SUPREME COURT OF NOVA SCOTIA

Citation: Certified Design Consulting Inc. v. Alex Lane Properties Inc., 2015 NSSC 367

Date: 20151223
Docket: Hfx. No. 443076
Registry: Halifax

Between:

Certified Design Consulting Inc., a body corporate

Plaintiff

v.

Alex Lane Properties Inc., a body corporate

Defendant

Decision

Judge:	The Honourable Justice Robert Wright
Heard:	December 2, 2015 in Halifax, Nova Scotia
Written Decision:	December 23, 2015

Counsel:	James MacNeil and Rilla Banks for the Plaintiff Peter Rumscheidt for the Defendant

Wright, J.

INTRODUCTION

[1] This is a Builders Lien case in which a motion has been brought by the plaintiff Certified Design Consulting Inc. ("CDC") under Civil Procedure Rule 10.04 for an order enforcing a purported settlement agreement negotiated directly between the parties on September 14, 2014.

[2] Concurrently, a cross motion has been brought by the defendant Alex Lane Properties Inc. ("ALP") under s.29(5) of the *Builders' Lien Act* for an order vacating the registration of a claim for lien filed by CDC on the ground that the requisite certificate of lis pendens was not registered within the time lines prescribed by that statute.

FACTUAL BACKGROUND

[3] ALP is the owner of real property located at 27 Alex Lane in Eastern Passage, Nova Scotia. In January, 2014 the principals of that company, Frank LaFramboise and Tris Winfield, began to activate their plan to convert a barn situate on that property into a six unit residential building (herein referred to as the "project"). They then took steps to obtain estimates from CDC to act as general contractor which eventually lead to the signing of a construction contract under date of October 23, 2014. This was negotiated with Derek Carter as owner and principal of CDC.

[4] As general contractor, CDC was responsible for a wide scope of work under the contract including, as would later take on greater significance, the supply and installation of cabinets for all six units. The contract provided for a total fixed price of $508,300 within which CDC was given an allowance of $39,800 for the cabinetry work component.

[5] The construction work began on or about October 9, 2014 using drawings and specifications prepared for ALP by third parties, and went fairly smoothly until about mid March of 2015. At that time, an HRM building inspector issued a directive that work on the project be halted when it was realized that the construction design documents, upon which a building permit had been issued, did not bear the approval stamp of a professional engineer.

[6] To solve that problem, ALP reviewed matters with a consulting engineer it retained, who did a site visit and gathered various information from CDC. This investigation raised various concerns on the part of ALP with respect to unsatisfactory performance of certain aspects of the work performed to date. The alleged deficiencies were identified in a document prepared by ALP dated April 20, 2014 which need not be detailed here for purposes of this decision. Suffice it to say that the major concern was whether, and to what extent, proper foundation footings and pads had been constructed, there being no record available of a foundation inspection having been conducted by HRM as normally required.

[7] Without specifically responding to this list of deficiencies, CDC continued its work on the project well into the month of May, 2015. By that time, however, the level of disagreement over construction issues had reached the point where CDC stopped work on the project. Furthermore, the third draw then went unpaid

by ALP, which was due once insulation was completely installed and the drywall ready for painting.

[8] The last work performed on the project by CDC took place on May 26 which was followed three days later by the filing of a Claim for Lien by CDC under the *Builders' Lien Act*. Subsequently, a Statement of Claim was filed by CDC on September 6, 2015 which alleged the sum of $312,489.99 to be due and owing. This was accompanied by a certificate of lis pendens which was not recorded, however, until September 10th. Eventually, a Statement of Defence and Counterclaim was filed by ALP on November 13, 2015 in which ALP claimed for recovery of the costs to remedy the various deficiencies on the project.

[9] In the meantime, as early as May 27th, the parties began communicating with one another by exchanging their positions on the outstanding issues and discussing potential resolution through alternate dispute resolution as stipulated by the contract. These communications did not lead anywhere, however, until a chance meeting between Mr. Carter and Mr. LaFramboise at a building supply store at the end of June.

[10] That meeting spurred both parties into making an earnest effort to resolve their differences. After further e-mail exchanges between the parties, a series of negotiations took place between their respective lawyers between July 17 and August 13, 2015. These early negotiations need not be chronicled in detail. Suffice it to say that through their counsel, negotiations were pursued to address the correction of the alleged deficiencies, the completion of the work, and what further monies were to be paid. These negotiations between counsel failed to achieve any kind of resolution.

[11] Further negotiations resumed, however, directly between Mr. Carter and Mr. LaFramboise on August 29th with a further exchange of e-mails. The course of these negotiations will be detailed later in this decision but the critical e-mail exchange took place on September 14th. On that date, Mr. LaFramboise sent an e-mail to Mr. Carter offering to settle on terms whereby both parties would end their relationship and go their separate ways on the condition that the lien and the lawsuit be removed, with ALP taking over the responsibility for the cabinetry contract with the subtrade. No monies were to change hands otherwise.

