

CANADA / JUDGMENT

Mahal Enterprises Inc. v. Kim

2014 BCSC 1801

COURT

Supreme Court of British Columbia

DECIDED

26 September 2014

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2014 BCSC 1801 Mahal Enterprises Inc. v. Kim IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Mahal Enterprises Inc. v. Kim, 2014 BCSC 1801 Date: 20140926 Docket: 10922 Registry: Rossland Between: Mahal Enterprises Inc. (doing business as Ramada Ltd. and Ramada Limited Grand Forks) Plaintiff And Sook Ja Kim and David Kim (both doing business as Metro Restaurant Equipment) Defendants Before: The Honourable Mr. Justice McEwan Reasons for Judgment Counsel for the Plaintiff: J. T.E. Gelber Counsel for the Defendants: D. J. McLellan Place and Date of Trial/Hearing: Rossland, B.C. September 2-4, 2014 Place and Date of Judgment: Rossland, B.C. September 26, 2014

- [1] The plaintiff operates a hotel and leases restaurant premises in Grand Forks, British Columbia.
- [2] The defendants are in the business of buying used restaurant equipment, preparing it for sale and reselling it.
- [3] The plaintiff was interested in outfitting the leased premises so they would be suitable for opening a restaurant. He came across an advertisement the defendants had placed in a Korean-language newspaper and contacted David Kim.
- [4] On February 27, 2011, David Kim went to Grand Forks to look at the premises to determine what equipment the plaintiff needed. This resulted in a list of equipment totalling \$28,450 in value, and HST of \$3,414, for a total of \$31,864.
- [5] The plaintiff paid a deposit of \$20,000 against this list.
- [6] The defendant returned to Vancouver and marshalled the equipment, some of which he had on hand and some of which he needed to acquire.
- [7] On May 7, 2011, Mr. Kim agreed to the supply of an additional \$9,700 worth of equipment, which, including \$1,194 in HST, resulted in a further agreement for \$10,894 in addition to the \$31,864 on the first equipment list.
- [8] To this point the arrangement appears to have been solely for the supply and delivery of the equipment. There was nothing in writing respecting installation.

- [9] The parties had a meeting on or about August 12, 2011, the gist of which was noted in the defendant's handwriting on the second equipment list. At that point the acknowledged state of accounts between the parties was that the plaintiff had paid \$42,000. The notation adds a further item, "120 chairs," and then a note, "total parts and labour 50,000 will complete." There is another notation on the document that reads "Balance on \$8000". It appears tolerably certain that as of this date (August 12, 2011), an allowance of labour for installation had been agreed. A further handwritten document made August 12, 2011 reads "Promissory Notice Kitchen Equipment Complete Instal by Aug. 20, 2011". It is signed by David Kim and dated August 12, 2011.
- [10] The defendant says he did not have the tools needed to install the equipment with him on August 12, 2011. For reasons that are not ultimately important, the job was not, in fact, completed until August 26, 2011. At that time a rather curious document issued from the plaintiff purporting to be an invoice from the defendant to the plaintiff dated February 27, 2011, and showing a description "Restaurant Total Parts - labour & complete installation \$53,000" inclusive of \$5,678.57 HST.
- [11] This document included an accounting of advances between May 2, 2011 and August 11, 2011 totalling \$48,000, leaving an outstanding balance of \$5,000. It is dated August 26, 2011 and signed by the defendant. He cannot really explain why he did this, but as far as it goes, this further document appears to be an uncontroversial summary of the state of accounts between the parties as of that date.
- [12] One feature of the August 12 note that is contested is the meaning of the addition of "120 chairs." The plaintiff says this was included in the \$8,000 required to complete, while the defendant says this was to be an additional charge. He elsewhere estimated the value of his labour for installation at \$5,000, which leaves the question of what the other \$3,000 was for unanswered.
- [13] The defendant did not, in any event, locate 120 used chairs. Instead he located 90 new chairs which he says cost him \$7,257, although he only has his bill for that amount to the plaintiff, not the invoice of the vendor to him. He did not approach the plaintiff for permission to substitute 90 new chairs for 120 used chairs. The plaintiff has, nevertheless, accepted the new chairs and they are being used by the business that now leases the restaurant.
- [14] On its face, the "invoice" the plaintiff prepared on behalf of the defendants is an admission of the full value of the contract. The plaintiff never did pay the \$5,000 shown as outstanding.
- [15] On August 26, 2011 the defendant completed the installations of the equipment he could do himself. He told the plaintiff that he could not do the hot water tank or equipment requiring connection to gas lines. He demonstrated the installations, apparently to the satisfaction of the plaintiff, who also paid the plaintiff's son a \$100 "tip."

