

SUPREME COURT OF NOVA SCOTIA

Citation: *Aaffinity Contracting & Environmental Ltd. v. APM Construction Services Inc.*, 2015 NSSC 33

Date: 2015-02-04

Docket: *Hfx.* No. 424444

Registry: Halifax

Between:

Aaffinity Contracting & Environmental Limited

Plaintiff

v.

APM Construction Services Inc., Riokim Holdings (Ontario II) Inc., and Wal-Mart Canada Corp.

Defendants

Judge: The Honourable Justice Arthur LeBlanc

Heard: December 1, 2014, in Halifax, Nova Scotia

Counsel: James D. MacNeil, for the Plaintiff
Andrea Isabelle, for the Defendants

By the Court:

Introduction

[1] This is a motion by the plaintiff, Aaffinity Contracting and Environmental Limited (“Aaffinity”), for summary judgment on the evidence. The defendant, APM Construction Services Inc. (“APM”), contests the motion. The other defendants, Riokim Holdings (Ontario II) Inc. (“Riokim”) and Wal-Mart Canada Corp. (“Wal-Mart”), take no position.

Background

[2] This action arises out of the renovation of a Wal-Mart store located at 220 Chain Lake Drive, Halifax, Nova Scotia (the “Property”). Riokim is the owner of the Property and Wal-Mart occupies the Property as a tenant.

[3] On March 4, 2013, APM was retained by Wal-Mart to act as general contractor for the renovation pursuant to the terms of Standard Construction Document CCDC 2 and related contract documents (“Main Contract”).

[4] On March 25, 2013, Aaffinity was retained by APM as a subcontractor for the demolition portion of the renovation project. The demolition subcontract was for \$100,000.00 plus taxes.

[5] Aaffinity carried out its work at the Property from April 5, 2013, to November 15, 2013. Pursuant to the terms of the subcontract, Aaffinity invoiced APM monthly based on the percentage of the contract that had been completed in each respective month, less the holdback of 10%.

[6] In addition to its obligations under the subcontract, Aaffinity performed “extra” work throughout the course of the renovation at APM’s request. Aaffinity provided APM with invoices for the extra work, attaching corresponding time and material sheets or other supporting documentation.

[7] Despite repeated demands, APM has not made payment on a number of invoices for subcontract work, extra work, holdbacks and interest. Aaffinity says the amount owed by APM as of October 7, 2014, is \$210,925.58, comprised of \$179,058.00 in balance and \$31,867.58 in interest.

[8] On December 23, 2013, Aaffinity registered a claim of lien against the Property in the amount of \$179,057.95 plus interest. On February 18, 2014, Aaffinity filed a certificate of lis pendens against the Property and commenced this action to enforce the lien.

[9] On May 20, 2014, APM filed its defence, stating that it was under no obligation under the subcontract to pay Aaffinity's invoices until Wal-Mart pays APM for the work. APM also alleges that it is entitled to a legal or equitable set-off in the amount of \$535.73 for deficiencies in Aaffinity's work.

[10] APM subsequently posted a lien bond in the amount of \$223,822.44 in order to vacate the lien and certificate of lis pendens.

Positions of the Parties

[11] Aaffinity submits that it is clearly entitled to payment of the outstanding invoices. There is no dispute that it performed the work required under the subcontract and invoiced APM each month. All extra work was carried out by Aaffinity at APM's request, with APM obtaining approval from Wal-Mart or signing off on the extra work itself. Aaffinity claims that APM has been paid in full by Wal-Mart and has simply refused to pay its invoices.

[12] With respect to the set-off claimed by APM, Aaffinity does not agree that its work was deficient in any way. That being said, Aaffinity is willing to reduce its claimed amount by \$535.73 for the purposes of summary judgment.

[13] APM does not deny that Aaffinity carried out the work under the subcontract and all extras APM requested. APM says, however, that it has not been paid by Wal-Mart for the extra work performed by Aaffinity, and it is not required under the terms of the subcontract to pay Aaffinity until Wal-Mart has approved the

extras and issued signed Change Orders. APM relies on the following clause in the demolition subcontract:

8. Claims. All claims, extras, or damages asserted by Seller under the Purchase Order shall be subject to all the conditions and restrictions governing claims by APM against the Owner. In no event shall APM be required to pay the Seller more than the total it has received from [sic] the Owner because of Seller's claims, extras, or damages, less a reasonable amount for APM's overhead and profit and its expenses incurred in recovering the claim. Any claim made by Seller which in turn is made by APM against the Owner shall not be deemed to be an admission by APM of the validity of the claim, and it shall not be used against APM in any manner or proceeding.

[14] APM says this clause incorporates by reference any conditions and restrictions contained in the Main Contract governing payment for extras. In other words, extras asserted by Aaffinity against APM are subject to all the conditions and restrictions governing claims for extras by APM against Wal-Mart.

[15] The Main Contract provides that APM, like Aaffinity, shall make monthly applications for progress payment. Wal-Mart's obligation to consider an application for progress payment does not arise until a "complete" application has been submitted by APM.

