

Citation: *16142 Yukon Inc. v. Bergeron General Contracting Ltd. and Steve Bergeron*,
2011 YKSM 5

Date: 20111018
Docket: 09-WL013
Registry: Watson Lake

IN THE SMALL CLAIMS COURT OF YUKON
Before: Her Honour Judge Ruddy

16142 Yukon Inc.

Plaintiff

v.

Bergeron General Contracting Ltd.
and Steve Bergeron

Defendant

Appearances:
Kerry Peters
James Tucker

Appearing on behalf of the Plaintiff
Counsel for Defendant

REASONS FOR JUDGMENT

[1] The plaintiff company, 16142 Yukon Inc., is an excavating contractor based and operating primarily in the Watson Lake area. When the events giving rise to the plaintiff's claim began, 16142 Yukon Inc. was managed by Kerry Peters, but owned by his mother. Mr. Peters assumed ownership of the company in the spring of 2010.

[2] The defendant company, Bergeron General Contracting Ltd., is a building contractor, also based and operating in Watson Lake, owned and operated by Steven Bergeron.

[3] Mr. Peters alleges that he, on behalf of the plaintiff, entered into an agreement with Mr. Bergeron, on behalf of the defendant, to clear and level a lot owned by the defendant (referred to as the “Industrial Property”), with such work to be charged at the applicable Yukon Government hourly rate. Mr. Peters further alleges an outstanding balance of \$25,072.80 for work performed by the plaintiff company on the Industrial Property. For the purposes of these proceedings, the plaintiff company has reduced its claim to \$25,000, the maximum allowable in the Small Claims Court of Yukon.

[4] The defendant company, through Mr. Bergeron, asserts that the agreement reached between Mr. Peters and Mr. Bergeron was not an agreement for payment for services rendered, but rather an agreement for an exchange of services wherein Mr. Bergeron would provide his carpentry services on a log home owned by Mr. Peters and his mother (referred to as the “Bellevue Property”), in exchange for the site preparation work to be done on the Industrial Property. Mr. Bergeron takes the position that no money is, therefore, owed between the parties.

The Plaintiff’s Case

[5] The plaintiff’s case consisted of a number of documents filed as exhibits and testimony from three witnesses: Mr. Peters, Yvon Goupil, who acts as equipment operator supervisor for the plaintiff, and Mr. Peters’ wife, Jane Peters, who acts as bookkeeper for the plaintiff.

[6] In the plaintiff’s version of events, in either the spring or summer of 2006, Mr. Peters and Mr. Bergeron entered into an agreement whereby the plaintiff would supply the equipment and provide the services necessary to remove the trees, grub, strip and clear the Industrial Property, and to level the lot for building. The services would be billed at the Yukon Government hourly rate. No estimate of total cost was provided.

[7] The work was started but not completed in 2006. Mr. Peters indicates that this was a result of Mr. Bergeron's financial difficulties, which led to a further agreement that Mr. Bergeron could work off the debt by performing carpentry work on the Bellevue Property at a rate of \$65 per hour.

[8] In June of 2009, Mr. Bergeron approached Mr. Peters about completing the work on the Industrial Property. According to Mr. Peters, it was agreed that the plaintiff would complete the work on the Industrial Property and Mr. Bergeron would bring a crew to complete the house on the Bellevue Property. Hours would be tracked and accounts would be set off against each other. According to Mr. Peters, Mr. Bergeron then indicated that he was having difficulty working for no money so it was agreed that Mr. Peters would pay Mr. Bergeron half of the hours worked on the Bellevue Property with the other half being applied against the debt.

[9] Two sets of handwritten invoices prepared by Mr. Goupil were provided as proof of the work completed by the plaintiff in both 2006 and 2009, filed as exhibits 2 and 18, respectively.

[10] A cheque, filed as exhibit 1, was provided to Mr. Bergeron in July of 2009. Mr. Peters says that Mr. Bergeron abandoned the Bellevue Property project shortly after. When Mr. Peters contacted Mr. Bergeron, he was advised that Mr. Bergeron was not prepared to continue and felt that there was no longer any money owed.

[11] The plaintiff filed its claim on September 24, 2009.

The Defendant's Case:

[12] Mr. Bergeron tells a very different version of events. He testified that, in August 2006, Mr. Peters approached him at his shop, located in Norm's Garage where Mr. Bergeron was renting space. Mr. Peters had heard that Mr. Bergeron

had purchased the Industrial Property and approached Mr. Bergeron to find out what his plans were for the Industrial Property.

