Citation: *Patrick McLarnon* and *Ita Achmadsjah* v. *Vanessa Stitt*, 2012 YKSM 7

Date: 20121030
Docket: 11-S0130
Registry: Whitehorse

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

Patrick McLarnon and
Ita Achmadsjah

Plaintiff

v.

Vanessa Stitt

Defendant

Appearances:

Patrick McLarnon	Appearing on own behalf
Ita Achmadsjah	Appearing on own behalf
Kyle Carruthers	Counsel for Defendant

REASONS FOR JUDGMENT

[1] This is a case in which a very tangled web was woven, though there is no suggestion that, at the time, any of the weavers were practicing to deceive.

[2] Patrick McLarnon and Ita Achmadsjah, (collectively referred to hereafter as “the plaintiffs”) developed a twelve unit condominium complex at 1906 Centennial Street in Whitehorse. The defendant, Vanessa Stitt, (referred to hereafter as “Ms. Stitt” or “the defendant”) purchased unit 304.

[3] The Contract of Purchase and Sale of the condo provided for a closing

date of July 15, 2009, however, the complex was not complete on that date. Closing occurred later, on July 31, but there were still outstanding issues, including the lack of an occupancy permit on some of the units, including Ms. Stitt's. As well, the landscaping and paving remained uncompleted. To keep the sale moving forward, it was agreed between Glenda Murrin, the lawyer acting for the plaintiffs, and Keith Parkkari, the lawyer acting for Ms. Stitt, that the sale would close but that there would be a hold-back of 10 percent to protect the purchaser from any builder's liens. After some months, this matter was dealt with by the provision of the occupancy permit and the running of the time for filing of liens provided for by the *Builders Lien Act, RSY* 2002, c. 18, and the lien hold-back was paid to the plaintiffs.

[4] However, there were two other outstanding issues – the paving and the landscaping. It had been further agreed that $5,000 would be held back pending completion of each of these items, resulting in a total hold-back of $10,000. This hold-back was never paid and the plaintiffs sue to recover that sum from Ms. Stitt.

[5] So far, the matter appears straightforward, but complications abound.

[6] When the plaintiffs obtained their development permit for the condo complex from the City of Whitehorse (the "City"), the permit included a plot plan which the plaintiffs had originally provided with their application for the Development Permit. This plan clearly shows that paving will be done only on the four parking pads in front of the complex. There were eight other parking

spots behind the building. However, the plan was clearly not in compliance with City Zoning Bylaw 2006-01. If the city street abutting the development is paved, Section 7.2.1 of the Bylaw requires hard surfacing of *all* parking spaces and also requires paving of the drive leading from the city street to the parking area. Centennial Street is paved. Despite this, on December 9, 2009, the City approved the development as complete and issued occupancy permits.

[7] The City later acknowledged its mistake and, as we shall see, participated in the rectification of the problem. The plaintiffs paved the four parking spots at the front of the building and also paved the eight parking spaces at the rear. They did not pave the driveway which, according to the defendant, was a sea of mud when it rained. The result of all this was that the plaintiffs felt they had completed their obligation in regard to paving, while the condo owners and Corporation believed they had not.

[8] Both had a point. The plaintiffs point to the approved plot plan which showed only four paved parking spots. They actually did more paving than the plan called for. They also point to the City approval of the project as complete. The owners and condo corporation rely on the Zoning Bylaw and s. 297(2) of the *Municipal Act,* R.S.Y. 2002 c. 154, which provides that:

> No person shall carry out any development that is contrary to or at variance with a zoning bylaw.

[9] It will be recalled that the other outstanding issue was landscaping. The plaintiffs were required by the terms of the Development Permit to provide 110

square meters of landscaping in the front yard of the development. The area is also shown on the plot plan. Essentially, the areas between the four front parking spaces were to be landscaped. The plaintiffs say they have complied with this requirement. Ms. Stitt says they have not and points to a photo of the front yard of the development that show the landscaping to consist of gravel, dirt and approximately eight rather pathetic-looking spruce trees. She scoffed at the idea that the landscaping, such as it is, covers 110 square meters.

