

Citation: *J. E. Sellors Services Ltd. v. Central Interior First Aid Ltd. and Marg Janzen*, 2012 YKSM 6

Date: 20121105
Docket: 11-S0052
Registry: Whitehorse

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

J. E. Sellors Services Ltd.

Plaintiff

v.

Central Interior First Aid Ltd. and Marg Janzen

Defendants

Appearances:

J. E. Sellors Services Ltd.
Central Interior First Aid Ltd.
Marg Janzen

Appearing on own behalf
Appearing on own behalf
Appearing on own behalf

REASONS FOR JUDGMENT

[1] The Plaintiff, J.E. Sellors Services Ltd. ("Sellors Ltd.") claims the principal amount of \$14,797.61 plus \$2,200.22 in interest from the Defendants, Central Interior First Aid Ltd. ("Central"), and Marg Janzen. The Defendants have filed a Counterclaim for the amount of \$21,140.70, which includes the \$14,797.61, interest since December 10, 2011 in the amount of \$5,043.12, disbursement costs for travel to from British Columbia to Whitehorse for trial and court costs.

[2] The Plaintiff and the Defendants are both based in British Columbia. The Plaintiff contracting company entered into a contract in 2010 with the Government of Yukon to act as a General Contractor in regard to road construction work to be performed on the Robert Campbell Highway (the "Project"). The Defendants, pursuant to an oral agreement with the Plaintiff, provided the Plaintiff with medic and mobile treatment services for this road construction work. The Defendants submitted invoices to the Plaintiff for services performed in the total amount of \$85,691.06, however, the Plaintiff paid only \$75,181.40, having adjusted the invoices to accord with what the Plaintiff believed the correct charges should be.

[3] As a result, the Defendants filed a creditor's claim, pursuant to the Yukon Contractor Regulations, against the Government of Yukon in the amount of \$14,797.61, representing the principal amount of \$10,509.60 plus \$4,288.01 interest. The Government, who was originally a named Defendant in these proceedings, has paid this amount into court and, by agreement of the parties, is no longer a party.

Position of the Parties

[4] The Plaintiff claims that he has paid the Defendants in full for the services provided under the terms of their oral agreement. To the extent that the Defendants have invoiced the Plaintiff for amounts in excess of that already paid, they have done so contrary to the terms of the oral agreement.

[5] The Defendants claim that the Plaintiff has been charged only for services

provided in accordance with the terms of that agreement.

Background

[6] J.E. Sellors is the owner/manager of the Plaintiff company. Mr. Sellors has 17 years' experience in the construction sector, including 12 years constructing logging and forestry roads. He has been involved in highway construction projects in the Yukon and British Columbia for the past five or six years.

[7] Ms. Janzen is the owner/manager of the Defendant company. Prior to this job, she had not been contracted to provide services in the Yukon.

Evidence

For the Plaintiff

Jeremy Sellors

[8] Mr. Sellors testified that he had a brief discussion with Ms. Janzen, via telephone, about contracting for Central's services. He states that they agreed that the Defendants would provide Level 3 First Aid services for the Project. The terms of the oral agreement required the Plaintiff to pay the Defendants \$600.00 per day while services were provided. In addition, the Plaintiff would pay an initial mobilization cost and a final demobilization cost. Mr. Sellors testified that there was no agreement between the parties that stipulated the Plaintiff would pay the Defendants for days that Level 3 First Aid Services were not required, regardless of whether they were on site or not, or that the Plaintiff would pay for any medical changeouts.

[9] Mr. Sellors testified that there was no discussion or agreement between the parties that required the Plaintiff to additionally compensate the Defendants for statutory holidays. He also said that there was no agreement that he would pay interest charges on outstanding invoices.

[10] He testified that there is no HST applicable on contracts for work in the Yukon and therefore it should not have been billed by the Defendants.

[11] According to Mr. Sellors, it is common practice within the industry to not pay for unused equipment unless there is a specific term in the contract for a “dry rental” payment. This contractual term is an exception to the common practice and was not a term of the oral agreement between the Plaintiff and the Defendants. Mr. Sellors stated that he paid for days when there was no work but the medic needed to be available, citing the example of rain days when there was a full camp. When the camp was empty, however, and there was no work, he says he was not required to pay.

[12] He testified that the industry standard is a 12 hour workday.

[13] Mr. Sellors also testified that, as far as he recollects, the only variation to the terms of the oral agreement was a one-time only agreement to pay half of the July 1 statutory holiday charge of \$275.00. This was a compromise on his part and is not indicative of any acknowledgement of a contractual requirement .

[14] He testified that no employee of the Defendants ever requested him to sign a Field Ticket or time sheet, although in his experience they normally would

have done so.

