

CANADA / JUDGMENT

Certified Coating Specialists Inc. (Re)

2017 BCSC 1055

COURT

Supreme Court of British Columbia

DECIDED

5 May 2017

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2017 BCSC 1055 Certified Coating Specialists Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Certified Coating Specialists Inc. (Re)

2017 BCSC 1055

Date: 20170505

Docket: B160590

Registry: Vancouver

In The Matter of the Bankruptcy and Insolvency Act of

Certified Coating Specialists Inc.

Before: The Honourable Mr. Justice Mayer

Oral Reasons for Judgment

In Chambers

Counsel for the Trustee of Certified Coating Specialists Inc.:

S.J. Nelligan

Counsel for Flatiron/Dragados Joint Venture and the Sovereign General Insurance Company:

J. Moshonas

Place and Date of Hearing:

Vancouver, B.C.

May 2, 2017

Place and Date of Ruling:

Vancouver, B.C.

May 5, 2017

- [1] This is an application brought by the Bowra Group Inc. (the "Trustee") in its capacity as the trustee in bankruptcy of Certified Coating Specialists Inc. ("CCS"). The Trustee applies for the following orders:
1. A declaration that certain holdback funds with respect to the BC Hydro Ruskin Dam & Powerhouse Upgrade project in the amount of approximately \$65,308 (the "holdback funds") are the property of the bankrupt CCS.
 2. An order directing the law firm Jenkins Marzban Logan LLP to deliver the holdback funds to the Trustee; and
 3. Costs at Scale B.
- [2] The respondents Flatiron/Dragados Joint Venture, Flatiron Constructors Canada Ltd., Dragados Canada Inc. (collectively "Flatiron") and the Sovereign General Insurance Company ("Sovereign") oppose the Trustee's application.

Background

- [3] By contract made March 13, 2015, CCS agreed to provide construction services as a subcontractor to Flatiron in respect of the Ruskin Dam & Powerhouse Upgrade Project (the "Project") pursuant to a subcontract dated March 13, 2015 (the "Subcontract").
- [4] On January 20, 2016, CCS was deemed to have filed an assignment in bankruptcy and the Trustee was appointed. Sovereign had issued a performance bond dated July 27, 2015, in the amount of approximately \$506,000 to Flatiron guaranteeing to pay the lesser of the bond amount or the cost to complete the CCS subcontract work should CCS breach its obligations to Flatiron. Sovereign had also issued a labour-and-materials payment bond on the same date and in the same amount.
- [5] Prior to its assignment in bankruptcy on January 20, 2016, CCS provided subcontract services in accordance with the Subcontract and invoiced Flatiron for such services and Flatiron paid the relevant amounts, less a holdback required pursuant to s. 4 of the Builders Lien Act. The holdback funds totalling approximately \$65,308 are currently held in the trust account of Jenkins Marzban Logan LLP, counsel for the Respondents. The Trustee takes the position that there are no lien claims against the holdback funds, or at least they have not determined if there are any at this time, and that the holdback funds must be delivered to the Trustee.