[10] As the dispute between the plaintiffs and the condo owners dragged on, the City was asked to make a site inspection. This inspection resulted in a letter dated January 6, 2011 from Mike Gau, the City's Manager of Planning and Development Services, to Stan Fordyce, Vice President of the Condo Corporation. The letter acknowledges the complaints by the Condo Corporation concerning the hard-surfacing and landscaping issues as well as a number of other complaints about alleged violations of the National Building Code. The letter indicates that the City had carried out a site inspection and that no Building Code violations were found. With respect to the paving and landscaping issues, Mr. Gau wrote the following:

> A site inspection was undertaken on October 27, 2010 to examine the hard-surfacing and landscaping components. The inspection revealed that four parking spaces in the front yard and eight parking spaces in the rear have been hard-surfaced. Internal sidewalks have been placed on the property. The remainder of the parking area has been left in a non hard-surfaced state. The parking requirement stated in the development permit conditions list signed by the developer states fourteen parking spaces, one loading space, and two bike racks are required. The plan approved by the City shows only the parking spaces and public areas leading to those spaces in the front yard as being paved. Likewise the

> landscaping provided by the developer reflects that which approved (sic) as part of the development permit application.
>
> The City acknowledges that the plan that was approved does not illustrate the specific requirements from the Zoning Bylaw, specifically paving of the driveway from the street to the rear of the property as well as all parking spaces required or provided. The City is going to meet with the developer to discuss bringing the development up to the standard in the Zoning Bylaw.

[11] The letter concludes:

> …the Planning and Development Services department will be contacting the developer to negotiate further paving. The City will ensure that paving is completed to the standard in the Zoning by-law.

[12] It appears that, subsequently, an agreement was reached between the Condo Corp., the City and the plaintiffs where each contributed an amount toward the $32,025 cost of completing the paving to the standard required by the City Bylaw. No evidence was led by any party as to the amount contributed by each. Indeed, the plaintiffs fiercely resisted disclosing this information, claiming it to be private and proprietary.

[13] I heard no evidence that any amount was expended by anyone to rectify the alleged inadequacies in the plaintiffs' landscaping efforts.

[14] Throughout the period from July 31, 2009 until the fall of 2011, the defendant's lawyer continued to hold back the $10,000.00. Finally, around September 15, 2011, Greg Fekete (who was acting for Ms. Stitt in succession to Mr. Parkkari) paid out the $10,000.00 to the contractor who completed the paving on behalf of the condo owners. How that came to occur, and the propriety and

effect of him so doing, form yet another part of the tangle.

[15] The holdback was originally agreed to in late July 2009 following an exchange of correspondence between Ms. Murrin and Mr. Parkkari and another member of his firm. These letters need not be set out *in toto.* Suffice it to say that three deficiencies were identified in Ms. Murrin's July 28, 2009 letter to Mr. Parkkari and are described as follows:

1. Landscaping;
2. Hard surfacing on the front of the building; and
3. Occupancy permits obtained on final eight units.

[16] The next day, Ms. Murrin wrote a letter agreeing that:

> The total $10,000.00 would be held until the hard surfacing is complete and sufficient landscaping is in place. To further clarity, once hard surfacing is in place, $5,000.00 will be released to our client and once landscaping is completed, $5,000.00 will be released to our clients.
>
> As to specifics of landscaping, we consider landscaping to be complete once groundcover, either rock, grass or decorative landscaping material is in place in all areas not covered by hard surfacing.

[17] Mr. Parkkari's letter of July 30 to Ms. Murrin agreeing to the arrangement stated that, in addition to the builder's lien holdback:

> …$10,000.00 will be held until hard surfacing and sufficient landscaping to satisfy the City of Whitehorse requirements is complete.

[18] The following day, Ms. Murrin responded:

> We confirm that our client is agreeable to your office retaining the holdback funds until both the hard surfacing and landscaping as

> described in our letter of July 29, 2009 has been completed.

[19] As already noted, the occupancy permits were eventually obtained and the builder's lien holdback was, in due course, paid to the plaintiffs. The holdbacks of $5,000 for hard surfacing and $5,000 for landscaping remained.[1]

[20] On December 2, 2010, Ms. Murrin wrote to Mr. Parkkari that:

> Our client has advised that the landscaping and hard surfacing has now been completed.
>
> It is our client's position that they have satisfied all the conditions upon which the holdback funds were being held by your office, and now requests that these monies be released to him in full.

[21] The same day, Mr. Fekete, who had now taken over the defendant's file, responded:

> Further to discussions today among our conveyancing staff, we confirm that we continue to hold $10,000.00 in trust pending completion of the landscaping and hard surfacing. We note no deadlines were resolve (sic) in our July, 2009 correspondence, nor what constituted landscaping and hard surfacing. We understand these items to be completion of all necessary work to fulfill City bylaw and Development Agreement requirements.
>
> In any event, we wish to resolve this matter. As discussed among our respective staff members, please provide proof of the completion of the work so that we may release funds.

