

CANADA / JUDGMENT

Majnik v. 617538 B.C. Ltd. dba Midland Stucco

2013 BCSC 2364

COURT

Supreme Court of British Columbia

DECIDED

24 December 2013

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2013 BCSC 2364 Majnik v. 617538 B.C. Ltd. dba Midland Stucco IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Majnik v. 617538 B.C. Ltd. dba Midland Stucco, 2013 BCSC 2364 Date: 20131224 Docket: 49141 Registry: Kamloops Between: Bill Majnik (William Majnik) Attila Construction Ltd. Appellant And 617538 B.C. Ltd. doing business as Midland Stucco Respondent Before: The Honourable Madam Justice Hyslop On appeal from: A decision from the Provincial Court, dated June 19, 2013, (Atwal v. Majnik, Kamloops Docket C38924). Reasons for Judgment Counsel for the Appellant: J.R. Webber, Q.C. Harpinder Singh Atwal, principal of 617538 B.C. Ltd. doing business as Midland Stucco appeared on his own behalf Place and Date of Hearing: Kamloops, B.C. November 4, 2013 Place and Date of Judgment: Kamloops, B.C. December 24, 2013

- [1] This is an appeal from a judgment of the Provincial Court pronounced June 19, 2013.
- [2] The respondent, 617538 B.C. Ltd. doing business as Midland Stucco ("Midland"), sued Bill Majnik (William Majnik) Attila Construction Ltd. for \$37,450 for a stucco job performed by the respondent. The respondent abandoned the amount that exceeded the jurisdiction of the Small Claims Court.
- [3] After hearing all the evidence, the learned trial judge ordered the appellant, Attila Construction Ltd. ("Attila"), to pay the respondent, Midland, the sum of \$25,156, inclusive of court filing fees.
- [4] The counterclaim filed by Attila and Mr. Majnik was dismissed. It was dismissed by the trial judge because there was "a lack of evidence on the issue as to whether the work was done appropriately". In the notice of appeal, Attila appealed the dismissal of the counterclaim. However, on the morning the appeal, this part of the appeal was abandoned.
- [5] In the trial judge's reasons he stated at para. 1: This is a claim made by Harpinder Singh Atwal doing business as Midland Stucco, which is a numbered company.

- [6] In the amended notice of claim, the claimant is described as Harpinder Singh Atwal aka Midland Stucco (617538 B.C. Ltd.). The learned trial judge awarded the judgment against Attila to Mr. Atwal personally. When the judgment was entered, the style of cause changed from that in the amended notice of claim to Harpinder Singh Atwal, with no reference to the company Midland Stucco (617538 B.C. Ltd.). It was agreed at this appeal, that the style of cause in the final order should be changed to 617538 B.C. Ltd. doing business as Midland Stucco, and that judgment should be in favour of the numbered company.
- [7] Appeals from Provincial Court are limited by ss. 12 and 13 of the Small Claims Act, R.S.B.C. c. 430 [Act]: Hearing of appeal 12 An appeal to the Supreme Court under this Act
- (a) may be brought to review the order under appeal on questions of fact and on questions of law, and
- (b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial. Decision 13 (1) On an appeal, the Supreme Court may do one or more of the following:
- (a) make any order that could be made by the Provincial Court;
- (b) impose reasonable terms and conditions in an order;
- (c) make any additional order that it considers just;
- (d) by order award costs to any party to the appeal in accordance with the Supreme Court Rules.
- (2) There is no appeal from an order made by the Supreme Court under this section.
- [8] Madam Justice MacKenzie, as she then was, in *Smithers Parts Ltd. v. Hudson*, 2009 BCSC 1645, at para. 26 states:
- [26] The standard of review on pure questions of law is one of correctness, but the standard of review for findings of fact is they cannot be reversed unless the trial judge has made a palpable and overriding error. A palpable error is one that is plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33. An appeal court should only intervene when there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12; *R. v. Clark*, 2005 SCC 2. This court will only intervene in an appeal from Small Claims Court where the trial judge was clearly wrong in his apprehension of the law or the facts: *Priority Buildings Services Ltd. v. Ali*, [1999] B.C.J. No. 2820 at para. 10, and *Stewart v. Strutt*, [1998] B.C.J. No. 636 at para. 10, both being Provincial Court decisions.

