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Diamant Cleaning Vancouver Inc. v. Kindred Construction Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20231018
Docket: CA49268

Between:

Diamant Cleaning Vancouver Inc.

Appellant
(Plaintiff)

And

Kindred Construction Ltd.

Respondent
(Defendant)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
July 19, 2023 (*Diamant Cleaning Vancouver Inc. v. Kindred Construction Ltd.*,
Vancouver Docket S234192).

Oral Reasons for Judgment

Appearing as agent for the Appellant:

O. Li

Counsel for the Respondent:

D.K. Plunkett

Place and Date of Hearing:

Vancouver, British Columbia
October 18, 2023

Place and Date of Judgment:

Vancouver, British Columbia
October 18, 2023

GRIFFIN J.A.:

Nature of the Application

[1] The respondent, Kindred Construction Ltd. (“Kindred”), seeks an order that the appellant, Diamant Cleaning Vancouver Inc. (“Diamant”), deposit security for costs for the trial and appeal proceedings, pursuant to s. 34(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [CA Act]. The respondent seeks an amount of \$5,000.00 for the trial proceeding, and \$14,740.80 for the appeal. Costs have not yet been assessed for the trial proceeding.

[2] Diamant opposes the application and submits that it should be dismissed.

Nature of the Appeal

[3] Diamant appeals an order of Justice Fitzpatrick, pronounced on July 19, 2023 dismissing its action and ordering costs against it.

[4] In the action below, Diamant sued Kindred for outstanding amounts owed pursuant to a cleaning contract. Diamant claimed \$34,865.17 in the Notice of Civil Claim, and also claimed interest on the basis that Kindred had not made payment for over 3 months requiring Diamant to borrow money at high interest rates.

[5] In Kindred’s Response to the Notice of Civil Claim (“Response”), Kindred admitted that the parties entered into a contract for Diamant to provide final cleaning in relation to the construction of a multi-unit residential project. Kindred stated that the contract was a fixed price contract for the lump sum of \$28,700.00 plus GST. Kindred stated that it had paid Diamant \$7,645.78 to date and owed Diamant \$22,489.22 including statutory holdback.

[6] Kindred stated in the Response that Diamant had filed a claim of lien against the property for \$36,813.79; and stated it would pay into court the amount owed to Diamant in order to remove the claim of lien from the property. The Court cancelled the claim of lien on July 11, 2023 after Kindred’s application and payment of security.

[7] On June 8, 2023, Diamant brought an application for judgment on the full amount of its claim. There were irregularities in its motion materials, both in not referring to the Rule on which it was based and in respect of the quality of its evidence. Diamant did not have the benefit of legal counsel and was represented by its principle, Isabel Martinez.

[8] The matter was heard and determined in Chambers on July 19, 2023. The chambers judge found that the contract was a fixed price contract; Diamant had not followed the process in the contract related to change orders; and Ms. Martinez's evidence fell short of proving that Kindred had agreed to pay for extra work. Diamant submits as an argument on appeal that the judge did not look at any of the evidence filed by Ms. Martinez, and incorrectly found that Paragraph 6.2 of the contract solely governed the parties' dispute. It is not apparent on the record that the judge failed to look at Ms. Martinez's materials.

[9] The chambers judge was informed by Kindred that it had paid into court \$36,813.79 to discharge the lien against the subject property.

[10] The chambers judge dismissed Diamant's claim. However, the chambers judge ordered \$22,489.22, the amount the respondent owed the appellant on the contract, to be paid out to Diamant from the security for the lien funds held in court. The chambers judge ordered the remaining balance in the amount of \$13,724.57 returned to Kindred.

[11] The chambers judge then addressed costs, and according to Diamant, heard only from counsel for Kindred. After hearing from Kindred's counsel, the judge ordered costs on Scale B to be assessed, as against Diamant.

[12] Kindred argues there is little merit to the appeal and that it faces the prospect of being unable to recover its costs if it succeeds in defeating the appeal. Diamant submits that costs will be recoverable, subject to its receipt of the amount Kindred owes it on the contract. It submits that the chambers judge made several reviewable

errors, that the appeal has merit, and that it would be contrary to the interests of justice not to have this appeal proceed.

Legal Framework

[13] The jurisdiction to order security for costs of an appeal and of trial costs is found in s. 34 of the *CA Act*. It provides:

34 (1) A justice may order an appellant to pay into court security for one or more of the following:

- (a) costs of the appeal;
- (b) costs of proceedings in the court appealed from, in relation to the order being appealed;
- (c) an amount under the order being appealed.

(2) A payment under subsection (1) must be in the amount and form determined by the justice.

[14] The general test to be applied on an application for security for costs of the appeal is the same as against individuals and corporations: *Gill v. Canada (Minister of Transport)*, 2014 BCCA 453 at paras. 2–5 (Chambers).

