SUPREME COURT OF YUKON

Citation: *Nelson Drywall Interiors Alberta Inc. v. Dowland Contracting Ltd.*, 2019 YKSC 32

Date: 20190625
S.C. No. 12-A0055
Registry: Whitehorse

BETWEEN

NELSON DRYWALL INTERIORS ALBERTA INC.

PLAINTIFF
(DEFENDANT BY COUNTERCLAIM)

AND

DOWLAND CONTRACTING LTD. and YUKON HOSPITAL CORPORATION

DEFENDANTS
(DOWLAND CONTRACTING LTD., PLAINTIFF BY COUNTERCLAIM)

Before Mr. Justice J.Z. Vertes

Appearances:

R. Nigel Beckmann	Counsel for the Applicant, Dowland Contracting Ltd.
Patrick J. McGaffey	Self-Representing, Nelson Drywall Interiors Alberta Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] In this proceeding, there are two cross-applications: (1) an application for summary judgment by the plaintiff; and, (2) an application by one of the defendants to dismiss the claim for non-compliance with the *Rules of Court*, specifically for failure to attend an examination for discovery and to produce documents. For the reasons that

follow, both applications are dismissed. Following my reasons, I will provide directions for the further conduct of this action.

BACKGROUND

[2] This action relates to alleged breaches of a construction contract. In 2011, the defendant Dowland Contracting Ltd. ("Dowland") was contracted by the defendant Yukon Hospital Corporation ("YHC") to be the general contractor for the construction of hospitals in Watson Lake and Dawson City. Dowland in turn sub-contracted with the plaintiff, Nelson Drywall Interiors Alberta Inc. ("Nelson"), to provide the interior and exterior drywall work for these projects. Each party alleges that the other breached this sub-contract.

[3] Nelson's Statement of Claim alleges that Nelson performed the work stipulated by the sub-contract but, before completion, Dowland denied access to the work-site to Nelson and such action thereby resulted in a wrongful termination of the sub-contract. Nelson seeks judgment in the amount of $1,100,923.10 for work done but not paid plus damages for further losses flowing from the breach of contract. As part of this proceeding, Nelson registered claims of lien against the YHC lands.

[4] Dowland's defence alleges that it was the plaintiff who breached the terms of the sub-contract by failing to meet the stipulated schedule for the work, failing to pay its subcontractors and by misrepresenting its capacity to perform the work. It further alleges that the parties agreed to have Nelson assign its responsibilities for the exterior work to a third party but that Nelson failed to do so. It also filed a counter-claim seeking damages for its costs due to delays and payments it made to Nelson's sub-sub-contractors.

[5] Several of Nelson's sub-sub-contractors also registered liens against the YHC lands. As a result, in 2012, YHC paid the sum of $1,015,923.12, being the hold-back on the contract, into Court. Subsequently, three of these lien claimants were paid out a total of $224,170.70 from these funds so as to vacate their liens.

[6] The parties are in agreement that the amount claimed in the plaintiff's Amended Statement of Claim, in paragraph (d) of the prayer for relief, that being $1,100,923.10, should be reduced by this sum of $224,170.70.

[7] There have been two case management conferences that set directions for this proceeding, particularly with respect to examinations for discovery. Those examinations have not been concluded and the reasons for that will be discussed later in these reasons. The significant point is that in August, 2018, after the first attempt to hold those examinations failed, counsel for the plaintiff withdrew from the case. Nelson is now represented by its corporate officer, Mr. Patrick J. McGaffey. Mr. McGaffey is not a lawyer but he did state, at the hearing before me, that he is now in the process of retaining new counsel to represent Nelson.

APPLICATION FOR SUMMARY JUDGMENT

[8] Summary judgment on behalf of a plaintiff is provided by Rule 18(1) of the Yukon *Rules of Court*:

> 18(1) In an action in which an appearance has been entered, in an action referred to in Rule 17(13) or in a family law proceeding that is not an undefended divorce proceeding within the meaning of Rule 63(1), the plaintiff, on the ground that there is no defence to the whole or part of a claim, or no defence except as to amount, may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount.

