IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Melanson v. Melanson,*
2023 BCSC 459

Date: 20230327
Docket: 80775
Registry: Nanaimo

Between:

David Melanson and
Dream Weavers Day Care Ltd.

Plaintiffs

And

Stephen Anthony Melanson and
Lisa Marie Melanson

Defendants

And

David Melanson and
Dream Weavers Day Care Ltd.

Defendants by Counterclaim

- and -

Docket: 172664
Registry: Victoria

Between:

SDA Contracting Ltd.

Plaintiff

And:

David Melanson

Defendant

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

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The Plaintiff/Defendant, appearing in person:	D. Melanson (November 1, 2022 only)
Counsel for the Defendants/Plaintiff:	J. Aiyadurai
Place and Dates of Trial:	Nanaimo, B.C. November 1-3, 2022
Place and Date of Judgment:	Nanaimo, B.C. March 27, 2023

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INTRODUCTION

[1] This decision deals with two related lawsuits, Action No. 80775 (“the Melanson Action”), which was filed in Nanaimo on February 9, 2017, and Action No. 172664, (“the SDA Action”), which was filed in Victoria on July 18, 2017. On September 2, 2021, by consent, I ordered both proceedings to be tried together in Nanaimo. They are related to the same basic dispute between a father, David Melanson (“David”), and his son, Stephen Melanson (“Stephen”).

[2] The principal source of the dispute is an oral contract (“the oral contract”) that led to the construction of a building on Stephen’s residential property on Ingot Road in Cobble Hill, B.C. The Melanson Action was brought by David and Dream Weavers Daycare Ltd., a company which he apparently incorporated with his daughter, Christine Power (“Christine”), against Stephen and his wife, Lisa Melanson (“Lisa”) for alleged breaches of the oral contract and consequential damages. Stephen and Lisa denied liability and filed a Counterclaim (“the Counterclaim”) seeking compensation for David’s alleged breaches of the oral contract and theft of Stephen’s personal property. With leave of the Court the SDA Action was brought by Stephen on behalf of the corporate plaintiff against David seeking recovery of $105,997.43, which Stephen alleges was the balance of the agreed price of the oral contract.

[3] David filed responses in both Actions denying any wrongdoing. To make rather a long story short, on September 23, 2022, I ended up striking out his pleadings. This was because he failed to comply with orders I made over a year earlier, on September 2, 2021, which in any event stood merely as confirmation of previous and still valid orders, including for documentary disclosure, with which David had never bothered to comply. He had been warned over and over by various members of this Court that his non-compliance with court orders and the *Supreme Court Civil Rules*, and his overall obstructive and dilatory conduct in the litigation, if not corrected, would lead to just such a result, and that if he failed to respond to properly filed applications, as he had done repeatedly in the SDA Action particularly,

but also in the Melanson Action, the litigation would likely proceed without consideration of any evidence from him.

[4] David, once again and as usual, did not respond to the September 23, 2022 application before me to strike his pleadings, which was based, in part, on his failure to comply with an October 1, 2020 order of my colleague Master Dick, which itself was the result of an earlier application to strike his pleadings in the Melanson Action to which he did not file a response. In effect, Master Dick gave David a reprieve, declining to strike his pleadings, but ordering him to produce certain items of documentary evidence arising from his sworn testimony at a pretrial examination for discovery, evidence that she considered was necessary to permit Stephen and Lisa to properly respond to the Melanson Action. Master Dick specified in unambiguous language that non-compliance would result in the summary dismissal of his claim.

[5] Having reviewed the history of both Actions, including, as I have said, David's non-compliance with my September 2, 2021 orders, and of course his failure to respond to this latest application to strike his pleadings, I decided that things had gone on in this way for quite long enough, and I granted the relief sought. Nevertheless, I invited David to attend the trial as an interested party, and directed that he could participate to the extent of questioning the witnesses and making submissions. He accepted this invitation, and was present on the first day of trial on November 1, 2022. But in the midst of Stephen's testimony, just before 3 p.m., he stood up and announced "I'm leaving. I've had enough of the bullshit lies". I stood down briefly. Stephen later testified that, after I left the courtroom, David said "I'll get you. You can't lie like this forever", and made for the exit muttering about "karma".

