

Date: 20230317
Docket: CI 20-01-29304
(Winnipeg Centre)
Indexed as: Thermo Applicators Inc. v.
Razar Contracting Services Ltd. et al
Cited as: 2023 MBKB 52

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

THERMO APPLICATORS INC.	)	<u>R. Ivan Holloway</u>
	)	<u>Jared M. Wheeler</u>
	)	for the plaintiff
- and -)	
)	
RAZAR CONTRACTING SERVICES LTD.,	)	<u>Peter Halamandaris</u>
EVOQUA WATER TECHNOLOGIES CANADA	)	for the defendant
LTD., THE GUARANTEE COMPANY OF NORTH	)	Razar Contracting Services
AMERICA and INTACT INSURANCE COMPANY	)	Ltd.
)	
defendant(s),	)	<u>Aaron W.K. Challis</u>
	)	for the defendant
	)	Evoqua Water Technologies
	)	Canada Ltd. and Intact
	)	Insurance Company
)	
)	
	)	<u>Judgment Delivered:</u>
	)	March 17, 2023

Corrected judgment: An Erratum was issued on June 1, 2023. The text of the original judgment is reproduced here with corrections, and the Erratum is appended at the end of the Corrected Judgment.

KROFT J.

INTRODUCTION

[1] At a pre-trial conference on January 18, 2022, I agreed, pursuant to King's Bench Rule 50.04(5.2), to permit the plaintiff, Thermo Applicators Inc. (Thermo), to pursue a

motion for summary judgment against the defendants, Razar Contracting Services Ltd. (Razar), Evoqua Water Technologies Canada Ltd. (Evoqua), and Intact Insurance Company (Intact).¹

[2] The context of the summary judgment motion is claims by Thermo rooted in ***The Builders' Liens Act***, C.C.S.M. c. B91, (***BLA***), relating to construction work performed at Simplot Canada (II) Limited's (Simplot) potato processing plant near Portage la Prairie, Manitoba (the Project).

[3] Except for my rejection of Razar's "pay when paid" allegation, and my finding Thermo's liens were validly perfected in accordance with the ***BLA***, I am dismissing Thermo's motion.

[4] This motion was heard at the same time as a summary judgment motion brought by Thorpe Construction Ltd. (Thorpe) against Razar (who in turn third partied Evoqua). I issued a short, separate decision in respect of that matter (***Thorpe Construction Ltd. v. Razar Contracting Services Ltd. and Evoqua Water Technologies Canada Ltd.***, 2023 MBKB 53).

FACTS

[5] Much of the evidence about the circumstances giving rise to this litigation is not in dispute.

[6] Evoqua was Simplot's prime contractor for the Project. Evoqua hired Razar to perform mechanical work and, in turn, Razar hired Thermo to perform a portion of that mechanical work, i.e. to insulate and clad pipes to prevent freezing.

¹ Thermo discontinued its action against the defendant, The Guarantee Company of North America.

As such, the contractual chain was: Simplot (owner) – Evoqua (principle contractor), Evoqua – Razar (sub-contractor) and Razar – Thermo (sub-sub-contractor).

[7] Thermo’s insulation work was performed between the fall of 2019 and June 2020. The invoices from Thermo to Razar totaled \$609,121.86. At the time of the summary judgment motion, after accounting for credits, including payments received by Thermo from former defendant, the Guarantee Company of North America, invoices totaling \$469,885.16 remained unpaid by Razar to Thermo. Despite non-payment, Razar disputes only three invoices, one of which was among those paid by the Guarantee Company of North America effectively leaving only two Thermo invoices in dispute: Invoice #11334, dated March 20, 2020 for \$4,231.64 (temporary insulation) and Invoice #11441, dated June 24, 2020, for \$90,467.52 (headers and drops). Together they total \$94,699.16.

[8] In respect of both invoices, Razar says they reflect work falling outside the scope of its contract with Thermo.

[9] Two liens claiming in aggregate \$609,121.86 were filed by Thermo against Simplot’s real property, one on April 13, 2020 and the other on July 17, 2020. Pursuant to two separate King’s Bench orders, the liens were vacated upon Evoqua posting lien bonds (standing as security in place of Simplot’s real property), without prejudice to Evoqua’s right to contest Thermo’s claims. As a result of matters discussed in the next section, Razar also filed a lien that was vacated without prejudice to Evoqua.

[10] Razar does not object to paying Thermo any amounts held back as required by the **BLA**.

RAZAR – EVOQUA

[11] Above the Razar – Thermo contractual link is the Evoqua – Razar link. It is beyond question problems at this level caused, or substantially contributed to, the problems below.

