IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Changizi v. Passey,*
2024 BCSC 1532

Date: 20240719
Docket: S139055
Registry: Kelowna

Between:

Pedrom John Changizi

Plaintiff

And

Bryce Passey dba. BWP Construction

Defendant

Before: The Honourable Justice Hardwick

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S.M. Gardner
Counsel for the Defendant:	D.W. Draht
Place and Date of Trial/Hearing:	Kelowna, B.C. July 15, 2024
Place and Date of Judgment:	Kelowna, B.C. July 19, 2024

[1] **THE COURT:** These are my oral reasons for judgment in respect of two closely interrelated applications which I heard earlier this week. These applications raise certain interesting legal issues which must, given the fact that the relief sought is limited to the pleadings and not the merits of the claim, be adjudicated upon appropriately.

[2] The first-in-time application was filed by the defendant on June 28, 2024. The substantive relief sought is that:

a) first, the part of the pleading listing the personal defendant Bryce Passey (hereinafter the "defendant") as a defendant and other references to the defendant be struck out; and

b) second, the action be dismissed as against the defendant.

[3] There is a basket clause for relief and a claim for costs under the British Columbia *Supreme Court Civil Rules* ("*Rules*").

[4] The second-in-time application was filed shortly thereafter on July 2, 2024, by the plaintiff. The substantive relief sought is:

a) that 1594040 Alberta Inc. (hereinafter the "numbered company"), be added as a defendant in this proceeding; and

b) for leave to file an amended notice of civil claim in the form attached as Schedule "A" to said notice of application, and the style of cause be amended accordingly. This Schedule "A", I note, helpfully articulates the proposed amendments such that this issue is not being argued in a vacuum.

[5] Again, there is a claim by the plaintiff for costs under the *Rules*.

Factual Overview

[6] On December 8, 2023, the plaintiff filed a notice of civil claim alleging losses and damages stemming from a construction project located at 2450 25th Street

North East, Salmon Arm, British Columbia. This real property owned by the plaintiff shall hereinafter be referred to as the "Property". The claim is broadly stated, as noted, framed in breach of contract and negligence.

[7] On January 10, 2024, the defendant filed his response to civil claim opposing the entirety of the claim. The general denial of liability was, I expect, anticipated.

[8] However, beyond a general denial of liability, the defendant claimed that at all material times he was operating under the numbered company, as indicated, 1594040 Alberta Inc., (which I have defined as the "numbered company"), doing business as BWP Construction (hereinafter "BWP").

[9] Somewhat unusually, the numbered company is, I accept, registered as a sole proprietorship doing business as BPA. As I articulated to counsel at the hearing, it struck me as unusual that an incorporated company would operate as a sole proprietorship. In the normal course, a numbered company may very often do business under another name. Sole proprietors are usually, however, individual persons. I accept, upon a review of this issue, albeit on a limited basis, that there may be a somewhat gray area of interpretation involved. I expressly say may, because I am not finding this cannot be the case as this is not a determination of the matter on its merits. It is a high-level commentary in the context of competing applications on the pleadings and having regard to my relatively limited time to do further investigation into this interesting legal issue.

[10] Returning to the chronology of the litigation, there have been no lists of documents exchanged, no examinations for discovery and no notice of trial filed.

[11] On May 31, 2024, the plaintiff was advised that the defendant had retained new counsel who had been instructed to mount a defence of the claim. This resulted in the applications that are brought before me.

[12] Turning to the *Rules*. Under R. 6-2(7) and R. 6-2(8), the addition of parties is a matter of discretion to be exercised generously to allow an effective determination of issues without delay, inconvenience or separate hearings. I was referred to *Delta*

Sunshine Taxi (1972) Ltd. v. Vancouver (City), 2014 BCSC 2100. There are other authorities that stand for the same proposition.

[13] Evidence is not required to support the applications and pleadings are assumed to be true and must disclose a cause of action, allowing amendments liberally. Again, this is a trite proposition, but I was referred to a relevant authority which is *Meade v. Armstrong (City)*, 2011 BCSC 1591.

