

SUPREME COURT OF NOVA SCOTIA

Citation: Think Kitchen Cabinets Ltd. v. Harbourvista Apartments Ltd.,
2014 NSSC 28

Date: 20140123

Docket: Hfx No. 417236

Registry: Halifax

Between:

Think Kitchen Cabinets Ltd.

Plaintiff

v.

Harbourvista Apartments Limited

Defendant

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: September 17, 2013

Counsel: Christopher Wilson and Katie Archibald, for the plaintiff
Lisanne M. Jacklin, for the defendant

Moir J.:

Introduction

[1] We have to determine a motion to vacate a builder's lien without replacement security. Alternatively, the owner will be permitted to post security. The determination turns on whether the builder abandoned the building contract on March 22, 2013. If so, the claim for lien was registered too late.

Facts

[2] In October of 2012, Think Kitchen Cabinets Ltd., which I will call TKC, contracted with Harbourvista Apartments Limited

To supply and install all kitchen cabinets complete, washroom vanities, washroom vanity wall cabinet with mirror and shelves and counter tops for kitchens, island kitchen units and washroom vanities

at an apartment building Harbourvista was constructing on Portland Street in Dartmouth.

[3] The contract included detailed specifications as well as standard articles following a Canadian Construction Documents Committee form. By articles 1.1.1, the contract was for the supply of both goods and services.

[4] The contract was for a fixed price payable by a \$50,000 deposit, monthly progress payments in fixed amounts, and a completion payment. The fixed price was \$246,551, another \$24,814 for countertops and installation, plus HST.

[5] The parties altered the terms of payment. A deposit of \$100,000 was paid. The hold back was calculated at \$28,353. Last February, Ms. Irvine of TKC wrote to Mr. Silverman of Harbourvista:

... and dividing the balance into 4 = \$38,795.14 per floor. Let me know your thoughts.

After that, the balance was then to be paid per floor.

[6] The contract provided for completion by January 29, 2013 but neither party appears to have adhered to such a deadline. At a point, Harbourvista stipulated a deadline for completion of the first and second floors so tenants could move in during the Easter weekend. Good Friday was March 28, 2013.

[7] TKC filed a claim for lien against the apartment building on May 23, 2013. Harbourvista moves for an order vacating the lien on the ground that the filing was out of time. It contends that the evidence shows, to the standard necessary for summarily disposing of a builder's lien, that TKC abandoned the contract more than sixty days before the claim was filed.

[8] The parties disagree about how this relationship dissolved into sheer contention. I can make no findings on a subject like that on a summary motion. Let me summarize the positions as background to the main facts, which concern abandonment of the contract or maintenance of it for performance.

[9] Ms. Melanie Irvine is the president and owner of TKC. She says that Harbourvista requested materials for the wrong units. Also, she understood that Harbourvista was behind schedule with the construction. Furthermore, she says that the project manager gave her specifications for appliance openings in cabinets that were too small.

[10] Ms. Irvine does allow that she ran into a problem supplying the cabinet doors required by the contract. It turned out that the specified doors had been discontinued by her Chinese supplier. She made arrangements to have the doors manufactured locally, but no suitable product was ready on the contracted completion date or in the weeks that followed.

[11] Mr. Allan Silverman is the president of Harbourvista and Mr. Allan Offman is its project manager. They complain that TKC was behind schedule and its default delayed other trades. The problem with fitting appliances into cabinet openings was caused by TKC's design error, not a mistake in specifications supplied by Harbourvista. The problem with doors became acute in the last month when the deadline Harbourvista had set for completing the second floor was approaching, with prospective tenants waiting.

[12] On March 8, 2013, Mr. Offman advised that the first two floors had to be completed by all trades in time for the Easter weekend, starting March 28. Apparently, that is when Harbourvista was told that the cabinet doors from China were not available. Ms. Irvine reported to Mr. Silverman concerning the doors at various times, and she wrote on March 19, "I will definitely do our best with all

doors for the first two floors." Mr. Silverman asked what day they were coming. On March 20, Ms. Irvine reported, "I should have them next week".

