

Claim No: 10-329803

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Eastech Consultants Ltd. v. Selco Contracting Ltd., 2010 NSSM 81

BETWEEN:

EASTECH CONSULTANTS LIMITED

CLAIMANT

- and -

SILCO CONTRACTING LTD. And GERRY SILVER

DEFENDANT

DECISION

DATE OF HEARING: September 14, 2010

DATE OF DECISION: September 27, 2010

PLACE OF HEARING: Dartmouth, Nova Scotia

HEARD BEFORE: Patrick L. Casey, Q.C.
Small Claims Court Adjudicator

COUNSEL: Gary Parker (Owner), for the Claimant

Allison Kouzofnicoff, for the Defendant

NATURE OF PROCEEDING

- (1) This proceeding concerns a claim brought by Eastech Consultants Limited against Silco Contracting Ltd. for \$14,892.10 for alleged invoices outstanding and a counterclaim by Silco Contracting Ltd. against Eastech Consulting Limited for \$20,000.00 which involves an allegation of overpayment of their account, a dispute whether the services being invoiced were in fact performed and, if performed, whether they were part of the contract terms between the parties.

THE CLAIM

- (2) The Claimant produced a number of invoices in support of its claim. The nature of the services provided concerned engineering and surveying work in connection with the development of a subdivision. The work commenced in 2005 and was not completed until 2008.
- (3) There was no written contract between the parties, however, a fee was quoted for various phases of the work including the concept plan, tentative plan, engineering plan and final plan.
- (4) The billings presented by the Claimant were less than satisfactory. There were errors in the calculation of the HST. Some items were billed more than once.
- (5) The Defendant spent numerous hours of personal time and also retained their Accountant to reconcile the accounts.
- (6) The balance of proof that any amounts remain outstanding is on the Claimant. The burden of proof is the balance of probabilities.
- (7) Based on the preponderance of evidence I find that the total amounts invoiced by the Claimant to the Defendant inclusive of HST was \$90,368.38, however, this includes an over billing of \$4,902.00 for a net amount of \$85,466.38 inclusive of tax.
- (8) I also find based upon the preponderance of evidence that the total amount paid on the account was \$78,033.33 inclusive of tax.
- (9) This leaves the sum of \$7,433.05 payable by the Defendant to the Claimant.
- (10) I also find that the Claimant incurred accounting costs of approximately \$2,000.00 to assist in reconciling the accounts.
- (11) Based on the information provided to the Court I find this was a reasonable expenditure. Without the reconciliation it would have been very difficult to determine the amounts owing, if any. The amounts owing by the Defendant will be reduced by \$2,000.00 leaving a net amount owing of \$5,433.05.
- (12) The Claimant did not put forward a claim for interest with respect to any amounts owing.

THE COUNTERCLAIM

- (13) Gerald Silver (“Silver”) is one of the principals of the Defendant company. He testified that there were numerous delays involved in the project and his position was that the Claimant was directly responsible for those delays. He referred in evidence to various correspondence between himself and the Claimant as well as communications from Halifax Regional Municipality as the project went on. I have reviewed the correspondence and communications.
- (14) My impression from reviewing the documents and hearing the evidence is that the Defendant, with the benefit of hindsight, is making the problems out to be worse than they were. It is clear that the Claimant’s billing practices were less than ideal and this caused a great deal of frustration for the Defendant. It is also clear that there were errors in the submissions made to Halifax Regional Municipality but I accept the evidence of the Claimant that it is not unusual to expect errors.
- (15) There is insufficient evidence from which I can conclude however that the Claimant was entirely to blame for the delays in the project.
- (16) There is certainly evidence that the relationship between the parties was strained. At one point there was a meeting which included discussion about whether the Defendant was considering suing the Claimant. This meeting was followed up by a letter from Silver to the Claimant stating that “...I have no reason to consider pursuing any law suits against you or Eastech Consultants Limited and have no intentions of doing so.”
- (17) When asked about this letter, Silver testified that he was “blackmailed” by the Claimant to provide this letter. Having heard the testimony of both parties, I find that the evidence falls far short of Silver’s recollection on this point. I believe that while the relationship was strained and while there were significant delays in the completion of the project, I am not convinced that Silver was dissatisfied with the Claimants work to the extent that he would now have the Court believe.
- (18) Also, while Silver alluded in his testimony to loss of profits as a result of delays, there was no independent evidence from which the Court could conclude that the Defendant on the balance of probabilities suffered a loss of profit as a result of delays whether caused by the Claimant or otherwise. Reference was made to lot sales that were lost because of the delays however, no further evidence was provided.
- (19) I find based upon the evidence that the Claimant provided billing credits to the Defendant so that his billings would come in line with the quote with reference to the concept plan, tentative plan and engineering plans. The main dispute concerned the quote for the final plan. The Claimant’s position is that the final plan did not include services rendered for onsite inspection and as-built plans, these services having been rendered over a period of a number of months, and which required an Engineering Technician to be onsite at all times in accordance with HRM regulations.

