Camillus Engineering Consultants Ltd. v. *Fort Simpson (Village)*, 2009 NWTSC 71

Date: 2009 11 13
Action No.: S-1-CV-2001000164

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

CAMILLUS ENGINEERING CONSULTANTS LTD.

Plaintiff

- and -

THE MUNICIPAL CORPORATION OF THE
VILLAGE OF FORT SIMPSON

Defendant

AND BETWEEN

Action No.: S-1-CV-2003000050

THE MUNICIPAL CORPORATION OF THE
VILLAGE OF FORT SIMPSON

Plaintiff

- and -

CAMILLUS ENGINEERING CONSULTANTS LTD.,
CAMILLUS MARIANAYAGAM and
THE GUARANTEE COMPANY OF NORTH AMERICA

Defendants

MEMORANDUM OF JUDGMENT

[1] The parties to the application before the Court have been engaged in protracted litigation in excess of eight years, arising out of a construction contract dated May 10, 1999. By the terms of that contract Camillus Engineering was to construct a sewage treatment plant for the Village of Fort Simpson for a contract price of $1,870,453.00 plus tax. Before the contract was completed, disputes arose

between the parties to the contract, i.e., the owner (Village) and the contractor (Camillus Engineering), and litigation ensued. Camillus Engineering, and also some of its sub-contractors, filed liens against the subject property pursuant to the *Mechanics' Lien Act*, R.S.N.W.T. 1988, c. M-7, as amended.

[2] The main *lis*, i.e., that between the owner Village and the contractor Camillus Engineering, has not yet proceeded to trial. In advance of that future trial, the Village on this application seeks a ruling of the Court to the effect that one of the major trial issues is *res judicata* as a result of the Court's decision in 2004 in the mechanics lien litigation.

[3] For purposes of this application, I refer to three of the related Court actions - #0164, #0050 and #0077.

[4] Camillus Engineering commenced action #0164 by filing a Statement of Claim on May 17, 2001. Camillus Engineering claimed $673,099.00 and additional damages, and also sought a declaration that it had a lien against the subject property pursuant to the *Mechanics' Lien Act* in the amount of $673,099.00. The Village filed a Statement of Defence on June 15, 2001, denying that it owed any monies to Camillus Engineering.

[5] The Village filed a separate lawsuit, #0050, on February 6, 2003. In its Statement of Claim the Village says that Camillus Engineering failed to fully perform the construction contract, that there were many deficiencies and defaults that the Village was required to rectify, and it seeks judgment against Camillus Engineering in a minimum amount of $214,291.00. In action #0050, the Village also seeks judgment against Camillus Engineering's surety, Guarantee Company of North America, and, further, seeks damages as against the principal of Camillus Engineering, i.e., Camillus Marianayagam. All three defendants have filed Statements of Defence. Pleadings have closed, and this action, like action #0164, is to proceed to trial. Presumably these two actions will be consolidated for trial.

[6] The Village commenced action #0077 by the filing of an Originating Notice of Motion on February 23, 2003. In its Originating Notice of Motion, the Village sought relief under the *Mechanics' Lien Act*, in particular it sought an Order for replacement security, i.e., an Order allowing the Village, as owner, to pay an amount of cash into Court, pending resolution of the various lien claims, as a substitute for the liens which had been filed against the Village's title to the subject property. In action #0077 the Respondents named by the Village were Camillus Engineering, five of Camillus Engineering's sub-contractors, Camillus Engineering's surety, and other entities with related claims or interests.

[7] The Village's application in #0077 was heard by Schuler J on November 30, 2004, on notice to the Respondents. By Memorandum of Judgment dated December 14, 2004, Schuler J granted the Village's application. She set the replacement security, or lien fund, at $150,021.00. She ordered the Village to pay that sum into Court. She directed that, upon that sum being paid into Court, the Registrar of Land Titles was to remove the several liens from the Village's title to the subject property. The formal Order reflecting the decision of Schuler J was filed on March 1, 2005.

[8] It is the December 14, 2004 decision of Schuler J upon which the Village relies for its *res judicata* argument in the present application.

[9] At the November 30, 2004 hearing of the Village's application to allow it to provide replacement security under the *Mechanics' Lien Act*, the Village provided to the Court its proposed figure for the amount of that replacement security, and information as to how it had arrived at that figure. This information was detailed in the affidavit of one Michael Hullah, a quantity surveyor and expert witness retained by the Village. As stated by Schuler J in her decision: "Mr. Mullah has calculated the sum of $1,500,218.00 for the net value of the work performed by Camillus, based on the original contract amount, change orders issued, and costs to correct deficiencies. Ten per cent of that value is $150,021.00 which is the amount proposed by the Village for the lien fund."

[10] At the November 30, 2004 hearing, Camillus Engineering's counsel had sought an adjournment of the Village's application, and when this was denied, Camillus Engineering's counsel did not participate further in the hearing. However, Camillus Engineering's surety did participate. The surety argued a) that the value of the work done by Camillus Engineering, and the amount owing to Camillus Engineering by the Village, were in dispute, and b) that the amount of the lien fund could not be decided on the basis of the materials before Schuler J but rather should be determined after a *viva voce* hearing.

[11] In the end, Schuler J held that a *viva voce* hearing was not required, and set the lien fund at the figure proposed by the Village, i.e., $150,021.00.

