

CITATION NO.: Window Force Inc. v. 2304949 Ontario Inc. et al., 2024, ONSC 4095
COURT FILE NO.: CV-22-633
DATE: July 19, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Window Force Inc., Plaintiff

-and-

2304949 Ontario Inc. cob as TriCity Windows and Doors, Imtiaz Akhtar Choudhry, Farkhanda Jabeen, Muhammad Ahmad, and Bank of Montreal, Defendants

AND RE: 2304949 Ontario Inc. cob as TriCity Windows and Doors, Defendant/Plaintiff by Counterclaim

-and-

Window Force Inc., Plaintiff/Defendant by Counterclaim

BEFORE: MacNeil J.

COUNSEL: *J.H. Reiterowski* – Lawyer for the Plaintiff/Defendant by Counterclaim

M.Z. Tufman – Lawyer for 2304949 Ontario Inc., Defendant/Plaintiff by Counterclaim

HEARD: January 19, 2024 (via Zoom videoconference)

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Plaintiff/Defendant by Counterclaim, Window Force Inc. (“Window Force”), made this motion for summary judgment seeking damages for breach of contract and/or unjust enrichment for unpaid invoices and unpaid amounts owing for goods and services it allegedly provided to the Defendant/Plaintiff by Counterclaim, 2304949 Ontario Inc. carrying on business as TriCity Windows and Doors (“TriCity”). In the alternative, Window Force seeks an order pursuant to Rule 20.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, specifying what material facts are not in dispute, defining the issues to be tried, and ordering that the action proceed to trial expeditiously.

[2] Window Force’s action has been discontinued as against the other named Defendants.

[3] TriCity has counterclaimed against Window Force for damages it allegedly suffered in the amount of \$175,000.00, including for its repair or replacement of numerous windows delivered by Window Force, and for its reputational damage and related losses.

[4] In support of its position, Window Force filed the supporting affidavit of Vivek Sahni, who attests to being President of the company. For its part, TriCity filed the supporting affidavits of its President, Isabella Brener, and of a legal assistant, Agnes Forst. On agreement between the parties, no cross-examinations on the filed affidavits were conducted.

BACKGROUND

[5] Window Force is a corporation in the business of assembling and delivering custom-made windows. At all material times, it was the supplier of custom-made windows and frames to the Defendants.

[6] TriCity is a corporation in the business of installing and replacing windows and doors. At all material times, it was the purchaser of custom windows and frames from Window Force.

[7] On January 11, 2022, Window Force wrote to TriCity by email indicating that “production/service requests will be delayed” as five of its employees were on sick leave with COVID-19 and “the glass companies are already running on 25% capacity only with limited allocation to Window Force”. It apologized for any challenges created by the situation but advised that “we will continue working to increase the capacity as well as source more material from our vendors”. Window Force advised TriCity that “[s]ervice requests will not be addressed immediately because we are barely able to cope up with the production given the lack of staffing shortage”. The email further stated that: “If you have any customers who are being pushy/annoying and are unable to understand or unwilling to wait then I suggest you cancel and place the order with any other supplier who can do it faster for you, I do not want to keep you waiting and delay further.”

[8] Ms. Brener wrote Mr. Sahni a lengthy letter (undated) complaining about purported breaches of contract by Window Force.

[9] By way of an email sent by Ms. Brener to Window Force on February 28, 2022, TriCity cancelled 38 outstanding orders with Window Force “due to the heavy delay (almost 5 month production time).” In the same email, TriCity confirmed that Window Force had advised that 20 orders “should be ready within 2 weeks as glass is received. It’s very critical for my company to have those orders as promised within 2 weeks to prevent more income losses.” Ms. Brener asked that Window Force provide her with dates on glass orders for the orders that were being cancelled because TriCity had clients asking for “proof that the glass company delayed the glass supply”.

