IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wanklyn v. Elite Lifestyle Services Inc.,* 2024 BCSC 2341

Date: 20241220
Docket: S55285
Registry: Vernon

Between:

Beverly Jill Wanklyn

Plaintiff

And

Elite Lifestyle Services Inc., Elite Lifestyle Services and Rene Bertrand, doing business as Elite Life & Home Painting & Renovations

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:	A.V. Jaquish
The Defendant, Rene Bertrand, appearing in person and as Representative for the Defendants:	R. Bertrand
Place and Date of Summary Trial:	Vernon, B.C. November 21, 2024
Place and Date of Judgment:	Vernon, B.C. December 20, 2024

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I. Introduction

[1] This action arises from a series of contracts by which the plaintiff, Beverly Jill Wanklyn, hired the defendants to renovate her house. After paying them a total of $771,207.96 and waiting over a year and a half for the work to be done, she finally lost faith in them and hired a different contractor to complete the job.

[2] In her notice of civil claim, she alleges, among other things, that the defendants:

a) breached the contracts by failing to complete the work as promised;

b) made a series of fraudulent (or alternatively, negligent) misrepresentations to induce her to make those payments; and

c) diverted her payments to purposes unrelated to the project.

[3] She now applies for judgment by way of summary trial, seeking compensatory damages totalling $790,480.40, interest and costs as well as punitive damages in the amount of $50,000.

[4] The defendants did not formally respond to the application, although the individual defendant, Rene Bertrand, appeared at the hearing to ask for an adjournment, which I refused, and to make submissions in opposition to it.

[5] For the reasons that follow, I have concluded that Ms. Wanklyn is entitled to judgment in her favour, as set out below.

II. Summary of the Evidence

[6] Ms. Wanklyn's has adduced two affidavits in support of her application – her own and that of a lawyer employed by the law firm representing her in this action. The latter attaches extensive extracts from Mr. Bertrand's examination for discovery, in which he acknowledges the truth of many of Ms. Wanklyn's factual assertions. Because the defendants have not responded to the application, the facts asserted by Ms. Wanklyn in those affidavits are essentially uncontroverted.

[7] Ms. Wanklyn first met Mr. Bertrand in or around January 2017, through mutual friends. At the time, Ms. Wanklyn owned her home, a house located at 860 Manhattan Drive on the lakefront in Kelowna. It was an older house, built in 1924, and was poorly insulated. She was single and lived alone, although her sons occasionally came to stay with her. Mr. Bertrand resided at a nearby property, also on Manhattan Drive.

[8] Ms. Wanklyn says she was impressed by Mr. Bertrand's demeanour and his apparent knowledge base and skillset. She understood that he operated a business known as "Elite Life & Home Painting & Renovations". She hired him in that capacity to clean her home. After he told her that she could make some money by creating and renting out a guest suite, she agreed to engage him to do a renovation for that purpose, at a cost of just over $76,000. The quote he prepared for her, like all the future ones, directed her to remit payments to Elite Lifestyle Service Ltd., apparently an alias of the defendant, Elite Lifestyle Services Inc. ("ELSI"). ELSI is a British Columbia company whose principal, Justin Sturby, is Mr. Bertrand's business and spousal partner.

[9] After Mr. Bertrand successfully completed the guest suite, they discussed a more comprehensive renovation of the rest of the house. Ms. Wanklyn was planning to depart for a European vacation between March 15 and April 21, 2017. Mr. Bertrand told her that he could do the work and have it essentially completed while she was away. Upon her return, he said, she could reside in the guest suite while he completed the finishing touches to the rest of the house, all of which would be done by the May long weekend.

[10] The original scope of work included the following:

a) the requisite demolitions;

b) reconfiguring the master bedroom, master bathroom, main floor (including the kitchen, bathroom, laundry room, and guest suite);

c) removing and replacing the deck off the master bedroom;

d) installing central air conditioning;

e) installing new plumbing, windows, walls, ceilings, sub-flooring, flooring, lighting, doors, baseboards, doors, and eaves troughs;

f) installing a new hot water tank, electrical panel, central vacuum system, and roof;

g) insulating the crawl space; and

h) painting the entire house.

