Citation: *de Jager v. Rueckenbach*, 2010 YKSM 5 Date: 20101215
Docket: 10-S0017
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

Thomas de Jager & Kelly de Jager

Plaintiffs

v.

Fritz Rueckenbach & Heiki Rueckenbach

Defendants

Appearances:
Thomas de Jager & Kelly de Jager — Appearing on own behalf
Fritz Rueckenbach & Heiki Rueckenbach — Appearing on own behalf

REASONS FOR JUDGMENT

[1] This case involves a dispute between the de Jagers and the Rueckenbachs regarding a contract for the Rueckenbachs, doing business as The Beaver Contracting, to complete the roof on the de Jagers' home in the Pilot Mountain Subdivision of Whitehorse, Yukon.

Summary of the Facts:

[2] The Beaver Contracting came to the attention of the de Jagers through an advertisement in the Yukon News. On March 22, 2010, Mr. de Jager met with Mr. Rueckenbach at the building site to discuss the required work and to show him the architect's plans. On March 29, 2010 a contract was signed by Mr. de

Jager and by Mr. and Mrs. Rueckenbach. The contract, filed as exhibit 5 in these proceedings, sets out the agreement between the parties as follows:

> For the roofing construction, incl. T&G installation, insulating, strapping and metal roof installation, excluding materials.
> Proper equipment as discussed (a crane) to be supplied by the Client.
> Lodging will be provided by the Client.
>
> The work shall begin between April 12 to 19, 2010 and end between May 3 to 10, 2010;
> And will not proceed 13 workdays (sic).
> For a price of Can$ 15 500, - plus 5% GST
>
> OR/AND
>
> The work will take more than 13 work days,
> The total price will be adjusted to Can$ 18 400, - plus 5% GST
>
> A deposit of Can$ 6 000, - is required at Contract signing,
> A payment of Can$ 6 000, - is due when the roof construction is completed
> The final payment is due upon work completion.

[3] On Wednesday, April 21, 2010, Mr. Rueckenbach and sub-contractor, Paul Vandyke, arrived at the building site at noon to start work on the de Jager's roof. They continued for a full day on April 22nd. It appears for much of this time that Mr. de Jager was working with them. On Friday, April 23, 2010, they left the building site at around noon, advising Mrs. de Jager of their departure.

[4] Mr. de Jager had a telephone conversation with Mrs. Rueckenbach later that same day, the substance of which is in dispute. Mr. de Jager indicates that Mrs. Rueckenbach was verbally abusive and threatening. Mrs. Rueckenbach asserts that Mr. de Jager was angry and cancelled the contract.

[5] Mr. Rueckenbach and Mr. Schildknecht, a friend of the Rueckenbachs, went to the building site the next morning to retrieve Mr. Rueckenbach's tools which could not be located. With the assistance of Constable Crowe of the

RCMP, the tools, which had been put into a locked shed by Mr. de Jager, were retrieved.

The Claim:

[6] On May 5, 2010, Mr. and Mrs. de Jager filed a Claim in the Small Claims Court against the Rueckenbachs, seeking the return of the de Jager's $6,000 deposit and the recovery of approximately $4,000 in damages the de Jagers allege were suffered as a result of the work that was performed by Mr. Rueckenbach and Mr. Vandyke and as a result of Mr. Rueckenbach's failure to complete their roof on schedule. While the Claim as filed specifies the claim type as "fraud", it is evident from the attached "Reasons for claims and details" that the de Jagers are essentially alleging a breach of contract. There is no evidence before me to support a finding of fraudulent behaviour on the part of the Rueckenbachs.

[7] As is not surprising, each of the parties has a different view of the breakdown of the contractual relationship. Mr. de Jager takes the position that Mr. Rueckenbach effectively breached the contract by leaving the work site without any notice or explanation. The Rueckenbachs assert that Mr. de Jager failed to provide a safe and proper crane as required by the contract and that he verbally cancelled the contract during his telephone conversation with Mrs. Rueckenbach.

