Court of King's Bench of Alberta

Citation: Twister Developments Ltd v 1406676 Alberta Ltd, 2023 ABKB 535

Date: 20230921
Docket: 1703 10277
Registry: Edmonton

Between:

Twister Developments Ltd.

Plaintiff

- and -

1406676 Alberta Ltd.

Defendant

Judgment
of the
Honourable Justice M.E. Burns

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1. Starting in 2014, 1406676 Alberta Ltd. ("140") and Twister Developments Ltd. ("Twister") agreed to explore the construction of two buildings in Fort McMurray. Construction commenced, progress was made, and invoices were paid until July 6, 2016, when 140 notified Twister that it was terminating the relationship. At issue is whether Twister has been completely paid for its work on the project or whether 140 has overpaid Twister such that Twister must reimburse 140 any overpayment, and/or damages for lost rental revenue or to rectify deficiencies.

I. The Project

2. It is apparent from both parties that neither had undertaken a building project of this scope and magnitude before. Ward Fleming ("Ward") is the principal of 140. He is a financier by profession, not a land developer. Greg Goodvin ("Greg") is the principal of Twister. Twister is a relatively small company that had never worked in Wood Buffalo and this project was the largest project it had ever undertaken.

3. The project was to build two commercial steel buildings in Fort McMurray. One of the buildings had been pre-leased to Bassett Petroleum (the "Bassett Building") and the other building was not pre-leased (the "Spec Building").

4. Twister started working on design of the project in or around July 2014. Plans were provided by April 2015. A budget was developed. Ward talked to Bassett and planned on using a deposit on the building rental from Bassett and Ward's own funds to interim finance the project before financing. The budget was used to secure financing, for the construction of the buildings, from the Canadian Western Bank (the "Bank") on April 29, 2015. Once financing was secured, land was purchased in May 2015 and formal contracts were entered into at the end of May 2015.

5. Development permits were applied for on June 12, 2015, and then again on July 7, 2015, and obtained at the end of July 2015. Building permits were applied for but were delayed (discussed below). The permits were finally issued December 11, 2015.

6. Construction began on the buildings at the end of September and early October 2015, before the building permits were obtained. This was done with agreement between the parties, knowing that they would be faced with a penalty for starting the building before obtaining the permit.

7. On July 6, 2016, before the buildings were completed, 140 terminated its relationship with Twister.

A. Assessment of Evidence

8. Given the nature of the file, I rely mostly on the documentary evidence but where there is no documentary evidence, I prefer the evidence of Greg in general. He was prepared to say when he could not remember. Ward's evidence was vague. He often testified that "he would have" or "they would have". He often seemed to have no specific recollection and filled in the gaps with what promoted his narrative - that he was kept in the dark and did not know what was happening on the project.

9. It is apparent from the documentary evidence that Ward was kept informed and knew what was happening. He admitted that he would talk to Greg almost every second day. In addition, he examined each invoice in detail and assigned items to categories in the project budget. He then submitted them to T&T (the quantity surveyor/project monitor) and the Bank for review and payment. These are not the actions of someone who was kept in the dark.

B. Contextual Events

10. Two significant events affected the building project.

11. The first issue arose when the building permits were being obtained and the Regional Municipality of Wood Buffalo required the Bassett Building to be explosion proof. This was a complication that was not anticipated, and the possibility of an explosion proof building was not

contemplated in the original designs of the building nor reflected in the initial budget for the building. This requirement would greatly increase the cost of construction. Ultimately it turned out that the building did not need to be fully explosion proof, but many resources were spent and, most significantly, time was wasted, in an attempt to mollify the municipality. I find that the delay in obtaining the permits was not foreseeable and the resulting delay was not the fault of Twister, nor was it the fault of 140.

12. The other significant event was the Fort McMurray fire on May 3, 2016, which delayed construction because of the evacuation of the region and inability to access the site. Following the fire there was a shortage of accommodations, limited supplies, limited groceries, and no basic infrastructure in the city. Greg testified that the entire month of May was lost to construction. In addition, once able to return to the site, they found water flooded the entire construction area and that had to be dried out. Basic staffing was hard to find. The fire in Fort McMurray was catastrophic and devasted many lives. It was unforeseeable and truly a *force majeure*.

