Arctic Environmental v. Northern Mgmt .& Komaromi et al, 2000 NWTSC 53

Date: 2000 08 08
Docket: CV 08704

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ARCTIC ENVIRONMENTAL SERVICES LTD.

PLAINTIFF

-and-

NORTHERN MANAGEMENT & DEVELOPMENT LTD.

DEFENDANT

-and-

KATHERINE ANNE KOMAROMI, PAUL KOMAROMI and GREG KOMAROMI

THIRD PARTY

Applications for (i) summary judgment (ii) an order staying or striking out the third party notice (iii) consolidation of this action with CV 08545.

Application Heard at Yellowknife, NT July 4, 2000

Reasons Filed: August 08, 2000

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V. A. SCHULER

Counsel for the Plaintiff: Angela Davies
Counsel for the Defendant: Gary Romanchuk
Counsel for the Third Parties: Doug McNiven

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REASONS FOR JUDGMENT

[1] There are three applications before me as follows:

1. an application by the plaintiff, Arctic Environmental Services Ltd. ("AES"), for summary judgment against the defendant, Northern Management & Development Ltd. ("Northern") in this action CV 08704;

2. an application by the third parties, Katherine Anne Komaromi, Paul Komaromi and Greg Komaromi ("the Komaromis"), for an order staying or striking out the third party notice in CV 08704;

3. an application by Northern for an order consolidating CV 08704 and action CV 08545.

Background

[2] The Komaromis contracted with Northern to have their Inuvik laundry building demolished and removed from its site. Northern found a large quantity of asbestos at the site and brought in AES to remove it. AES invoiced Northern for its work. Northern did not pay and claims that the cost is solely the responsibility of the Komaromis. Both AES and the Komaromis say they had no dealings with each other. In this action by AES against Northern, the latter has added the Komaromis as third parties.

[3] AES commenced this action on February 29, 2000. Prior to that, Northern had filed a lien against the laundry property, claiming non-payment of the amount represented by the AES invoices as well as other amounts alleged to be owing. On November 23, 1999, the Komaromis applied by originating notice in action CV 08545 to pay the amount alleged to be owing into court and for discharge of the lien. An order to that effect issued on December 2, 1999. On December 8, 1999, in action CV 08575, Northern filed a statement of claim against the Komaromis based on the lien. Subsequently, those two actions, CV 08575 and CV 08545, were consolidated under CV 08545.

The Application for Summary Judgment

[4] The relevant Rules of Court that deal with a summary judgment application by a plaintiff are as follows:

> 174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.
>
> ...
>
> 176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> (2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.
>
> (3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

[5] Counsel referred to a number of cases which set out the test on an application for summary judgment. Some of those cases are based on rules that are different from those in force in the

Northwest Territories. Clearly, Rule 176(2) provides that the essential question is whether there is a genuine issue for trial. The principles that are applicable in answering that question were referred to by Vertes J. in *923087 N.W.T. Ltd. v. Anderson Mills Ltd.*, [1997] N.W.T.R. 212 (S.C.):

> The principles to be applied on motions for summary judgment were succinctly summarized, with respect to the Ontario Rules, by Kiteley J. in *Steer v. Merklinger* (1996), 25 O.R. (3d) 812 (Ont. Gen. Div.), appeal dismissed at (1996), 30 O.R. (3d) 417 (Ont. C.A.). They are equally applicable to motions under our Part XII. Her summary was as follows (at page 821):
>
> > The objective of the rule is to screen out claims that, based on the evidence provided, ought not, in the court's view, proceed to trial because they cannot withstand a "good hard look".
> >
> > The moving party has the burden of establishing that there is no genuine issue for trial. The responding party also bears an evidentiary burden to put evidence before the court showing the existence of issues requiring a trial...
> >
> > The court must look at the overall credibility of the respondent's pleading and determine whether it has a "ring of truth" about it that justifies consideration by a trier of fact.
> >
> > Where there are significant facts in dispute, the case should likely be sent to trial. However, this does not follow as a matter of course. If the evidence satisfies the court that there is no issue of fact that requires a trial for its resolution, the ... test has been satisfied. It must, however, be clear that a trial is unnecessary...
> >
> > The same principle applies to issues of credibility. In taking a hard look at the merits of the case, the court must decide if "any conflict [in credibility] is more apparent than real, i.e. whether there is really an issue of credibility that must be resolved in order to adjudicate on the merits"...

