

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *BSSD Excavating & Landscaping Ltd. v.
Green Blvd. Construction Ltd.*,
2023 BCSC 1685

Date: 20230927
Docket: S-249324
S-249325
Registry: New Westminster

Between:

BSSD Excavating & Landscaping Ltd.

Plaintiff

And

Green Blvd. Construction Ltd. and Randhir S. Atwal

Defendants

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:

J. Singh

Counsel for the Defendants:

R. Kusuhara

Place and Date of Hearing:

New Westminster, B.C.
August 1 & 2, 2023

Place and Date of Judgment:

New Westminster, B.C.
September 27, 2023

I. INTRODUCTION

[1] The defendants apply in two parallel proceedings for orders pursuant to s. 25, or in the alternative s. 24, of the *Builders Lien Act*, SBC 1997, c. 45, cancelling two builders liens and the associated certificates of pending litigation. The defendants also apply pursuant to ss. 256 and 257 of the *Land Title Act*, RSBC 1996, c. 250, to cancel the certificates of pending litigation.

II. BACKGROUND

[2] This litigation arises from a residential construction project. The plaintiff is BSSD Excavating & Landscaping Ltd. BSSD is owned and operated by Jaskarn Singh Sandhu. The defendants are Green Blvd. Construction Ltd. and Randhir Atwal. Mr. Atwal is the owner/operator of Green Blvd.

[3] Green Blvd. owns two lots in Coquitlam: 1405 Pipeline Place (Lot 1) and 1407 Pipeline Place (Lot 2).

[4] Mr. Atwal, on behalf of Green Blvd., entered into a contract with Mr. Sandhu, on behalf of BSSD, over text messages. The parties disagree on the scope of the work, but, essentially, the contract was to include lot digging, extraction, soil and dirt removal, road cleaning, backfill, and drain installation on the two lots.

[5] In the text messages, the parties agreed on a price of \$32,000 for each lot. Mr. Sandhu deposes that the cost of hauling dirt from the site was extra, to be billed based on the number of truckloads. Mr. Sandhu further deposes, in an affidavit filed on the day of these applications, that the payments were to be in installments, beginning with 30% on commencement of the excavation work and further installments on passing certain inspections. These latter terms were not documented in the text messages.

[6] BSSD began work on about November 18, 2022. On that date, Mr. Sandhu sent Mr. Atwal two estimates of \$33,600, corresponding with the agreed price of \$32,000 plus GST per lot.

[7] On December 28, 2022, Mr. Sandhu demanded payment in the amount of \$45,000, for work that he said BSSD had performed on the lots.

[8] On December 29, 2022, Green Blvd. paid \$10,000 per lot plus GST for a total of \$21,000.

[9] On January 27, 2023, Mr. Sandhu texted Mr. Atwal two invoices in the amount of \$23,000.25 each. These invoices appear to correspond with the agreed price of \$33,600 per lot, less the \$10,500 Green Blvd. had paid per lot, although not exactly.

[10] Various issues arose between the parties with respect to the work. The defendants allege deficiencies that would require them to hire a new contractor to address problems with the work by BSSD.

[11] On February 2, 2023, Mr. Sandhu stated in a text message that the work was 90% done and demanded that Green Blvd. pay \$30,000, with a remaining balance of \$16,000 to be paid when the work was done.

[12] After Mr. Atwal objected, Mr. Sandhu agreed that Green Blvd. could pay \$46,000 after the job was done. This amount appears to correspond with the two invoices Mr. Sandhu sent on January 27, 2023.

[13] Mr. Sandhu made no mention of additional charges for hauling dirt.

[14] Further issues arose between the parties and on February 21, 2023, Mr. Atwal told Mr. Sandhu by text message to stop work. On February 22, Mr. Atwal told Mr. Sandhu by text message to remove his machinery from the lots and informed him that BSSD was fired.

[15] Mr. Sandhu attaches to his affidavit two additional invoices dated March 28, 2023, in the amounts of \$39,417 and \$38,934, on Lot 1 and Lot 2 respectively. The invoices include a charge of \$33,400 per lot for "soil dumping", and specific amounts for truck transfers and gravel slinger trucks, plus GST.

