

CANADA / JUDGMENT

Citta Construction v. E. Lane Holdings et al

2003 BCSC 1929

COURT

Supreme Court of British Columbia

DECIDED

19 December 2003

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2003BCSC1929 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Citta Construction v. E. Lane Holdings et al, 2003 BCSC 1929 Date: 20031219 Docket: 02 1685 Registry: Victoria Between: CITTA CONSTRUCTION LTD. Plaintiff And ELIZABETH LANE HOLDINGS LTD. GREGORY HAYS and Sylvia MARCOLINI Defendants Before: The Honourable Mr. Justice Romilly Reasons for Judgment Counsel for the Plaintiff: P.G. Guy Counsel for the Defendants: G.N. Harney Date and Place of Trial: December 8-12 Victoria, B.C. NATURE OF THE ACTION

- [1] This is an action by the plaintiff for breach of an agreement between the plaintiff and the defendants to pay the amount of \$15,500 plus interest to settle an unpaid debt arising from a construction contract. The defendants submit that they have been charged in excess of the amount specified in the initial construction contract and that they are entitled to the defence of set off against the \$15,500 debt as a result of this overcharge.
- [2] For the reasons stated below, I find that there will be a judgment granted in favour of the plaintiff in the sum of \$4745 plus interest of 1.5% above prime from August 1, 2000 until today's date.

BACKGROUND

- [3] On or about May of 1996 the plaintiff agreed to act as general contractor for the defendants on a cost plus ten per cent basis for the construction of the Café Brio restaurant in Victoria, B.C. Of the ten per cent amount allowed over cost, five per cent was to be allocated for overhead and five per cent for profit. At the time of this agreement, the plaintiff and the defendants were friends and business associates. The terms of the oral contract for the construction of Café Brio were never reduced to writing.
- [4] Although an initial budget of \$400,000 was discussed, construction of the restaurant did not go smoothly and costs escalated due to various unforeseen problems. The plaintiff gave the defendants updated preliminary budgets from time to time and invoices on a monthly basis. The plaintiff's monthly invoices did not include a breakdown of the charge out labour costs and no inquiry was made by the defendants as to the breakdown of these charges.

- [5] Construction of Café Brio was completed in May or June of 1997 for a final cost of close to \$600,000. The plaintiff agreed to carry some of the outstanding debt on an interest-free basis for a limited period of time. In a meeting on July 11, 1998, the parties agreed that the remaining outstanding balance due to the plaintiff of \$18,779 would be settled for \$15,500. Minutes of this meeting and the agreement reached were taken and these minutes were initialled by the parties.
- [6] Subsequent to the July 11th meeting, a promissory note dated July 22, 1998, was sent to the defendants by the plaintiff stating that the balance due was \$15,500 and that interest would be calculated at prime plus 1.5% after a two year interest and payment-free period. A \$1000 gift certificate was to form partial payment of the debt and was to be delivered immediately. The promissory note was never signed by the defendants, no payments were made and the gift certificate was not delivered.
- [7] The defendant Gregory Hays gave evidence that not long after the meeting of July 11, 1998, the defendants discovered from the plaintiff's foreman, John Damore, that the wage rate charged by the plaintiff of \$35.00 per hour exceeded the wage rate paid to Mr. Damore by \$12.00 per hour. In addition, conversation with the plaintiff's carpenter, Joe McKinnon, revealed his wage rate to be \$19.00 per hour, not the \$29.00 per hour charged to the defendants. Gregory Hays stated that he visited his accountant, Mr. Eade, with this information. Mr. Hays testified that Mr. Eade advised him that the charge out labour rates used by the plaintiff, allowing for payroll costs, did not accurately reflect the actual cost of labour on the project.
- [8] The defendant Gregory Hays also stated that he received a telephone call from the plaintiff sometime in 1998 regarding the promissory note and that he advised the plaintiff that the promissory note would not be signed or paid as he felt that the actual labour costs were significantly less than had been charged. The plaintiff's recollection of this matter differed. The plaintiff testified that he did not discover until July 2000, the month in which payment was to begin on the promissory note, that the defendants had not signed the note and had no intention of paying the debt. THE ISSUES
- [9] During trial the issues to be decided were narrowed to the following:
- 1) At what point did the plaintiff receive notice that the contract for the payment of \$15,500 would not be honoured by the defendants due to the dispute over charge out labour costs;
 - 2) Is the defence of set-off available to the defendants against the \$15,500 payment agreed to by the parties;
 - 3) If so, which party bears the onus of proof as to the alleged overcharge of labour costs by the plaintiff; and,
 - 4) How should the amount to be set off against the debt owed by the defendants, if any, be calculated? ISSUE ONE