[12] As evidenced by King’s Bench suit number CI 20-01-28441 (the Razar Action), Razar has sued Evoqua seeking damages exceeding six million dollars, including a delay claim of over four million dollars. Evoqua has defended the lawsuit and counter-claimed against Razar for damages arising from Razar’s alleged failure to complete its work at all or on time, the costs incurred by Evoqua to complete Razar’s work, and Razar’s failure to discharge liens filed against Simplot by Razar’s sub-contractors. Evoqua says that other than statutory holdbacks of \$362,114.34, it owes nothing to Razar (and is in fact owed money from Razar), or any of Razar’s sub-trades, including Thermo. As with Razar, Evoqua does not oppose payment of the holdbacks.

THIS LAWSUIT

[13] Thermo commenced the present lawsuit on December 7, 2020. It alleges, among other things, joint liability against Razar and Evoqua. The claims are framed in, among other things, contract and the **BLA**.

[14] In its Statement of Defence, Razar pleads its contract with Thermo contained a “pay when paid” provision, i.e. Razar does not have to pay Thermo until Razar receives payment under its contract with Evoqua. As noted earlier, Razar also disputes certain invoices on the basis the work recorded therein went beyond the scope of its contract with Thermo.

[15] Consistent with its allegations in the Razar Action, Razar cross-claims against Evoqua for the amount, if any, it may be ordered to pay Thermo. In that cross-claim Razar appears to concede Thermo completed its work.

[16] In its defence to Thermo's claim and Razar's cross-claim, Evoqua alleges, among other things, all sums owed to Thermo were paid to Razar, Thermo's lien claim is limited to the amount owing by Evoqua to Razar (which amount is zero), and that no amounts are due or owing to Thermo pursuant to the lien bond which contains a pre-condition that Thermo obtain judgment against Evoqua.

[17] In its defence to Razar's cross-claim, Evoqua denies any amounts are due or owing to Razar.

DECISION

TEST FOR SUMMARY JUDGMENT

[18] A judge must grant summary judgment if they are satisfied there is no genuine issue requiring a trial. At all times, the persuasive burden rests with the moving party.

[19] When responding to a motion for summary judgment, the respondent must establish with evidence, or other material, why a trial is required. The respondent cannot rest on mere allegations or denials and must put its best foot forward at the hearing of the motion. When deciding if there is a genuine issue requiring trial, a judge can evaluate credibility and weigh/draw inferences from the evidence. See King's Bench Rules 20.02 and 20.03; *Dakota Ojibway Child and Family Services et al v. MBH*, 2019 MBCA 91, at paras. 108 – 111.

APPLYING THE SUMMARY JUDGMENT PRINCIPLES TO THIS CASE

[20] When I apply the legal principles to the present circumstances, save as provided in paragraphs 26 to 28 of these reasons, I am not satisfied this case lends itself to summary judgment. I reach this conclusion mindful of Thermo’s concern about getting caught up in what is predominantly a dispute between Razar and Evoqua.

[21] This case is a practical illustration of the sentiments expressed by the Manitoba Court of Appeal in *Provincial Drywall Supply Ltd. v. Gateway Construction Co.*, 1993 CarswellMan 106, including:

- Construction litigation involving the **BLA** highlights difficulties that can arise among owners, contractors, sub-contractors, suppliers and others in the course of a construction project;
- Builders’ lien legislation, including Manitoba’s **BLA**, represents an attempt to achieve protection, order, fairness and some certainty among the various players in a construction project by creating a variety of liens, holdbacks and deemed trusts; and
- Although the **BLA** goes a long way to achieve its goals, it is not perfect nor is it seamless or symmetrical. It is a “jigsaw puzzle which not only has a few pieces missing, but to complicate matters further includes additional pieces from other puzzles”. See *Provincial Drywall*, at paras. 9 – 23.

[22] In this case, the **BLA** appears to have done its job in terms of holdback, lien registration and vacating liens to permit construction to continue.

[23] On the other hand, because of the **BLA's** web-like nature and (mixing metaphors) missing puzzle pieces, Thermo nevertheless is stuck with the fact Evoqua's counterclaim and defence to cross-claim in this action allege nothing is due or owing to Razar, including on account of Razar invoices to Evoqua seeking payment for work performed by Thermo.

