

Court of King's Bench of Alberta

Citation: AG Clark Holdings Ltd v 1352986 Alberta Ltd, 2024 ABKB 531

Date: 20240905
Docket: 1103 14128
Registry: Edmonton

Between:

A.G. Clark Holdings Ltd, Giebelhaus Developments Ltd and CB Partners Corporation

Respondents
(Plaintiffs)

- and -

**1352986 Alberta Ltd, Redleaf Properties Corporation, 1354178 Alberta Ltd
and 1352992 Alberta Ltd**

Appellants
(Defendants)

**Reasons for Judgment
of the
Honourable Justice G.R. Fraser**

Appeal from the Decision by
L.R. Birkett, The Honourable Applications Judge

Dated the 23rd day of March, 2022
(2023 ABQB 219)

[1] Redleaf Properties Corporation, 1352986 Alberta Ltd, 1354178 Alberta Ltd, and 1352992 Alberta Ltd (collectively Redleaf) are appealing the March 23, 2022 decision of Applications Judge Birkett, *A.G. Clark Holdings Ltd v 1352986 Alberta Ltd*, 2023 ABQB 219.

[2] The decision found that Clark Builders (Clark) was entitled to a summary disposition of its s 53 *Builders Lien Act* application and declared the two builders' liens registered against title valid. The total amount of the liens was \$499,118.34 plus interest at the rate prescribed in the parties' contract plus costs. The decision also limited the liability of Redleaf, 4178 and 2992 to the lien amount registered against each company's respective leasehold interests.

[3] The background facts are not disputed by any party and are contained in Applications Judge Birkett's decision, paragraph seven through eleven. They are as follows:

The defendant, 1352986 Alberta Ltd, as Owner, and the plaintiffs, collectively Clark Builders, as Construction Manager, entered into a Construction Management Contract on July 29, 2009 for the renovation of an existing historical building on Jasper Avenue at 92 Street in Edmonton, to be known as the Redleaf Canada Presentation Centre.

The other defendants, Redleaf Properties Corporation, 1354178 Alberta Ltd and 1352992 Alberta Ltd, collectively referred to as the Lessees, have a caveat registered with respect to a leasehold interest on the lands owned by 1352986 Alberta Ltd.

Clark Builders provided services starting in July 2009, initially with a concept budget of \$1,655,236, which was revised early in the process to \$1,808,900. In accordance with the terms of the Construction Management Contract, Clark Builders issued monthly invoices from August 31, 2009 to June 30, 2011.

The Owner paid for all amounts due in the invoices that were issued up to and including October 31, 2010. However, invoices from November 30, 2010 to June 30, 2011 for the total amount of \$475,350.80 plus GST and interest remain outstanding.

Clark Builders registered a builders' lien on March 22, 2011 against both the fee simple estate of the Owner and the leasehold interest of the Lessees.

[4] Clark started its action in 2011. The Redleaf defendants defended the action and filed a counterclaim. Essentially, Redleaf denied that any money was owing and that the work that was done was incomplete and/or deficient.

[5] Both parties submitted affidavits to Applications Judge Birkett. Clark's affiants were Mr. Asselin, the project manager and Mr. Lux, a quantity surveyor. The Redleaf's affiants were Mr. Cameron, a quantity surveyor and Mr. Ying, the corporate representative for 2986. In her decision, Applications Judge Birkett found that Mr. Asselin's affidavit was "comprehensive and sufficient to satisfy the onus of proof on Clark Builders as lienholder to establish its liens are valid in the amount of the outstanding invoices".

[6] Redleaf submits that Applications Judge Birkett's findings regarding the affidavit were overstated. Redleaf submits that Applications Judge Birkett misunderstood the evidence, resulting in erroneous factual and legal conclusions, particularly when coupled with an erroneous understanding of Mr. Asselin's actual evidence. It submits that Mr. Asselin's affidavit was rather

general and did not have sufficient detail to support the granting of the summary judgment application. It now seeks to have the judgment either dismissed outright, or adjourned so that cross-examination of the affiants could take place.

