Citation: *Energy North Construction Inc. v. Legacy Construction*, 2014 YKSM 7

Date: 20140711
Docket: 12-S0115
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Chisholm

ENERGY NORTH CONSTRUCTION INC.

Plaintiff

v.

LEGACY CONSTRUCTION – BLAIR MACDONALD

Defendant

Appearances:
Bhreagh Dabbs — Counsel for the Plaintiff
Blair MacDonald — Appearing for the Defendant

REASONS FOR JUDGMENT

Overview

[1] This Claim and Counterclaim arise from a dispute regarding work done by the Plaintiff, a company which installs insulation, on a house being built by the Defendant, a Whitehorse construction company. The Plaintiff sues for payment of its account, plus interest, for services rendered. The Plaintiff argues that any deficiencies in its work were either properly rectified or offers were made to have them rectified.

[2] The Defendant submits that the work done by the Plaintiff was substandard and it misrepresented its true association with an oversight organization. The Defendant seeks set off with respect to deficiencies in the Plaintiff's work and counterclaims for the cost of replacing a newly installed roof,

the warranty of which, it says, was voided by the actions of the Plaintiff.

Summary of the facts

[3] The Defendant engaged the services of the Plaintiff in March 2012 to install spray foam insulation in the house it was constructing. The Plaintiff provided the Defendant with an estimate on March 26, 2012 for the cost of installing insulation in the roof, walls and rim joists. Although there was no written contract, it is common ground that the Defendant agreed to the estimate and work commenced on March 29, 2012. The Plaintiff finished installing the insulation in early April.

Deficiencies in the work inside the home

[4] After the completion of the work, the Defendant's representative, Blair Macdonald, noted deficiencies, specifically, overspray in the interior of the home that had to be removed and, in spots, a lack of uniform foam thickness. The Plaintiff returned to the worksite to remedy the deficiencies a few days later. Upon Mr. Macdonald's return from an out of town trip, he viewed the remedial work and was still displeased with the overall quality of the work, because areas of overspray had not been properly removed and areas of low insulation thickness could still be observed. On April 18 and 19, 2012 the Plaintiff sent a team of employees to the house to remove the overspray and remedy the insulation thickness. Sheldon Keobke, the senior employee on site, testified to having reviewed this second round of remedial work with Blair Macdonald. According to Mr. Keobke, although Mr. MacDonald was still unhappy with the length of time it took to complete the work, he was satisfied with the end result.

Mr. Macdonald does not disagree with this.

[5] However, upon closer inspection, issues with the work were still apparent. According to David Bernier, a witness for the Defendant, after the Plaintiff's second attempt to fix the deficiencies, he spent three days filling in low spots and sanding off overspray from interior logs.

Overspray on the roof of the house

[6] In May or June 2012, Mr. Macdonald contacted Kirk Potter, the president of the Plaintiff company, to complain that he had located spray foam material on a portion of the roof. The material he had discovered was what is commonly referred to as overspray. As the insulation was sprayed in the attic area, some of it made its way through cracks and window/insulation stops and ended up on the roof (the pressure of the spraying units may have led to some of the preparatory work (e.g. taping, plastic, cardboard) being disturbed, thus allowing the foam insulation to make its way through gaps and onto the roof). Mr. Macdonald was upset as the roof had recently been installed at a substantial cost.

[7] Mr. Potter visited Mr. Macdonald in May 2012 to inspect and discuss the overspray situation. He explained to Mr. Macdonald that overspray does not permanently bond with metal, that the sun's ultraviolet rays would break it down and that it could subsequently be easily removed with a clay bar. Mr. Macdonald was not agreeable to having the same work crew return to remedy this issue. Mr. Potter agreed that he and another individual would do the work.

[8] There is some disagreement as to what was to occur next. Mr.

Macdonald says that Mr. Potter was to contact the roof manufacturer to ensure that the use of a clay bar would not adversely affect the roof and then get back to Mr. Macdonald. Mr. Potter says that Mr. Macdonald was to contact him when he was ready to do gable work, at which time the parties would split the cost of a scissor or boom lift, and Mr. Potter and an associate would do the remedial work on the roof. I prefer the evidence of Mr. Potter in this regard, as it is reflected in subsequent correspondence sent to Mr. Macdonald.

