CITATION: Wessuc Inc. v Todd Brothers Contracting Limited et al, 2024 ONSC 2655
COURT FILE NO.: CV-19-00000179-0000 (Guelph)
DATE: 20240506

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
WESSUC INC.	)	D. Schmuck & R. Taylor, for the
	)	Plaintiff/Defendant by Counterclaim
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
TODD BROTHERS CONTRACTING LIMITED, ROSS CHRISTIE TODD, CINDY JANE TODD, BRAYDEN ALEXANDER TODD, and THE GUARANTEE COMPANY OF NORTH AMERICA	)	J. Siemon, for the Defendants/Plaintiffs by Counterclaim
	)	
Defendants	)	
	)	
	)	**HEARD:** April 12, 2024

MOTION TO WITHDRAW ADMISSIONS

JUSTICE G.D. LEMON

The Issue

[1] On the second day of trial, Wessuc Inc. moved to withdraw some of the admissions that it had made in its pleadings. The defendants disputed that order.

After hearing submissions, I granted leave to Wessuc to withdraw those admissions for written reasons to follow. These are those reasons.

The Background

[2] Although many issues were to be resolved at the trial, the following summarizes the background as set out in Wessuc's opening statement.

[3] Wessuc is claiming $1,014,612.43 for payment for sludge disposal services that it provided to Todd Brothers Contracting Limited. Wessuc also claimed damages for breach of trust under the *Construction Lien Act* against the individual defendants, but those claims were withdrawn at the outset of the trial. Lastly, Wessuc claims payment under a labour and material payment bond issued by the Guarantee Company of North America (now Intact Financial Corporation) with respect to the sludge disposal contract.

[4] The relevant facts begin when the Region of Durham issued a tender to clean an exfiltration lagoon that it operated in the Township of Brock. Wessuc provided Todd with an estimate for a portion of the work in the tender to act as subcontractor to Todd if Todd was awarded the contract.

[5] Wessuc provided a written estimate which specified that the final contract price would depend on the volume of sludge removed and disposed of by Wessuc.

Wessuc says that it provided a unit price estimate to Todd at $84.50 per cubic meter of removed sludge from the lagoon and $67.32 per cubic meter to dispose of the sludge offsite. Wessuc says that there was no agreed upon fixed or capped price.

[6] Wessuc's position is that during the tender process, Durham and Todd represented to Wessuc that there was approximately 6,100 cubic metres of sludge to be removed. This representation was negligent and induced Wessuc to underestimate the amount of sludge in the lagoon and the time to dispose of it.

[7] After the contract was awarded to Todd, the parties agreed to alter Wessuc's method of disposal of the sludge. Instead of dewatering the liquid sludge removed from the lagoon on site and loading the solids onto a truck for disposal at landfill sites, the parties agreed that Wessuc would pump the liquid sludge into tankers and then dispose of the liquid sludge on farmers' fields.

[8] Todd gave Wessuc instructions to start work on August 1, 2018. Wessuc says that Todd grew impatient with the progress of the sludge removal. In late September 2018, and in breach of contract, Todd hired another contractor to remove sludge from the lagoon as well.

[9] Wessuc says that it completed the removal and the disposal of the sludge in early October 2018 and was last on site on October 2, 2018.

[10] Wessuc says that it removed a total of 13,249.58 cubic metres of sludge from the lagoon and hauled approximately 820 tonnes to landfill sites. This was more than twice the amount estimated by Durham at the tender stage. Wessuc says that it is entitled to payment for the full amount of sludge disposed of according to the unit price contract it entered with Todd.

[11] In response, Todd says that, because of the agreed change in methodology to remove both sludge and water, Todd and Durham required, and Wessuc agreed, that the price was capped at Wessuc's estimate for 6,100 cubic metres regardless of the amount of sludge removed. Todd also says that it was forced to take over the contract and suffered losses or costs that should have been paid by Wessuc.

