

Citation: *Ellwood v. 10532 Yukon Ltd.*, 2005 YKSM 2

Date: 20050114
Docket: 04-S0052
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: Her Honour Judge Ruddy

Robb Ellwood

Plaintiff

v.

10532 Yukon Ltd. (202 Motor Inn)

Defendant

Appearances:
Robb Ellwood
Tip Mah

Appearing on his own behalf
Appearing on behalf of 10532 Yukon Ltd.

REASONS FOR JUDGMENT

[1] Robb Ellwood, a mechanical engineer, seeks payment for services rendered to 10532 Yukon Ltd. in relation to the development of a design to upgrade the heating ventilation and air conditioning (“HVAC”) system in the lounge of the 202 Motor Inn which is owned and operated by the defendant.

[2] Mr. Ellwood testified that, while completing another job, he heard that Tip Mah, the owner of 10532 Yukon Ltd., was considering upgrading the HVAC system in the 202 Motor Inn lounge. Mr. Ellwood sought out Mr. Mah, introduced himself, and explained what he could do in relation to the upgrade. Mr. Mah asked Mr. Ellwood to work with Duncan’s Limited (“Duncan’s”) on the project. Mr. Ellwood spoke with Steve Duncan and was given to understand that he should invoice Duncan’s and Duncan’s, in turn, would include his costs in their invoice to Mr. Mah.

[3] Mr. Ellwood prepared his proposal (marked as Exhibit 1) and forwarded it to Duncan's. Steve Duncan then contacted Mr. Ellwood to advise that Mr. Mah had given approval to proceed with the proposal. Mr. Ellwood completed the first four of the six bullets in the proposal (the latter two bullets relate to work to be done upon completion of the upgrade itself). Mr. Ellwood delivered five copies of the documents to Duncan's on May 28, 2003.

[4] On June 15, 2003, Mr. Ellwood had a conversation with Eddy Ng, the Manager of the 202 Motor Inn. Mr. Ng asked him to seek other bidders for the project, as both he and Mr. Ellwood felt Duncan's bid was too high. Mr. Ellwood contacted three contractors. Two expressed an interest; therefore, Mr. Ellwood forwarded copies of his drawings to each of them and escorted them through the job site. Mr. Ellwood contacted Mr. Ng on June 26, 2003 to advise that one of these contractors was interested in bidding on the project. On July 11, 2003, Mr. Ellwood contacted Mr. Ng to advise of the amount of the bid. At that time, Mr. Ng advised that the owner was not proceeding with the project.

[5] It is important to note that Mr. Ellwood testified that around the time of the June 15, 2003 call from Mr. Ng requesting he seek other bidders, Mr. Ng advised Mr. Ellwood to invoice the 202 Motor Inn directly rather than Duncan's, to avoid any appearance of conflict. Mr. Ellwood does not recall exactly when this conversation occurred, but says it was either during the June 15, 2003 phone call or during a conversation he and Mr. Ng had at around the same time on the sidewalk in Riverdale.

[6] As a result of this conversation, Mr. Ellwood sent an invoice to the 202 Motor Inn at the end of August 2003. This was followed by numerous reminders, the last being June 4, 2004. Over that period, Mr. Ellwood met several times with Mr. Ng, but made no progress and was ultimately told to get in touch with Mr. Mah. On June 6, 2004, Mr. Ellwood met with Mr. Mah who advised him that the

defendant would not pay the invoice as the work did not proceed and the defendant was of the view that Mr. Ellwood's expenses were Duncan's responsibility.

[7] Mr. Ellwood seeks payment of his invoice in the amount of \$3,210 plus reasonable interest and costs.

[8] The defendant, as represented by Mr. Mah, called two witnesses in defence of the claim: Mr. Mah himself, and Mr. Ng.

[9] Mr. Mah testified that he only met Mr. Ellwood on one occasion in the presence of Steve Duncan. Mr. Mah says he asked Mr. Duncan to look into the possibility of an upgrade to the HVAC system. According to Mr. Mah, he was dealing with Duncan's and did not even know who Mr. Ellwood was. Mr. Mah testified that it is not his practice to retain designers or engineering firms, but rather he would hire a contractor and leave such details to them.

[10] With respect to Mr. Ng, Mr. Mah testified that while Mr. Ng is the manager of the 202 Motor Inn, he has limited authority. Mr. Ng has the authority to hire staff and run the hotel. Mr. Ng has no authority to contract for renovations or construction, though Mr. Mah later conceded that Mr. Ng could contract for small repairs. Mr. Mah stressed that Mr. Ng is not allowed to make decisions, and that everyone in town knows this.