[6] Northern says there are two genuine issues for trial. First, it argues that it was not a party to the agreement that AES would perform the asbestos removal and therefore is not liable for payment to AES. Second, Northern says that there is an issue as to the amount owing to AES.

[7] Some further facts are relevant to this application. The initial proposal made by Northern to the Komaromis by letter dated March 19, 1999 quoted a price of $40,000.00 for demolition of the laundry building, excluding the cost of dealing with any environmental issues such as asbestos. It proposed that cost would be the responsibility of the Komaromis. The contract dated May 16, 1999 signed by the Komaromis and Northern was for $27,000.00. It does not make separate reference to the cost of dealing with asbestos, or say who is responsible for that cost. It does provide that Northern will adhere to the performance schedule set out in an earlier letter (not the letter of March 19 referred to above). That schedule includes a week for the removal and disposal of asbestos.

[8] After the demolition work began, the Workers' Compensation Board issued a stop work order as a result of the asbestos. Northern then contacted AES to come to Inuvik to consult with them about the removal of the asbestos.

[9] On July 5, Northern wrote to the Komaromis requesting additional fees for extra work required to remove the asbestos. Northern's letter states in part:

> With the additional asbestos found in the Laundromat site, we now require the services of an approved asbestos abatement firm to remove all the asbestos from the site. As discussed, we will be hiring an Arctic Environmental Services (AES) from Calgary to remove all the asbestos. They will be supplying a foreman and a site supervisor for the duration of the removal. Chii Construction will provide trained personnel as required by AES. The removal will start on Tuesday afternoon, July 6, 1999.
>
> Since the amount of asbestos has greatly increased from what we originally estimated we now require an additional $5000.00 plus GST to the contract. This will bring the total contract to $32,000.00 plus GST.

[10] A representative of the Komaromis countersigned the letter, authorizing the addition to the contract price.

[11] Mr. Valleau, the general manager of AES, attended the meeting in Inuvik on July 8, 1999 to discuss the asbestos removal. Present at the meeting were representatives of Northern and the Komaromis, among others. The minutes of that meeting, which were prepared by Northern, include the statement: "NMDL [Northern] has hired Arctic Environmental Services, an asbestos abatement firm from Calgary, AB, to complete the removal".

[12] AES and Northern did not enter into a written contract. AES sent invoices for the asbestos removal to Northern. The total amount invoiced was $40,268.02.

[13] AES takes the position that it was hired by Northern. Mr. Valleau, who was the only AES employee to work on the asbestos project, says in his affidavit that his verbal agreement with Northern was that AES would be paid $5000.00 for the initial consultation. He states that after the July 8 meeting he provided a verbal estimate to Mr. Kassem (who is described in the meeting minutes as Northern's president) of $40,000.00 for removal of the asbestos. He says that Mr. Kassem felt the quote was high but agreed to hire AES, which would invoice Northern for the work done by AES and its subcontractor. Mr. Valleau says that all discussions about the cost of and payment for the work were with Northern's representatives Mr. Kassem and Mr. Reid and that he had no discussions with the Komaromis and was given no indication that the Komaromis were responsible for payment.

[14] The affidavit evidence filed on behalf of the Komaromis also says that there were no dealings and no agreement between the Komaromis and AES.

[15] Northern relies on an affidavit sworn June 27, 1999, by Mr. Nassef, who describes himself as "the officer" of Northern. Mr. Nassef does not appear to have had any direct dealings with AES.

[16] Mr. Nassef states that the demolition was performed pursuant to the initial proposal of March 19, 1999. He makes no reference to the contract of May 16.

