

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Western Surety Company v. VVI
Construction Ltd.*,
2024 BCSC 190

Date: 20240118
Docket: S62013
Registry: Kamloops

Between:

Western Surety Company

Plaintiff

And:

**VVI Construction Ltd., Lortap Enterprises Ltd., Bruce Leonard
Walker, Kenneth Lewis Hendrickson, James Gordon Hampton
and Vic Van Isle Construction Ltd.**

Defendants

Before: The Honourable Justice Donegan
in Chambers

Oral Reasons for Judgment on Application for Default Judgment

Counsel for the Plaintiff (by video):

A.K. Laverdure

No other appearances:

Place and Date of Hearing:

Kamloops, B.C.
December 18, 2023

Place and Date of Judgment:

Kamloops, B.C.
January 18, 2024

Introduction

[1] The plaintiff, Western Surety Company (“Western”), seeks default judgment against one of the defendants in this action, James Gordon Hampton, pursuant to Rule 3-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. Asserting that its claim is for recovery of money in a specified or ascertainable amount, Western also seeks a judgment for the amount claimed in the Amended Notice of Civil Claim, interest to which it is entitled, and costs.

[2] Filed in support of the application are two affidavits of service, an affidavit from a representative of Western and an affidavit from counsel's practice assistant.

Facts

[3] James Toothill is the claims manager of Western. He deposed that before using bonds for a client, Western undertakes a process of underwriting, which includes obtaining an indemnity and security agreement from the client and others. The purpose of the indemnity agreement, as he explains it, is to recover from the indemnitors any amounts that Western expends in the course of dealing with claims under the bonds, including amounts paid to claimants under those bonds.

[4] In this case, Western entered into an Indemnity and Security Agreement, (the “Indemnity Agreement”) with all of the defendants on July 16, 2020. A copy of the Indemnity Agreement is attached to Mr. Toothill's affidavit. I note that the signature of Mr. Hampton, that is the named defendant Mr. Hampton, appears below his typed name at page 10 of the Indemnity Agreement. I also note that below his signature is his residential address, which is identified as 4456 Airport Way in Revelstoke, British Columbia.

[5] Among the terms of the Indemnity Agreement are the following:

- 1) The defendants will indemnify Western for any loss, damages, expenses, costs, claims, and liability, including legal, consulting, and adjusting fees that Western incurs arising from Western issuing the surety bonds for any of the defendants, or any default by the defendants under the Indemnity Agreement.

- 2) All funds due and coming due to VVI Construction Ltd. ("VVI") under any contract for which Western issued a surety bond or trust funds for the benefit of potential claimants under any bonds issued by Western. If Western assumes or discharges such obligations, it is entitled to assert the claim of such person to the trust funds.
- 3) Western is entitled to interest on amounts owing under the Indemnity Agreement at the CIBC prime rate, plus 2% per annum.
- 4) The defendants are jointly and severally liable for all of their obligations.

[6] VVI is a construction contractor based in Revelstoke, British Columbia.

[7] On July 27, 2020, at the request of VVI, Western issued a labour and material payment bond numbered 445,422 in the amount of \$2,106,191 in respect of a contract between the District of Sicamous and VVI (the "Sicamous Bond").

[8] On October 19, 2020, again at the request of VVI, Western issued a labour and material payment bond numbered 529,608 in the amount of \$874,587.79 in respect of a contract between VVI and Parks Canada regarding an entrance-gate rehabilitation project in Kootenay National Park (the "Parks Canada Bond")
Collectively, as the applicant has, I will refer to the Sicamous Bond and the Parks Canada Bond as the "L & M Bonds."

[9] VVI failed to pay some of its subcontractors as required under its subcontracts on these projects, so various subcontractors made claims under the L & M Bonds, which Western was obliged to pay.

[10] Between December 2021 and April 2023, Western began receiving claims from subcontractors under the L & M Bonds, and Western made payments in respect of each claim. These are set out at paragraph 10 of Mr. Toothill's affidavit, in the total amount of \$1,471,361.30.

[11] Under the Indemnity Agreement, VVI was required to pay Western these amounts. When it did not pay, its failure caused Western to incur additional costs, as

set out at paragraphs 12 and 13 of Mr. Toothill's affidavit, in the total amount of \$62,143.92.

[12] As Mr. Toothill outlined in his affidavit, Western has received, as of the end of April 2023, the amount of \$948,495.05 in respect of payments made by, or on behalf of VVI, toward the amount owing. This leaves a balance owing in the amount of \$585,010.17 (the "Claim Amount"). The particulars of these costs incurred by Western in connection with the L & M Bonds are set out in Western's Amended Notice of Civil Claim.

[13] Western has made several demands for payment of this amount, or earlier balances of the amount owing, the most recent of which was on March 23, 2023. Despite these demands, the defendants have refused or neglected to pay the amount owing under the Indemnity Agreement.

[14] Interest has accrued on the Claim Amount at a rate of 8.70% from March 23, 2023 through June 7, 2023; at a rate of 8.95% from June 8, 2023 through July 12, 2023; and at a rate of 9.20% from July 13, 2023 through to December 11, 2023, each of these rates being CIBC's prime rate, plus 2%, as set out and agreed to in the Indemnity Agreement, for a total interest amount of \$38,170.71.

[15] Western filed its Notice of Civil Claim on March 27, 2023. Process server, Norma Harisch, served the Notice of Civil Claim, along with a letter from counsel for Western personally on the defendant, Mr. Hampton, on April 11, 2023 at 4:33 p.m. The letter, dated March 30, 2023, stated that Western would require strict compliance with the time limit specified in the *Rules* for Mr. Hampton to file his Response to Civil Claim and that failure to do so would result in Western seeking default judgment against him.

