SUPREME COURT OF NOVA SCOTIA

Citation: Busch Mac Developments Ltd. v. Harris, 2009 NSSC 381

Date: 20091208
Docket: ANN No. 311456
Registry: Annapolis Royal

Between:

Busch Mac Developments Limited

Plaintiff

- and -

Stephen Harris

Defendant

Judge:	The Honourable Justice A. David MacAdam
Heard:	November 16 and 19, 2009, in Annapolis Royal, Nova Scotia
Written Decision:	January 19, 2010
Counsel:	Ronald D. Richter, for the plaintiff Jonathan G. Cuming, for the defendant

By the Court:

FACTS

[1] Early in 2007, 3100137 Nova Scotia Ltd., now known as Busch Mac Developments Ltd., [herein "Busch Mac"], entered into negotiations with Stephen Harris, [herein "Harris"], for the construction of a road of approximately 1,000 feet. The work included the installation of a water main, with a number of individual hookups and a fire hydrant. Early in May 2007, Harris commenced the road construction. In late July he began digging a trench for the water main. The parties dispute the nature of the contract. In particular, they disagree as to whether the contract called for time and materials without a maximum or cap, as claimed by Harris, or for time and materials with a cap of $70,000.00, as alleged by Busch Mac.

[2] The initial discussion involved Harris and Harold MacKenzie, [herein "MacKenzie"]. Mackenzie had a business relationship with Tom Busch, [herein "Busch"], the president of Busch Mac, but he worked on the project on a volunteer basis, neither as an employee of Busch Mac nor for compensation from Busch. MacKenzie knew Harris, and contacted him to inquire as to whether he was interested in working on the project. Harris, who had not previously done a road construction or installed a water main, met with MacKenzie at his home and at the site. MacKenzie and Busch also had discussions with two other contractors with respect to the road, one of whom was also contacted in respect to the installation of the water main.

[3] After the initial contact by MacKenzie with Harris, there were telephone conversations and meetings between Harris and Busch, in many instances also involving MacKenzie. On April 23, 2007, Harris, at the request of Busch forwarded a document, which contained the following:

QUOTATION FOR EXCAVATION SERVICES

BUSH LANE ROAD CONSTRUCTION

> After my onsite inspection to build your road of approximately 1000 ft. and to bring it up to ABL Environmental standards prior to class A gravel, I would quote

> a price of $70,000 plus HST. This would also include a water main, individual hookups and a fire hydrant.

[4] The circumstances behind the creation and forwarding of this document are in dispute. Busch says he asked Harris for written confirmation of the contract they had worked out verbally. Harris says Busch told him he needed a written contract in order to secure financing, and maintains that it was Busch who suggested the figure of $70,000.00 plus HST. Harris says he asked Busch to forward an outline of what he wanted in the document, but that Busch said he was not in his office and was unable to do so and asked Harris to forward a simple form of a contract. MacKenzie says he has never seen this document and presumably was not aware of its existence or of the circumstances under which it was forwarded.

[5] The dispute relates to whether there was a maximum, or cap, of $70,000.00 plus HST on the contract, and whether Harris was required to supply the materials for the installation of the water main, hook ups and a fire hydrant.

[6] Busch, MacKenzie and Harris agree that the contract was for time and materials. Busch says the contract price was the lesser of time and materials or $70,000.00 plus HST, and that the contract included the supply of materials for the water main. MacKenzie says the contract was for time and materials, and that there would be an attempt to keep the price under $70,000.00. Harris says there was no maximum, that the contract was for time and materials and that he was not involved in the selection or purchase of the materials used in the water main. He says his work was limited to excavating the trench and installing the water main, the hookups to the subdivision lots and a fire hydrant. As the work progressed, an additional lot was created, requiring an additional lateral or hook up to be excavated and installed. Initially there was to be one fire hydrant but over time two additional fire hydrants were added. Initially the piping was to be six-inch but by the time of the installation it was increased to eight-inch piping. Initially, the road had a turnaround, which was later changed to a cul-de-sac.