Standard of Review

[7] This is an appeal from the decision of an Applications Judge. The standard of review on an appeal of an Applications Judge's decision is correctness and the appeal is considered a *de novo* hearing. I may substitute my own findings for those of the Applications Judge: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166, at para 30.

[8] This action was started in 2011 and therefore is governed by the *Builders' Lien Act*. That Act was replaced by the *Prompt Payment and Construction Lien Act* on August 29, 2022.

[9] For the purposes of this application, the relevant sections of the *BLA* reads as follows:

49 (6) The procedure in adjudicating on the claims shall be of a summary character, so far as is possible, having regard to the amount and nature of the liens in question and the enforcement of them at the least expense.

53 (1) At any time following the expiry of the time limited for defence, the plaintiff may, and before setting the action down for trial the plaintiff shall, make a pre-trial application.

(2) The plaintiff shall serve notice of the pre-trial application on all other parties to the proceedings, at least 10 days before the date of the application.

(3) On the hearing of the pre-trial application,

(a) if no defence has been filed and no notice to prove lien has been filed and served, the court may declare the liens valid and make any further judgment or order that it considers appropriate,

(b) if defence has been filed, the court may give judgment declaring valid any liens in respect of which no notice to prove lien has been filed,

(c) the court may consider the affidavits filed on service of notice to prove lien and the transcript of any questioning on them, and may

(i) determine the validity of the liens concerned,

(ii) hear oral evidence, and

(iii) direct that at the trial of the action any particular issue or issues arising on the application be determined,

(d) the court may make any further order or direction that it considers necessary or desirable including, among other things, an order that the property be sold pursuant to this Act and an order that the action be entered for trial,

(e) the court may order that any lienholder or other party be given the carriage of the proceedings, and

(f) the court may order that questioning under Part 5 of the *Alberta Rules of Court* be conducted in the action, but no questioning may be conducted without an order of the court.

[10] In this case, a defence was filed. Pursuant to s 53, the court may give a judgment declaring the liens valid and may also make any further order that it considers necessary or desirable, including that the property be sold. Section 49 requires that adjudication of claims shall be of a summary character, so far as possible. I find that this direction makes it appropriate to apply the test for summary judgment to these claims.

[11] The test for granting summary judgment comes from *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, at para 47:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[12] Redleaf submits that because Clark brought its application under the *Builders’ Lien Act*, it was improper to apply the summary judgment test. As support for this position, Redleaf cites *Equinox Electrical Ltd v Progress Construction & Development Ltd*, 2014 ABQB 552.

[13] I find that *Equinox* is easily distinguishable from the case at bar. The focus of the *Equinox* decision was whether the builder’s lien had been registered in proper time. The materials focused on that aspect of the case and there was “precious little evidence on the rest of the application”. A ruling was made that the liens were registered within the proper time, and the rest of the application was adjourned so that affidavits could be filed.

[14] In this case, multiple, lengthy affidavits have been filed by all parties. The experts were cross-examined on their reports. There is not a lack of evidence, and Applications Judge Birkett found that there was enough evidence for her to have sufficient confidence to summarily resolve the dispute. I agree with her findings.

[15] The contract between the parties details the contract fee and reimbursable expenses. There is no dispute about the terms of the contract. Mr. Asselin's affidavit details the rates charged for various services and provides spreadsheets with a breakdown of hours worked and the costs. His affidavit also deposed that there were no outstanding deficiencies or warranty items for the project. Mr. Asselin was not cross-examined on his affidavit.

[16] In his affidavit, sworn March 2, 2016, Mr. Ying disputes the amounts in Mr. Asselin's affidavit, taking issue with the billings as not been reasonable or proper. There is no doubt that the cost of the project increased substantially from the original concept budget estimate of \$1,670,469. The final amount billed totaled \$2,351,613, not including GST. There is no doubt that the appellants were unhappy about the increased costs and believe that they were excessive. However, they provide no evidence to show that any of the costs were not in accordance with the contract.

[17] Regarding the increased costs, Mr. Ying's affidavit states "we consider (them) to be unjustified, excessive and unreasonable". This is a very general statement. The affidavit does not detail why Mr. Ying disagrees with the figures provided by Clark. It is unclear whether he disagrees with the amount of hours expended, the costs of the materials, or something else.

