Citation: *Skky Hotel Inc. v. Yukon Gardens Ltd*., 2017 YKSM 4 Date: 20170413
Docket: 15-S0070
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Luther

SKKY HOTEL INC.

Plaintiff

v.

YUKON GARDENS LTD.

Defendant

Appearances:
Frank Calandra — Appearing on behalf of the Plaintiff
Lorne Metropolit — Appearing on behalf of the Defendant

REASONS FOR JUDGMENT

[1] The plaintiff operates a hotel along the Alaska Highway within the City of Whitehorse. Frank Calandra, an Ontario lawyer, is a director of the company.

[2] The defendant is a Whitehorse garden supply and landscaping company owned by Lorne Metropolit, an older man who has been in the business for the duration of his adult life.

[3] At the request of the plaintiff, through its manager or architect, in the summer of 2012, the defendant performed work at the hotel grounds at the front in the area of the

hotel sign and further at the side of the hotel. At no time did Mr. Calandra directly communicate with the defendant.

[4] Three invoices were submitted, all dated 19 July 2012, the first two totaling $6,221.50 and the third was in the amount of $5,670.

[5] Mr. Calandra carelessly and with little or no thought, paid these amounts by cheque, dated 9 August and 6 September 2012. A small amount of $341.50, being part of the first cheque, is not being claimed by the plaintiff.

[6] Almost three years after the work was completed and paid for, Mr. Calandra "upon investigation" determined that he had been "gouged". He launched an action in this court in the amount of $8,340, claiming that the plaintiff was grossly overcharged. The plaintiff relies "upon the doctrines of *quantum meruit* and unjust enrichment".

[7] Mr. Calandra did not oversee the work done in 2012. He relied upon his architect and manager.

[8] The manager had difficulty recalling the details of arrangements with Mr. Metropolit. The architect provided an eight-paragraph affidavit to which there was no objection.

[9] The key parts of the affidavit are paras. 3 to 7:

> 3. The work done by the Defendant consisted of two parts: planting shrubs in front of the Skky Hotel sign and planting six trees and some shrubs in front of the hotel between the front wall and the parking barrier. Attached hereto as Exhibit "A" is a photo taken by me of the completed

> work done by the Defendant in front of the Skky Hotel sign; and attached hereto as Exhibit "B" is a photo taken by me of the completed work done by the Defendant between the front wall and parking barrier.
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> 4. There was never a written quote provided for the work pictured on either Exhibit "A" or Exhibit "B". I specifically state that in the first paragraph of the attachment #1 emails, with respect to the work pictured on Exhibit "B".
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> 5. I also wish to clarify that I never received a written or oral quote from the Defendant with respect to the work pictured at Exhibit "A". Rather, the "original quote" I refer to in my email of July 23, 2012, from me to Paola De Cristofaro ("PD") is a reference to the oral quote or authorization which I understood had been given to Corrina Lotz ("CL"), by Frank Calandra ("FC") authorizing landscaping for "about $5000". I repeat I was never provided with a quote for that work, nor did I know specifically what the $5000 in work would entail. Specifically, I did not know the labour, materials, or costs to do the work done which is set out at Exhibit "A", and never approved such.
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> 6. The email of July 17, 2012, from Frank Calandra, set out at attachment 1, indicates that he had approved a total of about $5000 of landscaping and was specifically looking to "get some value for money".
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> 7. At the time that I wrote LM [Lorne Metropolit] on July 17, 2012, he was in the midst of completing the work pictured at Exhibit "A" and had not yet billed such. I reiterate that I specifically requested LM to "give me a price to landscape the strip between the wall and parking stalls" and that no quote was provided.

[10] As is too common in this jurisdiction, there were no written quotes or detailed invoices. (*Kmyta v. Ho*, 2012 YKSM 1)

[11] Mr. Metropolit explained that none was demanded at the time, nor does he prepare written quotes for jobs of two days or less. His memory of giving a verbal quote of about $5,000 for the first job to the manager and her accepting it is credible.

[12] As to the other job, the defendant planted the trees, which would flower and give off a pleasant fragrance, a distance of only 42 inches from the wall. There were also 10 bushes.

[13] Again, neither the manager nor the architect can, with certainty, state that there was not a second job nor that all the work for both jobs was going to come in for around $5,000 in total. While the manager may have been authorized to spend only $5,000 in total, this was never communicated to the defendant.

[14] I accept the evidence of Mr. Metropolit that he, as an experienced businessman, would not have agreed to do both jobs for approximately $5,000. It was his understanding that this work would be done for just over $10,000 and that it was approved by the manager or architect. The architect was obviously concerned about not having received any quotes from the defendant. Furthermore, the architect was obviously dismayed at the landscaping work for the side strip being completed without a price.

[15] A major issue with the plaintiff was that the defendant planted the trees far too close to the building and that there was a significant risk of damage to the foundation. The Mayday trees selected were known to him not to have caused such damage in all of his years of experience. Mr. Metropolit did have some concern with the Northwest Poplar but this was not the type of tree planted there.

[16] Despite the obvious animosity between the parties, Mr. Metropolit stated freely and openly that he would give a personal guarantee and that the defendant would also guarantee that the six trees planted along the side strip would not cause any damage to the foundation or structure of the existing wall.

[17] Mr. Metropolit unhesitatingly gave these guarantees on the basis of his lengthy experience in the Yukon and with present examples of types of trees planted closely to buildings. Exhibits 10 and 11 are clear examples.

