IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20161208
Docket: S15702
Registry: Salmon Arm

Between:

0582471 BC LTD

Plaintiff

And

Steven Brown, Steven Brown doing business as Rona Interlakes, Rona Interlakes, Interlakes Building Supplies Ltd.

Defendants

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	D. Zachernuk
Counsel for the Defendants:	J. Kidston
Place and Date of Trial/Hearing:	Kelowna, B.C. November 22 and 23, 2016
Place and Date of Judgment:	Kelowna, B.C. December 8, 2016

[1] **THE COURT:** The defendants apply to have this action dismissed pursuant to either Rule 9-6 or 9-7.

[2] By way of background, the plaintiff, which formerly operated as Canadian Adventure Company Holdings Limited, has or had a remote mountain resort in an area known as Punch Bowl, located northeast of Revelstoke, British Columbia. The principal of the plaintiff is a lawyer, Derek McManus. The corporate defendant operates as a Rona Building Supply business under the name Rona Interlakes in Lone Butte, British Columbia. The individual defendant is the principal of the corporate defendant. For the purposes of my decision today it is not necessary that I distinguish between those two parties and consequently I normally will simply refer to them collectively as the defendants.

[3] In its amended notice of civil claim, the plaintiff alleges that the defendants agreed to supply plans and designs, a machined logs building package, other building material, hardware, tools, advice, assistance, guidance and referrals to other service and material suppliers, all in order to put up two buildings; to do the materials takeoff for the buildings; and after the buildings were erected, to facilitate the process of obtaining building permits. The plaintiffs allege that the defendants did not do the materials takeoffs and/or that the materials and supplies delivered lacked certain parts or elements that were necessary for the buildings. The pleadings are framed in contract, and in the alternative in negligence.

[4] In early 2013, the plaintiff contacted the defendant, following up on communications that had taken place in January 2012 and earlier, to advise that the plaintiff was intent on building a small lodge at Punch Bowl in the late spring and summer of 2013. The plaintiff provided sketches for the basic design, and asked the defendants to provide some input. Over the course of a couple of months, plans were developed for the small lodge and for a bathroom building. On the recommendation of the defendants, the plaintiff retained a structural engineer to complete, or at least to approve, the designs and plans for the structures. On the plaintiff's instructions, the individual defendant communicated directly with the

structural engineer, but the plaintiff remained, as described by its principal, “the builder, owner and contractor of the project”.

[5] Once the plans were finalized, the defendants provided a materials takeoff for the two buildings and a price list to the plaintiff, which the principal of the plaintiff reviewed and commented on. The plaintiff retained a builder and other trades in order to perform the actual construction of the two buildings. The defendants made recommendations and/or provided lists of builders and tradespeople to the plaintiff from time to time, but did not act as general contractor or become involved in the actual arrangements between the plaintiff and the people or companies the plaintiff selected and retained to provide labour or services to the project. No one on behalf of the defendants ever attended the Punch Bowl location.

[6] The defendants explained to the plaintiff that the materials takeoff would vary depending on the ground and building conditions at Punch Bowl, and would be educated guesses. The corporate defendant provided most but not all of the materials and hardware for the two buildings comprising the Punch Bowl project. Other materials were ordered and purchased directly by the plaintiff from other companies. The two buildings, which were both log structures, were prebuilt by the plaintiff's building contractor in the defendants’ yard. They were then disassembled. The materials, including the materials, hardware, and supplies provided by the defendants and some from other suppliers, were then transported by the defendants to Tappen, British Columbia, on August 16, 2013, and then from Tappen to a helicopter landing site near Mica on August 17, 2013. The defendant company then invoiced for the materials and for the transportation.

[7] The plaintiff emailed the defendant on September 20, 2013, to raise questions about the invoices and to explain that the invoices would be reviewed, including against material on site, in part to be sure “everything is there”.

[8] Between September and December, the defendant's invoices were unpaid. In an email dated September 28, 2013, the principal of the plaintiff wrote to the defendants saying:

> You have pointed out all of the assistance you [have] provided, beyond the actual sale of building materials and logs. . .There services were part of your package of selling a large amount of logs and building materials to us. It is a good business model.

[9] On October 21, 2013, the plaintiff advised that the review of the supplied materials against invoices was complete. On October 27, 2013, the plaintiff wrote to the structural engineer advising that the plaintiff would like to start providing the information the structural engineer required in order to complete the engineering work, so that the plaintiff could move forward to inspection by the building inspector. The plaintiff advised the structural engineer:

> Construction began Aug 17 and has continued steadily since. . .[and]
>
> Of course, all structural elements have been constructed per the approved plans your firm prepared.

[10] On October 28, 2013, the structural engineer wrote to the plaintiff and to the defendants, and asked the defendants for anything they had with regard to inspection of the project. On October 29, 2013, the plaintiff wrote to the structural engineer saying:

> Steve [Mr. Brown], was never to be on site. Given the very large helicopter . . . costs, everything is to be reviewed by descriptive and/or pictures.
>
> I have taken various pictures for this purpose. Please let me know what you need and I will put it together.