[16] Western filed an Amended Notice of Civil Claim on June 8, 2023, pursuant to an order granted a few days earlier. Process server, Norma Harisch, again served this Amended Notice of Civil Claim, along with the order underpinning it, personally on the defendant, Mr. Hampton, on June 15, 2023 at 5:37 p.m.

[17] Although not in the materials provided to me in this application, I am aware that Western had attempted to obtain default judgment against Mr. Hampton on the basis of his failure to file a response in the summer of 2023, but the Registrar directed that the application be brought before a Judge or Associate Judge in chambers, which Western has now done.

[18] Western filed the within application on November 24, 2023, and I heard it on December 18, 2023.

Discussion and Decision

[19] The Rule governing default judgment is Rule 3-8 of the *Rules*. Under subsection (1), a plaintiff may proceed against a defendant under this Rule if the defendant has not filed and served a Response to Civil Claim and the period for filing and service has expired.

[20] Under subsection (2), a plaintiff who wishes to proceed against a defendant under the default judgment rule must file: proof of service of the Notice of Civil Claim on the defendant; proof that the defendant has failed to serve a Response to Civil Claim; a requisition endorsed by the Registrar with a notation that no Response to Civil Claim has been filed by the defendant; and a draft default judgment order in Form 8.

[21] Rule 4-3(1)(a) provides that an originating pleading such as a Notice of Civil Claim must be served by personal service to be proven by way of affidavit of personal service in Form 15.

[22] I am satisfied that the requirements of Rule 3-8(1) and (2) have been met. Western has filed all of the documents required by subsection (2), and I am satisfied Mr. Hampton has not filed a Response to Civil Claim within the period of time he is required to do so. The period for filing and serving the Response to Civil Claim has expired.

[23] At the hearing, I raised a concern about proof of service. The process server, Ms. Harisch, deposed that she served the Amended Notice of Civil Claim and other documents by:

... handing them to and leaving them with James Gordon Hampton at 4456 Airport Way, Revelstoke, BC, on June 15, 2023, at 5:37 p.m. At the time of service, the person I served admitted to being James Gordon Hampton, the correct person to be served in this proceeding.

[24] I am satisfied from the whole of the evidence that Western has established Mr. Hampton was personally served with the Amended Notice of Civil Claim on June 15, 2023 at 5:37 p.m. The person who admitted to the process server that he was James Gordon Hampton and the correct person to be served in this proceeding was located and served at 4456 Airport Way in Revelstoke. This is the same address that appears below Mr. Hampton's signature at page 10 of the Indemnity Agreement found in Mr. Toothill's affidavit. Taken all together, I am satisfied this is sufficient evidence to conclude that personal service upon Mr. Hampton, the defendant in this proceeding, has been proven.

[25] Rule 3-8(3) sets out claims for which default judgment is available and reads as follows:

Claims for Which Default Judgment Is Available

Claim for specified or ascertainable amount

(3) If the plaintiff's action against a defendant includes a claim for recovery of money in a specified or ascertainable amount, the plaintiff may

(a) on that claim, obtain judgment in Form 8 against that defendant for an amount not exceeding the total of

(i) the amount claimed,

(ii) the interest, if any, to which the plaintiff is entitled, and

(iii) costs, and

(b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).

[26] I also note subsection (4) deals with interest and reads as follows:

Interest

(4) For the purpose of subrule (3), a claim may be treated as a claim for recovery of money in a specified or ascertainable amount even though

(a) part of the claim is for interest accruing after the date of the notice of civil claim, and

(b) the interest is to be computed from the date of the notice of civil claim to the date that judgment is granted.

[27] The key requirement in Rule 3-8(3) for default judgment in a sum certain is that there be a claim for “recovery of money in a specified or ascertainable amount”. The Court of Appeal discussed this concept recently in *Tiamzon v. Vandt*, 2020 BCCA 336 at paras. 17–18 as follows:

[17] The key requirement in R. 3-8(3) for a default judgment in a sum certain is that there be a claim for “recovery of money in a specified or ascertainable amount”. That provision replaces the requirement in former R. 17 that the claim be for recovery of a debt or liquidated demand. Under R. 17, the test for a debt or liquidated demand, accepted in *Standard Oil Company of British Columbia Limited v. Wood* (1964), 47 W.W.R. 494 (B.C. Co. Ct.), was that set out in *The Annual Practice*, 1964 ed., referred to at 497:

“Debt or Liquidated Demand.’ - A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a ‘debt or liquidated demand,’ but constitutes ‘damages.’”

[18] I take the language of R. 3-8(3) of the *Supreme Court Civil Rules* “specified or ascertainable amount” to be a modern expression of that same concept; I do not see the current rule as diminishing the need for the sum sought to be readily discernible, or calculable in the sense described in *Standard Oil*, on the pleadings alone. This conclusion is consistent with the balance of R. 3-8, which allows for default judgment with damages to be assessed.

[28] I have reviewed the Amended Notice of Civil Claim and find that it satisfies the key requirements of Rule 3-8(3). The sum of money due and payable under the Indemnity Agreement has been ascertained and/or is readily capable of being ascertained as a mere matter of arithmetic. There is no investigation beyond mere calculation.

[29] In the end result, I grant all of the orders sought by Western in its application, including costs in the amount of \$1,454.88. Western has provided a draft bill of costs, and I am satisfied that it is appropriate to exercise my discretion in this case to award lump sum costs rather than have them assessed. Having them assessed would only add unnecessary and additional inconvenience and cost.

“S.A. Donegan J.”

DONEGAN J.