IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Roofing Connection v. Select Projects Ltd. , 2011 NSSM 20

2011 Claim No. 336345
Date: 20110301

BETWEEN:

Name: **The Roofing Connection**
(CCP Atlantic Specialty Products Inc.)

Claimant

- and -

Name: **Select Projects Limited**

Defendant

Appearances:

Claimant: Cheryl O'Brien, Officer of Claimant

Defendant: Cory Withrow, Barrister and Solicitor

Hearing Date: December 14, 2010

Written Submissions:

(From Defendant) - December 10 and 14, 2010, January14, 2011

(From Claimant) - December 23, 2010 and January 26, 2001

DECISION as to JURISDICTION

1. This proceeding was initiated by a Notice of Claim by which the Claimant seeks $20,994.19 for unpaid invoices. The Defendant has filed a Defence and Counterclaim dated December 14, 2010, in which, simply put, it alleges breach of

contract and negligence on the part of the Claimant and counterclaims for $250,000.

2. The Defendant indicates that it is not prepared to waive any portion of its counterclaim that is above the statutory jurisdiction of this Court - $25,000.

3. Also, on December 14, 2010, the Defendant (which I will refer to herein as "Select") filed a Notice of Claim and Statement of Claim in Supreme Court against the Claimant (which I will refer to herein as "Select"), claiming damages in the amount of $250,000 based on essentially the same pleadings as contained in the Defence and Counterclaim in this Court. The Supreme Court proceeding is numbered as Hfx. No. 341033.

4. At the hearing before me on December 14th, as well as in its written submissions, Select asserted that because of the amount of the counterclaim and the filing of the Supreme Court action, this Court does not have jurisdiction to proceed. Given the lateness of this submission and the potential legal complexity, and in fairness to CCP, I directed the parties to file further written submissions which, as indicated above, CCP did on December 23 and January 26th, and Select did on January 14th.

5. This present decision deals only with the issue of jurisdiction.

Background

6. Before outlining the basic factual background, I should note that this summary is based only on representations by the parties and the documentation (including the pleadings) they provided to me. I heard no sworn evidence. For the most part however, there is no dispute as to these basic background facts. Where there is a dispute, I will note that or will note that this is merely what one of the parties alleges or says.

7. The claim advanced by CCP is for payment of invoices in relation to siding and roofing work it provided to a new apartment building in Elmsdale, Halifax County. Select was the general contractor on the project and hired CCP as the siding sub-contractor.

8. The work apparently was finished in the Spring of 2009. The significant outstanding invoice appears to be #27889 dated June 26, 2009, which is for five holdback amounts, which in all, total $19,500.65. As I understand it, this invoice was issued sometime after the final or substantial completion date in accordance with industry practice. There were two additional invoices for what appears to be incidental items in August and September, 2009.

9. On September 11, 2009, a detailed deficiency list was issued by Select. It is titled, “Deficiency List #5" and is a four page document. There are three deficiency items attributable to CCP (referred to as “RCL” in this document, for Roofing Connection Limited). The three items are: 1) “Room 407 - Remove red caulking from around deck door”, 2) “Exterior - White chaulky stains on siding”, and 3) “Exterior - extend downspouts”.

10. It does not appear that there was any further deficiency list issued by Select. There were a few emails between Select and CCP in April, 2010, in regards to the “chaulky stains” issue. I note that in her submission of January 26, Ms. O’Brien states that prior to the December 14th court date, CCP was never contacted or notified of any demand to have the exterior repaired. Before that date, she says the last communication apparently took place in June 2010.

11. It is not clear that the deficiency matter was ever satisfactorily resolved.

12. In response to my inquiry as to whether there was any document from the owner, Select sent to me on December 17th, a copy of a letter under date of September 30, 2010, from Corridor Developments Ltd, the property owner, to Select demanding that (1) Select take immediate measures to rectify the appearance of

the siding, and (2) Select remove and replace the siding in the Spring and/or Summer of 2011.