[18] Regarding a \$21,300 bill for stucco, Mr. Ying's affidavit states "The billings received for this work were about \$21,300 which was from our point of view excessive and unreasonable." The affidavit provides no evidence to substantiate the assertion. It is simply his opinion.

[19] His affidavit also asserts that the appellants believe that there are outstanding deficiencies that need to be completed or warranty work that needs to be done. Three specific items mentioned are that Clark did not complete all the landscaping, the roof leaked, and a sidewalk had an improper slope resulting in water running into the building. However, the affidavit contains no evidence to demonstrate compliance with the parties' contract provision requiring prompt notice in writing of any defective, faulty, or non-conforming work. The affidavit also does not contain any documents indicating the cost to complete the landscaping, or when the landscaping was completed. There are also no documents relating to repair of the improperly sloped sidewalk.

[20] Regarding the leaky roof, the affidavit indicates that Clark had returned to fix the problem "last summer", presumably summer 2015. The affidavit states that because the building had not been through a full-year weather cycle, it was uncertain whether the repairs have been successful. Presumably between summer 2015 and March 2016, there would have been weather that would have tested the repairs. There is no evidence that the repairs were unsuccessful. There is no documentation showing any cost to the appellants as a result of the leak.

[21] In contrast, Mr. Asselin's swears in his affidavit there were no existing deficiencies. Attached as exhibit to his affidavit is a report dated May 10, 2011, indicating that all deficiencies and warranty work was complete. There is no evidence that the appellants responded to this report.

[22] In addition to the affidavits of Mr. Asselin and Mr. Ying, two experts submitted affidavits. Mr. Cameron submitted one on behalf of the appellants and Mr. Lux submitted an affidavit on behalf of Clark. Mr. Cameron is a Professional Quantity Surveyor. He works for Altus Group, an Ontario company with an office in Edmonton. He was hired by Redleaf to

provide a cost in place estimate. His report, dated October 26, 2020, indicates that the total cost of the project should have been \$2,117,000.

[23] Mr. Lux also is a Professional Quantity Surveyor, and has worked for LCVM Consultants since 2008. His report is dated June 14, 2021. His report is essentially a critique of Mr. Cameron's report. Mr. Lux reviewed Mr. Cameron's report and then explained why he disagreed with Mr. Cameron's findings. Mr. Lux's report submits that the cost of the project should have been approximately \$2,600,000.

[24] Both reports were prepared approximately 10 years after the work was completed. In those 10 years, oil dropped to a negative price per barrel and COVID happened. There were many other ups and downs in the Alberta economy. Although both reports try to account for these variations, it is a difficult task. Mr. Cameron's report contains the caveat:

Altus Group Limited does not guarantee that tenders or actual construction costs will not vary from this estimate. Acute market conditions, proprietary specifications, or competition/collaboration among contractors may cause tenders to vary from reasonable estimates based on normal and abnormal competitive conditions.

This seems to confirm the difficulty of trying to determine costs 10 years after the fact.

[25] Mr. Cameron's report states that its estimates were "adjusted for the time difference to represent costs as they would have been in 2011". The parties entered into their contract in 2009, with construction starting shortly thereafter. Construction was completed by mid-2011. Most of the costs occurred prior to 2011. Using costs as they would have been in 2011 as the basis for the report lessens the reliability of the report's findings.

[26] I find that both Mr. Cameron and Mr. Lux have the necessary education and expertise to be considered experts as quantity surveyors. Each has provided his opinion in accordance with the scope of each person's retainer. I find that both reports are helpful in this matter. However, "helpful" is not the test. Expert evidence, to be admitted, must be necessary to enable the fact-finder to understand the evidence. It becomes necessary when the fact-finder is apt to come to a wrong conclusion without expert assistance or where important information is unavailable without the assistance of experts. See *R v DD*, 2000 SCC 43 and *R v J-LJ*, 2000 SCC 51.