[13] When Mr. Bergeron indicated a desire to build a shop, Mr. Peters advised that he could clear the lot and prepare it for building, including creating two driveways and a culvert. When Mr. Bergeron asked for an estimate of the cost, Mr. Peters quoted him \$20,000, but suggested that they could do a trade with Mr. Bergeron doing labour on the Bellevue Property. It was agreed that Mr. Bergeron's work would be calculated at \$65 per hour to a maximum of \$20,000 to offset the work to be performed by the plaintiff on the Industrial Property. Mr. Bergeron would supply the necessary tools; Mr. Peters would supply the materials. There was no timeline placed on the agreement; rather, it was agreed that each would perform the necessary work as and when able.

[14] Mr. Bergeron indicated that he did not experience financial difficulties in 2006, and he never told Mr. Peters, at any time, that he was having money trouble. He advised that the cheque, filed as exhibit 1, was issued to him as the drywalling of the ceiling was time sensitive, having to be completed in conjunction with the arrangements Mr. Peters had made with respect to insulation being blown into the house. As this required Mr. Bergeron to take time off work to complete within the requisite time frame, there was an agreement that Mr. Bergeron would be paid \$30 of the \$65 hourly rate in cash as compensation.

[15] Mr. Bergeron provided a breakdown of the work performed on the Bellevue property, filed as exhibit 16, which indicates a total value of \$16,120. The defendant also called Paul Amann, an excavating contractor, as a witness to challenge the plaintiff's valuation of the work performed on the Industrial Property. It is the defendant's position that he has performed work of an equivalent value on the Bellevue property and no further funds are owed to the plaintiff.

The Issues:

[16] There are no complex legal issues arising in this case. Instead, the case is one which turns on an assessment of the credibility of the evidence provided by each of the parties, both documentary and testimonial, and the impact those findings of credibility have on answering the following two questions:

1. What was the nature of the agreement between the parties?
2. What, if anything, is owed to the plaintiff by the defendant, bearing in mind the value of the work performed by each of the parties?

Analysis of the Evidence:

[17] As the onus is on the plaintiff to establish its case on a balance of probabilities, a detailed analysis of the plaintiff's evidence is necessary to determine whether the case has been made out. Upon reviewing the evidence called on behalf of the plaintiff, one can only conclude, and I do, that the plaintiff's case suffers from major credibility problems.

1. Kerry Peters:

[18] With Mr. Peters evidence, there were notable problems with inconsistencies, and with both clarity and detail of recollection.

[19] Inconsistencies include his assertion that Mr. Bergeron was on site on a daily basis supervising the work performed on the Industrial Property. Not only is this inconsistent with the evidence of Mr. Bergeron, but it is contradicted by the evidence of Mr. Goupil who testified that he only saw Mr. Bergeron a couple of times on site, and the most he did was drive slowly by the project on a daily basis.

[20] Similarly, Mr. Peters was insistent that the agreement entered into for work on the Industrial Property was consistent with agreements he had with Mr. Bergeron with respect to other projects they were engaged in together in the summer of 2006. According to Mr. Peters, all projects were to be done based on an hourly rate, and no estimates or quotes were given with respect to any of the projects. In addition to allowing, on cross-examination, that he may well have provided estimates with respect to those other jobs he performed for the defendant, I also note that Mr. Peter's insistence that all projects were simply to be performed at an hourly rate is inconsistent with exhibit 12, the invoice for one of those projects which simply shows a block fee of \$16,500 with no breakdown of hours or any indication of an hourly rate provided. This would certainly be more consistent with a conclusion that he performed that particular job based on an estimate of a total fee rather than an hourly rate.

[21] Thirdly, Mr. Peters was adamant that work on the Industrial Property was halted in 2006 as Mr. Bergeron was having difficulty paying for the work performed. He later testified that they worked until they failed to receive payment for work completed. This is contradicted by invoice 481, which itself appears to be much of a contradiction, as discussed below. Invoice 481 purports to be the first invoice to the defendant for work performed in August and September of 2006.

[22] The problem is we have two copies of invoice 481, each bearing a different date. The copy of invoice 481 included in the documents filed by the plaintiff as exhibit 8 is dated September 30, 2006, while the copy received by Mr. Bergeron, filed as exhibit 3, is dated September 28, 2007. There is no explanation for this inconsistency; however, if one accepts that the defendant was not billed until September of 2007, his failure to pay or difficulty in paying could hardly be the reason for the work stoppage in 2006.