[11] Mr. Bertrand presented Ms. Wanklyn with a quote, dated February 23, 2017, to do that work at a cost of $379,575, of which $10,000 was allocated to the cost of the demolition. Ms. Wanklyn agreed to engage him accordingly, and, to that end, paid ELSI, by bank drafts, dated February 24, 2017 and March 16, 2017, in the amounts of $200,000.00 and $127,245.00, respectively, for a total of $327,245.

[12] When she returned from vacation on April 21, 2017, Mr. Bertrand arranged for a limousine to pick her up from the airport. She was expecting to arrive home to a newly-renovated house. Instead, she was shocked to find that the house had been gutted and progress halted. Her belongings remained in storage offsite.

[13] Ms. Wanklyn asked for her money back. Mr. Bertrand refused to provide a refund, explaining that her money had already been spent purchasing the materials needed for the renovation. This appears to have been untrue.

[14] When Ms. Wanklyn demanded an explanation, Mr. Bertrand told her that he had discovered some rotting wood in some of the support beams. He had withheld that information from her until then, he said, because he had not wanted to spoil her holiday. He told her that he needed another $50,000 to replace the rotting wood, upon receipt of which the project could continue as planned. Ms. Wanklyn then provided the defendants with a bank draft in that amount.

[15] Despite that promise, the work did not progress. Instead, in July 2017, Mr. Bertrand informed Ms. Wanklyn that all of the support beams in the house were rotten and in need of replacement. It was now necessary, he said, to rebuild part of the house from scratch, which would involve pouring new foundations, installing new exterior stucco and a new porch. The additional work would take another two months and would cost an additional $125,000. He provided her with a quote, dated July 24, 2017, to perform that work for that price. On July 26, 2017, Ms. Wanklyn provided ELSI with a bank draft for $93,750.

[16] As the project languished during the rest of the summer, Mr. Bertrand told Ms. Wanklyn, falsely, that he was awaiting municipal permits. In September 2017, he told her that the house contained asbestos and that the work could not proceed until the problem was addressed. He also told her at this time that the solarium windows, the house's footings and the garage all needed to be replaced. To that end, he provided her with yet another quote, this one dated September 29, 2017, in the amount of $102,017.28, for that additional work. She responded that same day by paying ELSI $76,512.96 by way of a bank draft.

[17] The subcontractor completed the asbestos abatement work in October 2017. No substantial work was done on the project thereafter.

[18] In December 2017, the pipes froze because they had been left exposed without insulation. Ms. Wanklyn paid the first of four invoices, in the amount of $1,393.87, to the subcontractor who was hired to fix the problem. Mr. Bertrand agreed to pay the rest of the repair cost himself. According to Ms. Wanklyn, he paid the next two invoices but failed to pay the final one after that, so the subcontractor ended up writing it off.

[19] Between January and April 2018, Mr. Bertrand was rarely on site. He told Ms. Wanklyn that he was waiting for a structural engineer to prepare plans so that construction could proceed. In April 2018, he told her (falsely), that the city had concluded that the house was structurally unsound and now had to be torn down

and rebuilt from scratch in its entirety. He suggested that she consider rebuilding the house with an additional storey but she refused.

[20] On May 2, 2018, Mr. Bertrand presented Ms. Wanklyn with yet another quote to complete the renovation, this one for $1,247,400, in addition to the amounts she had already paid. She agreed to make the payment but this time her bank refused to lend her any more than $223,700 until the work was completed. She provided the defendants with a bank draft in that amount on May 18, 2018.

[21] In June 2018, Mr. Bertrand told Ms. Wanklyn that progress was now stalled because he was waiting for an environmental consulting report, which was expected later that month. In assisting her to obtain insurance on the property, he told her that construction work would take place from June 27 to September 30, 2018.

[22] On July 25, 2018, Ms. Wanklyn and her son met with Mr. Bertrand at the house to discuss the project. During that meeting, he told them that he had been dealing with the environmental consultant for many months and expected to receive the requisite permits soon after the forthcoming report was issued. He told them that municipal officials had refused to grandfather the house for the rebuild, which meant that the design would need to be modified yet again. Nevertheless, he warned them against speaking with city officials directly, because if they did, they would likely be left with an 800-square-foot house.

[23] It soon emerged that none of those representations were true. After the meeting, Ms. Wanklyn contacted the environmental consultants directly and learned that Mr. Bertrand had first approached them only on July 6, 2018. Moreover, their subsequent report dated July 26, 2018 indicated that the house had indeed been grandfathered for planning purposes by the City of Kelowna.