BACKGROUND

- [9] Attila, a general contractor, hired Midland to do stucco work on a building which housed a car dealership. Attila's evidence was that it had allowed \$12,500 in its budget for the stucco work. The stucco work was done by Midland between May 16 and June 16, 2006.

- [10] Harpinder Singh Atwal is the principal of Midland and William (Bill) Majnik is the principal of Attila.
- [11] The dispute was how much Midland should be paid by Attila for the stucco work.
- [12] The trial judge found:
- [3] although I do note that on his [Mr. Atwal's] evidence it appears that, at least it is unclear as to what the amount, if any, was that was agreed to, and in fact it appears that Mr. Majnik is to some extent in agreement that he did agree to have Mr. Atwal do this work, but only if it would be done in a most economical fashion.
- [5] I do find that there was a contract, although it was oral. The terms of that contract are unclear, including what the amount would be for the work to be done. GROUNDS OF APPEAL
- [13] The appellant argues that the learned trial judge erred as follows:
- 1) misapprehending the evidence of Mr. Majnik by concluding that Midland did not know Attila's budget figure for the stucco work was \$12,500 prior to the work being started;
 - 2) failing to consider the doctrine of quantum meruit in determining the amount due under the oral contract and, in doing so, failed to consider the quote of Tom's Stucco;
 - 3) by awarding judgment based on Midland's cost to do the work; and
 - 4) by not admitting the square footage cost estimates of a third party contract which were being submitted to confirm the reasonableness of Mr. Majnik's testimony that the respondent's invoice was grossly over-inflated.
- [14] I have not considered ground number four of this appeal, as this would require a new trial, which I am not prepared to order. Midland has been owed money by Attila for about six and a half years. Further legal action is not in accord with the stated purposes of the Act s. 2(1): to have them resolved and to have enforcement proceedings concluded in a just, speedy, inexpensive and simple manner. Ground #1 - The Learned Trial Judge Erred in Misapprehending the Evidence as to Whether Midland was Aware of the \$12,500 Budget of Attila for the Stucco Work
- [15] Mr. Majnik testified as follows: A I do have a brief note. I call it how the event unfolded. Upon contacting Midland Stucco, the numbered company, to come and look at the work that we needed to have done at the Saturn dealership. And they did attend and -- and I also pointed out at the same time that there that my budget figure for the project was \$12,500. No comment was made at that point. However, I was told that they will do everything in their power to -- to ensure that the work that have to be done will be done most economically. So on the basis of that I gave a verbal okay to proceed the work.