[13] Ms. Irvine said that manufacture of the doors might speed up if they could be made of a different wood than was specified. Mr. Silverman was not happy. "[Y]ou are asking me to pick out material for doors. How could this happen, when the contract was signed months ago."

[14] On that same day, Ms. Irvine wrote to Mr. Offman about the cuts for appliances. She proposed "modifying some corner cabinets". She had dispatched six carpenters. "This will cost approx. \$960.00 in labour today." And, "I will need to order new doors on the units that will change." Further, "we do need to be compensated for the minimum cost."

[15] Mr. Joel Bernard was the carpenter mainly on site at Harbourvista for TKC. On March 20, Mr. Offman responded to Ms. Irvine to the effect that the problems with the openings were not quite as she understood. "Joel and I are working on site to make things work". He also saw "the doors and drawers [as] a problem"

and requested that TKC "ensure your forces on site are sufficient to complete the work at hand".

[16] On the next day, Ms. Irvine sought to schedule a meeting about extras and a new payment schedule. Mr. Silverman "lost it". He apologized by e-mail, but also said "You have to solve the problems. You are the contractor We want our goods as ordered and professionally installed on time." Mr. Silverman noted that he had ten tenants expecting to move in on March 28.

[17] Ms. Irvine's response came at 7:47 the next morning, Friday, March 22. She made an issue about a progress payment. She wrote, "I have not been charging for extra work and delays! ... This is stopping today!!!!!"

[18] Mr. Silverman stood his ground. "We are still waiting for doors, drawers, hardware for the 2 floors." He said, "The deal was to pay you as each floor is finished. You have not finished a floor yet." The evidence supports these statements to such an extent that the subjects are uncontroverted.

[19] The extras should be submitted to Allan Offman, said Mr. Silverman.

Harbourvista's demand was "do your work properly, and completely, and on time."

[20] Mr. Silverman's e-mail was sent at 8:08 in the morning of March 22. Ms. Irvine's evidence is that she was then advised by Mr. Offman that Harbourvista was not interested in meeting the next day to discuss extras and a new payment schedule. What Ms. Irvine did next is crucial to the issue of vacating the lien.

[21] Ms. Irvine's e-mail of 7:47 included this threat, "If you are not willing to pay us for our work – I will be pulling all of my guys off your site." According to Ms. Irvine, after Mr. Offman refused to hold a meeting on extras and a new payment schedule:

22. I then asked Joel Bernard to come back to Think Kitchen's shop to meet and decide what to do next. He left his tools and equipment at the building and met me at the shop.
23. While meeting with Joel Bernard, we talked about the issues with the project. He told me the trades were behind and that there were other issues with the building. I told him that I wanted to make a plan for each unit in order to complete the project. I did not tell Joel Bernard that Think Kitchens was finished with the job.
24. I asked Joel Bernard to meet at Think Kitchen's office with me on the following day, Saturday, March 23, in order to make a plan for the following week. He told me he was unable to meet that Saturday, but that he would be able to meet with me on Sunday, March 24.

25. During the meeting with Joel Bernard, I received an email from Allan Silverman, suggesting that I pulled my men of the job. Attached as Exhibit "C" is a true copy of that email.

Mr. Bernard was the only worker from TKC on site on the morning of March 22 when the conversations and e-mails were going on. In cross-examination, Ms. Irvine conceded that she sent no other workers to the site on the 22nd or 23rd.

[22] The e-mail referred to in paragraph 25 of Ms. Irvine's affidavit is timed 8:43 on March 22, 2013, and it reads:

Melanie; You are the first contractor on my job to have pulled your men. Our project is ahead of schedule and EVERYONE has been paid on time. No financial issues. You are in violation of your contract as of now, and having been a lawyer in my previous life, I will have no hesitation in suing you for walking off the job. The consequences are serious to your company and its reputation. I suggest you reconsider where you are going with this, as we know it is an excuse for other problems.

