SUPREME COURT OF YUKON

Citation: *Cardinal Contracting Ltd. v. Seko Construction (Vancouver) Ltd*., 2017 YKSC 51

Date: 20171003
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 Meagan Hannam	Counsel for the Petitioner
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] Cardinal Contracting Ltd. (“Cardinal”) has a subcontract agreement with Seko Construction (Vancouver) Ltd. (“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”).

[2] 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.

[3] 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.

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

ISSUES

[5] There are three issues to address:

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?

ANALYSIS

Issue 1: Is Seko entitled not to pay Cardinal until paid by Martian?

[6] Although it was not raised during the Subcontract, Seko now says the Subcontract has a "pay when paid" clause and it has not been paid by Martian.

[7] Articles 2B of the Agreement Between Contractor and Subcontractor reads as follows:

> Payments shall be made monthly on progress estimates as approved by the Contractor covering 90% of the value of the Work completed by the Subcontractor to the end of the previous month; such payments to be made 7 days after the Contractor receives payment for such Work from the Owner.

[8] There are two competing interpretations of this clause. Counsel for Cardinal submits that it simply addresses the timing of payments during the performance of the contract. It relies on *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.,* [1995] N.S.J.

No. 43 (N.S.C.A.). In *Arnoldin*, the front page of the contract did not state that payment will only be made if the owner pays the contract. Rather the general terms stated:

> … The balance of the amount of the requisition as approved by the Contractor shall be due to the Subcontractor on or about one day after receipt by the Contractor of payment from the owners.
>
> … Final payment shall be made on acceptance of the work by the Contractor. Architects and/or Engineers, and Owners, and within 30 days after payment has been received by the Contractor. …

[9] As to whether receipt of payment from the owner is a condition precedent to pay the contractor or simply a timing device to facilitate prompt payment to the contractor, the Nova Scotia Court of Appeal ruled that it was not a pay when paid clause. The Court stated at para. 28, that to be a condition precedent the wording would require much clearer language than the obscure language of that contract.

[10] In so ruling, the Nova Scotia Court of Appeal declined to follow the decision in *Timbro Developments Ltd. v. Grimsby Diesel Motors Inc.*, [1988] O.J. No. 448, (Ont. C.A.). In *Timbro*, the wording of the contract was very specific:

> 8.a. When used for sub-contracat [as written] work the following terms will apply: Payments will be made not more than thirty (30) days after the submission date or ten (10) days after certification or when we have been paid by the owner, whichever is the later. …

[11] I am in agreement with the interpretation in *Arnoldin* where the words in the contract before it which were not as clear and precise as the words in *Timbro* where the contractor clearly assumed the risk of non-payment by the owner to the contractor.

[12] In the case at bar, I am of the view that the payment clause is a timing clause rather than a “pay when paid” clause as in *Timbro*. There is no clear wording that the

payment on the Subcontract was conditional on the owner paying the contractor. Therefore, I order that the balance outstanding shall be paid regardless of whether Martian has paid Seko, subject to amount only under the two remaining issues.

Issue #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?

[13] Cardinal charged for services rendered by Ryan Eby in the first four progress claims plus the 12.5% margin. These fees were paid by Seko but Seko now wishes to reverse those payments on the ground that Ryan Eby was included as a supervisor of Cardinal not a worker of Cardinal. Ryan Eby was charged out at a lump sum rather than hours worked. The total charge for Ryan Eby is $41,343.75.

[14] Seko also objects to the 12.5% charge added on to the cost of the building despite the fact that its construction manager approved the charge.

[15] Counsel for Cardinal submits that Seko is estopped from denying these claims having previously accepted and paid for them. See *Hyslip v. Macleod Savings & Credit Union Ltd.,*[1988] A.J. No. 642 and *Triple Z Developments Ltd. v. Surrey (City)*, [1997] B.C.J. No. 2199.

[16] Counsel for Seko relies on the Warranty clause 13.1 of the Subcontract.

[17] In my view, the charges are valid and were paid for. The dispute is not one of warranty, so Seko is estopped from recovering these payments to Cardinal.

Issue #3: Is Cardinal obligated to fix or pay the deficiency and warranty items claimed by Seko?

[18] Section 18 of the Subcontract conditions provides as follows:

> 18.1 If the Subcontractor should neglect to prosecute the Work properly or fail to perform any provisions contained in the Contract Documents, the Contractor may give the Subcontractor written notice specifying such default and if

> such default shall continue for the period of time specified in Article 1C. hereof the Contractor, without the prejudice to any other right or remedy it may have, may make good such deficiencies and deduct the cost thereof from the payment otherwise due to the Subcontractor or may terminate this Subcontract, and may, for the purpose of completing the Work, take possession of all materials, tools and equipment, upon the premises, and may either complete this Subcontract itself or employ any other person, firm or corporation to do so, charging all costs incurred to the Subcontractor.

[19] Seko gave notice of deficiencies in March 2016, and Cardinal began to work on the deficiencies but has not completed them and has refused to complete them since Seko had not paid Cardinal for completing the project. By August 2016, Cardinal had reduced the value of the deficiencies list from $140,200 in March 2016, to $26,500. Seko says the deficiencies and warranty claim is now $26,000.

[20] Seko indicates that the value of various deficiencies was calculated at two times the actual cost of repair. Counsel for Cardinal submits that it was complying with the deficiencies list until Seko stopped paying invoices.

[21] In my view, Seko is entitled to reduce its payment to Cardinal by $13,000. Although it might be no surprise that Cardinal stopped work on the deficiencies, it is nevertheless contractually obliged to complete or pay the cost. Seko, on the other hand, has not been upheld on the previous two issues and should be limited to the actual estimate for deficiencies and warranty.

CONCLUSION

[22] I order that Seko pay Cardinal $155,828.31 representing the amount claimed of $168,828.31 less the deficiency and warranty claim of $13,000. I also declare that Cardinal is entitled to a lien in the amount of $155,828.31.

[23] Counsel may speak to costs, if necessary, in case management.

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VEALE J.