

In the Alberta Court of Justice

Citation: Lee v Canyon Plumbing & Heating Ltd, 2023 ABCJ

Date: 20230612
Docket: P2190101828
Registry: Calgary

Between:

Won Chai Lee

Plaintiff

- and -

Canyon Plumbing & Heating Ltd., Gold Homes Ltd.

Defendants



Reasons for Decision of the Honourable Justice L.L. Burt

Background

[1] The Civil Claim sought damages of \$7,481.53. The Plaintiff testified and called one other witness, Bong-Joon Kim (Kim).

[2] The Dispute Notes for the Defendants did not include Counterclaims and denied liability and damages.

[3] The parties were self-represented except for Canyon Plumbing & Heating Ltd (Canyon) which was represented by counsel. The Defendants each called one witness, the corporate representatives of the two corporations.

[4] The case concerned a property located at 238 14th Avenue in Calgary, Alberta (the Property). The Property was built in 2015 by the Defendant Gold Homes Ltd (Gold) and ultimately sold to the Plaintiff in 2018. Canyon was the plumbing company hired by Gold to install a sump pump in the Property at the time it was built.

[5] The seller of the Property to the Plaintiff in 2018 was not a party to the action. The Plaintiff had no contract with either Defendant.

[6] The Plaintiff, at the time of purchase, had the Property inspected by his home inspector. The home inspector's report was prepared in or about April 2018.

[7] The Plaintiff's home inspector noted in its report where a sump pump was likely located in the Property's basement floor but the report stated it was in a "sealed pit" and could not be easily accessed.

[8] The Plaintiff's home inspector's report raised a specific issue about the sump pump in relation to a missing check valve. This was in early April 2018 prior to purchase of the Property by the Plaintiff. The Plaintiff then started emailing the seller of the Property about the sump pump issue, again in early April 2018 and prior to purchase.

[9] The seller of the Property stated in an email dated April 16, 2018, to the Plaintiff, that the sump pump was "accessible" and set out how to access it. The Plaintiff did not access the sump pump, nor did he specifically request of the seller permission to access the sump pump although, in the Court's view, the seller's email implied such access was permitted.

[10] The Plaintiff waived conditions with respect to his purchase of the Property and about a year later, in August 2019, the Plaintiff had a plumber, Kim, at the Property. The plumber noted the sump pump in the basement floor of the Property sealed by bolts in the cement and ultimately determined that there was no sump pump when he removed the bolts and unsealed it. The plumber then installed a sump pump at the Plaintiff's request and the cost in that regard was \$787.50. Of note, prior to this installation, the Plaintiff had no flood in the basement of the Property or any problem in relation to the lack of sump pump in the Property.

[11] Then in September 2019, the Plaintiff hired a structural engineer to investigate whether any "structural damage had been caused due to the absence of a sump pump in the Property for an unknown period of time and perhaps since the Property was built in 2015. The engineer concluded, the Court was told by the Plaintiff, that there was no structural damage, and the engineer charged the Plaintiff \$750.00 for the investigation and report. The engineer was not a witness at trial.

[12] Thereafter, the Plaintiff requested of Gold any geo-technical report for the Property or the neighbourhood in which the Property was located. No such report was provided to the Plaintiff. However, Gold did advise the Plaintiff by email in August 2019 that a sump pump had been installed in the Property by Canyon when the Property was built in 2015.

[13] The Plaintiff then contacted Canyon and was advised that a "Little Giant TSW series" sump pump was installed in the Property when it was built.

[14] In November 2019, the Plaintiff's legal counsel contacted Canyon about the lack of a sump pump in the Property as of the date when the Plaintiff purchased it from the seller in 2018. Canyon then attended at the Property and replaced the sump pump that had recently been installed by Kim, in August 2019, with a Little Giant TSW series sump pump as was installed, or supposed to have been installed, when the Property was built in 2015. There was a check valve and discharge line as part of Canyon's installation.

[15] In November 2019, the discharge line connected to the Little Giant sump pump by Canyon froze. Canyon attended at the Property again and made changes to the discharge line to prevent freezing in the future. At the same time, the Plaintiff had Canyon remove the Little Giant sump pump and reinstall the sump pump Kim had installed in the Property in August 2019. This was because the Plaintiff found the sump pump Kim had installed to be "easier to access". There had been no problems with the Little Giant sump pump Canyon installed except with respect to the discharge pipe and that was corrected by Canyon.

