Citation: *LeClerc, et al. v. Superstore*, 2004 YKSM 6 Date: 20041129
Docket: 04-S0044
Registry: Whitehorse

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

Robert LeClerc and Carole Massé
Plaintiffs

v.

Real Canadian Superstore
(Division of Westfair Foods Ltd.)
Defendant

Appearances:
Robert LeClerc — Appearing on behalf of the Plaintiffs
Anna Pugh — Counsel for the Defendant

REASONS FOR JUDGMENT

Introduction

[1] The plaintiffs are independent contractors who do a variety of jobs, primarily as subcontractors. The defendant is a large grocery and dry goods store with an outlet in Whitehorse. The plaintiffs allege a breach of contract and damages flowing from that breach.

The Facts

[2] In May of 2003, Dwayne Lesiuk was the Manager of the Real Canadian Superstore (Superstore) which was under construction at the time. Mr. Lesiuk conducted an “employment fair” at a downtown hotel and interviewed the plaintiffs. According to the plaintiffs, the interview went well but no promises were made.

[3] In September of 2003, the contractor who was painting the new store contracted with the plaintiffs to help paint the store in order to have it completed on time. During that month, the plaintiffs saw Mr. Lesiuk every day and developed a good relationship with him. There was some discussion about the plaintiffs contracting to be a “handyman” for the store.

[4] On March 15, 2004, the plaintiffs met with Mr. Lesiuk at his office. The plaintiffs testified that they reached an agreement to provide “handyman” services to the Superstore. The hourly rate would be eighteen dollars and Mr. Lesiuk advised them that they would get 200 to 300 hours of work for the first year. The arrangement would be reviewed after the first year. It would be necessary, however, that the plaintiffs take out third party liability insurance in the amount of two million dollars.

[5] Mr. Lesiuk undertook to reduce the contract to writing. Mr. LeClerc returned the next day, March 16, 2004, to sign it. As he was working on a job-site, Mr. LeClerc just signed it without reading it. In his own words, he had established a trust relationship with Mr. Lesiuk and assumed that their agreement of the previous day had been reduced to writing.

[6] I should add that English is a second language for both Mr. LeClerc and Ms. Massé. While both could understand and speak some English, at times a French language interpreter interrupted the proceedings to explain some technical aspects of the evidence. It was evident to me that Mr. LeClerc’s English was better than Ms. Massé’s.

[7] On March 16, 2004, Mr. Lesiuk spoke to Mr. LeClerc about painting lines and signage around some freezers and compressors and asked him to provide a quote. The plaintiffs provided a quote dated April 3, 2004 for the work in the amount of $578.21. Mr. Lesiuk’s view was that the quote was too “fancy”

(expensive?) and that the plaintiff should redo it. Another quote was prepared by the plaintiffs, but when Mr. LeClerc tried to contact Mr. Lesiuk around April 8, 2004, he was advised that Mr. Lesiuk would be away for two or three weeks. Some days later, the plaintiffs understood that Mr. Lesiuk no longer worked for the Superstore.

[8] Mr. Marc Wilson was the Assistant Manager at the Superstore when Mr. Lesiuk had dealings with the plaintiffs. Mr. Wilson had no knowledge of the discussions or the contract Mr. Lesiuk had entered into with the plaintiffs. It is evident that Mr. Lesiuk's departure was sudden and unexpected and that Mr. Wilson was faced with taking over the store as manager without a suitable transition period. Mr. Wilson did not have time to deal with Mr. LeClerc when he approached him about the contract he had signed with Mr. Lesiuk. I accept that Mr. Wilson communicated to the plaintiffs that he did not need their services. The plaintiffs testified that Mr. Wilson said that he would not honour the contract because he did not sign it. I am satisfied that Mr. Wilson had a lot of issues to deal with as a result of the sudden departure of Mr. Lesiuk and the last thing he wanted to do at that time, was to deal with plaintiffs and the contract signed by his predecessor of which he had no knowledge. At trial, Mr. Wilson's position was clear that he was not prepared to refer work to the plaintiffs.

The Plaintiffs Claim

[9] The plaintiffs allege a breach of contract and claim loss of 200 hours of work (the lower number of the 200 to 300 hours promised by Mr. Lesiuk) at $18.00 per hour for a total of $3,600.00. In their meeting of March 15, 2004, Mr. Lesiuk told the plaintiffs that liability insurance was a prerequisite to working for the Superstore. On March 30, 2004, the plaintiffs obtained insurance for the year beginning March 30, 2004. The plaintiffs testified that they did not require this insurance for their normal work, that they obtained it solely because of the representations made by Mr. Lesiuk and that they had no other use for it because of the nature of their work as subcontractors. The plaintiffs also advised

that they could not cancel the insurance in order to get a refund of any portion of the amount paid. As a result, they also claim the cost of the third party liability insurance, $850.00.

The Defendant's Response

[10] The defendant does not deny that there was a contract and that it was a contract for services. The contract did not set out any specific services to be performed. Rather, the plaintiffs would or could be called upon from time to time, as needed to provide "handyman" services. Consistent with the contract, Mr. Lesiuk did ask the plaintiffs to provide an estimate for painting lines and words around a cooler and a freezer but those estimates dated April 3, 2004 and April 8, 2004 were never accepted. As no "handyman" services were agreed to, the defendant asserts that there is no breach of contract and no damages.