[6] He never returned. As a result, the SDA Action and the Counterclaim went ahead not only undefended, but without any participation or input from David. The chief witnesses were Stephen and Lisa, both of whom struck me as forthright and honest witnesses. I have no particular reason to disbelieve anything they told me. I accept their evidence in all material particulars, not least of all because much of what they said was corroborated by David's answers in sworn evidence from pretrial

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examinations for discovery which were read into the trial record. The SDA Action is allowed, as is the Counterclaim to the extent particularised below.

THE ORAL CONTRACT

[7] My conduct of the case included pre-trial hearings, at which Stephen and David confirmed that the terms of the oral contract are not disputed. In brief, Stephen and Lisa agreed with David that part of their residential rural acreage on Ingot Road would be used as the site of a daycare business to be run by Christine, who at the time was living in Ontario and wanted to re-establish herself in B.C. I find as a fact that David was the driving force behind the whole idea, in the absence of which none of the resulting conflict and unhappiness would ever have occurred.

[8] Stephen and David incorporated SDA Contracting Ltd. ("SDA") as equal shareholders. David in his personal capacity hired SDA to construct a two-storey building on Stephen and Lisa's Ingot Road property with the lower floor to be used as a daycare facility and the upper floor as residential accommodation for Christine. It was a fundamental term of the contract that David would fund all of the construction costs. Neither Stephen nor David would be paid for any work performed.

[9] In separate dealings, apparently, David and Christine incorporated Dream Weavers Daycare Ltd., through which, according to David, the daycare business was to be operated, and once it was up and running, the idea was that the company would pay David $2,500 per month plus a percentage of profits. In this way, it was hoped that David would recoup his construction costs and eventually make a profit.

THE SDA ACTION

[10] It was well understood between the parties that Stephen was not in a position to make any financial contribution to building the daycare. He was at the end of a long career in the military and had no capital. His role was to manage the project and to do as much of the work as he had time for, but nothing more. David agreed to pay for all the construction costs. It seems that he had recently been awarded a

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sizeable sum in a lawsuit in the United States and had the money to invest. As I have said, the whole thing was his brainchild. Stephen located a turn-key property for Christine not far from his place, but David persuaded him that a building on his Ingot Road property would be better. Part of his reasoning was that it would be the first project for SDA and help to launch Stephen in the construction business as a second career. Stephen started working on the project in August, 2014 with the acquisition of required permits, leasing equipment, purchasing materials, and so on.

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[11] David and Stephen agreed that the estimated price of the oral contract was $300,000. This estimate turned out to be sound, as ultimately the all-in costs amounted only to a few thousand dollars more. There is no dispute that David funded the project to the tune of the first $200,000 or so, which was sufficient to bring the daycare building to lock-up by May 15, 2015. Substantial finishing work and landscaping remained to be done before the facility could be used for its intended purposes, but then David stopped supplying SDA with funds to complete the job. According to Stephen, David used his money, instead, to establish and finance an escort agency called “Black Orchid”, which he ran out of a house on Nicol Street in Nanaimo and a rental unit on Government Street in Victoria.

[12] Christine moved to B.C. in July, 2015 expecting to open for business in September. She was dismayed to discover that the building project was not further advanced. As things turned out, she was not able to take occupancy until the spring of 2016. Meanwhile, SDA’s creditors were chasing Stephen for payment of delinquent accounts, including for leased construction equipment which Stephen, on David’s promise of indemnity, had personally guaranteed. In the absence of the additional promised funding from David, Stephen and Lisa had to arrange for financing on their own hook to complete the daycare project and pay SDA’s operating accounts. They could not persuade a conventional lender to extend them credit, so in December 2015 they came to terms with a private lender. I am satisfied on all of the evidence that $105,997.43 of the money borrowed from this lender was used to finish the daycare building.

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[13] This is the amount claimed in the SDA Action. No other relief was sought. The terms of the contract were clear and undisputed. I accept Stephen and Lisa's evidence about David's failure to perform his end of the bargain by cutting off funding for the project before it was completed. I hereby enter judgment for the plaintiff against David in the amount claimed, plus interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 ("*COIA*") from May 15, 2015 to the date of this order. As SDA was dissolved in 2019 for failing to file annual reports, at counsel's recommendation, I hereby direct that any amounts collected on this judgment are to be paid into court to the credit of the SDA Action pending the company's restoration to the Business Registry. Once this is done, the parties will be at liberty to apply to court for directions concerning disbursement.

