

CANADA / JUDGMENT

Leemhuis v. Kardash Plumbing Ltd.

2020 BCCA 99

COURT

British Columbia Court of Appeal

DECIDED

4 March 2020

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2020 BCCA 99 Leemhuis v. Kardash Plumbing Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Leemhuis v. Kardash Plumbing Ltd.,

2020 BCCA 99

Date: 20200304

Docket: CA45457

Between:

Adrian Leemhuis and Lorraine Morris

Appellants

(Plaintiffs)

And

Kardash Plumbing Ltd.

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated

June 22, 2018 (Leemhuis v. Kardash Plumbing Ltd., 2018 BCSC 1137,
Vancouver Docket S127524).

Oral Reasons for Judgment

Counsel for the Appellants:

B.R.H. Johnston

Counsel for the Respondent:

D.J.E. Bilkey, Q.C.

B. Morrow

Place and Date of Hearing:

Vancouver, British Columbia

March 4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 4, 2020

Summary:

The appellants hired a general contractor to construct their home in Golden, British Columbia. The general contractor engaged the respondent subcontractor to perform plumbing work for the home. Several years later, a faucet and a pipe fitting the respondent installed broke, causing flooding damage. The appellants brought a claim by way of summary trial against the respondent alleging breach of contract. The judge dismissed the claim, holding there was no contract between the appellants and respondent for the installation and supply of the plumbing fixture. Rather, if the alleged contract existed, it was between the appellants and their general contractor. The appellants appeal, arguing that an objective reasonable bystander would have concluded that the appellants and respondent intended to contract based on the invoices provided.

Held: Appeal dismissed. A reasonable interpretation of the evidence supports the judge's finding that the appellants and respondent did not enter into the contract alleged. The invoices adduced are not helpful in establishing the contract alleged in this case. Therefore, there is no basis for this Court to interfere with the judge's finding that the parties' intention based on their conduct and the circumstances does not suggest the contract alleged.

MACKENZIE J.A.:

Introduction and Background

- [1] The central issue on this appeal is whether there was a contract between the appellants, Adrian Leemhuis and Lorraine Morris, and the respondent, Kardash Plumbing Ltd. ("Kardash"), for the supply and installation of a pipe fitting connected to a faucet (the "faucet") in the appellants' home in Golden, British Columbia. The faucet broke in April 2012, resulting in flooding damage to the home. The home was constructed by the general contractor, Ballast Nedam Canada Limited ("Ballast"), in 2003-2004. Ballast had subcontracted plumbing and other work to Kardash.
- [2] The appellants brought a claim against Kardash that proceeded by way of summary trial pursuant to R. 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, to determine whether Kardash was liable to the appellants for breach of an implied warranty or condition as to quality or fitness under s. 18(a)-(c) of the Sale of Goods Act, R.S.B.C. 1996, c. 410, or breach of an implied common law warranty of fitness, with damages to be assessed later.
- [3] The judge considered the evidence of the parties' relationship, and the fact Kardash had provided plumbing services and materials pursuant to a work and materials subcontract between it and Ballast, with Ballast acting in its capacity as general contractor. (The claims against the defendants, Ballast, LA Torre S.P.A. and Cascade Faucets Inc., have been discontinued.) The judge determined that the supply of plumbing fixtures was merely incidental to the agreement between Kardash and Ballast. The judge concluded, if the contract alleged by the appellants existed, it was an implied common law term that the faucet would be of good quality and reasonably fit for its use. However, the expert evidence did not establish the faucet was defective, not of good quality, or not reasonably fit for its use. Finding there was no contract between the appellants and Kardash regarding the faucet, the judge dismissed the claim.
- [4] On appeal, the appellants contend the judge erred in failing to find there was a contract between the appellants and Kardash for the sale of the faucet; failing to properly consider whether, if there was such a contract, it was an implied common law term that the faucet would be of good quality and reasonably fit for its use; and finding the expert evidence did not establish the faucet was defective, not of good quality, or not reasonably fit for its use. The appellants do not appeal the finding that the Sale of Goods Act did not apply.
- [5] In my view, the judge's conclusion that there was no contract as alleged is supported by the evidence or lack thereof. The appellants have failed to identify any material error in the judge's reasons. It is unnecessary to address the other issues as they depend on a non-existent contract. I would dismiss the appeal.

