SUPREME COURT OF NOVA SCOTIA

Citation Northeast Equipment Ltd. v. High Performance Energy Systems Inc., 2013 NSSC 334

Date: 20131018
Docket: Hfx 311787
Registry: Halifax

In the Matter of the Builders' Lien Act, R.S.N.S. 1989, c. 277

Between:

Northeast Equipment Limited, a body corporate, Palmer Refrigeration Inc., a body corporate, and Fred M. Dunphy Excavating and Construction Limited, a body corporate,

Plaintiffs

v.

High Performance Energy Systems Inc., a body corporate, and Halifax Regional Municipality

Defendants

Judge: The Honourable Justice Patrick Duncan

Heard: April 11, 2013, in Halifax, Nova Scotia

Counsel: Blair H. Mitchell, for plaintiff, Northeast Equipment Ltd.
Kent Noseworthy for plaintiff, Palmer Refrigeration Inc.,
Mark Bailey, with Articled Clerk Joceline D'Entremont for plaintiff Fred M. Dunphy Excavating and Construction Ltd.
Jasmine Mary Ghosn for defendant, High Performance Energy Systems Inc.
David Greener and Randy Kinghorne for defendant, Halifax Regional Municipality

By the Court:

Introduction

[1] Halifax Regional Municipality (HRM) moves for summary judgement on evidence to strike the claim of Palmer Refrigeration Inc. (Palmer) as having no real prospect of success. In the alternative, it is submitted that the claim amounts to an abuse of process and should be dismissed.

[2] For the reasons that follow, the motion is granted.

Background

[3] HRM contracted with High Performance Energy Systems Incorporated (HPES) to carry out construction work in relation to the provision of heating and cooling systems for a group of municipal buildings located at Alderney Landing in Dartmouth, Nova Scotia. Palmer claims to have been an unpaid subcontractor on the project and filed a claim of lien against HRM. The basis of the claim of Palmer as set out in paragraph 4 of the Statement of Claim is:

> 4. The Plaintiff states that it carried out the supply of high density polyethylene piping, fusion service, fittings and related material and supplies upon or in respect of the lands and premises more particularly described in the Claim of Lien hereinafter set forth, and such services were rendered at the request of or on behalf of the Defendant. The Plaintiff's account for such services was the sum of One Hundred and Twenty-Eight Thousand, Two Hundred and Ninety Dollars and Three Cents ($128,290.03) as of March 12, 2009, with interest thereon at the rate of 2 % per month from the date of invoice.

At the commencement of the hearing Palmer withdrew most of its claim in paragraph 4. It says that its claim is for rentals of a cube van and a tractor, as well as associated labour costs, all of which were part of providing “fusion services”.

[4] A claim was also made at paragraph 10 of the Statement of Claim on the basis of *quantum meruit* but abandoned by the Plaintiff before the hearing of this motion.

[5] A review of the Statement of Claim leaves little if anything remaining upon which to base Palmer's claim. Notwithstanding this shortcoming, the Plaintiff pursues its claim by allegations set out in a single affidavit signed by Palmer's principal, James Bardsley, and his wife, Carol Harrietha. They assert that work was provided by two of Palmer's labourers in accordance with a subcontract to HPES. The Plaintiff also alleged that it rented a cube van and a Kubota tractor to

High Performance which was used on the site and for which it has not received payment.

[6] James Bardsley was the President and a Director of HPES, as well as a shareholder. There was a breakdown in the relationship between Mr. Bardsley and his fellow HPES shareholders and directors, David Stewart and Peter Beaini, that culminated, in part, in a series of lawsuits brought by Palmer against HPES, and a number of liens filed by Palmer companies against HPES work sites, this case being one of the latter.

[7] I say "in part" because there was also an overarching action between David Stewart, Peter Beaini and High Performance Energy Systems Inc. as Plaintiffs and James Bardsley, Palmer Refrigeration Inc. and Palmer Engineering Ltd. as Defendants. The decision of Moir J. is reported as *Stewart v. Bardsley* 2012 NSSC 191("Stewart case"). It is essential reading to understanding why this Palmer claim against HRM is ill founded.

[8] Justice Moir exhaustively dealt with the various deeds and misdeeds between Stewart and Beaini, on the one hand, and Bardsley on the other. He cited

a number of breaches of fiduciary duty on the part of both sides. He dealt with the claims made between High Performance and the Palmer group of companies. It was in this larger context that at paragraph 219 of his decision it was determined by Justice Moir that no amount was owed by High Performance Energy Systems Inc. to Palmer Refrigeration in relation to various claims including the claim on this project.

