

Citation: *M & M Building Construction Ltd. v. Sruthi Trading and Investment Inc.*, 2021 YKSM 6

Date: 20211007  
Docket: 20-S0059  
Registry: Whitehorse

**SMALL CLAIMS COURT OF YUKON**  
Before His Honour Judge Killeen

M & M BUILDING CONSTRUCTION LTD. and  
OSSAMA GHALY

Plaintiffs

v.

SRUTHI TRADING AND INVESTMENT INC. and  
GOVINDARAJ MURUGAIYAN

Defendants

Appearances:

Ossama Ghaly

Govindaraj Murugaiyan

Appearing on his own behalf  
and on behalf of M & M Building Construction Ltd.  
Appearing on his own behalf  
and on behalf of Sruthi Trading and Investment Inc.

**REASONS FOR JUDGMENT**

[1] KILLEEN T.C.J. (Oral): Ossama Ghaly, on behalf of his company M & M Building Construction Ltd., has brought an action against the defendant Sruthi Trading and Investment Inc., represented in these proceedings by the principal of that corporation, Mr. Murugaiyan.

[2] The various documents that were filed on behalf of the parties indicated both the individuals and the corporations as being plaintiffs or defendants respectively, but the

parties agreed that it was actually an issue between the corporation M & M Building Construction Ltd. and the corporation Sruthi Trading and Investment Inc. The defendant, upon filing the material and in addition to filing a reply, also filed a counterclaim setting out certain issues.

[3] I note that a court is required to decide a case like this based upon the evidence presented before it, as opposed to opinions, suggestions, or speculation. I am entitled to draw inferences from the evidence but, ultimately, I have to make conclusions based upon the evidence that I accept. The test in a case like this is whether or not I accept the claim on a balance of probabilities, meaning that it is more likely than not that it occurred.

[4] I am just going to say to both parties, you represented yourselves, it was difficult at times to follow some of the evidence because of the fact that there were often statements or opinions advanced in questioning, and there were often arguments advanced in questioning or in giving answers. Ultimately, the case is as it is and I have considered the evidence that was put before me.

[5] The issues in this case arose out of a contract that came into existence in the summer of 2019. The defendant wished to build a duplex in Whitehorse. Plans had been drawn up. The plans that have been presented to the Court as part of Exhibit 1 are incapable of being used as blueprints. They were what I will describe as a concept idea showing the size of the rooms. They were clearly modified after initially having been drawn by ANVIS Interior Design & Construction, so, for example, there were

details with respect to windows (the size of windows, addition of windows) but one of the rooms, a bathroom, did not even have an entry door originally on the plan.

[6] Mr. Murugaiyan had an inability to find a contractor in Whitehorse to complete the project. Ultimately, he and a friend travelled to Edmonton to enter into a discussion with Mr. Ghaly on behalf of M & M Building Construction Ltd.

[7] Mr. Ghaly was involved in the building trade and had been involved in that trade for over two decades. He described some of the work that he did. Mr. Ghaly expressed initially, apparently, that he was somewhat frightened to take on this type of job. That evidence came from the friend of Mr. Murugaiyan, but it seems consistent with taking on a project a significant distance away in an area where he would have been required to rely upon trades and others with whom he had no familiarity.

[8] I will just point out that there was no evidence submitted with respect to building code differences, but it would not be surprising to find that there was some difference between the building code as it existed in the City of Edmonton and the building code as it exists in the City of Whitehorse. Clearly, there are differences, which can arise from factors such as weather, soil conditions, availability of materials, things of that sort.

[9] Ultimately, it was determined that a contract would be entered into between the two corporations for payment in the amount of \$220,000. It was essentially a contract that provided for payment for the labour as opposed to including materials and acquiring necessary equipment such as, for example, something to do the excavation.

[10] The construction obviously could not start until Mr. Ghaly had travelled to Whitehorse. The evidence is that he traveled to Whitehorse in early August. That presented a problem.

[11] Mr. Howard described that, and the parties acknowledge that, starting at the beginning of August was relatively late in the construction season. Mr. Howard indicated that normally you would want to get started in May because, of course, you are required to start at the bottom by digging and then putting in whatever foundation is required. That can be done once the ground has thawed. August would be well into that period of time. It was also going to take a significant period of time to construct a fairly large building of this sort. A duplex, apparently, with the two units was several thousand square feet. I heard an estimate that it was about 6,000 square feet in total. A building of this size is going to take a considerable period of time, a considerable amount of effort, and it is going to get into colder weather with all of the difficulties that that will bring. As it turned out, the construction continued.