[23] Even if one takes the best case scenario for the plaintiff, that the defendant was billed on September 30, 2006, this hardly explains how the work stoppage can be explained by a failure to pay as the handwritten invoices, filed as exhibit 2, indicate that the last date work was performed in 2006 was September 15th, some two weeks before the defendant was billed.

[24] I also note that Mr. Goupil testified that work was stopped when he was advised by Mr. Peters that he was being moved onto a new project. There was no indication that it was due to non-payment of invoices.

[25] In addition to numerous contradictions, Mr. Peters displayed an almost deliberate vagueness when confronted with any of the more difficult aspects of the plaintiff's evidence, retreating into either a lack of detail and recollection, or a lack of knowledge complete with an offloading of responsibility onto either Mr. Goupil or Mrs. Peters.

[26] Examples of this include his lack of recall with respect to details surrounding the agreement and related discussions, including where and when the discussions took place and who was present.

[27] Furthermore, when asked about work performed by Mr. Bergeron on the Bellevue Property, Mr. Peters indicated that very little was done. When pressed for details, he noted that Mrs. Peters, rather than he, was responsible for tracking progress and he had no real idea what had been done. I find this lack of knowledge very hard to accept, given his stated concern about non-payment for work performed by the plaintiff on the Industrial Property. One would think Mr. Peters would be very vigilant about ensuring Mr. Bergeron's work was tracked to make sure he received an equivalent amount of work as against money owing. In addition, there did not appear to be any indication in Mrs. Peters' evidence that she had been tasked with tracking the work performed by Mr. Bergeron. Her only evidence on this point was that, in preparing the final invoices, she

estimated the hours performed by Mr. Bergeron in October of 2009 in preparing the credit memo filed as exhibit 6.

[28] Similarly, when confronted with tough questions about problems with the plaintiff's documentary evidence, Mr. Peters took refuge in his continual assertion that he did not, in any way, deal with the paperwork. This was done with respect to the unexplained difference in the dates on the two copies of invoice 481 and the serious problems evident with Mr. Goupil's handwritten invoices, filed as exhibit 18, where he asserted that Mr. Goupil brought exhibit 18 to Mrs. Peters, and he, Mr. Peters, had no knowledge with respect to the invoices. For a businessman, Mr. Peters' evidence seems to suggest that he has remarkably little knowledge with respect to the administration of his own business; something I find very difficult to accept.

2. Yvon Goupil:

[29] Mr. Goupil's evidence was also fraught with difficulty. He displayed a marked tendency to proffer almost absurd explanations when confronted with inconsistencies in his evidence.

[30] When talking about his handwritten invoices filed as exhibit 2, he testified that he prepared the invoices daily, filling them out completely every day, and dating them on the date the invoice was completed and the work performed.

[31] However, it must be noted that exhibit 2 includes a number of invoices describing work performed in August and September of 2006. All of the invoices are dated September 15, 2006, and many of them appear to describe work performed on more than one day. When confronted with this inconsistency, Mr. Goupil changed his story to say that he dated all invoices on the dates that he had the customer sign them. He went on to say that he did so to give the customer more time to pay. This is an explanation I find to be somewhat bizarre

when one notes that these handwritten invoices did not represent the formal bill to the client, as those were prepared by Mrs. Peters upon receipt of Mr. Goupil's handwritten invoices.

[32] When shown exhibit 18, the handwritten invoices for work performed in 2009, which are each dated for individual days, he responded that, actually, he had been given new instructions by Mr. Peters a couple of years before to date all invoices on the date the work was performed, as Mr. Peters noted that the invoices were coming in too slowly. This is not only a very convenient response, but it directly flies in the face of Mr. Peters' repeated assertions that he had no knowledge of or involvement with the paperwork of the business.

[33] Additional testimony provided by Mr. Goupil with respect to exhibit 18 netted similarly absurd responses. Mr. Goupil displayed a clear and detailed recollection of having Mr. Bergeron sign the exhibit 2 invoices in 2006, including where, when and what was discussed, yet he is unable to recall any details about having Mr. Bergeron sign the exhibit 18 invoices in 2009, some three years later, saying that Mr. Bergeron must have signed them as they are signed.