Govern Your Self Accordingly.

Ms. Irvine did not respond to this e-mail. She did not tell Mr. Silverman or Mr. Offman that she had called her worker back for consultations rather than to terminate the contract. She did not explain her failure to send in workers on the 22nd or the 23rd.

[23] Mr. Bernard give a different account from Ms. Irvine of the events of early morning March 22:

4. I am a cabinet maker by trade.
5. On March 22, 2013, I was actively employed as sub-contractor by the Plaintiff and had been engaged as the primary installer of kitchen cabinets, washroom vanities and cabinets at a project for the Defendant located at 222 Portland Street Dartmouth, Nova Scotia.
6. On the morning of March 22, 2013 I was at the above noted job site and was standing next to Allan Offman, project manager for Harbour Vista, while he was engaged in a conversation with Melanie Irvine, my contact for Think Kitchens.
7. I could hear the conversation and it appeared as if Melanie hung up on Allan Offman. He kept repeating her name but she was gone.
8. Seconds later I received a call from Melanie Irvine telling me "to pack up my tools we are done". I asked her if she meant done for the day and she replied "we are done". She followed that up with a text that said "make sure you take everything off the site! I'm not sending you back anytime soon. I'm at the office waiting for you :):)"
9. I packed up my tools. I texted her "okay waiting for John to get here and help me with my saws, Allan is fuming". The text was at 8:30 a.m. and by 9:00 a.m. I was gone off the jobe [*sic*] site with all of my tools and back to the Think Kitchens office.
10. I went back to the Think Kitchens office and she and Shawn Romaine, her right hand man, were present. Melanie Irvine indicated she was not doing anymore work until they made another payment. There certainly was not \$100,000.00 worth of cabinets built, in my opinion. Not even close. The big expense with cabinets is the doors, hinges, hardware and drawers and these weren't even completed. I was in the shop everyday. There was no doors or drawers there. She had eight kitchens for the third floor.
11. All that was delivered to the site on Mach 22, 2013 were boxes and counter tops for two floors. At the time that I left the job site there was

nothing complete and there was no way that anything could be complete and tenants were schedule[d] to move in the following week.

[24] The differences in the two accounts cannot be resolved summarily. I will have to take what is common among Mr. Silverman, Mr. Offman, Mr. Bernard, and Ms. Irvine to determine whether the lien should be vacated, and leave the rest to trial.

[25] What Harbourvista did next is uncontroverted. Mr. Bernard terminated his subcontract with TKC. He went to work for Mr. Offman, arranged for Provincial Woodworkers to complete the job, and took employment with them. All of this happened quickly. Mr. Offman says:

Provincial Woodworkers came to the job site on March 22, 2013 and had cabinets made and delivered by Wednesday of the following week making it possible to have the first two floors done in time to meet our deadline for tenants by March 31, 2013.

[26] Ms. Irvine claims she never intended to abandon the contract. Saturday, March 23 was the second day on which no one for TKC had shown up at the Harbourvista site. Late that afternoon, Ms. Irvine found out that Mr. Bernard was quitting TKC. Ms. Irvine contracted Mr. Romaine and arranged a visit to the

Harbourvista site for Sunday, March 24. She did not advise Mr. Silverman or Mr. Offman.

[27] Ms. Irvine and Mr. Romaine arrived at mid-morning on Sunday, March 24. They were there, they say, to inspect each unit to devise a plan for instructing a new installer to complete the project. Both Mr. Silverman and Mr. Offman were on site. Ms. Irvine says, "Allan Silverman told me that I had already quit on Friday, and demanded that I leave his property." She says, "Had I quit on Friday ... or abandoned the contract ... I would not have attended the building on Sunday"

[28] The claim for lien was filed on May 23, 2013. It is for \$11,230.

