Date: 2010 07 08

Docket: S-1-CV 2007 000 227

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DONNIE ROBINSON

- and -

DYNO NOBEL CANADA INC.

Defendant

MEMORANDUM OF JUDGMENT

[1] The Plaintiff is a businessman who resides in Yellowknife and who brings action against the Defendant, Dyno Nobel Canada Inc., a subsidiary of a large international conglomerate having its head office in Sydney, Australia. Its North American headquarters are in Salt Lake City, Utah and it has a western and northern Canadian regional office in Calgary. There are site offices in several smaller locations including Yellowknife.

[2] In 2004, an explosives company from Ontario, called ETI, bought NWT Rock Services Limited which had been operating in Yellowknife since the early 90's. The Defendant purchased NWT Rock from ETI in March of 2006 and continued the operation under the trade name of NWT Rock or NWT Rock Services.

[3] The Plaintiff claims breach of contract arising out of an oral agreement entered into with the Defendant between December 2006 and March 2007.

[4] Alternately, if there was no contract, the Plaintiff seeks redress for the Defendant's negligent misrepresentations.

[5] The Defendant says the parties never agreed on the essential terms and that there was no contract between them.

[6] Further, although not pleaded in the Statement of Defence, the Defendant asserted in its Trial Brief and at trial that its employee who negotiated the alleged contract lacked either the actual or ostensible authority to bind the Defendant contractually.

[7] The Plaintiff did not object to this defence being raised, perhaps because the Defendant consented to his amending the Statement of Claim just prior to trial to claim negligent mispresentation.

[8] I will assume that the Defendant's failure to plead lack of authority was an oversight and has not prejudiced the Plaintiff. Accordingly, I will deal with this aspect of the defence.

[9] Finally, the Defendant denies having made negligent misrepresentations.

[10] When the Defendant failed to perform the work, the Plaintiff contracted with Breakaway Drilling which completed the job at a higher price. The Plaintiff seeks the difference between what he paid Breakaway and what he would have paid the Defendant.

[11] In the Agreed Statement of Facts, the parties concurred that, if the Defendant is held liable, damages would be in the amount of $114,893.71, not including pre-judgment interest.

Issues

[12] The issues are:

(1) Did the Defendant's employee, Ray Anderson, have actual or ostensible authority to enter into the alleged subject contract on behalf of the Defendant?
(2) If the answer is "yes", did the parties agree upon the essential elements of the bargain and enter into a valid and enforceable oral contract?

If I find that there was a valid contract then it follows that the Defendant's failure to perform would constitute a breach in the circumstances.

(3) If there was no valid contract, did the actions and words of the Defendant amount to negligent misrepresentation?

Background

The Contract

[13] The Plaintiff was an owner of a family business, RTL Enterprises Ltd. , which had operated in the Northwest Territories for forty years in the business of, inter alia, construction and trucking. The family sold the company in 2006 but the Plaintiff retained a shareholding and his association with his successors. He did, however, describe himself as "retired".

[14] In November of 2006, he acquired a block of four (4) contiguous raw land lots (the "site" or the "property") in an industrial subdivision from the City of Yellowknife in a ballot draw. Of interest is that the Defendant's site operations are located approximately three (3) blocks away.

[15] By the terms of the process, the Plaintiff was required to develop the lots and this included erecting at least one 1200 square foot structure on each lot. Although the Plaintiff had two years to accomplish this, for his own reasons, he wanted to develop the property during the spring or summer of 2007.

[16] The site was in a "virgin" state comprised entirely of bedrock which would have to be drilled, blasted and leveled before development could take place. The terrain on the lots was reasonably flat and as easy to drill as other ground in the area, or easier.

[17] The Plaintiffs received a written quotation for drilling and blasting from the Defendant dated December 13, 2006.

[18] At the time, there were only two (2) drilling companies in Yellowknife. Breakaway Drilling was a medium sized company having started operations in 2003

and it had eight (8) drills in inventory. The Defendant was much larger, having approximately 20 drills.

[19] The Defendant's quotation was prepared by Ray Anderson, then Acting Manager of the Yellowknife/northern operation. It was prepared on NWT Rock letterhead and, as was standard at the time, showed signature blocks for "Cliff Friesen, Operations Manager" and "Ray Anderson, Project Manager". The quotation was unsigned.

[20] In December of 2006, Friesen was transitioning into retirement and residing in southern Canada. He had ceased being actively involved in company operations, at least in the north. At this time, the only Manager in the Yellowknife office was Ray Anderson .