[12] From that background, the principal issue to be decided is whether there was a contract between Todd and Wessuc and what were the terms of that contract. Was it a unit price contract or a lump sum contract? The balance of the issues between the parties will likely flow from those findings.

[13] As between Wessuc and GCNA, one of the issues is whether Wessuc or its agents gave notice in accordance with the terms of the bond.

The Pleadings

[14] The pleadings are more than the usual statement of claim and statement of defence. There is also the counterclaim, the defence to counterclaim and the reply. All pleadings were amended. The trial record is entitled “The Amended Amended Trial Record.” In this motion, Wessuc seeks to withdraw admissions that it made in its Amended Reply and Defence to Amended Counterclaim.

[15] The action was commenced by Wessuc by Statement of Claim issued May 10, 2019.

[16] The Todd defendants delivered a Statement of Defence and Counterclaim dated June 18, 2019.

[17] Wessuc delivered an Amended Statement of Claim dated November 1, 2019.

[18] The Todd defendants delivered an Amended Statement of Defence and Counterclaim dated November 13, 2019.

[19] Wessuc delivered a Reply and Defence to Amended Counterclaim dated January 18, 2022.

[20] Wessuc delivered an Amended Reply and Defence to Amended Counterclaim dated January 24, 2022.

[21] Of significance to this motion, paragraph 1 of Wessuc's Amended Reply states, "[t]he Plaintiff [Wessuc] admits the allegations contained in paragraph 5, 9, 10, 11, 13, 16, 18, 19(a)(d), 20, 21, 23, 24, 25, and 29 of the Amended Statement of Defence [of Todd]."

[22] Wessuc delivered a Particulars – Amended Amended Statement of Claim dated February 16, 2024.

[23] Wessuc delivered an Amended Amended Statement of Claim dated February 28, 2024.

[24] Wessuc delivered a Revised Particulars – Amended Amended Statement of Claim dated March 20, 2024.

The Authorities

[25] The test to be applied for leave to withdraw an admission was set out by Saunders J. in *Antipas v. Coroneos* (1988), 26 C.P.C. (2d) 63 (Ont. H.C.):

> A review of the cases indicates that a party requesting leave to withdraw an admission must pass three tests by establishing (1) that the proposed amendment raises a triable issue; (2) that the admission was inadvertent or resulted from wrong instructions; and (3) that the withdrawal will not result in any prejudice that cannot be compensated for in costs.

[26] Counsel has also provided me with the helpful authorities of *Kostruba & Sons Inc v. Perez,* 2011 ONSC 4894, 38 C.P.C. (7th) 100; *Philmor Deva (Richmond Hill) Ltd v. Steinberg* (1986), 9 C.P.C. (2d) 20 (Ont. H.C.); *Belsat Video Marketing Inc. v. Zellers Inc,* [2003] O.J. No. 3168 (Ont. S.C.).

[27] The test has been reviewed and amended by the Ontario Court of Appeal in *Champoux v. Jefremova*, 2021 ONCA 92 (para. 28):

> The trial judge then went on to apply the test from *Antipas v. Coroneos*, as recently endorsed in *Liu v. The Personal Insurance Company*. That test directs courts to first consider whether the admission is one purely of fact, law, or mixed fact and law (since questions of law can be more easily withdrawn than questions of fact), and then apply a three-part conjunctive test regarding when an admission could be withdrawn, being:
> (a) Does the proposed amendment raise a triable issue in respect to the truth of the admission?;
> (b) Is there a reasonable explanation for the withdrawal, such as inadvertence or wrong instructions?; and,
> (c) Has the party wishing to withdraw the admission established that the withdrawal will not result in any prejudice that cannot be compensated for in costs?
>
> [Full citations removed]

The Admissions

[28] In its Amended Reply and Statement of Defence to the Amended Counterclaim, Wessuc stated that:

> The Plaintiff admits the allegations contained in paragraph 5, 9, 10, 11, 13, 16, 18, 19(a) and (d), 20, 21, 23, 24, 25, and 29 of the Amended Statement of Defence.

