

CITATION: Falcon Forming Inc. v. Koler Construction Inc., 2024 ONSC 4231
OSHAWA COURT FILE NO.: CV-19-00001228-0000
DATE: 20240726

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Falcon Forming Inc., Plaintiff

AND:

Koler Construction Inc., Simcoe Street GP Limited, Simcoe Street Limited Partnership, Canadian Imperial Bank of Commerce and The Corporation of the City of Oshawa, Defendants

BEFORE: The Hon. Justice S.E. Fraser

COUNSEL: Julian Heller and Kevin Fernandes, for the Plaintiff

Paul Hancock, for the Defendant, Koler Construction Inc.

HEARD: April 30, 2024

ENDORSEMENT

I. Nature of the Motion

- [1] Koler Construction Inc. (“Koler”) bring this motion in this construction action for an Order that Falcon Forming Inc. (“Falcon”) produce and/or identify supporting documentation and provide particulars related to the additional costs and delays alleged at Items 1(g), 1(h), 1(l), 4, 5 and 6 of its Scott Schedule or, that if there is no further information, that Falcon so confirm.
- [2] The parties agreed by a Letter of Intent that Falcon was to provide enough crew to finish formwork, install rebar, and place concrete in 25 weeks or less. Koler asserts that contract was a scope of work contract. Falcon’s statement of claim asserts that the contract was for labour. The work was not completed in the 25 weeks. Falcon claims this is because of delays on Koler’s end totalling two months. Falcon states that the contract was effectively extended by two months for which Falcon invoiced Koler an additional \$705,873.34 as set out in two invoices which provide no meaningful details about the labour provided.
- [3] Koler seeks the particulars of the delay. Koler claims that Falcon has failed to provide particulars when sought and that its position has shifted through the litigation. The alleged shift is from the position Falcon took at examinations for discoveries that it would produce an expert report addressing delays, to the conferences, where the Plaintiff stated that the contract was a labour only contract, to its position now, which is that the contract was a fixed price contract within a particular scope of work (supplying labour for concrete/formwork portion of the project).

[4] Falcon states that it has provided all the evidence that it has and that it has no more disclosure to provide. It states that its claim is adequately particularized in its Scott Schedule, that it has been examined for discovery such that further questioning is not appropriate and that it has provided the basis of its claim.

[5] For the reasons set out below, I find that Falcon must particularize the delay claim, and identify any supporting documentation.

II. Issues

[6] The single issue on this motion is whether Falcon should be required to further particularize its claim.

III. Analysis

[7] In assessing whether further particulars should be ordered, I examine the procedural history of this matter, the nature of a Scott Schedule, and examine whether further disclosure should be ordered.

A. *History*

[8] This is a 2019 action in which the Plaintiff claims \$2,416,663.13. Examinations for discovery of the Plaintiff's representative Moises Lindo took place on March 6, 2020.

[9] At the examinations, Mr. Lindo was asked a series of questions about the delay claims.

[10] In response to Falcon's undertaking to produce any documents relied upon relating to its lost opportunity costs and lost profit, Falcon provided some information, including emails. It also advised that it would be providing an expert report in due course, presumably to show the calculations for the delay claims. The emails provided do not reveal any meaningful information about the delay claims. Falcon later advised in its answers to undertakings that it would not be providing an expert report.

[11] At examinations for discovery, the Defendant's counsel asked Falcon's representative for particulars of what was holding up the project as of December 4, 2018 and he was referred to a series of emails. Counsel for the Plaintiff basically told the Defendant to review the email productions to understand how the delays were incurred such were set out in several binders of materials.

[12] The Defendant also requests particulars of the delay claim and the Defendant asked for an undertaking to provide a breakdown of what the workers were able to do and what they could not do.

[13] On July 13, 2023, Justice Corkery heard the Defendant's motion on undertakings and refusals. The motion was scheduled for 60 minutes only, and all of the issues could not be addressed. The parties were directed to schedule a case conference at which time the Scott Schedules were to be addressed.

