

SUPREME COURT OF YUKON

Citation: *North America Construction (1993) Ltd. v. Yukon Energy Corporation*, 2019 YKSC 9

Date: 20190213
S.C. No. 11-A0114
Registry: Whitehorse

BETWEEN:

NORTH AMERICA CONSTRUCTION (1993) LTD.

PLAINTIFF

AND

YUKON ENERGY CORPORATION

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
H. David Edinger
John Landry and
Morgan Burris

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a request by the defendant, Yukon Energy Corporation (“Yukon Energy”) for an order for the return of funds it paid to the plaintiff, North America Construction (1993) Ltd. (“NAC”) in satisfaction of a judgment issued after trial in the Supreme Court of Yukon plus interest and costs as agreed.

[2] On November 20, 2017, before the appeal in this matter was heard, Yukon Energy paid \$1,682,470.48 to NAC based on an Amended Order filed after the trial

judgment. On December 6, 2017, Yukon Energy also paid to NAC \$585,000 as agreed between the parties for interest and costs.

[3] The Court of Appeal of Yukon allowed the appeal of Yukon Energy in part and the cross-appeal of NAC in part. Four claims were remitted to the Supreme Court of Yukon for a new trial, scheduled for 10 days to begin on September 30, 2019. The Court of Appeal also set aside the trial judge's order on costs.

[4] The parties agree that the amount resulting from the four claims being remitted for a new trial is \$341,510. Yukon Energy also seeks the return of payment of the \$585,000 in costs and interest as agreed, for a total of \$926,510.

[5] NAC opposes this request. Instead of repaying the amounts, NAC proposes to provide a bond from a surety in the amount of \$926,510 as security, at NAC's expense. This bond would ensure payment to Yukon Energy if after the second trial these amounts or any part thereof are found owing to them.

[6] NAC notes that it voluntarily removed its claim of builders' lien and certification of pending litigation from the project site which gave rise to this litigation after receiving payment from Yukon Energy.

ISSUE

[7] This request raises two issues: first, does this Court have jurisdiction to make the order requested; and second, should this Court order NAC to repay the monies requested to Yukon Energy.

ANALYSIS

a) Jurisdiction

[8] The parties agree that this Court has jurisdiction to make this order of repayment at a Case Management Conference, based on Rules 1(8)(I), 36(4) and 36(6) of the *Rules of Court*.

[9] In most cases an order of repayment is sought from the same Court of Appeal that overturned some or all of the trial judgment. However, it does not appear that this Court is prevented from issuing such an order, especially given the broad discretion set out in the Rules cited by counsel.

b) Should NAC be ordered to repay the amounts requested

[10] NAC's arguments are primarily equitable. NAC acknowledges that the trial judge's Amended Order no longer supports the payment of \$341,510 and costs. They argue they should not have to repay because:

- 1) Yukon Energy delayed some months before they paid NAC the judgment, thus depriving NAC of interest on those monies;
- 2) the outcome of the second trial is uncertain and could result in NAC being awarded more monies again;
- 3) NAC released its builder's lien and certificate of pending litigation after receiving the judgment monies; and
- 4) NAC offered to secure the amount of \$926,510 by a surety bond.

[11] NAC does not rely on the cases provided as they say none are on point.

[12] I prefer the British Columbia Court of Appeal decision in *Camaso Estate v. Saanich (District)*, 2013 BCCA 370. There the Court of Appeal ordered repayment of monies paid to the plaintiff after trial, once that judgment was overturned in part, on appeal. The Court wrote:

[5] On 10 January 2013, we gave reasons for setting aside the trial judgment and ordering a new trial of the action ... As a result, the respondents no longer have a judgment against the appellants. They are in the same position they were in before the trial judgment came down. The appellants have made a partial payment on a money judgment that no longer exists. It remains for the respondents to prove both liability and damages at a second trial.

[13] Similarly, in this case, there is no longer any basis for a judgment for the \$341,510 and costs, as a result of the Court of Appeal of Yukon decision. While NAC's offer of surety is reasonable, Yukon Energy is by virtue of the British Columbia of Court Appeal decisions entitled to the repayment of those monies paid which are unsupported by any judgment.

[14] The parties agree that interest shall be discussed and negotiated so my order is limited to the amounts less any interest calculations as agreed.

VEALE C.J.