[9] Mr. Macdonald did not follow up with the Plaintiff to pursue the completion of this remedial work. No further work or communication had occurred by August 2012. It did not help matters that Mr. Potter was dealing with a serious family illness that took him out of the Yukon. The Plaintiff sent correspondence to the Defendant in August. In an August 13 e-mail to Mr. Macdonald, Stan Fordyce, office manager for the Plaintiff, requested that the Plaintiff be given an opportunity to send a roofing company to look at the overspray with a view to rectifying it. On August 28, Mr. Fordyce sent an e-mail to the Defendant, indicating that Mr. Potter was back in town and wished to deal with the overspray on the roof and the outstanding account. Mr. Fordyce also wrote:

> As I stated in the last email we would require access to your building in which the last conversation on the phone on or about August 13, you indicated you did not want us there for any reason whatsoever.

[10] It appears from this August correspondence, and a further letter to the Defendant in September, that the Defendant was refusing the Plaintiff access to his property. Although in his testimony, Mr. Macdonald says the issue was Mr. Potter's unavailability, the correspondence of August 28 clearly reveals that Mr.

Potter was available.

[11] It seems that by this point Mr. Macdonald had decided that one side of the roof had to be replaced because of the overspray issue. Indeed, on July 10, 2012 he received a quote from David Bernier of Frontier Restorations, who had initially installed the roof, to replace one side of the metal roof.

[12] Mr. Macdonald testified to having contacted the roof manufacturer and, based on that communication, was under the impression that his roof warranty was void as a result of the overspray.

[13] I should point out that the affected area of the roof has not been replaced and no remedial work has been done to the roof to date.

Invoice

[14] Prior to work being performed to remedy the interior deficiencies, the Plaintiff sent the Defendant an invoice on April 16, 2012 in the amount of $20,867.70 which included a 5% discount, apparently because of the problems that had arisen during the job. The Defendant did not pay the invoice. As indicated, commencing in August 2012 a number of letters and e-mails were sent to the Plaintiff regarding the removal of the overspray and with respect to the overdue account. Mr. Macdonald, on behalf of the Defendant, indicates he had some telephone contact with the Plaintiff in response to correspondence. However, other correspondence from the Plaintiff received no response from the Defendant.

Issues

1. Was there a breach of contract and, if so, who breached it?
2. What, if any, damages is the Plaintiff liable for with respect to the overspray on the roof?
3. Misrepresentation issue
4. Interest on the account

Analysis

[15] The Plaintiff must prove its case on the balance of probabilities. Similarly, the Defendant must prove its counterclaim on the same standard.

[16] I find that all witnesses generally gave credible evidence, however because of the documentary evidence submitted by the Plaintiff and the fact that the Defendant's representative could not clearly remember all interactions with the Plaintiff, in certain instances, where details were in dispute, I prefer the evidence of the Plaintiff.

[17] As earlier indicated, no written contract existed between the parties. Based on the Plaintiff's estimate, the parties agreed orally that the work would be performed for the estimated price, that the work would take approximately five days and that it would be completed in as timely a fashion as possible.

[18] It appears there was no specific discussion with respect to how payment would occur.

1. Was there a breach of contract and, if so, who breached it?

[19] In *William v. Hodson,* 2011 MBQB 187, the Court stated at para 28:

> Where a contract is not completed, it is usually as a result of the fault of one party or the other. It is for the court to determine who is at fault.

[20] In the matter before me, the Plaintiff argues that there was no breach of contract. The Plaintiff argues that the deficiencies were remedied and that it made efforts to arrange to have the overspray removed from the roof of the house. It argues that efforts to do so were rebuffed by the Defendant. The Plaintiff says that if deficiencies still existed after the two attempts by the Plaintiff to remedy them, the Defendant had an obligation to advise the Plaintiff of the situation before hiring someone else to complete the work.

[21] The Defendant is of the view that the interior insulation was not properly installed and that after a number of attempts to remedy the situation, there were still problems. The Defendant takes the position that despite an agreement to have Mr. Potter remove the overspray on the roof, the Plaintiff did not follow up. The only way to now remedy the overspray issue is by replacing one-half of the roof.

[22] The Plaintiff's initial work was indisputably deficient. It should be noted that Mr. Keobke testified in direct examination that he was made aware from the outset that the log work inside the home should be protected. The Plaintiff's workers had to return on two occasions to work on deficiencies. Although Mr. Keobke and Mr. Macdonald agree that after the second attempt to rectify the situation, a walk through occurred at which time Mr. Macdonald noted his approval, it is clear more deficiencies were later discovered. As I understood the evidence of David Bernier, the sanding that he did to remove overspray from logs

was in areas that were not immediately visible to the eye. He also applied foam to low depth areas of the insulation. This work remedied any remaining deficiencies.