At Trial

- [6] The appellants contended at trial that in or about 2003 they entered into a contract with Kardash for the supply and installation of plumbing in their home in Golden. They said the alleged contract included an implied warranty pursuant to the Sale of Goods Act or at

common law that the faucet would be fit for use in their home. The judge observed the appellants appeared to suggest there were individual contracts of sale respecting various plumbing materials supplied by Kardash, including the faucet. The appellants relied on expert opinion evidence to prove the faucet was defective and therefore not fit for the use for which it was used.

- [7] On the other hand, Kardash disputed the alleged contract. Kardash said it supplied plumbing work and materials pursuant to a subcontract between itself and Ballast, the appellants' general contractor. Kardash admitted it performed a variety of services at the home, including installation of the faucet, but that the evidence established that either Ballast or the appellants' interior designer ordered the faucet in question.
- [8] The judge was concerned that the appellants' pleadings did not set out the necessary material facts regarding the formation of the alleged contract. The pleadings simply made "a bald allegation without elucidation" that there was a contract for the supply and installation of the plumbing fixtures, which included a number of expressed or implied terms. However, the judge went on to consider the application based on the materials contained within the notice of application.
- [9] The judge articulated the issues as being whether there was a contract between the appellants and Kardash, and its terms; if there were in fact a contract between the appellants and Kardash, whether the relevant warranty and condition provision under the Sale of Goods Act applied to the contract; if not, whether there was a common law warranty of fitness; and finally, whether there was a breach of both or either the statutory and/or common law warranty.
- [10] On the question of whether there was a contract as alleged, the judge noted that no invoices had been produced respecting the supply of the faucet or any labour or materials for the initial installation work. He also found the evidence established there was no communication between the appellants and Kardash on those matters. Instead, the appellants dealt only with their general contractor (Ballast) or their interior designer, who either made the orders or authorized Kardash's purchase of plumbing fixtures, including the faucet.
- [11] The judge found Kardash provided the plumbing services and materials pursuant to a work and materials subcontract between itself and Ballast, with Ballast acting in its capacity as a general contractor. The supply of plumbing fixtures was merely incidental to this agreement and did not apply to the contract alleged. The judge concluded there was an implied common law warranty as to fitness, but it was provided pursuant to the contract between Ballast and Kardash, and was not breached.

The Issue on Appeal

- [12] The issue is whether the judge erred in finding there was no contract as alleged between the appellants and Kardash for the supply and installation of the faucet.
- [13] In light of my disposition of this issue, it is unnecessary to address the second issue, which is whether there was an implied warranty at common law and whether it was breached.

Standard of Review

- [14] Questions concerning the requirements for the formation of a contract are questions of law, reviewable on a standard of correctness: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 53; *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293 at para. 55. Questions regarding whether a given requirement for the formation of a contract is met involves applying a legal standard to a set of facts and is therefore a question of mixed fact and law, reviewable for palpable and overriding error: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 43, 76.

Applicable Principles

- [15] While the existence of a binding and enforceable contract requires an intention to contract, it is not subjective intention that is relevant, but objective intention: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 35; *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23. This principle stems from the seminal case, *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that [the] other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

- [16] This Court in *Berthin v. Berthin*, 2016 BCCA 104, put the requirement this way:

- [46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

The test for determining consensus ad idem at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": Fridman, *supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power*

Authority, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. [At para. 27.]

[17] In determining intention to contract, a court is not confined to the four corners of the agreement, but may look at "all the circumstances" or "all the material facts": *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at para. 21; *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144 at para. 75; *Lacroix v. Loewen*, 2010 BCCA 224 at para. 36 (per Finch C.J.B.C.). In *Langley*, McEachern C.J.B.C. observed that McLachlin J. (as she then was) in *Osorio v. Cardona* (1984), 15 D.L.R. (4th) 619 (B.C.S.C.), considered "evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties."

Discussion

[18] In my view, a reasonable interpretation of the evidence supports the judge's finding that the appellants and Kardash did not enter into the contract alleged.

[19] The appellants contend the judge erred in addressing the requirement of an intention to enter into the alleged contract by applying a subjective test, which considers what a party assumed, believed or understood regarding the relationship.

[20] The crux of the judge's reasoning is this:

[17] The discovery evidence of Peter Kardash is that none of the invoices on which the [appellants] rely relate to the relevant installation work at the [appellants'] home. No invoices have been produced with respect to the supply of the faucet or for that matter any labour or materials provided in respect of the initial installation work. In addition, I note that in the invoices provided, they list charges for both parts and labour or a blended labour and materials charge. I do not consider that the invoices provided by the [appellants] at the hearing of this application allow me to infer that the parties had a practice of entering into separate contracts for the supply of goods.