[34] When asked why the white copies of the exhibit 18 invoices had not been given to Mr. Bergeron, Mr. Goupil offered the odd explanation of having noted that the invoices were not charged at Yukon Government rates and asking Mr. Bergeron if he could keep the white copies so that he could check on the rates. He then says he took the documents to Mrs. Peters and she advised she would take care of it.

[35] When shown exhibit 7, which are unsigned copies of the exhibit 18 invoices filed with the plaintiff's claim but which, unlike exhibit 18, have no signature from the defendant on them, Mr. Goupil then said he had not had Mr. Bergeron sign the invoices before taking them to Mrs. Peters, but rather took

them to her first to have them photocopied to confirm his hours, and then had Mr. Bergeron sign them.

3. Jane Peters:

[36] Unlike with Mr. Peters and Mr. Goupil, I had no particular concerns with the evidence of Mrs. Peters. By and large, she presented as a credible witness. However, as she had no direct knowledge with respect to any of the issues in dispute and was unable to offer any explanations as to the discrepancies in some of the documentation, her evidence did little to advance the plaintiff's case.

4. The Plaintiff's Documents:

[37] This brings me to an assessment of the frailties of the plaintiff's documentary evidence. If the testimonial evidence is concerning in this case, the documentary evidence is downright disturbing. There are two major problems flowing from the documents filed by the plaintiff.

[38] Firstly, as discussed earlier, there are the two copies of invoice 481 dated a year apart with no reasonable explanation offered for this discrepancy.

[39] Secondly, there is the very troubling exhibit 18. Exhibit 18 represents the handwritten invoices prepared by Mr. Goupil for work performed on the Industrial Property in 2009. Problems with exhibit 18 include the fact that the white customer copies were still attached to the invoices, raising serious questions about whether the documents were ever shown to Mr. Bergeron.

[40] In answering this concern, the plaintiff points to the fact that the invoices in exhibit 18 are signed by Mr. Bergeron. This raises an even more concerning problem with the exhibit. Mr. Bergeron insists that the signatures on the exhibit 18 invoices are not his. Furthermore, he agrees that he did, in fact, sign the invoices filed as exhibit 2. Given this evidence, a comparison of the signatures on the exhibit 2 invoices and the exhibit 18 invoices raises serious questions

about whether the two exhibits were signed by the same person. There are marked differences in the signatures. Those on the exhibit 2 invoices clearly show an 'S' and a somewhat stylized 'B', which makes sense given Mr. Bergeron's initials. Those on the exhibit 18 invoices are decidedly larger and clearly show a 'B' and then a rather inexpert attempt to copy Mr. Bergeron's stylized 'B'.

[41] Obviously, these discrepancies raise the very real possibility that the signatures on exhibit 18 were forged to suggest that Mr. Bergeron had signed the invoices when, in fact, he had not. This suspicion is further reinforced when one considers the fact that copies of the very same invoices were filed with the plaintiff's claim in September 2009, and filed again as exhibit 7 in these proceedings. Mysteriously, these copies of the invoices do not have the signature the plaintiff asserts is Mr. Bergeron's in exhibit 18. While there was much speculation by the plaintiff's witnesses as to why this discrepancy might have occurred, there was no reasonable explanation offered for this glaring difference.

Evidentiary Findings:

[42] Overall, the credibility issues in the plaintiff's evidence call the reliability of the entirety of the plaintiff's case into serious question.

[43] The same credibility concerns did not arise with respect to the evidence of the defendant. By and large, Mr. Bergeron's evidence was clear, credible and plausible.

[44] Where the evidence of Mr. Peters conflicts with that of Mr. Bergeron, I prefer that of Mr. Bergeron.

[45] Where the evidence of Mr. Goupil conflicts with that of Mr. Bergeron, I prefer that of Mr. Bergeron.

[46] With respect to Invoice 481 and its conflicting dates, I accept Mr. Bergeron's evidence that he received the invoice in September of 2007 and not 2006.

[47] With respect to exhibit 18, I accept Mr. Bergeron's evidence that he did not sign the invoices. I am further satisfied, on a balance of probabilities, that Mr. Bergeron's signature was forged in an attempt to strengthen the plaintiff's case.