[16] On April 5, 2023, BSSD registered two builders liens, in the amounts of \$62,417.25 and \$61,934.25, on Lot 1 and Lot 2 respectively (the “Liens”).

[17] On May 10, 2023, BSSD filed two actions to enforce the two liens, and registered certificates of pending litigation on each of the two lots (the “CPLs”).

[18] Initially, following the hearing of these applications, I was unclear on how BSSD calculated the amount of the Liens. With the benefit of further submissions by counsel for BSSD, I now understand that each Lien is for the invoice of January 27, 2023, plus the invoice dated March 28, 2023, for a total lien claim of approximately \$62,000 per lot, or \$124,000 overall.

[19] Green Blvd. disputes there was an agreement to pay anything more than \$33,600 per lot, on which it paid \$10,500 per lot, leaving a balance of just \$23,100 per lot, or \$46,200 overall. Green Blvd. also disputes this amount is owing because of deficiencies and work left undone when the contract was terminated.

[20] BSSD acknowledges that the work was not complete when Green Blvd. terminated the contract. Mr. Sandhu acknowledges that \$2,000 worth of work needed to be done on Lot 1, and \$6,000 worth of work needed to be done on Lot 2.

[21] Green Blvd. continued with the project after it terminated the contract with BSSD. It has now built a home on each of the lots. Mr. Atwal deposes that he expects the homes will be ready for sale in November of 2023.

III. ANALYSIS

A. Section 25 of the *Builders Lien Act*

[22] Green Blvd. relies on two subsections of s. 25 of the *Builders Lien Act* pursuant to which a lien may be cancelled. Those subsections are:

25 (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

(a) a lien is extinguished under section 22 or 33,

. . . [and]

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

- (a) the claim of lien does not relate to the land against which it is filed, or
- (b) the claim of lien is vexatious, frivolous or an abuse of process.

[23] With respect to s. 25(1)(a), Green Blvd. relies on s. 22 of the *Builders Lien Act* which states that:

22 A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.

[emphasis added]

[24] Section 20 sets a 45-day deadline within which a lien must be claimed.

[25] In this case, the evidence establishes that BSSD continued to work on the project until February 22, 2023, when its contract was terminated by Green Blvd. The Liens were filed on April 5, 2023, which was within the 45-day deadline.

[26] The real issue is the lien amount and whether the contract between the parties included extra amounts for dirt hauled from the site.

[27] Section 2 of the *Builders Lien Act* establishes the statutory right to a lien "for the price of the work and material, and the extent that the price remains unpaid." Here, Green Blvd. challenges both the price of the work and the extent to which the price remains unpaid. It argues that the amount actually owing on each lot is \$22,000 plus GST and that, accordingly, the Liens in the amount of \$62,000 each, were not "filed in the manner . . . provided in this Act" and are therefore extinguished.

[28] In my view, neither price of the work nor the amount owing is captured by the words "in the manner . . . provided in this Act" such that a lien claimed in the wrong amount is extinguished by s. 22 of the *Act*. The common dictionary definition of the word "manner" is the way in which the thing is done. There is no suggestion that

BSSD failed to follow the procedure under the *Act*, for example by filing the wrong form.

[29] Green Blvd. cites *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253 at paragraph 19 for the proposition that a lien can only be for "the extent that the total price of the work remains unpaid". However, Justice Burnyeat did not cancel the lien in that case under s. 25(2)(b). Rather, he reduced the amount of the security ordered under s. 24 to an amount less than the claim of the lien. I will address s. 24 below.

[30] The only available grounds for cancellation is s. 25(2)(b): "the claim of lien is vexatious, frivolous or an abuse of process". I do not take Green Blvd. to argue that the Liens are vexatious or an abuse of process. The issue is whether they are frivolous.

[31] In *West Fraser Mills Ltd. v. BKB Construction Inc.*, 2012 BCCA 89, the Court of Appeal held that:

[24] The test for whether a claim is frivolous imposes a low threshold on the lien claimant. The wording of s. 25(2)(b) of the *Act* is similar to that of R. 9-5(1) of the *Supreme Court Civil Rules*, which deals with scandalous, frivolous, or vexatious matters. The test for striking pleadings under that rule is whether it is "plain and obvious" that pleadings should be struck . . . The only consideration under the practice rule is whether there is "a question fit to be tried" . . . [cites omitted].

