

CITATION: JMX Contracting Inc. v. Trifield Construction Management Corp.,
2015 ONSC 1865
NEWMARKET COURT FILE NO.: CV-14-118185-00
DATE: 20150323

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JMX Contracting Inc.)
) Rocco A. Ruso and Heather Michel, for the
Plaintiff) Plaintiff
)
-and-)
)
)
Trifield Construction Management Corp.,) Vanessa A. Ibe, for the Defendants
Sari Goodman and Ilan Philosophe)
)
Defendants)
) HEARD: March 17, 2015

REASONS FOR DECISION

EDWARDS J.:

Overview

[1] The plaintiff, JMX Contracting Inc. ("JMX"), seeks partial summary judgment against the defendants, Trifield Construction Management Corp. ("Trifield"), in the amount of \$30,015.63. The relief sought arises out of an agreement made between the parties reflected in minutes of settlement that were fully executed as of April 30, 2013 ("The Minutes of Settlement").

Facts

[2] JMX provided demolition type services to Trifield between August 2012 and January 2013 at two sites that were referred to throughout the motion as the "Peel Site" and the "Railroad Site".

[3] During the course of the work performed by JMX, invoices were rendered to Trifield which were paid for until issues arose in the early part of 2013 that resulted in correspondence from JMX to Trifield demanding payment for the outstanding balance in connection with the two projects.

[4] On March 18, 2013, counsel for Trifield, Vanessa Ibe, who also argued the motion before this court, wrote to counsel for JMX, Rocco Ruso, with an offer to settle. There is no dispute that Ms. Ibe had full authority to make such offer.

[5] On March 19, 2013, Mr. Ruso, on behalf of JMX, accepted the offer made by Ms. Ibe, on behalf of Trifield, in her correspondence of March 18.

[6] Between March 19, when the offer was accepted, and April 16, 2013 Mr. Ruso and Ms. Ibe exchanged correspondence with respect to the form of The Minutes of Settlement and mutual release which would give effect to the agreed upon terms of settlement.

[7] On April 17, 2013, Mr. Ruso sent to Ms. Ibe the release and The Minutes of Settlement signed by JMX. On April 30, 2013, Ms. Ibe sent to Mr. Ruso the release and The Minutes of Settlement signed by Trifield on April 19, 2013. The Minutes of Settlement required Trifield to pay to JMX the sum of \$30,015.63 within thirty days after both parties having executed The Minutes of Settlement. As such, the settlement funds were required to be paid by May 19, 2013.

[8] The Minutes of Settlement and the mutual release were drafted by Ms. Ibe. There do not appear to have been any changes made to the draft minutes of settlement or the draft release by Mr. Ruso on behalf of JMX.

[9] There are two critical terms of The Minutes of Settlement which become important in the context of the resolution of JMX's motion seeking partial summary judgment. Paragraph 3(c) of The Minutes of Settlement provides:

JMX hereby expressly acknowledges and agrees that:

- (c) Subject to paragraph 4 below JMX will not provide or perform any additional work or services at, on or in respect of the Railroad Jobsite.

[10] Paragraph 4 of The Minutes of Settlement provides:

JMX hereby acknowledges and agrees that it will continue to satisfy its warranty obligations in respect of all work performed and services provided by JMX for Trifield at the Peel Jobsite and the Railroad Jobsite.

[11] On May 29, 2013, in response to an inquiry by Mr. Ruso, Ms. Ibe advised that the settlement funds would be paid by June 3, 2013.

[12] On May 30, 2013, the architect retained in connection with the work being conducted at the Railroad Site advised Aaron Goodman, the Operations and Construction Manager of Trifield, that there were issues with respect to the demolition work performed by JMX at the Railroad Site which would require rectification. Mr. Goodman provided an estimate with respect to the rectification cost in his affidavit and placed those costs at least in the range of \$50,000. The issues with respect to the work conducted by JMX was reflected in an email, dated May 30, 2013, from Richard Aubry, who is described as an architect of the Preston Group. The email of

May 30, 2013 was never provided to JMX until the motion for summary judgment was served on the defendants.

[13] On May 31, 2013, Ms. Ibe sent an email to Mr. Ruso indicating that:

Selective demolition work performed by JMX at the second floor and roof immediately south of the demising wall at 45 Railroad was defective. The defect was latent and could not be discovered until the commencement of the erection of the steel beams to reinforce the wall which only commenced yesterday. Your client is responsible for the cost of the corrective work in accordance with paragraph 7 of the Minutes of Settlement. Accordingly, my client is in the process of obtaining a quote (or quotes) for the corrective work which it will charge back to your client. In the meantime, our client is withholding payment until this issue is resolved.

[14] The reference in the email of May 31, 2013 from Ms. Ibe to Mr. Ruso with respect to paragraph 7 of The Minutes of Settlement is likely an error, as paragraph 7 of The Minutes of Settlement relates to the voluntary signing of The Minutes of Settlement. In all likelihood, the reference in the email to paragraph 7 should have been to paragraph 4 quoted above.

[15] Not surprisingly, the email of May 31, 2013 did not find favour with JMX or Mr. Ruso, who almost immediately responded to Ms. Ibe, indicating that her clients' position was unacceptable and that the settlement funds were late.

[16] On June 11, 2013, Mr. Ruso wrote to Ms. Ibe by email indicating that his client had the right to rectify the work and that her clients had the obligation to provide his client with the opportunity to rectify the deficiencies. Mr. Ruso also advised that his client had the right of inspection and requested an opportunity for his client to inspect the deficiencies.

