IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Four Seasons Roofing Limited v. Lavigne, 2006 NSSC 402

Date: 20061206
Docket: S. H. No. 266185
Registry: Halifax

Between:

Four Seasons Roofing Limited, a body corporate

Plaintiff

v.

Glen Lavigne

Defendant

D E C I S I O N

Judge:	The Honourable Justice A. David MacAdam
Heard:	December 6, 2006, in Halifax, Nova Scotia
Oral Decision:	December 6, 2006
Written Decision:	January 31, 2007
Counsel:	Paul B. Miller for the Plaintiff Glen Lavigne, self represented Defendant

MACADAM, J:

[1] In January, 2006 Glenn Wright, President of the plaintiff, Four Seasons Roofing Limited, (herein "Four Seasons"), presented a proposal for the replacement of the roof on a building located on the property known as Civic No. 2749 Agricola Street, Halifax, Nova Scotia. The proposal was accepted by the defendant, Glen Lavigne, the owner of the subject property.

[2] The scope of work, as described in the proposal, contained the following:

> If wood work is required, work must be approved prior to wood work being done.

[3] According to Mr. Wright, his company was to inspect the wood deck for rot and decay and then to determine what wood needed to be replaced. During the course of replacing the roof, there was some wood work that apparently had to be replaced and this led to the invoicing of an extra for "wood replacement on deck" in the amount of $625.00. There was another additional charge for "fascia wood replacement" in the amount of $497.90, but this extra is not in dispute.

[4] Mr. Wright acknowledged he had no discussions with the defendant nor, for that matter, with the defendant's representative who was on site, in respect to this additional wood work, although he indicated his crew would not have proceeded without the necessary approval. He also testified on presentation of the invoices that included this additional wood work, there was no objection taken by the defendant, nor was there objection taken for some time subsequently, in fact, he said, not until after these proceedings had been commenced.

[5] The defendant called David Henneberry, who was his representative on site; but, neither the plaintiff's counsel nor Mr. Lavigne asked him whether he had had a discussion with any of the employees of the plaintiff in reference to the additional wood work. The question was never put to Mr. Henneberry.

[6] Upon presentation of invoices in the total amount of $26,492.61, Mr. Wright, on behalf of the plaintiff, received a cheque for $13,000.00 representing approximately one-half, on his understanding the remaining balance would be paid within ten days. Not being paid, he subsequently contacted the defendant in an effort to obtain payment. It was only some time later that he received objection from the plaintiff to the extra for the wood work.

[7] Mr. Lavigne, in his presentation to the Court, indicated he did not dispute the balance of the contract amount, nor the extra charge for fascia wood replacement. His only dispute related to the additional charge for “wood replacement on deck”. He, therefore, did not dispute the majority of the amounts being claimed by the plaintiff.

[8] Mr. Wright testified that, not having received payment, in April, 2006, he signed, on behalf of the plaintiff, a Claim for Lien for the supply of labour and materials in re-installing the roof of a building on lands owned by Mr. Lavigne, “known as 2787 Agricola Street, Halifax, Halifax Regional Municipality, Nova Scotia”. It is not in dispute that this was not the property on which the roof had been replaced. Subsequently, the plaintiff filed an Amended Claim for Lien, changing the description of the property on which the roof had been replaced to, “2749 Agricola Street, Halifax, Halifax Regional Municipality, Nova Scotia”. There appears to be no dispute that this, in fact, is the property on which the roof had been replaced.

[9] In both the original Claim for Lien and the Amended Claim for Lien, it is alleged that the last date that labour and materials were supplied was on or about February 17, 2006. It is clear that if the original Claim for Lien is valid, the Claim for Lien was filed within the statutory period provided for under the *Builders' Lien Act*, c. 277, R.S.N.S., 1989, as amended, while the Amended Claim for Lien would have been filed outside the statutory period.

