Paul Andrew WEBBER and Felipe (Phil R.) ORTIZ
acting as DIAMOND AUDIO

2006 NWTTC15
File: T-01-CV-2006000015

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

PAUL ANDREW WEBBER

Plaintiff

-and-

FELIPE (PHIL R.) ORTIZ
acting as DIAMOND AUDIO

Defendant

REASONS FOR JUDGMENT
of the
HONOURABLE CHIEF JUDGE BRIAN A. BRUSER

Evidence Heard at:	Yellowknife, Northwest Territories 2006: June 22; July 24 and 25; August 21 and 22; August 28 to 31.
Decision:	October 6, 2006
For the Plaintiff:	Self-represented with assistance from Anne-Mieke Mulders
For the Defendant:	Self-represented

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[1] The evidence was heard this year in Yellowknife on June 22, July 24 and 25, August 21 and 22, and August 28 to 31.

[2] The Canadian Oxford Dictionary (Thumb Index Edition) has as one of its definitions for the word “pride”: *knowledge of one’s own worth or character; a sense of dignity and respect for oneself*.

[3] The circumstances arise from a combination of pride and contract law. Pride has nourished one of the longest civil trials that I have experienced as a lawyer and as a judge. Pride interfered with any reasonable prospect of resolving this matter before or during the trial, despite strong evidence favouring each side, and despite the intent of sub-rule 2(2) of the *Territorial Court Civil Claims Rules: … to secure an inexpensive, expeditious and just determination of every proceeding*.

[4] The admonishments and the encouragements that I resorted to in an effort to assist the parties to settle the dispute to their mutual satisfaction failed.

[5] The parties had a right to proceed to trial and to put their positions forward. I have allowed them all the time they have required. The cost to them and to the taxpayers of the many hours of trial has been grossly disproportionate to the value of the respective claims. To their credit, they have treated each other, the witnesses, and the Court with respect and courtesy, and their presentations have been thorough, clear and helpful.

[6] Mr. Webber's source of pride has been his first new vehicle, a 2004 Ford Mustang GT which cost approximately $40,000.00. Mr. Ortiz' source of pride has been his audio business, including his sense of expertise in installing car stereos, an expertise acquired over many years of dedication, expense and hard work.

[7] The voluminous pleadings include the claim, the defence, the counterclaim and the defence to the counterclaim. There were several witnesses called by each side. The evidence they gave was often technical, and was for the most part credible and reliable. Despite the number of witnesses and the technical nature of much of the evidence, the legal issues and their resolution are not complicated.

[8] Clearly, the parties did not have in their field of vision the litigation that would result when they made their verbal contract in April 2005.

[9] The contract required Mr. Ortiz to install a car audio system inside the Mustang. Some of the details of what the components of the audio system would be, and some of the installation details, were to be discussed after the contract crystallized; these later details were eventually incorporated into the contract. Despite the additions, the defendant charged an all inclusive price of $6500.00.

[10] The defendant represented his business to be competent to do a professional job; I interpret this to mean that the work was to be done with reasonable care and in a good and workmanlike manner. The parties did not contemplate that any part of the contract would be carried out in a haphazard manner; Mr. Ortiz was far too proud to

allow any of the work to be done with less than reasonable care and in less than a good and workmanlike manner. For his part, Mr. Webber's pride in his vehicle would accept nothing less than what he bargained for.

[11] The definition of the word "bargain" in the *Dictionary of Canadian Law* (third edition) is: *To contract; to enter into an agreement; to negotiate an agreement*. The plaintiff thought that by making the full payment before the work commenced, he would soon have a professionally installed audio system that would meet his expectations. The bargain from the defendant's perspective was that he would be paid $6500.00 before the work began. He also anticipated that the plaintiff would permit him to use the Mustang for promotional purposes, thereby benefiting his business. The contract price was certainly far less than what Mr. Ortiz would have charged had he not looked forward to the promotional work.

[12] When the contract was negotiated, it was clearly understood by the parties that the completion date they agreed upon would be an essential term. "Essential term" is defined in the *Dictionary of Canadian Law* as follows: *… a provision in a contract which both parties agreed at the time they entered into the contract was so important that performance of the contract without strict compliance with that provision would be pointless*.

[13] The plaintiff planned to use the Mustang for the purpose of taking his girlfriend to a local high school graduation on May 13, 2005. The contract required that the audio system would be completely installed and in proper working condition by May 7. This latter date became an essential term because Mr. Webber had clearly communicated the deadline to Mr. Ortiz (and the reasons for it). The defendant accepted May 7 as the completion date.

[14] The work was not completed by May 7, but the plaintiff nevertheless permitted the defendant to continue with the expectation that everything would be done by May

13. On May 13 the plaintiff took possession of the vehicle for graduation purposes, even though the installation remained incomplete.