Issues:

[8] The issues to be decided are as follows:

1. Whether there was, in fact, a valid and enforceable contract;
2. If so, were the Rueckenbachs in breach of the contract;
3. Are the de Jagers entitled to the return of their deposit;
4. Are the de Jagers entitled to recover for any other damages; and
5. Are the Rueckenbachs entitled to any payment for services rendered?

Analysis:

1. Was there a valid and enforceable contract?

[9] Much of the evidence centered on the issue of who should bear the blame for the breakdown in the contractual relationship which occurred at the end of April. Having carefully considered the evidence, I conclude that the problems giving rise to the breakdown in the relationship are rooted in a failure on the part of both parties to adequately define the terms of the contractual relationship at the time the contract was signed.

[10] In hearing the evidence, it became clear to me that successful completion of the work was dependent on having clear plans containing detailed and accurate measurements, including the necessary pitch of the roof. While Mr. de Jager was in possession of architect's plans, I accept as a fact that these were insufficient to guide the work to be performed on the roof.

[11] There is a clear difference of opinion before me as to whose responsibility it was to provide the plans necessary to complete the work.

[12] When Mr. de Jager first testified regarding the discussions preceding the signing of the contract, he noted that he showed the architect's plans to Mr. Rueckenbach, but does not note any discussions regarding there being an obligation on Mr. Rueckenbach as part of the contract to prepare and provide the necessary plans. It was clear, however, that this was Mr. de Jager's expectation as he noted his surprise when Mr. Rueckenbach arrived to commence the work with no plans or drawings. Later in his evidence, Mr. de Jager confirmed that it was his understanding that Mr. Rueckenbach was to produce the necessary plan with measurements.

[13] For his part, Mr. Rueckenbach testified that there were no discussions about plans before he provided the quote as it was his understanding that Mr. de Jager was already in possession of the necessary plans.

[14] The contract filed as exhibit 5 makes no mention of any agreement with respect to who would be providing the plans.

[15] I find as a fact that the parties did not clearly address the issue of who was to supply the plans necessary to complete the work at the time the contract was signed, and that each party honestly believed that it was the other's obligation.

[16] In assessing the validity and enforceability of the contract, this misunderstanding, in my view, raises the issue of mutual mistake.

[17] In defining the three types of mistake: common, mutual and unilateral, the Alberta Court of Appeal, in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* (2003), 17 Alta. L.R. (4th) 243 defined each as follows, at para. 12:

> Common mistake occurs when the parties make the same mistake. For example, one party contracts to sell a vase to another when unbeknown to both, the vase was destroyed and no longer exists. Mutual mistake occurs when both parties are mistaken, but their mistakes are different. In this event, the parties misunderstand each other and are, to use the vernacular, "not on the same page". Unilateral mistake involves only one of the parties operating under a mistake.

[18] In addressing the impact of each of the three types of mistake, the court went on to say at para 13:

> The presence or absence of an agreement is one of the foundational differences amongst the three types of mistake. With common mistake, the agreement is acknowledged. What remains to be determined is whether the mistake is so fundamental as to render the agreement void or unenforceable on some basis. But in the case of a mutual or unilateral mistake, the existence of an agreement is rejected. As explained in Cheshire, Fifoot & Furmston, *supra* at 253:
>
> > Where common mistake is pleaded, the presence of agreement is admitted. The rules of offer and acceptance are satisfied and the parties are of one mind. What is urged is that, owing to a common error as to some fundamental fact, the agreement is robbed of all efficacy. Where either mutual or unilateral mistake is pleaded, the very existence of the agreement is denied. The argument is that, despite appearances, there is no real correspondence of offer and

> acceptance and that therefore the transaction must necessarily be void.

[19] In *Ekmekjian v. Warde*, 2008 BCSC 1611, the B.C. Supreme Court noted at para 60:

> When examining mutual mistake, courts will examine all relevant circumstances to determine whether or not there was a consensus between the parties regarding the contract's terms. If a consensus is found, the contract will be rectified. If there is no consensus, the contract will be declared void and the court may set the agreement aside.