[7] Each of the parties has brought an application against the other seeking damages. Busch Mac claims the cost of supplies in the amount of $31,692.72; the cost of repair of a water valve in the amount of $1,000.00; the cost of completion of the work in the amount of $37,968.84; and the payments made by Busch Mac to Harris in the total amount of $53,000.00. This claim is less the contract price

between Busch Mac and Harris of $79,100.00. The net claim was therefore $44,561.56. Following the evidence, in closing submissions, counsel for Busch Mac further adjusted the claim to reflect the deletion of certain costs on the basis that they were additions or changes to the original contract. The adjusted amount claimed by Busch Mac is $20,946.79. Busch Mac also claims costs.

[8] Harris claims $42,081.01, less $25,000.00 paid on November 21, 2007, for a net claim of $17,081.01. He also claims prejudgment interest and costs.

ISSUES

[9] Essentially there are two issues: (1) whether the contract price was the lesser of time and materials or $70,000.00 plus HST, or was for time and materials without a maximum; and (2) whether Harris was required to supply the materials for the water main, hookups and fire hydrant. Busch Mac agrees that Harris would not have been responsible for the cost of the additional fire hydrants, hook up laterals and any increased costs arising from the increase of the piping from six-inch to eight-inch.

EVIDENCE AND DISCUSSION

[10] Busch testified that one of the reasons for selecting Harris to do the work was his agreement to accept biweekly payments of $4,000.00, rather than requiring full payment up front. Harris testified that some early conversations dealt with the method of payment and says it was agreed that he would provide biweekly invoices, attaching, with each invoice, an outline of the work done to that date. This arrangement apparently proceeded from May 25 until August 10, 2007, with six payments of $4,000.00 being made. According to a statement prepared by Harris, after crediting the $4,000.00 payment on August 10, the remaining balance was $24,793.93. It is not disputed that there were three other payments made, up to and including September 6, 2007, one for $2,000.00 on August 24, one for $1,000.00 on August 28 and one for $1,000.00 on August 30. The balance on the account after crediting all of these payments as of September 6, 2007, was, according to Harris, $41,328.61.

[11] Busch does not deny receiving the necessary documentation in respect of the first three invoices, but suggested he did not pay particular attention to them.

[12] Although there is dispute as to the date, it appears there was a meeting at which Busch expressed concern about the cost of the road. He also said he had concerns that Harris might lien the project, impairing his ability to obtain financing. He says he proposed to pay Harris $25,000.00, although he had by then decided Harris would not be completing the project.

[13] Harris says Busch expressed concern about the cost of the road, but that they agreed to the amount owing. However, since the $4,000.00 payments had ceased, he required a payment on account before continuing with the project. He says Busch agreed to pay $25,000.00 on the balance, and he agreed to resume work on the road and the water main. He referenced a letter dated November 2, 2007, from Ronald D. Richter, counsel for Busch, indicating that he was finalizing documentation for a mortgage and that he was required to pay $25,000.00 from the first draw to Harris. The closing date for the mortgage was said to be November 8, 2007, although it was indicated that "it may not close on that date". Harris testified that this meeting occurred on November 2 and that later that day he arranged for a bulldozer to be moved to the site. However, when no payment was made on November 8, he had the bulldozer returned to his own property.

[14] Busch testified that, although he had already decided to terminate his relationship with Harris, on October 23, 2007, he requested a quotation from Harris for gravel placement on the road. He says this was for the gravel that was to be compacted in order to make the road ready for final grading. Harris testified that Busch said he needed a firm contract in order to arrange alternative financing. Busch says he simply asked for the quotation to have a statement as to what Harris would say was the amount that remained outstanding.

[15] With respect to the materials for the water main, Harris said he did not have the resources to purchase these materials, and that he made this known to Busch early in the negotiations. He said it was never part of the contract that he would supply the materials for the water main and that he had no input into the selection of the materials or the negotiations with the supplier. Busch says the contract included the materials for the water main, but, recognizing Harris did not have the resources to make the purchase, he says it was agreed he would purchase them on his account and be reimbursed. MacKenzie says he and Busch contacted the supplier, and MacKenzie himself picked up the materials and delivered them to the site. He testified that this was done in July 2007, which would have been two months or more after the commencement of the work.

[16] Busch testified that he contacted Howard Little Excavating Ltd. (herein "Little Excavating") for a quote on completing the construction of the road. The quote, admittedly, also included the supply and installation of a type of gravel that was not included in the original agreement with Harris. After adjusting the contract with Little Excavating to exclude the amount for the supply and installation of gravel not included in the contract with Harris, he now claims the Little Excavating cost for completing the work, on the basis of the original contract being for a maximum of $70,000.00 plus HST.