[29] By this motion, Wessuc sought to withdraw the admission of paragraphs 5, 18, 19(a) and (d), 21, 25 and 29.

[30] Those paragraphs as pleaded by GCNA and Todd are:

> 5. The Surety [GCNA] states that Wessuc failed to give the notice required pursuant to the Labour and Material Payment Bond and that the Surety is therefore relieved of any obligations under said bond that may otherwise have been owed to Wessuc.
> …
> 18. This modification [of the methodology] was acceptable to Durham and [Todd], so long as Wessuc agreed that it would not seek any additional remuneration if the volume of Solids exceeds 6,100 m^3. Wessuc was still required to provide records of the volumes of Solids removed and disposed of.
> …
> 19. The terms of the agreement between [Todd] and Wessuc included the following:
>
> > (a) Wessuc would be paid for removal of up to 6,100 m^3 of Solids, and not seek compensation for any volumes of Solids over 6,100 m^3, with such rates to be inclusive of all costs, materials and equipment necessary to complete the Work;
> > …

> (d) Wessuc would only be paid the cubic meter of Solids removed from the Lagoon and lawfully disposed, regardless of the volume of any liquids also removed by Wessuc, at the unit rates set out in its Estimate;

…

21. With respect to new paragraph 20 of the Amended Statement of Claim, [Todd] states that it was Wessuc who proposed to [Todd] an alternative method of Solids removal and disposal from those contemplated in the agreement between [Todd] and Durham. [Todd] simply passed this new methodology along for Durham's consideration and possible approval, which was granted on the clear understanding of Wessuc and everyone else that Durham was only going to pay for the removal or disposal of up to 6,100 m^3 of Solids, and that accordingly [Todd] was only going to pay Wessuc for the removal and disposal of up to 6,1000 m^3 of Solids, at the unit rates agreed upon.

…

25. As part of the modified Work, Wessuc would need to include sufficient Lagoon water with Solids it was removing to assist in the disposal method it was using to place the Solids onto farmers' fields.

…

29. With respect to paragraph 27 of the Amended Statement of Claim, the amount of non-Solids removed is irrelevant and not payable, *per se*. In addition, the reference to 2,487.27 "dry tonnes" is meaningless as a payable item. The only relevant metric is the volume of cubic metres of Solids. [Todd] states that Durham's estimate of total 6,100 m^3 of Solids in the Lagoon was reasonably accurate. The Agreement did not provide for calculation of unit rates based upon a percentage of or ratio of Solids to water precisely because Durham (and [Todd]) would not be paying for the removal or disposal of water. The costs of removing the water in addition over and above the volume of Solids was to be borne by Wessuc.

Overview

[31] In brief, the admissions in issue are in complete contrast to the rest of Wessuc's pleadings. Wessuc alleged that it was owed funds based on the removal of more than 6,100 cubic metres of sludge. It pleaded that it gave proper notice under the bond or should be relieved of any error in that regard. The particulars of damages are inconsistent with the admissions in issue.

[32] The inconsistent errors in January of 2022 should have been obvious to Wessuc's counsel given the long history of pleadings, examinations, and productions. In Todd's Reply of February 11, 2022, it pointed out those admissions and yet Wessuc's counsel did nothing about them.

[33] However, Todd took no steps to bring those issues to an end until the first day of trial. Instead, Todd continued to prepare for the obvious issues in dispute despite the technical admissions. That preparation included a joint book of documents that are consistent only with the pleaded issues and not with the admissions.

[34] If Todd or GCNA was serious about relying on those admissions, a brief summary judgment motion should have followed. While Wessuc's error is obvious and, no doubt, embarrassing to counsel, Wessuc was not advised of Todd's

reliance on these pleadings until opening submissions. Indeed, in trial management discussions, there was no hint of a shortened trial because of these admissions. That conduct by Todd's counsel should be equally embarrassing.

