Date: 2022 10 12
Docket: S-1-CV-2019-000073

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADIAN DEWATERING L.P.

Plaintiff

- and -

RYFAN INC., and THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

Defendants

- and -

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

Third Party

MEMORANDUM OF JUDGMENT

[1] The Plaintiff Canadian Dewatering L.P. (CDLP) commenced an action against the Defendants Ryfan Inc. (Ryfan) and the Municipal Corporation of the City of Yellowknife (City) over unpaid amounts that CDLP claims are owed to them for work CDLP performed pursuant to a contract. Ryfan filed a third party notice against the City.

[2] There are two applications before the court. CDLP has filed an application seeking that the matter be referred to arbitration and the action judicially stayed while the matter is arbitrated. Ryfan has also brought an application seeking that the scheduled examinations for discovery proceed virtually, by videoconference. The City takes no position on either application.

[3] For the reasons that follow, I am dismissing CDLP's application and granting Ryfan's application.

BACKGROUND

[4] In 2017, the City engaged Stantec Inc. (Stantec), an engineering consultant, to gather information to estimate the approximate cost to complete the replacement of piping and valves in Lift Station No. 5, located in the Kam Lake area. Stantec contacted CDLP and requested a budget to create a bypass system during the project. CDLP provided a budgetary proposal to Stantec in May 2017.

[5] The City put out an Invitation to Tender for the Lift Station No. 5 Piping Replacement Project (Project) in February 2018. Ryfan was the successful bidder and was awarded the contract.

[6] In order to replace the piping and valves at the lift station, it was necessary to bypass the City's existing pumps and piping. After obtaining quotes, Ryfan retained CDLP to install and operate a bypass pump system for the Project. The Sales Quote (SQ013631) submitted by CDLP on February 28, 2018 was in the amount of $93,357.60.

[7] There were two documents dated May 10, 2018 that Ryfan and CDLP exchanged: 1) a credit application wherein Ryfan applied for credit with CDLP; and 2) a Purchase Order that Ryfan submitted for approval with CDLP as the supplier.

[8] The credit application did not specify an amount being sought for credit and referred to the need for a "PO". The credit application also contained a number of terms and conditions of sale that the credit applicant, Ryfan, agreed to.

[9] The Purchase Order created by Ryfan referenced the Project and the Sales Quote provided by CDLP. The Purchase Order stated that CDLP was to be the supplier and it was for a total amount not to exceed $220,000. It also stated that "any additional work or material not included on original PO must have written approval by the Project Manager prior to delivery and/or payment".

[10] A number of issues arose during the Project which resulted in delays and other problems. It is not necessary for the purposes of this decision to establish a timeline of events or ascertain who, if anyone, was at fault. The details of what occurred are not necessary to determine the limited issues before me. The result of these issues was that CDLP performed work that they claim was in addition to what was originally agreed upon and this additional work was agreed to or approved by Ryfan. CDLP submitted invoices to Ryfan totaling $531,369.90 for their work on the Project.

[11] Ryfan has paid CDLP $207,900.00 for the work completed and they claim an additional $23,100.00 is part of holdback funds held by the City. They have not paid CDLP for the outstanding balance claimed by CDLP.

[12] CDLP filed a Statement of Claim on March 29, 2019 claiming the sum of $531,369.90 plus interest from Ryfan and the City. The Statement of Claim was amended on August 27, 2020 to claim $323,469.62 plus interest from the Defendants.

[13] Ryfan and the City each filed a Statement of Defence on December 18, 2020. In their Statement of Defence, Ryfan denied being liable for payment to CDLP for any additional amounts exceeding $220,000. The City claims that there was no approval to exceed the $220,000 cash allowance for the bypass pumping system and any costs incurred without the City's prior consent are invalid.

[14] The parties have taken various steps in the litigation including scheduling examinations for discovery.

ISSUES

[15] The issues on this application are:

1) Whether this matter should be submitted to arbitration and if so, judicially stayed pending the arbitration process?

2) Whether the examinations for discovery should proceed virtually?

ANALYSIS

Should this Matter be submitted to Arbitration?

[16] CDLP seeks to have this matter submitted to arbitration for resolution of the dispute between CDLP, Ryfan and the City. If the matter is submitted to arbitration, CDLP argues that there should be a judicial stay of the action to permit the arbitration process to occur.

