Claim No: SCCH-451285

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Construction Technologies (CTI) Inc. v. Harbour Vista Apartments Ltd., 2016 NSSM 45

BETWEEN:

CONSTRUCTION TECHNOLOGIES (CTI) INC.

Claimant

- and -

HARBOUR VISTA APARTMENTS LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 12, 2016

Decision rendered on August 10, 2016

APPEARANCES

For the Claimant	Marjorie Newell Accounting Specialist
For the Defendant	David Morrison, Legal counsel

BY THE COURT:

[1] The Claimant was a supplier of certain specialized materials (doors, windows, railings, siding etc.) used in the construction of an apartment building being constructed in Dartmouth by the Defendant in 2013. The amount billed during the course of the relationship was in the hundreds of thousands of dollars. The Claimant contends that there was $20,000.00 left owing, as a result of accounting errors on its own part. It seeks to recover that amount now.

[2] During the active phase of the construction, there were many deliveries to the site and billings that did not exactly conform to those deliveries. I believe it is fair to say, on all of the evidence, that the billing and accounting practices of the Claimant were highly deficient. Its accounting staff at the time did not properly attribute payments and in some instances appear to have attributed the same payment more than once. Billings were not sent out on a timely basis. Some bills went to the office and some to the job site, leading to further confusion. It also seems that returned product was not always credited, or not credited properly.

[3] At times the Claimant was looking for money, but not being able to identify which specific invoices were outstanding, it encouraged the Defendant to make bulk payments to be applied to the account. The net result was that, as the project was nearing completion, neither party knew how much was actually owing.

[4] To further complicate matters, the accounting system being used by the Defendant appears to have been mostly manual, and would have been of no help to get to the bottom of the issue.

[5] At the end, it was clear to both parties that there was an outstanding balance, and the Claimant was anxious to be paid. Allan Silverman, the owner and project manager for the Defendant, met with the president of the Claimant company, Jeff Thompson, to try to settle the account. In the end, a $35,000.00 payment was made on August 1, 2013, which Mr. Silverman inscribed on the cheque as “settlement in full.”

[6] Mr. Silverman testified that he did not know precisely what he owed, and that he still had outstanding issues, but agreed to this payment in order to close the books on the account with the Claimant. Mr. Thompson did not attend the hearing and did not testify, although he remains the president of the Claimant company.

[7] The matter remained dormant until more than a year later, when the Director of Finance for CTI (Joseph Lord) reviewed the account and discovered some errors and reported to Mr. Thompson that the corrected books and records showed the Defendant still owing $20,000.00 to the Claimant. Mr. Lord approached the Defendant in September 2014 and began making requests for this $20,000.00 to be paid. That request was eventually considered by Mr. Silverman who denied that this amount was owing, and refused to pay.

[8] The matter did not advance much until it was taken up again some months later by a new accounting person hired by the Claimant company, Marjorie Newell. It was she who reviewed the accounts (again) and spearheaded the bringing of this claim.

[9] The Defendant was represented at the hearing by counsel who raised the defence of "accord and satisfaction." He relied on the case of *Action Management Inc. v. Archibald*, 2011 NSSC 358 as authority, not because of a factual similarity but because it comprehensively discusses this legal principle.

[10] The basic principle of accord and satisfaction is met when a debt is settled, with an amount agreed upon, that puts and end to all obligations going in either direction. In most such cases it would be inequitable for the creditor to come back later and say, in effect, "you still owe me some money." An accord and satisfaction settles the debt and all claims and counterclaims that may have existed at the time of the payment.

[11] Not every payment will constitute an accord and satisfaction, even where the paying party writes a statement "paid in full" or some such language on the cheque. It depends on the true intention of the parties.

[12] Justice Murray in the *Action Management* case recited two cases that set out important principles:

> [103] In *D&C Builders v Rees* 1965, 3 All ER 837 Lord Denning included the following statement at page four:
>
> > "In applying this principle, however, we must note the qualification: The creditor is only barred from his legal right when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them." (Emphasis added)

> [104] In *Sears v Russell*, 2006 NBQB 271 (CanLII) cited by the Plaintiff the Court discussed what constitutes a full settlement in the case of a lesser sum:
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> > "11. Where a creditor cashes, certifies, deposits or otherwise negotiates with a cheque delivered on condition of full settlement, accepting receipt may be evidence of accord and satisfaction, but not conclusive evidence and no presumption of the kind should be drawn. The creditor is at liberty to cash and keep the funds and disregard the condition as long as he or she does not agree otherwise or communicate express acceptance of the condition." (Emphasis added)

[13] Applying these principles, I make the following observations.

[14] The Claimant was content at the time to accept $35,000.00 in full settlement of the account. I accept that it is likely that it believed this amount was precisely, or close to, the actual state of the account, but such mistaken belief was entirely of its own making.

[15] There is no evidence that the Claimant was reserving its rights to claim a greater, or more accurate amount. Viewed as of 2013, I believe the Claimant would have seen this as an accord and satisfaction. Had the situation been reversed, and the Defendant came along later with a claim to a credit (such as for some returned goods) the Claimant would very likely have said that the account was settled.

[16] I find that there was a binding accord and satisfaction to settle the account at $35,000.00 at that time, and that there is no inequity in enforcing that contract.

[17] Another way of looking at the situation, which admittedly was not pleaded by the Claimant, is the concept of unilateral mistake. That legal principle holds

that, where a contract is made where one party is mistaken as to a material fact, the contract may be voidable at the instance of the mistaken party.

[18] The Nova Scotia Supreme Court case of *Orrin Irvin Lewis Works v. Rhonda Elaine Works*, 2002 NSSC 159 (CanLII) contains a good review of the jurisprudence surrounding unilateral mistake. Justice MacLellan neatly sums it up in the following paragraph:

> [18] I conclude that generally the law is that where one party only is mistaken about something significant to a contract, the Court will exercise its discretion to not enforce the agreement only if it is satisfied that it would be unfair, unjust or unconscionable to do so considering all the circumstances, including whether the other party was aware of the mistake or should have been aware of it and also whether it was central to the agreement itself.

[19] This leads to a similar question: is it unjust to hold the Claimant to the bargain that it made in 2013? Did the Defendant know, or ought it to have known, that the Claimant had a mistaken belief as to the actual amount owing for its supply of goods?

[20] If the answer were that it is unjust, the remedy would not be to mechanically award the Claimant $20,000.00. The remedy would be to declare the agreement void, and open up the claim to all claims and counterclaims. The result after such a finding would be to require the case to be litigated fully, as inconvenient as that might be.

[21] In the end, I do not have to go that far, as I find that it is not unfair, unjust or unconscionable to hold the Claimant to its bargain. I am satisfied that the Defendant did not know that the Claimant was mistaken, and objectively ought

not to have known. If find that Mr. Silverman was genuinely in doubt as to how much was owed, and rather than pursuing a complex claim and counterclaim type of process to factor in his own grievances, he chose to end it all with a lump sum payment that was acceptable to both parties.

[22] By either legal route, we end up at the same conclusion. The Claimant settled the account at $35,000.00 and gave up any further amount that it might have been eligible to claim.

[23] In the end, the claim must be dismissed.

Eric K. Slone, Adjudicator