II. Issues

13. There are several issues to be determined including:

a. What contract governs this relationship?

b. Has Twister been paid for its work as contracted?

c. Does Twister owe 140 for:

i. Overpayment

ii. Delays and lost rental revenues

iii. Repair costs (deficiencies)

III. Analysis

A. What contract governs this relationship?

14. I find that these parties entered a cost-plus contract, despite the fact that three different fixed price contracts were executed between the parties. On the clear evidence before me, I find that the parties developed an alternative arrangement, as was the case in ***Triple R Contracting Ltd v 384848 Alberta Ltd***, 2001 ABQB 52 (***Triple R Contracting***); see also ***Wolf Construction v Kinniburgh***, 2019 ABQB 660 (***Wolf Construction***).

15. In ***Triple R Contracting***, the parties entered a written contract to construct a building. However, the Court found that the written contract was never followed; instead, the parties had a different arrangement for construction, which was never reduced to writing. The Court noted at paras 21-22:

> ...I appreciate that written contracts must be treated with respect. However, when, as here, the subsequent conduct of the contracting parties points to the conclusion that they do not consider themselves to be governed by the Contract's terms and instead developed an alternative arrangement established on clear evidence, it is unreasonable to impose the written Contract on the relationship. The progression of the evidence and argument at trial demonstrated the artificiality in attempting to apply the Contract to the obligations of the parties...

> Further, while clear evidence of the new agreement is required, there is no requirement either in the Contract itself or at law that such a wholesale replacement of the Contract, as distinct from mere modifications and amendments, must be in writing...

16. In ***Wolf Construction***, the defendants entered into a written fixed price contract with the plaintiff builder. The Court found that, despite the executed fixed price contract, the actual contract between the parties was a cost plus contract. The plaintiffs' evidence was that the written contract was made at the request of the defendants, "just for insurance purposes to get the ball rolling on their side for financing" (para 10), but that the parties had agreed amongst themselves that they would proceed on a cost plus basis. The Court accepted this evidence and found that the parties never intended to rely on the written contract, which was executed after work on the property had already begun.

17. While it is true, as 140 argues, that at trial neither party called any evidence to suggest that any other agreements, written or verbal, were entered into by the parties with respect to the project, at least not formally, there was a lot of evidence with respect to the relationship and how they conducted themselves within that relationship. The parties' relationship commenced well before the signing of the written documents.

18. Greg testified that Ward asked him about building a commercial building in Fort McMurray. Ward indicated that he had a Fort McMurray tenant but companies in Fort McMurray were "super busy". He noted that there was a shortage of buildings with the square footage needed by his tenant. Ward wondered, "if we do two is it more cost effective" and Greg answered yes. Greg indicated they would do one first and then the next, e.g., the foundation of one then the foundation on the next, etc. The plan was to bring people up from Edmonton because it was cheaper than using resources in Fort McMurray where Ward wanted to build.

19. As noted above, Twister started working on design of the project in or around July 2014. The parties diligently worked on creating a budget they thought they could meet. At the point where financing was required the parties had to enter into a fixed price contract to satisfy the Bank.

20. There were two separate written agreements signed, at the same time, on May 25, 2015. One was a form of agreement from 140 (the "140 Agreement") and the other was a form of agreement from Twister (the "Twister Agreement"). On June 5, 2015, the 140 Agreement was amended due to an expected decrease in the cost of construction. The effect was to reduce the price on the agreements.

21. The evidence was that Greg presented Ward with the Twister Agreement and said, "I'll sign your form of contract if you'll sign mine". Each agreement was executed. Neither party argued that one agreement should have precedence over the other.

22. Greg was told by Ward that the Bank needed a fixed price contract. Greg agreed to fixed price based on what they had budgeted together and thought it would fit in. Until they knew, they would send invoices that would be paid once a month. Greg indicated Twister was not in a position to fund the project. His expectation was that he would get $150,000 profit per building.

