2007 CarswellOnt 9226
Ontario Superior Court of Justice

Corr Millwork Co. v. DJ McRae Contracting Ltd.

2007 CarswellOnt 9226, [2007] O.J. No. 3919

Corr Millwork, Plaintiff v. DJ McRae Contracting, Defendant

L. Ntoukas D.J.

Heard: February 12, 2007
Judgment: February 12, 2007
Docket: Toronto SC-04-10585

Counsel: James S. Marks, for Plaintiff
T. Pandi (Agent), for Defendant

Subject: Contracts

Headnote

Construction law --- Contracts — Subcontracts — General principles

Construction law --- Contracts — Payment of contractors and subcontractors — Entire contract — Conditions precedent to payment — Miscellaneous conditions

Table of Authorities

Statutes considered:

Sale of Goods Act, R.S.O. 1990, c. S.1
Generally — referred to

***L. Ntoukas D.J.*, (Orally):**

1 This is a claim by the plaintiff, John O'Neill and Corr Millwork Company Limited, for damages arising out of work performed pursuant to various subcontracts with the defendant, DJ McRae Contracting Ltd. The defendant denies liability on the basis that there were certain deficiencies in the work performed by the plaintiff and that the cost of correcting these

deficiencies exceeds the amount outstanding on the various subcontracts. And in addition, the defendant has filed a defendant's-claim for the amount outstanding with respect to correcting deficiencies in excess of the amount of the plaintiff's claim.

2 Mr. O'Neill gave evidence on behalf of the plaintiff that he entered into various contracts with the defendant to perform work, specifically the Queen's Park project, Saint Mary's project, and the Toronto Zoo project. Tabs 10 and 12 of Exhibit Number One were admitted into evidence by the plaintiff as the purchase order and schedule 'A' to the purchase order, respectively. These documents together formed the contracts between the parties with regards to the Toronto Zoo project. The terms of schedule 'A' clearly state that, "All drawings, specifications, and addenda are the terms of reference for this contract and acceptance of these items are binding. Each trade is responsible to coordinate and familiarize themselves with all aspects of the project. No extras will be considered for failure to do so."

3 Mr. O'Neill gave evidence that he verbally advised Mr. Hayward for the defendant that the use of particleboard as opposed to plywood was a mistake as such board absorbs water very easily, and that he also advised the defendant representative that a 180 degree wrap edge should have been utilized for the plastic laminate, as opposed to the waterfall edge which would allow water to come in contact with this particle board, again potentially causing a problem. It was Mr. O'Neill's evidence that in response to this advice that he gave to the defendant, Mr. Hayward indicated that the architect did not want any deviations from the plans and specifications. Mr. O'Neill further testified that after problems arose with the countertops swelling the defendant hired an independent inspector from an organization referred to as the Architectural Woodwork Manufacturer's Association of Canada, Ontario Chapter, referred to in evidence as O.M.A.C.

4 At tab 51 in Exhibit One, a letter dated June 29th, 2004, from a Mr. Thompson who was an inspector at O.M.A.C., was admitted into evidence by the plaintiff. The letter quite clearly indicates that the countertops were swelling at the Toronto Zoo location due to the use of the particleboard. Reference in particular is made to the last paragraph of that letter, which states, "The particleboard as a core material acts like a sponge. Even the moisture in the air will cause it to swell. So it cannot be relied upon to stand up under conditions such as these toilets."

5 The evidence of Mr. O'Neill was that despite his belief that the architect was at fault, after the problems occurred with the countertops he was willing to accept one-third responsibility, being the cost of the labour to remove and replace the countertops. This is evidenced by a letter found at tab 72 of Exhibit One from Mr. O'Neill to the defendant, dated October 24th, 2004. Following this letter, tab 73 was entered into evidence as a document signed by both parties on October 27th, 2004, following the letter found at tab 72. Pursuant to this document the plaintiff was to absorb 100 percent of the cost of removing and replacing the countertops, including labour and materials, at the Toronto Zoo location, and agreed to certain deductions on the two other contracts at Saint Mary's and Queen's Park as set out in that document.

6 Mr. O'Neill gave his evidence that he signed this document even though he believed it was unfair because at the time there was a substantial sum in excess of $20,000 owing to him by the defendant, and because he believed he would get timely payment of those amounts if he signed. It is the position of the plaintiff that this document found at tab 73 is not an enforceable agreement as there was no consideration flowing from defendant to plaintiff, but rather only promises flowing from plaintiff to defendant. And as a result, in the absence of this agreement the plaintiff on the facts is entitled to payment as per the evidence that was given orally and through the documents admitted as Exhibit One.

7 A closing submission was written and filed by the representative for the plaintiff, indicating that the claim total was $8,347.33. This amount was arrived at for the value of the work performed in accordance with specifications for both the Queen's Park and the Toronto Zoo projects, and an amount was deducted for the Toronto Zoo project, being the one third that the plaintiff had agreed to be responsible for, basically being the cost of $2,900 for the charge-out rate of the labour. Further reference can be made to that document - which will remain in the court file - as to how the amounts were established.