- [10] A \$1000 gift certificate to be used at Café Brio formed part of the agreement reached by the parties on July 11, 1998. The promissory note, dated July 22, 1998, and delivered to the defendants sometime in 1998, stated that the certificate was to be paid immediately. The gift certificate was never delivered. No explanation was advanced by the plaintiff as to why CITTA did not pursue fulfilment of this term of the agreement.
- [11] I find that, on the balance of probabilities, it is more likely that the defendant Gregory Hays informed the plaintiff in 1998 some time after receiving the promissory note that the promissory note had not been signed and would not be honoured. ISSUE TWO
- [12] The plaintiff submits that the defendant's claim in equitable set off should not be allowed as it is not particularized in the statement of defence.
- [13] Although the defendants did not specifically claim set off in their pleadings, claiming breach of contract instead, the defendants clearly set out the material facts supporting such a claim by stating the following in paras. 5-7:
- (5) The Plaintiff breached the terms of the contract in that it did not adhere to the formula set out in the contract for calculation for cost plus charges.
 - (6) The Plaintiff charged higher labour rates than authorized by the contract.
 - (7) The Plaintiff took a higher profit margin than authorized by the contract. .
- [14] I find that the function of the statement of defence of giving fair notice regarding the claim of overcharge on the original construction contract was fulfilled. Further, I find that, at the time the statement of defence was drafted, the defendants had yet to receive the documentation necessary to substantiate or calculate the overcharge, if any. Further, the defence of set off was argued by the defendants at trial. Counsel for defence moved to amend the pleadings if necessary at the close of trial. In these circumstances, it would be unjust to disallow the defence of set off on the grounds that there had been a failure to plead.
- [15] In so finding, I note that the purpose of the Rules of Court is the just, speedy and inexpensive determination of each case on its merits. I find that it would not, on the facts of this dispute, serve the administration of justice to require the parties to engage in further expensive litigation regarding the allegation of breach of contract where the matter can be decided in a single proceeding.
- [16] It is clear that the agreement reached by the parties for the settlement of the outstanding debt owed by the defendants to the plaintiff for the construction of Café Brio was predicated on a correct calculation of costs by the plaintiff. It was not until after the agreement was reached that the defendants discovered that a discrepancy between the labour rates charged and the actual labour costs existed. I am satisfied that an overcharge could not have been discovered from the invoices provided to the defendants by the plaintiff.

- [17] Based on the preceding analysis, the defence of set off is clearly connected to the claim for payment advanced by the plaintiff such that it would be unjust to enforce payment without considering whether there has been an overcharge. As a result, equitable set off is available to the defendants if supported by the facts: See *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* and *Tsang* (1985), 65 B.C.L.R. 31 (C.A.), and *Cam-Net Communications v. Vancouver Telephone Co.*, [1999] B.C.J. No. 2855 (C.A.). ISSUE THREE
- [18] Counsel for the plaintiff submits that the defendants chose not to conduct examinations for discovery or deliver interrogatories in this action and as such he did not ask the plaintiff how, in fact, labour costs had been calculated for the construction of Café Brio. Without this factual matrix, the plaintiff submits that it is impossible to determine whether there has been an overcharge. The plaintiff further asserts that the breakdown of labour costs provided by the plaintiff is of illustrative value only and may not be relied upon to calculate actual labour costs.
- [19] Counsel for the defendants provided me with authority for the proposition that the onus of showing that the labour charges for the construction of Café Brio were reasonable rested with the plaintiff. In *Jamieson Construction Co. Ltd. v Lacombe & N.W.R.*, [1926] 2 D.L.R. 653 (Alta. S.C., App. Div.) at 653 the court held that: Where a contractor is entitled to a quantum meruit for work done, to be determined on a cost plus basis, he is only entitled to such costs as he has actually incurred which are reasonable in amount and were reasonably and justifiably incurred under all the circumstances, and where there is no express contract the onus is on the contractor to show reasonableness. In addition, in *Taylor v. Taylor*, [1954] O.W.N. 575 (H.C.J.), the court stated: [U]nder a "cost-plus" contract the contractor should keep accurate accounts of all material he uses and of all wages he pays out and any incidental expenses, in such a manner that the person to be charged therewith can readily check and verify the charges. Generally he should not be allowed to put the owner in the position of having to accept his unsupported statement of account, for that is evidence of a kind most difficult to refute, but this is not to say that such a contractor must fail to recover anything merely because his records are imperfect.
- [20] I note that the plaintiff was cross-examined regarding the method of calculating labour charges for the construction of Café Brio, although an exact accounting was not obtained. In addition, payroll records demonstrating actual payments made to a number of employees were provided by the plaintiff. There is no air of legitimacy to the plaintiff's submission that the plaintiff did not need to demonstrate the reasonableness of its labour charges and that the labour break down it provided may not be scrutinized for accuracy. ISSUE FOUR
- [21] I am satisfied that the amount of \$15,500 is owed to the plaintiff as a result of the July 11, 1998, agreement. I am also satisfied that the defendants are entitled to set off against this debt if overcharge is established on the facts.

