Citation: *Grieco v. Ryan,* 2010 YKSM 4

Date: 20100610
Docket: 09-S0018
Registry: Whitehorse

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

Mike Grieco

Plaintiff

v.

Terry Ryan

Defendant

Appearances:
Mike Grieco — Appearing on own behalf
Terry Ryan — Appearing on own behalf

REASONS FOR JUDGMENT

[1] The Defendant operates a home renovation business in Whitehorse under the name of Carpenter/Tradesman Home Renovations. He contracted orally with the Plaintiff to construct a new roof on the Plaintiff's home (the "Project"). Due to some delay in completing the Project, the Defendant's wife, Ria Ryan, also a co-owner of the business, prepared a draft contract (the "Contract"). The Contract was between the Defendant as the Contractor, and the Plaintiff as the Client. The Contract was signed by both the Plaintiff and the Defendant.

[2] One of the terms of the Contract was that if the Defendant did not complete the Project by April 31 [sic], 2009, the Plaintiff would receive "…return of all money given for labour". The Project was not completed by April 30 (although the Contract stated April 31, it was clearly the intention of the parties that the end of April was to be the completion date for the Project). The

Defendant continued to work sporadically on the Project in May, with the consent of the Plaintiff, until the Plaintiff terminated the Defendant's services on May 23 or 24, 2009.

[3] The Contract stipulated that the Plaintiff pay the Defendant $4,000.00 for labour. In total the Plaintiff paid the Defendant $3,050.00. The Plaintiff had also purchased approximately $3,000.00 in materials.

[4] The Plaintiff subsequently hired another Contractor to complete the work on the roof initially started, but not finished, by the Defendant. The Plaintiff seeks the return of the $3,050.00 he paid the Defendant.

Issues

[5] There are several issues in this case. Firstly, what was the nature and content of the initial oral agreement between the parties and, secondly, what was the effect of the Contract upon this oral agreement? Further, is the term of the Contract requiring full repayment of monies advanced enforceable? Two issues arise in this regard; 1) is this term of the Contract an unconscionable term; and 2) did the Plaintiff waive compliance with this term by allowing the Defendant to continue to work on the Project after April 30, 2009?

[6] In order to properly determine these issues it is necessary to establish the facts as they relate to: the time the oral contract was entered into; the anticipated schedule of work; whether the completion of the Project was delayed either before or after the Contract was entered into, and, if so, the reasons for the delay; and the reasonableness of the actions of the Plaintiff in terminating the ability of the Defendant to continue to work on the Project.

Witnesses

[7] The Plaintiff testified on his own behalf. The Defendant also testified, as well as Ms. Ryan and Cress Lundstrom, who completed some of the work on the Project on May 23 at the request of the Defendant.

[8] Ms. Ryan, although a witness herself and not a named party, was present in the courtroom with leave of the Court for the evidence of all the witnesses, as it was clear that she was primarily responsible for the conduct of the Defendant's case.

[9] A number of documents were filed at trial, comprised primarily of Inspection Reports, not all of which had been made available to both parties prior to the trial commencing.

[10] The trial took place over the course of 2 days on November 23, 2009 and January 27, 2010.

[11] At the outset, I consider the evidence of the Plaintiff to be reliable. He was clear and concise in his testimony and recollection of events.

[12] I also consider the evidence of Ms. Ryan to be reliable, insofar as she was testifying to events she would be expected to have direct knowledge of. I find, however, that the probative value of her evidence with respect to the actual work on the Project to be very limited, as it is clear that her involvement with the Defendant's general contracting work, and the Project, was primarily limited to running the office.

[13] I consider the evidence of Mr. Lundstrom to be reliable.

[14] I consider the evidence of the Defendant to be less reliable than that of the other witnesses. This is largely due to his limited recollection of times and

specific events, as well as inconsistencies in his testimony. I do not find, however, that he was deliberately providing false or misleading evidence.