[17] Although Busch proposes the document of April 23, 2007, as the contract, on its face it does not reflect his version of the contents of the agreement. The document makes no reference to time and materials. Although it refers to building a road, it says it is a "quotation for excavation services". Reference is made to a "water main, individual hook ups and a fire hydrant". No reference is made to supplying materials for the water main. MacKenzie, who apparently was regularly on the site, and who picked up and delivered these materials, never suggested that there was any understanding that such materials, although purchased on Busch's account, would be invoiced to the account of Harris.

[18] Busch stated in his pre-hearing submission that both Busch and MacKenzie would testify that the contract was for a price of no more than $79,100.00, as outlined in the written document of April 23, 2007, and that no parol or extrinsic evidence would be required to ascertain the basic terms of the agreement. Counsel referenced the decision of Warner J. in *D.L.C. Electrical Incorporated v. Oxford* 2008 NSSC 157, where the issue involved the interpretation of a contract. Justice Warner said:

> 24 The issue in this case is the interpretation of that contract. Both parties have referred the Court to, and asked the Court to consider, extrinsic or parol evidence in support of their interpretation of the contract.
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> 25 In a case involving similar circumstances, **J & P Reid Developments Ltd. v. Branch Tree Nursery & Landscaping** , 2006 NSSC 226, this Court summarized some of the relevant principles for interpreting construction contracts at ¶¶ 58 to 65, some of which read as follows:

60 *Goldsmith on Canadian Building Contracts*, Fourth Edition, by Immanuel Goldsmith and Thomas Heintzman, (Carswell: 1995) summarizes the relevant principles at pages 1-38 and 1-39 as follows:

> . . . the function of the court in interpreting a contract is to determine the intention of the parties as expressed in their agreement. It is not the actual intention of the parties, but the intention of the parties as they have expressed it, that is the guiding consideration.
>
> If the parties have expressed their intention in clear terms, there is no need to resort to rules of interpretation, and in fact it is not permissible to do so.
>
> . . . in case of ambiguity the courts will construe a document against the person who prepared it, and every endeavor will be to give some sensible meaning to a document, however difficult this may sometimes be.
>
> . . . . .
>
> When the parties have taken the trouble to embody what they consider to be their agreement in a written document, the courts will be very reluctant to come to the conclusion that the document is completely meaningless; but in the last resort, if it is impossible to arrive at a proper construction, the contract may be held to be void for uncertainty.
>
> A written contract must be construed as a whole, and, as a general rule by looking at nothing other than the document itself. If the written agreement itself is clear and unambiguous, it is not permissible to ask what the parties in fact intended by the words they used, nor may the surrounding circumstances or the pre-contract negotiations be taken into consideration. There are, however, certain circumstances where such extrinsic evidence may be considered.

61 Of particular relevance to this case is the rule [respecting] extrinsic evidence. *Goldsmith on Canadian Building Contracts*, at pages 1-40-1-42 says:

> Evidence of surrounding circumstances is admissible to explain the meaning of words which are ambiguous or to identify persons or

> things not clearly defined in a document. The facts which existed at the time when the agreement was entered into and the conduct of the parties may sometimes be helpful in resolving such an ambiguity or clearing up such questions of identification. Such evidence, however, must not contradict or vary the written agreement, and may only be used to clarify any ambiguities or uncertainties. If the words of the agreement in themselves are clear and unambiguous, no such evidence is admissible at all. Nor can extrinsic evidence be admitted to fill a blank which the parties have left in the agreement. This sometimes happens where printed forms are used.
>
> . . . . .
>
> It is important to distinguish between extrinsic evidence sought to be adduced for the purpose of construing a contract, and evidence intended to be used for the purpose of showing that no contract in fact exists, or that the contract does not correctly set out the agreement between the parties. The rule against the admissibility of extrinsic evidence applies only in the former situation.
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> 62 The extrinsic or parol evidence rule — that external contradictory evidence is not admissible, is derived from the Supreme Court of Canada decisions in *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 (S.C.C.), *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 (S.C.C.) and *Carman Construction Ltd. v. Canadian Pacific Railway*, [1982] 1 S.C.R. 958 (S.C.C.).