THE MELANSON ACTION

[14] Having struck the plaintiffs' pleadings in the Melanson Action, all that remains to be dealt with is the Counterclaim. I note in passing that, on September 21, 2017, because Dream Weavers Daycare Ltd. had no assets and had never filed annual reports or tax returns, this court ordered the plaintiffs to post $20,000 as security for costs. In the same order a Certificate of Pending Litigation that the plaintiffs had filed against title to the Ingot Road property was cancelled. This was part of the relief sought in the Counterclaim that I do not need to address.

[15] On the totality of evidence taken at trial, including, once again, read-ins of David's responses to questions at pretrial examinations for discovery, I am satisfied on a balance of probabilities that, on January 18, 2016, David entered onto the Ingot Road property and wrongfully removed tools belonging to Stephen from his workshop. They were never returned. I accept Stephen's evidence, backed up by credible documentation showing the replacement value for each item, that he is entitled to be compensated for this theft in the amount of $20,518. There is no evidence to suggest that any of the items in question belonged to SDA or that David had any right to take them.

[16] The evidence also satisfies me that, on December 30, 2015, David removed a Kubota excavator leased by or on behalf of SDA from a worksite on Peri Road in Lake Cowichan, B.C., and that, around the same time, in addition to stealing Stephen's tools, David also removed from the Ingot Road property various items of equipment leased by or on behalf of SDA including a couple of heavy-duty trailers. The lease payments accruing on these items were guaranteed by Stephen personally and, in the end, the items were either repossessed by the relevant leasing agent or returned to Stephen on his personal repayment of the applicable arrears.

[17] The costs and expenses associated with all of this – that is, payment of lease arrears plus interest, bailiff and storage fees, and so on – were paid using the proceeds from the same loan taken out by Stephen and Lisa to finish the daycare construction project, along with other bills and accounts that SDA failed to pay after David stopped financing the company's operations. I accept Stephen's calculation of the amounts that he and Lisa paid out to put these accounts in order, being $33,272.60. I hereby order David to pay this amount to Stephen and Lisa, plus interest pursuant to the *COIA* from the date of default on May 15, 2015, to the date of this order.

GENERAL REMARKS

[18] I pause here to emphasise a couple of important points. First of all, the evidence is clear that Stephen performed all of his obligations under the oral contract. The daycare building went up. Photographs of it presented in evidence show a large, solid, attractively built and finished structure. The daycare part of it is spacious, bright and cheerful. The landscaping around it makes for a nice children's playground. The apartment up top is well-appointed and comfortable looking. Christine has been working and living in the building for close to 7 years now. In 2016 she entered into a lease agreement under which she is obliged to pay rent of $2,500 per month to Stephen and Lisa. In reality, I was told, she pays in variable amounts depending on her revenues.

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[19] Secondly, Christine testified that she never had anything to do with Dream Weavers Day Care Ltd. She runs her business through a limited company of her own. David is not involved in this company and receives no rent or income from it. In all of the years that she has lived and worked in the building, David has never asked Christine to pay back any of the money that he spent to develop it or sued her for breach of any alleged agreement between them to pay rent or share revenue. Neither Christine nor her company has any proprietary interest in the Ingot Road property. They are rent-paying tenants and nothing more. The daycare building, when all is said and done, is merely a valuable improvement upon a parcel of land that belongs entirely and exclusively to Stephen and Lisa.

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[20] There would seem to be no doubt that, after mid-May 2015, dealings with David turned into an unpleasant and costly ordeal for Stephen and Lisa. I would refer, in particular, to an October 8, 2015 altercation at the Ingot Road property in which David used a pickup truck as a battering ram, driving recklessly toward Stephen and smashing into a second vehicle to make his escape, allegedly with an SDA-owned trailer on his hitch. For all that, the claims before me are about monetary compensation, and within the general mix of evidence it cannot be ignored that Stephen and Lisa, despite the aggravation that David has put them through, have ended up the sole beneficiaries of a well-built, value-enhancing, income-producing building on their own property to which, assuming the SDA judgment is satisfied, David will have contributed in excess of $300,000.