[22] Although there was additional correspondence between Ms. Murrin and Mr. Fekete related to the release of the builder's lien holdback, it appears that Ms. Murrin never responded to Mr. Fekete's December 2nd letter. Nor did she reply to a further letter Mr. Fekete wrote to her on May 26, 2011 stating that the

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[1] The $10,000.00 holdback is actually described in the correspondence as $5,000.00 from what would otherwise be the closing funds and $5,000.00 from the builder's lien holdback, but nothing turns on this.

matter had been outstanding for two years and that Ms. Stitt had advised that the work remained unfinished. The letter concludes:

> Given that the purchase and sale completed two years ago your client has had ample opportunity to complete the work. Accordingly, unless we hear further from you by June 15, 2011 indicating that the work has been completed we will be releasing the holdback directly to our client so she can provide to the condominium corporation to allow the work to be completed.

[23] Nor did Ms. Murrin reply to a further letter from Mr. Fekete advising that he would release the holdback funds on June 27, 2011 "…unless we hear further from you".

[24] On September 2, 2011 Mr. Fekete sent another letter to Ms. Murrin advising that he had released the holdback funds to the contractor completing the work on behalf of the condominium corporation.

[25] There was still no response.

[26] Mr. Fekete testified that, contrary to what the letter says, he had not yet released the funds. He hoped this final shot across Ms. Murrin's bow might provoke a response. When another two weeks passed and there was still no reply, he released the funds.

[27] Why Ms. Murrin failed to respond to the letters remains unclear. The plaintiffs did not call Ms. Murrin as a witness, contenting themselves with an affidavit she swore October 5, 2012. In the affidavit she acknowledges receipt of a letter than can only be Mr. Fekete's May 26th "deadline" letter. She further

deposes that the letter was discussed with the plaintiffs. She does not say why the letter (or those sent in June or September) went unanswered, although she does say that at some unspecified time, another lawyer, Andre Roothman, began acting for the plaintiffs. Mr. Roothman did not testify either. Ms. Achmadsjah, the sole witness for the plaintiffs, also failed to shed any light on the subject, so the lack of response to Mr. Fekete's ultimatum will forever remain a mystery.

[28] It must next be said that the plaintiffs were not alone in leaving things in a mysterious state. Mr. Fekete testified that he paid the full $10,000.00 to Advanced Asphalt, the contractor who completed the paving work at the condominium. It appears that the total cost of this work was $32,025.00. The condominium complex contains twelve units and one would normally expect the paving cost to be divided amongst the unit owners. As well, it will be recalled that the City and the developer also contributed to the cost of the additional paving. Thus, it is not reasonable to assume that the defendant herself contributed nearly one third of the total. In argument, I indicated to the defendant's counsel my puzzlement on this issue and gave him the opportunity to reopen the defendant's case if she wished to clarify matters. Ms. Stitt declined the offer.

[29] It remains to determine the legal result of all that occurred. To do so, it is first necessary to establish what the terms of the holdback agreement were and whether or not the plaintiffs remedied those deficiencies in a way that fulfilled those terms, thus entitling them to payment of the holdbacks.

[30] I begin by noting that the Contract of Purchase and Sale sheds no light on the matter. The contract makes no mention of landscaping or hard surfacing. Nor does the defendant offer any evidence capable of establishing that the plaintiffs or their agents made binding representations in regard to either issue.

[31] It may be convenient to deal first with the holdback pending completion of the landscaping. Ms. Stitt scoffed at the plaintiff's landscaping work and the photograph of the complex that was entered in evidence makes it abundantly clear to me that 1906 Centennial Street will never be mistaken for the Butchart Gardens. However, what the defendant or I think of the landscaping is not really the point. In one of her letters, Ms. Murrin attempted some definition of what completion of the landscaping would entail. However, the only logical interpretation to place on the landscaping requirement is that the developer had to complete landscaping to the extent required by the Development Permit and applicable City Bylaws. In the absence of clear contractual language suggesting otherwise, using any other standard would be completely unworkable since judging the adequacy of landscaping is, in the end, mostly a subjective exercise.

[32] On the evidence, I can only conclude that the plaintiffs' landscaping efforts complied with the requirements of the Development Permit and the Zoning Bylaw. The City approved the project as complete. As a result of the Condominium Corporation's complaints, the City later conducted another site inspection and Mr. Gau's letter indicates that the conclusion was that:

> … the landscaping provided by the developer reflects that which approved (sic) as part of the development permit application..

[33] It is true that Mr. Gau's letter goes on to acknowledge that the hard surfacing requirements contained in the development permit do not conform to the requirements of the Zoning Bylaw, but no such admission is made in respect of the landscaping. Nor does the letter say (as it does in regards to the hard surfacing) that any remedial action is required. In the result, I find that the landscaping had been completed to the point whereby the deficiency had been remedied and the holdback should have been paid upon proof of completion.