[18] Further, the evidence establishes that there was no communication between Kardash and the [appellants] with respect to the supply and installation of the faucet or any materials. The evidence establishes that the [appellants] dealt with either their general contractor or their designer only, who either made orders to or authorized the purchase of plumbing fixtures, including the faucet, by Kardash.

[19] I also note that the discovery evidence of the [appellant] Adrian Leemhuis was that he assumed that Ballast Nedam hired Kardash to perform the plumbing, heating and ventilation work for his home. His evidence was that he did not hire Kardash. He was not

aware of any written contract between Ballast Nedam and Kardash. He did not have any conversations regarding plumbing with anyone from Kardash and referred any questions in this regard to Ballast Nedam. He was not aware who made the decision as to which faucets were to be installed in the [appellants'] Golden home but assumed that Ballast Nedam would have been involved. None of this suggests a contract between the [appellants] and Kardash.

- [20] As a result, I find that Kardash provided the plumbing services and materials pursuant to a work and materials subcontract between itself and Ballast Nedam with Ballast Nedam acting in its capacity as a general contractor and that the supply of plumbing fixtures was merely incidental to this agreement between those parties. Accordingly, if there was an implied warranty with respect to fitness, it was a warranty provided pursuant to a contract between Ballast Nedam and Kardash. Although this finding is sufficient to dispense with the [appellants'] claim, it [sic] will also provide reasons assuming that either a work and materials contract or a sale contract existed between the [appellants] and Kardash.

With the exception of certain discovery evidence of Mr. Peter Kardash (representing Kardash), which I will address shortly, there is no dispute regarding the judge's findings of fact. Indeed, in cross-examination Mr. Leemhuis agreed that Ballast coordinated the construction and Ballast hired the subtrades that worked on the appellants' home.

- [21] It seems the basis for the appellants' argument that the judge considered Mr. Leemhuis' subjective intention is found in para. 19 of his reasons. I disagree that the judge was considering Mr. Leemhuis' subjective intention in that passage. Instead, I see that paragraph as being part of the judge's consideration of the surrounding circumstances in which the alleged agreement was made. Mr. Leemhuis' assumption was relevant to show he was not involved in the decisions in question. Although the judge did not set out the legal test he applied, most of what he said in para. 19, when read in the context of the surrounding paragraphs, refers to circumstances relevant to whether a reasonable person in the situation of the parties would conclude they had entered into a contract. This includes evidence regarding the hiring of Kardash and the person with whom the appellants dealt in the construction of their home, which was Ballast.
- [22] After reviewing the evidence to determine whether it established the alleged contract, the judge concluded, "[n]one of this suggests a contract between the [appellants] and Kardash." Thus, in my opinion, the judge did not impermissibly use the evidence of Mr. Leemhuis' state of mind to conclude he had no intention to enter into a contract with Kardash. Rather, the judge was simply observing that none of the evidence established affirmatively that there was a contract. I understand that to be all the judge meant by saying that "[n]one of this suggests a contract".
- [23] It is common ground the judge erred in relying on certain discovery evidence of Mr. Kardash (referred to at para. 17 of the judge's reasons), that none of the invoices on which the appellants relied related to the relevant installation work at the appellants' home. This discovery evidence had not been admitted. However, as Kardash submits in its factum, this

error was inconsequential. This evidence was available from the invoices themselves as itemized; they did not relate to the installation and/or supply of the faucet. The invoices were all dated in March 2005, well after the construction was completed. The appellants do not dispute that at the trial the judge asked whether the appellants had the invoice dealing with the faucet, but it was not produced. The inadmissible discovery evidence was not required to find the invoices did not relate to the faucet. However, the appellants say the judge's error in considering the inadmissible discovery evidence of Mr. Kardash means the judge failed to draw the inference that the invoice for the faucet was similar to the other four invoices in the record that set out materials and labour invoiced to the appellants. Even if that argument prevailed, I find it would have no material effect on the outcome.