[12] There were a number of complaints made by the defendant in court about the quality of some of the work. Things such as where the dirt was placed after the excavation, whether it was placed in the correct location, and whether the construction went as quickly as it might have.

[13] There were issues detailed to some extent in the claim, such as a deficiency with respect to a cement wall, difficulties with trusses, the location of trusses, the location of ledgers, and other things of that sort.

[14] There were concerns raised in court by the defendant with respect to things such as the quality of construction of the stringers for a staircase and a description of it being a very uneven staircase.

[15] It was noted that inspections took place. I accept that inspections by a building inspector would have been to determine whether or not the construction met the building code, as opposed to being a comment on the quality of the work.

[16] I do have to say, however, that it would strike me as odd that a building inspector would approve construction of a poured cement wall that was tilting to one side or another. It also struck me as unlikely that any building inspector would approve a staircase where the stringers were cut so unevenly that the stairs were of different heights. Obviously, there is a small tolerance for imperfection, but anything more than the small tolerance likely would have resulted in the inspector refusing to accept the construction as meeting the building code.

[17] The construction went on and on. Ultimately, and inevitably as the weather got colder, it became more and more difficult to do work outside. There was, however, still work which had to be done.

[18] I am told that there is uncertainty as to when exactly the metal sheeting was put on the roof to keep out the elements but, in any event, it clearly proceeded into colder weather and seems to have resulted in some problems. For example, a leak occurred where part of a membrane or flashing had not been properly installed and the plaintiff had difficulty with working outside, for example, installing metal exterior sheeting when it

was cold. There was a complaint that the screws did not line up and that the work was done in a poor fashion.

[19] I am just going to note that anybody working in extreme conditions would understand that something like metal will have some expansion and contraction. A difficulty with installing it can be that you have to take into account that expansion and contraction.

[20] In any event, while these complaints were raised in the course of evidence, there does not appear to have been any significant reporting to the plaintiff over the course of the construction that the quality of the work was deficient.

[21] I am going to say as well, it is obvious that in a construction project of any size there is a significant likelihood that there will be some deficiencies that exist. Typically, if the parties cannot come to a conclusion with respect to repair or reconstruction, there may be some compensation. Indeed, this is a case that perhaps might have been better dealt with by arbitration as regards the quality of the work and compliance with the plans.

[22] The plaintiff raises issues as well, with respect to how the project was proceeding; pointing out that it took a long period of time, for example, to put in the wiring.

[23] I just note that wiring has to be roughed in before the drywall can be put on. Until the drywall is on, you cannot tape it, you cannot prime it, and you cannot paint it. I was

told by the electrical contractor the period of time that it took to get that done, and I was somewhat surprised that it took as long as it did.

[24] I do not want to get into the reasons for that because they are not clear. I am simply going to say that it was clear that the construction, while proceeding, might perhaps have proceeded at a faster pace. I am absolutely unable from the evidence to say where fault lies on that. The defendant says he was forced to incur additional costs, for example, for equipment rental or other things such as interest. The plaintiff says his crew was working as best as they could.

[25] I think both parties knew starting at that time of year there was likely to be a weather issue that would cause them difficulties with all of the work getting done. Nonetheless, they both chose to embark upon the project.

[26] Ultimately, in March, Mr. Ghaly, on behalf of the plaintiff, was concerned about the payments that were coming in to him. A payment was made by cheque in the middle of March. A short while later, that cheque was cancelled. I assume a stop payment was put on that cheque. At about that time, there had also been discussion about the cost of some additional work that was to be done.

[27] Changes on a construction project are not unusual but can be costly. A change to the size of a couple of decks had also occurred, and a change to something with respect to the ceiling over the bathtubs had occurred. The parties were talking about an additional cost for that. Initially, this issue was contested. The defendant said the additional cost was to be \$10,000. Later, at a point in his evidence, Mr. Murugaiyan, on

behalf of the defendant, appeared to acknowledge that the additional cost was to be \$15,000, taking the total price to \$235,000.

