Homes Ltd.

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:	D. Lehrer
Counsel for the Defendants Liaqat Ali Bajwa, Samara Ajmal Bajwa, and Blueline Homes Ltd.:	J. Singh
No other appearances	
Place and Dates of Hearing:	New Westminster, B.C. April 29, 2022 and April 6, 2023
Place and Date of Judgment:	New Westminster, B.C. June 2, 2023

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Introduction

[1] The plaintiff, TDM Excavating & Contracting Ltd., seeks a declaration that it is entitled to a lien against funds paid into court by the defendants Liaqat Ali Bajwa, Samara Ajmal Bajwa, and Blueline Homes Ltd. arising from liens claimed by the plaintiff pursuant to s. 4 of the *Builders Lien Act*, S.B.C. 1997, c. 45 [*Act*].

[2] The plaintiff has discontinued its claims against the other defendants, settling with most of them. The total claim of the plaintiff was for $205,488.78. With funds paid in settlement, that claim has been reduced to $95,488.78.

[3] By way of consent order made July 22, 2021, defendants Liaqat Ali Bajwa and Samara Ajmal Bajwa (collectively, the “Bajwa Defendants”) paid into court $45,000 with respect to the claim of lien against their lands, and Blueline Homes Ltd. (“Defendant Blueline”) paid into court $45,000 with respect to the lien claim against its lands.

Background

[4] TDM is a construction company that focuses on site servicing work.

[5] The defendant 1046416 B.C. Ltd. (the "Defendant 104'') is a company incorporated in British Columbia.

[6] The defendants Christopher Shiran Alangaramoney, Khanh Vy Ho and Loc Nguyen are directors of Defendant 104.

[7] On June 22, 2018, Defendant 104 entered into an agreement with TDM (the "Agreement"). TDM agreed to perform the following civil works for a subdivision based on a drawn plan:

a) Sanitary and storm works;

b) Road works and sidewalks;

c) Video, air and compaction tests as required;

d) Other civil works as per the plan;

e) Hydro, Shaw and gas; and

f) Street lights.

(Collectively, the “Work”.)

[8] The contract price under the Agreement between Defendant 104 and TDM for the above civil works was $345,500 plus GST.

[9] The properties upon which the Work was being performed included the following:

a) 16165 111A Avenue, Surrey, British Columbia, with a legal description of:

PID: 030-539-706
Lot 1 Section 14 Block 5 North Range 1 West New Westminster District Plan EPP82445.

(the “Bajwa Lands”); and

b) 16145 111A Avenue, Surrey, British Columbia; with a legal description of:

PID: 030-539-676
Lot 4 Section 14 Block 5 North Range 1 West New Westminster District Plan EPP66699.

(the “Blueline Lands”).

[10] TDM performed the Work pursuant to the Agreement with Defendant 104 on improvements being constructed on various lots, which include the Bajwa Lands and the Blueline Lands.

[11] Defendant 104 sold one lot in the subdivision, the Bajwa Lands, to the Bajwa Defendants on March 13, 2019.

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[12] Defendant 104 sold the Blueline Lands to Defendant Blueline on October 15, 2019.

[13] On November 6, 2019, TDM made a lien claim in the amount of $289,106.47 pursuant to the *Act* and filed it against the Bajwa Lands and the Blueline Lands at the New Westminster Land Title Office which was registered under No. CA7856244 (the "Lien").

[14] The Lien is based on invoices rendered between September 14, 2019 and November 30, 2019.

[15] According to submissions of the plaintiff, settlements with other defendants totalling $110,000 have been made, leaving a claim of $95,488.78 remaining

[16] TDM's notice of civil claim was filed on December 20, 2019.

[17] There is no dispute that the Agreement is a valid and binding contract and that the amounts were due and owing by Defendant 104 and liable to TDM for the debt.

[18] TDM brings this application under R. 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 for summary judgment.

Is the matter suitable for determination summarily?

