

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1153765 B.C. Ltd. v. Dann*,
2024 BCSC 2148

Date: 20241126
Docket: S249515
Registry: New Westminster

Between:

1153765 B.C. Ltd.

Plaintiff

And

Jeannette Ty Dee Dann

Defendant

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for the Plaintiff:	R.S. Atwal
Counsel for the Defendant:	P.R. Sorensen
Place and Date of Hearing:	New Westminster, B.C. September 13, 2024
Supplementary Written Submissions of the Plaintiff Received:	November 1, 2024
Supplementary Written Submissions of the Defendant Received:	November 13, 2024
Place and Date of Judgment:	New Westminster, B.C. November 26, 2024

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I. OVERVIEW

[1] This dispute arises from a residential construction contract between the parties. The plaintiff, 1153765 B.C. Ltd., is a development company that manages residential construction projects in BC. It claims damages for breach of contract in the amount of \$183,231.32 in this action.

[2] The defendant, Jeannette Ty Dee Dann, is a legal assistant and the registered owner of residential property in Burnaby, BC. Ms. Dann engaged the plaintiff to complete the construction of a single-family home at her Burnaby property in 2022. She now applies to cancel the certificate of pending litigation (“CPL”) the plaintiff filed against this property on the basis that the plaintiff has pleaded no viable claim to an interest in land, as required by s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA].

[3] The plaintiff underscores its role in Ms. Dann’s construction project as both a contractor and financier, and maintains that its pleading is adequate to sustain its claim to an interest in land.

[4] For the reasons that follow, I conclude that the notice of civil claim does not support a claim to an interest in land, as required by s. 215 of the *LTA*. I therefore cancel the CPL filed by the plaintiff on title to Ms. Dann’s Burnaby, BC property.

II. THE CLAIM

[5] On June 1, 2023, the plaintiff filed a notice of civil claim in this action (the “NOCC”). The NOCC pleads the following essential allegations:

- a) By April 2022, Ms. Dann was in debt, facing litigation with her previous contractors, and engaged in discussions with the plaintiff about taking over the construction project at her residential property (Part 1, para. 6);
- b) In or about May 2022, the parties entered into a contract pursuant to which the plaintiff agreed, as contractor and financier, to oversee construction and to finance the project to completion (Part 1, para. 7);

- c) Ms. Dann's construction project was then less than 40% complete (Part 1, para. 8);
- d) Pursuant to the contract between the parties, the plaintiff funded Ms. Dann's residential construction project and paid all trades and suppliers directly, with Ms. Dann agreeing to reimburse the plaintiff before she obtained the occupancy permit (Part 1, para. 9);
- e) The parties agreed that the plaintiff would be paid a fee of \$50,000 plus GST once the occupancy permit was obtained (Part 1, para. 10);
- f) The plaintiff performed work on the construction project, including both funding the project and providing management services (Part 1, para. 18);
- g) The occupancy permit was obtained on October 27, 2022, at which time the plaintiff was entitled to be paid (Part 1, para. 19);
- h) Ms. Dann did not pay the plaintiff in full, as required, contrary to the parties' contract (Part 1, para. 20); and
- i) The plaintiff claims a balance owing in the amount of \$183,231.32, excluding interest, for work completed pursuant to the parties' contract, a figure based on total expenses paid by the plaintiff in the amount of \$653,231.32, less the \$470,000 that Ms. Dann paid to the plaintiff (Part 1, para. 22).

[6] In the alternative, the plaintiff pleads that Ms. Dann has been unjustly enriched by the value of its work, to its detriment, and for no juristic reason: NOCC, Part 1, para. 25. The plaintiff denies Ms. Dann can rely on the contract between the parties as a juristic reason for her alleged unjust enrichment because she is in breach of this contract: NOCC, Part 1, para. 25. In the further alternative, the plaintiff seeks equitable relief based on the doctrine of *quantum meruit*: NOCC, Part 1, para. 26.