[20] In considering all of the relevant circumstances in the case at bar, I conclude that there is indeed a mutual mistake in this case given the conflicting beliefs of the parties as to whose responsibility it was to provide the plans necessary to complete the work. As a result, I conclude that there was no consensus and the contract must be declared void.

2. Were the Rueckenbachs in breach of the contract?

[21] Having decided that there was not, in fact, a valid and enforceable contract, I need not decide whether the Rueckenbachs were in breach thereof.

[22] There are, however, a couple of issues raised in the evidence that are deserving of comment, as they appear to be of particular concern to the parties. Firstly, much evidence was led with respect to the safety of the work site and of the crane provided by the de Jagers. The Rueckenbachs did clarify that they did not have concerns about the safety of the building site as a whole, and the safety of the site was certainly confirmed in evidence by the various witnesses called by the de Jagers; however, the Rueckenbachs expressed concerns about the safety of the crane, asserting that it was not in proper working order and that it was incapable of safely performing the work due to its small size.

[23] I am satisfied based on the evidence of Lewis MacGillivray, the automotive mechanic who serviced and tested the crane, that it was in proper working order and capable of performing the job required. This was further

confirmed by the photographs filed as exhibit 1 which show the crane lifting a log to the desired height.

[24] I do note that Mr. MacGillivray could not confirm the date he serviced the crane, but I am satisfied, on the evidence of Mr. de Jager, that this occurred before the crane was brought to the building site.

[25] I also reject Mrs. Rueckenbach's submission that the photos in exhibit 1 and exhibit 2 may show two different cranes given some differences in the appearance of the left side of the front bumper. This damage could well have been caused on the building site in the time frame between the taking of the photographs. I note that, other than the difference in the appearance of the left side of the bumper, the photos appear to depict the same crane. In particular, the rust patterns on the bumper and the scrape down the right side of the white grille are consistent throughout. To suggest that the photos depict different cranes is entirely speculative, in my view, absent any evidence to suggest that a second virtually identical crane was brought in to replace the first.

[26] Secondly, much evidence was led with respect to Mr. de Jager locking up Mr. Rueckenbach's tools and Mr. Rueckenbach's efforts to retrieve them through Constable Crowe. Each party seemed to ascribe nefarious motives to the other in relation to this incident. In my view, the handling of the tools after the breakdown in the relationship does not speak well of either party. However, at the end of the day, while the incident was clearly important to the parties themselves, it is ultimately irrelevant to the legal issues to be decided.

3. Are the de Jagers entitled to the return of their deposit?

[27] The absence of a valid and enforceable contract leads to the inescapable conclusion that the de Jagers are entitled to the return of the deposit of $6,000 paid as per the terms of that invalid contract.

4. Are the de Jagers entitled to recover for any other damages?

[28] As part of their Claim, the de Jagers have alleged that the actions of the Rueckenbachs have caused them to suffer additional damages. Specifically, they argue that several logs were rendered unusable as a result of Mr. Rueckenbach cutting them to the wrong measurements. Secondly, they argue that the failure of Mr. Rueckenbach to complete the roof on schedule resulted in the de Jagers incurring additional expenses.

[29] Dealing first with the issue of the logs, the evidence clearly establishes that Mr. de Jager was actively involved in the process of measuring and cutting logs. In fact, it became evident on cross examination, that Mr. de Jager did the measuring while Mr. Rueckenbach and/or Mr. Vandyke cut the logs. When this was put to Mr. de Jager, he did agree this is what had happened, but insisted that he had measured correctly, but they had cut incorrectly.

[30] There is absolutely no evidence, beyond Mr. de Jager's bald assertion, that his measurements were accurate and the problem lay with the cutting of the logs. There was no evidence of either the measurements given or the lengths cut. The evidence falls well short of satisfying me, even on a balance of probabilities, that Mr. Rueckenbach was responsible for rendering the logs unusable. The de Jagers are not therefore entitled to recover damages in this regard.

