

CANADA / JUDGMENT

N.C. Trading Company Ltd. v. Repute Development & Construction Ltd.

2016 BCSC 503

COURT

Supreme Court of British Columbia

DECIDED

1 March 2016

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2016 BCSC 503 N.C. Trading Company Ltd. v. Repute Development & Construction Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: N.C. Trading Company Ltd. v. Repute Development & Construction Ltd., 2016 BCSC 503 Date: 20160301 Docket: S176884 Registry: New Westminster Between: N.C. Trading Company Ltd. Petitioner And Repute Development & Construction Ltd., PDQ Construction Ltd., Xcellence Concrete Pumping Ltd., RTR Terra Contracting Ltd., RMC Ready-Mix Ltd., and Rona Inc. doing business as Dick's Lumber Respondents Before: Master Caldwell Oral Reasons for Judgment In Chambers Counsel for the Petitioner: C.A. Campbell Counsel for the Respondent Repute Development & Construction Ltd.: D.F.Y. Young Counsel for the Respondent PDQ Construction Ltd.: R.J. Carter Counsel for the Respondent RTR Terra Contracting Ltd.: B.J. Clarkson No other appearances Place and Date of Trial/Hearing: New Westminster, B.C. March 1, 2016 Place and Date of Judgment: New Westminster, B.C. March 1, 2016

- [1] THE COURT: We are dealing here with a petition that, in layman's terms, seeks to set aside or cancel a builder's lien filed with respect to a project and replace it with some kind of security. The big dispute is how much; I assume, the form and the like has been or will be arranged once the proper amount is determined.
- [2] Mr. Campbell for the petitioner, who is the owner, seeks payment in of about \$150,000 - \$155,000. The lien amount by the general contractor is about \$1.008 million, and the subsidiary liens filed by five other lien claimants are in the amounts of \$20,000, \$13,000, \$284,000, \$31,000, and \$5,000, give or take, giving us a total in there of something just over \$350,000, all of which, I believe it is agreed, are subsumed under the total amount claimed by Repute in the \$1.008 million.
- [3] By way of brief summary of the background, the petitioner owner contracted with Repute, the general contractor, for the performance of a job. That contract is, in round figures, \$3.4 million. Concost Consultants were contracted as the project consultants to deal between the petitioner and the general contractor, Repute. Repute has invoiced for about \$2.26 million, so far and the petitioner has paid, again in round terms, \$1.55 million. There were

discussions about a holdback and that appears to have reached a resolution where there was no holdback. That would be the \$155,000.

- [4] Now, Concost originally, said that the Repute work was about \$1.35 million, and that was done by about July of 2015. By the Fall of 2015, Repute walked away from the project and at that point Concost re-estimated the work done at \$970,000. There was yet another quantity surveyor hired who valued Repute's work at \$660,000.
- [5] In the middle of October, a Notice of Default was delivered by Concost on behalf of the owners, and Repute delivered a refusal to remedy the project.
- [6] There are two main difficulties. When the work commenced, it appears that it became obvious that there was additional excavating and shoring work that needed to be done. Whether that is an extra to the \$3.4 million contract or whether it is to be subsumed into that and included in that contract amount will be the central dispute between the parties.
- [7] Repute says that once they got into the work, they discovered that additional excavating and shoring work was necessary. They, if not immediately, then in short order, took up that claim with the owner through the consultant and directly with Ms. Lam of the owner, and sought a change order. Discussions were had with respect to that change order, but there was a refusal to sign such a change order. Notwithstanding that refusal, work continued and there were some less than focused emails and other correspondence and communication directed at the issue of the additional work, whether it be additional work or whether it be properly subsumed contractual work, and the need for a change order. No real resolution occurred, and that is why I say the central issue is really going to be whether the additional time, money, and resources that went into the perhaps unexpected excavation and shoring should be properly borne by the owner as an extra or by Repute as part of their contract.
- [8] There was also an initial dispute about the deposit which was 10 percent of the contract or about \$340,000, whether that was going to be refunded or otherwise. It now appears common ground amongst counsel that that deposit, having been paid, was never refunded, but rather was applied as against various invoices and should be accounted for out of the \$1.008 million which is currently lienied for, such that it seems that the proper amount of the monies after accounting that should be lienable would be the \$1.008 less the approximate \$340,000, which leaves us with a figure of about \$650,000 at the top end.
- [9] As I have been led through this by counsel, I have been referred to four documents that have been referred to as quantity surveys. The first one seemed to be the one at a little more than \$1.3 million, \$1.35 million. That was in July of 2015. That was amended by the Fall to a figure of \$970,000. The lowest estimate of the quantity of work which has been done by Repute is \$661,000. That was a quantity surveyor provided later. There is also reference in a letter to one of the individuals that was involved in the original \$1.3 million valuation putting it at something over 1.4, I believe \$1.47 million, but that was an email correspondence between the parties.

- [10] All of those have been provided by or on behalf of the owner petitioner. It is important, in my view, to note that Repute, being the head contractor and main respondent here, was clearly given the opportunity to have their own quantity surveyor attend to determine the quantity and value of the work which they had performed, and they have refused or neglected so to do, at least until this date. I am told that arrangements are currently being made for such a quantity surveyor to attend in the near future in order to obtain that type of evidence.
- [11] At one level, that evidence would seem to be fairly key to this assessment, but on second and more sober reflection, one wonders whether that quantity survey is going to be of any assistance because it will almost undoubtedly proceed on the basis of Repute's instructions to the quantity surveyor that they are to value the work done overall, including the additional excavating and shoring work which Repute undertook and which they say is an addition to the contractual obligation they had. In like fashion, the quantity surveys provided by the petitioner owner address the situation such that the value of the work done leaves to Repute's account alone the additional excavating and the like.
- [12] So we will, as one counsel indicated in their submissions, be still comparing apples and oranges, unless and until a court determines what the contract was and whether the additional -- and I keep calling it additional, but whether the subsidiary excavation and shoring was a contract included amount or a contract extra amount. Once that simple determination is made on the evidence, virtually everything will flow from that.
- [13] However, that issue remains a very live issue and the test that I have to address, as all counsel agree, has as its first beacon whether a prima facie case, not a strong case or anything of that nature, but a prima facie case has been made out to support the possible success of Repute's claim here on the lien of \$1.008 million.
- [14] Given the admissions as to the \$340,000 which must come off the top of that, I am of the view they cannot point to a prima facie case with respect to the full \$1.008 million, but they have made out that level of proof with respect to the balance, which is, in round figures and just for ease of reference, a million less \$340,000 which leaves a figure of \$660,000.
- [15] That, it would seem to me, is about the best case scenario for the lien claimants. Everyone agrees that the order that is made and the figure which is fixed to replace the builder's lien and place either cash or bond in place for security should be done under s. 24, rather than hybridizing 23 and 24, and I agree with that. The order will be made under section -- I believe it is 24 of the Builders Lien Act.
- [16] As I say, the figure appears to be, at the high end, \$660,000, at the low end it is possibly slightly under \$500,000. In my view, the appropriate, not really compromise, but the number that cries out on balancing all of those is \$600,000. The order will be in the standard form for cancellation of the builder's lien and the like and replacement of that security by cash or bond or other arrangement between the parties in the face value of \$600,000.

[17] As I say, it is made under s. 24. It recognizes that there is, in my view, a prima facie case, at least, to be argued with respect to the main issues and that one main issue is the one that is going to have to be determined by the court before much more can be done with it.

[18] In the circumstances, I will leave costs in the cause. "Master Caldwell"

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