[15] In regard to the Declaration of David Smith, an employee of the Defendants, Mr. Sellors agreed that he may have acted unprofessionally at times, but disagreed that it was to the extent Mr. Smith indicates.

Darlene Loney

[16] The affidavit of Darlene Loney, the office manager and bookkeeper for the Plaintiff, was filed. She confirmed that mobilization and demobilization costs were to be paid by the Plaintiff to the Defendant at the beginning and end of the project, but she did not recall any agreement being made for these costs to be paid for other changeouts. Her knowledge was based upon information provided to her by Mr. Sellors.

[17] Ms. Loney stated that the HST was improperly charged as no HST is payable for work performed in the Yukon and, as a result, she adjusted the invoices to pay the GST portion only. She failed, however, to adjust invoices #S100721 and #S100826 and mistakenly paid HST in the total amount of \$1,489.25 on those invoices, over and above the GST that was required to be paid.

Jason Smith

[18] The affidavit of Jason Smith was filed. He was an employee of the Defendants on this project in June and July 2010. He was paid \$16.00 per hour, however he noticed while on the project that the Fair Wage Agreement in force in the Yukon required that he be paid the minimum wage of \$21.00 per hour.

[19] Mr. Smith stated that he was only paid for the actual hours he worked and was not paid for days off, rain days, stand-by time, or travel from the job site to Nelson, B.C.

[20] Mr. Smith's monetary dispute with the Defendant was resolved by agreement and the intervention of the Yukon Employment Standards Branch.

Mason Winofsky

[21] Mr. Winofsky provided an unsworn letter. It was intended that this letter be filed as an Exhibit but through oversight it was not. I nevertheless exercise my jurisdiction to consider this letter with all the other evidence. Mr. Winofsky was an employee of Mr. Sellors on the project and remains an employee of the Plaintiff.

[22] Mr. Winofsky's letter essentially speaks to the professionalism with which Mr. Sellors operated on the project. This stands in stark contrast to the information in the Declaration provided by David Smith, who is referred to in Mr. Winofsky's letter.

For the Defendants

Jim Leavitt

[23] Mr. Leavitt provided a Declaration and he also testified at the trial. He was hired as sales manager for the Defendants in May 2010. He testified that he was in Ms. Janzen's office when Mr. Sellors and Ms. Janzen spoke by telephone and entered into the oral agreement. He stated that the call was on speakerphone and he heard the conversation.

[24] Mr. Leavitt testified that the terms the parties agreed to were as follows:

- \$600.00 per day, based upon a 12 hour day for every day the medical unit was on site;
- \$75.00 per hour for every hour in excess of 12 hours a day;
- \$275.00 for statutory holidays over and above the \$600.00 daily rate;
- mobilization and demobilization rates at the rate of \$1.30 per km, as well as for medical changeouts;
- the Plaintiff would supply the fuel on-site;
- the Plaintiff would supply lodging.

[25] Mr. Leavitt processed the first two invoices, which were paid within 30 days. Despite invoicing regularly from that date, Mr. Leavitt stated that the Defendants received no payments from the Plaintiff until after the job was completed. Mr. Leavitt stated in his affidavit that he listened via speakerphone to a further conversation between Ms. Janzen and Mr. Sellors in early August when Mr. Sellors was complaining about the August statutory holiday charge. Ms. Janzen stated that Mr. Sellors could send the medical services truck back to Fort Nelson if he was not prepared to abide by the contractual terms. Mr. Sellors did not send the unit back.

[26] Mr. Leavitt also heard a third conversation between Ms. Janzen and Mr. Sellors in mid-September in which Mr. Sellors complained about being charged for rain days and no-work days. Ms. Janzen stated that the agreement made in June was that these days would be paid for. She did, however, tell Mr. Sellors that she would not charge for the July 17th no-work day. She advised Mr. Sellors that if he was not prepared to abide by the terms of the agreement between them he should send the medical services back to Fort Nelson. Again, Mr. Sellors did not send the unit back to Fort Nelson.

Marg Janzen

[27] Ms. Janzen stated that Mr. Sellors contacted her on June 2, 2010, to advise her that he may need to retain Central for a project he was bidding on in the Yukon. She estimated that this telephone conversation lasted for approximately five minutes. Ms. Janzen stated that she advised Mr. Sellors during this conversation that she had never provided services in the Yukon.

[28] She stated that Mr. Sellors subsequently contacted her later in June to advise her that he needed Central's medical unit services. Ms. Janzen confirmed that Mr. Leavitt was in the office when she spoke to Mr. Sellors. She stated that she put the phone on speaker so Mr. Leavitt could listen, as she was training him to manage the business and thought this would be useful in his training.