[28] A document was drawn up; a second part of the contract agreement. I have two versions of it before me as Exhibits 4 and 5. The evidence of the plaintiff, through Mr. Ghaly, was that he was concerned about the payment. He wanted clarification of the total payment, bearing in mind the additional cost now of \$235,000 as opposed to \$220,000, and somebody else on his behalf drew up a document.

[29] The two versions of the document confuse me. They are difficult to understand, difficult to reconcile in the sense that Exhibit 4, which was entered by the defendant, shows on the second page a Calculation of Fees, and it has a line indicating payments received by cheque: \$135,000; remaining balance: \$100,000.

[30] I note that contrary to the order for filing of documents that was made in January 2021, that document was not disclosed in advance. It was disclosed during the course of the trial, and the explanation for that, on behalf of the defendant, was that he did not want the plaintiff to know that he had a copy of that document.

[31] I am going to say as well that the document in its form appears to be a consistent document, that is, it appears to have all been created at the same time by somebody working on their computer entering figures as they went along.

[32] The second version of the document had been included as part of the information filed by the plaintiff. In all respects, it is the same except that, under Calculation of Fees, there are payments received by cheque and, instead of \$235,000, it shows a



figure of \$117,000, with a remaining balance of \$118,000 as opposed to \$100,000. The lines which typically would have been added by the person working at the computer entering a figure into the space are gone. The font size appears to be different.

[33] I have to say that, looking at this, it appears that somebody changed that document. Mr. Ghaly, on behalf of the plaintiff, says that somebody else prepared the document and that he does not know about that.

[34] When I was looking at it, I also noted that the name of the defendant is "Struth Trading and Investment Incorporated", as opposed to the way the defendant describes his corporation, which is generally S-r-u-t-h. It is further complicated by the fact that a document found in Exhibit 2, what purports to be an invoice from November 19, 2019, also has that spelling in handwriting that is consistent with the handwriting of the defendant as opposed to the handwriting of the plaintiff or their representatives.

[35] At the end of the day, I do not know how these two versions of the same document came into existence. To some extent, I know the second contract was never signed. It could be said that they are immaterial. To some extent, it also appears that, along the way, information about the amount that had already been paid was being altered in some fashion either by one or the other party to the benefit of one or the other. I just have to say, on the evidence, it is unclear to me how that might have occurred.

[36] In any event, by that point in time, it was clear that the project was not moving as would have been desired by either party. From the defendant's perspective, construction was dragging. From the plaintiff's perspective, construction was dragging

because of the actions or inactions of others, and the plaintiff was not being paid.

Ultimately, M & M Building Construction Ltd. decided not to continue with the project and gave notice that they were terminating the contract for non-payment.

[37] Later, additional work was done to complete the house. The defendant takes the position that work had to be done to correct deficiencies that were in existence. That would not be surprising, for a variety of reasons, based upon any construction project of this size.

[38] In any event, the figures with respect to what had to be done to complete the project and repair the damage were put before the Court by the defendant. I am just going to say that when I looked at those and I saw costs incurred by the defendant to make necessary changes to what had already occurred to complete the project and that a rough dollar amount of about \$84,000 was spent, taking the value of the work under the contract done to date by the plaintiff to an amount around \$150,607. If I just do the arithmetic, that sum is not that different from the estimate given by the plaintiff with respect to the value of the work done to that point. His position was that about 65 percent of the work was done, and when he worked it out, he came to a figure of \$152,750. I say that only because it is pretty clear to me that both parties are actually relatively close in terms of what had been done and, in my view, there had to be some additional work done to change or repair deficiencies up to that point.

[39] When the matter then proceeded to a claim, other issues arose by virtue of a counterclaim. The defendant said that in addition to the amount that he had paid, other things have to be considered. To start with, Mr. Ghaly and others working with him

ended up living in a house that the defendant owned. He had given Mr. Ghaly access to the home, but Mr. Ghaly had to pay rent for it as well as pay utility bills. He said that a trailer was provided to Mr. Ghaly to allow him to move equipment from Edmonton to Whitehorse to begin the construction project. The defendant says Mr. Ghaly has that, and he should pay for it. There was a bill with respect to propane to heat the home in which Mr. Ghaly and, at times, his crew were residing. Mr. Murugaiyan claims additional costs with respect to interest. He claims additional costs with respect to mental anguish. Several things were put before the Court.

[40] I do not have clear evidence with respect to any interest issue. I say that based upon my earlier remarks, which is that both parties at the start knew that this was going to be a reasonably lengthy undertaking and had to understand that by starting two and one-half months later than would have been optimal, the project was going to get into difficult weather with a longer period of time required.