[14] Beyond a general denial of liability, at the crux of this case is the defendant's allegation that at all material times he was operating under the numbered company. In response, the plaintiff states that the defendant did not properly identify himself as operating under a numbered company as required, pursuant to s. 27 of the *Business Corporations Act*, S.B.C. 2002, c. 57, [*BCA*], and therefore is not entitled to limited liability protection that the corporation would otherwise provide.

[15] This is clearly a key factual dispute, as I have identified, upon which the affidavit material is, without the benefit of discovery and cross-examination, directly conflicting. The two facts I can determine are that firstly the parties imprudently did not enter into a written contract and secondly is that approximately three months after work on the Property began, there was an invoice issued which includes in the top right-hand corner reference to the numbered company.

[16] The plaintiff, to paraphrase, says that he did not know before and did not notice this, henceforth explaining why he only sued the defendant at first instance and now, with the benefit of response pleadings, seeks to add the numbered company as he has three potential theories of liability he seeks to have the opportunity to pursue.

[17] To quote directly from the application materials of the plaintiff:

> 8. At this stage, allowing the application to amend the notice of civil claim will not result in significant delay or inconvenience to any party, particularly as the parties have yet to move into the discovery phase of litigation, rather it will avoid the risks of separate hearings and inconsistent findings and instead, promote judicial economy and the

> objectives of the Rules of Court in securing a just, speedy, and inexpensive determination of every proceeding on its merits.

[18] Pursuant to R. 9-5(1)(a) of the *Rules*:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, . . . on the ground that
>
> > (a) it discloses no reasonable claim or defence, as the case may be . . .
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed . . .

[19] Pursuant to R. 9-5(2):

> No evidence is admissible on an application under subrule (1) (a).

[20] I summarized the law in this area in *Tosen v. Gumtree Catering*, 2023 BCSC 121. I am going to repeat my comments from that decision as they are especially apt.

> **The Applicable Law**
>
> **Striking of Pleadings**
>
> [15] Rule 9-5(1) of the *Rules* provides as follows:
>
> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence, as the case may be,
> >
> > (b) it is unnecessary, scandalous, frivolous or vexatious,
> >
> > (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
> >
> > (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> [16] There is a high standard for the applicant to meet in arguing that the pleadings do not disclose a reasonable cause of action under R. 9-5(1)(a). A pleading should only be struck on the ground that it discloses no reasonable cause of action when it is "certain to fail" and the case is "perfectly clear": *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 21, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990

CanLII 90 and *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) at 25, 1988 CanLII 3036.

[17] In considering an application to strike a statement of claim for disclosing no reasonable cause of action, the court must read the statement of claim generously and to accommodate inadequacies in form that are merely the result of drafting deficiencies: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 143.

[18] If the pleadings are deficient, the court may choose to either dismiss the matter entirely or give leave to amend the pleadings to rectify the deficiency. This decision involves an exercise of discretion. In *Kindylides v. Does*, 2020 BCCA 330, the Court of Appeal described this discretion:

> [22] It is nonetheless clear that the decision to refuse leave to amend pleadings following a successful application to strike involves an exercise of discretion. As was explained in *Watchel*:
>
> > [29] A judge's decision whether to permit an amendment rather than striking the claim is an exercise of discretion: *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 at para. 35. Similarly, a judge's decision whether to reopen a hearing where a final order has been pronounced but not entered is also an exercise of discretion: *Grewal v. Grewal*, 2016 BCCA 237 at para. 70. A discretionary decision of a lower court is only reversible if the court misdirected itself or if the decision is so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.
>
> [23] Justice Willcock elaborated on this point in *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 [*Jones*]:
>
> > [35] Determining whether to permit an amendment is … preferable to dismissal of inadequate pleadings requires the exercise of a discretion by a trial judge. The exercise of that discretion may require consideration, including the degree to which the pleadings are deficient, of the extent to which the deficiencies may be addressed by an obvious or straightforward amendment, the apparent merit of the claim that may be made out with amendment and the prejudice that may be incurred by dismissing the claim. The exercise of that discretion requires consideration of the factors set out in Rule 1-3:
> >
> > > (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
> > >
> > > (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
> > >
> > > > (a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.

Summary Dismissal

[19] Rule 9-6 of the *Rules*, the summary dismissal rule, is also relied upon by the defendants.