[19] The parties agree that this matter is suitable for determination under R. 9-7. The record is comprehensive, including uncontroverted expert evidence of the defendants. The sole question is interpretation and application of the *Act* to the largely undisputed facts. The value of the claim is now $95,488.78.

[20] I agree that I am able to reach a fair and just result on the material before me and that resolving the issue summarily would be proportionate and efficient in the circumstances without the need to refer the matter to the trial list.

The Legislative Scheme

[21] Section 20 of the *Act* governs the time for filing a claim of lien:

> **Time for filing claim of lien**
>
> 20(1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of
>
> (a) the contractor or subcontractor, and
>
> (b) any persons engaged by or under the contractor or subcontractor
>
> may be filed no later than 45 days after the date on which the certificate of completion was issued.
>
> (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
>
> (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
>
> (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

[22] Here there was no certificate of completion issued and so s. 20(2) governs the time for filing.

[23] The Bajwa and Blueline Defendants are "owners" for the purposes of s. 20(2) because they had an interest in the subject lands at the time the claim of lien was filed. The definition of "owner" in s. 1 of the *Act* is inclusive, not exclusive, of the fact that the Work was not done at the defendants' request, but was done for their direct benefit. They are owners "in every usual sense of the word", including under the *Act*: *Port Royal Riverside Development v. Vadasz*, 65 B.C.L.R. (3d) 367 at paras. 13 and 14, 1998 CanLII 2175 (S.C.).

[24] The claim for lien was filed on November 6, 2019. Therefore the 45-day post-completion period under ss. 20(2)(a) and (b) runs from September 22, 2019.

Was the Agreement a head contract? If so, was it completed on or before September 22, 2019?

[25] Where there is a head contractor engaged and the head contract has been completed, the 45-day period runs from the completion date under s. 20(2)(a) of the *Act*.

[26] "Head contractor" is defined under s. 1 of the *Act* as:

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> … a contractor who is engaged to do substantially all of the work respecting an improvement, whether or not others are engaged as subcontractors, material suppliers or workers.

[27] The defendants submit that TDM was a head contractor because the improvement to the lands was the Work and nothing more. They say the purpose of the Agreement with Defendant 104 was to obtain building permits and not to go further on and build on the lands. As such, TDM was engaged to do substantially all of the work respecting that improvement.

[28] TDM argues that the defendants' position is not consistent with the purpose of the *Act*. The Work was clearly, they submit, part of the larger work needed to improve the lands. As such, TDM was not the head contractor. In support of this position TDM refers me to *NR Excavating & Services Ltd. v. Mand*, 2013 BCSC 723 at paras. 59-70 [*NR Excavating*] for the proposition that excavation and civil services are not complete improvements under the *Act*, but are part of a larger improvement being the development as a whole, including the building of dwelling units.

[29] In fact, the lands were subsequently built upon, and Defendant 104 was one of the builders later engaged to do that work by subsequent purchasers.

[30] "Improvement" is defined under s. 1 of the *Act* as <u>including</u>:

> … anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

[31] "Completed" is defined under the *Act* for the purposes of s. 20(2) as meaning "substantially completed or performed, not necessarily totally completed or performed": *Act*, s. 1.

[32] If as the defendants submit, TDM is the head contractor, then under s. 1(2) of the *Act*, a head contract under s. 20(2)(a) has been "substantially completed" as follows:

> (2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed <u>if the work to be done under that contract is capable of completion or correction at a cost of not more than</u>

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> (a) 3% of the first $500 000 of the contract price,
>
> (b) 2% of the next $500 000 of the contract price, and
>
> (c) 1% of the balance of the contract price.
>
> [Emphasis added.]

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[33] The building permit for the Bajwa Lands was issued on July 5, 2019. The City of Surrey confirmed that it was ready to issue a building permit for the Blueline Lands on July 20, 2019. The defendants rely on those facts to argue that the Work was substantially completed by July 20, 2019. This does not take into account the evidence that under the Agreement, the Work contracted for was not completed. The Agreement makes no mention of building permits requiring to be issued and, if and when they were, that the Work would be completed at that time.