[27] In this case, the parties signed a detailed contract. Redleaf agreed to pay Clark 5% of the total cost of work plus reimbursable expenses. Reimbursable expenses are detailed in appendix "A" of the contract. Mr. Asselin's affidavit to prove the lien details how costs were incurred and charged. Attached to the affidavit as an exhibit are spreadsheets detailing hours worked and costs for various items.

[28] Redleaf disputes some of these costs. This is not surprising, given that the project came in significantly over budget. Mr. Cameron, on behalf of Redleaf, submits that the project still would have been over its initial budget, but should have cost less than it did. His report submits that there is still an amount owing to Clark, but it is less than the amount claimed.

[29] Mr. Lux on behalf of Clark submits that the project could have cost more, and that Clark did a good job of controlling costs. His report was based on a review of Mr. Cameron's report.

[30] I find that although these reports are helpful, they are not necessary. This is not a situation where evidence would be unavailable without the reports. It is not a situation where

expert reports are required to come to a proper conclusion. The parties agreed to the submission of reports, so I will not exclude them from the record. However, I place little weight on the findings of either expert, and find that I can make a proper decision without the use of the reports.

[31] Mr. Ying objected to some of Clark's charges. Applications Judge Birkett found that his objections lacked enough specifics to be of assistance. I agree with this finding. Under the *Rules of Court*, Redleaf had the opportunity to bring new evidence before me. It chose not to do so. I find that Mr. Ying's objections are only general in nature, and that there is not sufficient evidence to support his objections.

[32] A ruling under s 53 of the *BLA* is not a summary judgment application. However, it can be final in its nature. If the decision is going to be one that resolves the matter, it is essentially the same as obtaining a summary judgment. I find that it is appropriate to use the same test for that of summary judgment on this application.

[33] Applying the test for summary judgment, I find that there are no uncertainties on the facts that reveal a genuine issue for trial. Clark has provided sufficient detail to support the amount claimed on a balance of probabilities. Redleaf claims that on the evidence a fair and just disposition is not possible. However, it has not put its best foot forward regarding this claim. Its expert report agrees that there is an amount owing, just that it is a lesser amount. That report uses the wrong timeframe. Mr. Ying's affidavit lacks the specifics necessary to make it of assistance. It is essentially a bare denial or a different opinion about the appropriateness of the cost.

[34] In *Shefsky v California Gold Mining Inc*, 2016 ABCA 103, it was found that a denial does not amount to a triable issue and that summary judgment was still possible. In *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101, Bielby, JA found that a conflict of opinions does not preclude summary judgment.

[35] When I weigh all of the evidence provided, I have sufficient confidence that this matter is appropriate for summary judgment. I find that Applications Judge Birkett's decision was correct.

[36] I find that Clark has proved its builders' liens valid in the amount of the outstanding invoices, being \$475,350.80 plus GST in the amount of \$23,767.54 for a total amount of \$499,118.34, plus interest at the interest rate defined in the Construction Management Contract from the date that such payments became due until the date that payment in full is received by Clark.

[37] Clark Builders shall have judgment against the defendant, 1352986 Alberta Ltd, as the property owner, in the amount of the outstanding invoices plus GST and interest pursuant to their contract.

[38] The other appellants Redleaf Properties Corporation, 1354178 Alberta Ltd and 1352992 Alberta Ltd, have a caveat registered with respect to a leasehold interest on the lands owned by 1352986 Alberta Ltd. They are not party to the Construction Management Contract. Their liability here is for the lien registered against their leasehold interest in the amount of the outstanding invoices plus GST and interest as set out above.

[39] Nothing in this decision related to the builders' lien affects the counterclaims filed by Redleaf and 2986.

[40] Costs of this action are awarded to Clark. If the parties cannot agree on costs, they may make written submissions to me within 30 days of the date of this judgment.

Heard on the 24th day of April, 2024.

Dated at the City of Edmonton, Alberta this 5th day of September, 2024.

G.R. Fraser
J.C.K.B.A.

Appearances:

Alexandra C. Bochinski
DLA Piper (Canada) LLP
for the Respondents (Plaintiffs)

Brent Mielke
MLT Aikins LLP
for the Appellants (Defendants)