Conclusions:

[48] Based on my findings with respect to credibility, I make the following conclusions with respect to the issues:

1. Nature of the Agreement:

[49] The agreement between the parties was not an agreement for payment for services rendered on the Industrial Property at the hourly rate set by the Yukon Government, but rather was an agreement to trade off services with the plaintiff doing the site work on the Industrial Property to prepare it for building and the defendant providing carpentry services on the Bellevue Property at a rate of \$65 per hour to a maximum of \$20,000, the amount quoted by Mr. Peters with respect to the value of the work to be performed by the plaintiff on the Industrial Property.

[50] As a result, the plaintiff has not satisfied me that the defendant owes the amount invoiced by the plaintiff.

2. Value of Work Performed:

[51] Having found that the defendant does not owe the amount invoiced by the plaintiff, I must still consider whether the evidence establishes the basis for the plaintiff to argue unjust enrichment, upon a comparison of the value of the work performed by each of the parties.

[52] Mr. Bergeron provided an uncontradicted breakdown of the work he performed on the Bellevue Property, as set out in exhibit 16, which indicates that the labour performed on the Bellevue Property, when calculated at a rate of \$65 per hour, amounted to \$16,120. When reduced by the cash payment of \$1,620, for drywalling the ceiling, this leaves a remaining balance of \$14,500 to be credited against the work performed by the plaintiff on the Industrial Property. The plaintiff has credited Mr. Bergeron with \$5,200 for services rendered on the Bellevue Property as indicated by the credit memo filed as exhibit 6. This would leave a remaining amount of \$9,300 of work done by the defendant and not yet credited by the plaintiff. Given the claim is for \$25,000, this would suggest an outstanding difference of just over \$15,700 in the value of the work performed by the plaintiff as set off against the work of the defendant.

[53] However, to be satisfied that the plaintiff is entitled to judgment in the amount of \$15,700, I must be satisfied, on a balance of probabilities, that the value of the work performed by the plaintiff is consistent with the amount as invoiced by the plaintiff.

[54] For the following reasons, I am not satisfied that the plaintiff has appropriately valued the work performed.

[55] Firstly, while the plaintiff purported to have charged the work performed at Yukon Government rates, the plaintiff provided absolutely no evidence as to what those rates would have been at the time the work was performed. In addition, the evidence of Mr. Goupil suggested that the work performed in 2009 may not have even been billed at Yukon Government rates.

[56] Secondly, the significant problems identified with respect to the credibility of the plaintiff's evidence overall render it too unreliable to support a finding with respect to valuation even on a balance of probabilities.

[57] Thirdly, the problems with the exhibit 18 invoices are so profound as to render them useless as evidence as to what, if any work, was performed by the plaintiff on the Industrial Property in 2009.

[58] Finally, the defendant called Paul Amann, of Paul Amann Excavating Ltd., to provide opinion evidence challenging the plaintiff's assessment of the value of the work performed on the Industrial Property. Mr. Amann's evidence, which was, by and large, credible, called into question both the amount, nature and value of work the plaintiff suggests was performed on the property.

[59] According to Mr. Amann the total cost of completing the work required to make the site building ready, including leveling the property and installing the culvert and two driveways, which Mr. Peters admitted on cross-examination were part of the agreement, would be only \$18,260, well under the amount billed by the plaintiff.

[60] Mr. Peters attempted to challenge Mr. Amann's evidence as to the total value of the project on the basis of bids submitted by Mr. Amann on a Yukon Government project. However, I accept Mr. Amann's evidence that the specifications and requirements of that project differed significantly from those of the work to be performed on the Industrial Property, notwithstanding some similarities with respect to size of property, such that the two jobs cannot be fairly compared.

[61] I would also note that the evidence of Mr. Amann and the photographs filed as exhibit 17, showing water pooled on the Industrial Property, suggest that the property was not properly sloped when leveled by the plaintiff.

[62] Noting Mr. Amann's \$18,260 estimate of the value of the work required for full completion of the project, and noting the fact that the work was not fully

completed and the fact that the work that was completed may well have been improperly performed leading to the flooding seen in exhibit 17, I have serious questions about the plaintiff's assertions with respect to the value of the work performed.

[63] At the end of the day, the plaintiff has failed to satisfy me, on a balance of probabilities that any money is owed to the plaintiff by the defendant. Accordingly, the plaintiff's claim is dismissed.

[64] At the conclusion of the trial, the defendant sought leave to argue the issue of costs. The matter will, therefore, be referred to the Trial Coordinator to set an appropriate date for argument with respect to costs. As this will need to proceed in Whitehorse, both parties have leave to participate by telephone.

RUDDY T.C.J.