23. Greg clearly operated as if he would be able to complete the project for the budget originally contemplated with a small profit for himself and Ward accepted all invoicing from

Greg as long as they complied with the requirements of the Bank for the purposes of obtaining financing.

24. I find that it was never the intention of the parties to rely on the contracts they formally signed. They did not get legal assistance in drafting them and used contracts based on contracts they had used in past relationships. They knew they needed to sign a fixed price contract because the Bank required it – but the parties had a relationship and were planning on building on a cost-plus basis – based on the budget they so carefully created.

25. The change in the price of the contract when a large line item was reduced after the first agreements were signed supports this finding. 140 should not be interested in the budgeting process if they are protected by a contract for a fixed price – it would be on Twister to make sure the project came under budget – if it was over, that would also be on Twister. But 140 was concerned because this was a cost-plus contract. If a large budget item could be reduced, it benefited both parties. This is why the amended agreement of June 5, 2015, was signed for the benefit of the Bank.

26. Following the signing of the fixed price agreements for the benefit of the Bank, the parties continued in their relationship pretty much unchanged from before the signing of the agreements. The terms of the agreements did not govern the relationship of the parties and until the relationship was terminated it appears that the agreements were not referenced – outside the need for them for financing purposes.

27. The parties continued in their relationship as before the signing of the fixed price agreements, watching budget items, seeking cost savings, agreeing to changes informally, and working toward project completion. Neither party acted as if bound by the fixed price agreement. As discussed below, almost immediately after entering the agreements Ward proposed an invoicing method that would facilitate getting money from the Bank but did not follow the terms of the fixed price agreements.

28. To summarize, I find that the parties' relationship was governed by their conduct – they agreed to a budget to construct the two buildings and subsequently agreed to the payment of invoices as set out by Ward. The fixed price agreement was meant to fulfil the requirements of the Bank to obtain financing, it did not reflect the relationship of the parties and how they agreed to build the project. It is not fair or reasonable to try to impose the terms of the fixed price contract on the parties when their history and relationship establishes that it was not reflective of the agreements under which they were operating.

B. Has Twister been paid for its work as contracted?

29. Twister argues that it is owed $173,012.08 for the last work it completed on the project. It argues that (i) it has always been paid based on invoicing that was cleared through T&T (as discussed below), (ii) the invoices, as submitted by 140 to T&T, totaled $172,280.25 through this invoice process and, (iii) on August 8, 2016 Ward went to the Bank to increase funding and in that letter 140 indicates it owes Twister $157,238 for the Bassett Building and $61,167 for the Spec Building for a total of $218,405.

i. Invoice process

30. T&T was engaged by the Bank to act as its quantity surveyor/project monitor on the project. T&T had been advised that there was a fixed price contract in the amount of $3,820,908.

T&T indicated that they would visit the site to coincide with each draw recommendation and confirm that the invoice provided was substantiated by the work completed on site.

31. In an e-mail on June 27th, 2015, Ward emailed Greg and Gary Goodvin ("Gary") to outline how to make draws "simple and seamless":

a. every 30 days Twister would send 140 the work completed to date with the invoice from Twister based on the budget and indicating what budget item each amount was for;

b. the invoice would be sent to the quantity surveyor (Brandon at T&T);

c. Brandon would review the progress claim, visit the site and prepare his report for the Bank;

d. Brandon would send the Bank the monthly progress draw report outlining the costs incurred to date and the cost to complete and how much the Bank could fund;

e. The Bank would put the money in 140's account; and

f. 140 would write a cheque to Twister for the amount so Twister could pay all the trades.

32. The parties operated under this system for most of its relationship. I note that the system, in operation, was not what the parties had formally set out in the fixed priced agreements. In particular T&T was not certifying a percentage of work completed; rather, it was certifying that the invoice was fairly reflective of the work that had been completed (without reference to percentage completed).

33. Again, this supports the finding that the parties were operating on a relationship not governed by the written agreements but on the relationship and agreements they made along the way. In fact, it was Ward who proposed the process for Twister to obtain monthly progress payments. And, for the most part, Ward accepted all invoicing from Greg as long as they complied with the requirements of the Bank for the purposes of obtaining financing.

