SUPREME COURT OF NOVA SCOTIA

Citation: *Concrete Shoring Technologies Inc. v. Civil Tech Construction Ltd.*, 2014 NSSC 459

Date: 20140613
Docket: Hfx No. 409794
Registry: Halifax

Between:

Concrete Shoring Technologies Inc.

Plaintiff

v.

Civil Tech Construction Ltd.

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	April 16, 2014, in Halifax, Nova Scotia
Oral Decision:	June 13, 2014
Written Decision:	March 10, 2015
Counsel:	Gary Richard, for the Concrete Shoring John Kulik, QC, for the Civil Tech

By the Court (Orally):

Introduction

[1] Concrete Shoring, the Plaintiff, rents and sells shoring equipment and products used in the "shoring process". "Shoring" means the process of providing support to buildings while they are being built. In particular, it involves forms to support the concrete while it hardens, after which the equipment is removed. The following are examples of the types of equipment used; beams, frames, trusses, jacks, clamps, and vertical (forms) or shores.

[2] In 2011, the Defendant, Civil Tech, was in the process of constructing several large apartment complexes in the Halifax Regional Municipality. There were two sites as it relates to this matter, the "Windmill Rd. Site", and the "Larry Utech Blvd. Site".

[3] Concrete Shoring and Civil Tech entered into a contract on or about September 21, 2011, for the rental of shoring equipment to be used at the Windmill Rd. apartment site.

[4] Concrete submits that the contract stipulates that Civil Tech would be responsible for any damaged items and any items of equipment not returned. The evidence submitted by Concrete is that there were both; items that were damaged and items that were not returned. Concrete is requesting this Court to issue Summary Judgment in its favour on the issue of liability. It submits there is no genuine issue of material fact as to liability that would require a trial.

[5] Concrete submits the only issue for trial on the evidence is damages. This would require an assessment and calculation of the numerous items which Concrete says were damaged and not returned.

[6] Concrete issued two invoices for the damaged and missing items as alleged:

1) August 2, 2012 (Inv. # 2012201A) - $61,354.80; and

2) October 9, 2012 (Inv. # 2012200 revised) - $49,548.24.

[7] Concrete summarized its position by stating that procedures and systems were put in place under the contract with Civil Tech. However, Civil Tech did not

take advantage of those procedures. As a result, liability should fall to Civil Tech automatically.

[8] A key provision in the contract therefore involves the equipment being counted and inspected upon delivery.

[9] Civil Tech argues that a summary judgment motion is not the time to decide the merits of the case. The weighing of evidence to determine liability should be reserved for trial.

[10] *Rule 13.04* of the *Nova Scotia Civil Procedure Rules* is designed to determine, on the evidence, if there is a genuine issue of material fact and if so, the onus shifts to the Defendant, to show that the Defence has a reasonable chance of success. Just to clarify, the onus is on the mover to clarify there is no issue of material fact in dispute and then the onus would shift to the Defendant.

[11] Civil Tech states that this case is all about liability. Once liability is determined the issue of damages will be easily determined, says Civil Tech, because the price list attached to the agreement will dictate the quantum of damages. Civil Tech says damages will be a straight forward calculation, but first it must be determined what equipment, if any, Civil Tech is liable for, for the damaged or lost materials.

[12] Civil Tech submits that what is needed to grant summary judgment on liability is undisputed evidence as to the following facts: 1) what equipment was damaged; and 2) what equipment was not returned, (if any). Civil Tech argues both of these are in dispute. Civil Tech has provided affidavit evidence as to damaged and missing equipment. It is different than the affidavit evidence provide by Concrete.

[13] Civil Tech is disputing these key facts and submits there is evidence to the contrary, on every point. Civil Tech submits the court cannot summarily determine liability, when in order to do so the Court must first determine: 1) what equipment was damaged; and 2) what equipment was lost. Civil Tech submits there is a dispute on the evidence about both, in addition to any parts that were missing from the equipment. The "missing parts" claim is an additional allegation of the Plaintiff.

The Affidavit Evidence

[14] Civil Tech, points to several specific paragraphs in its affidavit evidence in support of its position.

[15] At paragraph 33 of his affidavit, Mr. Nikkhah states that as of October, 2012, the only pieces of equipment still in Civil Tech's possession were 137 jacks. Mr. Nikkhah, who is president of the company, further states that these were returned to Concrete in early October, 2012. Further, at paragraph 34, the President states:

> 34. As of that date, Civil Tech had returned each and every item it had received from Concrete Shoring. Civil Tech has none of Concrete Shoring's equipment left in its possession.