[12] Mr. Carter replied the same day communicating his agreement with that offer and undertaking to have his lawyer lift the lien and have the lawsuit removed to conclude the matter.

[13] What was thought to have been a final settlement went off the rails when legal counsel for CDC (a predecessor to Mr. MacNeil) prepared mutual release documents and a consent order (that would serve to both vacate the lien and dismiss the legal action) and sent them to Mr. Rumscheidt for his review and approval. After consulting with his client, Mr. Rumscheidt wrote a letter of reply under date of September 21, 2015 advising that ALP was not prepared to sign the release and furthermore, now took the position that there was no full and final settlement reached.

[14] A number of reasons were outlined in that letter for the taking of that position but it became clear from the evidence given by Mr. LaFramboise on cross-examination, that the only material impediment to concluding the settlement was the scope of the provisions in the draft release that ALP had been asked to sign.

Previously, there had been no discussions whatsoever between the parties as to the need or content of any such document.

[15] More specifically, the objection to the scope of the release was twofold. First, in its boilerplate form, the release was expressed to cover not only the existing claims known to the parties, but also any future claims in respect of the project which, of course, would encompass any presently unknown deficiencies which might later be discovered. Second, there is a clause in the release which would preclude ALP from ever bringing any kind of claim or action against any third party who might, in turn, claim contribution or indemnity against CDC. Mr. LaFramboise did not want to foreclose the possibility of making any such claim in future, even though it is apparent that no such claim against a third party has been advanced as yet.

[16] ALP maintains that it was a condition of the purported settlement agreement that its terms be subject to review and approval by its lawyer. Having since taken legal advice on the scope and effect of the release as drafted, Mr. LaFramboise maintains that the impugned provisions of the release stretch beyond what he agreed to in his negotiations with Mr. Carter. ALP therefore maintains its refusal to provide any release that would extend beyond known claims for deficiencies that have been alleged to date.

[17] CDC, on the other hand, maintains that the form of the release as presented captures what the parties agreed to, as evidenced by their exchange of e-mails in September. Although those e-mails make no mention whatsoever of the need of a release to conclude the settlement, ALP maintains that the provision of such a

release should be an implied term of the settlement agreement. Hence the present impasse between the parties preventing their resolution of this matter.

ISSUES

[18] The issues to be decided by the court on the hearing of these motions can be stated as follows:

1. Did the parties reach a binding and enforceable settlement agreement of all matters in dispute through their exchange of e-mails on September 14, 2014? If so, are there any terms which need to be implied to give effect to that agreement?
2. If no settlement agreement was reached, should the builders' lien be vacated pursuant to s.29(5) of the *Builders' Lien Act*?

LEGAL ANALYSIS AND FINDINGS

[19] I begin the analysis with a closer examination of the e-mail chain between Mr. LaFramboise and Mr. Carter during the period of August 29 – September 14, 2014.

[20] The settlement negotiations began to gain momentum on September 4th when Mr. LaFramboise conveyed an offer to settle on terms whereby CDC would be allowed to walk away from the contract with ALP to take over from there, including responsibility for the purchase and installation of the cabinetry. Mr. LaFramboise also said that he had no money to send to CDC (maybe $10K).

[21] Mr. Carter replied the same day that if ALP would pay for the cabinets from the supplier and pay CDC the sum of $10,000, it would be a done deal and that he

would then lift the lien and conclude the legal action. He then asked Mr. LaFramboise if they were in agreement.

[22] The next e-mail of note (after some further intervening e-mails about the cabinetry subcontract and the need to confirm the exact costs thereof), was sent on September 8th by Mr. LaFramboise to Mr. Carter. In that e-mail, Mr. LaFramboise related that he had just had a long and in depth meeting with his lawyer that day to review all reports, claims and counter-claims and to go over costs and delays. He included an e-mail that had been sent to his lawyer in which he had set out ALP's two options. The first was premised on litigation of ALP's counter-claim with a breakdown of all of the deficiency claims and completion costs. The second option contemplated that they "make a deal to have them leave and resume work ourselves with promise not to go after them".

[23] Mr. LaFramboise further expressed his thoughts that the most reasonable approach at that point was for both parties to walk away from the project and go their separate ways and that he would be making further inquiries with the cabinetry supplier.

[24] Mr. LaFramboise reiterated this position in a further e-mail to Mr. Carter on September 9th, namely, that ALP would let CDC "walk away from the mess and not come after Certified". He added that "If its not about the $ and its about moving forward, then my offer to you is walk away and we will do the same". He mentioned the need for removal of the lien and for counsel to prepare a draft for review, and that he would talk further with the cabinetry supplier if required.