[18] The personal and corporate guarantee is permanently recorded in this judgment.

[19] In its claim to have money returned that had been paid almost three years prior, the plaintiff maintains that the defendant was unjustly enriched and the Court should only allow him to be compensated on a *quantum meruit* basis.

[20] The plaintiff's argument is twofold.

[21] Firstly, the trees planted were more expensive than what could be purchased at a box store. That is true; however, Mr. Metropolit, who was a Director for the Alberta Greenhouse Growers' Association, testified that his trees are stronger and healthier, and furthermore that there is a 100 percent one-year warranty.

[22] The plaintiff's witness, Fay Brannigan, has owned the Greenhouse at Cliffside for six years. The trees she put in her estimate came in at $250 apiece. In his clarifying explanation of costs, the defendant costed the trees at $450 apiece less a one-seventh discount, ie. $385.71. A witness for the defendant costed the trees at $850 each.

[23] This part of the claim totally fails as the defendant's price was fair and besides all that, a consumer cannot go back to a supplier of goods and services almost three years after the fact and complain about prices, unless there was a reckless or fraudulent misrepresentation. There is no evidence of that.

[24] Secondly, the plaintiff claims it was “gouged” by the defendant in terms of the overall price for services rendered.

[25] The main witness for the plaintiff in this regard was Fay Brannigan who would have done all the work for about $7,000.

[26] The defendant called two witnesses, John Vanderkley with 49 years of experience and Kevin MacDonald with four years of experience, both as landscapers. Their estimates for the work just at the side with the six trees and 10 shrubs, etc. came in over $8,000 each, whereas the defendant came in at $5,400.

[27] There was obviously a serious miscommunication on the plaintiff’s side between the director, the manager and the architect. As noted, above, this casual way of doing business in the Yukon needs to come to a full stop. With emails and attachments, as commonly in usage as they are, estimates, quotes, approvals and contracts can be exchanged in an instant.

[28] The defendant was fortunate that the plaintiff so readily paid for the work in full. If the shoe were on the other foot, Yukon Gardens may have had to prove its case and perhaps then the principle of *quantum meruit* would come into play.

[29] Mr. Calandra has asked that I consider three cases from this jurisdiction.

[30] *De Jager v. Rueckenbach*, 2010 YKSM 5 at para. 35 is helpful in understanding on the basis of the reference to *Rafal v. Legaspi*, 2007 BCSC 1944 in which Fisher J. stated:

> 30 *Quantum meruit* will be available if the services in question were furnished at the request or with the encouragement or acquiescence of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services…

[31] The typical situation would be as stated by Fisher J. and would not normally include a claim for overpayment to the provider of services, three years after the work.

[32] *Ketza Construction Corp v. Mickey*, 2000 YTCA 4, gives guidance in this legal area of *quantum meruit* and particularly constructive is the discussion about *Keating on Building Contracts*, paras. 12 and 13:

> 12 In so concluding, he [the trial judge] relied upon Keating on Building Contracts, 6th ed. (London: Sweet & Maxwell, 1995) at 84, in which the learned authors noted that a claim on a quantum meruit may arise when there is (a) an express agreement to pay a reasonable sum; (b) there is a contract but no price is fixed; and (c) there is a quasi-contract which may occur if work is carried on while negotiations are underway but the negotiations fail to result in a contract.
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> 13 It is of no practical importance in this case whether here there was a contract but no price was fixed, or the circumstances give rise to quasi-contract. Under either view, the respondent was entitled to recover on a *quantum meruit*, an expression which, in the words of Keating, means "the amount [it] deserves" or "what the job is worth".

[33] According to the defendant, it was paid “the amount it deserves” or “what the job is worth”. This was substantiated by the evidence of the witnesses, Vanderkley and MacDonald. The plaintiff’s witness, while honest and credible, did not possess the expertise of Mr. Metropolit and Mr. Vanderkley, nor was she properly and fully questioned about the extent of the work required under the sign.

[34] As to *Kareway Homes Ltd. v. 37889 Yukon Inc.,* 2012 YKSC 10, this case was appealed with limited success to the Court of Appeal, 2013 YKCA 4. In particular, Mr. Calandra referred me to paras. 106 and 107 of the trial decision. The appellate decision at para. 40 upheld the reasoning of the trial judge.

[35] With reference to para. 51 from the Court of Appeal:

> …Absent a finding of recklessness or fraud on the part of the Builder, and none was found by the trial judge, I am unable to discern why the agreed upon prices…should be treated any differently than the cost items…Each were estimates but were accepted by the parties. The Builder bore the risk of the estimates being too low, and the Owner of them being too high.

[36] From paras. 13, 14 and 24 above, and given para. 51 of *Kareway*, the plaintiff's claim is bound to fail.

[37] While there was no specific detailed agreement here as there was in *Kareway*, the defendant proceeded on the basis that the manager and architect of the plaintiff did not express any direct refusal of the defendant's offer to do both jobs for about $10,000. Indeed, it was the understanding of Mr. Metropolit that both projects should be completed and they were completed to the obvious benefit of the plaintiff's property. The defendant was not unjustly enriched in any way based on his own evidence of pricing and that of his two witnesses all of whom I found to be credible and reasonable.

[38] The plaintiff's claim is dismissed. The defendant is awarded costs and furthermore, pursuant to s. 59(a) of the *Small Claims Regulations*, I hereby award to the

defendant $500 as compensation for inconvenience and expense. A thorough review of the record reveals that the defendant is entitled to such relief.

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LUTHER T.C.J.