Issue

[9] To succeed in this claim of lien which arises by way of subcontract, it must be shown that an amount is due and owing by the contractor to the subcontractor in relation to goods and services supplied to the site. If it has already been determined by my colleague on this court that no such amount is due and owing, the issue is whether, having regard to the test for summary judgement, the earlier findings support the termination of the prosecution of this claim.

Analysis

Test for summary judgment

[10] As stated in the recent decision of *Coady v. Burton Canada Co.* 2013 NSCA 95:

> 22 … 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.
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> 26 The legal principles applicable to a motion for summary judgment are not complicated. The seminal case in Canada is *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423 which has been applied in a long series of cases in Nova Scotia ever since. See for example, *United Gulf Developments Limited. v. Iskandar*, 2004 NSCA 35; *Eikelenboom v. Holstein Association of Canada*, 2004 NSCA 103; *Orlandello v. Attorney General (Nova Scotia)*, 2005 NSCA 98; *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52; *Hogeterp, supra; Young v. Meery,* 2009 NSCA 47; *AMCI Export Corp., supra; Bank of Nova Scotia, supra; Frothingham, supra; Globex Foreign Exchange Corporation. v. Launt*, 2011 NSCA 67; and *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74.
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> 27 In *Guarantee* the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:
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>> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc*. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the

> respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

Res judicata

[11] Our Court of Appeal has considered the doctrine of *res judicata* on a number of occasions including *Hoque v. Montreal Trust Co. of Canada* 1997 NSCA 153 leave to appeal denied [1997] S.C.C.A. No. 656 and more recently *Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc.*, 2013 NSCA 76. In the latter case, the Court of Appeal cited the relevant portions of *Hoque, ibid*; as follows:

> [31] In *Hoque, supra*, Justice Cromwell for the Court reviewed the principles that govern issue estoppel and cause of action estoppel:
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> > [20] *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was), in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; 2 N.R. 397; 47 D.L.R. (3d) 544 at 555 [D.L.R.]: Page: 8"... The first, 'cause of action estoppel', precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel per *rem judicatam* is known as 'issue estoppel', a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-561:
> >
> > > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of

> action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

[21] *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed." : see Sopinka, Lederman and Bryant, **The Law of Evidence in Canada** (1991), at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

[22] It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which could have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.

[23*]* *Res judicata* requires that the previous court decision be final and between the same parties or their privies. Both of these requirements are met here. The final orders of foreclosure were not appealed or otherwise challenged. As to privity, it is not argued that there was no privity as between Dr. Hoque and his trustee in bankruptcy who was the named defendant in the foreclosure actions. It is not disputed that all of the claims now asserted by Dr. Hoque vested in his trustee at the time of his assignment in bankruptcy. …

[30] The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to

> be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered. …
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> [37] Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

(emphasis added)

[12] At paragraph 93 of the *Stewart* case, Moir J found:

> 93 There is also a claim by Mr. Stewart and Mr. Beaini that High Performance owns a Kubota tractor and a cube van in the possession of Mr. Bardsley or one of the Palmer companies. They have not proved the claim on a balance of probabilities. The claims depend largely on evidence about who said what to whom, and I do not credit the evidence sufficiently for proof at the civil burden.

[13] While it is correct that this left open for consideration whether Palmer owned the tractor and cube van, it did not resolve whether anything was owed by HPES to Palmer on account of the use of those vehicles on the Alderney project.

That and many other Palmer claims against HPES became part of the overall analysis that Justice Moir was required to resolve. He begins by noting that:

> 102 Ms. Carol Harrietha eventually provided a voluminous affidavit on the claims of Mr. Bardsley and the Palmer companies against High Performance. They total $1,970,885 less payments of $1,145,969 for a balance of $825,915. Nothing in her accounting fits the description "another business loan". Nothing fits the figure of $200,000.

[14] Justice Moir then methodically addresses the components that made up this claim. In a section called "Groundless Suits" he turned to, among others, the Alderney project:

> 174 Between June and September of 2009, Mr. Bardsley caused Palmer Refrigeration to start suits or file liens in relation to High Performance projects. In one case, his wife served him with a Small Claims Court claim against High Performance and he let it go to default. The falsely procured judgment was set aside.
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> 175 In another case, Palmer Refrigeration obtained a judgment in Small Claims Court for $21,174 against High Performance. Mr. Stewart gave evidence in defence, but Palmer was successful.
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> 176 The outstanding suits by Palmer Refrigeration related to High Performance are to be summarized as follows:
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>> A suit for $778,000 for rental of drilling equipment, drilling services, technical support and labour. I refer to my findings on ownership of the

drilling rigs. Also, High Performance paid for much, perhaps all, of the labour. The suit is largely, or wholly, unfounded.