[17] Mr. Nassef says that after the asbestos problem was discovered, and after consultation with the Komaromis, Northern contacted Mr. Valleau to attend in Inuvik to consult with the Komaromis, Northern and the Worker' Compensation Board. He says that the purpose of this meeting was to ensure that AES was capable of doing the work to the satisfaction of the Board, to discuss the

ramifications the asbestos problem had in terms of increased work by Northern and to ensure that the Komaromis were satisfied as to the proper party to provide the asbestos removal service. He then states, "In the circumstances it was Northern's position that the Komaromis agreed to hire Arctic [AES]".

[18] Mr. Nassef goes on to say, "It was felt by Northern during all of the negotiations that the changes by Arctic [AES] would all be borne and paid for by the Komaromis." It is not clear what negotiations this refers to, whether they are the negotiations with the Komaromis about the asbestos problem or the negotiations with AES about doing the work. The important thing is that Mr. Nassef talks only about what Northern's position was and what Northern felt. He does not say that Northern told either AES or the Komaromis that Northern would not be responsible for payment.

[19] In paragraph 15 of his affidavit, Mr. Nassef says:

> I am informed by Sam Kassem and by Scott Reid and do verily believe that they were made aware of the approximate costs that were estimated by Arctic [AES]. I am further informed by them that at no time did they agree to a specific figure nor did they ever agree that the charges by Arctic [AES] would be paid by Northern.

[20] Finally, Mr. Nassef says that when AES's invoices were received by Northern, they were passed on to the Komaromis for payment.

[21] Mr. Nassef's affidavit does not specifically address what Mr. Valleau says about the discussion between himself and Mr. Kassem, particularly about Mr. Kassem hiring AES despite his opinion that the quote was high.

[22] In response to Mr. Nassef's affidavit, AES filed another affidavit sworn by Mr. Valleau on June 29. In that affidavit, Mr. Valleau deposes to another conversation with Mr. Kassem in which Mr. Kassem, who was upset because Mr. Valleau had expressed concern about whether Northern would pay AES for its work, stated that Northern pays its bills.

[23] A judge hearing an application for summary judgment is entitled to assume that the parties have put their best foot forward. It is not sufficient for the responding party to say that more and better evidence will or may be available at trial; the judge is entitled to assume that the parties would present no additional evidence at trial: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. Gen. Div.); *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Ont. Gen. Div.). Therefore, I will assume that the evidence before me is what would be heard at trial.

[24] Mr. Nassef does not deny that it was Northern who arranged for AES to get involved and had all the discussions with AES about doing the work or that it was Northern who hired AES. In my view, the letter of July 5 from Northern to the Komaromis taken along with the minutes of the meeting are clear acknowledgements that Northern hired AES. Even if the statement "we will be hiring" in the letter of July 5 was meant to refer to both Northern and the Komaromis, as counsel for Northern argued, that does not mean that Northern did not hire AES. It would simply be a statement that Northern and the Komaromis would jointly hire AES.

[25] I am entitled to assume that at trial the evidence of AES and the Komaromis would be that they had no dealings with each other. In response to Mr. Valleau's evidence of specific conversations,

I am entitled to assume that Northern's evidence would consist of Mr. Reid and Mr. Kassem saying that they did not agree to a specific figure to be paid to AES and they did not ever agree that the charges would be paid by Northern. This does not, in my view, amount to a denial that Northern hired AES.

[26] Northern's evidence consists of broad denials which cannot withstand a "good hard look". It has presented no evidence of any agreement that AES was to look only to the Komaromis for payment or that AES was hired by the Komaromis and not Northern. What Northern may have felt about who, as between it and the Komaromis, should ultimately pay the AES charges does not affect Northern's direct obligation to AES. In my view, Northern has not presented specific facts showing that there is a genuine issue as to whether Northern hired AES. The evidence is that it did hire AES. AES is therefore entitled to look to Northern for payment for its work.

[27] I find that Northern has not raised a genuine issue as to its liability to AES. I need not, for purposes of this application, make any determination as to whether the Komaromis are also liable.

[28] On the question of the amount owing, the evidence from AES is that it estimated $40,000.00, it was hired despite Mr. Kassem's concern that the estimate was high, and it eventually billed a total of $40,268.02.

[29] Mr. Nassef concedes that AES provided significant services. On the question of the amount owing, his affidavit says only, "Northern is not in a position without review and examination for discovery to assess or agree as to the amount".