[10] At issue, therefore, is whether the plaintiff is entitled to the additional extra $625.00 for "wood replacement on deck", together with HST, and whether there is a valid claim for lien on the property known as 2749 Agricola Street, Halifax, Nova Scotia.

[11] In respect to the extra, the onus is on the plaintiff to establish the merits of its claim and in this circumstance it has not done so. There is no evidence that the defendant, or any representative of the defendant, consented to the additional work and notwithstanding, it would undoubtedly have been required in order to ensure a workmanlike performance on the part of the plaintiff, it is the plaintiff's contract and the plaintiff's stipulation with which the plaintiff has not complied. The assumption by Mr. Wright that his crew would not have proceeded without

the necessary approval or consent from the defendant or the defendant's representative is an assumption, and not evidence, and the failure of the defendant to object when first presented with the invoice, is not sufficient to support a finding there was consent or approval, or, at least, a waiver of the same. The onus is on the plaintiff and the onus has not been met.

[12] In respect to the Claim for Lien, the plaintiff's counsel refers to the provisions of Section 21(1) of the *Builders' Lien Act*, supra, as follows:

> Substantial compliance only with Sections 19 and 20 shall be required, and no lien shall be invalidated by reason of the failure to comply with any of the requisites of such Sections, unless in the opinion of the court or judge who has the power to try the action under this Act, the owner, contractor, subcontractor, mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

[13] Counsel suggests that there has been substantial compliance and no prejudice in view of the fact that the subsequent Statement of Claim and lis pendens were served on the defendant. However, counsel failed to reference subsection (2), which reads as follows:

> Nothing contained in this Section shall be construed as dispensing with the registration required by this Act. R.S., c. 277, s. 21.

[14] Section 19 provides for the contents of the claim. Included in subparagraph (d) is the requirement to provide "a description of the land or property to be charged". Clearly, in the original Claim for Lien, the description of the land or property to be charged, was not the description of the property on which the roof had been re-installed by the plaintiff.

[15] In his pre-hearing submission, plaintiff's counsel refers to the decision of Hood, J. in *Empire Excavators Ltd. V. T.A.G. Developments Ltd., 1998* Carswell NS 162 (S.C.); 168 N.S.R. (2d) 309. In *Empire Excavators Ltd.*, supra, the description of the lands to be charged was incorrect in that it included more than the approved lot on which the work had actually been performed. Justice Hood, in respect to the necessity to observe the provisions of the *Act* for filing and registration of liens, references the decision of Chief Justice Clarke on behalf of the Court of Appeal in *Langevin Developments Ltd. v. Tri-Corp General Contracting & Sales Ltd. (1988), 87 N.S.R. (2d) 332 (S.C.A.D.),* at para 34:

> *The provisions in the Act for filing and registration of liens must be strictly followed.*

[16] Justice Hood also references *Rafuse v. Hunter (1906), 12 B.C.R. 126 (B.C. Co. Ct.)* where the plaintiff had sought an amendment to the description of the land to be liened. The land liened was part of Lot 341, while the land sought to be added was not part of Lot 341. Justice Wilson, at p. 127:

> ...there is no existing lien ... and this is the very land the defendants now seek to charge. [It] is the creation of a new lien against land which up to the present has not been charged.

[17] On the other hand, other cases referenced by Justice Hood, include where there has been "mis-description" of the land, apparently where the description is of a larger block of land than the one on which the goods have been supplied or the work performed. Justice Hood refers to the decision of the Ontario Court of Appeal in *Nor-Min Supplies Ltd. v. Canadian National Railway* (1979), 27 O.R. (2d) 390 (Ont. C.A.), where the registration on the wrong lands was excused, noting, that subsequently, the Ontario High Court of Justice in *Twin Windows Inc. v. Holiday Construction Ltd.* (1985), 15 C.L.R. 311 (Ont. H.C.), observed that the curative section involved had been amended and it was not bound by the *Nor-Win* decision. Justice Hood added that neither was she bound and that she did not accept it as persuasive. Justice Hood was clearly distinguishing between the circumstance where the "wrong" lands are described from where there is a mis-

description of the subject lands, but within the described property is the land on which the goods have been supplied and the work performed. Justice Hood notes that the purpose of lien legislation is outlined by the Ontario Court of Appeal in *Electric Furnace Products Co. v. Quality Rentals* (1991), 46 C.L.R. 24 (Alta. C.A.) as follows:

> There is no doubt that the *Builders' Lien Act* and its predecessor, *The Mechanics' Lien Act, ...* were structured to secure to the workman payment for his work ... But the *Act* is inhabited by another objective. It is that an owner is assured that his property will not be liened after the expiration of 45 days from the day that the work is completed and that the major lien fund can be paid out to those lien claimants who have registered during the time limited by the *Act*.

[18] Also referenced by Justice Hood is the authoritative text, in the area of lien law, Macklem and Bristow, *Construction Builders' and Mechanics' Liens in Canada* (6th ed. 1990 Carswell Toronto) where the authors, in Section 69(g) state:

> If too much land is described in the claim for lien, the claimant will be entitled to a lien upon the land that should have been described; such an error will not invalidate the lien: *Poison v. Thomson* (1916), 10 W.W.R. 865 (Man. C.A.); *Beseloff v. White Rock Resort Dev. Co.* (1915), 8 W.W.R. 1338 (B.C.C.A.); *Ont. Lime Assur. v. Grimwood* (1910), 22 O.L.R. 17 (H.C.); *Modern Const. Co. v. Maritime Rock Products Ltd.*, [1963] S.C.R. 347.

[19] Similarly, from *Modern Construction Co. v. Maritime Rock Products Ltd.*, [1963] S.C.R. 347 (S.C.C.) Justice Hood references the reasons of Justice Ritchie, at pp. 355-356 to the following effect:

> ... I do not think that the validity of the lien is destroyed by the fact that the description in the statement of claim and claim for lien includes together with those lands, certain Crown lands to which no lien attaches.

[20] At para. 49 of her reasons, Justice Hood observes:

> In *Rafuse v. Hunter, supra*, the judge was concerned that the lands being sought to be liened were lands which had 'not been charged'. That is not the situation here. The lands in question were charged but so were additional lands.

[21] Justice Hood concludes her review of the authorities by noting, at para. 50:

> The wrong land is not liened so as to invalidate a lien when the lien covers lands in excess of the lands required to be liened, in circumstances where the land liened was a predecessor lot to the lands on which the work occurred and where the lot designators are so similar as to be likely to cause confusion.In the present circumstances, the "wrong" lands were liened and it is not simply a circumstance where the description included a larger tract of land of which the correct lands were part.

[22] As such, I am satisfied that on the authorities, the lien is not valid and the provisions of Section 21(2), rather than the provisions of Section 21(1) are

applicable. The Legislature specifically provided that the curative section would not apply so as to dispense with the registration required by the *Act* and by virtue of Section 19(1)(d), one of the requirements for a claim of lien is to provide a description of the land or property to be charged. In the present circumstance, the initial Claim for Lien did not so provide and therefore did not meet the requirements of the *Builders' Lien Act*. The Amended Claim for Lien was filed outside of the statutory period, and therefore, cannot assist the plaintiff in this regard.

[23] The plaintiff therefore shall have judgment for $12,773.86, together with interest at 4 percent, commencing 30 days following the date of the invoice, to and including the date of judgment, or payment, and thereafter, if unpaid, interest in accordance with the provisions of the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233.

[24] In addition, the plaintiff shall have its costs, which shall not include any disbursements relating to the registering of the Claim for Lien and the Amended Claim for Lien, but may include disbursements for the issuance of the Statement of Claim, obtaining the Law Stamp and for serving the Statement of Claim and

other documents. The plaintiff shall also have party and party costs in the amount of $3,000.00.

J.