[15] The plaintiff returned the car to the defendant within three days for the work to be completed; he did not, however, drive the car after graduation other than to travel to the defendant's shop.

[16] The plaintiff could have recovered the vehicle immediately after May 7, or kept it in his possession after May 13, but he chose not to do so. Instead, although not a happy customer, he was prepared to allow the defendant more time to complete the contract.

[17] The plaintiff took possession of the vehicle in late May for approximately five days for another social purpose. Once more he returned it to the defendant. When he had the car on this occasion, Mr. Webber noticed some interior damage to vinyl on the front doors. I accept his evidence that he drew the damage to the attention of Mr. Ortiz who assured him that he would repair it to a new condition. Once again, the plaintiff could have kept the vehicle, but instead he allowed an extension of the time for the work to be completed. I accept the plaintiff's evidence that the defendant assured him that priority would be given to the project and that Mr. Ortiz himself would work on the car.

[18] The actions of the plaintiff in allowing the May 7 deadline to pass, and returning the vehicle on two occasions, conveyed a clear message to the defendant that there was no longer any specified completion date. The parties did, however, agree that the work must be concluded without unreasonable delay.

[19] On July 5, 2005, the plaintiff permanently removed the vehicle from the defendant's possession before the work had been completed. I accept the defendant's position that relatively little work remained.

[20] Before taking possession of his vehicle in July, Mr. Webber had not personally alerted Mr. Ortiz to his intentions, although he had attempted to contact him. During the

same period Mr. Ortiz was trying to contact Mr. Webber to discuss the ongoing delay. It was one of Mr. Ortiz' employees who allowed the plaintiff to enter the shop for the purpose of removing the vehicle. It is helpful to appreciate that this is not a case about any right of the defendant to retain possession of the vehicle until payment was made; this is because payment in full was made very soon after the contract was entered into.

[21] By removing the vehicle on July 5, the plaintiff prevented the defendant from completing the installation. He also prevented the defendant from repairing the damage caused during the course of the work. The damage was to the right and left front door trim panels, scratches on the tint of the rear window, a drained battery, a damaged carpet in the rear of the vehicle, holes drilled for installation purposes, and a flat tire allegedly caused by a nail left inside or outside the shop. There are additional costs claimed by the plaintiff related to the damage. There had also been an ongoing issue regarding difficulties constructing a "beauty plate." The beauty plate was a custom built component designed to look attractive while hiding some of the more unattractive components of the audio system.

[22] During the several weeks before July 5, the defendant did not personally work on the vehicle as he had promised, and he did not supervise his employees as thoroughly as he ought to have done. The reason for these omissions was the birth of his baby. This delay did not constitute breach of contract or repudiation for two reasons: (1) there was no specified completion date after May 7 (followed by May 13), and, (2) this particular period of delay was not unreasonable because the message that Mr. Webber was consistently giving to Mr. Ortiz was that delays would be reluctantly tolerated. There was no discussion about the delay immediately before July 5 for the purpose of determining if Mr. Webber would accept this new problem as reasonable in the circumstances. Because each party had tried unsuccessfully and with good intentions to contact the other, the issue of timing was left open and not clearly understood by either. The failure by the defendant to complete the work by July 5 did not in these circumstances amount to breach of contract or repudiation.

[23] I find that the plaintiff has established on a balance of probabilities that all the alleged damage with the exception of the flat tire was caused in the course of the performance of the contract.

[24] I accept the testimony of Michael George, a witness for the plaintiff, who worked on the Mustang. He was no longer an employee of the defendant at the time of trial. I am satisfied from the evidence of this witness, and from other evidence, that Mr. George scratched the tint on the rear window. He testified: *It would make perfect sense* (that he scratched the tint in the course of his work). The plaintiff testified that neither he, nor anybody else scratched the tint before the defendant began the work or during the brief periods thereafter when the vehicle was in the plaintiff's possession. Mr. George's testimony and other evidence satisfy me that the door panel hooks and the vinyl damage were caused during the course of the work. With respect to the allegations that unnecessary holes were drilled in the vehicle during the installation process, I am satisfied that for the most part, only necessary drilling was done. The plaintiff regularly attended at the defendant's shop to monitor the progress of the work; he could have stopped the process of drilling had it caused him serious concerns. He failed to do so and can not now be heard to complain about damage caused by drilling.

[25] The claims that the flat tire and the drained engine battery were caused by the negligence of, or breach of contract by, the defendant are not proven; the evidence does not satisfy me that the battery was run down other than in the proper and necessary course of the work, and the suggestion that a nail on the defendant's property caused a tire puncture is just that - a suggestion based on suspicion but short of proof.