[11] Mr. Ng provided strikingly similar testimony confirming his limited authority, indicating that he has no authority to do renovations, but has authority to hire, order liquor (small orders), and do small repairs.

[12] Mr. Ng testified that he let Mr. Ellwood into the lounge at the 202 Motor Inn on three or so occasions as he understood that Duncan's had sent him. Beyond that, Mr. Ng indicated that he had nothing further to do with the project. Mr. Ng

stated that when Mr. Ellwood approached him with anything related to the project he would refer Mr. Ellwood to Mr. Mah, and advise Mr. Ellwood that he, Mr. Ng, had nothing to do with it. Mr. Ng denies advising Mr. Ellwood to invoice the 202 Motor Inn.

[13] The defendant takes the position that Mr. Ellwood was not hired by the defendant and therefore, the defendant is not liable for his fees.

[14] Given the opposing evidence and positions, this case turns on the issue of credibility.

[15] Mr. Ellwood was very precise, clear and thorough in his testimony. Mr. Ellwood had a good recollection of the events, but was not given to exaggeration. Where he could not remember something, he clearly stated so, even when not in the interests of his claim. He was also able to support his testimony with documents, including his working notes, letters and E-mails, filed collectively as Exhibit 2 in these proceedings.

[16] The defendant's witnesses, on the other hand, appeared to have very limited recollection of the events except where it helped their cause.

[17] Mr. Mah was both evasive and non-responsive in his testimony. He was asked repeatedly whether he spoke to Mr. Ng regarding upgrading the HVAC system, and he gave a number of different answers, ranging from "no" to "they discussed what Mr. Ng should do if the air conditioner broke down" to "he advised Mr. Ng that Steve Duncan had said not do anything this year as the price was too high" to "they spoke every day about it".

[18] The evidence of Mr. Ng was even more problematic. His evidence was at times both internally inconsistent and inherently in-credible. In terms of inconsistencies, his evidence varied on the extent of his involvement with Mr.

Ellwood. He initially said, after letting Mr. Ellwood in the lounge the first time, he had no other dealings with him. Mr. Ng later conceded he saw him a couple more times after that to again let Mr. Ellwood into the lounge. Similarly, Mr. Ng originally testified that he simply ignored the invoices sent by Mr. Ellwood and did nothing in response to them, but when pressed in cross-examination about the notes on the invoices asking him to call if there was a problem, he then said he did call Mr. Ellwood on one occasion to ask why Mr. Ellwood was sending invoices to him as Mr. Ellwood did not work for him. Not surprisingly, he could not recall when he made that call.

[19] In terms of the credibility of Mr. Ng's evidence, his testimony on a couple of points is difficult to accept. Firstly, he indicated that when Mr. Ellwood attended at the 202 Motor Inn, he simply let him in or gave him the keys and left him alone, without confirming who he was or why he was there. Similarly, he testified that he simply ignored the invoices sent by Mr. Ellwood as he did not have the authority to deal with him. Lastly, he says that when Mr. Ellwood spoke to him about getting other bids, he replied "do whatever you want to do; I have nothing to do with that". It is important to note that Mr. Ng is the Manager of the 202 Motor Inn. Regardless of his and Mr. Mah's evidence as to his limited authority, hotel manager is an important position. I find it highly unlikely that a business person in such a responsible position would act in such a fashion.

[20] For these reasons, where the evidence of the plaintiff and the defendant conflict, I accept the evidence of Mr. Ellwood over that of the defendant. I find that Mr. Ellwood completed the work as described and that Mr. Ng directed him to invoice the defendant directly for that work. I accept Mr. Ellwood's evidence that industry practice dictates that the consultant is paid regardless of whether the project proceeds unless it does not proceed through the fault of the consultant. That is not the case here. I further accept Mr. Ellwood's evidence that, while he could not complete the last two bullets of his proposal, he

completed work of equal value in his efforts to secure additional bids as per Mr. Ng's request.

[21] Notwithstanding Mr. Mah's insistence that Mr. Ng did not have the requisite authority to make such decisions, I find that in his capacity as Manager of the 202 Motor Inn, it was reasonable for Mr. Ellwood to believe that Mr. Ng either had the authority or was acting on behalf of Mr. Mah when he directed Mr. Ellwood to invoice the defendant directly and to seek additional bids.

[22] I order the defendant to pay Mr. Ellwood's invoice for services rendered in the amount of \$3,210 plus interest as of September 30, 2003. The interest calculation, in accordance with the *Judicature Act*, from September 30, 2003 to today's date is \$150.72. Interest after today's date until the date of payment will similarly be calculated in accordance with the *Judicature Act*. Mr. Ellwood is also entitled to reimbursement of his court costs in the amount of \$150.00.

Ruddy T.C.J.