[41] I am not prepared to say on the evidence that there was any additional interest cost to the defendant, nor am I prepared to deal with any issues of mental anguish. It struck me that after additional things were being done to complete the project, things were going well, and likely the issues raised in the counterclaim might not have come up but for the litigation.

[42] The charge for rent also struck me as unusual because there was no documentation suggesting that rent would be paid. Indeed, Mr. Ghaly and some equipment and, at times, some of the employees, came from Edmonton to Whitehorse for the purpose of this project. That is, it was not that Mr. Ghaly was going to be living

here in any event and was getting the bonus of free rent. It was, rather, that he came specifically for work on this project.

[43] I will note that had he been living in his own apartment or home in Edmonton, he would have been responsible for utilities at that location. The absence of any documentation of a setoff or suggestion of rent payments along the way lead me to conclude that there was no agreement ever, or suggestion ever, that Mr. Ghaly would be paying rent to the defendant. It, rather, arose later. Largely, that came from the evidence of Mr. Murugaiyan, who ultimately suggested that because the project took so long, he decided to charge rent.

[44] The issue with respect to the trailer is that Mr. Ghaly met an associate of Mr. Murugaiyan in a parking lot of a hardware or lumber store in Alberta and the other person had paid for a trailer in the amount of \$1,737.75. Mr. Ghaly used that trailer to move equipment here. I note that that may not have been his idea, but it clearly was something that had to be done and perhaps, most importantly, he still has that trailer and there is some value to that trailer.

[45] Clearly, the agreement was that Mr. Ghaly would pay the utilities involved in living at the house or residence owned by the defendant. The agreement was that he would register with the electrical provider and would pay those bills, and that was done. If they wanted internet, he was responsible for that.

[46] His understanding was that heat for the building was provided through electric heat, which he was responsible for. Later, the defendant says he had to pay to refill the propane tank. It was filled in November 2019 after they moved out and there was a cost

of \$1,128.49 for that. It seemed to me that Mr. Ghaly, on behalf of the plaintiff, understood that there was responsibility for the heat as well. Whether the heat was provided through electricity or in part by propane, it was provided.

[47] I find with respect to the counterclaim that the amount of payment for the propane, \$1,128.49, is the responsibility of the plaintiff, as is the cost of the trailer, \$1,737.75.

[48] The issues, then, with respect to the actual claim become more difficult. One issue that arose was with respect to the amount of money that had been paid by the defendant to the plaintiff, and the second issue was with respect to the value of the work that was done. To some extent, the value of the work is easier to decide.

[49] I had mentioned that both parties seemed relatively close together in terms of what was actually required to be done afterwards, one taking the position that by adding on the work done later and the repair work, about \$150,000 worth of work had been done. When the other party looked at it, it was concluded that about \$152,000 worth of work had been done.

[50] I accept that there would have been some deficiencies. I am not saying that they were the responsibility of Mr. Ghaly entirely. They may well have been as a result of weather conditions. They may well have been as a result of the construction starting much later than might have been optimal. They might have been as a result of delays by others. We have heard, for example, Mr. Howard in his evidence. I am not saying he is an expert, but he certainly has some experience in this. There were certain things that were not as he would have expected them to be.

[51] Overall, when I looked at all of that, inclusive of the tax that would have been required and correction of any deficiencies, my finding, based on the evidence, is about \$150,000 worth of work was done by the plaintiff.

[52] The other issue, then, is: What was actually paid for? It was difficult to follow exactly what it was that was paid. Part of it was relatively easy. The account of the plaintiff showed deposits in the amount of \$117,100 from cheques that had come from the defendant or the other person, the friend of the defendant, who on two occasions paid \$5,000. Confusion arose because there is reference, in the second contract that was not signed, to a missing payment of \$5,000 and reference to cash payments.

[53] Mr. Murugaiyan, on behalf of the defendant, takes the position that I should simply add up what he refers to as "the receipts", which are in his material at Tab 1 described as "invoices" on those documents, and we would come to a much more substantial number.

[54] When I looked at those documents carefully, I realized they are created by two different parties. The handwriting is clearly different. It makes sense that some were created by Mr. Ghaly on behalf M & M Building Construction Ltd., and some of them are created by Mr. Murugaiyan on behalf of Sruthi Trading and Investment Inc.