[21] The position of Manager of overall operations had been vacant after the dismissal of the incumbent some months earlier. The new Manager, Richard Miller was hired in the fall of 2006 but did not arrive in Yellowknife until mid January 2007. Although he had experience in management, he had virtually none in the field of drilling and blasting.

[22] Shortly after receiving the quotation of $11.00 per blasted cubic metre, the Plaintiff advised Anderson that he was accepting the quote. Subsequently, there were telephone conversations between the two to resolve some details.

[23] The quotation called for Robinson to remove overburden (earth, trees, snow) if required and to "dewater", if required. Robinson had contemplated that the contract would be performed in April and May when snow removal would not be an issue.

[24] Anderson wanted to start the project earlier (March) since he had little work at that time. Accordingly, at Robinson's request, Anderson agreed that responsibility for removal of overburden and dewatering would be assumed by NWT Rock.

[25] Further, Robinson wished to ensure that no blasted rock would exceed one metre in size - a so-called "metre minus" condition. Anderson's evidence was that this was standard when blasting on building lots and readily agreed to this term.

[26] Robinson, using a standard form RTL Contract, drafted an agreement dated February 14, 2007, with all the terms as contained in the original quotation and as amended by verbal agreement. The commencement date was shown as March 2, 2007, and the completion date May 15, 2007.

[27] Sometime in February, Robinson and Anderson met at the site. Robinson gave Anderson a copy of the draft contract and Anderson advised he was leaving on a short break the next day but would sign it within a few days of his return. As it happens, within one or two days of his return, Anderson fell ill and was hospitalized in southern Canada, probably in the first week of March. The contract was never signed. Anderson was "laid off" some months later after notifying the Defendant that he had been cleared to return to work.

[28] The Plaintiffs takes the position that the parties had agreed to the essential terms of the contract prior to or at this meeting in February.

History of NWT Rock

[29] Anderson testified that he began working as a driller with McCaws Drilling & Blasting out of Rocky Mountain House, Alberta, in 1980. In early 1992, he came north with the company which then divided and the northern operation continued under the name of NWT Rock Services Ltd.

[30] After a few years hiatus in the south, Anderson returned to NWT Rock in 1997 and was project superintendent at a massive undertaking-drilling and blasting the Diavik Diamond mine site. In approximately 2004 the company was sold, then sold in turn to the Defendant in 2006. With this new ownership, the retirement or dismissal of veteran employees and the hiring of Richard Miller came an abrupt change in the culture and mode of operation of the NWT Rock but this did not become fully apparent until the spring of 2007.

Acceptance by Part Performance

[31] The Plaintiff presented evidence showing that the Defendant commenced work on the job in early March of 2007.

[32] Specifically, Anderson testified that the drills were supposed to go on site the day after he got sick in early March. A track operator with many years of experience with NWT Rock, Wade Gaetz, testified that the day after Anderson took ill, he moved approximately 40 rubber mats (used for clearing snow and covering drill holes prior during blasting) to the site and then built a ramp with a track hoe to a higher elevated area of 10 to 12 feet and swept off the snow in preparation for the commencement of drilling.

[33] Both he and Anderson said that in their experience there was nothing particularly remarkable about the site in terms of the terrain. Gaetz said that he was due to leave NWT Rock, having already put in his notice, and that he instructed his successor on what he had done and left town about two (2) days after having worked on the site.

[34] Another witness, Robert Wiseman, who owned a lot adjacent to the Plaintiff's site testified that he noticed that in the spring of 2007, a drill rig, track hoe and several blast mats were staged from his property to the Plaintiff's lots; that the equipment subsequently disappeared but blast mats remained and were blocking his driveway denying him access. He then approached NWT Rock and asked that the mats be removed and they were, probably in April.

[35] Gordon Kirby testified for the Defendant as an officer. Among other things, he did confirm that Wiseman had asked that the blasting mats be removed.

[36] There is little doubt in my mind that the Defendant did mobilize to the Plaintiff's site in early March of 2007 and commenced work on the contract.

[37] The Plaintiff says that if there was any doubt that the Defendant had accepted the changes and that the parties did have a contract, that doubt should be erased by the fact that the Defendant commenced working on the site; and that this action can only be interpreted to signify acceptance of any changes and to confirm that both parties understood they had a contract.

Circumstance Leading to Alleged Breach of Contract

[38] Sometime in February or early March, RTL had secured a contract with a diamond mine to build a tank farm and in turn entered into a contract with the Defendant to drill and blast the site on which the structures would be built. Time was of the essence as RTL would incur severe penalties if the job was not completed in accordance with a very tight schedule. There was no evidence of who negotiated this contract on behalf of the Defendant but given the timing, it is highly unlikely it was Anderson.