13. There was no indication (in fact, no suggestion by Select) that this letter had been previously provided to CCP.

14. In her submission of December 23, Ms. O'Brien questions whether this letter was created after the fact and notes that the letter was sent to the attention of Phillip Higgs at Select and notes that Mr. Higgs is also a principal of Corridor Developments Ltd. Mr. Withrow responds that this is irrelevant .

15. I also note that in its pleadings, Select says the siding material must be removed and replaced and this cost is approximately $250,000 (paragraphs 10 and 11 of Statement of Claim). There is no written estimate to support this.

Issue(s)

16. In basic terms, the issue here is whether to;

    a. Stay the proceeding on the basis that, with the filing of the counterclaim, it exceeds the Court's monetary jurisdiction, or because of s. 15 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, or both; or,

    b. Sever the counterclaim from this proceeding which would then leave the Small Claims Court with clear jurisdiction to deal with CCP's claim. Select would, of course, still be at liberty to proceed with its claim in the Supreme Court.

Applicable Principles

17. The leading Supreme Court cases on this issue include ***Haines, Miller & Associates v. Fosse*** 1996 CanLII 5307 (NS C.A.), (1996), 153 N.S.R. (2d) 44

(S.C.) and ***Llewellyn Building Supplies Limited v. Nevitt***, (1987), 80 N.S.R. (2d) 415 (C.C.). I also refer to Adjudicator Richardson's decision in ***Lone Cypress Woodworking v. Manabe*** *(* 2006) 240 N.S.R. (2d) 302 NSSM 2, which refers to and relies on the *Llewellyn* decision.

18. In ***Haines, Miller*** Chief Justice Glube quotes with approval the following statement of Judge Haliburton (as he then was) in ***Llewellyn***, (p. 417 of *Lllewellyn*):

> "*...it will be apparent, then, that the Adjudicator of the Small Claims Court must exercise his judicial discretion as to the most effective and convenient way for the matter before him to proceed. He must bear in mind the objective of the Small Claims Court procedure; which is to provide a cheap, effective and relatively speedy method of adjudicating civil disputes. It is his duty in exercising his discretion to ensure that specious or frivolous allegations raised by a defendant in the pleadings before him not be permitted to subvert the purposes of the Act and of his court. He must be mindful of the right of a plaintiff to choose the forum in which his action will be heard. He must consider whether the issues raised in the claim and the counterclaim can be conveniently severed and be heard in that fashion without adding unnecessary or unreasonable expense to the proceedings, or whether the most "judicious" method of dealing with the issues before him would be to have the whole proceeding consolidated in an action which is outside his jurisdiction and which would, therefore, involve the proceedings being commenced in another court."*

19. In ***Haines, Miller,*** Chief Justice Glube found that the issues raised in the counterclaim were sufficiently separate and distinct from the issues in the main claim in the Small Claims Court and, therefore, that the Small Claim Court matter should proceed.

20. In reliance on those decisions, I have ruled in a previous case that a counterclaim which raised separate and distinct issues could be severed and the Small Claims action could proceed (see ***TJ Inspection Services v. Halifax Shipyard***, July 8, 2004, SCCH 222129).

21. In the ***Lone Cypress*** case Adjudicator Richardson outlined the process as follows (par 25):

> *"Given the above, it seems to me that a party making a counterclaim in excess of the Small Claims Court's jurisdiction has several options:*
>
> > *a. he or she cannot make the claim unless he or she is prepared to waive the excess portion of the claim;*
> >
> > *b. he or she can make the claim by waiving the excess; or*
> >
> > *c. he or she can commence the claim in the Supreme Court, thereby triggering the provisions of s. 15."*

22. To that, I would add two further considerations, as mandated by ***Llewellyn*** and ***Haines, Miller***.

> 1) Are the matters raised in the counterclaim so inextricably linked to the principal matter that they should be heard together or are they sufficiently separate and distinct that they may appropriately be severed;
>
> 2) Are the matters raised in the counterclaim "specious or frivolous" bearing in mind the objective of the purpose of the Small Claims Court Act stated in s. 2 to "..to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice".