[34] I turn next to the question of the hard surfacing or paving. The developer, in fact, provided more paving than was required by the Development Permit Plot Plan which only shows paving in front of the building. Moreover, in her July 28, 2009 letter where the holdback issue is first discussed, Ms. Murrin specifically refers to "hard surfacing on the *front* of the building" (emphasis added). This caveat disappears from the correspondence thereafter – including the letter Ms. Murrin wrote on the same subject the very next day. In all correspondence after July 28th, the words used to describe the event that will trigger the payment of the holdback are reduced to "completion of the hard surfacing" or equivalent wording. Later, it would become clear that when the plaintiffs and the defendant used this phrase, they were talking apples and oranges.

[35] Since it appears that there never was a meeting of minds on precisely what degree of hard surfacing would fulfill the holdback agreement, I am driven to conclude that the only reasonable expectation of the parties would be that the hard surfacing be completed to the extent required by the zoning bylaw.

[36] As noted earlier, the hard surfacing efforts of the plaintiffs can reasonably be interpreted as fulfilling their obligations under the Development Permit and that the plaintiffs, therefore, had some justification for taking the position that their obligations were complete and the holdback should be paid. However, it is also clear that the paving did not comply with the requirements of s. 7.2.1 of the Whitehorse Zoning Bylaw and that the plaintiffs were well aware of this by January of 2011, if not before. Moreover, the plaintiffs are deemed to be aware of s. 297(2) of the *Municipal Act* which forbids carrying out a development contrary to a zoning bylaw.

[37] In the result, I conclude that the plaintiffs were obligated to complete the hard surfacing of the driveway as well as the parking spaces themselves, before claiming payment of the holdback.

[38] Regrettably, this is hardly the end of the matter. Sometime after the Gau letter of January 6, 2011, the plaintiffs, the City and the Condominium Corporation reached agreements which resulted in the driveway paving being completed with each contributing toward the cost. In my view, the defendant was entitled to use holdback money up to the $5,000.00 agreed on, toward rectification of the deficiency. However, if rectification cost less than the amount held back, she could not simply put the excess in her pocket. To do so, would constitute an unjust enrichment.

[39] The trouble in this case is that there is no evidence that establishes what the defendant paid to rectify the deficiency. It appears that the total $10,000.00

holdback was paid to the paving contractor. I have already noted that, given that there are twelve units in the condominium, and noting the contributions by the developer and the City, it is unlikely that the defendant herself paid nearly one third of the total cost. If she did, it could be argued that much of the money she so generously provided belonged to the plaintiffs. Since the defendant declined the opportunity to provide further evidence as to the extent of her financial contribution, what she actually contributed remains unknown. Her actual obligation could not have exceeded roughly $2667 – one twelfth of the total. Even that sum is only reached by totally discounting the contributions of the plaintiffs and the City. Knowing how much the plaintiffs contributed would have reduced this sum (to their benefit) but they declined to disclose the information.

[40] To sum up where we arrived at so far, I find that the landscaping had been completed and that portion of the holdback should have been released upon proof of completion. I further find that the hard surfacing had not been completed and that the defendant was entitled to use hold back money to the extent necessary to rectify the deficiency, however, the amount that the defendant actually contributed is unknown.

[41] Having journeyed thus far, we come to the final aspect of the case, namely, the puzzling lack of response by the plaintiffs (or their solicitor and agent, Ms. Murrin) to reasonable requests by the defendant (or her solicitor and agent, Mr. Fekete) for proof of completion or to pleas to resolve the issue. The holdback eventually sat in Mr. Fekete's trust account for over two years and it was, in my view, reasonable in the circumstances of this case to set some

deadlines in an effort bring the matter to a resolution. Moreover, he did not pay the money out for many months after initially threatening to do so. Arguably, it was reasonable for the defendant to have eventually concluded that the plaintiffs had abandoned their claim to the money.

[42] I do not lose sight of the plaintiffs' argument that the Gau letter provided proof of completion and that the defendant and her solicitor were well aware of its contents. However, the letter is sufficiently equivocal that reliance on it alone would fail the test of prudence.

[43] It would take someone much higher up the judicial food chain to determine to a nicety the exact interplay of all the conflicting considerations in this case. The best that I can do, on the state of the evidence before me, is to apportion the amount in dispute in a manner that seems equitable.

[44] With that in mind, my decision is that the $10,000.00 holdback should be split evenly between the parties. In the result, there will be judgment for the plaintiffs in the amount of $5,000.00. In view of the divided result, I direct that each party will bear their own costs.

FAULKNER T.C.J.