[16] Part 6 of the Main Contract deals with changes in the work required under the contract, including extras:

PART 6 CHANGES IN THE WORK

GC 6.1 OWNER'S RIGHT TO MAKE CHANGES

6.1.1 The *Owner*, through the *Consultant*, without invalidating the *Contract*, may make:

- .1 changes in the *Work* consisting of additions, deletions or other revisions to the *Work* by *Change Order* or *Change Directive*, and
- .2 changes to the *Contract Time* for the *Work*, or any part thereof, by *Change Order*.

6.1.2 The *Contractor* shall not perform a change in the *Work* without a *Change Order* or a *Change Directive*. [*Emphasis added*]

[17] Change Orders and Change Directives are addressed in the following provisions:

GC 6.2 CHANGE ORDER

6.2.1. When a change in the *Work* is proposed or required, the *Consultant* will provide the *Contractor* with a written description of the proposed change in the *Work*. The *Contractor* shall promptly present, in a form acceptable to the *Consultant*, a method of adjustment or an amount of adjustment for the *Contract Price*, if any, and the adjustment in the *Contract Time*, if any, for the proposed change in the *Work*.

6.2.2 When the *Owner* and *Contractor* agree to the adjustments in the *Contract Price* and *Contract Time* or to the method to be used to determine the adjustments, such agreement shall be effective immediately and shall be recorded in a *Change Order*. The value of the work performed as the result of a *Change Order* shall be included in the application for progress payment.

GC 6.3 CHANGE DIRECTIVE

6.3.1 If the *Owner* requires the *Contractor* to proceed with a change in the *Work* prior to the *Owner* and the *Contractor* agreeing upon the corresponding adjustment in *Contract Price* and *Contract Time*, the *Owner*, through the *Consultant*, shall issue a *Change Directive*.

...

6.3.4 Upon receipt of a *Change Directive*, the *Contractor* shall proceed promptly with the change in the *Work*.

...

6.3.13 When the *Owner* and the *Contractor* reach agreement on the adjustment to the *Contract Price* and to the *Contract Time*, this agreement shall be recorded in a *Change Order*.

[18] According to APM's interpretation of the Main Contract, there are two possibilities when extra work is proposed. If APM and Wal-Mart agree on the price to be paid and the time required for the extra work, a Change Order will be issued. Once APM has the Change Order, it can invoice for the value of the extra work in its next application for payment. If APM and Wal-Mart have not agreed on the price to be paid and the time required for the extra work, a Change Directive will be issued. Although APM must promptly perform the extra work contemplated by a Change Directive, it is not entitled to invoice for the work until

a Change Order is provided. APM says Wal-Mart is currently still reviewing the submissions for Aaffinity's extra work, more than a year after the work was completed.

The Test for Summary Judgment

[19] Summary judgment on the evidence is governed by Rule 13.04, which provides:

- 13.04 (1)** A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
- (2)** The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
- (3)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
- (4)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
- (5)** A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
- (6)** The motion may be made after pleadings close.

[20] In the leading decision of *Coady v. Burton Canada Co.*, 2013 NSCA 95, [2013] NSJ No 425, Saunders, J.A. explained the purpose of summary judgment:

22 ... Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[21] The test for summary judgment on the evidence consists of two stages. At the first stage, the moving party must satisfy the Chambers judge that there are no material facts in dispute requiring trial. At this stage, the merits of each party's

position are irrelevant, and there is no burden on the responding party. If the moving party fails to prove that there are no material facts in dispute, the motion for summary judgment is dismissed: *Coady*, para. 42.

[22] If the moving party satisfies the first stage, the responding party must establish that its claim, or defence, has a real chance of success. Although the burden lies with the responding party, the Chambers judge must necessarily consider the relative merits of both parties' positions:

42 [T]he judge's task is to decide whether the responding party has demonstrated on the evidence, (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success? (*Coady*)

[23] A "real chance of success" is "a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation": *Coady*, para. 87.

[24] On a motion for summary judgment, it is not the role of the Chambers judge to resolve or draw inferences from disputed questions of fact, or mixed law and fact. Nor should the judge weigh evidence and evaluate credibility: *Coady*, para. 87.

The Evidence

[25] The evidence for Aaffinity is contained in the affidavit of Mark Bryden, the company's Contracts Manager on the Wal-Mart renovation project. The evidence for APM is contained in the affidavit of Dennis Wadden, Vice-President & General Manager of Operations (Atlantic) of APM. Both affiants were cross-examined.

[26] According to Mr. Bryden's affidavit, Aaffinity completed the following extras to the subcontract at APM's request:

- Additional demolition work related to McDonalds and loading dock demolition located within Wal-Mart;
- Additional demolition work related to the cart storage area;
- Removal of vinyl composite tiles for the purpose of vinyl tile replacement;
- Additional demolition in the gun room;
- Rock breaking;
- Removal/reinstatement of unsuitable soils; and
- Miscellaneous extra work.

