

CANADA / JUDGMENT

Denning Restoration v. Solid Surface Countertops

2000 BCSC 1782

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 1782 Docket:

3069/99

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DENNING RESTORATION & IMPROVEMENT INC.
PLAINTIFF

AND:

SOLID SURFACE COUNTERTOPS LTD. AND ROBERT BURKHOLDER
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE R. D. WILSON

Counsel for the Plaintiff: J. Gereluk

Counsel for the Defendants: J. Horton

Date and Place of Hearing/Trial: 20 October 2000

Victoria, BC

I.

- [1] The defendants seek a summary disposition, pursuant to Rule 18A, of the plaintiff's claims against them.

- [2] The plaintiff's claims sound in contract, although pleas of bailment and trust are also made.
- [3] Mr. Victor Denning is the principal officer of the plaintiff. The defendant Burkholder is the principal officer of the corporate defendant.
- [4] The dispute concerns certain Czechoslovakian mouldings.

II.

- [5] In the summer of 1998, Mr. Burkholder suggested to Mr. Denning that he, Mr. Denning, acquire an inventory of mouldings, then being marketed, on an "as is, where is" basis by a liquidator. Mr. Denning followed Mr. Burkholder's suggestion. By an agreement made 12 August 1998, Mr. Denning agreed with the liquidator to acquire the mouldings. The agreement between Mr. Denning and the liquidator was reduced to writing. The parties to that agreement are the plaintiff as "purchaser" and the liquidator as "vendor". The recitals to that agreement refer to the assets as a "large amount of mouldings and picture frame material" on the liquidator's premises at 11 August 1998. It was a term of the agreement that:

... It is estimated that the Mouldings and Frame Material which form the sale assets amount to approximately 90,000 feet less such portion as has been disposed of prior to the close of business on August 11, 1998 and which amounts to approximately 3000 feet.

- [6] It was further a term of that agreement that Mr. Burkholder would attend at the liquidator's premises to take inventory of the material.
- [7] In addition to agreeing to inventory the material, Mr. Burkholder agreed to act as sales agent for the plaintiff in the marketing of the material, in consideration of a payment to him, by the plaintiff, of a commission calculated on 20% of the gross sales price. It was also a term of the agreement between the plaintiff and Mr. Burkholder that the plaintiff would be responsible for all expenses of marketing.
- [8] The plaintiff completed its contract with the liquidator. The consideration paid by the plaintiff for the material was \$48,000.00. It was a condition of that contract that the material be moved from the liquidator's premises forthwith. In preparation for that move, Mr. Burkholder did attend to inventory the material. Due to the manner in which the material was stored, Mr. Burkholder did not count each and every item in the inventory. Rather, he took information recorded on the containers, and transferred that information to an inventory sheet. By inventorying the material in this manner, Mr. Burkholder concluded that the plaintiff had purchased 80,272 linear feet of Czechoslovakian moulding. He confirmed his inventory count in a facsimile transmission to the plaintiff on 14 August 1998.
- [9] Mr. Burkholder then caused the material to be relocated at a temporary storage site. There it remained until mid-October 1998, when it was transferred to a more permanent warehousing facility. Upon the arrival of the material at this facility, Mr. Burkholder removed the mouldings from their containers and did an actual count of the material then in his possession. As a result of this count, Mr. Burkholder calculated that he was then in

possession of some 65,808 linear feet of Czechoslovakian moulding. In the course of doing the actual physical count, Mr. Burkholder learned that the information recorded on the containers, upon which he had relied in August, was in error. In some instances, the information printed on the container indicated more linear feet than were actually contained in the container. In other cases, the information on the container was in error, in that more linear feet were actually contained in the container.

- [10] Commencing in August 1998, Mr. Burkholder marketed the mouldings. The world did not beat a path to Mr. Burkholder's door. The Czechoslovakian mouldings apparently were not a hot ticket item on the market in the County of Victoria at that time.
- [11] After considerable prompting by the plaintiff, Mr. Burkholder did provide some information with respect to the success, or lack thereof, of the marketing program.
- [12] Frustrated by the lack of activity on the part of Mr. Burkholder, the plaintiff took the remaining material from Mr. Burkholder's hands in February 1999. The plaintiff used some of the material for its own purposes, and sold 52,254 linear feet to a retailer in Victoria.

III.

- [13] The plaintiff says that, based upon the inventory of August 1998, Mr. Burkholder has failed to account for 18,304 linear feet of mouldings. Alternatively, based upon the October inventory, Mr. Burkholder has failed to account for 3,754 linear feet of Czechoslovakian moulding. The plaintiff seeks judgment against Mr. Burkholder for that deficiency.
- [14] The plaintiff's claim on the August inventory is based on the proposition that the count at that time was accurate.
- [15] Mr. Gereluk has argued that the August inventory was not a mere estimate, but rather a count which manifestly demonstrated that Mr. Burkholder had performed his duties under the agreement he had with the plaintiff, to make an accurate count of the mouldings, piece by piece.
- [16] I am not persuaded by Mr. Gereluk that the August count was accurate. I think it is more in harmony with the preponderance of probability that Mr. Burkholder did not count each piece of moulding, item by item. Rather, he simply took the information recorded on each container, accepted it as accurate, and reported to the plaintiff accordingly. Unfortunately, Mr. Burkholder was wrong. That became clear when he took the trouble to do a proper inventory in October 1998.
- [17] I find that the count done by Mr. Burkholder in October 1998 provides more reliable evidence of the probable volume of inventory of Czechoslovakian mouldings purchased by the plaintiff from the liquidator. By October 1998, it appears that the inventory on hand was approximately 80% of what had been estimated in the plaintiff's agreement with the liquidator. What is not accounted for in that figure is the quantity of mouldings sold by Mr. Burkholder between mid-August and mid-October 1998.

[18] When the plaintiff took possession of the mouldings in February 1999, it did not conduct an inventory. The plaintiff's present calculation of the quantity of material taken is just that, a calculation based upon materials used, retained, or sold.

IV.

[19] The plaintiff's premises are that the defendants took possession of 80,272 linear feet of mouldings, for the account of the plaintiff, in August 1998. And, accounted 18,304 linear feet less than that volume in February 1999. I have found the first premise is not true. Therefore, Mr. Gereluk's argument is not sound, and the plaintiff cannot prevail.

[20] It may be that Mr. Burkholder did breach his contract in failing to conduct a proper inventory in August 1998. I am not satisfied, however, that any damages have resulted from that breach of contract.

[21] Nor am I satisfied, on a preponderance of the evidence, that the plaintiff has suffered a loss of mouldings while the material was in the possession of Mr. Burkholder.

[22] In sum, the plaintiff has not proved any loss attributable to the conduct of the defendants, or either of them. In result, the action is dismissed with costs.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson

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