[39] A meeting was convened at RTL's offices in mid March at which Robinson met Richard Miller face to face for the first and only time. Miller indicated the Defendant could not do the Plaintiff's job and the tank farm at the same time. Robinson agreed that the Defendant could dedicate its forces to the tank farm job on the representation from Miller that there would be a delay of only a few weeks in getting to his site. Robinson said he was led to believe the Defendant would commence work in mid April and complete by the middle of May. None of the terms negotiated between Robinson and Anderson, as reflected in the draft contract, had changed with the exception that the time frame for start and completion had been pushed back. At this meeting, there was no hint or suggestion from Miller that the Defendant would not perform the job or that he perceived any difficulties or impediments in doing so.

[40] In April, the Plaintiff took a pre-arranged holiday and asked two officials of RTL, Larry Fairbairn and Larry Wheaton, to look after the job for him in his absence.

[41] In a series of emails starting April 23rd involving Larry Fairbairn, Alexander Morse and Roland Courtenay from the Defendant and the Plaintiff it was agreed there would be a site meeting with the individual responsible for surveying the property (hired by Robinson) to ensure the Defendant was aware of the "flagging limits" and for the purpose of discussing the timing of a "pre-blast survey". In one email, Morse advised that the Defendant was a week and a half away from completion of the tank farm and another job they wanted to finish before moving to the Plaintiff's site. He confirmed the Defendant would be going ahead with a pre-blast survey.

[42] It was customary for a drilling and blasting company working in proximity to buildings to retain an expert to interview owners in the neighbourhood and inspect

their foundations prior to blasting. This was an insurance requirement to guard against false or exaggerated damage claims and was generally conducted by an insurance adjuster, at least in the Yellowknife area.

[43] On April 25th, Fairbairn reported to Robinson by email that he, Wheaton, and the lot surveyor had met with Morse and Courtenay on the site on the morning of April 25th. He advised the Defendant was clear on flagging limits, that snow was no longer an issue and that the Defendant was proposing to start drilling and blasting in a particular area on site. Further he related the Defendant's advice that it would move to the site after some other work was completed on "Saturday" which would have been April 28th.

[44] On April 27th (the date Robinson was scheduled to return from holiday) Morse emailed Fairbairn and others, including Miller, and advised that the pre-blast survey would be completed on the weekend of April 28th and 29th.

He also wrote:

> When Rick Miller returns from Bauma in Germany on the first (of May) we will get the contract signed and we should be able to start.

The Plaintiff responded as follows:

> When will Rick be back. Back from Bauma means nothing to me. Rick told me the contract was signed 2 weeks ago.

Morse's reply was to the effect that Miller would return to Yellowknife on the 1st of May and that as far as he knew, the contract had not been signed. On May 2nd at 9:26 a.m. Miller sent the following email to Robinson:

> Hello Donnie
>
> I just returned from Germany and have been trying to catch up on some outstanding issues, of which one of them are your lots. I have putting off signing the contract yet, because I wasn't 100% certain we could complete the scope of work in the allotted time with everything we had going on, as per our original meeting with you and your team.
>
> Originally the plan was to move drills from the tank farm over to your lots after they were done, but because the scope / quantities continually changed / increased on that project, it

> appears we may finally be complete there by tomorrow. Also now that we can physically see the very rough terrain on your lots, it's readily apparent that cab drills such as the D9-11 and the REEDRILL 345 that are operating at the tank farm are not capable of working on that sort of terrain, and a roll-over is a very real and unacceptable risk.
>
> Because we have no smaller drills available to carry out the required work, we unfortunately will have to regret on this project. We are presently running approx. 10 to12 weeks out.
>
> I understand this will be very disappointing to you, and apologize for any inconvenience this decision may cause, but in the end we can only do what we can do.
>
> Sincerely
>
> Rick Miller
> Northern Operations Manager
> NWT Rock Services
> a division of Dyno Nobel

[45] Robinson reacted with dismay, phoned Miller and then his superior in Calgary and received very curt responses to the effect that it would be unsafe to perform the work. There were no overtures from the Defendant suggesting that they could or would perform if the job was delayed for a period of time.

The Defendant's Evidence

[46] Neither Morse nor Courtenay were called as witnesses for the Defendant. Gordon Kirby testified as an officer for the Defendant. At the material time, he had been the superintendent on a project in Baker Lake, Nunavut, but was brought into Yellowknife in early April of 2007 to manage the RTL and quarry projects. He had little to do with the Plaintiff's contract and knew almost nothing about it until after the decision was made not to proceed with the job.

