IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Direct Horizontal Drilling Inc. v. North American Construction Management Ltd.,* 2024 BCSC 1490

Date: 20240624
Docket: S116804
Registry: Vancouver

Between:

Direct Horizontal Drilling Inc.

Plaintiff

And:

North American Construction Management Ltd. and The Guarantee Company of North America La Guarantie, Compagnie D'Assurance De L'Amerique Du Nord

Defendants

Before: The Honourable Justice Tammen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.C. McKechnie
Counsel for the Defendants:	C. Dayan
Place and Date of Hearing:	Vancouver, B.C. June 4, 2024
Place and Date of Judgment:	Vancouver, B.C. June 24, 2024

[1] **THE COURT:** The plaintiff applicant seeks leave pursuant to R. 9-7(16) to bring a second summary trial application pursuant to R. 9-7(2). The defendant respondent opposes.

[2] The underlying dispute concerns the construction of two natural gas pipelines under the Fraser River, which construction occurred in 2009 and 2010. The defendant contracted with Terasen Gas to construct the pipelines, and the defendant then sub-contracted with the plaintiff to perform the work.

[3] It is not in dispute that the plaintiff did not complete all required work on both pipelines and that the defendant stepped in and completed the work on one of the two. What is in dispute is the reason for the plaintiff's non-completion of the work and whether the defendant specifically instructed the plaintiff to stand down.

[4] Despite not completing all the work required under the contract, the plaintiff invoiced the defendant for the entire amount payable. The defendant did not pay the final invoices, totalling approximately $2.6 million.

[5] The plaintiff commenced this lawsuit in October 2011. The plaintiff characterizes this litigation as a simple debt claim. It has presented invoices for work performed pursuant to a contract, and it need only prove that the invoices remain unpaid in order to secure judgment.

[6] The defendant says the claim is more complex than that, and of necessity will involve an analysis of the terms of the contract, the reasons for the non-completion by the plaintiff, and ultimately the plaintiff's entitlement to the entire amount. The defendant also advances a setoff and counterclaim, it says pursuant to the terms of the contract.

[7] I pause here to note that I tend to agree that the defendant has more accurately captured the issues in this litigation. It is almost certainly not a simple debt claim as the plaintiff submits. For certain, the presiding judge will need to analyse and interpret the contractual terms which govern the relationship between the parties. That might well necessitate other evidence concerning formation of the

contract. It would more than likely also require evidence of some sort concerning the non-completion by the plaintiff and the reasons the defendant decided to finish the work itself.

[8] The first summary trial occurred in September 2018 and was heard by Justice Marzari. She found the matter unsuitable for summary disposition. Her reasons for dismissing the application are indexed at *Direct Horizontal Drilling Inc. v. North American Pipeline Inc.*, 2018 BCSC 1769. The most salient findings of Marzari J. are stated as follows:

> [12] Other than setting out the bare averments to the pleadings above, the plaintiff's evidence does not establish what work was done and what work was not completed. Plaintiff's counsel explained that he considered it was sufficient for the plaintiff to meet its onus to make out its claim in a summary trial to set out that it had submitted invoices for work, and the invoices were unpaid. The plaintiff did not rely on any particular part of the contract to establish a right of payment. Indeed, the plaintiff's counsel conceded that on the "bare terms of the contract" successful completion of both pipelines was likely required. However, the plaintiff took the position that once it had proven that there were unpaid invoices, the claim became a claim "in debt" and the onus should shift to the defendants to state why the plaintiff was not entitled to payment.
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> [20] During the course of argument, counsel for the plaintiff conceded that its application as filed may not be suitable for summary trial on the basis that the defendants' liability to pay the plaintiff under the contract is in issue. In addition, the plaintiff had understood that the counterclaim would also be before the court on the summary trial, although the plaintiff's notice of application does not refer to it.
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> [21] The plaintiff requested that that the summary trial be adjourned or dismissed with leave to bring a new or amended application with additional evidence that would address the defendant's liability and the counterclaim. The defendants strongly opposed the adjournment on these terms and sought dismissal of the entire claim on the basis of the inadequacy of the plaintiff's evidence, or alternatively dismissal of the application with costs.
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> [26] In this case, the evidence led by the plaintiff is insufficient to prove its claim of over $2.6 million, including with respect to:
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> > a) The complete reliance on the bare averments of Mr. Briscoe that the allegations of fact in the notice of civil claim and summary trial application are "true to the best of [his] knowledge";

> b) The inconsistency an ambiguity as between the allegations in the notice of civil claim that the work was provided "in accordance with the Agreement" and those in the notice of application which state that the work was terminated by the defendants before it was completed;
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> c) The lack of detail in the invoices as to the work alleged to be performed; and
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> d) The absence of any evidence establishing that the work that is stated in the invoices was performed.

[9] At para. 27, Marzari J. referred to the practice of having an affiant swear an affidavit that does nothing more than aver to contested statements in pleadings:

> I should note that with respect to the first deficiency noted above, the parties could find no case law on the question of whether an affidavit that does nothing more than aver to contested statements in pleadings is admissible to prove those allegations of fact in a summary trial. The plaintiff says that this is an ordinary and acceptable practice, while the defendants say that Mr. Briscoe's affidavit statements adopting his pleadings should be given little to no weight.