34. I do not find that Twister is unilaterally or retroactively changing the agreement between the parties, as argued by 140. The parties both changed the agreement by their conduct. While the contract did contemplate progress payments based on the percentage of work actually completed, that is not the arrangement 140 proposed or the parties accepted post signing of the fixed price agreements.

35. It appears that T&T was never asked by 140 to confirm the percentage completed before invoices were paid – T&T only certified that what

36. was claimed was reflective of the work completed by Twister. I note that Twister never had contact with T&T – that process was solely in the hands of Ward. He is the one that could have clarified T&T's role, but he did not, as the parties agreed to the process as set out above.

37. At the end of the day, the invoices were provided, T&T certified for the Bank that the work had been completed, the Bank funded and the invoices were paid – until July 2016.

ii. Outstanding at termination

38. Twister argues that it should be paid its final outstanding invoices. 140 argues that Twister has not established damages and it has the burden to do so. The relationship came to an end around July 6, 2016. Twister does not dispute the fact that 140 can end the relationship, it simply wants to be compensated for the work completed before termination.

39. I find that the agreement was that progress payments would be made once a month based on the work completed on the project. Twister submitted invoices for work done on a monthly basis and they were provided to T&T. All the invoices submitted were included in the T&T Reports and approved by T&T. All invoices had been paid except the last ones. I find that this was the practical relationship established by the parties and that Twister should be paid for all of the work that T&T certified, specifically the $173,012.08 which Twister submits is presently due and outstanding. (And which I note is less than the amount Ward advised the Bank was outstanding to Twister.)

C. Does Twister owe 140?

40. 140 argues Twister was an incompetent contractor because it did not keep "typical" construction records, issue change orders, contemporaneously maintain consistent billing practice, have a system to identify deficiencies, or even maintain a construction schedule.

41. Ward was sufficiently knowledgeable of the building process to know that a one-person general contractor was not going to be producing the types of schedules and construction processes that would be expected from a major contractor. That would cost time and money. Ward chose to go with a smaller contractor anticipating that costs could be contained precisely because he was using a smaller contractor.

42. Further, as noted above, I also do not accept that Twister did not keep 140 informed of the true progress of construction. The evidence establishes that the parties worked relatively well together until the setbacks occurred and 140 had the opportunity to complete the project with another contractor. It is telling that 140 never complained with respect to the quality of the work or the progress being made other than to acknowledge that the project was not going as planned.

i. Overpayment

43. 140 argues that it has overpaid Twister. If this was a fixed price contract and a contractor failed to complete the project, the owner may be entitled to set off the remedial costs or damages for breach of contract arising from the failure of a contractor to complete. These costs may exceed the amount due to the contractor for progress payments. However, here I have found that this is not a fixed price contract. Twister was being paid for the work it completed. T&T certified that the work being invoiced was reflected in the work completed.

44. I do not find, based on the arrangement of the parties, that Twister has been overpaid. I also note that Ward represented to Twister and the Bank that Twister was owed the money it had invoiced at the time of the contract termination. (Transcript, March 10, 2022, p 86, lines 29-39)

ii. Delays and lost rental revenue

a. Delays from permit process

45. 140 takes the position that Twister was responsible for securing the necessary permits. Ward says that Greg told him he would look after "the whole thing". As such, 140 blames the

delays with the permits on Twister. 140 argues that Twister "was responsible for the poorly executed permitting, design and construction."

46. Twister was in fact the party that applied for the development and building permits. Twister says they took steps to secure the permits, some of which were delayed due to problems with the plans and the need for the Bassett Building to be explosion proof.

47. There was some evidence that permitting applications were not sufficient when submitted. Twister's first applications for development permits were applied for on June 12, 2015, and then again on July 7, 2015 and were voided. It was not clear why although Greg appeared to have some difficulty with the Wood Buffalo computer system. Development permits were obtained at the end of July 2015.

48. Building permits were then submitted but Wood Buffalo raised concerns with landscaping, curb appeal and, ultimately, concerns about the classification of the Bassett Building. Twister, 140 and the engineers were all involved and Ward made many, many calls to the municipality and Bassett to attempt to sort through the requirements. The permits were ultimately issued on December 11, 2015.

