CITATION: Forefront Electric v. Dutchies, 2024 ONSC 4898
COURT FILE NO.: CV-22-390
DATE: 2024/09/05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
FOREFRONT ELECTRIC INC.	
Plaintiff	Trevor J. Buckley, Counsel for the Plaintiff
– and –	
MICHAEL RENKEMA O/A DUTCHIES FRESH FOOD MARKET, DUT GATEWAY INC., DUTCHIES FRESH FOOD MARKET, DUTCHIES FRESH FOOD MARKET, DUTCHIE'S GATEWAY INC. O/A DUTCHIES FRESH FOOD MARKET, DUT GATEWAY INC. O/A DUTCHIE'S FRESH FOOD MARKET, 2287862 ONTARIO INC. O/A DUTCHIES FRESH MARKET LIMITED, DUTCHIES FRESH MARKET LIMITED, DUTHIE'S FRESH MARKET, DUTHIE'S FRESH MARKET LIMITED, DUTCHIS FRESH FOOD MARKET, MICHAEL RENKEMA, BEACONRIDGE DEVELOPMENTS INC., AND JOHN DOE CORPORATION	
Defendants	Richard Campbell, Counsel for the Defendants
	HEARD: February 1, 5 and 6, 2024
	Written submissions: February 16, 26 and March 8, 2024

GIBSON J.

REASONS FOR DECISION

Overview

[1] This action concerns a breach of contract claim proceeding pursuant to s.3(2) of the *Ontario Regulation 302/18 Procedures for Actions under Part VIII of the Construction Act*, R.S.O. 1990 c. C.30. It relates to the provision of electrical services by the contractor Forefront Electric Inc. ("Forefront") at the premises known municipally as 130 Gateway Drive in Kitchener, Ontario, which was being prepared to open as a grocery store. On October 28, 2021, Forefront entered into a time and materials contract with Michael Renkema ("Renkema") and "Dutchies Fresh Food Market" (the nature of this entity is one of the issues in dispute in this litigation) to install an electrical system at the subject property. The contract was signed by Mr. Renkema as "President" of "Dutchies Fresh Food Market", and by Aaron Baptie, as "Vice President" of Forefront.

[2] Forefront performed services under the contract, but now says that it remains unpaid for $207,102.97 of time and materials provided.

[3] A Statement of Claim was issued on April 11, 2022. In addition to Mr. Renkema and Dutchies Fresh Food Market, multiple other iterations of Dutchies were included in the Statement of Claim to ensure that the proper parties were named. It has now been admitted that "Dutchies Fresh Food Market" is "an entity not known at law." For the purposes of this decision, the Defendants, other than Mr. Renkema personally, will be referred to as "Dutchies."

[4] In its written closing submissions, the Plaintiff asserts that the Defendants have repeatedly misled Forefront, the property owner Beaconridge Developments (which has subsequently been let out of the action), the arbitration adjudicator and the Court regarding their corporate structure throughout the litigation to hinder Forefront's claim. It submits that Mr. Renkema is personally liable, jointly with DUT Gateway Inc. and 2287862 Ontario Inc. o/a Dutchies Fresh Food Market Limited, Dutchies Fresh Market Limited and Dutchie's Fresh Market. It also claims punitive damages in the amount of $300,000. The Defendants deny that they have misled, and submit that there should be set-offs against any amounts found to be owing to Forefront due to undocumented labour and materials, material left at the site, and improper claims for overtime and breaks and for use of one of Forefront's own bucket trucks.

[5] In its written closing submissions, Dutchies acknowledges that an amount is owing to Forefront. It submits that this amount, after deduction of the specified set-offs, is $88,596.90. Dutchies deny that they have engaged in fraud, and contest the amounts claimed by Forefront.

[6] The evidence-in-chief of the Plaintiff's witnesses Aaron Baptie and James Gasselle was given by affidavit. Only Mr. Baptie was cross-examined. The Defendants did not call any evidence. Final submissions of the parties were made in writing.

Interpretation of Contracts

[7] The key issue in this case is the interpretation of the contract, and how the actions of the parties accorded with it. The principles for interpretation of contracts were summarized by Lauwers J.A. at paras. 15-16 in *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326:

[15] The parties agree that the Supreme Court's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, sets out the governing principles of contractual interpretation. The relevant principles are also addressed in this court's decisions in *Weyerhauser Co. v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, *per* Brown J.A., rev'd on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, 444 D.L.R. (4th) 77; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corp.*, 2021 ONCA 592, at para. 46, *per* Jamal J.A.; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24, *per* Blair J.A.; and *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at paras. 52-56, *per* Doherty J.A.