[29] She testified that the agreement reached was on the terms described by Mr. Leavitt in his testimony. She stated in cross-examination that she advised Mr. Sellors of all the services he would be charged for in their conversation and Mr. Sellors did not say anything other than stating "okay; the job starts on the 23rd or 24th".

[30] She testified that she sells her invoices to Liquid Capital Exchange Corp., an accounts receivable firm, which charges the Defendant 4% of the gross ticket value per month. The Defendants' total associated cost was \$3,748.83.

[31] Ms. Janzen stated that she charges 3% on unpaid invoiced amounts over 30 days. She stated that the issue of interest was not discussed with the Mr. Sellors but that it reflects an actual cost to her.

[32] She testified that she only learned on October 25, 2010 that the Plaintiff was altering the invoices and that she told Mr. Sellors to send the medical service truck home if he would not pay the invoices. She stated that she would not order a unit to return and leave a jobsite without medical services, due to liability concerns.

[33] Ms. Janzen was aware in September 2010 of an issue regarding payment for no-work days and told the Plaintiff in e-mail correspondence that he could send the medical service truck home at that time if he was not prepared to authorize payment for days medics were on site, even if not working. The issue was in regard to the Plaintiff's concerns over the July 1 and 17 dates mentioned in invoice #S100721. Ms. Janzen claimed in this e-mail that she had to pay the medic, Jason Smith, for those days and had to pay all her medics likewise. She stated that her medical services unit and medic were not available for work elsewhere when on site for the Plaintiff and, as such, she charges regardless of whether it is a work day or not.

[34] Nonetheless, she gave the Plaintiff a credit for July 17, 2010.

[35] Ms. Janzen agreed in cross-examination that she made the decision to have Jason Smith return after 29 days on the jobsite and have him replaced by another medic. She stated that it was a legal requirement in British Columbia to have medics demobilized regularly. She did not say that it was a legal requirement in the Yukon.

[36] Ms. Janzen testified that her medics were instructed to fill out a daily Field Ticket or time sheet and have them signed by the on-site supervisor. She stated that she was told that Mr. Sellors would not sign these, therefore she simply billed according to the agreement and processed them without signature.

[37] The Defendants provided Field Tickets and Invoices for work Central performed for other contractors on other projects in 2010, 2011 and 2012. These Field Tickets and Invoices show, with one minor exception of a \$1.20 per km mobilization charge, a mobilization and demobilization charge of \$1.30 per km and statutory holiday rates of \$275.00.

David Smith

[38] David Smith provided a Declaration. He was an employee of the Defendant who began working on the project on July 29, 2010. Mr. Smith stated that he was told he would be paid for every day that he was on the site and that he was paid accordingly. These included rain days or no-work days. He stated that he did not leave the camp on those days as he believed it was his responsibility as the designated first-aid attendant to be there in case something went wrong and his services were required.

[39] Mr. Smith stated that Mr. Sellors would not sign any of his time sheets and would not sign for the 12.5 hours of overtime that he requested Mr. Smith to work.

[40] Mr. Smith expressed his concern with respect to what he considered to be the lack of professionalism with which Mr. Sellors operated on site.

Invoices

[41] Central provided the following invoices to the Plaintiff:

S100630 June 30, 2010 \$4,354.00 plus GST \$217.70: Total \$4571.70

Paid in full July 23, 2010 (#10726)

S100721 July 21, 2010 \$12,875.00 plus \$1,545.00 HST: Total \$14,420.00

Paid in full September 20, 2010 (#10938) (noted July 1 as no medic on site and July 17 as no work) (Note: HST overpayment of \$901.25 not deducted from payment)

S100812 August 12, 2010 \$14,708.00 plus \$1,764.96 HST: Total \$16,472.96

Paid \$11,970.00 November 25, 2010 (#11134 or #11135) (deducted HST in amount of \$1,194.96, July 24, August 9 and 10 no work days in amount of \$1,800.00, and \$1,500.00 for medic changeout) (Unsigned Field Ticket #3977 attached)

S100826 August 26, 2010 \$8,400.00 plus \$1,008.00 HST: Total \$9,408.00

Paid in full (#11016) (Field Ticket #3981 attached with note from DH Roney that invoices must be approved) (Note: HST v GST overpayment of \$588.00 not deducted from payment)

S100912 September 12, 2010 \$11,108.00 plus \$1,332.96 HST: Total \$12,440.96

Paid \$10,080.00 November 25, 2010 (#11134 or #11135) (Field Ticket #2536 attached) (Plaintiff deducted HST in amount of \$852.96 and \$1,508.00 for medic changeout)