Vacating a Builder's Lien for Invalidity

[29] The parties made a contract for the supply of goods and services. Therefore, TKC had a right to register a lien "before or during the performance of the contract, or within sixty days after the completion or abandonment thereof":

Builders' Lien Act, s. 24(1). Subsection 29(4) permits the court to vacate the lien

when there is a payment of security into court or "upon any other proper ground". The subsection provides for the order to be made "upon application", which Rule 94.05(b) translates into a motion because a builder's lien action is started as required by the statute.

[30] The courts have set a high bar for exercising the discretion to vacate a builder's lien based on "any other proper ground". Grounds concerning the validity of the lien, such as late registration, usually depend on fact-finding through trial. The motion is summary.

[31] Judge O'Hearn spoke of "a heavy burden on the applicant to show that this [no lien exists] is clearly the case and that the claim can safely be disposed of on a summary application ...": *McLanders Contractors Ltd. v. Eastern Flying Services Ltd.* (1982), 55 N.S.R. (2d) 449 (Co. Ct.) at para. 2. In that same paragraph he said that the builder's lien is an important security "which should not be taken away except on the clearest grounds." This distinguishes posting security from "any other proper ground".

[32] The Court of Appeal reiterated Judge O'Hearn's approach at para. 10 of *W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd.*, 2006 NSCA 120. The Court emphasized the summary nature of a motion of this kind and put Judge O'Hearn's comments in that regard into the context of modern authorities on when the trial court should, and when it should not, order summary judgment: see para 25.

[33] Therefore, Harbourvista's motion to vacate TKC's lien on the ground that it was too lately registered may only be granted if Harbourvista has clearly established that there is no genuine issue requiring a trial.

[34] If there is a genuine issue of law, it might be appropriate to leave it for trial or to determine it under Rule 12 - Question of Law. If there is a genuine issue of fact that has to be determined in order to reach a conclusion about whether the claim was registered on time, then the question has to go to trial. On the other hand, the discretion to vacate on "any other proper ground" is legislated, and it cannot be ignored if there is no genuine issue requiring a trial. The legislative policy seems clear: a party ought not to be put to the expense of a trial of an issue not genuinely contestable.

[35] Harbourvista's motion does not require us to determine underpinning factual issues of the variety discussed by Justice Saunders in para. 27 of *W.M. Fares*.

There is no dispute about the contract. There is no issue about completion under s. 24(1). The contract makes it clear that s. 24(3) does not apply. No dispute about damages needs to be resolved to determine the validity of the lien as security.

[36] When I set out the facts that underpin the issue on this motion, I attempted to avoid determining any factual controversy. There are controversies that will have to be determined at trial, but none of them are relevant to the question of the validity of the lien:

- Whether TKC's mistake or Harbourvista's mistake led to extra work on appliance openings?
- What was the contractual deadline for performance by TKC?
- Whether TKC was unable to perform within the contracted time?

- Who owes what to whom?

[37] Only parts of only two issues discussed in para. 27 of *W.M. Fares* are controversial on the present motion:

- (iii) was the appellant's claim for lien ... registered within the time limits prescribed under s. 24 of the *Act*?

...

- (v) ... was there "abandonment" of the contract?

At that, the first depends entirely on the second, except for the simple task of counting days between uncontroverted dates. The motion comes down to a single question.

Is There a Genuine Issue of Law or Material Fact about Abandonment that Requires Trial?

[38] At para. 23 of *W.M. Fares*, Justice Saunders said, "The law is clear. The question of abandonment or not is one of intention." He referred to *Dieleman Planer Co. Ltd. v. Elizabeth Townhouses Ltd.* (1974), 48 D.L.R. (3d) 635 (S.C.C.)

in which Justice Judson approved of the following from the decision that was under appeal, (1973), 38 D.L.R. (3d) 595:

It is clear that work ceased, but in my view cessation of work and abandonment are not necessarily co-existent. In order to constitute abandonment a cessation of work would have to be permanent in the sense that it was not intended to carry the project to completion.