Analysis

23. I would start by saying that I do not consider this to be a case where the issues are sufficiently separate and distinct that it would be appropriate to sever the counterclaim for that reason. The facts relating to both claims arise of exactly the same contractual relationship and exactly the same performance of work under the contractual relationship. On the face of it, it is appropriate that they be dealt with together.

24. I turn then to the issue of whether the matters raised in the counterclaim are "specious or frivolous". While there may be issues here that cause one to question this, in the final analysis I conclude that I cannot find the counterclaim specious and frivolous, and certainly not to the extent that would cause me to sever it from this proceeding.

25. In saying this, I am entirely mindful of objects of the *Small Claims Court Act* as enunciated in s. 2 of the *Act*. There are, however, other principles at play. These would include the right of the party in the position of the Select to have its claim adjudicated without having to abandon some part of it. I cannot easily overlook that right.

26. There is, on the record, a clear indication that Select has raised the issue with respect to the siding. Whether this constitutes a $250,000 item is an entirely other matter. Nevertheless, there is enough here that I cannot dismiss it out of hand. The counterclaim has at least has an "air of reality". Perhaps, Select's claim for $250,000 will ultimately be determined to be baseless. However, at this point and on the basis of the material before me, I am unable to make that finding.

27. Clearly there is a tension in these types of cases between, on the one hand, seeking to uphold the rights of a claimant such as CPP here to seek a relatively timely and cost-effective remedy, and, on the other hand, not overlooking the rights of a defendant who, prima-facie has a claim that exceeds the monetary limits of this court. At the same time, one must be cognizant that the factual basis of this type of contest is typically by way of un-sworn representations that have not been tested by cross examination, a key component of natural justice, and which this Court is also mandated to respect and apply under s. 2. So while the basic principle of this Court might be considered to be inexpensive and speedy justice it is subject to some fundamental overarching principles.

28. In ***American Home Assurance Company et al v. Brett Ponticac Bucik GMC*** (1991), 105 N.S.R. (2d) 425 Saunders. J. stated (p. 436):

> *"...I do not regard s. 15 as a means by which a defendant could thwart any action taken against it by simply deciding to sue as a plaintiff in the Supreme Court. Such and attempt to oust the jurisdiction of the Small Claims Court would be attributing a meaning to words which would defeat the purpose of the legislation. In other words, it would be the very abuse of process about which these applicants have complained."*

29. It is this concern that makes these type of cases difficult. There are two things that potentially militate against that concern.

30. First, under the current Civil Procedure Rules, there appears to be enhanced provisions relating to summary judgements for both plaintiffs and defendants. In essence, it should be easier and more cost effective to compel a party to "put their best foot forward" at an early stage of the proceedings.

31. Secondly, if a defendant in circumstances such as the present has artificially exaggerated its counterclaim and has done so to demonstrably take the matter outside of the jurisdiction of the Small Claims Court, that may well sound in enhanced costs in the Supreme Court proceeding (see Rule 77.07(2) (e) and (f)). This was alluded to by Haliburton, J. in ***Llewellyn*** as follows:

> *If the defence is, in fact without merit, and initiated for the mere purpose of frustrating the claimant, then that Court, it seems to me, would be very much inclined to allow costs of a substantial nature against the defendant. That consideration should be sufficient to constitute an effective remedy for the claimant.*

32. For the above reasons, I do find that the Court is without jurisdiction to proceed and the claim must therefore be stayed.

ORDER

33. It is hereby ordered that the herein claim be and is hereby stayed without costs to either party.

DATED at Halifax, Nova Scotia, this 1st day of March, 2011.

Michael J. O'Hara
Adjudicator