S100925 September 25, 2010 \$8,075.00 plus \$969.00 HST: Total \$9,044.00

Paid \$8,190.00 (Field Ticket #8752 attached – one day credit for July 17 given to Plaintiff) (Plaintiff deducted HST in amount of \$579.00 and \$275.00 for statutory holiday charge)

S101008 October 8, 2010 \$8708.00 plus \$1,044.96 HST: Total \$9,752.96

Paid \$7,560.00 (Field Tickets #4752 and replacement #4425 attached – one day credit given for no-show on October 2) (Plaintiff deducted HST in the amount of \$684.96 and \$1,508.00 for medic changeout)

S101022 October 22, 2010 \$8,554.00 plus \$1,026.48 HST: Total \$9,580.48

Paid \$8,981.70 (Field Ticket #4753 attached) (Plaintiff deducted HST in the amount of \$598.78 but included payment for demobilization cost of \$754.00) Issue regarding payment of \$600.00 for no work day on October

12: annotations indicating deducted on Invoice but not by bookkeeper)

S101023 December 9, 2011 \$1,987.50 plus \$238.50 HST: Total \$2,226.00

This is for overtime that was never actually billed and which has not been advanced as a claim in the Defendant's Counterclaim)

A final payment of \$24,731.70 was made by letter dated December 10, 2010 for invoices #'s S100925, S101008 and S101022.

Analysis

[42] The critical issue in this case is determining the terms of the oral contract between the parties. Ms. Janzen, Mr. Leavitt and Mr. Sellors were the only parties present when the contract was entered into. Ms. Janzen and Mr. Leavitt have the same recollection and Mr. Sellors differs on some points, most notably the additional mobilization and demobilization charges, the payment of overtime, the charges for non-work days and the charge for statutory holidays.

[43] There is no dispute that there was an agreement that the Plaintiff would pay the Defendants \$600.00 per day and the initial mobilization and demobilization charges. With respect to the remaining items, I find I have concerns regarding the extent to which the parties were in agreement on these. The phone conversation in which the contract was made was brief and did not involve a full and frank discussion in which the terms were clearly set out and clearly agreed to. On the evidence of Ms. Janzen, there was no response from Mr. Sellors in regard to some of the terms she stipulated.

[44] In circumstances where a contract is formed by way of an oral agreement, it would be prudent for the parties to reduce their understanding of the terms to writing so that discrepancies in understanding don't arise well after the parties

have performed under the contract.

[45] I also have no independent evidence before me of what the industry standard is in regard to payment for no-work days, statutory holidays, medical changeouts and overtime. The closest thing to such independent evidence is what Central billed other contractors.

No-work days

[46] Filed with the court on April 2, 2012 were the Medical Provider Time Sheets submitted by the three medics who were employees of the Defendants that worked on the project: Jason Smith, David Smith and Nazar Maduro. Ms. Janzen indicated at the pre-trial conference on December 1, 2011 that she would be relying on these documents at trial. I understand that these were disclosed to the Plaintiff. These documents, however, were not filed as Exhibits at trial. I also note that in other materials provided to the court were additional copies of these time sheets that were not identical in every respect. I have, however, decided to consider all these time sheets as evidence pursuant to s. 7 of the *Small Claims Court Act* and s. 56 of the *Small Claims Court Regulations*.

[47] The following are the days that the Plaintiff claims he should not have to pay for: July 1, 17 and 24, August 9, 10, October 2 and 12. I find that I agree with the July 24 and October 2 days as there is confirmation in the Defendants' Medical Time Provider Sheets that the employees were not working those days.

[48] I have some concern regarding July 17, notwithstanding the Defendants' concession for this day, as it appears from the Medical Provider Time Sheets that

there was a medic on site for 10 instead of the usual 12 hours that day. The Defendants' information was that her medic told her he went to Watson Lake that day, however, it may be that he only took off two hours earlier than usual to do so.

[49] I also have a problem with the August 9 and 10 dates as the Medical Provider Time Sheets indicate that there was a medic on site for 12 hours each day. I note from the time sheets of two of the Plaintiff's employees' (Mason Winofsky and Eric Arsenault), that one of them was working for 12 hours on the 9th and the other for 12 hours on the 10th.

[50] I note from the two sets of time sheets for Jason Smith that on one set it indicates for July 1 that he was "in camp" but that it was "no work" and a "holiday". No hours were claimed. On the other time sheet for July 1, the words "in camp" are not included. It appears that the words "in camp" are not in the same handwriting as the other writing on the time sheet.