[23] The Defendant did not lead evidence to establish that once the deficiencies were remedied, the work was not up to standard. Although I understand Mr. Macdonald's frustration with respect to the deficiencies and the fact that the Plaintiff had to return to the house on more than one occasion, the law is clear with respect to payment. Denning, L.J. pronounced the law in this area in *Hoeniq v. Isaacs*, [1952] 2 All E.R. 176:

> In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good…

[24] I do not find in this situation that the Plaintiff's breach went to the root of the matter. Having considered all of the evidence, I find that the work done by the Plaintiff was substantially complete, with certain outstanding deficiencies. The Defendant should have paid the invoice and then pursued his remedies

regarding set off.

[25] I still must consider whether it was reasonable for the Defendant to have hired Mr. Bernier to deal with the outstanding deficiencies. Even though Mr. Bernier did not represent himself to be an insulation specialist, his testimony regarding the low spots in the insulation and overspray on the logs was credible. The work he did to bring the deficiencies up to standard seems reasonable. The work Mr. Bernier performed was not seriously challenged on cross-examination. His efforts occurred after two attempts by the Plaintiff to deal with the interior deficiencies.

[26] Although it is normal to allow the initial contractor the opportunity to remedy deficiencies, if a number of attempts have been unsuccessful, it seems only reasonable to turn elsewhere.

[27] I award the Defendant $1,000 based on Mr. Bernier's three days' work.

2. What, if any, damages is the Plaintiff liable for with respect to the overspray on the roof?

[28] The parties take very different positions as to what is the appropriate remedy for this issue.

[29] The Plaintiff takes the position that the overspray does not permanently bond to or negatively affect the metal and may be easily removed with a clay bar. The overspray is an inert material that breaks down with the ultraviolet rays of the sun. Mr. Potter and Mr. Keobke both testified that they have had experience with overspray on metal roofs and on vehicles and that they had no problems in removing it. A technical representative of the spray foam manufacturer, Peter

Frenette, took the same view in a letter. Although Mr. Frenette did not testify at the trial, I still give his position some weight. Alternatively, the Plaintiff says that the panels with overspray on them could be replaced without replacing the whole side of the roof.

[30] The Defendant is of the opinion that the overspray is a chemical and voids the warranty on the metal roof. The Defendant argues that because of the manner in which this roof has to be installed, one whole side of the roof would have to be disassembled to remove the panels affected by the overspray. Mr. Bernier testified that the manner in which the panels lock together would make it extremely difficult to disassemble without damaging the panels not affected by overspray. In his view, replacing the whole side of the roof is the preferred option.

[31] The Defendant relies on a letter from Gary Serba of Vicwest, the manufacturer of the roof, dated January 4, 2013 to demonstrate that the paint warranty on his roof is void. However, there is confusion as to the type of roof which was installed. Mr. Macdonald claims that his roof had a WeatherX forty-year coating warranty, but in cross-examination it became apparent that the roof might be the Vicwest Metallic roof which may not have the same warranty. The Defendant did not file the specific warranty documents received from the manufacturer for his roof. One of the documents filed by the Defendant and upon which he relies states:

> the specifications and other information contained in this document are provided for information purposes only and, do not constitute a warranty… (Exhibit 21)

[32] Mr. Serba was not called to testify with respect to the warranty issue. It is not clear what his credentials are or with what information he was provided before concluding in the January 4, 2013 letter to the Defendant that the overspray would void the paint warranty for the WeatherX coating. It is also of some significance that Stan Fordyce indicates that a Vicwest representative advised him that the 'clearcoat over the metallic colour may be faded after the foam is gone', but that 'this would not affect the performance of the roof'.

[33] Considering the state of the evidence, the Defendant has not proved on a balance of probabilities that the overspray has voided the roof paint warranty.

[34] As indicated, Mr. Macdonald and Mr. Potter had agreed in the spring of 2012 that a boom lift would be necessary to access the roof and remove the overspray. It is estimated that the cost to rent a boom lift to work on the affected areas of the roof would be $600. Considering the process of moving the machine to the site, setting up and performing the remedial work on the roof, one day's work for two people is an appropriate estimate. I fix the cost of labour at $800, plus the lift rental cost of $600, for a total of $1,400 payable by the Plaintiff. Although there had been an earlier agreement by the parties to share the cost of the lift, I find that in all the circumstances the Plaintiff should bear that cost.

