CITATION: Continental Homes Inc. v. 2646576 Ontario Inc., 2024 ONSC6219
COURT FILE NO.: CV-19-632358
DATE: November 8, 2024

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act,* R.S.O. 1990, c.C.30

B E T W E E N:	)	
	)	
	)	
CONTINENTAL HOMES INC.	)	Eni Hanxhari for the plaintiff,
	)	Tel.: 416-238-5100,
Plaintiff	)	Email: eni@bozailaw.com;
	)	
-and-	)	
	)	
	)	
2646576 ONTARIO INC. and	)	Stefan Juzkiw for the defendants;
8682470 CANADA INC. o/a CHANG XIN	)	Tel.: 905-290-5055,
CONSTRUCTION	)	Email: stefan@juzkiw.com;
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** May 2, 3, 7 and 16, 2024

Associate Justice Wiebe

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] The reference concerns only this action. The trial in this action concerns the claim for lien of the plaintiff ("Continental") in the amount of $35,000 and the claim by Continental as against 8682470 Canada Inc. o/a Chang Xin Construction ("Chang") for damages for breach of contract in the amount of $130,000. The defendants deny these claims and assert a counterclaim against Continental in damages for breach of contract in the amount of $63,516.77.

[2] The property in issue is a commercial site located at 2230 Markham Road, Toronto ("the Property"). The registered owner is the defendant, 2646576 Ontario Inc. ("264"). The project was

the demolition of the roof, front and back walls and the excavation and construction of additions to the front and back for the purpose of creating an enhanced storage area for the owner.

II. BACKGROUND

[3] Based on the evidence, the following facts appear not to be in dispute.

[4] The principal of Chang is Kenny Lin, a realtor and a contractor. The principal of Continental is Saiid Nessari. The two met in 2014. The two companies worked together on several projects together thereafter and before the subject project.

[5] In December, 2018 Mr. Lin's superior at his realty firm introduced him to Peter Leung, the principal of 264, a meat supplier. Mr. Leung wanted to expand the building on the Property to be a proper storage space.

[6] On December 3, 2018 Messrs. Lin and Leung signed a one-page contract on behalf of their respective companies, a contract whereby Chang undertook the work of designing the project, demolishing the roof, front wall and back wall of the existing building, and building a new and higher roof and additions at the front and the back with a loading ramp at the back. It was a fixed price contract, with the fixed price being $370,000 (plus HST).

[7] On December 3, 2018 Mr. Lin prepared and signed a contract document, called a "Renovation Contract," which contained more details, such as a work schedule and a payment schedule. This document specified that the project was to begin in April, 2029 (depending on the permit) and be completed on or before November 31, 2019. It also contained a penalty clause whereby Chang agreed to pay 264 $1,000 for every day the project was delayed. Mr. Lin signed this document, but Mr. Leung did not. Mr. Lin maintained that this document formed part of the main contract.

[8] In January or February, 2019 Mr. Lin prepared the design and applied for a building permit. The permit was completed in May, 2018. Because of his previous relationship with Continental, Mr. Lin approached Mr. Nessari in mid-May, 2019 to have them do much of the work. The permit was issued on May 26, 2019. Mr. Lin sent it to Mr. Nessari.

[9] Mr. Nessari and Continental's project manager, Bexhet Ajdarevic, stated that in the evening of May 27, 2019 the two of them and Mr. Lin met in a Starbucks café and for two hours hammered out what each thought was a contract whereby Continental would do the specified scope of work for a fixed price of $205,000 plus HST. Mr. Lin admitted at discovery and in cross-examination that this meeting happened on May 27 or 28, 2019 and at discovery he admitted asking Mr. Nessari to send him a contract document. At trial he denied doing this.

[10] On May 28, 2019 Mr. Nessari drafted a contract document to capture what he thought was agreed to, and sent it to Mr. Lin. The contract document specified that the Continental work would include the demolition of the roof, front and back walls, and the excavation for and installation of the concrete footings, foundation, slabs and walls for the front and back additions. The document specified a payment schedule which included the following: $41,000 plus HST to be paid immediately as an initial deposit, and $61,500 plus HST to be paid upon completion of the demolition, excavation, footings and foundation. It also authorized Continental to stop working if payments were not made in accordance with this plan.

[11] In his affidavit Mr. Lin stated, on the other hand, that this document was nothing but an initial "offer" and that the Starbucks meeting happened on May 29, 2019 at which time there was a verbal agreement that differed significantly from what he called the Nessari "offer" document. Two significant discrepancies, according to Mr. Lim, were the following. He said in his affidavit that the parties verbally agreed to a payment schedule that would have Chang pay only $30,000 by June 20, 2019 and $10,000 at the end of "phase one" which he said was the demolition and excavation. He also said that the parties agreed that the work would be done by September 1, 2019 and that there would be a $1,000/day penalty for any delay beyond that date.

[12] Mr. Lin's response to Mr. Nessari's May 28, 2019 email was to tell Continental to start working. There was no email or text corroborating these instructions, but this was not denied. Mr. Nessari said he took this as Mr. Lin's confirmation of an agreement in accordance with the document Mr. Nessari emailed on May 28, 2019.