[15] The principles that apply on an application for security for costs of the appeal differ slightly from those that apply on an application for security for trial costs. The onus is on the appellant to show why costs of the appeal should not be ordered; however, the onus is on the respondent to show why costs of the trial should be ordered: *England Securities Ltd. v. Ulmer*, 2023 BCCA 11 (Saunders J.A. in Chambers) at para. 33; *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at paras. 9, 11. Security for costs of the appeal is ordered more readily than security for trial costs: *Liu v. Ma*, 2023 BCCA 309 (Chambers) at para. 16; *Siekham v. Hiebert*, 2008 BCCA 299 at paras. 10, 13 (Chambers).

[16] In both situations, the overriding concern is the interests of justice. This requires consideration of the merits of the appeal; the appellant's financial means; the potential for the appellant to be prevented from appealing if security for costs is ordered; and the potential for non-recovery of costs if the applicant is successful on appeal and there is no security. The timeliness of the application will also be a

factor. On this approach, the prejudice to either party flowing from making or not making the order will be balanced, as is typical with other discretionary orders in Chambers: *Creative Salmon Company Ltd.* at paras. 9, 11; *England Securities Ltd.* at para. 25.

[17] In *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 316 (Chambers), Rowles J.A. stated that to award security for costs of the trial or the trial judgment with a view to preventing a party from pursuing an appeal is improper and “undermines the balancing of the interests of justice referred to in the cases” (para. 39).

[18] Before security for trial costs will be ordered, generally speaking “[t]his Court should have the benefit of the trial court’s disposition on costs before deciding whether and in what amount security should be ordered” (*International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCCA 272 at para. 4). In that case, the Court adjourned an application for trial costs generally because party and party costs had not yet been assessed, noting, “[j]udicial economy militates against a two-step process” (at para. 4).

Merits of the Appeal

[19] I will briefly comment on the merits of the appeal.

[20] Kindred submits that the chambers judge’s decision was simply to disallow Diamant’s claim for extras, and this was based on findings of fact and the evidence, making it very remote that Diamant will succeed on appeal.

[21] While Kindred’s argument in respect of the claim for extras is attractive, it nevertheless seems to me that there is merit to Diamant’s appeal. I say this because on the material before me, I have difficulty understanding why Diamant’s claim was dismissed in its entirety.

[22] Diamant’s claim was for the full amount due under the cleaning contract and extra costs. Even if on the facts the chambers judge did not accept that Diamant was entitled to its claim for extras, Diamant was nevertheless entitled to the contract

price which it had not been paid. Kindred has not explained why Diamant was not granted judgment for at least \$22,489.22 as was conceded was owed to it, rather than have its claim dismissed in its entirety.

[23] Further, there appears to have been no provision for interest on the amount owed to Diamant, whether contractual or pre or post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[24] If, as I suspect, Diamant should have been successful, in part, on its claim, at least in obtaining judgment for the full contract price without extras, Diamant had an available argument that it should have been entitled to interest plus all or part of its costs. Yet it appears that the costs order was made without considering that Diamant succeeded, in part, on its claim and without giving Diamant an opportunity to speak to the issue. Arguably Diamant had substantial success but at a minimum Diamant can argue that the two parties had mixed success. I also appreciate that Kindred had an available argument that Diamant should be denied its costs because Kindred had conceded the amount due under the contract.

[25] Nevertheless, there is merit to Diamant's appeal that the resulting order of Justice Fitzpatrick was in error.

Potential for Non-Recovery of Costs

[26] I now consider Diamant's financial circumstances. It is currently suffering some financial strain. However, it is not without some financial means, and it appears to be an operating local small business even though it is not up to date in its corporate filings.

[27] I note that Diamant also has available to it the \$22,489.22 owed to it from Kindred. This is some evidence of the kind of revenue that Diamant has been successful in generating in its business.

Trial Costs Not Yet Assessed

[28] As for trial costs, these are not yet assessed. It was for this reason that the chambers judge did not consider it necessary to order security for the trial costs out of the money that was in trust as security. I appreciate that Kindred has made a low estimate of trial costs which I take into account. But in my view, this remains a good reason not to order security for trial costs.

Potential for Diamant to be Prevented from Proceeding with its Appeal

[29] There is also a potential for Diamant to be prevented from proceeding with its appeal if it is ordered to pay costs.

[30] Ms. Martinez's arguments raise an access to justice issue. She is an immigrant running a cleaning small business, whose financial situation limits her ability to hire counsel, and she makes a strong argument that as a self-represented litigant she, and her company, did not have a fair hearing in the court below. The manner in which the matter was dealt with raises an argument that Diamant encountered a miscarriage of justice. If so, Diamant should not be deprived of the opportunity to correct it in this Court, yet this could be the result if Diamant is ordered to post security.

Disposition

[31] In conclusion, Kindred brought this application in a timely manner. However, Diamant's appeal has some merit. While Diamant is under financial strain, it is a local operating business which has a history of generating revenue. The ordering of security for costs may prevent Diamant from pursuing a meritorious appeal.

[32] For these reasons, I conclude it is in the interests of justice not to order security for costs for either the appeal or the trial.

[33] I therefore dismiss the application.

[34] I note that Diamant, in its response, has asked for costs of this application. I prefer to follow the ordinary practice, as set out in s. 44(1) of the *Court of Appeal Act*. The costs of this application will be determined by the outcome of the appeal.

“The Honourable Justice Griffin”