[9] The legal principles applicable to a summary judgment are well established. The test is whether there is a *bona fide* triable issue of fact or law. The objective of the rule is to screen out claims or defences that, based on the evidence provided, ought not to proceed to trial. It must be plain and obvious that there is no genuine issue for trial. On the other hand, where there are significant facts in dispute, the case should likely be sent to trial. The traditional approach has been to apply this standard quite strictly.

[10] In recent years, this traditional approach has been relaxed in an effort to avoid the high costs and length of time it takes to hold a trial in most cases. The Supreme Court of Canada, in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, stated that summary judgment rules "must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims" (para. 5). The question is not whether there is a genuine issue for trial but, rather, whether there is a genuine issue *requiring* a trial to allow a court to reach a fair and just result.

[11] The Court, however, did not depart from the traditional approach that where there are complex and competing facts that cannot be adequately resolved on a summary judgment application, the just and fair thing to do is to send the case to trial (paras. 49-51).

> [49] There will be no genuine issue requiring a trial when the judge is able to 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 judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute,

> proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> [51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

[12] In this case, Mr. McGaffey provided a lengthy affidavit in which he set out all the invoices that were submitted on the YHC projects. He seemed to argue that, since the sub-contract was a stipulated price contract, once the invoices were submitted they had to be paid. If there was any dispute over the work then the recourse was to sue for recovery of some or all of the money covered by the invoices. This is a highly problematic proposition to say the least. In any event, Mr. McGaffey states that there were no deficiencies noted at the time that Nelson submitted the invoices and therefore they would be due and payable.

[13] Dowland filed the affidavit of its project manager on the YHC projects, Mr. Michael Ukrainetz, who deposed that there were several breaches by Nelson if its contractual obligations, including, failure to maintain construction schedules, misrepresenting its capacity to complete tasks that it had contracted to do, late or non-payment of its sub-sub-contractors, all of which caused delays in the progress of the projects and forced Dowland to hire new sub-contractors and to change some of its plans.

[14] I agree with counsel for Dowland when he submitted that, where a case depends on credibility and there exist considerable disputes on the facts, then the case will generally need to proceed to trial. Here, the critical question to answer is: Who breached the contract? That question, however, cannot be answered without a detailed examination of the facts and assessments of credibility. There is an insufficient evidentiary foundation at the present time to enable any judge to reach a fair and just determination of that critical question.

[15] For these reasons, the plaintiff's application for summary judgment is dismissed.

APPLICATION TO DISMISS THE CLAIM

[16] Dowland seeks to dismiss the claim for non-compliance with Rules 2(5)(a), (c) and (f):

> (5) Where a person, contrary to these rules and without lawful excuse,
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> (a) refuses or neglects to obey a subpoena or to attend at the time and place appointed for the examination for discovery,
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> …
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> (c) refuses or neglects to produce or permit to be inspected any document or other property,
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> …
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> then
>
> (f) where the person is the plaintiff, petitioner or a present officer of a corporate plaintiff or petitioner, or a partner in or manager of a partnership plaintiff or petitioner, the court may dismiss the proceeding…

[17] Courts have generally regarded striking an action due to non-compliance as a remedy of "last resort": *Langret Investments S.A. v. McDonnell* (1996), 80 B.C.A.C. 4.

Furthermore, where a litigant is self-represented, or where as here represented by a non-lawyer, courts generally grant greater leniency in terms of compliance with the Rules. Nevertheless, they are required to comply eventually. There must be fairness and an equal application of the Rules to both parties.

[18] Dowland's application is based on the following sequence of events. The parties, including the then counsel for Nelson, appeared before a Case Management Judge on March 14, 2018. At that time an order was issued that examinations for discovery be completed by August 30, 2018. Arrangements were made for those examinations to be held in Whitehorse on August 27, 2018. Dowland's counsel attended with their witness but Nelson's counsel was not willing to proceed. Nelson's counsel also informed the others that Mr. McGaffey, the witness for Nelson for purposes of discovery, would not attend.