[16] The October 9, 2012 invoice submitted by Concrete for $49,948.24 is solely for items not returned. As far as Civil Tech is concerned that number should be zero. Its position on the evidence is that it returned all equipment.

[17] In regard to damaged material, Mr. Nikkhah states at paragraph 59 of his affidavit, there was only one instance when materials were damaged by them.

> 59. Other than the 18 shores, for which Concrete Shoring was paid, at no time did I ever agree that any materials were damaged by Civil Tech. I have continued to dispute this with Mr. Verri to this day.

[18] Mr. Real Rossignol filed an affidavit, as the former site supervisor for Civil Tech. He was employed by Civil Tech in 2011 and 2012 and ceased employment with them in August of 2012.

[19] At paragraph 14, Mr. Rossignol disputes receiving the equipment in "rental ready condition", stating that over 50% of the panel system was damaged or in poor condition. Further, he stated that over 25% of the "flyer system" was in "poor condition, and was also missing many pieces".

[20] Further at paragraphs 57 and 59 Mr. Rossignol stated as follows:

> 57. As I stated above, we received damaged and incomplete items from Concrete Shoring, and worked with them as best we could.
>
> 59. I personally also had a number of discussions with Alberto Verri in which I complained to him about the damaged and unusable materials. I do not remember the exact dates of the conversations but they took place before August 2012, when I left Civil Tech.

[21] Furthermore, in addition to disputing that there were damaged and missing items, Civil Tech argues there is very clearly a dispute as to the terms of the contract.

[22] I turn now to discuss the contract which is attached to the affidavit of Mr. Verri, President of Concrete, as Exhibit "C".

The Rental Agreement

[23] The terms and conditions of the contract, as "agreed to and accepted", by Mr. Verri and Mr. Nikkhah on behalf of the respective companies are set out in the agreement as follows:

> Terms and Conditions
>
> All materials used in rental ready condition.
>
> Rental Rates based on a 30 day month. Invoicing to start when equipment leaves our yard…
>
> Shortages and damaged materials will be charged as per out latest price list (see attached).
>
> Materials to be counted and checked at site at time of delivery.
>
> Tracker will supply engineering layout, if required.
>
> All above agreed to and accepted.

[24] For the "invoicing to start when it leaves our yard", (presumably Concrete's yard), then the materials would have to be counted and checked there first.

[25] The contract further states that the "materials are to be counted and checked **at site** at the time of delivery". The site would presumably be the construction site at which Civil Tech needed the shoring. The contract stipulates that to be:

> Re: Windmill Road Apartment Building, Lot # 1898AB, Dartmouth.

[26] The evidence of Concrete is that the materials were, in fact, counted and checked at time of delivery.

[27] Civil Tech states in evidence that "it was not realistic for them to count and check the equipment at time of delivery, because until all the equipment is "laid out" on site any damage or missing material cannot be reasonably inspected."

[28] The evidence of Concrete goes further, stating that Civil Tech in fact, signed for each delivery. By doing so Concrete states that Civil Tech acknowledged receiving the materials as listed, and in a "rental ready condition".

[29] The terms of the contract are, to some extent supported by the evidence. The "system" discussed by Concrete, which was open to be utilized by Civil Tech, was to conduct a count and inspection to verify the quantity and quality of the items delivered.

[30] The contract is otherwise silent as to the effect of a non-inspection by Civil Tech. The implication, since invoicing starts when it leave the yard of Concrete, is that a conscious decision by Civil Tech not to inspect, could lead to Civil Tech being responsible for the condition of the equipment and the quantity delivered, even if there was equipment that was damaged or not all there.

[31] Concrete argues that liability arises as a result of their system of "checks and balances", in effect.

[32] Concrete also relies on their Rental Forms. These forms have a place at the bottom to state whether the "systems" had damage, as well as the count for the equipment.

[33] Concrete argues it has the better evidence. For the most part, it says, the equipment lists and terms of rental have been reduced to writing. Concrete states that Civil Tech on the other hand, has been more relaxed and is now forced to rely on memory and recollection, as to these material facts.

[34] Concrete submits that Civil Tech is required to put its best foot forward. Concrete argues Civil Tech's evidence does not seriously challenge Concrete's entitlement to summary judgment on liability.

[35] Concrete submits the competing evidence, does not give rise to an issue of material fact in determining liability.