49. I do not find that the evidence establishes that Twister and its designers failed to design buildings that complied with the applicable codes and local requirements leading to preventable delays and additional costs. The whole building permit question was finally resolved without the need to have an explosion proof building. There was no evidence of a failure of design.

50. The length of that delay for the application for the development permits compared to the length of delay for the ultimate resolution of the building permits seems minimal. The reality is that it was the business of the tenant that 140 leased the building to (Bassett) that caused the concerns raised by the municipality. Those concerns had to be worked through.

51. As noted above, I find that the delay in obtaining the permits was not foreseeable and the resulting delay is not the fault of Twister, nor is it the fault of 140.

b. Lost rental revenue

52. 140 takes the position that various delays caused by Twister led to lost rental revenue from Bassett Petroleum.

53. On November 19, 2014, 140 entered into an offer to lease to commence November 1, 2015. Essentially the intent was to build to suit the tenant's, Bassett Petroleum, needs. The lease was for 10 years. Occupancy actually occurred in April 2017 and by that time the price per square foot fell from $46 to $40.

54. When the construction contracts were entered into, Greg knew that Ward was planning on leasing one of the buildings to Bassett Petroleum. According to Ward, Greg advised that Twister could complete the buildings in six to eight months. Ward then "worked backwards or counted forwards from there to get to the November 1st date." (Transcript, March 9, 2022, p 106 lines 16-19)

55. In examination in chief, when asked if he discussed with 140 how long it would take to do the project, Greg testified: "...I made a point of saying this didn't have anything to do with the grade work and all that stuff. But the buildings themselves which was – which was the focus of – of my company, I figured six to eight months. (Transcript, March 7, 2022, p 45 lines 28-39). And further, "But we said we would be, like, substantially complete between six and eight months for

the first building; and then the second building was kind of designed to be maybe a month or two months behind the other one so that we could use our trades from one to go over to the other." (Transcript, March 7, 2022, p 46 lines 17-20)

56. The difficulty with this argument is that there was no contractual term for the completion of the buildings. None of the three signed contracts included such a term and it is apparent that Greg was just giving his best guess on how long it might take.

57. While there may have been some delay during the permit process, it is difficult to accept that Twister is somehow responsible for 140's decision to sign a lease even before building permits were obtained. I am not prepared to find Twister responsible for the decision of 140 to enter into the rental contract at such an early stage.

c. Repair costs (deficiencies)

58. In this case the contract was cancelled early. Neither building was complete; neither were ready for final inspection. Twister was not given an opportunity to address or fix deficiencies.

59. KCM Contracting Inc. ("KCM"), the contractor that replaced Twister on the project, identified the "deficiencies" or things that needed to be completed on the project. KCM reported on what they saw – an unfinished project.

60. In ***Cubbon Building Centre Ltd v Gabrysh***, 2020 ABQB 219 (***Cubbon***), Mah J noted that a party responsible for deficiencies must be given a reasonable opportunity to rectify such deficiencies. The Court noted, at paras 95-96:

> Second, and more important, Cubbon was deprived of the opportunity to perform its fixes and finishes and bring the project to finality. This was an opportunity that Mr. Gabrysh was obliged under law to give to Cubbon prior to engaging a second contractor. The Court of Appeal stated the law follows in *Impact Painting Ltd* at paras 19 & 20:
>
> > [19] In relation to Man-Shield's claim for back charges, having been provided no authority, the trial judge determined at para 28 that in his view, the onus is on the claimant party to prove that:
> >
> > > 1. The back charge is for an expense actually, necessarily and reasonably incurred by the party claiming the back charge.
> > >
> > > 2. By the terms of the subcontract, or by some other agreement between the parties, the charge is one, or is in relation to some task, for which the subcontractor undertook responsibility.
> > >
> > > 3. The general contractor incurred the expense because the subcontractor defaulted on the responsibility to which the charge relates.
> > >
> > > 4. Prior to incurring the charge, the general contractor gave notice to the subcontractor of its default and a reasonable opportunity to cure it.