[20] Rule 9-6 of the *Rules* provides, in part, as follows:

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[21] An application under R. 9-6 is a challenge based on a limited review of affidavit evidence. The bar on an application for summary judgment is high. If the defendant can convince the court that the plaintiff is bound to lose or the claim has no chance of success, then the defendant will succeed on the R. 9-6 application: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10–11.

[22] While the court may consider evidence on a summary dismissal application, it is not a summary trial. The presiding judge may only weigh evidence to the extent necessary to determine whether it is incontrovertible: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 49.

[21] I further rely upon the somewhat more articulate comments on the same issue from Justice Burnyeat of this Court in *Gateway Building Management Limited v. Randhawa*, 2013 BCSC 350 at paras. 16–17:

[16] The test to be applied to determine whether an action should be struck out as disclosing no reasonable claim requires a conclusion that,

> assuming that the facts as stated or even if amended are true, those facts disclose no cause of action, the pleadings disclose no arguable issue, and it is plain and obvious that the claim cannot succeed. If there is a chance that the action may succeed, then the Petition and the Action should be allowed to proceed: *Hunt v. Cary Canada Inc.*, [1990] 2 S.C.R. 959.
>
> [17] In *Dempsey v. Envision Credit Union*, 2006 BCSC 750, Garson J., as she then was, provided the following summary of Rule 9-6 jurisprudence:
>
> > In summary, a pleading will be struck out if:
> >
> > (a) the pleadings are unintelligible, confusing and difficult to understand (*Citizens for Foreign aid Reform*, [*Citizens of Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.)]);
> >
> > (b) the pleadings do not establish a cause of action and do not advance a claim known in law (*Citizens for Foreign aid Reform*, *supra*);
> >
> > (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time (*Borsato v. Basra*, [[2000] B.C.J. No. 84 (S.C.)]);
> >
> > (d) the pleadings are not *bona fides*, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (*Borsato v. Basra*, *supra*);
> >
> > (e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants (*Ebrahim v. Ebrahim*, 2002 BCSC 466).
> >
> > (at para. 17)

[22] Counsel for the defendant and the proposed defendant make quite an interesting legal argument, which does not appear to have been fulsomely considered by this Court. Mainly, that this was an oral contract and s. 27 of the *BCA* contemplates a contract in writing.

[23] On a plain reading of s. 27, there is, I acknowledge, some basis for this argument, hence my conclusion that this is an interesting legal argument. There is also, when read contextually, a contrary analysis that would support the interpretation that it would defeat the purposes of s. 27 of the *BCA* if it could be avoided through an oral contract.

[24] As I indicated to counsel at the hearing, if I were gowned and hearing the case on its merits, my analysis on this issue would be far more articulate and considered. Rather, what I have concluded is that at this stage of the litigation, it

constitutes a triable issue which, subject to resolution of the subject matter between the parties, should be allowed to proceed.

[25] Specifically, I am not satisfied that relief under either R. 9-5 or R. 9-6 is appropriate in these circumstances. Rather, I consider it appropriate to use my discretion in accordance with the law described above to allow the addition of the numbered company under R. 6-2.

[26] In exercising my discretion, I am also mindful of the fact that the limitation period for a claim against the numbered company is not, at least on the face of the materials before me, statute barred at this time. Accordingly, even if the relief sought by the plaintiff were not granted at this juncture, a separate claim could still be commenced within the relevant limitation period.

[27] As with the above, I am not passing judgment on the merits of such claim, except to say that I am satisfied that a claim could be drafted in a manner that discloses a reasonable cause of action in accordance with the law.

[28] If that occurred, I would anticipate the court hearing a joinder application to avoid the possibility of inconsistent findings of fact. This is not, as submitted by the plaintiff, an effective use of judicial resources.

Summary of Relief Sought

[29] The relief sought in the application that was filed by the defendant on June 28, 2024, is thus dismissed. There shall be an order that the numbered company be added as a defendant in this proceeding, and the style of cause amended accordingly.

[30] Leave is granted to file the amended notice of civil claim in the form attached as Schedule “A” to the above-defined notice of application filed July 2, 2024 [see correction, commencing at para. 37].