[24] In early August 2018, Ms. Wanklyn, now justifiably suspicious about everything Mr. Bertrand had been telling her, demanded to see the defendants' receipts for the work done to that point. They refused to provide them. When the receipts were later produced through the discovery process in this action, they

purported to show that the defendants had spent $85,803.57 on the project, but upon scrutiny it became clear that most of them pertained to other projects. Only $17,363.66 were clearly referable to her house. A few more were referable to a project on Manhattan Drive, which may have been hers or another one. In his examination for discovery, Mr. Bertrand acknowledged that the defendants were working on four to six other projects at the same time, including a project at his own home, also on Manhattan Drive. Mr. Bertrand further acknowledged that the defendants had commingled her payments with their other funds and used them for those other projects.

[25] On August 18, 2018, Ms. Wanklyn again demanded a refund of her money. The defendants refused. Instead, on August 23, 2018, they made their first application to the city on her behalf for a building permit to carry out a partial demolition of the house.

[26] On August 31, 2018, Ms. Wanklyn formally terminated her contract with the defendants. She subsequently hired a different contractor to complete the renovation at a cost of $995,025.41.

[27] Ms. Wanklyn commenced this action on October 9, 2018. After the pleadings closed, the parties exchanged lists of documents and conducted examinations for discovery. No substantive steps were taken in the litigation after that, except that counsel for the defendants formally withdrew on August 8, 2023.

[28] Ms. Wanklyn filed this application on June 12, 2024, after providing the defendants with notice of her intention to proceed.

III. Discussion

A. Suitability for Summary Disposition

[29] The test to be applied in determining whether an action lends itself to summary disposition was set out by the Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). There, the question was said to turn on the following factors:

a) whether the requisite factual findings can be made on the evidence presently before the court; and

b) whether it would be unjust, for some other reason, to decide the case by way of a summary application.

[30] In *Cepuran v. Carlton*, 2022 BCCA 76, the Court listed the following factors as potentially relevant to the analysis:

a) the amount involved;

b) the complexity of the matter;

c) its urgency;

d) any prejudice likely to arise from delay;

e) the cost of taking the case forward to conventional trial in relation to the amount involved (described as “proportionality”);

f) the course of the proceedings;

g) whether the evidence is sufficient to decide the dispute; and

h) any other relevant factors.

[31] Given that there is no opposition to the present application, the task of making the requisite factual findings presents fewer challenges. In addition, Ms. Wanklyn’s factual assertions are, to a large extent, confirmed by the testimony of Mr. Bertrand on discovery.

[32] Although the damages sought are substantial, the issues raised are not complicated. There is little if any benefit to be gained by requiring Ms. Wanklyn to proceed to a conventional trial to prove her claim. It is doubtful that the evidentiary record would improve sufficiently to justify the additional delay and cost of a trial.

[33] For those reasons, I have concluded that the matter is appropriately resolved by way of summary trial.

B. Liability

[34] Ms. Wanklyn advances the following causes of action in the notice of civil claim:

a) breach of contract;

b) fraudulent, or alternatively, negligent misrepresentation; and

c) conversion and breach of fiduciary duty.

[35] I am satisfied that the evidence before me establishes the defendants' liability for breach of contract and fraudulent misrepresentation.

[36] With respect to the claim in contract, the defendants promised to complete the renovation, at each stage, within a time span measured in weeks and for a fixed price that kept growing, and then failed to do what they promised. Instead, after about 18 months of inactivity, Ms. Wanklyn had received only an interior demolition, asbestos abatement, and some minor electrical and plumbing work. In the end, she had to spend another $995,025.41 to have a different contractor complete the work that the defendants had promised to do in exchange for the money she had given them.

[37] Turning to the claim in fraudulent misrepresentation, Ms. Wanklyn cites *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, for the elements of that cause of action, which are as follows:

a) false representations have been made;

b) the false representations were made:

   i. knowingly;

   ii. without belief in their truth; and / or

iii. recklessly, careless as to whether they be true or false;

c) such representations induce the plaintiff to act; and

d) damages have been suffered.