- [16] When the plaintiff went to get a permit after the installation, the Regional District told him to get an engineering report. The plaintiff did so and a number of deficiencies were noted. Those that mattered to the plaintiff were reflected in a notice he sent to the defendant on November 6, 2011. It reads as follows: Notice From: Mahal Enterprises Inc DBA RAMADA Limited Grand Forks To: Metro Restaurant Equipment (Attn: David Kim) This is about the Restaurant in the Ramada, Grand Forks, equipment and installation notice. As you know you agreed to get this work done in May. However, due to delays this promise hasn't been fulfilled. Therefore, we have suffered emotionally, physically, and business. Please respond quickly, so we can finish the equipment and installing.
1. Plumbing (Grease Trap) and installing canopy that must not have problem to apply for permit. Here is the engineer inspection result and phone number is attached like you wanted.
 2. Gas hose that fits is needed for (2 burner, 4 burner, and steak pan that fit the gas hose) to install. Again, there won't be problem getting permit.
 3. 2 door freezer needs to be replaced or adjust the mount.
 4. If you are not going to install hot water boiler, we ask for refund and take it back.
 5. Send shelves for the walk in cooler, walk in freezer, and temperature measure. Last, most of the other shelves that weren't sent.
 6. In future, if there are more problems with more equipment and installations, I'll complain and let you know further. As you know I tried calling you many times to get in contact with you, so I'll trust that you'll know what my problems are. I have asked and waited for solutions. Due to this I'll wait for your responsible answer saying (when solution will be finished) 'til Nov. 09, 2011 4p.m. November 06 2011 Your[s] sincerely Jay Ra Mahal Enterprises Inc DBA Ramada Limited GrandForks
- [17] The plaintiff got no answer to this notice, and on November 15, 2011, he sent a further notice: Final Notice From: Mahal Enterprises Inc DBA RAMADA Limited Grand Forks To: Metro Restaurant Equipment (Attn: David Kim) This is about Restaurant in Ramada Grand Forks's equipment and installation final notice. As you know you agreed to get this work done in May 2011. However, due to delays promise hasn't been fulfilled and work has not been finished. Therefore, we have suffered emotionally, physically, and business. As you aware I have sen[t] a notice letter, however I still can't contact you, or countermeasure to receive all the goods, and installations. At this point, we have decided that you are not willing to finish the job, which I'm disappointed. I will wait for your answer 'til Nov. 18, 2011 4 p.m. If there is no answer, I will not pay the last \$5000 amount. Furthermore, all the equipment, installations, and broken promises you that we lost/suffered must be held responsible. This is final notice so therefore, we will act according to the law. November 15 2011 Jay Ra Mahal Enterprises Inc DBA Ramada Limited GrandForks