[47] He testified that it was not a standard practice for a driller to agree to a "metre- minus" stipulation in a contract without a sizable premium of $5or $6 a cubic metre being added to the base price.

[48] Nowhere in his evidence does he speak to having worked on jobs in Yellowknife at the managerial level or at all previously. And there is no evidence of

his familiarity with what was or was not standard practice in Yellowknife at the time.

[49] As for the decision not to proceed with the job he had this to say:

- that Miller and his superior Bill Thompson gave him "the word" that "it was not going to happen."

- one of the things they brought up was the fact that there was a discrepancy from the contract to the quote for oversize and for grubbing and stripping (overburden).

- that the "safety point" was mentioned to him and the availability or lack of same of the right drill for the job.

[50] As well, he testified that at the time he arrived in Yellowknife, the Defendant was instituting tighter controls and protocols on contracts and operations generally and that authorizations for some jobs above a certain value had to be obtained from Salt Lake City for approval.

[51] Finally, he confirmed that in late April or early May he issued instructions for drilling equipment to be moved to the Homes North site across the road from the Plaintiff's property to start that job.

[52] Richard Miller testified. His employment with the Defendant ceased in the middle of 2008.

[53] He said he got a telephone call from the Plaintiff in early April of 2007 asking about the status of the contract and whether it was signed. He said at the time he was not handling physical contracts but rather it was Alex Morse. In response to Robinson's question he asked Morse who told him he thought the contract had been signed and conveyed that information to the Plaintiff.

[54] Subsequently, he looked for the contract and it was eventually found despite the disarray in the office due to the transition to the Defendent's new ownership and departure of previous management.

[55] He saw that the contract was not signed and that there were differences between the quote of December 13, 2006, and the contract with respect to "overburden" and "metre-minus".

[56] His testimony was to the effect that he thought the Defendant could "negotiate a differential" with Robinson. Clearly, he assumed the contract document to be a counteroffer.

[57] He did not attempt to consult with Anderson to gain insight into what might have led to the Plaintiff to produce the contract document which he conceded was "before his time" because there had been enmity between them. So, Miller was completely unaware that Anderson had agreed to the changes orally.

[58] Miller said that the Defendant had been losing money on the quarry projects for RTL because they were being penalized for oversized rock. He called his superior who told him they "couldn't live with this stipulation." He added that to proceed with that stipulation would have meant another loss for the Defendant.

[59] Notably, he confirmed these "problem" contracts contained the same "metre-minus" provision that appeared in the Plaintiff's contract.

[60] As well, he conceded he never told the Plaintiff that the Defendant wanted to change the terms of the contract respecting overburden and metre-minus; that the Defendant's first indication of its concerns with the contract were communicated to the Plaintiff in his email of May 2nd; that there was no hint or suggestion that the Defendant would be open to negotiate or that the Defendant could proceed with the job if the Plaintiff would agree to a delay. Further, he had indicated that the Defendant's drills were "tied up" on the tank farm and yet admitted that this job was finished by the end of April or early May.

[61] Miller denied that equipment was ever dispatched to the Plaintiff's property and was clearly oblivious to the activities of Gaetz as he was of the fact that Anderson had verbally agreed to contract changes.

[62] He agreed with the suggestion he was brought in to "clean up" the Defendant's Yellowknife operation.

[63] Finally, he said he did an assessment of the contract when he returned but confirmed that he arrived back in Yellowknife on May 1st , went to the office on May 2nd and at 9:26 a.m. he sent the email to the Plaintiff advising the Defendant would not be proceeding.

Damages

[64] When it became clear to Robinson that the Defendant was not going to perform, he entered into a contract with Breakaway to do the work. Roger Mann, an owner of Breakaway, testified that he had been in the drilling business for 24 years and worked for NWT Rock most of that time until 2003. He said:

- there was little overburden on the site and the cost of clearing it came to $1526.71;

- he was familiar with Robinson's lots and the particular area having blasted the road that circles the Plaintiff's property;

- that the subject property was better than average in terms of difficulty to drill and blast on;

- that he did not include a "metre-minus" provision because it was standard in the industry in Yellowknife when working on building lots.

[65] The parties have agreed on the measure of damages. I need not assess them. The work cost the Plaintiff $114,893.71. more than it would have had the Defendant performed. While perhaps not the whole story, the reason for the larger price can be attributed to the fact that Breakaway knew:

1. It had no competition on this job.

2. The Plaintiff needed the work done in the spring/summer of 2007.

3. The company was already extremely busy and did not need the work.

Analysis

Actual or Ostensible Authority

[66] Where an employee is authorized to act on behalf of a principal or where the employee is placed in a manager's position where his authority to do all things as would fall within the scope of the office is assumed or implied, then the principal is estopped from denying the agency and is bound by the actions of the agent.