The Contract

[11] A valid contract was entered into by the plaintiffs and by Mr. Lesiuk on behalf of the Superstore. It was a contract for services, not a contract of service. I am satisfied that this contract contemplated the Superstore calling on the plaintiffs from time to time to provide "handyman" services for the store. The contract itself did not guarantee any minimum amount of work, either in number of hours or in dollar terms.

[12] The contract was executed on March 16, 2004. Paragraph 2.1 of the contract provides that the term of the agreement is October 1, 2003 to May 1, 2004. I am satisfied that this was a mistake and does not reflect the intention of the parties. It is evident that Mr. Lesiuk, in his haste, picked up a standard form contract with these dates already typed in. Mr. Lesiuk filled-in the remaining "blanks" in his own handwriting. I am satisfied that the intention of the parties was to have the contract run from March 16, 2004 to March 15, 2005. The contract will be rectified accordingly (See Cheshire, Fifoot & Furmstron, *"Law of Contract"* 11th ed., Butterworths, at pages 231-234).

[13] The written contract does not guarantee the plaintiffs any work. Indeed, the way the contract was intended to operate (based on Mr. Wilson's evidence of trade practice) precluded giving such a guarantee. When some work needed to be done, Superstore would ask the "handyman" for an estimate. Based on the estimate received, alterations could be negotiated to the estimate, or Superstore could decide that it would do the work in-house. Mr. Lesiuk's request to provide a quote for paint and signage on March 16, 2004 was consistent with this practice.

[14] I am satisfied that Mr. Lesiuk, on behalf of the Superstore, made an oral representation to the plaintiffs that they "would or could get 200 to 300 hours of work" in the upcoming year. I am not prepared to incorporate that oral representation into the written contract. The nature of the contract for service as "handyman" does not guarantee that the "handyman" will actually get all the work needed to be done. The "handyman" gets an opportunity to "submit a bid" to do the work. In the normal course, for a store of the size of the Superstore, one would expect that the "handyman" would receive numerous opportunities to bid for work at the store and would actually get a significant amount of the work, as the ability of the store to do the work "in-house" is limited.

[15] In effect, what Mr. Lesiuk told the plaintiffs was that he would deal with them as the Superstore's "handyman", that they would receive numerous opportunities to provide estimates and bid on work within the store and that the plaintiffs would likely receive a considerable amount of work, in the range of 200 to 300 hours a year. Mr. Lesiuk would have been aware, as was Mr. Wilson, that the then current "handyman" was charging $30.00 per hour, almost double the rate charged by the plaintiffs. Moreover, that "handyman" was very busy elsewhere, and was not responding to the Superstore's needs satisfactorily. Based on the promise of the opportunity to have a considerable amount of work referred to them, the plaintiffs entered into the service contract with the Superstore and obtained third party insurance at a cost of $850.00. The

defendant, Superstore, through its new manager, repudiated the promise to offer work opportunities to the plaintiffs.

[16] At the end of the trial, I queried whether the facts raised a cause of action in tort law, that of negligent misrepresentation. Ms. Pugh undertook to research that issue and submit arguments and case law by the end of the week. She did so, and I add, in a very professional manner. Based on her submissions, I am satisfied that Mr. Lesiuk's representation to the plaintiffs, although they induced the plaintiffs to enter into the contract with the Superstore, were not untrue, inaccurate or misleading. A cause of action based on negligent misstatement has not been made out.

[17] On the other hand, the oral representations by Mr. Lesiuk to the plaintiffs raise the issue of collateral contract. In appropriate circumstances, a court may properly construct a collateral contract from things said or done during the preliminary negotiations (See *City and Westminster Properties (1934) Ltd. v. Mudd*, [1959] ch. 129, [1998] 2 A.H.E.R. 733; *Ahone v. Gravelle et al*. (1989), 30 B.C.L.R. (2d) 368; *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515). In the case at bar, the collateral contract can be stated as follows: "If you sign a contract for service with the Superstore, I will refer a significant amount of 'handyman' work to you (which I estimate will result in 200 to 300 hours of actual work) provided you get third party liability insurance in the amount of two million dollars". I use the term "refer" rather than "guarantee" to indicate that an intermediate step of providing an acceptable estimate of cost is involved as a condition of actually getting a contract to do the work.

[18] The plaintiffs obtained the required insurance relying on the promise that a considerable amount of work would be referred to them. This constitutes consideration for the promise. Considering the cost of the insurance, this promise was important to them. The plaintiffs would not have obtained the insurance in the absence of the promise to refer a considerable amount of work to them. The

work promised was not referred to the plaintiffs. In fact, Mr. Wilson repudiated the "handyman" contract with the plaintiffs. The collateral contract was breached. The damages ascertainable in the circumstances would be the cost of the insurance, $850.00 (See also Cheshire, Fifoot and Furmstron, *Law of Contract*, supra, at pages 124-126). Judgment for the plaintiff in the amount of $850.00. In the circumstances, the plaintiffs will be entitled to their court costs as well. Interest will be calculated only from the date of judgment.

LILLES C.J.T.C.