[16] The Plaintiff sought reimbursement of his costs for Kim's investigation and report, as well as for the structural engineer's investigation and report for a total of \$1,537.50.

[17] The remainder of the Plaintiff's Civil Claim damages related to his alleged loss of Airbnb income and his legal fees.

[18] With respect to the Airbnb damages allegation, the Plaintiff had rented out the basement in the Property as an Airbnb in 2018. During the summer of 2019, the Plaintiff declined five Airbnb reservation requests. This was after Kim had installed a sump pump in the Property. The Plaintiff had not had a flood in the basement of the Property at any time prior to trial nor any problem related to the absence of a sump pump or the sump pump installed by Kim or the sump pump installed by Canyon. Furthermore, the Plaintiff admitted he had declined Airbnb reservation requests in the past, unrelated to the sump pump.

[19] The Plaintiff then removed the Property from the Airbnb reservation list after August 2019 because, he testified, he continued to be worried that the basement could flood when a guest was staying at the Property. The Plaintiff was being "cautious" in this regard, he stated.

Issues

[20] Did the Defendants or either of them breach a duty owed to the Plaintiff and if so, did the Plaintiff suffer legally compensable damages.

[21] The Defendants also raised a limitations defence in this case.

Decision

[22] After the Plaintiff's case was closed at trial, the Defendants brought a non-suit application and a summary dismissal application. Counsel for Canyon appeared to make the applications on behalf of both Defendants. The Court heard submissions from the Plaintiff in response to the applications.

[23] Having considered the record before the Court, it grants the Defendants' application for summary dismissal based on a limitations defence.

[24] The Plaintiff filed his Civil Claim more than two years after he ought to have discovered the sump pump was missing from the Property in April 2018 after his home inspector raised a concern about the sump pump and recommended the Plaintiff confirm its operation, and the seller advised the Plaintiff how to access the sump pump. The Plaintiff sued on July 28, 2021, more than three years thereafter, and accordingly his Civil Claim is statute barred.

Summary Dismissal

[25] Section 8 of the *Provincial Court Act*, RSA 2000, c P-31 states:

8(1) The practice and procedure of the Court shall be as provided in this Act and the regulations.

(2) Where this Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may

- (a) apply the *Alberta Rules of Court*, and
- (b) modify the *Alberta Rules of Court* as needed.

[26] As well, Rule 7.3 of the *Alberta Rules of Court* reads, in part, as follows:

(1) A party may apply to the Court of summary judgment in respect of all or part of a claim on one or more of the following grounds:

...

b) there is no merit to a claim or part of it;

...

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in 7.3(1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;

...

[27] As summarized in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (*Weir-Jones*), *Hryniak v Mauldin*, 2014 SCC 7 (CanLII) set out a three part test for when summary judgment is an appropriate procedure:

There will be no genuine issue requiring a trial when the Court can reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the Court to make the necessary findings of fact, (2) allows the Court to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[28] This outline of the procedural approach to summary judgment encompasses a number of points. To enable a “fair and just summary determination”, the record before the Court must:

(a) *Allow the judge to make the necessary findings of fact.* An important thing to observe about this part of the test is that it assumes the summary judgment judge (or Master) is able to make findings of fact. The judge is entitled, where possible, to make those findings from the record and draw the necessary inferences. The parameters on fact finding are discussed, *infra*, para. 38. Summary judgment is not limited to cases where the facts are not in dispute. If the summary judgment judge is not able to make the necessary findings of fact, that is an indication that there is a “genuine issue requiring a trial”. This issue is discussed, *infra*, paras. 27ff.

(b) *Allow the judge to apply the law to the facts.* There are cases where the facts are not seriously in dispute, and the real question is how the law applies to those facts. Those cases are ideally suited for summary judgment: *Tottrup v Clearwater (Municipal District No. 99)*, 2006 ABCA 380 (CanLII) at para. 11, 68 Alta LR

(4th) 237, 401 AR 88. If the record allows the judge to make the necessary findings of fact (as contemplated by the first part of the test), applying the law to those facts essentially comes down to a question of law. Cases like this one, based on the expiration of the limitation period, often fall into this category, as do those that turn on the interpretation of documents.