[7] The plaintiff further pleads that the work it performed increased the value of the property and, as such, the defendant holds her registered interest in the property in trust and for the benefit of the plaintiff: NOCC, Part 1, para. 28.

[8] The plaintiff seeks the following relief:

- a) A declaration that Ms. Dann is in breach of the parties' contract (NOCC, Part 2, para. 1(a));
- b) Judgment in the amount of \$183,231.32, plus interest (NOCC, Part 2, para.1(b));
- c) In the alternative, damages for breach of contract (NOCC, Part 2, para. 1(c));
- d) Damages for breach of good faith and honest performance (NOCC, Part 2, para. 1(d));
- e) In the alternative, restitution for unjust enrichment (NOCC, Part 2, para. 1(e));
- f) In the alternative, compensation based on *quantum meruit* (NOCC, Part 2, para. 1(f));
- g) A declaration that Ms. Dann was unjustly enriched and an order that she holds her registered interest in the property in trust and for the benefit of the plaintiff (NOCC, Part 2, para. 1(g));
- h) A CPL against title to the property (NOCC, Part 2, para. 1(h));
- i) Damages for misrepresentation and breach of duty of care (NOCC, Part 2, para. 1(i));
- j) General damages (NOCC, Part 2, para. 1(j));
- k) Costs (NOCC, Part 2, para. 1(k)); and

- l) Such further and other relief as this Court may deem just (NOCC, Part 2, para. 1(l)).

[9] The plaintiff also seeks an accounting, contractual interest, and damages for unjust enrichment: NOCC, Part 2, paras. 2–5.

[10] Plaintiff's counsel asserted in his oral submissions that there was no contract between the parties. Notably, the NOCC does not plead an absence of privity of contract as between the parties. There is also no pleading to support the plaintiff's submission that Ms. Dann agreed to provide the plaintiff with a mortgage on title to the property to secure her debt pursuant to the parties' construction contract.

III. THE CPL

[11] The plaintiff filed the CPL on June 1, 2023, the same day the plaintiff filed the NOCC. On August 1, 2024, Ms. Dann applied to cancel the CPL.

[12] The preliminary question before me is whether the NOCC is capable of supporting the plaintiff's claim to an interest in land, as required by s. 215 of the *LTA*. Certificates of pending litigation that fail to meet this requirement may be cancelled for that reason: *Bilin v. Sidhu*, 2017 BCCA 429 at para. 55.

[13] For reasons that are unclear, the plaintiff filed no builders lien on completion of Ms. Dann's residential construction project, pursuant to the *Builders Lien Act*, S.B.C. 1997, c. 45 [*BLA*]. Defence counsel asserts that the plaintiff filed the CPL in an effort to circumvent its own failure to file a builders lien within the prescribed time, and that this practice ought to be disallowed as a matter of public policy, citing *Cape Group Management Ltd. v. 0793231 B.C. Ltd.*, 2024 BCSC 493 at para. 42 [*Cape Group*].

IV. LAW AND ANALYSIS

A. Do the pleadings disclose an interest in land?

[14] To register and maintain a CPL against land, a party must claim an interest in that land: *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 9; *LTA*, s. 215. Section 215(1) of the *LTA* provides as follows:

Registration of certificate of pending litigation in same manner as charge

215 (1) A person who has commenced or is a party to a proceeding, and who is

(a) claiming an estate or interest in land, or

(b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the *Court Order Enforcement Act*, a copy of the notice of application or other document by which the claim is made.

[15] In order to be validly registered, a CPL must be supported by pleadings that assert an interest in the lands subject to the CPL: *Nouhi* at para. 9. Valid registration is a threshold criterion for the sustained registration of a CPL under s. 215(1) of the *LTA*: *Bilin* at para. 55; *Nouhi* at para. 9.

[16] The relevant time to assess the validity of a CPL, and the pleading on which it rests, is the date of filing of the CPL with the Registrar of Land Titles. Accordingly, I have considered the pleadings filed in support of the CPL, and not as they might be further amended: *Bilin* at para. 62. The issue is whether the plaintiff is claiming an interest in land, not whether they can prove an interest in land: *Samji (Trustee of) v. Chatur*, 2013 BCSC 1915 at para. 60. The whole of the NOCC must be considered to determine whether the plaintiff pleads a claim to an interest in land: *Batth v. Sharma*, 2024 BCCA 29 at para. 30.