[17] On June 25, 2013, Kelli Baker, the controller of JMX, sent an email to Mr. Goodman with respect to the deficiencies and repeated the position of Mr. Ruso that JMX had the right of inspection and the right to rectify any defect. An immediate response was sought by Ms. Baker from Mr. Goodman. Despite this request to inspect the deficiencies and to rectify the deficiencies, no response was made by Mr. Goodman to this email. There does not appear to have been any response made by Ms. Ibe on her clients' behalf either.

[18] In Mr. Goodman's affidavit, he indicates that he was advised by the site architect, Mr. Aubry, not to allow JMX to return to the Railroad Site to perform any further work. The position of Mr. Aubry was never communicated to JMX. The evidence is therefore clear and beyond dispute that JMX was never given the opportunity to attend at the Railroad Site to inspect any of the alleged deficiencies nor was JMX given an opportunity to rectify any of the deficiencies.

Position of the Plaintiff

[19] JMX relies on The Minutes of Settlement which JMX argues are clear and beyond dispute. Specifically, it is argued that The Minutes of Settlement require Trifield to pay the sum

of \$30,015.63 within thirty days from the date of execution of The Minutes of Settlement. The Minutes of Settlement were signed by JMX on April 17, 2013 and by Trifield on April 19, 2013, and as such payment was due by May 19, 2013.

[20] With respect to the suggestion that the defendants have the right of set-off with respect to the deficiency costs, counsel for JMX argues that in the absence of JMX being given an opportunity to inspect and rectify the deficiencies, no such right of set-off exists. Specifically, counsel for JMX refers to paragraph 4 of The Minutes of Settlement pursuant to which JMX has the obligation to satisfy its warranty obligations with respect to the work performed at the Peel and Railroad Sites.

Position of the Defendants

[21] Ms. Ibe on behalf of Trifield argues that there are genuine issues which require a trial with respect to the amount for which Trifield alleges that it is entitled to set-off and/or counterclaim against JMX with respect to the deficiencies at the Railroad Site. Implicit in Ms. Ibe's argument is the suggestion that Trifield was under no obligation to allow JMX to either inspect and/or to rectify any of the alleged deficiencies and that paragraph 4 of The Minutes of Settlement which is relied on by JMX neither explicitly nor implicitly gives JMX that right or opportunity.

Analysis

[22] A clear admonition to motion court judges with respect to motions for summary judgment has been made clear by the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 S.C.C. 7, to provide timely, affordable and fair access to justice. While there are cases that will undoubtedly have to go to trial where the full forensic machinery of a trial is available to both parties, *Hryniak* has made clear that a culture shift is required by everyone associated with the judicial system to ensure that the parties to a lawsuit are provided with a means, where possible, to avoid the unnecessary expense and delay inherent in a full blown trial.

[23] At paragraph 28 of *Hryniak*, Karakatsanis J. states:

This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible—proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[24] In this case, JMX rendered invoices for work done in the latter part of 2012. The parties, with the assistance of their counsel, entered into minutes of settlement that required Trifield to pay JMX approximately \$30,000 by no later than May 19, 2013. We are now nearly two years after the execution of The Minutes of Settlement and well after two years when the invoices outstanding were rendered by JMX.

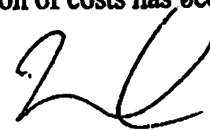
[25] I agree with JMX's counsel that there is essentially only one issue on this motion for summary judgment. There is no issue with respect to the quantum claimed by JMX. The only issue is whether or not paragraph 4 of The Minutes of Settlement entitles Trifield to set-off the alleged costs to rectify the alleged deficiencies at the Railroad Site without giving JMX the opportunity to inspect and/or to rectify those deficiencies.

[26] In *Rocksolid v. Bertolissi*, 2013 ONSC 7343, Smith J. reviewed at some length the jurisprudence with respect to the obligation of an owner or general contractor to provide a subcontractor with a reasonable opportunity to correct deficiencies. A review of that jurisprudence in my view makes clear that in the absence of some contractual provisions which would preclude such a right, there is an obligation on an owner or general contractor to provide a subcontractor like JMX, with an opportunity to inspect and/or rectify deficiencies in the subcontractor's work. In that regard, Smith J. referred to a decision of Hill J. in *CS Bachley Builders Ltd. v. Lajlow*, [2008] OJ 4444, at paragraph 65 where Hill J. stated:

The plaintiff acknowledges deficiencies in the carpentry and related work of its roofing sub-trade. Mr. Tomkins did not suggest these deficiencies were trivial. However Bachley was entitled to the opportunity to correct the unsatisfactory work, to lay off the correction costs against its sub rather than absorb it, and to complete its contract. ...it was unreasonable not to permit Bachley to rectify the roofing deficiencies.

[27] Whether it is explicit or implicit from the terms of paragraph 4 of The Minutes of Settlement, it was unreasonable in my view for Trifield not to provide JMX an opportunity to inspect the deficiencies at the Railroad Site. It was equally unreasonable not to give JMX the opportunity to rectify the deficiencies and to comply with its obligations to satisfy its warranty work as specified in paragraph 4 of The Minutes of Settlement.

[28] In coming to the conclusion I have in this regard, I do so without prejudice to the right of the defendants to continue with its counter-claim. This is precisely the type of case that a motion for summary judgment affords the parties a fair process by which the court can make the necessary findings of fact and apply the law to the facts, thereby achieving for the parties a fair and just adjudication of the case on its merits. In my view, there is no genuine issue that requires a trial with respect to JMX's entitlement to enforce The Minutes of Settlement. JMX is therefore entitled to judgment in the amount claimed together with prejudgment interest and costs. If the parties cannot agree upon costs, written submissions limited to two pages in length are to be received by the court within fifteen days of receipt of these reasons. If no costs submissions are received within that timeframe, the court will assume that the question of costs has been resolved by the parties.



Justice M.L.J. Edwards