[19] The words in the April 23, 2007, document created by Harris and forwarded to Busch Mac are clear, and, on their face, unambiguous, at least with respect to the price. However on the evidence of all persons who testified, namely Busch, MacKenzie and Harris, the stated price does not accurately reflect what was agreed. As earlier observed, Busch testified that, although it was a time and materials agreement, there was a maximum of $70,000.00 plus HST. MacKenzie testified that it was a time and materials contract and the parties were to try to keep it within $70,000.00. Harris testified that it was a time and materials contract with no maximum. To give effect to the document as written, in respect to price, would be to give effect to what was not agreed. On this point it would appear the parties are in agreement. However, since it is clear the time and material costs exceeded $70,000.00, plus HST, Busch Mac submits that the April 23 document should govern, notwithstanding that its terms do not accord with or reflect the terms of the

agreement of the parties, including the terms of the agreement as testified to by Busch himself. In my view there is no reason in law to recognize as a term of a contract something the parties never agreed, never intended and were not acting under.

[20] In *Goldsmith, op. cit.*, reference is made to the distinction between "extrinsic evidence sought to be adduced for the purpose of construing a contract, and evidence intended to be used for the purpose of showing that no contract in fact exists, or that the contract does not correctly set out the agreement between the parties". In respect to showing that the contract does not correctly set out the agreement, the authors describe rectification of written agreements, at p. I-63. The authors comment:

> It sometimes happens that a written document does not in fact accurately set out what has actually been agreed between the parties. In such circumstances the court has power to rectify the agreement in order to give effect to what was their true intention. Before such relief can be granted, however, it is necessary to show that both parties had in fact agreed on the particular matter, but that as the result of a mutual mistake their agreement has been incorrectly incorporated in the written agreement. A unilateral mistake is not sufficient in order to obtain rectification....

[21] On the evidence, there was no mistake in the drafting of the document of April 23, 2007. Harris says it was not intended to reflect the agreement, but was provided so that Busch would have an agreement and a price in writing. Harris' view was that he was not inserting the actual price for the work he was undertaking to perform. Nevertheless, it cannot be said that the $70,000.00 figure resulted from mistake. Busch says he asked for a written form of contract to confirm the agreement. On his own evidence the price as stipulated in the written document is not accurate, but he did not suggest in his evidence that the price was inserted by mistake.

[22] The authors of *Goldsmith on Canadian Building Contracts*, in considering the enforceability and form of contract, observe, at 1§2:

> ...it is important to distinguish between a written contract, i.e. one in which the agreement between the parties is reduced to writing, and an oral contract evidenced by some document, in which case the agreement is an oral agreement, and the writing is merely evidence of the fact that an oral contract has been

> entered into. Except in cases where there is a legal requirement for a contract to be evidenced in writing, the written evidence need not necessarily contain all the terms of the oral agreement.

[23] In discussing written contracts, *Goldsmith* emphasizes the following, at 1§2(b):

> ... It is important to bear in mind that where the agreement itself is not in writing, the memorandum itself is not the contract; it is merely evidence of an oral agreement. It may, therefore, be open to the other party to prove that the alleged memorandum is not an accurate memorandum of the oral agreement, that in fact no oral agreement was made at all, or that it has been varied or rescinded.

[24] *Goldsmith* notes, in a footnote, that "[w]hether the document or documents in question in themselves constitute a written agreement or are merely a memorandum of an agreement made orally between the parties is a question of fact" (ch. 1, fn. 201).

[25] It is clear that there was an oral agreement and that the written document is merely a reflection of some of the terms of that agreement. The written document did not stipulate the terms for payment, nor did it describe in any detail the work to be carried out. Its statement of price was not accurate on the evidence of the three witnesses who testified about the negotiations between the parties with respect to the project.

[26] On the evidence as a whole, I am satisfied this was a time and materials contract with no maximum. Apart from the evidence of Busch suggesting a maximum, and the evidence of Harris denying it, there is the evidence of MacKenzie that it was time and material with the intention of trying to keep the amount below $70,000.00. MacKenzie's evidence in no way suggests a maximum. Although he referenced the $70,000.00 figure, he did not suggest that it constituted a maximum, rather, he said it was a figure they were trying to keep within.