- [16] Later, when Mr. Atwal was cross-examining Mr. Majnik, Mr. Majnik said the following: Q Okay, you -- you said like I can do it eleven hundred five hundred; right? You tell me you are budget; right? A Twelve thousand five hundred. Q Yeah. So, okay -- THE COURT: Now, hold on. What he said was he had a budget figure for this job of \$12,500. Not that he told you that, just simply that there was a budget figure of that amount.
- [17] To summarize this evidence, Mr. Majnik stated that Mr. Atwal, on behalf of Midland, came to the dealership to look at the stucco job. It was at that time that Mr. Majnik told Mr. Atwal that the budget for the job was \$12,500. There was no direct response to this comment from Mr. Atwal, other than his saying he would do everything in his power for it to be done economically. The learned trial judge misapprehended Mr. Majnik's evidence as to Midland's knowledge of the \$12,500 budget for the stucco work. Ground #2 - The Learned Trial Judge failed to Consider the Doctrine of Quantum Meruit in Determining the Amount Due Under the Oral Contract and, in Doing so, Failed to Consider the Quote of Tom's Stucco
- [18] Mr. Majnik testified: I was somewhat anxious to get this job completed. That was the last stage of the work, and -- and it was a substantial amount of money owed. And so I was hoping to be able to final bill the company. And so I approached a company who [had] done a fair amount of work in Kamloops. I called Tom's Stucco. They done a lot of work for prominent construction companies like A & T and D & T Construction, and they've done a lot of homes throughout Kamloops. Unfortunately the company is no longer in Kamloops because they have -- they were offered a very large undertaking in Regina that they had to do 500 or 700 houses. So I probably would have left too. So anyway, in any event -- THE COURT: I'm sorry, was that Tom's Stucco? A Tom's Stucco, yes. THE COURT: Tom's. Okay, yes. A Yeah. I do have a quote from them, a copy of the quote that they presented to me at the time if you wish to -- okay. THE COURT: Okay. Sorry, how did this arise, this -- A Due to -- due to the delay by Midland Stucco. THE COURT: Yes. A They didn't -- after they agreed that they would get started there was a substantial delay, and so I panicked and I approached another company, that company to -- to perhaps they may be able to speed up the process. And that's the quote I received from them.
- [19] At trial, Tom's Stucco's written quote of \$11,980.79 to do the stucco work was entered as an exhibit: THE COURT: If you remember correctly you took objection to the estimates that were provided and as a result we marked them as Exhibit A. Now, this is a bit of a different situation in that the estimates that were presented by Mr. Atwal were after the fact and to give some indication as to what other companies would have done the work for. Whereas, if I understand correctly, the Tom's invoice is one which you actually acquired during this process? THE CLERK: That would be Number 6. THE COURT: But it will be for the purposes of context and not for the purposes of an expert opinion as to what the appropriate cost was.
- [20] Mr. Majnik testified as follows: A Okay. So after obtaining the quote from Tom's Stucco, for whatever reason I happened to drive out to the job site. I didn't have very much to do. And I noticed that Midland Stucco delivered some scaffolding and possibly even a scissor-lift, which [is] normally used for higher buildings to -- to allow them to speed up the process.

And so at that point I didn't really have very much alternative but to call Tom's Stucco and apologize. I said, "Look, I -- the people -- their equipment is on site. I won't be able to get you to do the job." So he was okay with that. And what I noticed is that upon having this so-called scissor-lift, which is an expensive equipment to rent, was sitting there for a number of days. I must admit I don't know how many days, but a number of days it was sitting there without anyone making any use of it. I felt that that was most foolish, because why would you want to pay the rental on an equipment that you're not using. So I contacted Midland and finally they did make an attempt to -- to start the project. And immediately an issue [came] up, which I felt it -- they are not proceeding with the work in a proper manner. They were applying styrofoam panels to the -- to the building. And I questioned them on it and I was assured that, oh yeah, this process will be much more reasonable and quicker and so I will be happy at the very end.

- [21] To summarize this evidence, when Midland delayed turning up on the job site to do the stucco work, Mr. Majnik went to Tom's Stucco and asked him to give a quote and, based on that quote of \$11,980.79, he told Tom's Stucco that they had the job. In the meantime, Midland turned up and started the work. Ground #3 - The Learned Trial Judge Erred by Awarding Judgment against Attila Based on Midland's Cost to do the Work
- [22] In *The Law of Contract in Canada*, Fridman, Q.C., 6th ed., in s. 6, Contract and restitution, it reads: A complication or confusion arises from the fact that there is a contractual quantum meruit, as well as restitutionary quantum meruit. In some circumstances, for example, where there is a contract between the parties but they have not agreed upon a price for goods or services to be delivered or rendered by one party to the other, the court must award money to the unpaid party on the basis of a reasonable amount for the goods or services. This is a liability from a truly contractual relationship, and the situation between the parties is founded upon the concept of contract as it has been expounded earlier. Where no contract exists between the parties, or such contract as there is cannot be recognized or enforced, the courts have allowed a deserving party to recover something on a quantum meruit basis, which is not the same as what might have been recovered if there had been a valid, enforceable contract upon which the successful party could have sued. The distinction between these cases, as between contract and quasi-contract, lies in the idea that there has to be an agreement, between the parties, and such agreement must be in the form of an enforceable contract, to which the law will give effect.
- [23] In determining Midland's remuneration, the trial judge stated:
- [8] I am going to find that Mr. Atwal should be paid not on the amount which he has claimed in his invoice, but on the amount which he has set out as his expenses. By that what I mean is the labour costs, material costs and the lift cost. That equals a total amount of \$26,882.76.
- [24] In *CH2M Hill Energy Canada, Ltd. v. Consumers' Co-operative Refineries Ltd.*, 2010 SKCA 75, the court referred to Professor Fridman, which I have quoted above:

- [24] This quotation, as well as the cases cited by the trial judge in the passage quoted above, make it clear that what Professor Fridman calls "contractual quantum meruit" is really a principle of contract construction, or interpretation, to the effect that, where the parties to a valid contract have agreed for the provision of goods or services, clearly intended to be paid for, but have failed to provide for the terms of remuneration, then they may be presumed to have intended a reasonable price and, on that basis, a contractual term to pay a reasonable price may be implied.
- [26] The second point is that the principle of quantum meruit is only one method among many of contract construction and, in any case, there may be other factors that influence the implication of terms into a contract that fails to expressly set out an essential term. Ultimately, the task of construction is the task of determining the intentions of the parties. In the instant case that has to be done in the context of very extensive and lengthy negotiations as to what would and would not be payable or reimbursable under the contract.
- [27] The last point is that, even where the court concludes that it is necessary to resort to the principle of "contractual quantum meruit" because the contract has omitted an essential term, it is still necessary to decide what constitutes "reasonable remuneration" in accordance with that principle. Accordingly, even if the principle were found to apply, in the circumstances of this case, it would not automatically follow that the appellant should be paid the 18% mark-up it claims in addition to reimbursement, which it has received, for the union contract wages and burdens paid in relation to craft labour. [My emphasis]
- [25] In *Jamieson Construction Co. Ltd. v. Lacombe & N.W.R. Co.*, [1926] 1 W.W.R. 628, the court stated:
- [7] I do think that the terms of the reference in the respect pointed out on the defendant's behalf are at least ambiguous and that consequently some other form of words should be substituted. I think that what the plaintiff is entitled to for "cost" may be expressed in these words:--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 negotiations for the doing of the work to its conclusion. [My emphasis]
- [26] There is nothing wrong in the trial judge considering the amounts expended by Midland in completing the stucco work. However, the trial judge should have given considerable weight to Tom's Stucco's quote for \$11,980.79, which had been accepted by Mr. Majnik to do the stucco work, after Midland failed to show up.

- [27] This amount is in line with Attila's budget of \$12,500, which Midland knew was Attila's budget. Midland responded that "it would be done in a most economical fashion." [para. 3 of the learned trial judge's reasons for judgment]. This reflects Attila and Midland's intentions at the time of entering the contract. Tom's Stucco's quote was accepted by Attila and reflects reasonable remuneration in the context of the conversation that Attila and Midland had when they entered the contract.
- [28] I substitute judgment in favour of Midland for \$12,656 (inclusive of costs) for the amount of \$25,156.
- [29] Midland will have interest at registrar's rate on the amount of \$12,500 in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [30] I order costs in the amount of \$1,500 plus court filing fees and the cost of transcripts. These costs may be deducted by Attila from the amount owed to Midland.
- [31] Attila was served with a garnishee from Canada Revenue Agency attaching any funds owed by Attila to Midland. Both parties consented and agreed that the amount due to Midland from the funds deposited by Attila shall be paid directly to the Canada Revenue Agency. The balance of the funds not paid out to Canada Revenue Agency on account of this appeal and the costs awarded shall be returned to Attila. "H.C. Hyslop J." HYSLOP J.

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