- [14] On September 21, 2023, the parties attended a case conference before Justice Corkery. The Endorsement reflects that there was a dispute between the parties as to whether the contract was as Falcon claimed for labour only with no scope of work or, as Koler asserted for labour with a scope of work. Plaintiff's counsel was to confirm his position in this regard. Justice Corkery ordered that that Falcon produce a Scott Schedule showing the basis for its claim for additional labour provided, the \$400,000 delay/loss of opportunity claim and the \$50,000 claim.
- [15] Falcon provided its Scott Schedule relating to these issues on December 5, 2023.
- [16] On December 6, 2023, the parties attended a case conference before Justice Corkery. In his Endorsement, Justice Corkery noted that Falcon's Scott Schedule listed additional costs incurred. It also noted that the Defendant intends to request further particularization and supporting documentation as evidence that the costs were incurred.
- [17] The Endorsement also reflected that the Plaintiff's position was that the contract was for labour only with no scope of work. It was expected that a consent order could be reached so stating.
- [18] The parties could not come to agreement on a consent order. On this motion, Falcon states that is because that although the Letter of Intent is for labour, it is for labour for the form work such that it would not be entirely correct to say that it was for labour only. Falcon asserts that this is important because, under the contract, the labourers could not have been required to do other types of work.
- [19] On January 5, 2024, the parties again appeared before Justice Corkery who ordered that Koler could have leave to bring a motion for particulars of the additional costs that were incurred by Falcon as the consent order could not be reached.
- [20] This motion was brought first as a short motion. When it was placed on the short motion list over the objection of the Plaintiff, RSJ Edwards ordered at Triage Court that, if the motion took longer than one hour, the Plaintiff could address this through costs.
- [21] The motion was not heard as a short motion, and I heard it as a long motion.

B. Nature of a Scott Schedule and the Plaintiff's Scott Schedule

- [22] The Plaintiff argues on this motion that the discoveries have been completed, and that a Scott Schedule is a pleading which particularizes the claim. Falcon argues that no further particulars should be ordered at this stage.
- [23] Falcon relies on *729806 Ontario Ltd. v. 796105 Ontario Ltd.*, 1994 CarswellOnt 2890, [1994] O.J. No. 1436, 48 A.C.W.S. (3d) 545, in which Master Sandler stated:

I must re-emphasize that this Scott Schedule is not evidence, but is really a part of the pleadings, and is designed to indicate the positions, and

assertions, and allegations, of the plaintiff and the defendant, and to quantify the dollar value of the various claims and counter-claims.

[24] Further, in *4361814 Canada Inc. v. Dalcov Inc.*, 2015 ONSC 1481, Master Albert stated at para. 91:

A Scott Schedule is a chart prepared in construction lien proceedings to particularize without evidence the allegations of deficiencies and completion costs pleaded. The Scott Schedule helps the parties identify the issues in dispute in complex, multiple issue cases.

[25] I accept that this is the purpose of the Scott Schedule.

C. *Should Further Disclosure be Ordered?*

[26] I am persuaded that the particulars given in Falcon’s Scott Schedule are not full answers to the questions asked. The Defendant was advised that there would be an expert report, asked for particulars at discovery, and since then had been dealing with a shifting position from Falcon. I find that Falcon particularized this aspect of its Scott Schedule after examinations for discovery took place. These two facts persuade me that the Defendant, Koler, is entitled to receive further disclosure to understand the nature of the delay claim.

[27] Falcon’s Scott Schedule provides only partial answers to the questions asked at examinations for discovery and the Defendant is entitled to know the basis of the delay claim. In my view, the case at bar is similar to *Dependable Mechanical Systems Inc. v. Four Seasons Site Development Ltd.*, 2019 ONSC 5798, where this Court ordered that full answers be given.

[28] I also find that this is not a matter that should be left for a ruling later under Rule 31.07. Koler is entitled to understand the basis of the delay claim.

IV. Order

[29] I therefore order that Falcon shall provide particulars and any supporting documents related to the additional costs and delays alleged at Items 1(g), 1(h), 4, 5 and 6 of its Scott Schedule.

[30] I urge the parties to settle costs. If they cannot, costs will be addressed in writing limited to three double-spaced pages exclusive of offers and supporting documents. Koler’s shall be provided by August 16, 2024 and Falcon’s by August 30, 2024. There shall be no reply. Each may be sent to me through my Judicial Assistant Robyn.Pope@ontario.ca.

[31] I thank the parties for their preparedness and helpful materials.

Justice S.E. Fraser

Date: July 26, 2024