8 Mr. Hayward gave evidence as the principal of the defendant company. His evidence was that he relied on the plaintiff's expertise in bidding on the Toronto Zoo job and that there were deficiencies in the work. Reference was made to tab 60, being the second report made by O.M.A.C. According to the evidence of Mr. Hayward, this second report was initiated by the O.M.A.C. inspector. Page two was referred to, which in the second last paragraph refers to installation defects that can, in quote, "...contributed to the rapid delamitation of the plastic - to particle board and cause swelling of the particle board core,"

and then there are points after that. The defendant relies on these items found in page two and the photos entered into evidence by the defendant as Exhibit Three, as evidence of the deficiencies in the plaintiff's work for which there should be a set-off under the defence and for part of the defendant's claim. And the defendant relies on the cost to correct these deficiencies, as found at tab 79 of Exhibit One, as to the quantum of the set-off being claimed and also the damages being claimed pursuant to the defendant's claim. The defendant also relies on the document found at tab 73 and states that the plaintiff wrongly failed to honour what was a contract between the two parties as to how there would be a resolution of the Toronto Zoo problem, and indicates to the Court that the breach by the plaintiff, being the failure to perform the corrective work, relieves the defendant of any further obligations to the plaintiff for the costs outstanding on the contracts.

9 The issues for the Court are: What was the cause of the countertops swelling on the Toronto Zoo Project and what was the role of the plaintiff's work deficiencies, if any. Second, what is the impact of the October 27th, 2004, document found at tab 73. And third, what is the quantum of the damages, if any, in either case.

10 The Court finds that the plaintiff has satisfied on a balance of probabilities that the cause of the countertops swelling was the architectural specifications and plans requiring particleboard and waterfall edge to be utilized. And where the evidence of the plaintiff and the defendant contradict the Court accepts the evidence of the plaintiff as credible, having regard to the reasonableness of his evidence and the consistency of the evidence, and also having regard to the evasiveness of some answers provided by Mr. Hayward for the defence and the inconsistency and the lack of certain relevant pieces of evidence with respect to the defence and the defendant's claim.

11 In reaching this conclusion, the Court relies in particular on the reports found at tabs 51 and 60 by the O.M.A.C. inspectors. The tab 51 document, as discussed, clearly states that the swelling would occur due to moisture in the air. The second O.M.A.C. report found at tab 60 does not contradict the finding made in that initial O.M.A.C. report, and in fact, merely states that the installation defects contributed to a rapid delamitation but does not state that the delamitation would not have otherwise occurred and that the moisture in the air would not have been the main cause of the countertop swelling. It is clear when the two reports are read together that the swelling would have occurred irregardless of the method of installation utilized by the plaintiff, due to the particleboard and the waterfall edge being utilized.

12 Although the defendant alleged that he relied on the plaintiff's expertise and that the plaintiff should have advised of these potential problems with regard to particleboard and waterfall edge, it was the uncontradicted evidence of Mr. O'Neill that he did advise the defendant of these potential problems, and in fact, on cross-examination Mr. Hayward admitted that those discussions may have taken place. And also, I would add that it was clear on cross-examination that Mr. Hayward believed that it was the architect's fault that these countertops swelled. That was stated very clearly, more than once, in Mr. Hayward's evidence on cross-examination.

13 The defendant, as indicated, also relies on the document found at tab 73 of Exhibit One, being the October 27th, 2004, memo signed by both parties. Again, as discussed it was the defendant's position that the plaintiff breached the agreement and therefore the defendant was released from further obligations to pay. The Court finds that there was no consideration passing from the defendant to the plaintiff for this alleged agreement, and therefore there was no valid contract on which the defence can rely. In closing arguments and through evidence, the defence took the position that the consideration was the past history of significant business between the parties and the future possibility of business, and that it would have been good business practice for the plaintiff just to absorb the cost and move on to future business. Although the Court would agree that the motive for the plaintiff entering into the document found at tab 73 no doubt was the promise partly of future business, a motive in law does not equate to consideration. In addition, it is clear that at the time this document was signed the plaintiff was in an unequal bargaining position, being owed in excess of $20,000 in total by the defendant at the time. The Court therefore finds that the defendant cannot rely on this document to release it from its obligations to the defendant.

14 The defence also took the position that it could rely on the *Sale of Goods Act* with respect to the plaintiff's work. Although there is some evidence that there were installation defects in existence, it is clear from the evidence provided to the Court that these were minor in nature, and in fact, the architect for the Toronto Zoo accepted the work and made payments for the work, which would suggest that any of the items listed on the second O.M.A.C. report were not of significance to the client themselves.

15 As a result, the Court finds that there is no basis upon which the defence can rightfully deny the plaintiff's claim for

payment on the Queen's Park job and the outstanding amount for the Toronto Zoo reduced, as described in the written submissions filed with the Court. Judgment is therefore granted in favour of the plaintiff against DJ McRae Contracting Company Limited for the sum of $8,347.33. The defendant's claim is dismissed accordingly.

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