[24] In my view, given the law and the overlap among Thermo, Razar and Evoqua's claims, it is in the interest of justice and fairness for the state of accounts among the parties to be resolved at a trial after discovery has taken place. My view also is consistent with Evoqua having paid money in the Court pursuant to the **BLA** without prejudice to its right to challenge Thermo's claims. It is also consistent with the approach taken in ***Simmons Construction Ltd. v. Bird Construction Co.***, 1990 CanLII 7990 (MB CA) and more recently ***All-Star Concrete (2011) Ltd. v. Boretta Construction 2002 Ltd. et al***, June 1, 2022, unreported (Man. Q.B.).

[25] Considerable attention is devoted in the briefs to whether or not Evoqua could avail itself of a right of setoff in respect of Thermo's claim². As interesting as the arguments were (and challenging), I will not rule on them, deferring to the trial judge who ultimately will be charged with settling the state of accounts among the parties.

[26] Notwithstanding the foregoing, there are two aspects of Thermo's claim, which in my view, merit summary judgment.

[27] First, Thermo has established there is no genuine issue requiring trial in regard to Razar's assertion its contract with Thermo contained a "pay when paid" provision.

² Remember, there is no contract between Evoqua and Thermo

To find such a condition precedent exists, clear language to that effect must be in the contract. See *A&B Mechanical Ltd. v. Canotech Consultants Ltd. et al*, 2013 MBQB 287 (CanLII), at paras. 34, 37, 40. No such language has been drawn to my attention, whether in documents, conversations or otherwise.

[28] Second, to the extent Razar and Evoqua challenge the validity of Thermo's liens in terms of perfection, I see no basis therefore based on the evidence. I am separating validity in terms of perfection from validity in terms of the amounts claimed, which I already determined must await trial.

[29] As noted earlier, central to Thermo's concern, and perhaps one of the impetuses for its summary judgment motion, is the prospect of its claim being delayed by the litigation between Razar and Evoqua. This concern is legitimate.

[30] In my view, this action, Thorpe's Action and the Razar Action (and any other connected action) should proceed together and will benefit from a common pre-trial process directed by one judge. I recommend the parties write to the Chief Justice to make that request. Although the ultimate decision rests with the Chief Justice, assuming the request is granted, the pre-trial judge can set deadlines for discovery, and any other procedural steps, to assure, among other things, matters proceed to trial in a coordinated and timely way.

CONCLUSION

[31] To summarize, I order:

- a) Summary judgment dismissing Razar's claim its contract with Thermo contains a "pay when paid" clause;

- b) Summary judgment declaring Thermo's lien to have been validly perfected;
and
- c) The balance of Thermo's summary judgment motion is dismissed.

[32] I direct the parties to reach out to the Chief Justice in respect of assigning a common pre-trial judge to direct all outstanding actions.

[33] Thus far I have not commented in respect of the payment of the statutory holdbacks which Evoqua and Thermo agree should be paid. For its part, Evoqua says the holdbacks have not been paid because of disagreements among Razar, Thermo and Thorpe. Based on the evidence available to me today, I am not able to solve that issue. I leave it to the parties to either agree on the *pro rata* sharing and, failing agreement (perhaps assisted by the pre-trial judge), that matter, and the matter of interest thereon, must await trial.

[34] The parties shall bear their own costs respecting this motion.

_____ J.

Date: 20230317
Docket: CI 20-01-29304
(Winnipeg Centre)
Indexed as: Thermo Applicators Inc. v.
Razar Contracting Services Ltd. et al
Cited as: 2023 MBKB 52

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

THERMO APPLICATORS INC.	)	<u>R. Ivan Holloway</u>
	)	<u>Jared M. Wheeler</u>
	)	for the plaintiff
- and -)	
)	
RAZAR CONTRACTING SERVICES LTD.,	)	<u>Peter Halamandaris</u>
EVOQUA WATER TECHNOLOGIES CANADA	)	for the defendant
LTD., THE GUARANTEE COMPANY OF NORTH	)	Razar Contracting Services
AMERICA and INTACT INSURANCE COMPANY	)	Ltd.
)	
defendant(s),	)	<u>Aaron W.K. Challis</u>
	)	for the defendant
	)	Evoqua Water Technologies
	)	Canada Ltd. and Intact
	)	Insurance Company
)	
	)	<u>Judgment Delivered:</u>
	)	March 17, 2023

KROFT J.

E R R A T U M

For purposes of clarity, the following amendments have been made to p. 2 of the above noted judgment:

- (i) the words "... construction work performed at Simplot Canada (II) Limited's (Simplot) potatoe processing plant ..." now reads:

"... construction work performed at Simplot Canada (II) Limited's (Simplot) potato processing plant ..."

Please replace the existing p. 2 with the attached revised p. 2.

DATED this 1st day of June, 2023.

_____ J