[25] Later that day, Mr. Carter requested confirmation of the terms of the offer, asking "do you mean no money, you take over with Progressive and all walk

away?" Mr. LaFramboise replied in the affirmative, confirming as well that he had an appointment with the cabinets supplier the next morning. At that juncture, if not before, Mr. LaFramboise confirmed that the cabinet contract price would be $46,000 inclusive of HST (the tax being the difference between the allowance of $39,800 above referred to).

[26] That set the stage for the crucial exchange of e-mails which took place on September 14th. It began with an e-mail from Mr. LaFramboise to Mr. Carter, the full text of which reads as follows:

> I had the chance to meet with Kirk and Ross at Progressive Cabinets. They showed me a sale invoice for the cabinets for a total of $45K which was $6K higher than the contract allowance.
>
> At this point, we are confirming that if the lawsuit is removed and the lien is removed, both party can part their separate ways.
>
> You can have your lawyer send an agreement to Peter stipulating that these items will or have been done and thats it. We will take over the cabinets with Progressive. We expect this to be done in a expeditious manner.

[27] Very shortly thereafter, Mr. Carter sent an e-mail to Mr. LaFramboise, the full text of which reads as follows:

> OK, I agree with your offer. I will have my lawyer lift the lien and law suit removed. This has concluded our dealings period. There will be no further communications, business or legal dealings between Certified Design Consulting Inc or Alex Lane Properties. The contract is considered null and void, the complete issue is resolved period. Our relationship is concluded period. I have contacted my lawyer, instructed her to do the necessary paper work.

[28] It was then left to the lawyers to prepare the necessary documents to remove the lien and terminate the lawsuit which of course the parties themselves did not know how to do. As previously recited, things began to unravel when ALP refused to sign the form of release document transmitted by counsel for CDC.

[29] It is on this body of evidence that the court must now decide whether the parties, through their exchange of e-mails, reached a final and binding settlement agreement and if so, whether there are any implied terms necessary to give effect to that agreement.

[30] There are four related legal principles to be applied in the disposition of this case which can be summarized as follows:

1. To be enforceable, there must be agreement between the parties as to all essential terms. The determination of what terms are essential, however, varies with the nature of the transaction and the context in which the agreement is made.
2. One party's subjective intent has no independent place in this interpretative exercise. Rather, the determination of whether all essential terms of the agreement have been reached is to be assessed from the perspective of an objective, reasonable bystander in light of all the material facts.
3. Where the agreement calls for the execution of a further document, the question is whether the further documentation is a condition of there being an agreement, or whether it is simply an indication of the manner in which the agreement already made will be implemented.
4. In appropriate cases, the essential terms do not all have to be expressed; they may have to be implied in order to give effect to the agreement reached.

[31] The articulation of these legal principles can be found collectively in the decisions of the Nova Scotia Court of Appeal in *United Gulf Developments Ltd. v.*

Iskandar, 2008 NSCA 71, *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.et al.*, 2000 NSCA 95 and *Sinanan v. Woodyer*, [1999] N.S.J. No. 166.

[32] Significantly, the offer to settle that was ultimately made on September 14th came from ALP. The terms of the offer were simple, namely, that both parties would end their contractual relationship and go their separate ways on the condition that the lien and the lawsuit be removed, with ALP taking over the responsibility for the cabinetry contract with the sub trade. No monies were to change hands otherwise.

[33] In his cross-examination, Mr. LaFramboise maintained that any settlement was to be subject to the review and approval of his lawyer as a condition precedent. He also testified that by saying in the offer that both parties would part their separate ways, he intended that to mean parting ways only in respect of existing deficiencies then known to the parties "but not if I found something else". He further testified that he did not intend his offer to preclude the possibility of making further claims against third parties in any way.

[34] As articulated by the Nova Scotia Court of Appeal in *United Gulf Developments* (at para. 82), the court must determine "from the perspective of an objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty". The court went on to say that evidence of one party's subjective intent has no independent place in this interpretative exercise.

[35] Nowhere in the offer of settlement contained in Mr. LaFramboise's September 14th e-mail is it stated that any settlement agreement was to be subject

to the review and approval of his legal counsel as a condition precedent. Indeed, Mr. LaFramboise earlier indicated to Mr. Carter in his September 8th e-mail that he just had a long and in depth meeting with his lawyer to review all aspects of the matter and that he was considering, as an option, making the very offer of settlement actually made six days later as the most reasonable approach at that point.