[39] The authorities do not suggest that the question of intention is entirely subjective. Otherwise, a builder who repudiates the construction contract, but privately intends to continue with it, has not abandoned it within the meaning of s. 24(1). This can happen. For example, a contractor who wishes to extract an amendment to the construction contract, or to settle a dispute about what is owing under it, might, at a sensitive moment, threaten to quit, might even stop working, in the hopes that the owner will agree to the amendment, or settle the dispute, rather than live with the calamity of the contractor's withdrawal at a sensitive moment. In such a case, the contractor takes a great risk because repudiation turns on communicated intention in the law of contracts, not the contractor's private intent.

[40] Abandonment under s. 24(1) and repudiation are not the same thing.

However, they can be closely related. A contractor's repudiation and the owner's acceptance of the repudiation "terminates future further performance by either side": G.H.L. Fridman, Q.C., *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at p. 621. A repudiated contract is abandoned in the sense that future further performance is terminated.

[41] Justice Saunders also provided some important commentary on repudiation.

It is to be found at paras. 86 to 91 of *White v. E.B.F. Manufacturing Ltd.*, 2005

NSCA 167. Para. 88 reads:

Repudiation occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due. Repudiation can be either explicit or implicit. It is implicit "where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract." *Furmston, supra*, at p. 522.

The inquiry into repudiation is highly circumstantial including "the nature of the contract, the attendant circumstances, and the motives which prompted the breach": para. 89.

[42] Repudiation, or anticipatory breach, is the tails side of a coin that has, for the face, termination for breach. Justice Saunders makes the coin analogy at para. 87 of *E.B.F.* A fundamental breach gives rise to a right of election. The innocent party may elect to hold the party in breach to further future performance and sue for damages arising from the breach or to terminate further future performance and sue for damages arising from the breach and from the loss of future performance. The intention to elect one or the other has to be communicated.

[43] Again, an election to terminate future performance is apt to "after the ... abandonment thereof".

[44] It is not possible to determine by summary proceeding whether TKC repudiated the contract and Harbourvista accepted the repudiation. It is not possible to determine whether Harbourvista breached the contract and TKC elected to terminate it. However, it is clear that one or the other of those two things happened on March 22, 2013. It is clear that the contract was terminated. And, that is all that matters for the question of the validity of the lien.

[45] These uncontroverted facts lead to the conclusion that the contract was terminated on March 22, 2013 no matter what Ms. Irvine's private intentions may have been:

- Harbourvista required TKC on site to complete work on the first and second floors, and TKC put required forces in place.
- TKC claimed an unspecified amount was due for extras and sought to meet quickly about that.
- TKC also claimed a proper payment was past due and sought to discuss that at the meeting.
- Harbourvista claimed that no further payments were due until a floor was finished and that any claim for extras should be submitted to the project manager.
- TKC wrote, "If you are not willing to pay us for our work – I will be pulling all my guys off your site."

- None of the workers, save one, were dispatched to the site on March 22, 2013.
- The one who did report for work left under instructions of TKC.
- At 8:43 a.m. on March 22, 2013, Harbourvista told TKC of Harbourvista's position that "walking off the job" was a breach of the building contract.
- TKC did not respond and no workers were dispatched by it to the site.
- Harbourvista hired a replacement contractor.

[46] Either Harbourvista was in fundamental breach for refusing to discuss new terms for payment and extras, and TKC elected to terminate the contract by following through on its threat to withdraw forces, or withdrawing the forces was a repudiation and Harbourvista accepted it by hiring a replacement. In either case, there is no question of law and not genuine issue of material fact requiring a trial

on the question of whether obligations for all further performance were terminated on March 22, 2013. That is to say, the status of the contract as abandoned is established by uncontroverted facts, and abandonment does not remain to be established by proof of any material fact.

Conclusion

[47] All obligations for future further performance of the contract between TKC and Harbourvista were terminated on March 22, 2013. That is, the contract was abandoned on that day within the meaning of s. 24(1) of the *Builders' Lien Act*. The claim for lien was filed more than sixty days after March 22. Therefore, it is unenforceable. An order vacating the registration follows.

[48] The parties may address costs in writing if they wish.

J.