

SUPREME COURT OF YUKON

Citation: *Cardinal Contracting Ltd. v. Seko Construction
(Vancouver) Ltd.*, 2017 YKSC 70

Date: 20171122
S.C. No. 16-A0104
Registry: Whitehorse

BETWEEN

CARDINAL CONTRACTING LTD.

PETITIONER

AND

**SEKO CONSTRUCTION (VANCOUVER) LTD. and
MARTIAN PROPERTIES INC.**

RESPONDENTS

Before Mr. Justice R.S. Veale

Appearances:

Murray Leitch and

Counsel for the Petitioner

Meagan Hannam

James P. Flanigan

Counsel for the Respondent Seko Construction
(Vancouver) Ltd.

Grant Macdonald, Q.C.

Counsel for the Respondent Martian Properties Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] Seko Construction (Vancouver) Ltd. (“Seko”) applies for an order that the Petition of Cardinal Contracting Ltd. (“Cardinal”) be converted to a Statement of Claim and a trial of the proceeding pursuant to Rule 50(12)(d) of the *Rules of Court*. The application was filed on June 13, 2017, in response to the Petition of Cardinal under the *Builders Lien Act*, R.S.Y. 2002, c. 18, and was set for hearing on June 15 and 16, 2017.

[2] For the reasons below, I denied the application and proceeded to a hearing followed by Reasons for Judgment, cited as *Cardinal Contracting Ltd. v. Seko Construction (Vancouver) Ltd.*, 2017 YKSC 51.

BACKGROUND

[3] Cardinal has a subcontract agreement with Seko, dated April 20, 2015 (“the Subcontract”), to work and furnish materials in the construction, alteration or repair of a building on land owned by Martian Properties Inc. (“Martian”).

[4] Through seven progress claims, Cardinal invoiced Seko in the amount of \$2,787,438.75 and Seko paid the full amount of the first four progress claims in the amount of \$2,316,034.63, leaving a balance outstanding of \$471,404.12.

[5] Shortly before this hearing, Seko paid another \$301,306.33 and Cardinal agreed to a deduction of \$1,269.48, reducing the outstanding claim to \$168,828.31.

[6] Cardinal filed a lien against Martian’s land and it is not in dispute, except as to the amount of the outstanding claim owing.

[7] Three issues were addressed as follows:

1. Is Seko entitled not to pay Cardinal until paid by Martian?
2. Is Seko entitled to refuse to pay Cardinal’s invoices for services rendered by Ryan Eby and the 12.5% margin on the building?
3. Is Cardinal obligated to fix or pay the deficiency and warranty items claimed by Seko?

[8] The evidence consisted of three affidavits of Ken Eby, the President of Cardinal, two affidavits of Peter Shoulak, the Vice-President of Seko, one affidavit of Terry McCutcheon for Martian, and one affidavit from Preston Blackie, a professional painter.

[9] There was no application to cross-examine on affidavits.

[10] The two issues on this application are:

1. Are there disputed issues of fact that cannot be determined summarily on affidavit evidence and documents?

2. Is the conversion to a statement of claim with the consequent requirement for discovery and trial, consistent with the object of the *Rules of Court* under Rule 1(16)?

THE LAW OF PETITIONS

[11] The most common way of commencing a proceeding in court is by way of a statement of claim. This procedure usually involves examination for discovery and the production of documents before proceeding to a trial on oral evidence or a summary trial on affidavits. In this jurisdiction, the use of full-scale trials is a relic of the past, as most litigants cannot afford the costs and risks of trial. Most cases proceed on affidavits, occasionally with cross-examination.

[12] The petition is used in circumstances provided in Rule 10 and I set out the relevant provisions in this application.

(1) A petition in Form 2 shall be filed where

(a) an application is authorized to be made to the court,

(b) the sole or principal question at issue is alleged to be one of interpretation of an *Act*, statute or regulation, will, deed, oral or written contract, or other document,

...

(g) the relief sought relates to land and is for

(i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,

...

[13] Rule 10 provides that a petition proceeds on affidavits unless an application is made for cross-examination on affidavits or, as in this case, pursuant to Rule 50(12)(d):

50(12) On an application the court may

...