- [18] The defendant did not respond to this notice either. He explained that he was away on an extended vacation.
- [19] On January 16, 2012, the plaintiff issued the Notice of Civil Claim in this proceeding. It includes a list of deficiencies that expands upon those included in the November 6th notice. These are set out in paras. 30-35 of the Notice of Civil Claim:
30. The Plaintiff states that the Defendants are in breach of the Contract and claim damages therefor. Particulars of the breach of Contract but are not limited to the following:
- (a) The range hood and kitchen layout as installed by the Defendant does not ensure proper coverage over the cooking surfaces;
 - (b) The range hood is not UL listed;
 - (c) The exhaust duct system was installed incorrectly and does not meet applicable standards;
 - (d) The gas ranges, griddle, grill and deep fryer are not CSA approved and cannot be used in a commercial kitchen;
 - (e) The hot water tank was not installed;
 - (f) The freezer provided is a one door freezer and not a two door freezer as agreed;
 - (g) The grease trap provided is 25 gallon and not 50 gallon as per the Contract. The 25 gallon grease trap installed is rated at 10 gallons per minute which is insufficient for double pot sink use;
 - (h) The sandwich preparation table installed is 36 inches wide rather than the 60 inch specification in the Contract;
 - (i) One of the fridges supplied is decorated with a proprietary Pepsi logo;
 - (j) Generally the equipment installed is not suitable for an operating commercial kitchen;
 - (k) Generally the equipment and installation is not certified to minimum applicable safety and regulatory standards and does not meet relevant regulatory requirements for a functioning commercial kitchen; (l) The equipment and installation did not pass safety and building inspections;
 - (m) The Defendant failed to provide a warranty on parts for 90 days;
 - (n) The installation of the subject equipment was not done in a reasonable amount of time and in any was not completed prior to August 12, 2011. The hot water tank was never installed.
31. By virtue of the foregoing the Plaintiff states that the Defendants are materially in breach of the Contract. The Plaintiff claims damages for breach of contract. Despite having paid \$48,000, the Plaintiff does not have an operable commercial kitchen or anything close to it.

32. Because of the improper installation, the equipment not being CSA certified, and other breaches of the Contract described herein, the Plaintiff is and has been unable to obtain a permit to operate the restaurant and has, as a result, been unable to generate profit.
33. The Plaintiff states that the economic loss it has suffered by being unable to operate the restaurant arose naturally from the Defendant's breach of the Contract.
34. Further, the Plaintiff states that the Defendant was or should have been in contemplation of the high likelihood of economic loss in the case of non-completion or substantial breach of contract by the Defendant.
35. The Plaintiff states that its economic loss in this regard was foreseeable and claims damages as such.
- [20] The plaintiff claims that the deficiencies in the equipment and the installation led to economic loss claimed calculated as the rent the restaurant would have yielded (\$3,000 per month) multiplied by the number of months until the premises were rented to a Mr. Stoyanowski, in April 2013.
- [21] There is very little reliable evidence as to any potential renters of the premises in the interval. There was no suggestion of any effort to mitigate. The plaintiff apparently believed that, when the defendant failed to respond to his demands, damages simply mounted against him at the monthly rent "someone" might have paid to operate the restaurant, without any further effort on his part.
- [22] Mr. Stoyanowski's arrangements with the plaintiff included substantial upgrades and replacements of some of the equipment the plaintiff had paid the defendant for.
- [23] Mr. Stoyanowski testified, apparently for the purpose of helping the court to appreciate the deficiencies in the equipment the defendant provided to the plaintiff. The plaintiff's position is that he ultimately got only \$16,700 worth of value from the defendant calculated as follows: February 27, 2011 List 1 Ice Machine - \$1,500 4 Rice Cooker - free 11 Water tap and pre rinse set - \$450 13 Hand sink with tap - \$250 14 Walk in cooler (extremely unreliable and requires extensive and ongoing repairs - \$7,500 16 Steel working bench, 60" - \$250 21 2-way stock pot burners - \$950 May 7, 2011 List 1 Stainless Wall covers - \$1,200 6 Single compartment sink - \$350 7 Double compartment sink - \$950 8 Two stainless steel shelves - \$300 11 Chairs (but only got 90, not 120 as indicated on contract; supposed to be new but were broken) - price was originally included in the \$50,000 contract, David Kim later demanded \$3,000 for these chairs on August 20, 2011 Total: \$16,700
- [24] Mr. Stoyanowski's evidence is not really of much assistance. His standards and requirements for the restaurant he wanted to run have no particular bearing on the contract between the plaintiff and the defendant for the equipment actually provided.