[11] The structural engineer advised the plaintiff that they had “priced the engineering lower because we are planning to rely on Steve for his inspection reports”.

The plaintiff replied:

> Having sold the building package to us, Steve's work is done. As such, I will take the process the rest of the way.

[12] There is no evidence that the defendants agreed to provide inspection reports as part of the materials and services they agreed to provide to the plaintiff, and no evidence that the plaintiff expected inspection reports from the defendants as part of their contractual arrangements. The plaintiff's own correspondence amply demonstrates that inspection reports were not part of the contract between the plaintiff and the defendants.

[13] When payment of its various invoices was not forthcoming, the defendants retained counsel. This resulted in a negotiation and eventual settlement between the plaintiff and the defendants, the main terms of which were that the defendant would provide reporting to the structural engineer to facilitate the engineer's report and eventual building inspection, and that the plaintiff would pay the outstanding invoices.

[14] The principal of the plaintiff wrote to the defendant's lawyer on December 6, 2013, confirming the terms of settlement and concluding the letter by saying:

> Upon release of the funds to Rona as aforesaid, completion of the Air Miles matter, and the completion of the matters related to the 6 bins, borrowed tools, and purchase return for credit, the obligations of CAC and Rona to each other will be complete.

[15] The required inspection report was sent by the defendants to the structural engineer on January 5, 2014, together with photos taken by the plaintiff's principal and the plaintiff's builder during construction, which the plaintiff had forwarded to the defendants on December 21, 2013. The settlement funds were released, and all other terms of the settlement were performed.

[16] In November 2015, the within action was commenced by the plaintiff. The defendants seek dismissal of the action under Rule 9-6, on the basis that all of the issues between the parties were settled and the terms of the settlement were carried out.

[17] Alternatively, the defendants seek dismissal of the claim on a summary trial basis pursuant to Rule 9-7, alleging that the plaintiff has not proven that it has any cause of action against any of the defendants, who were only material and hardware suppliers to the project, and who performed the contract they had entered into and were not negligent in any way.

[18] The defendant's notice of application is supported by notices to admit and the plaintiff's responses thereto; an affidavit from Mr. Brown setting out his and his company's dealing with the plaintiff, details of the agreements made and the materials and services provided, and describing the settlement agreement in performance of the same; and the affidavit of Pierre Walry, whose company Walry Ltd. was the builder of the two buildings at Punch Bowl pursuant to a contract between Walry Ltd. and the plaintiff.

[19] The only evidence the plaintiff has filed in opposition to the defendants' application is three affidavits of a legal assistant employed by the plaintiff's counsel's law firm, who simply appends documents which have been produced by the plaintiff in the litigation. Some of the documents are email strings, in some instances between the plaintiff and defendants; in other instances, between the plaintiff and third parties; some are business documents of the plaintiff, including such things as a slide presentation prepared for the purpose of soliciting investments; and two are price quotes with respect to repairing a metal roof which I infer, although there is no proof of it, relates in some way to the nature of the claim, or to the particulars of the claim, the plaintiff intends to advance in this case against the defendants. Most of the documents attached to the legal assistant's affidavits are inadmissible hearsay.

[20] The plaintiff has provided no admissible evidence in support of the merits of its claim against the defendants, or to challenge or contradict the evidence of Mr. Brown or Mr. Walry. The notice of application was filed on March 29, 2016. The plaintiff had ample time to file responsive affidavit evidence on the merits of the claim. The plaintiff did not seek in those approximately eight months, to cross examine the affiants, nor to conduct examinations for discovery. Although counsel for the plaintiff said at the hearing of this matter before me that the matter is not suitable for summary trial, the plaintiff has provided no real basis for taking that position and in fact did not advance that position in its application response. In the application response, the plaintiff makes representations or allegations as to the factual basis for its position, such as, the materials and supplies delivered to the plaintiff lacked certain Simpson Strong Ties, which is reflective of that alleged in the amended notice of counter claim, but provides no proof.

[21] A summary trial is a trial. The defendants have provided evidence that all issues between them and the plaintiff were settled, and further, that the defendants provided the services and materials they agreed to provide to the plaintiff. There is no admissible evidence to the contrary. None has been led at this summary trial.

[22] There can be no reasonable conclusion drawn in this case other than that the plaintiff has failed to prove its claims against the defendants with the result that the plaintiff's action is dismissed.

[23] The defendants are entitled to one set of taxable costs.

[24] That concludes my decision. Is there anything arising?

[25] MR. ZACHERNUK: Nothing from me, My Lady.

[26] MS. KIDSTON: Yes, My Lady, as far as costs in this application, the defendants actually asked for special costs.

(SUBMISSIONS AS TO SPECIAL COSTS)

[27] THE COURT: All right; in view of the offers of settlement that were made, which in my view the plaintiff ought reasonably to have accepted, at least with respect to the $15,000 offer, I am going to order that the taxable costs of the action will be paid by the plaintiff to the defendants, and effective one week after the offer of February 17th, so effective February 24th of 2016, the costs will be double costs; so for any steps taken after that date.

"Beames J."