Facts

[15] I find the following:

- The Plaintiff and the Defendant agreed in December 2008 that the Defendant would undertake work on the Project. The oral agreement contemplated that the work on the Project would take place as weather permitted, however, the expectation of the parties was that this work would begin in January if possible. The Defendant agreed in cross-examination that he was working on other projects from January to April, 2009.
- The oral agreement did not contemplate work on the Project being delayed until as late as April, 2009. While I agree that work could not be started on the Project without first obtaining a building permit, and that this permit was not obtained by the Defendant until April 21, 2009, I find that this was an issue for the Defendant and not the Plaintiff. There was no evidence that the Plaintiff had an obligation under the terms of the oral agreement to obtain the building permit and, in fact, it was the Defendant that did so in the end.
- Further, while I agree that the Defendant could not operate as a business in the City of Whitehorse without first obtaining a business license, it appears that he simply renewed his business license on April 8, 2009. Regardless, this again is an issue for the Defendant and does not relieve him from his obligations under the oral agreement or the Contract.
- In expectation that the work on the Project would start soon, the Plaintiff advanced the Defendant $2,000.00 on December 23, 2008. He also purchased materials for the work on the Project on December 16, 2008. The Plaintiff, relying on the representations of the Defendant, cleared the roof of snow on several occasions so that the Defendant could commence work.

- The Defendant did not, however, commence or continue work on the Project within the time frame that he had represented to the Plaintiff that he would be able to. It appears that the Defendant did no work on the Project until April, 2009. The weather in early 2009 was not such, however, that it frustrated the ability of the Defendant to commence or continue work on the Project.
- The Plaintiff made his dissatisfaction with the delay of work on the Project known to the Defendant and Ms. Ryan. As a result, Ms. Ryan drafted the Contract which was signed by both the Plaintiff and the Defendant. The term requiring repayment of monies paid to the Defendant by the Plaintiff was inserted by Ms. Ryan and not specifically requested by the Plaintiff.
- The poor health of the Defendant was known to the Defendant and Ms. Ryan at the time the Contract was drafted and signed. Therefore, the agreement by the Defendant to the terms of the Contract was with an understanding of the limitations that his health may impose on his ability to complete the Project by the time stated. There was nothing new arising in the Defendant's state of health from the time the Contract was signed to the date the Plaintiff terminated his services.
- The Defendant worked on the Project during April and, towards the end of April, asked the Plaintiff for a short extension for medical appointment reasons. The Defendant advised the Plaintiff that there were only two or three days of work left to complete the Project.
- The Plaintiff, in hopes that the Defendant would continue in early May to work diligently on the Project until it was completed, did not terminate the services of the Plaintiff when the Project was not completed by April 30, 2009. I accept the evidence that the Defendant had requested an extension past April 30 on the basis that he had a medical appointment to deal with and there were only a couple of days left to complete the Project.
- The Defendant continued to work sporadically on the Project, or have others attend to work on the Project, in May 2009. The Defendant also had unrelated projects he was involved with in May.

- The Plaintiff expressed his dissatisfaction with the sporadic nature of this work to the Defendant. The Defendant assured the Plaintiff that he would show up to work on the Project on May 23, 2009. The Defendant, however, did not show up to work on the Project that weekend, but sent Mr. Lundstrom instead. Mr. Lundstrom was not sent with specific instructions to perform the work that the Defendant would have done had he been there. Mr. Lundstrom's evidence was that the Defendant had promised to pay him $150.00 to complete some shingle work only. Mr. Lundstrom was asked the following question by the Plaintiff: "On May 23, 2009 did you not say that Mr. Ryan said I would pay you $800.00 to finish his job, and that you could not/would not finish Mr. Ryan's job for $800.00?" Mr. Lundstrom replied as follows: "I would not finish that job for $800.00". He did, however, do some minor work on the shingles for which the Defendant paid him $161.25. The Plaintiff attempted to engage Mr. Lundstrom to complete the Project, but he declined to do so.
- While there was some evidence about a need to order additional shingles which did not arrive until after the May 18 long weekend, I find that this delay did not alleviate the obligation of the Defendant. Firstly, it appears that some of the responsibility for the need to order extra shingles may have rested with the Defendant. Regardless, there was other work that could have been completed in any event and the Defendant did not do it.
- As a result of the Defendant not showing up to complete the work on the Project as promised, the Plaintiff went to his residence and told Ms. Ryan that the Defendant's services were terminated.
- The Defendant did no further work on the Project after that date.
- The Plaintiff hired another contractor to complete the Project for a price that was close in overall labour costs to the $4,000.00 agreed to by the Plaintiff and the Defendant, including the $3,050.00 that the Plaintiff had already paid to the Defendant. I am satisfied on the evidence, including the Inspection Reports that were filed, that the work done by the

subsequent contractor hired by the Plaintiff was work that was required to be done to complete the Project.