[34] The parties agree that some of the work contracted for under the Agreement was outstanding or otherwise to correct deficiencies as of September 22, 2019. The defendants' own expert, Mr. Adam Breadmore, a professional quantity surveyor, valued that work at $12,440. Mr. Breadmore arrived at this value by considering project deficiencies which included a streetlight, asphalt overlay, sod, and grout catch basin. The value of the contract was $362,775 (inclusive of GST). For some unexplained reason, Mr. Breadmore does not use that figure as the value of the Agreement, instead he applies a 20% "construction contingency" and values the civil works performed under the Agreement at $389,324. Mr. Breadmore concludes that the project's total estimated cost is $467,189 (inclusive of the contingency). With respect to the construction contingency, Mr. Breadmore states in his report:

> … I estimated the total project cost to be $467,189. This amount includes a construction contingency of 20%. This ratio of contingency is standard for civil construction estimates. All assumptions made and estimating practices are per industry standard and my experience as a Professional Quantity Surveyor.

[35] Mr. Breadmore completed his report on April 21, 2021. In the methodology section of his report he notes that "… this opinion is based primarily on secondhand documents as the project was completed ahead of my engagement." He further

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elaborates on the methodology he used in arriving at his opinion and values as follows:

> … the Civil Engineer's Certificate of Substantial Completion, dated July 29, 2020, notes deficiencies and associated values. However, these values are derived from the Civil Engineer's estimate of the project, which I was not provided with. It would also be unreasonable to apply these values using the "3-2-1 formula" above as equal works are estimated at a different value under the Plaintiff's own cost estimation made when they entered their contract for the work. As such, I prepared my own cost estimate of the works and assessed valuations of the deficiencies for a consistent comparison.

[36] I do not agree with Mr. Breadmore's methodology. The *Act* is clear. Section 20(2) refers to the contract price as the amount to be used to determine substantial completion. His value of the contract used to perform his calculations is in error, which in turn renders his opinion that the work was substantially completed under the *Act* unreliable and erroneous.

[37] However, I do accept Mr. Breadmore's valuation of $12,440 for work to be completed. That amount is 3.43% of the contract price. Therefore, as at the time of filing the claim for lien, the Agreement was not substantially performed because the work remaining under the Agreement is more than 3% of the first $500,000 of the contract price as set out in s. 20(2)(a) of the *Act*. Therefore, if the plaintiff was a head contractor, the plaintiff filed in time under the *Act*.

[38] While I do not need to address the defendant's first position, which is that the improvement is not limited to their work, but ultimately is the building of dwelling units on the lands, I will address that position as there is recent authority brought to my attention by the defendants which may lead to some confusion.

<u>If the Agreement was not a head contract, was the improvement completed or substantially ready for the use intended on or before September 22, 2019?</u>

[39] Under s. 1(3) of the *Act*, where there is no head contract, an improvement under s. 20(2)(b) has been completed as follows:

> (3) For the purposes of this Act, an improvement is completed <u>if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.</u>
>
> [Emphasis added.]

[40] The plaintiff argued that pursuant to *NR Excavating,* there is no purpose to the plaintiff's Work without the construction of dwellings:

> [62] In the circumstances of this case, it is insensible to view the relevant "improvement" as consisting of only the work performed by JMT. JMT's work and services formed an integral part of the construction of the dwellings in the development project. There would be no purpose in JMT's work without constructing the dwellings. JMT's contract was not for construction of a discrete functional improvement.
>
> [63] A rational, common sense interpretation of the meaning of "improvement" in the circumstances of this case is that it refers either to the entire 27 residence project, or, as a minimum, to the individual clusters. On either interpretation, there was no head contract in this case, as the owners contracted with JMT and other contractors directly to perform various aspect of the work on the improvement.
>
> [64] On the argument of the owners, the work of each contractor contracting with the owner should be considered a distinct improvement. For purposes of lien filing times, the *Act* would not need to distinguish between cases in which there is a head contract and cases where there is not. However s. 20(2)(b) contemplates that there are cases where there is an improvement for which there is no head contract …
>
> [65] Other sections of the *Act* reinforce the meaning of the word "improvement" as referring to the entire functional structure, in the context relevant here. For example, s. 35 limits the liability of a good faith purchaser of an improvement to 10% of the "purchase price of the improvement." In relation to the project in question, this would limit the liability of a purchaser to 10% of the purchase price of the dwelling unit. There is no purchase price for separate elements of the unit. Section 1(3) refers to completion of an improvement, in terms of whether the improvement or a substantial part of it is ready for use or is being used for the purpose intended. Once again, this must refer to the dwelling unit in the circumstances of this case, not the excavation and site services work.
>
> [66] Where there is no head contract, s. 20(2)(b) stipulates that the time for filing claims of lien depends upon completion or abandonment of the improvement, not the contractor's contract with the owner. In *Carmel Pacific Enterprises Inc. v. Spirit Equestrian Centre Ltd.*, 2005 BCCA 266, the court held that in the case of a claim of lien by a construction manager in relation to the construction of a residence, s. 20(2)(b), applied, and the relevant improvement was the residence, which was completed more than 45 days prior to the filing of the lien, notwithstanding that work under the construction manager's contract continued in relation to a swimming pool. The chambers judge had erred by asking himself whether the contract of the construction manager had been completed, whereas s. 20(2)(b) focuses upon the completion or abandonment of the improvement.

[41] The facts in *NR Excavating* are similar to the facts before me. There was no head contract in the sense that the defendants contracted directly with others to

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perform the dwelling building services. By June 2019, the building of dwellings had started on the lands in question.

[42] It makes eminent sense to me that, as Justice Verhoeven finds in *NR Excavating*, it is "insensible" to view the relevant improvement as only the Work under the Agreement in these circumstances. That would be inconsistent with the legislative scheme.

[43] The defendants refer me to a recent decision of this Court which they submit is contrary to *NR Excavating* and supports their position that the Agreement addresses the entire improvement. In *Stoneworks Marble & Granite Ltd. v. Edgeline Construction Ltd.,* 2022 BCSC 1096 [*Stoneworks*], this Court held that the improvement at issue was limited to the services under the plaintiff's contract. There was no head contract found to exist. The plaintiff supplied materials and labour in respect of stone work in the kitchen and bathrooms in the defendant's property. The Court held that the contract for materials and labour was the "improvement" and the purpose of the improvement was to obtain an occupancy permit, since the property could not be listed for sale without the permit.

[44] The facts differ significantly from the facts before me, and on that point alone the decision is distinguishable. The plaintiff in *Stoneworks* was a supplier of materials and as such filed a material supplier lien, which is governed by different legislative considerations. More generally problematic, however, is that the Court in *Stoneworks* followed the decision in *General Paint Ltd. v. The Board of School Trustees of School District No. 38 (Richmond)*, 2001 BCSC 222. That decision was made pursuant to legislation that has been replaced by the current *Act*. Furthermore, the Court in *Stoneworks* was not referred to *NR Excavating.* The Court therefore may have been led into error. Given the value of the lien in *Stoneworks* was $7,500, it is not surprising that no appeal was taken.

[45] I find that *Stoneworks* is not helpful in the circumstances before me.

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[46] The plaintiff's claim of lien was therefore filed in time pursuant to s. 20(3) of the *Act* as the improvement was not completed by September 22, 2019.

Conclusion

[47] In conclusion, the plaintiff is entitled to a declaration of lien against the Bajwa Lands and Blueline Lands in the amount of $95,488.78. I direct that the $90,000 paid into court is to be paid to the plaintiff toward satisfaction of the lien.

Costs

[48] If the parties cannot agree on the matter of costs, they may contact trial scheduling to arrange for a hearing.

"Wilkinson J."

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