- [22] The issue to be determined therefore is what the plaintiff was entitled to charge for labour under a cost plus contract. This issue was addressed by the Alberta Supreme Court in *Jamieson Construction*, supra, at p.655: "The costs and expenses which the Plaintiff actually incurred in doing the work in so far as such actual costs and expenses were reasonable in amount and reasonably and justifiably incurred having regard to all the circumstances and conditions of time and place and relationship of the parties and otherwise existing from time to time from the commencement of the negotiations for the doing of the work to its conclusion."
- [23] I accept that an oral cost plus contract would require a contractor to charge actual costs plus ten per cent. I am, however, mindful of the principle set out in *Dalway v. Moore*, [1991] B.C.J., 455 (S.C.) at pg. 3-4, citing *Kerr v. Harrington* (1947), O.W.N. 237 (H.C.J.) at 240. In *Dalway*, Millward J. found that, in the case of cost plus contracts, each case must be decided upon the terms of the contract in question and the rules laid down by the courts or other cases must be followed with care.
- [24] Although counsel for the defence provided authority for the exclusion of supervisory costs from the "cost" portion of a cost plus contract, I do not accept this argument on these facts. The defendants received notice that supervisory time was being charged in summaries attached to the plaintiff's monthly invoices and these invoices were not contested. I would agree with the plaintiff that this amount was properly charged as part of the "cost" portion of the contract.
- [25] Payroll records provided by the plaintiff revealed that holiday pay for employees was calculated and paid at a rate of 10 per cent. Although submissions were made by counsel for the defendants as to a reduction in holiday pay to the statutory minimum of 7.46 per cent, I would not allow this reduction. I do not find these payments to be unreasonable and I am satisfied that it would be unfair to require the plaintiff to bear this cost.
- [26] The plaintiff submits that the document it provided regarding calculation of labour costs was by illustration only and that any argument based upon it is necessarily pure conjecture. I reject this argument to the extent that clear error is revealed by the figures used to calculate employer Canada Pension Plan (C.P.P.) contributions and Employment Insurance (E.I.) premiums. These costs are set by the federal government and easily ascertainable by reference to federal records for 1996. The contributions for C.P.P. required from employers in 1996 were 2.8%. The plaintiff's document is based on contributions of 4.5%. Employer contributions for E.I. 1996 were set at 4.13%. The plaintiff's document allows 5% for employer contributions. Copies of 1996 pay cheque stubs for five CITTA employees for work billed to Café Brio were provided by the plaintiff. A review of these records reveals that CITTA's C.P.P. and E.I. contributions did not exceed the statutory minimums for 1996. The labour costs charged to the defendants will be reduced accordingly.

- [27] Payroll records also reveal that only one out of the five employees received extended medical benefits and that mileage reimbursement was rare. I find that the charge of \$1.75 per hour for truck and mileage per employee, including office staff, and \$1.00 per hour for extended benefits per employee, unsupported by the documents provided. I reduce these charges by \$.75 per hour to a total of \$2.00 per hour for truck and mileage and extended medical per employee.
- [28] As set out in the appended tables, I calculate the overcharge on labour to be \$14,031.10. This amount will be reduced by \$3276.00 in order to rectify the windfall that would otherwise be awarded to the defendants as a result of the reduction to the original debt of \$18,776 granted to the defendants in the July 11, 1998, agreement.
- [29] The end result is that the defendants are entitled to a set off of \$10,755.00 against the \$15,500.00 debt they owe to the plaintiff. Type Base Pay Plus Holiday Pay 10% WCB 7.5% C.P.P. 2.8% WCB 4.13% Total Plus 2.00 Mileage & Dental Rate Charged Total Excess Charged Per hour Foreman 1 23.00 25.30 1.90 .71 1.04 30.95 32.00 1.05 Foreman 2 23.00 25.30 1.90 .71 1.04 30.95 35.00 4.05 Supervisor 1 24.00 26.40 1.98 .74 1.09 32.21 35.00 2.79 Supervisor 2 24.00 26.40 1.98 .74 1.09 32.21 36.00 3.79 Supervisor 3 24.00 26.40 1.98 .74 1.09 32.21 40.00 7.79 Labourer 1 12.67 13.94 1.05 .39 .58 17.96 18.00 .04 Labourer 2 12.67 13.94 1.05 .39 .58 17.96 22.00 4.04 Carpenter 19.00 20.90 1.57 .59 .86 25.92 29.00 3.08 Office 1 10.00 11.00 .83 .31 .45 14.59 20.00 5.41 Office 2 10.00 11.00 .83 .31 .45 14.59 22.00 7.41 Type Total Excess Charged Per hour Number of Hours Worked Total Overcharge Foreman 1 1.05 23 24.15 Foreman 2 4.05 971 3932.55 Supervisor 1 2.79 479 1336.41 Supervisor 2 3.79 1 3.79 Supervisor 3 7.79 42.75 333.02 Labourer 1 .04 1435.25 57.41 Labourer 2 4.04 6.75 27.27 Carpenter 3.08 2242 6905.36 Office 1 5.41 4.5 24.35 Office 2 7.41 15 111.15 Sub-Total 12755.46 Plus 10% 1275.55 Total Overcharge 14031.10

CONCLUSION

- [30] There will be judgment in favor of the plaintiff in the sum of \$4,745 plus interest of 1.5% above prime from August 1, 2000 until today's date. In addition the plaintiff would be entitled to costs. "S.R. Romilly, J." The Honourable Mr. Justice S.R. Romilly

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