[16] These principles were conveniently summarized by Brown J.A. in *Weyerhauser*, at para. 65. A judge interpreting a contract should:

> i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
>
> ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

Assessment

Contracting Parties

[8] The Defendants suggest that the contracting parties were either Mr. Baptie and Mr. Renkema personally, such that the contract is a nullity, or that the contract was between Forefront

Electric Inc. and Dutchies Fresh Market Limited. I do not accept this proposition. Both suggestions are contradicted by the Defendants' own pleadings. There was no mutual misnomer. It was Mr. Renkema who drafted the contract. *Contra Proferentem* applies. A plain reading of the contract clearly favours a finding that "Dutchies Fresh Food Market" was the intended party of the contract. Neither Mr. Renkema nor any of the other Defendants have led any evidence regarding Mr. Renkema's intentions when he signed the contract. The Defendants have not adduced any evidence as to the Defendants' corporate structure and the entity operating the subject grocery store. The Defendants have yet to identify a company that exists at law who was a party to the contract. The Court will not indulge a shell game intended to distort or cloud findings in this regard.

Liability

[9] The company named in the contract "Dutchies Fresh Food Market" is a non-existent company. "DUT Gateway Inc., operating as Dutchies Fresh Food Market" is also a non-existent company. Section 21(1) of the *Business Corporations Act* prescribes personal liability for the party entering into a contract on behalf of a non-existent corporation. I find that Mr. Renkema is personally bound by the contract. It is evident that he is a sophisticated businessperson. Mr. Renkema knew or ought to have known that "Dutchies Fresh Food Market" did not exist, yet he inserted the name in the contract and signed as "President" of "Dutchies Fresh Food Market."

[10] Michael Renkema is personally liable jointly with DUT Gateway Inc. and 2287862 Ontario Inc. o/a Dutchies Fresh Market Limited, Dutchies Fresh Market Limited and Dutchies Fresh Market.

[11] I find that the Defendants have clearly breached the contract with Forefront. Invoice #3200 was delivered to the Defendants on November 30, 2021, and has a balance of $68,200.12 outstanding. Forefront issued invoice # 3255 on December 24, 2021, for which the entire balance of $137,918.35 remains outstanding. Invoices #3019 and #3085, dated August 20 and October 15, 2021, both remain outstanding in the amount of $4,894.40 collectively. The total amount owing from all outstanding invoices amounts to $207,102.87. The Defendants' non-payment amounts to a breach of contract.

Time and Materials

[12] I find that Forefront is entitled to the entirety of the unpaid invoices that form the breach of the contract, including all time and materials as billed. Once a contractor proves that it has kept proper accounts and is able to show supporting documentation, the onus shifts to the opposing party to adduce evidence to show that the amounts claimed or the accounts are incorrect or unreliable. A party cannot simply make a bald assertion that they dispute what is owing and then lead no evidence to support their position.

[13] I found Mr. Baptie to be a credible witness during his *viva voce* testimony, and I accept his evidence.

[14] In this case, the Defendants had a positive obligation to lead evidence as to why the invoices should not be paid when disputing the reliability of the time and materials for the project. They did not do so. I find that Forefront's evidence as to the amounts involved is credible and reliable.

[15] The Defendants have not satisfied their onus and have not adduced any evidence to show that the quote was incorrect or unreliable or that materials were not used on the job.

[16] I agree with the submission of the Plaintiff that, in accordance with the principles for interpretation of contracts summarized in *Prism Resources*, the reading of the contract to include overtime reflects the whole of the contract and is in line with industry standards and sound commercial expectations. Any sensible commercial party in these circumstances would anticipate that the wage would be higher than work performed within regular working hours. Moreover, I agree that Forefront is entitled to the costs incurred for time spent by its employees for breaks and overtime as this was an actual cost incurred by Forefront. Contractors in cost plus contracts are entitled to their actual costs: *Balmoral v. Biggar*, 2016 ONSC 319. The full amount claimed in the timesheets, inclusive of breaks and overtime, represents Forefront's employment burden and should be compensable when the contract is read as a whole, and in light of industry standards and reasonable commercial expectations of the parties to a cost-plus contract.

[17] I accept the affidavit evidence of the Plaintiff that the materials required to complete the job were in short supply at the time due to the ongoing global pandemic and could not be ordered in time to complete the project by December 11, 2023. To facilitate the completion of the project by this date, Forefront had to source the materials needed for the project from their own supplies. Forefront obtained a quote as to the value of these supplies ("the Guillevin quote") in order to quantify their claimed costs for these supplies. I also find that Forefront is entitled to the costs of the materials supplied to the project, including the costs outlined in the Guillevin quote and the use of its bucket truck. I accept the evidence of Forefront that it received prior approval from Mr. Renkema prior to invoicing for materials outlined in the Guillevin quote.

[18] There is no evidence of any wasteful use of materials. Forefront provided the Defendants with credits for any materials not used.

[19] A surcharge for the use of additional bucket trucks is an industry standard in a cost-plus contract, and this was communicated to the Defendants without objection.