Costs

[31] Costs under the *Rules* are awardable at the discretion of the presiding justice, whether at trial or in chambers. I am exercising that discretion accordingly.

[32] The key consideration in any costs order is the determination of substantial success. Substantial success is quite apparent, based upon these reasons and the resulting relief. The plaintiff is thus entitled to his costs of both applications in accordance with the tariff set forth under the *Rules* at Scale B as a matter of ordinary difficulty and on the basis that they are costs in the cause.

[33] For the benefit of the parties, that means that the ultimate outcome will determine the payability of these costs, but in the event the plaintiff succeeds, he is entitled to his costs of both of these applications.

Transcript of Reasons

[34] I have delivered these relatively brief reasons for judgment orally in order to not delay the progress of this matter. I do, however, consider the basis for my orders potentially relevant for any future judge, whether in chambers for disclosure issues, or at trial, having regard to the issue involving s. 27 of the *BCA*. Accordingly, I shall direct a transcript of these oral reasons be prepared on the Court's initiative, with the reservation of my right to edit for grammar, headings, and any omitted citations.

[35] In the event either party seeks to obtain a transcript on an expedited basis for the purposes of an appeal, they will need to make alternate arrangements to obtain them at their expense.

[36] Those are my reasons for judgment.

[37] CNSL D. DRAHT: Madam Justice, just a clarification question. Your reasons mention the schedule to the notice of application, though the affidavits provided by my friend do have a July 4th and July 5th proposed amendment, just speaking with respect to the fraud allegations that have been withdrawn.

[38] THE COURT: Yes, I understood that that was no longer on the table, so that was my understanding, that fraud was not an issue, that is why I have not raised it at all.

[39] CNSL D. DRAHT: Okay, thank you.

[40] THE COURT: So counsel are both *ad idem* on that part?

[41] CNSL D. DRAHT: As I understand, it will be the most recent iteration that we proceed.

[42] THE COURT: Yes, that is -- yes, that was my understanding, but if --

[43] CNSL S. GARDNER: That's correct.

[44] THE COURT: All right, yes. So I think you both understand where I am go -- I understood that fraud was taken off the table, it was not argued.

[45] CNSL S. GARDNER: Yes.

[46] THE COURT: But numbered company will go in and you can make this interesting point.

[47] CNSL S. GARDNER: We got it.

[48] THE COURT: You got it.

[49] CNSL S. GARDNER: Yeah, it'll be the -- the one that's attached as Exhibit “C” in the second affidavit, so I think we're fine on that point, but thank you very much, Madam Justice.

[50] THE COURT: All right. Well, maybe I will just say that maybe just -- so for the registry’s perspective, it is Exhibits -- I did not bring all the binders down and I am not returning them because I marked them up, so they will be disposed of. It is Exhibit “C” to the affidavit number --

[51] CNSL S. GARDNER: It would be the affidavit #3, the affidavit --

[52] THE COURT: Affidavit #3.

[53] CNSL S. GARDNER: The second affidavit of Magdalena Kopecka, Exhibit “C”, filed July 9, 2024.

[54] THE COURT: All right. We will make sure that we -- I will have Madam Clerk send me the notes with respect to this and we -- I will amend the oral reasons to reference that. So to make sure that it is very clear when they are transcribed.

[55] CNSL S. GARDNER: Yeah, and actually for the record, sorry, it was -- it's at Tab 9 of the application record, so Tab 9, the affidavit #2 of Magdalena Kopecka filed July 9, 2024.

[56] THE COURT: Okay, yes.

[57] CNSL S. GARDNER: Exhibit “C”.

[58] THE COURT: All right. I will make that -- yes, that is -- was my misstatement, but I did understand that it was clear that the fraud was off the table, so that is why I did not address it.

[59] CNSL S. GARDNER: Yeah.

[60] THE COURT: Thank you very much, counsel, for your --

[61] CNSL S. GARDNER: Yeah, that's perfectly clear.

[62] THE COURT: -- able submissions.

[63] CNSL S. GARDNER: Thank you very much.

[64] CNSL D. DRAHT: Thank you, Justice.

“Hardwick J.”