[27] Attached to Mr. Bryden's affidavit are numerous exhibits intended to prove that Aaffinity obtained the approval of APM or Wal-Mart for each of the extras. In some cases, Aaffinity prepared time and material sheets which were signed by an APM employee on a signature line beneath the words, "I HEREBY AUTHORIZE PAYMENT FOR THE ABOVE." In other cases, quotes or diagrams were prepared by Aaffinity at APM's request and APM provided verbal or written approval for Aaffinity to proceed. Change Directives were issued by Wal-Mart for most, but not all, of the extras. Mr. Bryden admitted on cross-examination that Aaffinity was not in possession of a signed Change Order for any of the extra work.

[28] Mr. Wadden's affidavit explains that APM submitted monthly applications to Wal-Mart for progress payment from April 30, 2013, to November 30, 2013. Wal-Mart's first failure to make full payment to APM occurred in relation to the September 2013 payment application, with Wal-Mart paying \$16,905.35 less than the full amount of the claim. Wal-Mart paid APM's October application in full. On December 1, 2014, Wal-Mart made a partial payment of the November 2013 application in the amount of \$25,194.86, leaving \$3,779.23 outstanding.

[29] Since November 2013, APM has submitted two invoices for extra work, both dated January 14, 2014, in the amounts of \$53,193.25 and \$1,037.45. APM has also submitted a final application for progress payment dated April 30, 2014, in the amount of \$62,488.31. To date, APM has not received payment for these invoices. According to APM, the total outstanding amount for all invoices, before interest, is \$137,403.59.

[30] Mr. Wadden's affidavit further states that APM is prohibited from submitting invoices for the extras claimed by Aaffinity and for the Main Contract holdback until Wal-Mart provides its approval in the form of a signed Change Order. Nor can APM submit an application for final payment until all Change Orders have been resolved.

Application of the Test

[31] Under the first stage of the test for summary judgment, Aaffinity must establish that there are no material facts in dispute. It has not done so. In my view, whether Wal-Mart has paid APM for any of the work completed by Aaffinity is very much in dispute.

[32] In written and oral submissions, Aaffinity argued that Clause 8 of the demolition subcontract did not apply to the claim because APM has been paid by Wal-Mart for Aaffinity's work. In its brief, Aaffinity relied on the following statement in Wal-Mart's counterclaim against APM:

[3] Wal-Mart says that it has made all payments due and owing under the Contract to APM and that any failure on APM's part to pay its subcontractors is the fault of APM and not Wal-Mart.

[33] At the hearing, Aaffinity argued that Mr. Wadden's own evidence was further proof that APM had been paid for the work. On cross-examination, Mr. Wadden confirmed that, in general, monthly applications for payment are based upon all work completed by APM and its subcontractors during that month. If it has not yet received invoices from subcontractors for that month, APM may estimate the percentage of work completed when it invoices the owner. Mr.

Wadden also confirmed that APM has been paid for all applications for progress payment submitted to Wal-Mart up to and including November 30, 2013, less \$20,684.58 that remains outstanding. Aaffinity points out that its invoices were all filed with APM before November 30, 2013 and asks this court to conclude, based on Mr. Wadden's testimony that a monthly billing covers all work done in that month, that APM has been paid for Aaffinity's work.

[34] Neither the pleading by Wal-Mart nor the evidence of Mr. Wadden satisfies me that there is no issue of material fact as to whether APM has been paid by Wal-Mart for Aaffinity's work. While Wal-Mart's counterclaim may contain allegations of fact that Aaffinity considers helpful to its position, the pleading itself is not evidence of the statements made therein.

[35] As to Mr. Wadden's testimony, I do not share Aaffinity's interpretation of the evidence. Mr. Wadden's affidavit is clear. APM has not invoiced for the extras claimed by Aaffinity, nor the holdbacks, and it cannot do so under the terms of the Main Contract until Wal-Mart approves the work and issues a signed Change Order. His evidence on cross-examination does not conflict with his affidavit evidence that approval and payment for extras requires a separate process, and APM has not been paid for the extras claimed by Aaffinity.

[36] In oral submissions, Aaffinity raised the alternative argument that even if APM has not been paid by Wal-Mart, summary judgment should be granted on the basis that APM had modified the demolition subcontract by signing time and material sheets purporting to "authorize payment" for the extra work. This position fails to address those extras for which time and material sheets were not submitted. More importantly, this argument was not raised by Aaffinity until the hearing. It provided no authorities and offered no evidence, other than the signed time and material sheets. Caught by surprise, APM had no opportunity to file evidence on the point or provide the court with its own authorities on the issue. Whether APM has modified the terms of the contract is a genuine issue requiring trial. Evidence of the full and complete context under which the time and material sheets were signed is necessary to properly determine their effect, if any, on the terms of the contract.

[37] Having found that Aaffinity has failed to meet its burden, there is no need to move on to the second stage of the analysis: *Coady*, paras. 39, 57.

Conclusion

[38] The motion for summary judgment on the evidence is dismissed. As required by Rule 13.07, I would ask the parties, including those that did not appear on this motion, to contact me to arrange for a motion for directions not later than 10 days following the release of this decision.

[39] If counsel are unable to agree on costs, I will accept written submissions within 30 days of the release of this decision.

Leblanc, J.