[36] I therefore conclude that from the perspective of an objective, reasonable bystander, in light of all these material facts, that review and approval of the settlement agreement by ALP's lawyer was not a condition precedent. Nor was it a condition precedent that a formal settlement agreement be prepared by legal counsel. Rather, the intention to be objectively gleaned from the September 14th exchange of e-mails is that the documentation to follow represented a mere expression as to the manner in which the settlement, already agreed to, would be formalized.

[37] I also find from an objective assessment of the evidence that the parties agreed that the settlement negotiated was to extend to all claims arising under the construction contract, both past and future. That was certainly the tenor of the exchange of e-mails in which Mr. LaFramboise, in his offer of settlement, spoke in terms of both parties then parting their separate ways once the lien and lawsuit were removed (which was left to the lawyers to attend to) and "thats it". In his preceding e-mail, Mr. LaFramboise spoke in terms of "letting Certified walk away from the mess and not come after Certified". That language was never qualified by reservation at any time of the right to bring future claims if further deficiencies were later discovered.

[38] It should also be noted that after reviewing the exchange of September 14th e-mails later that day, and speaking with counsel for CDC, counsel for ALP simply informed Mr. LaFramboise that CDC's lawyer would get started on the paperwork (whereupon a consent order and mutual releases were drafted). There was no mention of any lack of approval or other impediment to concluding the agreement negotiated directly between the parties until a week later (after the draft release document was presented for execution).

[39] To sum up, I am satisfied on an objective assessment of the evidence that the offer and acceptance exchanged in the September 14th e-mails between the parties demonstrate a mutual intent to create a legally binding agreement. I am likewise satisfied that this crucial exchange of e-mails contained all the essential terms of the agreement between the parties. In short, both parties agreed to end their contractual relationship and go their separate ways, foregoing the right to pursue any further claims against each other (past or future) on the condition that the lien and lawsuit be removed, with ALP taking over the responsibility of the cabinetry contract. Beyond that, there were no necessary terms concerning the agreement yet to be determined or which may not be implied. Only the preparation of the documentation needed to implement the settlement in conformity with that agreement was left to be done.

[40] As mentioned earlier, when drafting the release documents, counsel for CDC included a provision which would prevent ALP from pursuing a claim against any third parties who might claim contribution or indemnity against CDC. That is now asserted to be an implied condition of the settlement agreement reached between the parties, an assertion that is vigorously opposed by ALP.

[41] It was recognized by the Nova Scotia Court of Appeal in *Sinanan* (at para. 47) that there are appropriate cases where the court must imply a term to a contract in order to give effect to it. On the subject of releases, the Court of Appeal cited with approval (at para. 38) the following passage from *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* [1995] O.J. No. 721:

> It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, no party is bound to execute a complex or unusual form of release: although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice.

[42] When the settlement agreement was negotiated in the present case on September 14th , ALP's counter-claim had not yet been filed with the court although both parties were well aware of the construction deficiencies in dispute. That being so, something more than an order merely vacating the lien and dismissing CDC's lien action was needed to complete the settlement documentation. Hence, the preparation of the draft release sent to ALP for execution.

[43] In these circumstances, and there being no agreement to contrary, I am satisfied that this is an appropriate case where the settlement implies a promise to furnish a release provided, of course, that it reflects the agreement reached by the parties.

[44] As noted earlier, there was never any discussion at any point in the settlement negotiations of the requirement that ALP undertake not to pursue a claim against any third parties who might claim contribution or indemnity against

CDC. In my view, that is not a term that reflects the settlement agreement reached or which can be said to be necessary in order to give effect to it. The court will therefore not imply such a term in the settlement agreement reached here. The release to be furnished by ALP should be revised accordingly.

CONCLUSION

[45] The court is authorized under Civil Procedure Rule 10.04 to declare that an agreement for settlement was or was not made, to declare the terms of an agreement, and to grant an order enforcing an agreement according to its terms.

[46] CDC will therefore be entitled to an order declaring that a settlement agreement was made on the terms recognized earlier in this decision. The order should also provide for enforcement of the agreement including the responsibility of ALP to pay the cabinetry contract fixed price of $46,000 as the invoices from Progressive Cabinets come due. The order may also include a requirement that ALP indemnify CDC in respect of the amounts owing under the cabinetry subcontract where CDC was the contracting party with Progressive Cabinets.

[47] There should also be an order, of course, vacating the registration of the lien and now dismissing both the lien action and the counter-claim subsequently filed by ALP (it therefore being unnecessary for the court to otherwise deal with the cross motion filed by ALP concerning the timeliness of the recording of the certificate of lis pendens).

[48] As for costs, CDC has been mostly successful on its motion, but not completely so. I therefore award costs of the motion to CDC of $1,000, being at the low end of the range for a one day hearing under Tariff C.

J.