[31] Dealing next with the claim for additional expenses, the de Jagers argue that they relied on the Rueckenbachs to complete the contract on time, noting the urgency occasioned by Mrs. de Jager's medical condition and special needs. They further argue that they were financially unable to retain the services of another contractor to complete the roof due to the Rueckenbachs failure to return their deposit. Nor, they argue, would they have been able to retain another contractor at that time of the year. As a result, Mr. de Jager has been forced to complete the roof himself as well as running their seasonal business. The

consequent delay has resulted in their incurring additional living expenses in the form of rent, water delivery and laundry.

[32] Having concluded that the contract was not valid and enforceable due to a failure **on the part of both parties** to reach consensus on an essential term, I am not satisfied that the additional expenses incurred by the de Jagers can or ought to be laid at the Rueckenbachs' door. Even had I been satisfied that the expenses were incurred as a result of the Rueckenbachs' actions, which I am not, the evidence does not satisfy me that the de Jagers have made any attempts to mitigate their loss. No efforts were even made to contact other contractors. I am of the view that the de Jagers should not be entitled to recover these expenses from the Rueckenbachs.

5. Are the Rueckenbachs entitled to recover any payment for services rendered?

[33] There seems to be little dispute that Mr. Rueckenbach and Mr. Vandyke were on the building site for one full and two half days, for a total of approximately 18 to 20 hours. In the absence of a valid and enforceable contract, I must consider whether the Rueckenbachs are entitled to any payment for services rendered based on the doctrine of *quantum meruit.*

[34] In *Goldsmith on Canadian Building Contracts*, (Toronto: Carswell, 1988) looseleaf, the doctrine of quantum meruit is discussed as follows:

> The doctrine of quantum meruit, by virtue of which the courts will hold a person liable in certain circumstances to pay a reasonable remuneration for work performed for his benefit, is based on a theory of implied contract, or quasi contract. This means that, although no actual agreement has been made between the parties, the law will imply a promise to pay a reasonable amount, what the work is reasonably worth, if the circumstances bringing the doctrine into play exist….
>
> In order to render a person liable to pay on a quantum meruit basis, the work must either have been done at his request, express or implied, or he must accept the benefit of the work….

> Once it has been established that a contractor is entitled to be recompensed on a quantum meruit basis, it is up to him to establish, by proper evidence, what a reasonable remuneration for the work done would be in the particular case.

[35] Similarly, in *Rafal* v. *Legaspi*, 2007 BCSC 1944, Fisher J. noted:

> *Quantum meruit* will be available if the services in question were furnished at the request or with the encouragement or acquiescence of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of services: Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992) at 290-92; *Nicholson* v. *St. Denis* (1975), 57 DLR (3d) 699 (Ont. C.A.), leave to appeal to S.C.C. refused, [1975] 1 S.C.R. x. (paragraph 30)

[36] In this case, the work done was, in my view, done at the request, and indeed, under the direction of Mr. de Jager. However, the evidence is unclear as to what work was actually performed and what benefit, if any, was conferred by the provision of services. Reference was made to time spent trying to figure out what to do and time spent cutting and planing logs, but it was wholly unclear to me what, if anything, was actually accomplished.

[37] Furthermore, the only evidence I have been provided with respect to the value of the work performed is the invoice the Rueckenbachs gave to the de Jagers, filed as exhibit 10 in these proceedings. That invoice claims for 69 hours of labour for two workers at a rate of $75.00 per hour, a food allowance of $400.00 and a vehicle expense of $195.00, which, with the addition of GST, amounts to $6,058.50. This amount is clearly a gross exaggeration of the value of the actual work done by Mr. Rueckenbach and Mr. Vandyke.

[38] The evidence provided by the Rueckenbachs falls short of satisfying me with respect to either the nature and value of the work performed or reasonable remuneration for that work. Having fallen short of their evidentiary burden, I conclude the Rueckenbachs are not entitled to compensation on a quantum meruit basis.

Conclusion:

[39] At the end of the day, there will be judgment for the de Jagers in the amount of $6,000. The de Jagers will also be entitled to recover their court costs as calculated by the Clerk of the Small Claims Court.

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RUDDY C.J.T.C.