[10] Justice Marzari then said this at paras. 28–30:

> While this may be a common practice in some uncontested applications, I find this practice to be entirely inadequate in the context of a summary trial, particularly on such sparse and ambiguous pleadings.
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> The defendants say that these deficiencies entitle the defendants to judgment in their favor dismissing the plaintiff's claim in its entirety.
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> While I agree that the plaintiff took a significant risk in proceeding by way of a summary trial on the basis of the evidence in this application, I find that the evidence before me is simply too scant and unclear to allow for determinations of fact on the evidence by way of summary trial.

[11] Finally, at paras. 34–36:

> Overall, I consider that it would be unjust to decide the issues on the basis of this application, and I dismiss the application for summary trial.
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> The plaintiff has asked that in the event this application is dismissed, that I grant leave to allow further applications for summary trial to be made pursuant to Rule 9-7(16).
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> While I consider that this claim may be amenable to some sort of summary procedure in the future on the basis of proper evidence and admissions, in this case I consider that leave to bring such a further application should be considered in the context of a more fully articulated or draft application.

[12] I agree wholeheartedly with Marzari J. that the practice of having an affiant on a summary trial simply attest to the truth of the notice of civil claim is entirely inadequate.

[13] Since the application before Marzari J., the parties have conducted examinations for discovery in early 2022, and there have been multiple lists of documents exchanged. The plaintiff filed its second summary trial application in January 2024, omitting to seek leave. The defendant did not file a substantive response to that application, instead filing its own application seeking a declaration that the matter was unsuitable for summary disposition and that the plaintiff required leave to bring a second summary trial application.

[14] When the matter came on for hearing before Justice Shergill, it was adjourned to permit the plaintiff to seek leave. The leave application was heard by me on June 4, 2024. During the hearing, I was advised by counsel that a previous trial date scheduled for some time in 2021 was adjourned by consent. Counsel could not recall the number of days which were scheduled, nor the reason it was adjourned.

[15] Counsel agreed that there is little jurisprudence on the factors to be considered by a judge hearing an application for leave under R. 9-7(16). Both counsel referred to the decision of Justice Voith, as he then was, in *Kitsul v. Slater Vecchio LLP*, 2015 BCSC 1394. At para. 12, Voith J. observed as follows:

> Both counsel agree there is very little guidance on what legal considerations or legal framework govern the application of R. 9-7(16). They further agree, and it seems self-evident, that in order for the plaintiff's summary application to proceed, some material circumstance or consideration which impeded or prevented the original application from proceeding, ought to have been addressed or removed.

[16] I agree with those comments, and find that they have particular application here in light of the comments of Marzari J. at the first application, specifically at para. 36 of her reasons. There she expressly envisaged that the matter would only be appropriate for summary resolution on the basis of proper evidence and in the context of a more fully articulated application.

[17] On this application, the plaintiff has re-filed its original affidavit, the one found to be inadequate by Marzari J. In addition, presumably to attempt to shore up the deficiency related to the reasons for non-completion, the plaintiff filed an affidavit from another of its employees, David Fisher. Mr. Fisher's affidavit is based partly on his own direct involvement in the project and partly on his review of the plaintiff's file in relation to the matter. Mr. Fisher was not on site at the material times, in particular when the stop-work decision was made.

[18] Mr. Fisher appends to his affidavit some records called Pason sheets, which he says record events on site each day. The records are difficult to read because of the small font and even more difficult to comprehend absent some special training. Mr. Fisher refers to the Pason sheets as "cryptic" but purports to interpret them in his affidavit.

[19] The defendant says these records are classic hearsay, not admissible for the truth of their contents. The plaintiff counters by submitting that they are clearly business record, admissible for that purpose. In my view, that is not a straightforward issue, and I cannot determine it at this stage. For certain, the records require interpretation by someone with training, such as Mr. Fisher, and his interpretation would need to be tested through cross-examination.

[20] I also tend to the view that additional evidence, likely *viva voce*, would be required on this important issue. I agree with the defendant that Mr. Fisher’s affidavit does not adequately address the myriad concerns of Marzari J., which led to her ultimate conclusion that the matter was not suitable for summary trial. Primarily for that reason I would not grant leave to bring a second summary trial application.

[21] I am fortified in that conclusion by a broader assessment of the litigation history. I am far from persuaded that summary resolution is a more proportionate, more expeditious, and less expensive means to achieve a just result. The amount of money at issue here is significant ($2.6 million). The parties could have already had a trial in this matter but instead adjourned that trial by consent. It is difficult to say with precision how long a conventional trial would take, but a reasonable estimate is

more than five days but less than ten. Such a trial could still be booked in a reasonably timely way. If a second summary trial were permitted, it would likely take two days and might require cross-examination on affidavits. In short, there is little in the way of efficiency to be gained.

[22] For the forgoing reasons, the plaintiff's application for leave to bring a second summary trial application is dismissed.

[23] I did not hear submissions on costs. The defendant has been wholly successful on this application. My nascent view is that the defendant should be entitled to costs of this application in any event of the cause at Scale B. However, if either party wishes to make submissions on costs, they should make arrangements through scheduling to do so, preferably by the orderly exchange of brief written submissions.

[SUBMISSIONS ON COSTS]

[24] THE COURT: In the interests of expediency, I am going to make the order as suggested by Mr. McKechnie. Costs will be at Scale B in any event of the cause but payable at the conclusion of the litigation.

"Tammen J."