- The Defendant's failure to complete the work on the Project by April 30 and thereafter until his services were terminated by the Plaintiff was not due to any unexpected reason, but rather due to his other commitments and unwillingness to prioritize work on the Project.
- The Plaintiff afforded numerous opportunities to the Defendant to complete the Project. This included the payment of $1,000.00 to the Defendant on April 29, 2009, as well as allowing the Defendant to continue to work on the Project in May, 2009. The Plaintiff made the April 29 payment in good faith upon the representations of the Defendant that he would complete the Project in two or three days in the beginning of May.
- The Defendant did not complete the Project at the beginning of May, and the Plaintiff's patience ran out on May 23, 2009. The Plaintiff did not act unreasonably in terminating the services of the Plaintiff on that date, and the Plaintiff was entitled to engage the services of another contractor to complete the work on the Project.

Analysis

[16] In sum, my findings are that there was an agreement between the Defendant and the Plaintiff for the work on the Project to begin as soon as possible after December 2008. The delays on the Defendant's part were upsetting to the Plaintiff who expressed his frustration to the Defendant and Ms. Ryan. As a result Ms. Ryan drafted the Contract and, of her own initiative included the term about the remedy if an April 31 [sic] completion date was not met. The Defendant did not comply with the time requirements of the Contract for completion of the Project.

[17] Despite being provided further opportunity to do so by the Plaintiff after April 30, 2009, the Defendant did not prioritize his schedule to complete the

Project. I find that the actions of the Plaintiff with respect to the Project were reasonable throughout. In doing so, I have refrained from commenting on alleged actions of the parties that I do not consider to be relevant to the issues to be decided. The causes for the delays and ultimate failure by the Defendant to complete the Project, while perhaps providing some explanation and context, do not amount to a defence in law against the claims of the Plaintiff.

Was the contract unconscionable?

[18] For a contract to be unconscionable, it must generally be established that there was "inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain". (*Harry v. Kerutziger*, [1978] B.C.J. No. 1318 (C.A.)). A disadvantageous contract is not necessarily an unconscionable one. While the courts can and do "[protect] unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them", a court cannot "relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly" (*Miller et al. v. Lavoie et al.* (1966), 60 D.L.R. (2d) 495 (B.C.S.C.)). The law protects the freedom of individuals to enter into contractual agreements as they see fit.

[19] In this case, it is clear that the Contract had potentially serious negative consequences for the Defendant in the remedy it contemplated. Simply put, if the Defendant failed to complete the work by the date agreed to, he stood to forfeit wages for all his labour up to that point. I recognize that the Defendant was having health issues in April and May 2009, however he was aware of them at the time that Ms. Ryan drafted the Contract and he signed it, and he was able to consider whether they could prevent his completion of the Project by the required date. There is no evidence to suggest that the Defendant was in need or distress because of his medical situation and that the Plaintiff took advantage of this. Indeed, the evidence indicates that the terms of the Contract, including

the firm date of completion and the serious consequences of non-completion, were provided through Ms. Ryan's initiative.

Was there a waiver?

[20] I find that the term in the Contract that required the Project be completed by the end of April was a fundamental term. The failure of the Defendant to perform his contractual obligations by April 30, 2009 allowed the Plaintiff to claim the remedy to which the parties agreed.

[21] While not explicit, I find that the Contract contained an implied 'time is of the essence' term. In *Greenside Properties Inc. v. 8458429 Holdings Ltd.,* [1996] B.C.J. No. 531 (S.C.), Baker J. considered situations in which this term could be implicit in a contract. She found that the term is implied when the express words of the contract and the nature of the subject matter or surrounding circumstances make it inequitable not to consider a breach of the timing provision a fundamental breach (para. 52). Specifically, she considered the following relevant factors: the complexity of the contract and the time over which it is to occur; the time, effort and money spent satisfying other contractual terms; whether extensions are expressly or implicitly permitted elsewhere and; whether the terms are meant to be carried out "in good faith and with due regard to the essence of their bargain" or in a formalistic or technical manner (paras. 55-62).

[22] Applying these factors to the facts of this case, I find that the Contract was not complex, and was specifically only meant to survive a short period of time, i.e. the month of April. I find that there was no contemplation of an extension within the terms, but rather that the Contract was meant to put an end to the delay that had occurred up to that point. It was an agreement that required technical compliance. Accordingly, I find that the Contract contemplated that time is of the essence.