[12] The Village now argues that, for purposes of the extant litigation, i.e. actions #0164 and #0050, the determination of "the value of the work done" by Camillus Engineering is *res judicata*. It is submitted that there has been a judicial determination that the value of the work done by Camillus Engineering on this construction project is $1,500,218.00, and that Camillus Engineering is estopped from claiming otherwise.

[13] I find that the *res judicata* argument is without merit.

[14] Schuler J did not make a determination of "the value of the work done", nor was she asked to. As she stated in the Memorandum of Judgment of December 14, 2004, the only issue before her was the amount of the lien fund, or replacement security.

[15] It is true that the Village, in proposing that the replacement security be set at $150,021.00, arrived at that figure by taking 10% of the amount that the Village's quantity surveyor had opined was the value of the work performed by Camillus Engineering. However, the $150,021.00 figure was the only figure being proposed at the November 30, 2004 hearing, and Schuler J accepted it, in the absence of any other proposed figure, as being reasonable replacement security in order that the Village might have the various liens vacated from its title.

[16] Upon a careful reading of the Memorandum of Judgment of December 14, 2004, it cannot be said that Schuler J made a finding as to the value of the work done by Camillus Engineering. Indeed, a reading of the Memorandum clearly indicates that the value of the work done by Camillus Engineering was in dispute, and would have to be resolved at a subsequent trial.

[17] It was not necessary for Schuler J to make a determination of the "value of the work done" in order to set the amount of the replacement security pursuant to s.27(2) of the *Mechanics' Lien Act.* It was not "fundamental to the decision arrived at", using the terminology of the Supreme Court of Canada decision in *Angle* v. *Minister of National Revenue* cited by the Village on the within application.

[18] It must be remembered that this Court's order setting the amount of the replacement security in order to have the registration of the liens vacated was an Order issued pursuant to the mechanics lien legislation of this jurisdiction, and not pursuant to the more modern legislation in force in the southern provinces. Some of the case authority relied upon by the Village on the within application consider the provisions of Alberta's *Builders' Lien Act.* That statute requires the establishment of a "lien fund". The term "lien fund" is specifically defined in that statute. The statutory definition includes reference to, *inter alia*, the "value of the work actually done".

[19] In the Northwest Territories statute there is no requirement for a "lien fund". The term "lien fund" does not appear in the Northwest Territories statute.

[20] Under the Northwest Territories statute, the owner is entitled (not required) to hold back 10% of the contract price for 45 days after the contract is completed:

> 6. In the absence of a stipulation to the contrary, an owner is entitled to retain 10% of the price to be paid to the contractor for a period of 45 days after the completion of the contract.

[21] Under the Northwest Territories statute, the Court can set the amount of replacement security to be paid into Court in order to vacate the registration of liens. There is no requirement that the amount of that security be necessarily related to "the value of the work done".:

> 27(2) On application, the Supreme Court or a judge may receive security or payment into Court in place of the amount of the claim, and may, on receiving the security or payment, vacate the registration of the lien.

It is obvious that s.27(2) of the *Mechanics' Lien Act* is not intended for determination of any substantive issues in dispute, e.g. the actual value of work done to date.

[22] In setting the amount of the replacement security, Schuler J did not make a determination of the value of the work done by Camillus Engineering, nor was she required to. Although in the Memorandum of Judgment she makes reference to the "value of the work done" as being part of the methodology by which the applicant Village justifies its proposed figure of $150,021.00 for replacement security, she makes no finding on that issue. Indeed, that issue was not before her. The formal Order of March 1, 2005 flowing from the Memorandum of Judgment makes no reference to the value of the work done by Camillus Engineering.

[23] If it was the intention of the applicant Village in commencing action #0077 to not only have the Court set the amount of the replacement security but also to request that there be a final determination of the "value of the work done" by Camillus Engineering, then Camillus Engineering was entitled to *notice* of that specific request. The Originating Notice of Motion by which the Village commenced #0077, leading to the November 30, 2004 hearing before Schuler J, included no such notice.

[24] The Court did not accept the affidavit evidence of Michael Hullah on November 30, 2004 for all purposes, but solely for the purpose of setting the amount of the replacement security. Schuler J stated as much in her subsequent Memorandum of January 26, 2005 regarding costs of the November 30, 2004 hearing.

[25] For these reasons, I find that the doctrine of *res judicata* does not assist the Village. The within application is dismissed, with costs.

J.E. Richard
J.S.C.

Dated this 13th day of November, 2009.

Counsel for The Village of Fort Simpson:	W.D. Goodfellow, Q.C
Counsel for Camillus Engineering Consultants Ltd. in action # 0164:	R.A. Kasting.
Counsel for Camillus Engineering Consultants Ltd. and Camillus Marianayagam in action # 0050:	D. Hagg, Q.C.
Counsel for The Guarantee Company of North America:	S.M. MacPherson

S-1-CV-2001 000 164
S-1-CV-2003 000 050

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN

CAMILLUS ENGINEERING
CONSULTANTS LTD.

Plaintiff

- and -

THE MUNICIPAL CORPORATION OF THE
VILLAGE OF FORT SIMPSON

Defendant

AND BETWEEN

THE MUNICIPAL CORPORATION OF THE
VILLAGE OF FORT SIMPSON

Plaintiff

- and -

CAMILLUS ENGINEERING
CONSULTANTS LTD., CAMILLUS
MARIANAYAGAM and THE GUARANTEE
COMPANY OF NORTH AMERICA

Defendants

MEMORANDUM OF JUDGMENT BY THE
HONOURABLE JUSTICE J.E. RICHARD