[10] On March 28, 2022, legal counsel retained by Window Force sent a demand letter to TriCity requesting payment of the following three outstanding invoices in the amount \$53,026.86:

- (i) Invoice #3858, dated January 20, 2022, in the amount of \$30,432.16.
- (ii) Invoice #3878, dated February 10, 2022, in the amount of \$18,472.56, in respect of which TriCity has already paid \$15,479.27, leaving a balance owing of \$2,993.29.
- (iii) Invoice #3901, dated March 11, 2022, in the amount of \$19,601.41.

[11] The March 28th letter also noted that “a final custom order made by Tricity has been manufactured by Window Force and is available for delivery upon payment in full for such order.” Finally, TriCity was advised to cease and desist making allegations respecting Mr. Sahni’s character and truthfulness.

[12] By correspondence dated April 1, 2022, counsel for TriCity responded by denying the amounts owing and refusing to pay the invoices. Its response included allegations that Window Force had breached numerous contracts with TriCity, especially as they relate to the terms of delivery and quality. It stated that the delivery of certain windows had not happened yet and such purchase orders had to be cancelled with TriCity ordering from another supplier and offering discounts to those customers who were forced to wait. It also advised that other customers switched to another contractor. TriCity raised a further concern that Window Force had billed for improperly increased square footage.

[13] In its statement of claim, Window Force seeks damages in the amount of \$53,026.86 for the three outstanding invoices, and in the amount of \$30,440.44 for the cancelled orders in respect of which Window Force contends that it had already completed the work.

[14] Window Force states that it did not fulfill all of the outstanding orders because TriCity remains more than \$50,000 in arrears and offered no assurances that it would pay Window Force.

[15] When Window Force initially commenced its action, one claim dealt with a construction lien in the amount of \$11,800.94. TriCity brought a consent motion to discharge the lien, which was heard on September 22, 2022 by Justice Gordon. Pursuant to the Order of Justice Gordon, on October 6, 2022, TriCity paid \$14,751.18 into Court to the credit of the action, being the amount of the lien plus 25% of the full amount claimed as security for costs. Window Force then discontinued the action against all of the Defendants except for TriCity. The lien was discharged on January 5, 2023, but the \$14,751.18 amount remains paid into Court.

POSITION OF WINDOW FORCE

[16] It is Window Force's position that there is no genuine issue requiring a trial. This is a straight-forward case of Window Force delivering windows that TriCity ordered and then TriCity not paying for the windows. The affidavit evidence and other documents filed provide the court with a complete record of the material facts necessary to determine the action on its merits. Summary judgment is a more efficient, more expeditious and less expensive means than a trial to dispose of the action and achieve a just and fair result.

[17] Window Force alleges that it had a long-term business relationship with TriCity. Over the term of that relationship, the parties established a course of dealing for all orders of windows, as follows:

- (a) TriCity contacts Window Force with its requirements for windows, frames, etc., including the measurements, type of glass, etc.
- (b) Window Force sends TriCity an Order Acknowledgement with estimates for each window and the requirements, with a break-down of the costs of each.
- (c) TriCity signs the Order Acknowledgment and sometimes writes a note such as "please proceed" indicating consent to the price quoted and ordering the windows.
- (d) Window Force orders the glass from its manufacturer, which is cut to the exact specifications indicated in the order.
- (e) The manufacturer ships the custom cut glass to Window Force, where Window Force affixes the glass into custom frames, as per the Order Acknowledgement.
- (f) Window Force ships the completed windows and frames to TriCity.
- (g) The orders for the windows and frames are "free on board", such that title and the risk of damage or loss transfers to the purchaser, TriCity, as soon as the windows and frames are loaded onto the truck for delivery to TriCity or its customers.
- (h) Window Force sends an invoice from its accounting software for the windows and frames in accordance with the Order Acknowledgement.
- (i) TriCity is expected to, and normally does, pay the invoice in full within thirty (30) days of receipt of the invoice, windows and frames.

