

SUPREME COURT OF YUKON

Citation: *First Nation of Na-Cho Nyak Dun v.
Peterson et al.*, 2009 YKSC 05

Date: 20090206
S.C. No. 08-A0095
Registry: Whitehorse

Between:

FIRST NATION OF NA-CHO NYAK DUN

Petitioner

And

WESLEY A. PETERSON doing business as WES PETERSON CONSTRUCTION

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Carrie E. Burbidge
Wesley A. Peterson

Counsel for the Petitioner
On his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for summary judgment under Rule 18 of the *Rules of Court*. The First Nation of Na-Cho Nyak Dun (the “First Nation”) has filed four affidavits in support of its claim. Mr. Peterson has been given the opportunity to retain counsel and time to file affidavits in response. He is representing himself. He has not filed any affidavits and thus has not raised a *bona fide* triable issue. This application proceeded on the affidavit evidence filed by the First Nation.

[2] At the hearing, the First Nation advised the Court that it was proceeding on its claim for overpayment only and not the additional liquidated damages set out in the Statement of Claim.

THE FACTS

[3] On September 28, 2007, the plaintiff entered into a contract with the defendant to construct eight residential housing units, including septic systems, for a total price of \$951,392.40, which was the price tendered by Mr. Peterson (the "contract").

[4] The first four housing units were to be completed by December 13, 2007, later extended to February 28, 2008.

[5] The contract contains a clause requiring invoices to be supported by an engineer's certificate. Because of the longstanding relationship between the First Nation and Mr. Peterson, contract formalities were not followed and invoices were paid without the requirement of an engineer's certificate.

[6] Between September 24, 2007 and May 15, 2008, Mr. Peterson invoiced the First Nation for a total amount of \$483,131.62, which represents the total completion of four housing units. The four units were not completed by February 28, 2008, and Mr. Peterson has not performed any work since June 17, 2008. The final four residential housing units have not been started.

[7] The First Nation became aware of the failure to complete the four housing units in May 2008, but still continued to pay a May invoice in the amount of \$47,250.

[8] On June 18, 2008, the First Nation met with Mr. Peterson to work out a new work plan but Mr. Peterson refused to sign the proposed agreement to complete the housing units.

[9] On July 2, 2008, the project manager confirmed the default of Mr. Peterson, in writing, to the First Nation. An inspection report by the project manager on August 7, 2008, concluded that only 20% of the four housing units had been completed plus 90% of the septic systems, which represented an actual value, based on tendered prices, of \$84,823. This would result in an overpayment of \$398,308.62. The project manager is a Limited Licence Engineer with 25 years of experience primarily in municipal engineering and roadwork, which includes building construction.

[10] The second report dated August 7, 2008, was prepared by the architect whose firm designed the housing units. He based his estimates on the degree of work completed to “lock-up” which would result in 30 – 40% completion. However, “lock-up” was not reached as roofs, insulation, electrical and mechanical were not fully installed. He concluded that the degree of completion was 25 – 30% which, taking the 30%, would entitle Mr. Peterson to a payment of \$97,836, using the same tendered prices in the calculations of the project manager. The amount claimed would be \$483,131.62 less \$97,836, or \$385,295.62.

[11] In addition to the facts set out above, I find that it is more reasonable to accept the completion estimate of the architect simply because his firm designed the housing units. It also gives the benefit of the doubt to Mr. Peterson.

DISPOSITION

[12] The only issue presented is the amount of overpayment which I have found as a fact to be \$385,295.62. There is no doubt that the First Nation was not following the formality of requiring an Engineer to request a statutory declaration as well as receipts and vouchers as provided for in paragraph 24 of the contract. However, it was

Mr. Peterson's obligation to submit the application for payment to the engineer who would then recommend payment or not. However, the amount to be claimed as payment was stated as follows:

24.3 Applications for payment shall be dated the last day of the agreed monthly payment period and the amount claimed shall be for the value, proportionate to the amount of the Contract, of Work performed and products delivered to the Place of the Work at that date.

[13] Despite the lack of adequate financial control on behalf of the First Nation, paragraph 25.2 makes it clear that the First Nation is not bound by its payment to accept that the work claimed was actually done or that it has waived Mr. Peterson's obligation to perform the contract. Paragraph 25.2 states as follows:

25.2 The Contractor's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. Neither recommendation or certification of any progress or final payment by the Engineer, nor the issuance of any certificate, not any payment by the Owner to the Contractor under the Contract Documents, nor any use or occupancy of the Work or any part thereof by the Owner, nor any act of acceptance by the Owner nor any failure to do so, nor any correction of defective Work by the Owner shall constitute an acceptance of work or products which are not in accordance with the Contract Documents or a release of the Contractor's obligation to perform the Work in accordance with the Contract Documents.

[14] I therefore grant judgment to the First Nation against Wesley A. Peterson in the amount of \$385,295.62 plus interest pursuant to the *Judicature Act* and costs on Scale B.

VEALE J.