- [25] This case, like a lot of contracts between lay parties, must be construed from a mix of documentary and oral evidence. Doing the best I can, I find that the basic outline of the contract was for the supply of equipment by the defendant to the plaintiff. The equipment lists and prices were agreed between the parties. The equipment that was delivered was accepted by the plaintiff.
- [26] It took the defendant longer to marshal the equipment than originally anticipated, so that by the time of the last delivery, the plaintiff was anxious to be finished. He persuaded the defendant to install the equipment, although I think it was clear that the defendant was only attempting to accommodate the plaintiff in doing so.
- [27] The problems between the parties could have been substantially averted if the plaintiff had obtained engineering advice and a permit first. Then the requirements for the installation would have been understood before the defendant attempted the installation. He now attempts to impose the "engineer's" standard on the defendant after the fact, on the basis of an implied term "that the equipment would be installed in such a manner that it would pass safety and building inspections." Given the plaintiff's responsibility for establishing those standards, and his effective waiver in persuading the defendant to embark in the installation without that guidance, the plaintiff is in no position to assert or enforce such a term.
- [28] The August 12 terms suggest an allowance of some \$5,000 for installation, which the plaintiff has refused to pay, and the defendant has waived. So, the plaintiff is effectively in the same position relative to installation as if the defendant had declined to do the work. There is no evidence that that sum allowed for installation would not have covered the cost of getting someone else to do the work.
- [29] The deficiencies claimed in the equipment as delivered have not been satisfactorily established. The plaintiff was buying used equipment and that is what he got. There is no appraisal evidence to suggest that the plaintiff was overcharged for the quality of equipment he received.
- [30] The defendant has, nevertheless expressed a willingness to take some of the equipment that the plaintiff is now unhappy with off his hands. He lists this equipment as follows:
1. \$550 for #1 deep fryer
 2. \$1,200 for #2 four way burner with grille and griddle
 3. \$1,500 for #5 steam convection oven
 4. \$800 for #10 grease trap
 5. \$250 for #12 mini oven
 6. \$1,500 for #15 60 inch prep table
 7. \$1,200 for #17 10 foot canopy Total: \$7,000

- [31] This concession may be incorporated into the order in this matter by consent if the parties decide to do so.
- [32] The defendant claims \$7,457.60 for the chairs he supplied. On August 12, 2011, about \$3,000 was allowed for this. There is no bill showing the cost to the defendant of the purchase which was apparently from an auction house.
- [33] The proof of the actual cost of the chairs to the defendant is inadequate. Given the allowance, which was paid, and the fact that the plaintiff accepted them, I am of the view that the defendant has no further claim against the plaintiff.
- [34] The fact that the plaintiff cannot be said to have relied on the defendant to meet a standard for installation that it was his duty to ascertain, means that he cannot assert a claim against the defendant for the delay in getting the equipment properly installed, particularly when he did not, in any event, pay for it.
- [35] Where this leaves matters is that the plaintiff received the equipment he paid for, and he accepted it. He has not established that the equipment he got was not worth what he paid, or that it was not suitable for its purpose, although the defendant is prepared to take some of it back for a price adjustment. The fact that Mr. Stoyanowski wanted better equipment before he would start up the restaurant does not mean that what the defendant provided was inadequate.
- [36] This leaves the parties in a position where each has all that they are entitled to. All of the plaintiff's claims and all of the defendant's claims by counterclaim are therefore dismissed. "McEwan J."
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The Honourable Mr. Justice McEwan

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Prepared on 29 October 2026 · Esheria