[38] The evidence supports Ms. Wanklyn's contention that Mr. Bertrand made representations in the following areas to induce her to make the payments, either knowing they were untrue, or recklessly, without regard to their truth:

a) the defendants' capacity to carry out the work as promised;

b) the state of the house after the demolition;

c) the status of the renovations;

d) the timeline of the work to be performed;

e) the efforts that had been made to date to complete the renovations;

f) the need for a rebuild;

g) the permits that had been obtained and when they were obtained;

h) the professionals who had been hired and when they had been hired;

i) the conditions that the City of Kelowna had imposed; and

j) what her money was being used for and how it was being spent.

[39] Given my conclusion that the defendants are liable in contract and fraudulent misrepresentation, it is not necessary to consider whether they might also be liable in conversion and breach of trust. Ms. Wanklyn cites *Ast v. Mikolas*, 2010 BCSC 127 and *Trophy Foods Inc. v. Scott*, 1995 NSCA 74, in support of her claims based on those causes of action, but those cases are not analogous on their facts.

C. Compensatory Damages

[40] In response to the defendants' breaches of contract, Ms. Wanklyn opted to terminate the contract. The defendants have pleaded that they accepted the termination. In the circumstances, Ms. Wanklyn is entitled to restitutionary damages.

[41] Further, I have also found that the defendants made a series of fraudulent misrepresentations that induced Ms. Wanklyn to pay them amounts that she would not otherwise have paid.

[42] Her remedy for both of these causes of action is to be placed in the position she would have been in had the misrepresentations never been made and the contract never formed. To that end, Ms. Wanklyn seeks compensatory damages as follows:

ITEM	**AMOUNT**
Funds provided to Defendants for renovations: ○ February 24, 2017 - $200,000.00 ○ March 16, 2017 - $127,245.00 ○ April 27, 2017 - $50,000.00 ○ July 26, 2017 - $93,750.00 ○ September 29, 2017 - $76,512.96 ○ May 8, 2018 - $223,700.00	$771,207.96
Restoration from freezing pipes	$1,327.50
Missing furniture	$1,114.40
Storage costs	$2,529.52
Increased insurance premiums	$2,286.50
Temporary insulation and furnace	$12,014.52
TOTAL	**$790,480.40**

[43] Although I am satisfied that it is appropriate to order the defendants to disgorge most of the funds that Ms. Wanklyn paid them, the defendants are entitled to a credit for the benefit that Ms. Wanklyn obtained from the work they did. That benefit included an interior demolition, asbestos abatement and some plumbing and electrical work.

[44] Ms. Wanklyn agreed to pay $10,000 for the demolition work that was done. It appears that she also received the benefit of the goods and services reflected in the defendants' invoices attributable to her project, which total $17,363.66 by her calculation. In addition, some of work invoiced to Manhattan Drive is likely to have been for her project. Those invoices total $30,192.53 as follows:

a) $16,630;

b) $3,018.75;

c) $9,228.78;

d) $456;

e) $597; and

f) $262.

[45] Assuming half of the work invoiced to Manhattan Drive was for her benefit, the defendants are entitled to a total credit of $10,000 + 17,363.66 + $15,096.27 = $42,459.93. The net refund payable by the defendants is therefore $771,207.96 – $42,459.93 = $728,748.03.

[46] In addition to those funds to be disgorged, Ms. Wanklyn claims special damages for the following additional items:

a) restoration from freezing pipes;

b) missing furniture;

c) storage costs;

d) increased insurance premiums; and

e) temporary insulation and furnace.

[47] I accept that some of these expenses are attributable to the defendants' breaches of contract, but I am not persuaded that all of them are.

[48] The first exception is the missing furniture. Ms. Wanklyn says that on December 8, 2017, she purchased a leather chair for $1,114.40 intended for use when the renovations were complete. She says that Mr. Bertrand promised to pick up the chair for her and put it in storage but when she attended at the storage unit, the chair was missing. That promise, and the defendants' failure to keep it, is not properly pleaded in the notice of civil claim. Conversely, the loss of the chair does not flow the breaches of contract that are pleaded.

[49] The second exception is the storage costs. Ms. Wanklyn seeks to recover the cost for storing her possessions during the period from December 31, 2018 (when she says she took over the storage contract from the defendants) until October 9, 2019. During that period, she was waiting for the new contractor to complete the project. I am not persuaded that this expense can fairly be attributed to the defendants' breach of contract. Although she had to store her possessions for longer than she would have if the defendants had not breached the contract, the defendants paid for her storage costs while the contracts with them were extant. Had she engaged the second contractor from the outset, she would still have had to incur this expense.