[36] Concrete therefore, urges the Court to take a "robust approach" to this summary judgment motion. This is in keeping with *Rule 1.01*, which requires, a "just speedy and efficient" approach to every proceeding. Granting summary judgment on liability and moving matters along is justified on these facts, says Concrete.

Mr. Verri's Affidavit

[37] At paragraph 22 of President Verri's affidavit on behalf of Concrete he indicates that on 27 different dates, rental equipment was provided by Concrete to Civil Tech for use at their Windmill Road site. In paragraph 23, he affirms that on each occasion, "at the time of delivery (as applicable), **and in accordance with the contract**, an employee of Civil Tech **inspected** the rental equipment upon delivery or pick-up".

[38] At paragraphs 20 and 21, Mr. Verri states the same thing with respect to equipment delivered to the Larry Utech Boulevard Site, except there were deliveries on 21 dates (instead of the 27 for Windmill Road). Like the deliveries to Windmill Road, the evidence of Mr. Verri at paragraph 21 is that:

> …at the time of delivery or pick up (as applicable) and in accordance with the contract, an Employee of Civil Tech inspected the rental equipment, **upon delivery or pick-up**.

[39] Mr. Verri states this was verified by Concrete's employee Mr. Riley, who also filed an affidavit, with respect to the Utech site, Mr. Verri stated at paragraph 21:

> No equipment sent to the Larry Utech Blvd. Site was refused or returned as a result of being delivered damaged.

[40] Mr. Verri states further, with respect to the Windmill Road deliveries and/or pick up, that on one occasion only there was an issue with damaged equipment.

[41] At paragraph 24 of his affidavit, Mr. Verri states:

> On one occasion, being in or around October 2011, an employee of Civil Tech observed minor damage on material being delivered and refused delivery. The damaged materials were removed from the Windmill Road Site and were replaced with undamaged items.

[42] The total amount claimed by Concrete of $111,303.04, consisting of the two invoices, is for materials delivered to both sites, as shown on the invoices. The Contract, (Exhibit "C" Verri affidavit) references only the Windmill Road Site.

[43] Concrete, in its submission, states the following has been established by undisputable evidence:

1) Concrete Shoring delivered the goods to the Defendant;

2) The equipment was delivered in the course of a commercial relationship;

3) The parties agreed in essence to a form of bailment;

4) As a result the equipment was at the risk of Civil Tech, while in its possession;

5) Any damaged equipment or equipment not returned would be measured in accordance with the price list which is in evidence.

[44] In essence, the Plaintiff, Concrete, argues the Defendant, Civil Tech, failed to be precise, failed to take due diligence, and failed to keep track of its paperwork. Consequently, Civil Tech is forced to challenge the intentions of the parties, under the contract, in an *ex post facto* manner.

[45] Concrete submits on the contrary that its evidence is compelling, and is not *ex post facto*. It has demonstrated that Civil Tech failed to take advantage of the system under the terms of the contract.

[46] It is clear on the evidence that Concrete rented equipment to Civil Tech and that Civil Tech took delivery of that equipment. It is also clear that Civil Tech is responsible to pay Concrete for any damaged equipment or equipment not returned at the prices set out in the contract.

[47] There is, on the evidence, a dispute as to whether there was damaged equipment, the extent of the damage, and who caused the damage. Civil Tech says they are unsure as to whether the damages was caused before or after delivery.

[48] Some but not all of the return forms were signed by an Employee of Civil Tech. These forms noted some of the damage.

[49] Without evidence of an inspection at the time of delivery, it cannot be assumed that there was no damage before it was delivered. The contract calls for those inspections to have taken place . There is a dispute as to whether there was any equipment which was not returned. There is also a dispute as to whether the inspections took place, in accordance with the contract.

[50] Concrete states the documentation confirms the inspections. Civil Tech states it was not practical to do so. The contract stated that the materials were to be counted and checked at site at the time of delivery. On the evidence before me, Concrete did not ensure this was done. They left it to Civil Tech to decide.

[51] There is also a dispute as to what terms and conditions, constituted the contract. The lease "terms and conditions" attached to the rental forms, did not form part of the September 12, 2011 contract (Exhibit "C"). Even so they are relied upon by Concrete in paragraph 6 of the Statement of Claim dealing with "damage beyond reasonable wear and tear".

[52] There is on its face, a further contradiction in terms between the equipment being in "rental ready condition" and clause 7 of the lease terms and conditions, which states that the "Lessee acknowledges that there are no warranties of any kind…"

[53] In Clause 13 of the Defence, Civil Tech, states "some" of the equipment was already damaged prior to its receipt and use by them.