[19] In October, 2018, counsel for Nelson withdrew and Mr. McGaffey filed a Notice of Self-Representation.

[20] A further Case Management Conference was held on March 28, 2019, at which time it was ordered that the examination for discovery of Mr. McGaffey be completed by June 17, 2019. Arrangements were made to hold the examination in Vancouver on May 10, 2019. Conduct money was paid for Mr. McGaffey to fly from Calgary to Vancouver. The examination commenced at 10 a.m. on May 10 but then abruptly ended after 90 minutes, when Mr. McGaffey refused to answer any more questions and walked out saying "see you in court."

[21] Dowland's counsel submitted that this conduct represents non-compliance sufficient to justify dismissal of the claim pursuant to Rule 2(5). Further, Mr. McGaffey,

at that aborted examination of May 10, 2019, refused to produce certain documents and refused to answer some of the questions put to him.

[22] Mr. McGaffey, in response, said that the defendant was “playing games” and “wasting time” by asking irrelevant questions. He claimed that he had never participated in an examination for discovery that was not completed within one hour. Mr. McGaffey also complained about health issues complicated by the fact that he had to go to Vancouver.

[23] A big part of the problem here, of course, is that Mr. McGaffey does not have the benefit of legal counsel. If he did, he would most likely have been told that he had an obligation to answer all relevant questions fully and truthfully; that he had an obligation to produce all relevant documents; that any undertakings given at an examination, whether to look for an answer or a document, must be fulfilled in a reasonable time; and, that if one thinks a question is irrelevant an objection can be taken to that question and the issue of relevance determined by a judge. One does not simply refuse to answer and walk out.

[24] Taking all the circumstances into account, I am not satisfied that this is an appropriate case to impose the Draconian penalty of dismissing the claim. This action is quite aged (the Statement of Claim was filed on July 13, 2012); there is a significant amount of money sitting in court awaiting the resolution of this case; and, both sides have expressed a strong desire to go to court.

DIRECTIONS

[25] Both parties expressed a desire to conduct examinations for discovery. To date, there has been no examination of Dowland’s representative and only a brief

examination of Mr. McGaffey on behalf of Nelson. I think it best if further directions were given so as to expedite those examinations. Those directions are contained in the Order below.

[26] I wish to emphasize that failure to comply with any directions contained herein, unless it is by consent of the other party or pursuant to a further order of this court, will undoubtedly result in sanctions against the offending party.

[27] It should also be noted that these directions apply to these parties only. No one appeared for the defendant YHC at the hearing before me (although a written response was filed on behalf of that party stating it did not oppose the relief sought by Dowland).

ORDER

[28] I therefore order as follows:

1. The plaintiff Nelson's application for summary judgment is dismissed.
2. The defendant Dowland's application to dismiss the claim is dismissed.
3. The plaintiff's claim for judgment in the sum of $1,100,923.10, as set out in paragraph (d) of the prayer for relief in the Amended Statement of Claim, is reduced by $224,170.70, to the sum of $876,752.40.
4. All examinations for discovery will be completed by December 20, 2019.
5. The examination for discovery of the plaintiff's representative will be subject to the following conditions:

   (a) the examination will take place in Calgary, Alberta;

   (b) there will be no conduct money paid to the plaintiff's representative to secure his attendance at the examination;

(c) failure to attend at the time and place agreed to for the examination will result in payment by the plaintiff of all costs thrown away by the defendant Dowland;

(d) there will be no arbitrary time limits set on the examination;

(e) all undertakings given at the examination will be fulfilled within sixty (60) days of the examination's completion.

6. The plaintiff will pay costs to the defendant Dowland in the sum of $837.36 representing reimbursement of the conduct money paid for the examination of May 10, 2019, such costs to be paid within thirty (30) days of the date of this Order.

7. Costs of these applications will be costs in the cause.

[29] I ask Dowland's counsel to prepare the draft Order which will be presented to me for review. There is no need to obtain the plaintiff's consent to the form of the Order.

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VERTES J.