[50] The third exception is the temporary insulation and furnace cost, which also appears to be an expense that Ms. Wanklyn would have had to incur in carrying out the renovation, regardless of the defendants' breaches.

[51] In summary, I am awarding Ms. Wanklyn compensatory damages totalling $732,362, as follows:

a) net disgorgement of monies paid ($728,748);

b) restoration from freezing pipes ($1,327.50); and

c) increased insurance premiums ($2,286.50).

D. Punitive Damages

[52] In addition to the compensatory damages I have awarded, Ms. Wanklyn also seeks an award of punitive damages in the amount of $50,000 to punish the defendants for their reprehensible conduct. She relies in that regard on their alleged conversion and breach of trust in redirecting her payments to other purposes. She also argues that a punitive award is needed to deter the defendants and others from similar conduct.

[53] The purpose of an award of punitive damages was explained by Binnie J. in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36, as follows:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[54] In *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189, Goepel J.A., writing for the Court, summarised the principles to be applied in making such an award, as follows:

> [77] The three objectives of punitive damages are retribution, deterrence, and denunciation. Punitive damages awards should be approached with caution and restraint and resorted to only in exceptional circumstances: *Whiten* at para. 69. Punitive damages awards are rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19 at para. 87.
>
> [78] In *Whiten* at para. 94, the Court set out the factors that should be taken into account when considering an award for punitive damages. The factors include:
>
> > a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
> >
> > b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other

> penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
>
> c) Punitive damages are awarded only if compensatory damages (which to some extent are punitive in nature) are insufficient to accomplish these objectives, and the amount awarded is no greater than necessary to rationally accomplish their purpose;
>
> d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
>
> e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant; and
>
> f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[55] Additional factors to consider in quantifying an award in punitive damages include the financial means of the plaintiff, any criminality by the defendant, an abuse of the court process by the defendant, and if the impugned act was planned and deliberate: *Insurance Corporation of British Columbia v. Husseinian*, 2008 BCSC 241**.**

[56] I accept that there are a number of factors in this case that weigh in favour of an award of punitive damages. First, it is troubling that the defendants used Ms. Wanklyn's payments, at least partly, to carry out renovations at Mr. Bertrand's own home while progress at her house was delayed over and over again. Ms. Wanklyn entrusted the defendants with a significant portion of her net worth, leaving her vulnerable to the kind of abuse of that trust that the defendants engaged in. In addition, I have found that the defendants made fraudulent misrepresentations to induce her to continue paying them. In effect, the defendants lied to her on multiple occasions in an effort to keep her committed to the contract. Finally, there is no punitive element in the compensatory award I have made and Ms. Wanklyn does

not seek general or aggravated damages, leaving an award of punitive damages as the only potentially available means of deterrence.

[57] On the other hand, there are other factors weighing against a large punitive award in this case. In particular, I am not persuaded that the defendants set out from the beginning to convert Ms. Wanklyn's payments without ever intending to complete the project. Rather, it appears that they intended to do the work eventually, but were incapable of properly managing the project or seeing it through to completion.

[58] Ms. Wanklyn argues that the defendants also need to be deterred because they have acted in a similar manner with other clients. However, the evidence she has adduced to demonstrate that fact is hearsay and cannot properly form the evidentiary basis for a final order such as is sought here.

[59] For those reasons, I am awarding punitive damages in the amount of $10,000.

E. Interest

[60] Ms. Wanklyn is entitled to pre-judgment interest on the sum of $732,362 for the period from August 18, 2018, the date she demanded a full refund of her money, to the date of this judgment, at the prescribed rate set out in the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*].

F. Costs

[61] Ms. Wanklyn seeks an award of special costs to punish the defendants for their reprehensible conduct giving rise to this action. However, it has been held that pre-litigation conduct should not form the basis of an award of special costs, which is intended to address misconduct in the course of the litigation itself: *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177.

[62] Ms. Wanklyn has not raised any complaint about the manner in which the defendants have defended themselves in this litigation. I am therefore refusing to

award her special costs. However, as the successful party, she is entitled to her costs of the action at the ordinary tariff.

IV. Disposition

[63] I am granting Ms. Wanklyn judgment on her claim as follows:

a) compensatory damages of $732,362;

b) interest on that sum pursuant to the *COIA* from August 18, 2018 to the present;

c) punitive damages of $10,000; and

d) costs of the action at the ordinary tariff.

"Milman J."