[17] CDLP makes two arguments in support of its application. First, s. 15(1) of the *Mechanics Lien Act*, R.S.N.W.T. 1988, c.M-7 (the *Act*) permits arbitration of the dispute and second, the contract between the parties calls for claims in connection with the contract or the performance of the work to be resolved by arbitration.

[18] Section 15(1) of the *Act* contains a provision which allows parties to enter into arbitration to resolve some disputes; it states:

> 15(1) Where a claim is made by a subcontractor in respect of a lien on which the subcontractor is entitled and a dispute arises as to the amount due or payable in respect of the lien, the dispute shall be settled by arbitration.

[19] There are few cases which have judicially considered the *Act* and only one case refers to section 15(1). In *Kiwi Electric et al v Camillus Engineering et al,* 2001 NWTSC 36, the plaintiffs filed liens under the *Act* over work that the plaintiffs had completed pursuant to a contract and claimed remained unpaid. The plaintiff sought summary judgment against the defendant Camillus Engineering.

[20] In the summary judgment application, Kiwi Electric claimed it was owed $31,589.12 whereas Camillus Engineering claimed it only owed Kiwi Electric the sum of $27,230.21. As part of its submissions, Camillus Engineering claimed that s. 15(1) was a bar to the relief sought by the plaintiffs.

[21] The Court rejected that argument, stating at para 10:

> With respect, I disagree. Firstly, the "claim" the Court is being asked to adjudicate upon on this interlocutory application is the claim in debt against Camillus, and <u>not</u> with respect to the lien which the plaintiffs also happen to assert. Secondly, the amounts mentioned above (i.e., $27,230.21 owing to Kiwi; $21,520.87 owing to J.S.L.) are not in dispute. The arbitration process in s. 15, if it applies at all, surely applies only to the amount in dispute.

[22] The Court went on to grant summary judgment against Camillus Engineering for the undisputed amount of the outstanding unpaid balance. The decision was made without prejudice to the plaintiffs' right to continue with their claims for the disputed amounts, liens and other claims.

[23] While *Camillus Engineering* is a brief decision, the facts suggest that there was no dispute that Camillus Engineering owed the plaintiffs for unpaid work but the real matter in issue was with respect to the quantum owed. *Camillus Engineering* and a plain reading of s. 15(1) suggest that the section is applicable and arbitration is mandatory where the dispute involves only the lien and the amount due or payable pursuant to that lien. Where the dispute is about more than the amount due or payable, the mandatory arbitration provision is not applicable.

[24] The Statement of Defence of Ryfan and the City make it clear that the defendants dispute whether any amount is due or payable to CDLP. Ryfan has specifically denied liability for the amounts claimed by CDLP, disputes the validity of the lien filed by CDLP, and denies that there was any agreement to complete work in excess of the amount of $220,000 agreed to in the Purchase Order with CDLP. Similarly, the City denies that it approved any changes to the amount allocated for the bypass pumping system.

[25] The issues in this case go beyond simply a dispute about how much CDLP is owed and the defendants deny that Ryfan or the City owe CDLP any more than the $220,000 initially agreed upon. As this is a dispute about more than simply the amount due or payable pursuant to the lien, it is not a matter to which the mandatory arbitration process under s. 15(1) of the *Act* is applicable.

[26] CDLP also claims that the contract between the City and Ryfan calls for claims in connection with the contract or the performance of the work to be resolved by arbitration. There are several documents that form the contract between the City and Ryfan and which refer to a dispute resolution process.

[27] The General Conditions of the Contract contain a Dispute Resolution Process which contemplates the Owner and Contractor first engaging in negotiation, then mediation and finally arbitration. The terms of the Contract provide that negotiation is mandatory but mediation and arbitration require the mutual agreement of the Owner and Contractor to engage the process. Both parties can also commence an action if the dispute cannot be resolved by negotiation.

[28] The specific provision with respect to arbitration states:

> 10.5 Alternatively, or after mediation has failed, the OWNER and the CONTRACTOR may, by mutual agreement, submit the dispute to arbitration under the laws of the jurisdiction in which THE WORK is situated. Insofar as it is compatible with the law in the jurisdiction in which THE WORK is situated, the Recommended Procedures for Arbitration of Construction

> Disputes of the Canadian Construction Association, the most current edition, shall be followed. The arbitrator's decision shall be binding.