[17] Ms. Dann relies on the *Supreme Court Civil Rules* [SCCR], R. 9-5(1)(a) and seeks to strike Part 1, para. 28 and Part 2, paras. 1(g) and (h) of the NOCC on the

basis that they disclose no viable claim by the plaintiff to an interest in land.

Ms. Dann does not apply to strike the plaintiff's pleading of unjust enrichment, or any corresponding remedy for monetary damages. Rather, she denies the plaintiff is entitled to an interest in land as a remedy for any alleged unjust enrichment.

[18] *SCCR*, R. 9-5(1) permits the court to strike out any part of a pleading at any stage of a proceeding on the ground that it discloses no reasonable claim. The test for striking a pleading pursuant to R. 9-5(1) is whether, assuming the pleaded facts are true, it is plain and obvious that the pleading discloses no cause of action or is certain to fail: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. No evidence is admissible on an application under this Rule; rather, the allegations of fact in the pleadings must be taken as true: *NV Electrical Inc. v. Meola*, 2022 BCSC 666 at para. 13 [*NV Electrical*].

[19] Accordingly, whether or not the plaintiff has an interest in land at this point is determined based on the pleadings and not by a summary determination of the issues between the parties: *Tiwana v. Rai*, 2018 BCSC 1893 at para. 29. The question before me is therefore whether the pleadings disclose a claim for an interest in land, without regard to the merits of the claim; it is purely a question of adequate pleadings: *Nouhi* at para. 13. Accordingly, in addressing this question, I have considered only the NOCC.

[20] The plaintiff asserts that Ms. Dann holds the property in trust for the plaintiff by virtue of the plaintiff's work at the property: NOCC, Part 1, para. 28. This pleading is apparently based on the plaintiff's allegation of unjust enrichment, in turn, giving rise to an equitable remedy in the form of a constructive trust.

[21] The law regarding unjust enrichment is well-established. The parties agree that proving an unjust enrichment claim requires a plaintiff to establish the following three elements, as set out in *Kerr v. Baranow*, 2011 SCC 10 at paras. 36–40, and in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30:

- 1) The defendant has been enriched;

- 2) The plaintiff has suffered a corresponding deprivation; and
- 3) There is no juristic reason for the enrichment.

[22] This analysis requires the plaintiff to show that there is no juristic reason from an established category: *Garland* at para. 44. The Court in *Garland* outlined these established categories at para. 44:

... The established categories that can constitute juristic reasons include a contract (*Pettkus [v. Becker]*, [1980] 2 S.C.R. 834, 1980 CanLII 22), a disposition of law (*Pettkus, supra*), a donative intent (*Peter [v. Beblow]*, [1993] 1 S.C.R. 980, 1993 CanLII 126), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[23] The existence of a contract presents an insurmountable barrier to a claim for unjust enrichment: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 59. Notably, the plaintiff expressly pleads the existence of a contract between the parties in the NOCC. On the plaintiff's own pleading, this contract is a juristic reason for Ms. Dann's alleged enrichment. The plaintiff pleads that Ms. Dann cannot rely on the contract between the parties as a juristic reason because she is in breach of this contract: NOCC, Part 1, para. 25. In my view, this is not a pleaded material fact but rather an argument. While the plaintiff asserts that Ms. Dann cannot rely on the parties' contract as a juristic reason to disentitle the plaintiff to claim unjust enrichment because Ms. Dann is in breach of this contract, plaintiff's counsel provided no authority to support this submission.