See *Russelsteel Ltd.* v. *Consolidated Northern Drilling & Exploration Ltd.* [1981] A. J. No. 973; *Arpeg Holdings Ltd.* v. *Canada* , [2006] T.C.J. No. 470; *Calgary Hardwood & Veneer Ltd. et. al.* v. *Canadian National Railway Company*, [1979] A.J. No. 831.

[67] Ray Anderson was highly experienced in the drilling and blasting business. In December of 2006, he was the only Manger in the Yellowknife site office and was, in fact, the "Acting Manager" of the Defendant's enterprise. Richard Miller replaced him as Manager in January, 2007 but by his own admission, was acclimating himself to the business and had nothing to do with contracts that had come into the office before his arrival- at least until a later time.

[68] At trial, Anderson was not cross-examined about his authority or any limits the Defendant may have placed on him as Acting Manager or in his role with respect to the Plaintiff's contract after the arrival of Richard Miller. Nor did the Defendant adduce any evidence through its witnesses touching upon the issue of the authority of Anderson to enter into the subject contract on its behalf.

[69] In any event, I find that Anderson had the actual authority to submit the original quotation and negotiate the amendments to the contract with the Plaintiff in February of 2007. If, at this later time, he lacked the actual authority, then I find he had the ostensible authority to represent the Defendant.

Valid and Enforceable Contract

[70] Richard Miller was hired as Manager of the Yellowknife office with a mandate to "clean up" the operation. He was unaware of the background relating to the subject contract or that the Defendant had commenced work on the project in March of 2006. The company was having difficulty in completing other work, notably the tank farm. Miller had thought the contract was signed and that the Defendant had no choice but to proceed with it. While he was in Germany in late April, active steps were taken to prepare for drilling and blasting and representations were made to the Plaintiff or his representatives that work would commence in a matter of days.

[71] During this period, Miller became aware that the contract had not, in fact, been executed. He noted the apparent discrepancy between the original quotation and the written document and was particularly concerned about the "metre-minus" provision which had cost the Defendant dearly on the RTL quarry job. As well, there is no doubt he felt this job had been seriously underbid and that it was a bad business deal for the Defendant. He checked with his superior and it was resolved that they would not proceed with the contract with that provision in it. If it did occur to Miller that he should check with Anderson before making this decision, it is clear that he would not or could not have done so (at least personally) due to the enmity between them. Miller considered the written document to be a counteroffer and, noting that it was unsigned, concluded that there was no contract between the parties. In his view and that of his superior, the price was too low. They had equipment problems and other commitments including the Homes North project across the street from the Plaintiff's site. The decision not to proceed was taken because it was felt the Defendant could walk away from the project without legal repercussions. Miller would not have been aware that it was commonplace for these types of contracts to proceed without a formal written contract.

[72] The reasons given by the Defendant for not proceeding were and are largely a smokescreen and immaterial. Miller's assertion that his email of May 2nd was intended as a negotiating ploy is not credible. He had ample opportunity to let the Plaintiff know that the Defendant was open to negotiating had that been the intention.

[73] All of the essential elements of the subject contract were agreed upon between the Plaintiff and Defendant when Anderson accepted the changes proposed by Robinson sometime in late January or early February of 2007. At that point in

time, I find the parties entered into a valid and enforceable partly written and partly oral contract. The fact that a formal written document evidencing their agreement was prepared but not signed does not alter the validity of the contract.

See Fridman, *The Law of Contract*, 5th ed., 2006, at p. 63.

Having decided that there was here a valid contract, I need not deal with the issue of negligent misrepresentation.

Conclusion

[74] In the result, I find the Defendant liable for having breached its contract with the Plaintiff who shall have judgment against the Defendant in the sum of $114,893.71 together with pre-judgment interest in accordance with the provisions of s. 56 of the *Judicature Act*, R.S.N.W.T., 1988, c. J-1 from the date the cause of action arose which I determine to be May 2, 2007, the date the Defendant repudiated the contract.

[75] The Plaintiff is awarded costs including all reasonable and necessary disbursements. Either party may apply within 30 days of the date of entry of this Judgment on the question of quantum should the parties be unable to agree. In that event, the Clerk of the Court should be contacted to fix a date. Given that counsel are located in Edmonton, I would be prepared to hear the parties' submissions by telephone conference.

D.M. Cooper,
J.S.C.

Dated in Yellowknife, NT,
this 08, day of July, 2010.

Counsel for the Petitioner: Sigurd Delblanc

Counsel for the Defendent: James Thorlakson

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