[54] To summarize there is on the evidence a dispute about the following facts:

1) The lease terms;

2) Whether the equipment was inspected at the time of delivery;

3) Whether the equipment was delivered in a rental ready conditions, and

4) Whether all of the equipment was returned, and if not, what equipment was not returned. (see letters contained as Exhibits "Q" and "S" of Mr. Nikkhah's affidavit).

[55] On this motion Concrete submits a trial is not required to establish that some of its equipment was damaged while in the possession of the Defendant, or that in some cases was not returned at all.

Decision

[56] The only way in which summary judgement could be granted on liability, is if these disputed facts are not material to the question of liability. Would the law, if properly applied, permit summary judgment on these disputed facts.

[57] In **Burton Canada Company v. Coady**, 2013 NSCA 95, Saunders, JA, discussed the meaning of "material facts" in one of the twelve guiding principles. He stated this word takes on its ordinary meaning, "A material fact, he said, is a fact that is essential to a claim or defence."

[58] On the evidence before me, I have considered the exchange of letters between Mr. Verri of Concrete and Mr. Nikkhah of Civil Tech dated August 7 – 9, 2012. From these, it is evident this dispute arose almost immediately after the first invoice dated August 2, 2012, in the amount of $61,354.80 was issued. Within a week in fact. It is apparent the dispute over the amount of damaged and missing equipment has been an issue for some time and perhaps from the very beginning. In order for this Court to grant summary judgment, the contract or agreement in question would have to call for a form of strict liability, under the system put in place, as alleged by the Plaintiff. That is, liability would arise simply within the four (4) corners of the document.

[59] The price list mandates what will be paid, once it is established what materials are damaged or missing. Otherwise, it appears the terms of the the contract signed by both parties does not automatically determine liability separate and apart from whether there is a dispute about those matters, which it clearly appears there is. A pertinent clause is one related to inspection, which states:

> Materials to be counted and checked at the time of delivery.

[60] The contract does not say however, what will happen if an inspection, which appears by implication at least to be mandated, is not performed. There is an issue

as to what inspections were completed. Civil Tech stated in its affidavit evidence that it was impractical to do to. This relates closely to another issue in dispute, whether the materials were in rental ready condition, which in turn, relates to a third issue of whether the equipment was damaged or merely subject to normal wear and tear. These are some of the facts, clearly in dispute from my reading of the affidavits. Another principle from the **Coady** decision which is applicable, is that the Chamber Judge's assessment be based on all the evidence, regardless of the source.

[61] At this point, it cannot be said that the materials will be deemed satisfactory under the terms of the contract with or without an inspection. This goes to whether there was, as the Plaintiff argues, an agreed form of bailment. While some assessment of the evidence is required under the *Civil Procedure Rule 13.04*, unless it is clear that there are no material facts in dispute, summary judgment ought not to be granted.

[62] A further guiding principle in **Coady** at # 10 states:

> Summary judgement applications are not the appropriate form to resolve disputed questions of fact or mixed law and fact, or the appropriate inferences to be drawn from dispute facts.

[63] I find the facts in dispute here to be material, in that those I have mentioned and others, can or will affect the outcome of this matter and are essential to the claim or to the defence. I further find there are more facts in dispute than merely quantum.

[64] Finally, it is not the forum to resolve matters of credibility nor disagreement surrounding the interpretation of the contract or contracts in question.

[65] In **AGC Flat Glass North America Ltd. v. CCP Atlantic Specialty Products Inc.**, [2010] NSJ 140, Justice Bryson described the principles to be applied when a Plaintiff is moving for summary judgment at paragraph 13 which I adopt. These were espoused upon by Justice Saunders in **Coady** when he said:

1. Summary judgment engages a two stage analysis;
2. The first stage is only concerned with the facts.

[66] The judge decides whether the moving party has satisfied the evidentiary burden of proving there are no material facts in dispute. If there are material facts in dispute the moving party fails and the summary judgment motion is dismissed.

[67] I am not satisfied that the Plaintiff, Concrete Construction, has met its evidentiary burden of proving there are no material facts in dispute.

[68] In the result, the motion for summary judgment is dismissed[1].

[69] Order accordingly.

Murray, J.

[1] A chambers date of August 18, 2014 was set for directions to be given pursuant to Rule 13.07. Prior to the hearing date the parties waived same.