[18] In the event that any of the glass is cracked, or the windows and/or frames are otherwise damaged, Window Force would repair or replace the damaged product at its factory for free at TriCity's request.

[19] Window Force alleges that the parties' usual course of dealing was followed for the three invoices at issue, except that TriCity has not paid its invoices in full.

[20] Window Force received only a few complaints about the quality of the windows from TriCity, all of which were rectified. Where any shipments of windows or glass may have been damaged or non-conforming, Window Force offered to repair same. In all cases, however, TriCity had insisted on immediate delivery of the damaged or non-conforming windows and glass despite any defects.

[21] With respect to the complaint about "slow" delivery, Window Force had explained to TriCity in several emails that it was experiencing delays due to the supply chain slow-downs caused by the COVID-19 pandemic. In all cases, the windows were delivered to TriCity as soon as possible and TriCity always took delivery. TriCity has not returned any windows to Window Force.

[22] It is the position of Window Force that the work on certain of the cancelled purchase orders was completed by the time the orders were cancelled, and it is entitled to be paid for the work done on a *quantum meruit* basis and a breach of contract basis.

[23] Window Force submits that it has been deprived of the time, effort, labour and costs of manufacturing the custom windows for the aforementioned orders, as well as the finished custom windows themselves. TriCity has received those windows and enjoys the benefit of same without paying for them. There is no juristic reason for the corresponding deprivation caused to Window Force.

POSITION OF TRICITY

[24] It is TriCity's position that no summary judgment may be made in this action. The notice of motion seeks no disposition of its counterclaim since no final judgment can be made on its claim. As well, no findings of credibility can be made by the court since there were no cross-examinations on affidavits, and the contradictory affidavit evidence as it stands clearly does not permit the court to dispose of the matter summarily.

[25] The relationship between the parties was approximately ten months in duration. All of the deliveries from Window Force were grossly delayed. This was the principal reason for cancelling the orders. In addition, Window Force's products and service was "often of poor quality and

deficient”. TriCity notified Window Force of its concerns and the complaints it was receiving from its customers. TriCity also expressed concern to Window Force that it was “slandering” TriCity’s installations by trying to blame TriCity for the poor quality of Window Force’s products. TriCity made it clear that it could no longer live with Window Force’s performance.

[26] The facts make it clear that Window Force knew that its own performance was awful, and it specifically invited TriCity to cancel its orders and move its business elsewhere.

[27] TriCity submits that the motion should be dismissed with costs and the action be ordered to proceed to delivery of affidavits of documents, examinations for discovery, and to trial in the ordinary course.

Vivek Sahni’s Attestation

[28] Prior to the hearing, counsel for TriCity raised a concern that Vivek Sahni, who identifies himself as the President of Window Force in the first paragraph of his supporting affidavit, is not in fact the President of the Window Force; the President of Window Force is Serguei Essipov. Mr. Essipov, together with Vitaly Shapiro, are the only directors of Window Force. By emailed correspondence dated December 28, 2023, TriCity had asked counsel for Window Force to confirm this information. However, counsel for Window Force responded by email that TriCity had elected not to cross-examine Mr. Sahni on his affidavit and so the inquiry would not be answered. TriCity filed a Supplementary Motion Record containing the affidavit of Agnes Frost, sworn January 2, 2024, setting out the corporate search of Window Force and correspondence exchanged between counsel.

[29] At the hearing before me, counsel for Window Force took the position that this allegation was made too late and that TriCity’s Supplementary Motion Record had been filed late, after Window Force’s factum had been filed.

[30] Counsel for TriCity submitted that he filed the Supplementary Motion Record as soon as his office found out that Mr. Sahni was not the President of Window Force.

[31] After hearing the submissions of both counsel, I accepted the Supplementary Motion Record for admission on the motion.

ISSUES

[32] The following issues are raised on this motion:

- (a) Is this an appropriate case for summary judgment?
- (b) If so, did TriCity breach its contract with Window Force?