Fact or Law?

[35] All of the admissions are matters of fact, but nothing turns on that determination.

Triable Issue

[36] Despite the confusion of the admissions, the rest of the pleadings outline the real issues between the parties. Those issues are likely to take the estimated five days of trial. If the admissions were to stand, the trial should take less than a day or two. It is not clear to me why Todd did not outline that difference in the trial management meetings held in advance to ensure the trial was ready to proceed and to properly estimate trial time. Because this motion was necessary, the trial was delayed by two days.

[37] An obvious example of the difference between the admissions and the balance of the pleadings is with regard to paragraph 5. The defendants submit that Wessuc has admitted that it failed to give the notice required pursuant to the bond and that GCNA is therefore relieved of any obligations under the bond.

[38] However, the next three paragraphs of Wessuc's pleading state that Wessuc provided notice in accordance with the bond or is entitled to relief from forfeiture under the bond and provided GCNA with sufficient information to evaluate the claim. Those are triable issues.

[39] Similarly, Todd pleaded that Wessuc was not to be paid for the removal or disposal of liquids, only for the removal and disposal of solids. Elsewhere in its pleadings, Wessuc denied this paragraph. That denial would be inconsistent with the admissions now relied upon by Todd. Todd has apparently examined for discovery and prepared for trial on the denials but left Wessuc's admissions to spring on Wessuc at the outset of trial.

Inadvertence

[40] The inadvertence in pleading is breathtaking but explained by a simple failure to read the standard first three paragraphs of the various pleadings and amended pleadings. Those paragraphs can be overlooked by busy counsel while focussing on the real issues to be tried. That error is all the more understandable given the number of pleadings and their amendments. The real issues between the parties are more fully detailed in the balance of the pleadings exchanged back and forth between the parties.

[41] Mr. Schmuck outlines how the error occurred. I agree with Todd that his explanation does not explain the error, but only demonstrates a continuing failure to pay attention to detail. Be that as it may, the supporting affidavits explain that an error was made. There was no intention or tactical advantage to rely on those admissions elsewhere in this proceeding.

Prejudice

[42] In submissions, counsel for the defendants acknowledged that there was no prejudice to the defendants if the admissions were withdrawn. She agreed that the trial could continue as scheduled if the admissions were withdrawn.

[43] The error was made in the pleading in January of 2022. Since that time, the preparation for trial has continued on the basis of the contested issues. Two examinations for discovery have been held with respect to the damages that could only be in issue if the admissions were inadvertent.

[44] In Mr. Schmuck's supporting affidavit, he notes that the defence witness list includes a representative from GCNA to testify to bond issues. I agree with him that there would be no need for that witness to be called if the admission relating to the bond were confirmed. Given that the witness was to be called, I have no doubt that there is no prejudice to the defendants if the amendments are allowed.

Decision

[45] Accordingly, Wessuc's motion was allowed, the admissions were withdrawn, and the statement of claim was amended.

Costs

[46] This motion used up two days of court time. The inadvertent admissions should have been picked up and amended long before trial. The plaintiff is to blame for part of the lost time. The plaintiff having not picked up on the errors, the defendants should not have attempted to rely upon them at the last moment. The defendants are therefore to blame for some of the costs.

[47] This endorsement is being released while the trial judgment is on reserve and long before I have commenced deliberations. There shall be no costs of these two days to either party in any event of the trial.

_____

Justice G. D. Lemon

Released: May 6, 2024

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B E T W E E N:

WESSUC INC.

Plaintiff

- and –

TODD BROTHERS CONTRACTING LIMITED, ROSS CHRISTIE TODD, CINDY JANE TODD, BRAYDEN ALEXANDER TODD, and THE GUARANTEE COMPANY OF NORTH AMERICA

Defendants

MOTION TO WITHDRAW ADMISSIONS

Justice G. D. Lemon

Released: May 06, 2024