A suit for $128,290 against the Halifax Regional Municipality in support of a claim for lien of $128,290. The claim is for "the supply of high density polyethylene piping, fusion service, fittings and related material" at the Alderney Landing Project.

A claim for lien for $200,000 against The Waterton Project. After Mr. Bardsley unilaterally caused High Performance to lien this project and after Mr. Stewart and Mr. Beaini unilaterally discharged it, Mr. Bardsley preposterously caused Palmer Refrigeration to lien the same project for the same amount. I refer to my findings on the termination of The Waterton project. This antic is equally unfounded.

(emphasis added)

[15] After further analysis he concluded:

217 I find that the following invoices are for equipment rental not agreed by High Performance or they are for services performed by High Performance, not the Palmer companies:

December 2007	Drilling services	227,002.50
undated	cube van rental for 2008	34,418.67
undated	Kubota tractor rental for 2007-2008	40,680.00

undated	Drill rig rental for 2008	210,180.00
March 12, 2009	Drilling 40 holes	215,635.20

These total $727,916.34. That reduces Ms. Harrietha's balance to $98,000.

218 I am also satisfied that hourly rates in invoices for the services of Troy Winters and Brian Bardsley are excessive.

219 I find that nothing is owing by High Performance to Mr. Bardsley, Ms. Harrietha, or the Palmer companies. On the other hand, the applicants have not discharged the onus they bear to prove a balance of accounts favours High Performance.

(emphasis added)

[16] In support of his conclusion Justice Moir added:

229 The applicants lately claim $102,677 for excessive payments to Brian Bardsley and Troy Winters. I find that the payments were excessive, based mainly on evidence from Mr. Horwich. The amount has not been proved, but it was enough to support my finding that nothing is owing by High Performance to Mr. Bardsley, Ms. Harrietha, or the Palmer companies.

[17] It is clear that the tractor and van rentals, as well as the labour costs that Palmer claimed against HPES, and in relation to the Alderney project, were live

issues in the *Stewart* case, and that in the end analysis there was nothing owing to Palmer by HPES.

[18] Justice Moir recognized that notwithstanding his findings he did not have all of the parties before him that were parties to the Palmer claims he described in paragraph 176 (included above). In this regard he stated:

> 276 I refer to the summary of Palmer Refrigeration suits at para. 176. Two of these are for causes that, if they had merit, would belong to High Performance. Also, I found them to be wholly, or largely, unfounded. However, their future depends on the outcome of a motion in each, with the parties in the action before the court.

[19] In my view, he correctly anticipated a proceeding such as this one which seeks to bring to a close a Palmer claim against HRM based on disputes that arose between Palmer and HPES.

[20] I conclude that the Palmer claim against HRP for rentals to HPES of the cube van and the tractor; and the claimed labor costs, constitutes a collateral attack on the earlier findings of Justice Moir. Palmer can only succeed against HRM by the court finding that monies are due to it by High Performance. I am satisfied that it has already been determined by previous litigation that, as a matter of fact

and law, no amount is owing between the contractor (High Performance) and the alleged subcontractor (Palmer) in relation to the Alderney project. I am not prepared to permit the re-litigation of issues already determined.

[21] To the extent that this claim may now allege anything new, I am satisfied that there was a full opportunity for the contractor and alleged subcontractor to raise all issues and defences in the proceeding before Justice Moir and that they should have done so. There were opportunities to present counterclaims or claims of set-off.

Conclusion

[22] Palmer's claim is doomed to fail and must be struck. I find that there is no genuine issue of material fact requiring trial. The claim fails on the basis that there is no amount owing by the contractor to the subcontractor as has already been determined by this court. The doctrine of *res judicata* applies. To permit this claim to continue would amount to an abuse of process.

[23] The motion for dismissal brought by HRM as against the plaintiff Palmer Refrigeration is granted. The builder's lien registered as No. 93334267 is vacated.

[24] If the parties are unable to agree as to costs then I will receive their submissions.

[25] Order accordingly.

J.