[32] The question, the Court of Appeal held, is specifically not whether the applicant can prove its lien.

[33] In my view, there is a question to be tried whether the total price of the work was the \$32,000 per lot, as set out in the text messages, or \$32,000 per lot plus the cost of hauling dirt from the site, as asserted by Mr. Sandhu in his affidavit. The claim to the additional cost of hauling the dirt is not frivolous within the meaning established by the Court of Appeal in *West Fraser Mills*.

[34] I agree with Green Blvd. that the conduct of the parties was more consistent with an all-inclusive price of \$32,000 than with the the claim of \$62,000 per lot, which Mr. Sandhu only asserted after the contract was terminated. There is no support in

the text messages for an additional fee of \$33,400 per lot for “soil dumping”. There is also some question in the evidence whether and when the two additional invoices of March 28, 2023, were delivered to Green Blvd. They appear to have been attached to draft emails that may not have been sent until May 9, 2023, which was after the Liens were filed.

[35] However, *West Fraser Mills* establishes that evidence should not be weighed on an application under s. 25(2)(b) to cancel a builders lien. These arguments are better dealt by way of a summary trial application or as part of the court’s exercise of discretion under s. 24 setting an appropriate amount of security.

B. Section 24 of the *Builders Lien Act*

[36] Subsection 24 of the *Builders Lien Act* authorizes the court to order the cancellation of the lien by giving security which may be less than the amount of the claim of the lien. Section 24 of the *Act* provides as follows:

24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

(2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.

(3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.

...

[37] In *Q West Van Homes Inc. v. Fran-Car Aluminum*, 2008 BCCA 366, the Court of Appeal held that on an application under s. 24 to substitute security "there are two inquiries . . . one, are the claims advanced by the parties sustainable; two, what is

the appropriate quantum of the security" (para. 22). Justice Chiasson summarized the law as follows:

[56] Under s. 24 there is a two-prong test. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. In summary:

- the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a *prima facie* case will suffice;
- any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
- looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate security;
- that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
- the amount of security may be less than the amount claimed under the lien.

[38] Green Blvd. argues that the amount of security should be reduced to a nominal amount or, in the alternative, \$22,000 plus GST per lot.

[39] In *West Fraser Mills*, the Court of Appeal held that:

[33] . . . Section 24 is no more a means of conducting a summary trial than is s. 25.

. . .

[40] It is perhaps theoretically possible for the court to find under s. 24 that it is "plain and obvious" that a lien claim is not provable, and to order nominal security on this basis. However, it seems to me that if the evidentiary record (despite being not fully developed, as it would be in the context of an action) led to such a conclusion, it would be appropriate to find under s. 25(2)(b) that the lien claim was vexatious, frivolous, or an abuse of process. Had the Legislature intended s. 24 to be used as a means by which the court can fully and finally determine the factual or legal merits of a lien, it would have said so in the section. I think the scope of enquiry under s. 24 should be approached with caution in order to avoid injustice to lien claimants who, generally speaking, have the right to have their claims fully adjudicated at trial.

[emphasis added]

[40] It is not plain and obvious the claims by BSSD will fail. On the authority of *West Fraser Mills*, an application under s. 24 is not an appropriate procedure for the Court to effectively dismiss the claims. Accordingly, I must take both sets of invoices by BSSD into account.

[41] However, it is within my discretion to consider the strength of BSSD's claim to the full amount of the Liens in setting an appropriate amount of security.

[42] In *Tylon Steepe Homes*, Justice Burnyeat reduced the amount of the security on the basis the applicant had included profit and other amounts that were not within the price of the work and material. In doing so, Justice Burnyeat cited with approval the decision of Master Barber in *Strata Plan LMS2262 v. Belgrove Construction Ltd.* 2003 BCSC 535, where the Court stated at para. 10:

When the question arises at the time of posting security with respect to the amounts claimed, the onus shifts to those who want full security posted to provide at least the barest of details which would be something more than a bald statement that the monies are owing and something less than prima facie proof of the claim.

[43] BSSD acknowledges that \$2,000 worth of work remained to be done on Lot 1, and \$6,000 worth of work needed to be done on Lot 2. It follows that the security must, at a minimum, be reduced to \$60,417.25 for Lot 1 and \$55,934.25 for Lot 2.