(d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

[14] Setting a petition down for trial involves both delays and increased costs, requiring an examination of the object of the Rules of Court as follows:

1(6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of

- (a) the dollar amount involved in the proceeding,
- (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
- (c) the complexity of the proceeding.

[15] Rule 1(6) introduces the principle of proportionality in securing the just, speedy and inexpensive determination of every proceeding. The Court must consider the amount of time and the expense to be incurred, to ensure it is proportionate to the dollar amount of the proceeding and the importance and complexity of the issues involved.

[16] In *May v. Circumpacific Energy Corp.*, 2004 YKSC 10, I denied an application under Rule 52(11)(d) in an oppression application for the following reasons set out in para. 6 - a previous application had been dismissed - there was a right to a summary hearing and I was not prepared to exercise my discretion to order a trial on the eve of the hearing. The lawyer for the petitioners maintained that there were sufficient affidavits documents to make a decision, and if that is not the case, the discretion remained to order a trial.

[17] This assessment is similar to the order made in an application for summary trial, which has been considered in *Norcope Enterprises Ltd. v. Government of Yukon*, 2012 YKSC 25 (“*Norcope*”), and *Fine Gold Resources Ltd. v. 46205 Yukon Inc.*, 2017 YKSC 6 (“*Fine Gold*”). Both of these cases involved factual and legal disputes in construction contracts, and in both, this Court found that credibility disputes could be resolved by affidavits.

[18] The *Fine Gold* case as well follows the direction from the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, at paras. 24, 49 and 50 that:

1. costs and delays associated with the traditional process can deny adjudication to ordering people;
2. the summary judgment process must allow the judge to make the necessary findings of fact, allow the judge to apply the law to the facts and is a proportionately more expeditious and less expensive means to achieve a just result.

ANALYSIS

[19] A petition is the appropriate procedure where the application is authorized pursuant to ss. 22 and 24 of the *Builders Lien Act*, cited above:

Action to enforce registered lien

22 Every lien that has been duly deposited under this Act shall absolutely cease to exist after the expiration of 90 days after the work has been completed or materials or machinery furnished or wages earned or the expiry of the period of credit if that period is mentioned in the claim of lien filed, unless in the meantime proceedings are commenced to realize the claim under this Act and a certificate thereof, which may be granted by the court in which or judge before whom the proceedings are commenced, is duly registered in the land titles office.

...

Lien realizable in Supreme Court

24 In all cases the lien may be realized in the Supreme Court according to the ordinary procedure of the Supreme Court.

[20] The *Builders Lien Act* provides that liens can be imposed for financial claims by wage earners, contractors, and subcontractors. In all cases, there are monetary claims included in the lien claim. There is no requirement for a statement of claim and the *Builders Lien Act* provides for affidavit verification of both the amount of the lien as well as its validity.

[21] Section 24 of the *Builders Lien Act* refers to realization of the liens “according to the ordinary procedure of the Supreme Court”. In my view, the “ordinary procedure” would be by way of petition where the application is authorized by ss. 22 and 24 of the *Builders Lien Act*.

Issue 1: Are there disputed issues of fact that cannot be determined summarily on affidavit evidence and documents?

[22] The first issue is the contractual interpretation of whether the contract was a “pay when paid” contract or not. I found that no factual dispute was involved in that determination and I interpreted the contract not to be “pay when paid”.

[23] The second issue of whether the services of Ryan Eby could be invoiced is primarily factual but was not difficult to resolve on the affidavits.

[24] The third issue of whether Cardinal was required to correct or pay deficiency and warranty items is also primarily a matter of contract interpretation.

Issue 2: Is the conversion to a statement of claim with the consequent requirement for discovery and trial, consistent with the object of the *Rules of Court* under Rule 1(16)?

[25] As a matter of proportionality with only \$168,828.31 at stake on a total contract of \$2,787,438.75, it is both expeditious and cost effective to hear the issues on affidavits.

The issues are certainly of some importance to Yukon jurisprudence, but are not so complex, factually or legally, to require a full-scale oral evidence trial. I also take into consideration that the petition was commenced on September 30, 2016, and this application was made shortly before the hearing. I also consider that the substantial portion of the claim has been resolved and the outstanding claim is much reduced making a full trial not cost effective.

[26] I conclude that the application to put the matter to the trial list is dismissed.

VEALE J.