[27] At the time of entering into the agreement, Busch provided to Harris a quantity estimate prepared by his surveyor, estimating the quantities of gravel, among other things, required for the project. According to Harris, if it had been a fixed-price contract, or a contract with a maximum, the amount would have been adjusted by any difference between the actual quantities and the estimated quantities. Since it was a time and materials contract, Harris testified, such an

adjustment is unnecessary. Similarly, on cross-examination, he repeated that in a time and material contract, there are no extras. Harris testified that there would have been a number of extras if the contract had been for a fixed price. There were no extras billed because the contract was for time and materials.

[28] Busch testified that on receiving the first three invoices, with statements of work attached, he paid little attention to the fact that the statements were for more than the amount of the respective $4,000.00 invoices. Even a casual glance at the statements would have shown that the amount of work exceeded the amount being billed on the biweekly invoices.

[29] In requesting from Harris an estimate of the work required to complete the road and make it ready for final grading, notwithstanding that he then knew that he did not intend for Harris to complete the work originally contracted for, Busch was being less than frank in his dealings with Harris. He testified that he and Little Excavating already had a verbal agreement to complete the gravel placement when he asked Harris for the quote to finish the road. Busch testified that sometime around September 6 he told Harris to leave the project. In his evidence, however, he agrees apparently sometime around October 23 he asked Harris for a quote to finish the project, and met with Harris on site, possibly in November. At that time there was a heated discussion about the cost and the decision to pay Harris the $25,000.00. MacKenzie said it was only after the "heated discussion" that he concluded that Harris would not be finishing the project, and that in October he had hoped Harris would finish the job.

[30] Harris said the meeting was in November, suggesting it was around November 2, and that this was when Busch offered to pay $25,000.00 on the balance of the account if he would finish the road, and he agreed. He says the project had been shut down since early September due to (as he understood) engineering and financial problems. When the $25,000.00 had not been paid by November 8, he removed his equipment from the site.

[31] When the evidence of Busch and Harris conflicts on these matters, having regard to the evidence as a whole (including that of MacKenzie) I prefer the evidence of Harris as to the nature of the contract and the circumstances relating to the termination of the relationship.

[32] As to responsibility for providing the materials for the water main, hookups and fire hydrant, Harris did not pay for the supplies and was not invoiced for them. Whoever was initially responsible, because of the nature of the time and materials contract entered into (i.e., without a maximum or cap), Busch would ultimately have been required to pay for these supplies. On the other hand, if the contract price had a maximum or a cap, I am satisfied that it did not include the supply of the materials for the water main, hookups or any fire hydrants. There was nothing in MacKenzie's evidence to suggest he understood that notwithstanding that these materials were being supplied on the account of Busch Mac, ultimately under the contract they were the responsibility of Harris. MacKenzie was actively involved in the contract negotiations, picking up the supplies for the water main hook-ups and fire hydrants, and attending at the site during all phases of the road and water main construction. If the contract had a maximum or cap, or if Harris was required to supply the water main materials under the contract, it would be reasonable that MacKenzie would have known this. He gave no such evidence, saying only that the contract was for time and materials and that the parties would try to keep it under $70,000.00.

[33] The claim of $1,000.00 is for the repair of a water valve damaged by one of Harris's employees. MacKenzie testified that he saw a truck drive over the valve. Busch testified, without supporting documentation, as to the cost of replacing the valve, including the labour. Harris testified that until asserting his own claim he knew nothing about the alleged damaged water valve. He said he never received an invoice nor a request to fix it, if indeed the damage had occurred. On the evidence of MacKenzie I am satisfied that the incident likely occurred. However I am not satisfied as to the amount to be allocated for this damage. There was no invoice for the cost of the replacement valve and no evidence of the time or any other expenses incurred in replacing the damaged valve. It is clear it was simply a figure picked out of the air by Busch. This is not a satisfactory basis for awarding compensation for any such damage. The claim for reimbursement of the damaged valve is therefore disallowed.

[34] Harris is awarded $17,081.01, being the amount unpaid on the outstanding invoices, together with pre-judgment interest of 5% to the date of payment and costs.

MacAdam, J.