[30] This statement does not disclose a genuine issue for trial. It is not sufficient for the respondent on a summary judgment application to say merely that it does not know if a fact alleged is true or that it may not be true or that it would like to satisfy itself that it is true. I refer again to Rule 176(1), which says that the respondent must put before the court specific facts showing that there is a genuine issue for trial. Northern has not done that.

[31] Counsel for Northern referred to that fact that Mr. Valleau's affidavit which contains copies of the AES invoices was served on him only a few days prior to the hearing of this application. However, I note that Mr. Valleau's first affidavit, sworn June 14, 2000, refers to the invoices that were issued. Northern could have requested copies of the invoices when it was served with that affidavit. Furthermore, it is reasonable to think that if Northern did pass the invoices on to the Komaromis for payment, it would have reviewed them to ensure they were proper.

[32] Northern has had access to the invoices and ample time and opportunity to review them. It has presented no specific facts raising any issue about the amount AES says is owing,

[33] Accordingly, I find there is no genuine issue for trial either as to the amount owing to AES or as to Northern's liability to AES for same. Therefore, summary judgment against Northern in the amount of $40,268.02 plus interest claimed is granted.

[34] There was an additional claim by AES against Northern for $793.76. At the hearing of this application, counsel for Northern said that he understood this amount had been paid but if not, he

would consent on behalf of his client to judgment in that amount. If counsel have not already attended to this, judgment in that amount will issue as well.

Application by the Komaromis for an order striking out the third party notice

[35] Counsel for the Komaromis argued that the third party notice in CV 08704 should be stayed or, alternatively, struck out, because Northern has not established that the Komaromis are liable for the amount owing to AES.

[36] This was not framed as a summary judgment application by a defendant under Rule 175 as was done, for example, in *Robertson v. BHP Diamonds Inc.*, June 10, 1999, CV 06941 (S.C.N.W.T., unreported). Nor could it be, since the Komaromis have not yet delivered a defence to the third party claim as required by that rule.

[37] The application for a stay or to strike the third party notice must be dealt with under Rule 129, which provides as follows:

> 129.(1) The Court may, at any stage of a proceeding, order that
>
> (a) any pleading in the action be struck out or amended, on the ground that
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> (i) it discloses no cause of action or defence, as the case may be,
>
> (ii) it is scandalous, frivolous or vexatious,
>
> (iii) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (iv) it is otherwise an abuse of the process of the Court; and
>
> (b) the action be stayed or dismissed or judgment be entered accordingly.
>
> (2) No evidence is admissible on an application under subrule (1)(a)(i).
>
> (3) This rule applies with such modifications as the circumstances require to an originating notice and a petition.

[38] It was not suggested that the third party notice, which alleges an agreement between Northern and the Komaromis that the latter would pay any charges for AES's services , discloses no cause of action, nor that any of the other grounds listed in subsection (1)(a) of Rule 129 are present.

[39] The Komaromis say that they should not be brought into an action between AES and Northern when they say they had nothing to do with AES and that they hoped for a summary disposition of Northern's claim against them in the context of the lien action. Their real complaint is that the dispute between AES and Northern would delay resolution of the claim by Northern against them.

[40] I can see no basis upon which to stay or strike out the third party notice and the concerns on the part of the Komaromis about delay are answered in any event because now that summary judgment has been granted against Northern, the only issue left for determination is whether Northern can recover the amount owing from the Komaromis. The application to stay or strike out the notice is therefore dismissed.

Consolidation of the third party proceeding in CV 08704 and the lien claim in CV 08545

[41] Since both the third party proceeding and the lien claim involve the same factual issue, that is, whether the Komaromis are liable to Northern for the costs of the asbestos removal, it makes sense to consolidate the two. I therefore consolidate them under action CV 08545. A brief Memorandum of Judgment will also be filed in that action.

[42] Costs normally follow the event but if counsel wish to make submissions they may do so by contacting the Courtroom Services Supervisor to arrange a date for that purpose.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT this
8th day of August, 2000

Counsel for the Plaintiff: Angela Davies
Counsel for the Defendant: Gary Romanchuk
Counsel for the Third Parties: Doug McNiven