REFINANCING COSTS

[21] I was told that the loan taken by Stephen and Lisa in December 2015 to finish the daycare and pay SDA's current accounts came from an Alberta resident called Gail Gaudry, who advanced $160,000 at 10.2% per annum on interest only monthly payments of $1,433.33. Ms. Gaudry did not wish to renew her loan at the end of 2016, and in early 2017, Stephen and Lisa arranged for another secondary lender, Ridgedale Mortgages Ltd., to pay her out.

[22] This new loan was for $180,000 at 11.78% per annum on interest only payments of $1,725. In 2018, probably due, in part at least, to the enhanced value of the Ingot Road property created by the daycare development, David and Lisa were successful in persuading RBC to pay out the Ridgedale loan in the amount of $181,000, and to consolidate that amount within their existing first mortgage at 2.77%. On May 26, 2021, Stephen and Lisa refinanced the Ingot Road property with a mortgage loan from Coastal Community Credit Union at 2.44% on a 30-year amortisation.

[23] In submissions, David and Lisa argued that they should be compensated for the costs of obtaining and carrying these additional loan monies, on the basis that they were required to raise the funds to finish the building project and cover directly-related expenses and bills that David had agreed but failed to pay for. They calculate the aggregate damages under this general heading to be $130,948.45, broken down into $56,659.64 for the cost of obtaining and carrying the Gaudry and Ridgedale loans, inclusive of fees and insurance, plus $74,228.81, which they estimate to be the amount of interest and principal paid on the $181,000 absorbed in their RBC first mortgage upon paying out Ridgedale, and payments on the same amount that will have to be made over the 30-year amortisation period to Coastal Community Credit Union.

[24] Whether or not these calculations are sound, I cannot order compensation in the amounts demanded. The reason is simple: the material facts upon which the claim is based are nowhere referred to in the pleadings in either the SDA Action or the Counterclaim. It would be quite wrong of me to grant an award based on facts not alleged in pleadings and raised for the first time at trial. The catch-all language included in the “Relief Sought” section of both the SDA Action and the Counterclaim, namely, “Such further and other relief as the court deems just”, is not so elastic as to capture a large claim not factually specified in pleadings and about which David was never given any notice.

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<u>OTHER RELIEF</u>

[25] As for other relief sought in the Counterclaim, there is no necessity for a declaration that Stephen and Lisa “have exclusive use and beneficial and legal ownership of the Ingot Road property”. No evidence has ever been adduced suggesting otherwise and the Land Title documents produced for me to look at are conclusive on the subject.

[26] I decline to award punitive, aggravated or exemplary damages. David’s overall conduct towards Stephen and Lisa has left much to be desired, no doubt about that, but in my overall view the $15,000 amount specified in submissions as an appropriate award under this heading has been paid many times over by David’s substantial contribution to the improvement of their residential property. For the same reason I dismiss all the other small claims for compensation referred to in submissions for such things as cell phone, hydro and accounting bills, interest on credits cards, and the like.

[27] I see no need for an order banning David from contacting the plaintiffs or their child or entering onto the Ingot Road property. Stephen testified that since this litigation started he has only seen David in court. They do not speak to each other. David has never come anywhere near the property. Their estrangement would appear to be permanent and total. Finally, the claim for past and future costs of the healthcare services pursuant to the *Healthcare Costs Recovery Act*, S.B.C. 2008, c. 27 was not raised in evidence or submissions at trial and is dismissed.

<u>SUMMARY</u>

[28] The SDA action is allowed as aforesaid and judgment entered against David in the amount of $105,997.43. The Counterclaim is also allowed and judgment entered against David in the cumulative total amount of $53,790. Interest will be payable on both judgments pursuant to the *COIA* from May 15, 2015 to the date of this order.

[29] In the SDA Action, I hereby order David to pay SDA's costs throughout on scale B, and in the Melanson Action to pay costs throughout to Stephan and Lisa, also on scale B. I decline to make an award for special costs in either action. David's conduct during this litigation has been objectional and aggravating, but in my view, he has been adequately penalised and held to account for this by my order striking his pleadings.

"Baird J."

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