[44] I would reduce the security further. In my view, \$32,000 per lot (for a total of \$64,000) is an appropriate amount of security for the following reasons:

- a) Even if it is not frivolous or bound to fail, BSSD's claim to an additional fee of \$33,400 per lot for "soil dumping" is very weak;
- b) BSSD has provided only the barest of materials in support of the full amount claimed, including no more than a bald statement of additional contract terms the parties did not document in their text messages;
- c) The defendants will be prejudiced if they cannot market the homes for sale without encumbrances; and

- d) Security in the amount of \$32,000 – reflecting some additional cost of hauling dirt, but not the full amount claimed – will balance the need to protect BSSD, which provided work and materials to the project, with the interests of Green Blvd. to proceed with a sale of the lots.

[45] I would therefore grant orders pursuant to s. 24 of the *Builders Lien Act* in both proceedings cancelling the Liens upon Green Blvd. posting security in the amount \$32,000.

[46] Section 24 of the *Builders Lien Act* implicitly authorizes the court to cancel a CPL as consequential relief to the cancellation of a claim of lien: *4HD Construction Ltd. v. Dawson Wallace Construction Ltd.*, 2020 BCSC 1224, at paragraph 56.

[47] I would therefore also grant orders in both proceedings that the CPLs be removed from title upon Green Blvd. posting security in the amount \$32,000.

C. Sections 256 and 257 of the *Land Title Act*

[48] Green Blvd. argues that the CPLs can also be cancelled pursuant ss. 256 and 257 of the *Land Title Act*.

[49] Section 256 sets out the conditions for the Court to act on these provisions, while s. 257 sets out the remedies that are available if those conditions are met.

[50] Green Blvd. argues that it will experience hardship and inconvenience within the meaning of s. 256(1)(b) from the registration of the CPLs: specifically, it will be unable to sell the Lots until the claims by BSSD are decided at a trial.

[51] Green Blvd. argues that the Court should cancel the CPLs pursuant to s. 257(1)(a), either outright or on an undertaking by Green Blvd. to abide by any order as to damages, with or without requiring Green Blvd. to post security.

[52] In the alternative, if the Court does not order that the CPLs be cancelled, Green Blvd. submits that it may make an order pursuant to s. 257(1)(b) requiring BSSD to give an undertaking to abide by any court order for damages as a result of

the registration of the CPL. Green Blvd. argues that an amount of \$100,000 is reasonable as security for damages payable by BSSD.

[53] Green Blvd. cites a number of authorities in support of the relief it seeks under the *Land Title Act*, including: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*, 2014 BCCA 388, and *Beach Estate v. Beach*, 2021 BCCA 238.

[54] None of the authorities cited by Green Blvd. concern an application to cancel a CPL filed in support of a builders lien.

[55] The *Builders Lien Act* sets out a comprehensive code for a remedial statutory lien that creates an interest in land. The *Builders Lien Act* includes provisions that require the lien claimant to file an action and a CPL and authorize the court to cancel the lien and, by necessary implication, also cancel the associated CPL.

[56] The *Land Title Act* provisions have a different legislative purpose. They allow a party claiming an interest in land to file a CPL. In turn, the *Land Title Act* contains its own provisions authorizing the court to cancel the CPL.

[57] In my view, an owner experiencing hardship or inconvenience from a builders lien and associated CPL should find their remedy in the *Builders Lien Act*, not the *Land Title Act*.

[58] Further, it would be inappropriate, in my view, for a court to reach a different conclusion under ss. 256 and 257 of the *Land Title Act* than it would under ss. 24 and 25 of the *Builders Lien Act*. Moreover, Green Blvd. has not cited any authority for a court to order a builders lien claimant to give an undertaking as to damages.

[59] Accordingly, I decline to make an order under s. 257 of the *Land Title Act*.

IV. CONCLUSION

[60] There will be orders in Action S-249324 and Action S-249325 that the Liens be cancelled and CPLs removed from title upon Green Blvd. posting security in the amount of \$32,000 in each action.

[61] As success was divided, the parties will bear their own costs of these applications.

“Elwood J.”