[55] Those invoices further include, for example, invoice 762216, work done at 22 Dora Crescent (\$12,000, GST of \$600), taking us to a total \$12,600, and work done at 22 Dora on invoice 762217 (\$10,000). The evidence on that, though, indicates that one of those invoices is in relation to the claim for rent, one is in relation to an inclusion for things such as the propane and the trailer because, ultimately, a cheque, which was

then stopped, and then a bank draft in the amount of \$7,376.00 was issued, were paid.

The difference between the \$10,000 and that amount is the cost for the trailer and the propane.

[56] I do not think that I can rely upon those documents and say that the amount shown on them is clearly what was paid. That does not seem to be to be reliable.

[57] The main issue of contention in some respects is a document dated November 19, 2019. It purports to show a signature by Mr. Ghaly. He says, "That is not my signature." It is in the handwriting of the other person, who must be Mr. Murugaiyan on behalf of Sruthi Trading and Investment Inc. It shows payment received in the amount of \$15,000 and then GST paid for \$80,000, in the amount of \$4,000. I will just add that, along the way, the parties seem to have been, from time to time, adjusting GST. Initially, the cheques were in a multiple of \$1,000 or, indeed, \$5,000. Later, five percent was added on.

[58] Mr. Murugaiyan's position is that the \$15,000 and \$4,000 were actually two payments of cash totalling \$19,000 and that I should include those.

[59] Mr. Ghaly says, "No, I didn't get cash. I didn't get any cash out of that."

[60] I am just going to say that once parties begin to deal in cash — and both of you are businessmen — you have to know that there are going to be difficulties dealing with cash in the sense that a record does not exist of the transactions.

[61] A further complication out of that was when I went back and looked at the bank statements that had been filed showing the deposits to the account of M & M Building

Construction Ltd. where, although they do not specifically show a deposit on that date, a short while after that time a deposit was made in the amount of \$4,000.

[62] M & M Building Construction Ltd. received a number of deposits over the course of time. While many of them must have been in relation to this project, some of them are in other amounts and may have been other events that were occurring, or may have been in relation to a couple of deposits being made at the same time.

[63] Shortly after the claim that \$19,000 was paid in cash, I do note that there is a \$4,000 cash deposit on November 21, 2019, to that account. Mr. Ghaly's position was that he had received money from Western Union from his sister. When he received the money from Western Union, he asked them to turn it into cash so that he could take it to the bank.

[64] I have to say that strikes me as a very convoluted way to get money from one financial institution to another. I do not know why he simply would not take the cheque, or bank draft, or whatever else it was. Maybe there was an explanation based upon a cheque being held for a period of time, but that was not in the evidence and I am not going to start speculating about that.

[65] Overall, I am satisfied that, on the test of a balance of probabilities, a number of payments were made. They totalled \$117,100. Later, the bank draft was paid. It brought the amount to \$124,413.76. The evidence about cash being paid varied in the evidence of Mr. Murugaiyan. Initially he stated it was all cash, and then later it was at least half cash (\$9,000).



[66] I am not going to deal with what the evidence might be with respect to the documents showing the total paid of \$135,000 versus a total paid of \$117,100. It would only be speculation. Based upon a balance of probabilities, I accept that a further \$4,000 in cash was paid. That takes us to a total paid of \$128,413.76.

[67] I have found that the value of the construction work, inclusive of costs less any deficiencies, which had to be corrected by the defendant, was \$150,000. The difference, then, is \$21,586.24.

[68] Another issue that arose, arose as a result of the cheque being stopped. The plaintiff incurred charges for four payroll cheques that had come into existence and he had to pay \$45 on each cheque later when the cheques were returned. That is a total of \$180, taking the amount that is owing on the claim to \$21,766.24.

[69] The counterclaim amounts are as I have described already, \$1,128.49 and \$1,737.75. I simply reduce, then, the claim of the plaintiff by the amount that is also owed to the defendant on the counterclaim. In the result, the amount owed to the plaintiff by the defendants is \$18,900.

[70] I am not going to order costs to either party clearly because the parties were self-represented. This may have become confusing for them. I was not impressed with the failure to file documents but, in any event, I have made the findings.

[71] The result is M & M Building Construction Ltd. is owed \$18,900 by Sruthi Trading and Investment Inc.

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KILLEEN T.C.J.