- (20) According to the evidence provided the total amount of the invoices with respect to the final plan was over \$40,000.00 inclusive of HST (it is difficult to calculate the exact amount since HST changed from 13% to 15% part way through the project) instead of somewhere around \$14,000.00 (exclusive of HST) contained in the original quote. The difference is significant.
- (21) The Claimant says that no sensible person would have “open ended” a quote for final plans to include onsite inspection and as-built plans. The Defendant says that the Claimant should have specified in the quote that this work would be considered an extra.
- (22) As noted earlier, the Claimant adjusted his billing as the project went on as he had effectively over billed the Defendant above and beyond the quote. A further adjustment as required by the Defendant would not only set off entirely any amount that is outstanding, but would require the the Claimant to repay a significant sum to the Defendant. In fact, the owing amount would likely exceed the amount of the counterclaim.
- (23) The difficulty that I have with the position taken on behalf of the Defendant, however, is that one would normally expect that if the Defendant felt that the Claimant was significantly over billing based on the quote that he would register some form of objection in writing or refuse to pay. There is no evidence that any such objection was registered in this case.
- (24) I accept the Claimant’s contention that Silver is an experienced contractor. It is somewhat telling in my view that Silver registered complaints with Gary Parker (Parker) about the pace of the development yet registered no complaints about any alleged over-billing with respect to the final plan.
- (25) Having said that, this does not permit the Claimant “carte blanche” to simply remit the billings of the engineering technician at any hourly rate. Silver testified that the rate employed in this particular case was high compared to the industry average and I accept his evidence. There was no negotiation of the rate and the Court can imply or impute a reasonable amount based on all the circumstances.
- (26) There is also some confusion in the billing about the actual number of hours since in one bill it is expressed for example as 140 for a particular time period then on a second billing at 146 for the same time period and additional charges are added for Parker the principal of the Claimant.
- (27) In all of the circumstances I find it would be reasonable to reduce the bill to account for these factors. I will reduce the outstanding amount by a further \$2,500.00.
- (28) The Defendant, therefore, owes the Claimant the sum of \$2,933.05 after the reduction is applied.

COSTS

- (29) The Claimant requests that the Court award him the costs of filing the Notice of Claim Form.
- (30) In the end result the billing problems were the Claimant's responsibility. The Claimant has been successful but only partly successful. I exercise my discretion not to award costs in this case.

SUMMARY

- (31) The Defendant shall pay to the Claimant the sum of \$2,933.05.

Dated at Dartmouth, Nova Scotia,
on September 27, 2010.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant
Copy	Defendant

Form 7(c) - Order
In the Small Claims Court of Nova Scotia

Claim No: 10-329803

BETWEEN:

Name EASTECH CONSULTANTS LIMITED Claimant

Address 111 Tacoma Drive, Dartmouth, Nova Scotia, B2W 3E8

Phone 902-466-2176

Name SILCO CONTRACTING LTD. and GERRY SILVER Defendant

Address 1480 Caldwell Road, Eastern Passage, Nova Scotia, B0J 3A0

Phone 902-465-6594

On September 14, 2010, a hearing was held in the above matter and the following Order is made:

The Defendant shall pay to the Claimant sum of \$2,933.05.

Dated at Dartmouth, Nova Scotia,
on September 27, 2010.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant
Copy	Defendant