[24] The Court of Appeal considered when claims in contract and unjust enrichment can be pleaded concurrently in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 [*Revolution Resource*]. Justice Voith, speaking for the Court, concluded that there are two broad categories where claims in contract and unjust enrichment can be pleaded concurrently: 1) where a benefit is conferred beyond the scope of the negotiated terms of a contract; and 2) where some issue in relation to the validity or enforceability of the contract in question is raised (including, for example, issues of illegality, capacity, or frustration): *Revolution Resource* at

paras. 50–51. Based on the NOCC, I conclude that neither of those broad categories applies here.

[25] Counsel for neither party considered *Revolution Resource* in their initial submissions. Accordingly, I gave them an opportunity to do so by way of supplementary written submissions. Plaintiff’s counsel provided his response on November 1, 2024; defence counsel did so on November 13, 2024.

[26] Plaintiff’s counsel makes the following essential arguments:

- a) The plaintiff had rights outside of the *BLA*, including, in particular, those as a financier rather than as a construction contractor;
- b) The defendant does not plead a “dichotomy” between breach of contract and unjust enrichment;
- c) The benefit the defendant obtained falls outside any contract because there is no contract between the defendant and the plaintiff;
- d) The plaintiff pleaded breach of contract due to the plaintiff “being mentioned in paragraph E of the Contract”;
- e) The unjust enrichment pleading is “in the alternative,” should the breach of contract claim fail; and
- f) In the alternative, the plaintiff ought to be granted leave to file an Amended NOCC.

[27] I address each of these points in turn.

[28] As noted, the Court of Appeal identified two situations in *Revolution Resource* where unjust enrichment claims can be brought concurrently with claims in contract: 1) where the purported benefit passed outside the contract; and 2) where the validity of the contract is in question. Plaintiff’s counsel addressed only the first of these two scenarios. In my view, whether or not the plaintiff had rights outside the *BLA* is not

relevant to a determination of whether claims in contract and unjust enrichment can proceed concurrently.

[29] I accept that the defendant did not raise any argument about the plaintiff's ability to bring concurrent claims for breach of contract and unjust enrichment. I do not agree this is a barrier to considering the possible implications of *Revolution Resource* here. Both parties were given an opportunity to comment on that matter by way of supplementary written submissions. Based on *Nouhi* at para. 13, citing *Xiao v. Fan*, 2018 BCCA 143 at para. 27, the relevant inquiry focuses on the plaintiff's pleading, and not the defendant's response to the NOCC.

[30] It is unclear how the plaintiff's supplementary submission that the benefit the defendant obtained falls outside the contract because there is no contract between the parties can be squared with the NOCC. The NOCC expressly pleads the existence of a contract between the parties. Notably, the guidance in *Revolution Resource* applies even when a plaintiff's unjust enrichment claim is pleaded in the alternative: *Revolution Resource* at para. 47.

[31] Finally, the plaintiff has not applied to amend the NOCC. This action has now been set down for trial. Accordingly, such an application requires leave of the court or consent of the parties: *SCCR*, R. 6-1.

[32] Defence counsel says *Revolution Resource* is inapplicable here because:

- a) Whether there is a contract between the parties in this case remains a "live issue"; and
- b) The defendant intentionally narrowed her application to challenge only the plaintiff's assertion that there is a constructive trust, leaving open the possibility of a further, more complex, application seeking a broader dismissal of the action.

[33] *SCCR*, R. 9-5(1) requires the court to proceed on the assumption that the pleaded facts are true. I have done so here.

[34] The plaintiff's unjust enrichment claim might be sustainable if there is no contract between the parties. If so, the question of whether it gives rise to an interest in land remains. A proprietary interest does not generally follow a finding of unjust enrichment, unless the plaintiff has demonstrated why a monetary award would be inappropriate. There is no pleading in the NOCC that a monetary award would be inappropriate, nor any pleading to explain why a proprietary interest is instead appropriate. I conclude, based on the NOCC, as presently constituted, that the plaintiff's pleading is inadequate to sustain a claim to an interest in land.