[26] The defendant says that had he been given the opportunity to correct the damage to the door panels, to the scratched tint and to the carpet, and complete any remaining work, he had the ability to do so and would have done so at no extra cost. There was evidence on behalf of the plaintiff that the repair work could not have brought the damaged components to the new state they were in when the work began. I believe

the defendant; the pride he had in his business and in his personal abilities would have permitted nothing less than proper repairs. The removal of the vehicle by the plaintiff before he and the defendant had any discussion about terminating the contract was an act that frustrated substantial completion of the installation and prevented any reasonable attempt at rectification of damage. The defendant was willing to continue his contractual obligations. The plaintiff can not successfully argue a breach of the condition that time was to be of the essence when he repeatedly returned the vehicle to permit continuation of the work. Additionally, the plaintiff contributed to a small part of the delay by adding requirements that had not been part of the April agreement; these included installation of a Play Station and interior neon lighting. By carrying on in this manner, the plaintiff added to the time required to complete the contract, he sent mixed messages to the defendant regarding the deadline issue, and he breached the contract by his unilateral overreaction on July 5.

[27] The plaintiff insists that the work was done in a haphazard, less than professional manner. My finding is that when the work was underway parts of the audio system did not work properly and aspects of the work appeared unsightly. This was, however, a work in progress. The completed product would undoubtedly have made the plaintiff and the defendant proud. Instead, the plaintiff frustrated completion.

[28] The plaintiff paid for a piece of audio equipment called a DVD “deck” to play compact discs, but he did not receive it. In its place a temporary deck was installed at no extra charge. It is suggested by the plaintiff that the defendant never ordered the deck; I find that the evidence does not substantiate this suggestion. What happened to the order remains a mystery. In any event, the product was never delivered to the plaintiff. If Mr. Webber had allowed Mr. Ortiz to complete the contract, Mr. Webber would undoubtedly have had the deck he had ordered properly installed. The plaintiff has, however, had the benefit of the “temporary” deck for over one year at no additional cost and the defendant has been deprived of the opportunity to sell it; at this late date I infer there would be minimal, if any, benefit to the defendant to order the plaintiff to return the deck. I can not order the plaintiff to pay the defendant for the use of the deck

because the agreement was that he could use it at no extra cost pending the arrival of the ordered product. The costs of the deck ordered by the plaintiff and the temporary one were not the same, but given the understanding between the parties I see no reason to interfere with this aspect of their arrangement.

[29] For these reasons, the plaintiff does not succeed in any aspect of his claim. It was the plaintiff, not the defendant, who frustrated completion of the contract by his actions on July 5, 2005.

[30] I do not regard the unfortunate evidence of Steven Lockhart, a witness for the plaintiff, to have tainted the credibility of the plaintiff's evidence. It appears as though Mr. Lockhart deliberately fabricated evidence surrounding a course he claimed to have taken. I intend to forward this judgment and a transcript of Mr. Lockhart's testimony to the office of the Crown prosecutor for consideration of a criminal charge. I do not find that the plaintiff in any way knowingly encouraged or knowingly assisted Mr. Lockhart to fabricate evidence, or that he was aware of any fabrication before or during Mr. Lockhart's first day of testimony; it was not until Mr. Lockhart was recalled as a witness at a later date for further cross-examination that the falsehood became apparent. I am satisfied that the fabricated testimony caught the plaintiff completely off guard. I commend Mr. Ortiz for his efforts to reveal the truth.

[31] The defendant thought that his business would benefit when he decided upon a reduced price in the anticipation of promotional work. Anticipation without more does not amount to a contractual term. The evidence does not support any agreement, express or implied, to use the vehicle for any form of promotional work. There was never a meeting of the minds on this business objective. On the contrary, the plaintiff was repeatedly clear on this point throughout his dealings with the defendant. I believe the plaintiff's testimony that he was far too proud of his new Mustang to allow promotional decals to be placed on it or to allow any other form of promotional work. For these reasons, the defendant can not succeed in his counterclaim, because it is based on promotional work as a term of the contract.

[32] The defendant has argued that he was prevented from putting forward his counterclaim. This argument is without merit. The defendant was aware early in the trial of how the process would unfold. There was an abundance of evidence from Mr. Webber and from Mr. Ortiz regarding the issue of promotional work; this issue as framed in the counterclaim was thoroughly developed during the course of the trial.

[33] The failure of the parties to prove their claims leads me to rule that each is to bear his own costs and disbursements.

[34] In conclusion, neither owes the other anything.

[35] If either party is in possession of property belonging to the other, the property is to be returned forthwith. Components installed during the course of the contract are excluded from this order.

Brian A. Bruser
Chief Judge, T.C.

Dated this 6th day of October, 2006
at the City of Yellowknife, Northwest Territories.

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