- (c) If so, what are Window Force's damages?
- (d) How should the Court determine TriCity's counterclaim?
- (e) Should the \$14,751.18 paid into Court by TriCity on October 7, 2022, be paid to Window Force and credited to TriCity's damages?

ANALYSIS

(a) Is this an appropriate case for summary judgment?

[33] Pursuant to Rule 20.04(2)(a) of the *Rules of Civil Procedure*, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[34] Rule 20.04(2.1) sets out the court's powers in determining whether there is a genuine issue requiring a trial. It provides that the court shall consider the evidence submitted the parties and, where the determination is being made by a judge, the following powers can be exercised for this purpose, unless it is in the interest of justice for such powers to be exercised only at a trial: (i) weighing the evidence, (ii) evaluating the credibility of a deponent, and (iii) drawing any reasonable inference from the evidence.

[35] In *Pastink et al. v. 1190393 Ontario Limited et al.*, 2023 ONSC 6037, at para. 6, Fowler Byrne J. identified the following summary judgment principles, which I accept and adopt:

- a. There will not be a genuine issue requiring a trial if I am able to reach a fair and just determination on the merits of the motion. This will be the case when I can make the necessary findings of fact, apply the law to those facts, and this is a proportionate and more expeditious means to achieve a just result: *Hryniak*, at para. 49;
- b. I should first determine if there is a genuine issue requiring a trial based only on the evidence before me, without resorting to my enhanced fact-finding powers as set out in r.20.04(2.1). If, after this step, it appears that there is a genuine issue requiring a trial, I should then determine if a trial can be avoided utilizing my powers under r.20.04(2.1) and (2.2). Again, this is as long as their use is not against the interests of justice. Their use will not be contrary to the interests of justice if they lead to a fair and just result, and serve the goals of timeliness, affordability, and proportionality, in light of the litigation as a whole: *Hryniak*, at para. 66;
- c. The moving party bears the onus of showing that there is no genuine issue requiring a trial. It cannot rely on mere allegations or pleadings. When it has satisfied the court that there is no genuine issue requiring a trial, the burden shifts to the responding party to prove that their defence has a real chance of success. The responding party

cannot rely on allegations or denial. They must set out, in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial: *New Solutions Extrusion Corporation v. Gauthier*, 2010 ONSC 1037, at para.12, aff'd 2010 ONCA 348;

- d. A party must put their best foot forward on a motion for summary judgment with respect to the existence or non-existence of material issues to be tried: *Broadgrain Commodities Inc. v. Continental Casualty Company (CNA Canada)*, 2018 ONCA 438, at para. 7; *New Solutions*, at para. 12; *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 32, affirmed 2014 ONCA 878, leave to appeal refused, 2015 CanLII 5860 (S.C.C); and
- e. The court is entitled to assume that the record contains all the evidence which the parties will present if there was a trial: *New Solutions*, at para. 12; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11; *Broadgrain* at para. 7.

Discussion

[36] Based on the issues and the evidence before the court, I am persuaded that there is a genuine issue requiring a trial in this case. The evidence presented on the motion is not sufficient to permit the necessary findings of fact and credibility to be made.

[37] I find that determination of the issue of whether payment under the purchase orders and invoices is owing cannot be readily bifurcated from the other issues in the main action or in the counterclaim. I do not agree with Window Force's characterization of this motion for summary judgment as a simple payment to be made on outstanding invoices. I am satisfied that TriCity has, by way of the evidence it has adduced, established that there are genuine issues for trial. Evidence on the interactions and exchanges between the parties is necessary to assess the terms of the agreement between the parties and their respective conduct. There is competing evidence on the issue of the quality of the windows and frames delivered and on the issue of non-delivery of certain orders. The defence of set-off is claimed by TriCity. There is also a dispute between the parties as to whether the orders for the windows and frames were "free on board" and whether Window Force would repair or replace the damaged products for free at TriCity's request, as claimed by Window Force. *Viva voce* evidence and cross-examinations of witnesses will be required to determine those issues fairly. Performance under the agreement cannot properly be determined in a summary manner.