[35] Constructive trusts are designed to determine beneficial entitlement to property when a monetary award is inappropriate or insufficient: *Pro-Sys Consultants Ltd. V. Microsoft Corporation*, 2013 SCC 57 at para. 92, citing *Kerr* at para. 50. In *Pro-Sys*, the Court noted that the plaintiff's claim neither explained why a monetary award was inappropriate or insufficient, nor showed a link to specific property. The Court found it was plain and obvious on the pleadings that the claim based on constructive trust could not succeed and must be struck: *Pro-Sys* at para. 92.

[36] In essence, the NOCC pleads a claim for breach of contract. In my view, there are significant parallels between this case and two decisions that defence counsel cited: *NV Electrical and Cape Group Management Ltd. v. 0793231*, 2024 BCSC 493 *Cape Group*. Plaintiff's counsel described both as old law.

[37] In *NV Electrical* at para. 37, Justice Burke struck the plaintiff's claim for a constructive trust pursuant to *SCCR*, R. 9-5(1)(a) on the basis the plaintiff had not pleaded the material facts necessary to establish a constructive trust as an appropriate remedy. As in the case before me, the parties' dispute arose in the context of the construction industry where such claims are generally resolved through contract law or the *BLA*: *NV Electrical* at para. 37. Justice Burke concluded, as noted in *Park v. K.S. Mechanical Ltd.*, 2012 BCSC 1751 at paras. 39–41, that claims in unjust enrichment are rare in this context and that, absent unusual circumstances, breach of contract and builders liens represent the extent of a

subcontractor's remedies. She observed that the parties had engaged in an arm's-length business transaction and concluded that the plaintiff would have had no reasonable expectation that its work on the property would grant it proprietary rights, as opposed to monetary ones: *NV Electrical* at para. 40. The plaintiff in *NV Electrical* referred the court to no cases where a party in similar circumstances had been granted proprietary relief.

[38] In *Hans Demolition & Excavating Ltd. v. Green Oak Development (West 7th) Corp.*, 2021 BCSC 1472 at paras. 114–129, a decision cited in *NV Electrical*, the court allowed a claim for unjust enrichment but ordered a monetary remedy. The plaintiff subcontractor in that case had no contractual relationship with the homeowner. As noted by Burke J. in *NV Electrical* at para. 38, the common contractual framework in the construction industry usually constitutes a juristic reason to deny the subcontractor recovery against the homeowner and the *BLA* contemplates remedies for the subcontractor.

[39] I accept that unjust enrichment claims are exceedingly rare in the construction industry and that where there are exceptional circumstances warranting such a claim, the proper remedy will likely be monetary: *NV Electrical* at para. 39.

[40] In *Cape Group* at paras. 42–43, Justice Milman cancelled a certificate of pending litigation on the basis that the plaintiff's pleading did not support a claim to an interest in land. The claim was founded on alleged unjust enrichment that was remediable in damages. Justice Milman found that the plaintiff was, in effect, seeking to maintain a CPL in order to sustain its defective builders lien claim in another guise: at para. 42. He concluded that this should not be permitted as a matter of policy, citing *NV Electrical*.

[41] As in *Cape Group*, the plaintiff here has not pleaded that damages would be an inadequate remedy. As noted by Milman J. in *Cape Group* at para. 41, Walker J. in *Treasure Bay HK Limited v. 1115830 B.C. Ltd.*, 2024 BCSC 294 [*Treasure Bay*] rejected the suggestion that a plaintiff must specifically plead that damages are an inadequate remedy in order to sustain a CPL. Rather, pursuant to this view, the

court must read the pleadings as a whole to determine if the plaintiff is truly claiming an interest in land: *Cape Group* at para. 41. *Treasure Bay* involved an alleged breach of fiduciary duty claim in circumstances where funds that the plaintiff advanced were allegedly traceable into the subject property. As in *Cape Group*, there is no such allegation in the case before me.

[42] As in *NV Electrical*, the plaintiff here pleads unjust enrichment as an alternative to its primary breach of contract claim. The plaintiff in the case before me, as in *Cape Group*, pleads that its alternative unjust enrichment is remediable in damages. Generally, a proprietary remedy will not follow a finding of unjust enrichment unless a monetary award is inappropriate or inadequate in the circumstances: *Kerr* at para. 47.