[29] There are also Supplementary General Conditions which modify, delete or add to the General Contract. The Supplementary General Conditions give the Owner the authority to make final decisions on interpretations regarding time extension, extra payments and liquidated damages.

[30] There are a number of problems with CDLP's claim that they can avail themselves of the arbitration provision in the Contract. First, the Contract was between the City as Owner and Ryfan as Contractor. CDLP's role in the project was that of a subcontractor as defined in the Contract. CDLP was not a party to the Contract, did not sign the Contract and was not aware of the general provisions of the Contract until after commencing this action.

[31] Even if CDLP could avail themselves of the dispute resolution process outlined in the Contract, the General Conditions of the Contract are clear that resorting to arbitration to resolve a dispute between the parties requires mutual agreement. Neither Ryfan nor the City have agreed to submit this dispute to the arbitration process.

[32] The City of Yellowknife Construction Services General Conditions also form part of the Contract. The General Conditions also contain a Dispute Resolution Process which involves the City and Contractor referring disputes first to an engineer, then a referee and then an arbitrator.

[33] The City of Yellowknife General Conditions also permit an arbitration claim to include the work of a subcontractor. Section 8.3(b) states:

> (b) If a Claim involves the Work of a Subcontractor, either the City or the Contractor may join such Subcontractor as a party to the arbitration between the City and Contractor. The Contractor shall include in all its subcontracts a specific provision whereby its Subcontractors consent to being joined in arbitration between the City and the Contractor involving the Work of such Subcontractors. Nothing in this provision nor in the provision of such subcontracts consenting to joinder shall create any claim, right or cause of action in favour of the Subcontractors as against the City or the Engineer, that does not otherwise exist.

[34] While the City of Yellowknife General Conditions and the General Condition of the Contract appear to be in conflict with respect to the resort to arbitration, neither document makes a subcontractor a party to the Contract and neither provides a

subcontractor the right to initiate the dispute resolution process. Under section 8.3(b) of the City of Yellowknife General Conditions, the City or Contractor can join a subcontractor as a party to the arbitration process but they are not required to do so and there is nothing that indicates that a subcontractor can engage the arbitration process on their own initiative.

[35] Generally, the rights and liabilities between a subcontractor and the contractor are governed solely and exclusively by the agreement between them. There are exceptions where in some circumstances, a subcontractor may be entitled to rely on the provisions of the main contract between the contractor and the owner.[1]

[36] The credit application and the Purchase Order, both dated May 10, 2018, appear to form the agreement between CDLP and Ryfan for CDLP's work on the Project.

[37] The credit application signed by Ryfan contained a number of terms and conditions. The terms and conditions dealt with disputes and provided a process for the credit applicant to dispute a claim. Section 3 states:

> All claims against invoices must be made within **30 days** after receipt of service/equipment. Any dispute by the applicant shall be reported in writing with details of the dispute to the Credit Manager of **CANADIAN DEWATERING LP** within 30 days of the date that the labor was performed and/or the material was supplied. If the applicant does not issue a written dispute within the said 30 days, notwithstanding that the dispute is not resolved, the applicant shall pay to **CANADIAN DEWATERING LP** all amounts due and owing, without any set-off pending resolution of the dispute. The payment made by the applicant shall not affect the applicant's dispute.

[38] There are no other terms and conditions in the credit application which address the dispute resolution process or provide for a specific mechanism to resolve a dispute between the credit applicant and CDLP.

[39] The Purchase Order dated May 10, 2018 issued by Ryfan does not contain any dispute resolution mechanism. Neither document contains a dispute resolution procedure, beyond the reference to the issuing of a written dispute within 30 days contained in the credit application. More particularly, neither document contains a requirement that the parties resort to arbitration to resolve any disputes.

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[1] Heintzman, West and Goldsmith on *Canadian Building Contracts*, 5th Ed. at §12:8.