[38] There is no written contract between the parties. So evidence will be needed to prove what the terms of the parties' agreement were, whether there was any term respecting defaults under the

contract or termination, and whether there was any entitlement for Window Force to cure any defaults.

[39] I also note that the chronology of events before the court does not permit for the determination of an actual date of termination of the agreement either. TriCity relies on the email sent by Vivek Sahni, dated January 11, 2022, in support of its argument that Window Force invited TriCity to cancel its order. However, I am not persuaded that this email is as clearcut as contended by TriCity. In my view, it may have to be proven which orders had not been delivered by January 11th, whether the orders TriCity cancelled had customers who were “unable to understand or unwilling to wait”, and whether there was another supplier who could do the work faster than Window Force.

[40] While TriCity alleges that the contract was breached due to the promised delivery in the Fall of 2021 being missed, there is a potential question whether that term was conditionally waived by the actions of TriCity in agreeing to accept delivery of windows in February and March 2022.

[41] As well, by her correspondence to Window Force found in the affidavits filed, Ms. Brener appears to have given Window Force the opportunity to cure/rectify the deficiencies. There is no indication as to the response by Window Force to this correspondence.

[42] In my view, more particularized evidence respecting the damages claimed by both parties is needed by way of oral evidence at trial. Further, more particularized evidence relating to each of the parties’ mitigation efforts is required. Since no cross-examinations were held on the filed affidavits, there has been no opportunity for the parties to ask the questions relevant to the issue of mitigation. Some of the affidavit evidence of Mr. Sahni is directly contradicted by the affidavit evidence of Ms. Brener. To the extent that Window Force alleges that it offered to repair and/or address any deficiencies, there is insufficient evidence in the record to determine if such mitigation was possible, was done by Window Force, or was denied by TriCity. As of March 7, 2022, it appears that Window Force was rectifying certain deficiencies and updating TriCity in respect of same, as it completed service for a customer: “This service was completed on Saturday. Only one glass unit had to be replaced as it was cracked out of 5 units. All the other units as per customer were fine once he cleaned them. There were no scratch marks. We still left the remaining units at the request of the customer. ...”

[43] While Window Force alleges that the invoices it issued to TriCity should be paid in full. TriCity has raised valid concerns about late delivery and poor quality issues with many of the windows. It is not possible on the basis of the affidavit evidence filed to determine which of the line items on the orders and/or invoices filed relate to the broken windows to be able to quantify that amount. To the extent there were issues with the quality or performance of the custom

windows delivered by Window Force and/or installed by TriCity, evidence will need to be led at trial as to those problems, what work was needed to rectify them, and the cost of same.

[44] Contrary to the suggestion of counsel for the Window Force, granting TriCity the amount of the invoices attached to Ms. Brener's affidavit, in the range of \$10,502.00, would not effectively decide the counterclaim. In her affidavit, Ms. Brener clearly indicated that there were other damages being claimed for reputational loss and loss of clients which would require *viva voce* evidence to be decided. I agree with counsel for TriCity that the court would be essentially picking numbers "from the air" if the summary judgment motion proceeded.

[45] The claim and counterclaim are closely connected to both the issue of breach of contract and any set-off. TriCity's defence goes to the root of Window Force's claim and its counterclaim goes directly to impeach Window Force's allegations. Findings of credibility concerning the parties and their relationship are at the core of TriCity's defence and counterclaim.

[46] Summary judgment will provide a fair and just adjudication when the procedure "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute": see *Hryniak*, at para. 50. A judge must be confident that he or she can fairly resolve the dispute: see *Hryniak*, at para. 57. In *Baywood Homes Partnership v. Haditagli*, 2014 ONCA 450, at para. 44, the Court of Appeal discussed the difficulty faced by a summary judgment motion judge in trying to make findings of fact where credibility is a central issue:

What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.