[20] I find that Forefront discharged the obligations on it as contractor under a time and materials contract. I do not accept the claim of the Defendants that there should be a set-off in the amount of $118,415.97, so as to reduce the amount owing to $88,596.90.

Punitive Damages

[21] A court may award punitive damages where the conduct of the defendant is so "malicious, oppressive and high-handed that it offends the court's sense of decency": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[22] To obtain an award of punitive damages, a plaintiff must meet two basic requirements.

[23] First, that the defendant's conduct was reprehensible in the sense that it was "malicious, oppressive and high-handed" and a "marked departure from ordinary standards of decent behaviour".

[24] Second, punitive damages are awarded when they are rationally required to punish the defendant and to meet the objectives of retribution, deterrence, and denunciation when added to an award for compensatory damages: *Boucher v. Wal-Mart Canada Corp*., 2014 ONCA 419 at para. 79; *Whiten* 2002 SCC 18 at paras. 36, 94.

[25] In *Whiten*, the leading case on punitive damages, the Supreme Court awarded $1 million punitive damages as a result of the high-handed tactics employed by the insurer following its unjustified refusal to pay the insured′s claim. Justice Binnie, writing for the Court, set out a number of relevant factors for the court to consider, including:

a. The degree of misconduct;

b. The amount of harm caused;

c. The availability of other remedies;

d. The quantification of compensatory damages; and

e. The adequacy of compensatory damages.

[26] The governing rule when it comes to quantum of punitive damages is proportionality. In considering the quantum of punitive damages in *Whiten*, the Supreme Court noted:

> The more reprehensible the conduct, the higher the rational limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant′s awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).

[27] The current high-water mark for an award of punitive damages is $1.5 million awarded against an insurer in *Baker v. Blue Cross*, 2023 ONSC 1891, in which the plaintiff was awarded over $1 million in compensatory damages. In *Baker*, the insurer denied long-term disability benefits for a period of less than 10 years.

[28] On appeal, in *Baker v. Blue Cross Life Insurance Company of Canada,* 2023 ONCA 842, at para. 32, Hourigan J.A. stated that “punitive damages are designed to punish wrongful conduct,

to denounce that misconduct, and to act as a deterrent for future misconduct." And, at para. 34, he declared that "deterrence is impossible unless the punishment is meaningful." At para. 36, he said that "put simply, a modest punitive damages award becomes a nominal cost of operating in a way that wrongly and systematically denies policy holders their legal right", citing *Whiten* at para. 72.

[29] Punitive damages are only to be awarded in exceptional circumstances, to address the objectives of retribution, deterrence and denunciation. They should only be imposed if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

[30] Such exceptional circumstances have not been demonstrated in this case. While Dutchies should have paid Forefront promptly, and has not substantiated its objections to the amounts claimed by Forefront in the invoices, the Plaintiff has not established that the Defendants engaged in fraud, or in high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. No punitive damages will be awarded.

Order

[31] The Court grants judgment in favour of the Plaintiff Forefront for the full amount of its claim in the amount of $207,102.87, plus pre-judgment interest as pleaded, against the Defendants, Michael Renkema personally, and jointly with DUT Gateway Inc. and 2287862 Ontario Inc. o/a as Dutchies Fresh Market Limited, Dutchies Fresh Market Limited and Dutchie's Fresh Market.

Costs

[32] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Plaintiff may have 14 days from the release of this decision to provide its submissions, with a copy to the Defendants; the Defendants a further 14 days to respond; and the Plaintiff a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after the Plaintiff's initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

M.R. Gibson J.

Date: September 5, 2024

CITATION: Forefront Electric v. Dutchies, 2024 ONSC 4898
COURT FILE NO.: CV-22-390
DATE: 2024/09/05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FOREFRONT ELECTRIC INC.

Plaintiff

– and –

MICHAEL RENKEMA O/A DUTCHIES FRESH FOOD MARKET, DUT GATEWAY INC., DUTCHIES FRESH FOOD MARKET, DUTCHIES FRESH FOOD MARKET, DUTCHIE'S GATEWAY INC. O/A DUTCHIES FRESH FOOD MARKET, DUT GATEWAY INC. O/A DUTCHIE'S FRESH FOOD MARKET, 2287862 ONTARIO INC. O/A DUTCHIES FRESH MARKET LIMITED, DUTCHIES FRESH MARKET LIMITED, DUTHIE'S FRESH MARKET, DUTHIE'S FRESH MARKET LIMITED, DUTCHIS FRESH FOOD MARKET, MICHAEL RENKEMA, BEACONRIDGE DEVELOPMENTS INC., AND JOHN DOE CORPORATION

Defendants

REASONS FOR DECISION

M.R. Gibson J.

Released: September 5, 2024