[35] The evidence I have accepted demonstrates that there will be a cosmetic defect to parts of the roof, once the overspray is removed. In the normal course, the Plaintiff would be responsible for the cost of rectifying the defect. However, as indicated in *Mangion v. Managen Project Management Ltd*. (1989), 96 A.R. 122:

> …there is a restriction on the rule where the cost of rectification is great in comparison to the nature or effect of the defect. In those cases, a slavish following of the requirement is not required and damages are sometimes awarded.

[36] As in *Mangion,* in the matter before me, 'the deviation…is minor compared to the cost of rectification'. I award the Defendant $1000 in compensation.

3. Misrepresentation issue

[37] The Plaintiff advertises that it is a member of the Canadian Urethane Foam Contractors Association Inc. ('CUFCA'). It has produced a certificate which shows that as of July 12, 2012 it was a CUFCA member and Mr. Potter testified that the Plaintiff was a member at the time the work was done for the Defendant.

[38] The Defendant submits that the Plaintiff did not follow CUFCA standards, for example, by not having a certified sprayer on site at all times. The Plaintiff responds that it would only require a CUFCA certified sprayer if it intended to rely on the CUFCA warranty. It does not advertise the CUFCA warranty and does not rely on it. Additionally, the Plaintiff states that a CUFCA warranty was never discussed with the Defendant.

[39] The issue at the end of the day is whether or not the end product was up to industry standards. I have no evidence before me that the end product, once the deficiencies were remedied, was substandard. It follows that this part of the Defendant's counterclaim fails.

4. Interest on the account

[40] The Plaintiff's first invoice was sent on April 16, 2012 and included a

reference to a 2% per month interest rate. However, there is no indication that a monthly interest rate was discussed by the parties prior to this invoice.

[41] The parties did not have a prior business relationship as, for example, in the case of *Capital Builder Sales Ltd. V. Bachli Construction*, 1999 YTSM 503.

[42] In determining whether the invoices' stipulation of a 2% per month interest rate was sufficient to found a contractual obligation, I have considered, amongst others, the decision of *N.B.C. Mechanical Inc. v. A.H. Lundberg Equipment Ltd.*, 1999 BCCA 775, where the Court stated:

> [35] In my view, the trial judge erred in law in finding an implied contract. The root of the error is in para. 104 of his reasons, quoted supra, where he states his conclusion that, because of the letter of September 13 and the many invoices later submitted by the plaintiff, the defendant was aware that "the plaintiff would be charging interest on overdue accounts". With respect, the most that can be said is that Mr. McWhannel had some awareness that the plaintiff was claiming in its invoices the right to charge interest on overdue accounts but that is not enough to create an obligation on the part of the defendant. A right to charge interest cannot be based simply on a unilateral assertion in an invoice. See: Alex Gair & Sons Ltd. v. Marr Holdings Ltd., [1987] B.C.J. No. 329 (B.C.S.C.) and the cases cited therein.

[43] And later:

> [39] Where there is no express agreement to pay interest, agreement may be inferred from a course of conduct or an acknowledgement by the debtor subsequent to the contract being entered into…
>
> [41] …The history of this case illustrates the unfairness which can result if the court must award interest at an usurious rate in a case involving a genuine dispute which has taken years to resolve. If the parties have clearly agreed on such a term, then so be it. But there no longer is any reason to stretch the concept of implied contract to create a basis for awarding interest.

[44] I do not have any evidence before me that there was an express agreement to pay interest at the rate claimed. The 24% annual interest on the outstanding account is denied.

Miscellaneous issues

[45] The Defendant raises other issues, namely damage to a job box by the Plaintiff and the temporary taking of the Defendant's scaffolding by the Plaintiff. These matters may be dealt with summarily. The Plaintiff admits the accidental damage to the job box. The Plaintiff has bought a replacement box which is awaiting pick up by the Defendant. The scaffolding incident was clearly a mistake and when notified of it, the Plaintiff promptly returned the scaffolding.

Conclusion

[46] The amount of the Plaintiff's initial invoice was $20,867.70 from which $3,400 in set-off will be deducted. The Plaintiff is awarded judgment in the amount of $17,467.70. Pre-judgment and post-judgment interest is payable in accordance with the *Judicature Act.*

[47] I award costs to the Plaintiff as follows: $500 for counsel fees and $250 for filing and preparation fees.

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CHISHOLM T.C.J.