[43] In *Water Street Profile Services Inc. v. Kelowna Sustainable Innovation Group Inc.*, 2018 BCSC 925 [*Water Street*], Justice Baker dismissed a constructive trust claim where the plaintiff alleged the breach of a lease agreement. She found that this relationship could not sustain such a remedy as the alleged unjust enrichment did not relate directly to the impugned property: *Water Street* at para. 44. Justice Baker concluded that the constructive trust claim was being sought as a form of priority and security over the interests of other unsecured creditors for its monetary claim: *Water Street* at para. 45. She decided that a constructive trust remedy was not appropriate since the plaintiff's claim was essentially a monetary one: at para. 46. Justice Burke applied the same reasoning in *NV Electrical* at para. 43; she struck the plaintiff's constructive trust claim pursuant to R. 9-5(1)(a) on the basis that, if the material facts pleaded were taken as true, they were insufficient to establish entitlement to such a remedy and were thus bound to fail.

[44] Plaintiff's counsel relies heavily on *Oikon Developments Inc. v. Chris & Mando Ltd.*, 2024 BCSC 1333 [*Oikon*], a recent decision of Justice Hughes. Justice Hughes declined to cancel a CPL in *Oikon* on the basis that the plaintiff's pleading disclosed no claim to an interest in land: at para. 54. Unlike the case before me, the parties' dispute in *Oikon* involved a joint venture agreement and not a contract in the

construction industry. In my view, *Oikon* is distinguishable on its facts and *NV Electrical* and *Cape Group* are more analogous.

[45] I conclude that the plaintiff has failed to plead the necessary material facts to establish a proprietary claim to the property based on a trust. Pleadings particulars of the plaintiff's allegation that it funded the construction project are confined to Part 1, para. 9 of the NOCC. The plaintiff pleads there that, pursuant to a contract between the parties, it paid all trades and suppliers directly, with Ms. Dann to reimburse the plaintiff before the occupancy permit was obtained. That is what contractors routinely do in the context of arm's-length construction contracts: *NV Electrical* at para. 40. A bald assertion without a proper factual foundation is insufficient to withstand scrutiny under s. 215: *Porter v. Porter*, 2023 BCSC 2181 at para. 28, citing *Sonnenberg v. Sonnenberg*, 2023 BCSC 957 at para. 15.

[46] I acknowledge there is no absolute or immutable rule that a plaintiff must plead the inadequacy of damages, and that a failure to do so will not necessarily result in the cancellation of a CPL: *Oikon* at para. 47, citing *Batth* and *Treasure Bay*. Rather, the pleadings must be considered as a whole to determine whether they are sufficient to sustain an interest in land, as required by s. 215 of the *LTA*: *Oikon* at para. 47. I find, based on a review of the NOCC as a whole, that the plaintiff has not disclosed a claim to an interest in land.

[47] As noted in *Berthin v. Berthin*, 2018 BCCA 57 at para. 32, a CPL is an extraordinary pre-judgment mechanism to protect a valid claim to an interest in land until the issues in dispute can be resolved. Its purpose is not to provide pre-judgment security: *Samji* at para. 53; *Water Street* at para. 46.

[48] In summary, I conclude that the NOCC, in its present form, is inadequate to support a claim to an interest in land, based on unjust enrichment or a constructive trust. I conclude that the CPL was not valid when it was filed, as required by s. 215 of the *LTA*. Accordingly, I conclude that it must be cancelled. By extension, I strike Part 1, para. 28 and Part 2, paras. 1(g) and (h) of the NOCC on the basis that they do not support a claim to an interest in land.

B. Is the defendant entitled to summary judgment?

[49] Given my finding that the NOCC does not support a claim to an interest in land, I need not consider the parties' affidavit evidence, or whether Ms. Dann is entitled to summary judgment pursuant to *SCCR*, R. 9-6.

V. DISPOSITION

[50] The defendant's application to strike the CPL is allowed, with costs in the cause on the ordinary scale.

"Douglas J."