[47] In this case, I find that there is a genuine issue for trial with respect to the agreement and relationship between Window Force and TriCity, and the performance of each party under the agreement. These are not issues that can be resolved on the basis of the affidavit evidence before me given the clear conflict in that evidence. The written record does not allow me to fairly make the necessary findings of fact and, in particular, findings of credibility.

[48] In my view, the issues requiring determination at trial include:

- (a) What were the terms of the contract made between Window Force and TriCity?
- (b) Which of the parties terminated the contract?
- (c) What is the effective date of termination of the contract?
- (d) Was that termination lawful?
- (e) If the termination was unlawful, which of the parties has a claim for breach of contract?
- (f) Did the parties appropriately mitigate their damages?
- (g) If TriCity did not permit Window Force to cure or rectify any deficiencies in the custom windows delivered, was this refusal justified?
- (h) Should TriCity's counterclaim be granted?
- (i) What is Vivek Sahni's role or position with Window Force?
- (j) The credibility of the witnesses.

[49] I am required by *Hryniak* and Rule 20 to consider whether using the court's expanded fact-finding powers on a summary judgment motion would allow me to fairly resolve the issues in this case. I am of the view that there is no discrete issue that could be determined on a mini-trial that would resolve the proceeding; and that Mr. Sahni and Ms. Brener, who provided affidavit evidence on the summary judgment motion, are likely needed to be called as witnesses at trial. In the circumstances, I find that using the fact-finding powers will not shorten or reduce the resources or time needed to determine this matter compared to a trial. Accordingly, I decline to exercise my discretion to do so.

[50] I find that a fulsome record of evidence and cross-examination of the facts and issues is required to make dispositive findings, that can only be achieved by way of a trial.

[51] Based on the record before me, I am unable to make the necessary findings of fact and apply the law to those facts. As a result, a fair and just adjudication of the case on its merits cannot be achieved on this summary judgment motion.

- (b) *If so, did TriCity breach its contract with Window Force?***
- (c) *If so, what are Window Force's damages?***

- (d) *How should the Court determine TriCity's counterclaim?*
- (e) *Should the \$14,751.18 paid into Court by TriCity on October 7, 2022, be paid to Window Force and credited to TriCity's damages?*

[52] Given that I have found that summary judgment is not appropriate in the circumstances of this case, these remaining four issues will have to be determined at trial.

DISPOSITION

[53] For the foregoing reasons, the motion for summary judgment is dismissed.

[54] Both parties made submissions to the effect that, if the summary judgment motion was dismissed, a timetable should be set. Accordingly, I order that the following timetable shall apply:

- (i) The parties shall exchange affidavits of document within 60 days after the release of these Reasons for Judgment.
- (ii) Examinations for discovery shall be completed with 60 days after the exchange of the affidavits of documents.
- (iii) Answers to undertakings shall be completed for both parties within 30 days following the completion of the examinations for discovery.
- (iv) Motions related to undertakings and refusals, if any, shall be made within 30 days following the delivery of the answers to undertakings.
- (v) This timetable can be varied by written agreement of the parties.

[55] Since the summary judgment motion has been dismissed, the \$14,751.18 that was paid into court by TriCity on October 7, 2022 shall remain in the court, until further court order.

COSTS

[56] Window Force sought \$8,308.70 in partial indemnity costs if its motion was successful. During submissions on costs, counsel for TriCity sought the same amount if the motion was dismissed.

[57] I find that the amount of \$8,308.70 is a fair, reasonable and proportionate amount to award for costs on this motion to the successful party.

[58] Accordingly, Window Force is ordered to pay costs TriCity costs of this motion in the amount of \$8,308.70, all inclusive, payable within 30 days.

MacNEIL J.

Released: July 19, 2024