- [24] The appellants relied, in their factum, heavily on *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.*, [1998] B.C.J. No. 1123 at paras. 92-93 (S.C.) [Greenhill], for the proposition that invoices delivered by a contractor can provide evidence of the terms of the contract. In Greenhill, the court noted that the best evidence of that contract was set out in the various invoices that evidenced their agreement. Similarly here, the appellants say the invoices set out the rights and obligations between the parties for the supply of plumbing parts and services. They say the invoices are objective evidence of the contract alleged and a reasonable person reviewing the invoices would conclude there was a legal contractual relationship between Kardash and the appellants. It was governed by the rights and obligations described in the invoices, including the obligation to pay in full and on time, failing which Kardash could impose a fee and retain ownership of the parts.
- [25] In my view, Greenhill is distinguishable. In that case, the court noted the parties had an ongoing relationship of several years involving direct communication. The plaintiff was clearly a general contractor rather than a subcontractor. The question in Greenhill was not who had the obligation to pay the plaintiff, but what that obligation entailed. The inquiry centred on whether the plaintiff should be paid on a "cost plus" basis, or on a quantum meruit basis, based on a series of "estimates" from the plaintiff. But in the present case, the terms of the contract for the supply and installation of the faucet are not in dispute. Rather, the issue is whether the appellants and Kardash formed the contract alleged.
- [26] The appellants submit on the basis that they paid some of Kardash's invoices that they had a contract with Kardash. But in this case, I consider the invoices do not assist in establishing the alleged contract. The appellants say in their factum (at para. 10), "Kardash bought parts to install at the Residence, sold them to the appellants, installed them in the Residence and issued invoices for those parts." This sequence has Kardash selling parts to the appellants before issuing invoices for those parts. However, the judge found the appellants had no communication with Kardash with respect to the supply and installation of the faucet or any materials. Notably, if there was no communication between the parties before the invoices were issued in March 2005, well after the installation of the faucet (as the home was built in 2003-2004), there could have been no offer and acceptance as required for the existence of a contract. The following from the judge's reasons bears repeating:

- [18] Further, the evidence establishes that there was no communication between Kardash and the [appellants] with respect to the supply and installation of the faucet or any materials. The evidence establishes that the [appellants] dealt with either their general contractor or their designer only, who either made orders to or authorized the purchase of plumbing fixtures, including the faucet, by Kardash.
- [27] Again, the appellants neither hired nor had any communication with Kardash, the subcontractor, before or after the installation of the faucet. The appellants did not receive invoices directly from Kardash. That is found in the Examination for Discovery of Mr. Leemhuis at questions 130-36. Rather, Ballast, the general contractor, provided the invoices to the appellants. There is no evidence that the invoice for the faucet was given directly by Kardash to the appellants. The appellants would pay the invoices to Ballast and sometimes, on instructions from Ballast, would pay Kardash directly. That was the extent of the parties' interaction.
- [28] In Langley at para. 76, and Hoban Construction Ltd. v. Alexander, 2012 BCCA 75 at para. 38, this Court referred to Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97 at 103 (Ont. C.A.):

As a matter of normal business practice, parties planning to make a formal written document [of] the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it.

To the extent that the appellants submit the invoices represent the "formal written document" of the expression of their agreement to sell the faucet, the evidence of interactions between the parties falls short of the discussions and negotiations that "necessarily" take place "[a]s a matter of normal business practice" before parties enter into an agreement.

- [29] The appellants also submit that by issuing invoices to the appellants, Kardash protected itself in the event of non-payment by the general contractor. They say Kardash could not create a direct remedy against the appellants without also assuming reciprocal contractual obligations. On this basis, they submit the contract must have existed between themselves and Kardash. But the simple answer to this argument is that the alleged direct remedy did not arise because there was no contract. Nor is there any evidence of why Kardash issued invoices in the appellants' name. There may have been any number of reasons why this occurred. For example, it may have been to identify the project for which the invoice was issued, on instructions by Ballast, or for convenience. The appellants are asking the Court to speculate. I see no merit in this argument.
- [30] In summary, the appellants ask this Court to disturb the judge's finding that there was no contract between them and Kardash. I am not prepared to do so. In my view, the appellants have identified no material error to justify interfering with the judge's dismissal of their claim. The evidence provides an insufficient basis for a reasonable person in the position of the appellants to conclude that the parties had a contract as alleged.

Disposition

[31] In the result, I would dismiss the appeal.

[32] GROBERMAN J.A.: I agree.

[33] STROMBERG-STEIN J.A.: I agree.

[34] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Madam Justice MacKenzie"

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