[40] A subcontract can incorporate by reference provisions of the main contract but incorporation of an arbitration clause can only be accomplished by distinct and specific words in the subcontract: *Dynatec Mining Limited v PCL Civil Constructors (Canada) Inc.*, [1996] O.J. No 29 at paras 10-11.

[41] Neither the Purchase Order nor the credit application refer to the contract between Ryfan and the City. In addition, neither document expressly or implicitly adopts any of the dispute resolution mechanisms contained in the agreements between Ryfan and the City.

[42] The terms of the agreement between CDLP and Ryfan do not require arbitration as a form of dispute resolution between the parties. Simply put, CDLP cannot require Ryfan or the City to engage in arbitration to resolve this dispute. As such, it is not necessary to go on to consider whether this matter should be judicially stayed pending the arbitration process.

Should the Examinations for Discovery proceed virtually?

[43] Ryfan seeks to have the examinations for discovery proceed virtually. Ryfan is seeking to have its corporate witness and counsel for Ryfan attend examinations for discovery virtually. CDLP is opposed to the request although had previously agreed that the Court Reporter and counsel for Ryfan could appear virtually.

[44] Ryfan seeks to proceed with the examinations for discovery virtually for two reasons: 1) the ongoing Covid-19 pandemic and the persisting health threat posed by it; and 2) the business efficacy and cost considerations which are in line with the Court's objective of an efficient and cost-effective resolution to proceedings.

[45] With respect to Covid-19, neither party presented any evidence in relation to the ongoing pandemic. Counsel for Ryfan suggests that the Court can take judicial notice of the ongoing pandemic and resulting health threat that continues to be posed by it.

[46] Covid-19 continues to be present in the Northwest Territories but there is little information regarding its current impact. Unlike earlier in the pandemic, there are no restrictions in place and there is little public health guidance provided. Public health measures that had been in place such as masking, capacity restrictions, isolation requirements, etc. are no longer in place. There are a number of recommendations in place but individuals can choose whether to comply with those recommendations. From this, it is difficult to discern the current impact of Covid-

19 but certainly, counsel for Ryfan cannot be faulted for wanting to proceed with caution as a result of the pandemic.

[47] During the pandemic, a number of matters have been conducted by videoconference and it is anticipated that videoconferencing will continue to be regularly used for some court appearances. Despite the lack of restrictions, there continues to be concern for the safety of participants in the court process and a recognition that, to promote health and safety, some matters can continue to proceed by videoconference.

[48] This is also in line with ensuring the business efficacy and practicality of court proceedings which also has the benefit of reducing costs for litigants. An examination is not a brief encounter and can involve multiple participants confined to a room for lengthy periods of time for several days. The examination, whether by video or in person, results in a transcript and proceeding by videoconference is a viable procedure that has and will continue to be used. *Mostafa Altalibi Professional Corporation v Lorne DS. Kamelchuk Professional Corporation,* 2020 ABQB 673 at paras 10-12.

[49] Ryfan's corporate witness and counsel for Ryfan are located in Alberta whereas CDLP's witness and counsel are located within the Northwest Territories. If the examination for discovery were to proceed in person, travel and accommodations would be required for some participants. In addition, counsel had scheduled examinations to take place over a week and had previously agreed to proceed with a court reporter and counsel for Ryfan appearing virtually. I am satisfied that the examinations for discovery can also proceed with the Ryfan's corporate witness and counsel for Ryfan appearing virtually.

CONCLUSION

[50] In conclusion, I conclude that the terms of the agreement between CDLP and Ryfan do not require arbitration as a form of dispute resolution between the parties. As such, CDLP cannot require Ryfan or the City to engage in arbitration to resolve this dispute.

[51] I also conclude that counsel for Ryfan and Ryfan's corporate witness can attend examinations for discovery by videoconference.

[52] If the parties wish to speak to costs, they can contact the Supreme Court Registry within 14 days of the filing of this decision to request a date.

S.H. Smallwood
J.S.C.

To: Counsel for the Plaintiff: Douglas G. McNiven
Counsel for the Defendant Ryfan Inc.: Janine Dhaibi
Counsel for the Defedant/Third Party
The Municipal Corporation of the City
of Yellowknife: Cole Caljouw

S 1 CV 2019-000 073

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DEFENDANTS

- and –

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THIRD PARTY

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE S.H. SMALLWOOD