- [6] Counsel for the Trustee advises that if the holdback funds are paid over to the Trustee, the Trustee will make efforts to determine whether there are any valid claims, including lien claims, against those funds and that claimants including Flatiron will be at liberty to file proof of claims in the bankruptcy proceedings. In the case of Flatiron it appears that it will be necessary for it to seek leave from this court, as the time for filing proof of claims has expired.
- [7] Flatiron says that pursuant to the Subcontract, CCS was required to complete all of the work contemplated by December 21, 2016. In or about January 2016 CCS notified Flatiron that it was insolvent, has gone into receivership and would not be completing the work as agreed. CCS had effectively abandoned further work on the Project at that time.
- [8] As a result Flatiron was required to retain a replacement subcontractor who agreed to complete the remaining work for an amount which is approximately \$131,000 more than Flatiron says it would have been required to pay CCS had CCS completed the remaining work in accordance with the terms of the Subcontract.
- [9] Flatiron says that under the terms of the Subcontract, CCS is not entitled to payment of the holdback funds until substantial performance of the work and even upon substantial performance, as a result of CCS' breach of the subcontract, that Flatiron has a contractual, or alternatively an equitable, right of set-off entitling it to retain the holdback funds to offset its losses.
- [10] Flatiron points to s. 6.1.2 of the Subcontract which states that payment is not due until substantial performance of the work is completed. s. 6.1.2 of the Subcontract provides as follows:
2. upon Substantial Performance of the Work, [Flatiron will] pay to the Subcontractor the percentage of the Subcontract Price which has been held back from the preceding progress payments when due together with such Value Added Taxes as may be applicable to such payment .
- [11] In addition Flatiron points to s. 5.2.3 of the Subcontract Conditions, which includes a right of contractual set-off. Section 5.2.3 reads as follows:
- Without restricting any right of set-off given or implied by law, and notwithstanding any other provision of this Subcontract, the Contractor may withhold any payment or portion thereof to the extent necessary to protect the Contractor against any damage, cost or loss, including legal or other expenses arising out of the failure of the Subcontractor to fulfill any of its obligations under this Subcontract and apply such amount towards any damage, loss or cost incurred by the Contractor.
- [12] Flatiron says that it has or will suffer a loss of approximately \$131,000, being the difference in the subcontract price it was required to pay to the replacement subcontractor and the agreed-upon Subcontract price with CCS.

- [13] Flatiron concedes that its actual losses may be closer to approximately \$66,000, which amount is determined by deducting the holdback amount from the additional subcontract costs. I note that in any case this shortfall is more than the \$65,308 holdback funds held in the trust account of Flatiron's solicitors.
- [14] The Trustee asserts that the holdback funds are the property of the bankrupt CCS and seeks an order pursuant to the inherent jurisdiction of this court that the holdback funds are to be paid over.

Analysis

- [15] A trustee has no greater or higher rights than those of the debtor, except where otherwise provided in legislation: *Frank Bennet, Bennet on Bankruptcy*, 19th ed (Lexis Nexis, Canada, 2017) at 318. The question then is what property rights does CCS have in respect of the holdback funds?
- [16] I accept the argument of Flatiron that pursuant to s.6.1.2 of the Subcontract Flatiron is not required to pay the holdback funds to CCS until substantial performance of the work is completed and that since this event has not occurred it cannot be said that CCS is entitled to be paid the holdback funds and therefore it cannot be said that the holdback funds are the property of CCS.
- [17] In addition it may be that when the holdback funds become payable and therefore arguably become the property of CCS, that Flatiron will be able to rely upon the contractual right of set-off found in ss. 5.2.3 of the Subcontract Conditions or alternatively as it argues the right of equitable set-off, but it is not necessary for me to make a determination in this regard at this time and I decline to do so.
- [18] Finally, I refer to the decision of the Alberta Court of Appeal in *Iona Contractors Ltd. v. Guarantee Company of North America*, 2015 ABCA 240. That case addressed the question of whether or not the contractee, the Calgary Airport Authority, was entitled to holdback funds that were held in respect of a contract awarded to the prime contractor, Iona that went bankrupt.
- [19] In that case the Alberta Court of Appeal found that funds held back by the Calgary Airport Authority were impressed with a trust under the Alberta Builder's Lien Act and therefore were not the property of the contractor Iona. The question of whether or not the holdback funds held by Flatiron's solicitors are impressed with a similar trust was not argued before me, but it may well be that that is the case. But again, I do not believe it is necessary for me to make that determination.

Decision

[20] After my review of the materials filed and consideration of the submissions made and the authorities referred to by the Applicant and Respondents, I am not satisfied that the Applicant is entitled to the orders sought. Accordingly I dismiss the application of Bowra Group Inc. in its capacity as trustee in bankruptcy for Certified Coating Specialists Inc. with costs to the Respondents at Scale B.

"Mayer, J."

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Prepared on 28 October 2026 · Esheria