[51] I also note from the time sheets of Nazar Maduro some discrepancies in his reports for September 5 and 6. One set of time sheets indicates that he was "in camp" but had no hours for September 5 and the other time sheet indicates "no hours" only. For September 6, one set of time sheets indicates "in camp; went to town 4 hours" and the other time sheet simply states "went to town". Again, the words "in camp" appear to be in different handwriting. There was no other medic on site at the time. I note that on September 5 there are no hours for the Plaintiff's two employees for whom time sheets were provided, but there were

8 hours for them both on September 6.

[52] I further note from the Medical Provider Time Sheets of David Smith that one set indicates that on October 12 he was “Off” and the other time sheet for the same day states that he was “Off” and “in camp”. Again the words “in camp” appear to be in different handwriting. I note that the Plaintiff’s employees’ time sheets show 8 hours each for that day.

Statutory Holidays

[53] I find that the Plaintiff should pay the additional \$275.00 for statutory holidays that a medic was on site. This seems to be consistent with the normal practice for Central and I find it to be a reasonable charge, given the additional cost to Central of having employees paid for working statutory holidays.

[54] It appears, however that in respect of July 1, no medic was on-site and therefore there should be no charge for this day, notwithstanding that the parties agreed to split this charge 50/50.

Overtime

[55] I have some difficulty with this item. Firstly, the Plaintiff was never billed for any overtime and the Defendants never properly included a claim for overtime in the Counterclaim, although a reference to making a subsequent claim for overtime is apparent in the documents attached to the Counterclaim and the filed documents of the Defendants. The invoices provided to the Plaintiff by the Defendants also clearly indicate that overtime would be billed at a later date upon receipt of the time sheets from the medic/TCP on site.

[56] I accept that the regular work day is 12 hours and find that the evidence of hours worked in excess of that amount by the Defendants' employees, for which these employees were paid, is reliable and not contradicted. The total claimed is \$1,987.50 plus applicable taxes. I am prepared to allow the Defendants one-half of the overtime claimed.

HST

[57] As the work was performed in the Yukon, I find that all the Defendants' invoices should have reflected GST charges only and not HST.

Medical Changeouts

[58] There is no evidence that any specifics regarding medical changeouts were discussed during the initial conversation between Mr. Sellors and Ms. Janzen. I am not satisfied that the Plaintiff agreed to pay for a particular number of medical changeouts or was informed of what the changeout schedule would be. I note that the July changeout involved Jason Smith, who was in a wage dispute with the Defendants at the time, and the October changeout coincides with the arrest of Nazar Maduro.

[59] I find, however, that it was reasonable to expect that over the course of a 17-week project that there would be at least one and possibly two medical changeouts. Therefore, I will allow the Defendants the charge for one full changeout and one-half of a second changeout.

Interest on Unpaid Invoices

[60] There was no discussion between the Plaintiff and the Defendants

allowed the one medical changeout charge of \$1,508.00.

S100925 \$8,675.00 plus \$433.75 GST: Total \$9,108.75

I have included the \$275.00 statutory holiday charge and removed the credit provided for July 17.

S101008 \$7,200.00.00 plus \$360.00 GST: Total \$7,560.00

I have deducted \$600.00 for October 2, as there was no medic on-site, and disallowed the \$1,508.00 for the medical changeout fee.

S101022 \$8,554.00 plus \$427.70 GST: Total \$8,981.70

I have added \$600.00 for October 12, as it appears that there was likely a medic on-site, given the 8 hours the Plaintiff's two employees claimed for, even though no work may have been performed. I have also included \$754.00 for demobilization.

[62] Leaving aside for the moment the issue of overtime, I find that the Defendant was entitled to bill the Plaintiff the total amount of \$77,327.25.

[63] With respect to the overtime, I find that it was worked and there is an amount payable from the Plaintiff to the Defendants. That said, in the circumstances, in particular the failure to properly claim it and the limited evidence proffered in regard to overtime, the amount claimed should be split between the parties. I find that the Defendants are entitled to receive the amount of \$1,043.43 (\$993.75 plus \$49.67 GST) from the Plaintiff for overtime.

[64] Therefore, the total amount payable from the Plaintiff to the Defendants is \$78,370.68. The Plaintiff has already paid \$75,181.40, leaving an outstanding amount to be paid of \$3,189.28.

[65] I decline to award any interest on this amount as there was no contractual agreement for interest to be paid and both parties have been deprived of monies

they were entitled to pending the outcome of these proceedings

[66] I also decline to award any costs to either party.

[67] I order that the Plaintiff be paid \$11,608.33 from the monies held in trust and the Defendants be paid the balance of \$3,189.28.

COZENS, C.J.T.C.