(c) Assuming the first two parts of the test are met, *summary disposition must be a proportionate, more expeditious and less expensive means to achieve a just result.* This third criterion is a final check, to ensure that the use of a summary judgment procedure (rather than a trial) will not cause any procedural or substantive injustice to either party. Summary judgment will almost always be “more expeditious and less expensive” than a trial. In the end, if the judge finds that summary adjudication might be possible but might not “achieve a just result,” there is discretion to send the matter to trial. This discretion, however, should not be used as a pretext to avoid resolving the dispute when possible.

[29] These foundational criteria set the procedural framework of the modern law of summary dismissal. They set the procedure for determining whether there is “no merit” regarding the claim under *Rule 7.3*.

[30] The *Limitations Act*, RSA 2000 c L-12 states:

Limitation periods

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, *or in the circumstances ought to have known*, [emphasis added]

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[31] A fair and just determination could be made on the record before the Court with respect to the Defendants’ mid-trial summary dismissal application based on the principles set out in *Weir-Jones*.

[32] At the time of the application for summary dismissal, the Plaintiff’s case had been put forward at trial, in full, including the Plaintiff’s testimony, Kim’s testimony, and the Plaintiff’s document binder (exhibit 1). The Defendants had called no evidence yet.

[33] Nonetheless, the evidence, all from the Plaintiff's case, supported a conclusion that the Defendants' limitations defence must succeed and accordingly, there was no genuine issue for the trial to proceed further.

[34] The Court concludes the Plaintiff ought to have known in the circumstances as of April 2018 when he had his home inspector's report and waived his conditions as buyer of the Property and closed the deal with the seller for its purchase.

[35] As set out above, the Plaintiff's home inspector recommended to the Plaintiff that he "confirm proper operation [of the sump pump] prior to close" in light of the fact, at least in part, that there was "no external switch". The Plaintiff did not follow that recommendation because, according to his testimony, it was not "easy" to do so and he "trusted" the seller who had said that the sump pump was in the Property and there was "a very low chance that the sump pump may be used...".

[36] The Court concludes that in the circumstances, it was unreasonable for the Plaintiff not to follow the above recommendation of his home inspector before purchasing the Property. The lack of sump pump would have been discovered by the Plaintiff had he done so and, in fact, was discovered when in August 2019 he had a plumber simply remove the bolts that sealed the barrel in the basement floor where the sump pump was supposed to be and look inside.

[37] For these reasons, the Court concludes the Plaintiff did not seek a remedial order against the Defendants within two years after the date on which he ought to have known in the circumstances that there was no sump pump in the Property. He ought to have known in April 2018 and he did not sue until July 2021, more than three years later.

[38] The Civil Claim is summarily dismissed against the Defendants and the matter is now concluded. The Court need not decide the non-suit application of the Defendants.

Costs

[39] The Court is of the view that the application for summary dismissal of the Defendants should have been made before trial so as to avoid the expense of trial for the parties. The Defendants raised the possibility of a summary dismissal application at the pre-trial conference, months before trial. For reasons not explained to the Court, the application was not made prior to trial.

[40] Accordingly, the Court declines to award costs in favour of the Defendants for trial and trial preparation.

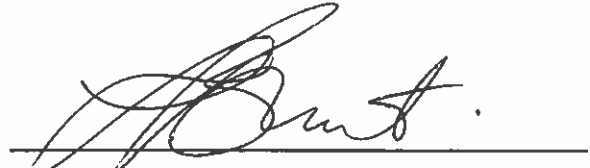
[41] The Court is inclined to award costs to each of the Defendants pursuant to Column 1 of the *Tariff of Recoverable Costs* for the filing of pleadings and document disclosure, the pre-trial conference, and the summary dismissal application. Noting that both Defendants had counsel prior to trial, such costs would be as follows:

- (1) \$190.00
 - (2) (b) \$100.00
 - (3) \$ 50.00
- \$340.00 plus the \$25 filing fee or \$365.00 per Defendant.

[42] The parties may provide written submissions to the Court, three pages or less, within thirty days of these Reasons for Decision if they do not accept the Court's inclination in the previous paragraph.

Heard on the 9th day of June 2023.

Dated at the City of Calgary, Alberta this 12th day of June 2023.

A handwritten signature in black ink, appearing to read "L.L. Burt", is written over a horizontal line.

L.L. Burt

A Justice of the Alberta Court of Justice

Appearances:

W.C. Lee, Self-Represented
for the Plaintiff

Counsel, M. Kwiatkowski
for the Defendant, Canyon Plumbing & Heating Ltd

Agent, M. Yuan
for the Defendant, Gold Homes Ltd