> [20] We discern no error in the trial judge's articulation of the factors to be considered when deciding whether to enforce a claim for a back charge; nor does the appellant appear to dispute the correctness of this statement of the applicable law.

Mr. Gabrysh did not afford Cubbon a reasonable or any opportunity to cure what he considered to be problems with the workmanship. In particular, he did not allow Cubbon to have the Hardie agent inspect the finished work as Mr. Reid had planned and as Mr. Gabrysh had been informed would take place. Had he done so, he would have been given the right by law to setoff the cost of rectifying any remaining deficiencies as found by the Court.

61. If a defaulting party is given the opportunity to rectify deficiencies, and they do not, then the innocent party is entitled to set off reasonable back charges against amounts owing to the defaulting party (***Cubbon*** at para 91) If an innocent party does not give the defaulting party a chance to rectify, the innocent party is still liable for work completed and is not entitled to recover the costs associated with rectification (***Cubban*** at paras 100, 102)

62. Twister argues they were not given notice of deficiencies until Twister started demanding payments of outstanding invoices, and even then, Twister did not receive particulars of deficiencies. Twister says they were not given the opportunity to rectify deficiencies, and they further claim that 140 failed to get *independent* confirmation of deficiencies. Twister notes that KCM's owner Jim Carr, and later his widow, Marjorie Carr, held a one-half interest in the Spec Building and thus are related to 140.

63. In cross-examination, Greg agreed that Twister was on site for about one week after being terminated from the project. He did not agree Twister could have had an opportunity to rectify deficiencies during that week; rather, Greg agreed that Twister was transitioning the project, or in his words "demobilizing". (Transcript, March 9, 2022, p 15 lines 39-41; p 16 lines 1-15)

64. 140 says they gave Twister a chance to repair deficiencies, but Twister refused the initial requests and by August 2016 the parties' relationship was such that it was unrealistic to require 140 to allow Twister on site. 140 gives examples where Twister demanded payment to rectify deficiencies including the improper installation of an underground tank by Dragon Mechanical and some repair of Trails West Constructions' deficiencies. 140 also emphasizes that Greg admitted they were billing repairs to 140; however, as Greg noted this was because they were billing out the work they were doing as they were doing it – i.e. in a cost based relationship. When asked, in relation to the repair of Trails West Constructions' deficiencies, Greg was asked, and answered:

> Q: ...So in terms of Twister's protocols or procedures here, if Twister had to personally go repaid some deficiencies by one of its subcontractors, it would be billed to Mr. Fleming?
>
> A: Yes, because remember we're billing out the work that we're doing as we're doing it. So if, if there's work there, the idea being that those monies would come out of monies that Trail West was to get but was held back.
>
> (Transcript, March 9, 2022, p 21 lines 39-41; p 22 lines 1-3)

65. Twister was removed as general contractor from the project prior to completion. Once hired as general contractor, KCM worked to determine what needed to be done to complete the project. 140 notes an initial visit by KCM where they identified items to complete, and that further items were identified after KCM began their work. In the context of an incomplete project, it is very difficult to determine whether a particular part of the project is "deficient" or simply "incomplete". It is entirely to be expected that there were incomplete portions of the project when Twister was removed.

66. As a result, I find that Twister was not given a reasonable opportunity to rectify deficiencies. As such, 140 is unable to set off the costs of rectifying any deficiencies that may have existed and could be attributed to Twister.

IV. Conclusion

67. In conclusion I find that 140 owes Twister $173,012.08 which is presently due and outstanding in relation to Twister's unpaid invoice.

68. I find that Twister does not owe 140 any money, nor is Twister responsible for lost revenue rentals or deficiencies.

69. If the parties cannot agree on costs they can provide written submissions to me within 60 days, of no more than 5 pages each, with an attached bill of costs and any settlement offers you want me to consider.

Heard on the 7th day of March, 2022 to the 11th day of March, 2022 and the 25th day of March, 2022. Final written arguments completed July 22, 2022.

Dated at the City of Edmonton, Alberta this 21st day of September, 2023.

M.E. Burns
J.C.Q.B.A.

Appearances:

Roger C. Stephens
for the Plaintiff

Bryan Kwan & Richard Wong
for the Defendant