[23] However, the Plaintiff clearly waived this requirement when he granted the Defendant an extension past April 30. Does this waiver mean that time ceased to be of the essence? I find that it did not, or, in the alternative, if it did, then the Defendant nonetheless failed to complete the work within a reasonable time following the waiver.

[24] In *RDA Film Distribution Inc. v. British Columbia Trade Development Corp.*, 2000 BCCA 674, the Court was considering a case where a deadline was waived in the course of a series of transactions undertaken by RDA to secure a loan. In summarizing the law on waiver, Newbury J.A. adopted cases and authority holding that where there is an extension of time granted by one party in a time-sensitive contract, that party can nevertheless insist that time remains of the essence, as long as the other party is aware of it. It would be unreasonable to demand that a party who is lenient once thereafter forfeits his right to timely performance. I find here that the Plaintiff did provide notice to the Defendant that time continued to be of the essence, despite having waived the April 30 completion date. He did so by ultimately contacting the Defendant and obtaining the Defendant's promise to work on the Project on May 23, and when this deadline was missed, he properly claimed his remedy under the Contract.

[25] If I am wrong, and a new "deadline" was not properly communicated to the Defendant, I find that, given all the circumstances, the work was not completed within a reasonable time after April 30. This is also determinative of the case (see *RDA Film,* above, paras. 43-52). Regardless of whether a new firm date for completion was communicated, the Defendant's conduct between April 30 and May 23 suggests he was not making reasonable efforts to attempt to conclude the Project within a reasonable time. As I noted above, he failed to prioritize the work the Plaintiff required, despite his awareness of the Plaintiff's frustration and the terms of the Contract, and despite his representations to the Plaintiff.

Conclusion

[26] I find that the Plaintiff is entitled to the remedy set out in the Contract, which is a refund of the entirety of the $3,050.00 he paid to the Defendant.

[27] The Plaintiff has claimed for wages lost due to a need to attend court. Notwithstanding that I accept that the Plaintiff has incurred some monetary losses attributable to time away from work to attend court, these losses are not compensable, other than through the application of s. 59 of the *Small Claims Court Regulations*, Y.O.I.C. 1955/152. Section 59 states in part that an amount not to exceed $150.00 can be awarded where "…the proceeding has been unduly complicated or prolonged by an unsuccessful party". This refers, of course, to the court proceedings themselves and not to the circumstances related to the Claim. I do not find that the Defendant's actions in this proceeding unduly complicated or prolonged the proceeding, notwithstanding the one adjournment on January 4, 2010 when Mr. Grieco was present and prepared to proceed but the Defendant was absent as a result of Ms. Ryan's illness. As such I decline to make an order under s. 59.

[28] I further find that there is insufficient evidence before me to substantiate the Plaintiff's claim made in submissions for $200.00 for wages payable to him by the Defendant for his labour on the Project. I further note that this was not plead in the Claim.

[29] The Plaintiff has also claimed in submissions the amount of $15.00 for tin snips removed from the Project by the Defendant. This was not plead as part of the Claim and arose only briefly during the cross-examination of the Plaintiff. In the circumstances I decline to award any damages for the tin snips.

[30] The Plaintiff is entitled to his costs in the amount of $100.00 for the preparation and filing of pleadings, $105.00 for the service of documents and

$50.00 for the Notice of Trial. He is awarded post-judgment interest in accordance with the *Judicature Act*, R.S.Y. 2002, c. 128.

[31] In the circumstances, including in particular that, as a result of my decision, the Plaintiff has received a benefit from the Defendant in the form of unpaid labour, I decline to award pre-judgment interest. On this point, there is no question that the Plaintiff, by paying only $880.00 in labour costs to WF Renovation Inc., and receiving back all that he has paid the Defendant, has received free labour valued at approximately $3,120.00. I accept that the Plaintiff did have to deal with delay, frustration and some expenditure of time and effort on his part, not contemplated in the oral agreement and Contract. In the end, however, the Defendant voluntarily chose to enter into the Contract and, while the term inserted by Ms. Ryan and relied upon by the Plaintiff in his Claim is somewhat Draconian in effect, it is legitimate and enforceable, and the Plaintiff is within his legal rights to seek the remedy he and the Defendant agreed to.

[32] In sum, the Plaintiff is awarded the total amount of $3,305.00 plus post judgment interest.

COZENS T.C.J.