[13] On May 28, 2019 Mr. Lin instructed Mr. Nessari to get the locates. These are maps and other information provided by utilities identifying the location of their underground assets. They are required before excavation can be done.

[14] Mr. Nessari immediately ordered the locates. He said he expected to get them in one week. The Bell Canada locates were issued on May 29, 2019. However, the critical gas and hydro locates were issued no sooner than on June 18, 2019 and received the next day.

[15] In the meantime, on June 5, 2019 Continential commenced demolition. This work went slowly. Mr. Lin says that Continental did not provide adequate manpower and machinery for its work. Mr. Nessari denies these allegations. It was unclear if and when the demolition was finished.

[16] On June 20, 2019 Chang paid Continental $30,000. Mr. Nessari took this money as a delayed part-payment of the initial deposit. He also asserts that there was an unpaid debt from a previous project owed by Chang to Continental in the amount of $6,000 that was to be applied to this payment. The defendants deny this. Continental continued working.

[17] Mr. Nessari says that he asked for the allegedly outstanding deposit money when the demolition was done, and it was not forthcoming as the defendants wanted more work done first. Mr. Nessari sent a text on July 12, 2019 again seeking the money. He says that the money again was not forthcoming as the defendants wanted more work done first.

[18] There was an issue with the survey. A survey was required before excavation can begin, as it identifies the exact location for excavation. The survey was provided to Continental by text dated July 19, 2019.

[19] With the locates and the survey finally in hand and despite its complaints about money, Continental began the excavation and the footings. Mr. Lin, however, became more dissatisfied with the level of manpower and machinery that Continental applied to this work. He said he was also dissatisfied with the methods used for excavation around utilities.

[20] On July 30 or 31, 2019 Mr. Nessari says he demanded payment of the unpaid deposit and threatened to stop work if it was not paid. Mr. Lin says he told Mr. Nessari verbally that Continental had delayed the project and he wanted the $30,000 back. He says that only 10% of the excavation

and footings was done by this point. He asserted in cross-examination that he told Mr. Nessari "not to come again," an assertion Mr. Nessari denied.

[21] Mr. Nessari stated in his affidavit that he received no notice of contract termination (verbal or in writing), and that he attended the site on August 1, 2019 and noticed the presence of the new contractor. There was no formal contract termination in writing.

[22] On August 1, 2019 Mr. Lin hired 2514080 Ontario Inc. o/a Build4Canada ("Build4Canada") to complete what Mr. Lin called phase one of the Continental scope, namely the remaining excavation and the footings and foundation. Build4Canada provided an estimate to Chang on August 1, 2019 showing a fixed price of $75,340 plus HST. This estimate was accepted and Build4Canada proceeded with the work.

[23] Mr. Lin stated in his affidavit that Build4Canada finished the project by the end of January, 2020. He provided nothing to corroborate this statement.

[24] On September 10, 2019 Continental registered a claim for lien in the amount of $207,650. On December 6, 2019, after hiring a lawyer, it commenced this action with a statement of claim that reduced the lien claim to $35,000 and claimed damages for breach of contract, namely lost profit and loss of opportunity, in the amount of $130,000.

[25] On January 9, 2020 the defendants obtained an order on consent vacating the Continental claim for lien with $35,000 of cash security. The consent order of Master Robinson, as he then was, stated that both defendants paid the cash security. It also stated explicitly that the $35,000 of security pertained to both the claim for lien and security for costs. This suggests that the claim for lien was further reduced to $28,000.

[26] On January 29, 2020 the defendants served a statement of defence and counterclaim. In their counterclaim, the defendants claimed general and special damages that totaled $600,000.

[27] On November 4, 2021 Continental obtained a judgment of reference from Justice Pollak. On November 17, 2021, Continental obtained an order for trial from me. The first trial management conference took place with me on December 20, 2021. I made orders for necessary interlocutory steps.

[28] At the third trial management conference on December 5, 2022 I scheduled a six-day summary trial in this action for December, 2023 and early January, 2024.

[29] On July 7, 2023, at the request of the lawyer for Continental, I scheduled a motion by him to be removed as lawyer of record for the plaintiff, returnable July 17, 2023. I granted the motion.

[30] At the trial management conference on September 5, 2023 Mr. Nessari appeared and advised that he could not find a lawyer. At the request of the defendants, I scheduled a motion by them to dismiss this action due to the plaintiff's non-compliance with my removal order, returnable September 19, 2023.

[31] On September 19, 2023, Ms. Hanxhari appeared by phone and advised that she was being retained by Continental. I adjourned the motion to September 29, 2024. Ms. Hanxhari served her

notice of appointment on September 19, 2023. On September 29, 2023 I rescheduled the summary trial to take place on May 2, 3, 7, 8, 9 and 17, 2024.

[32] At the trial hearing, Continental called Messrs. Nessari and Ajdarevic. As for the defendants, after listing five people on their trial witness list, they called only Mr. Lin.

[33] On May 8, 2024, the fourth day of the trial, the defendants proposed calling an expert, Bill Wang. His admissibility was challenged in the qualification *voir dire*. It came out that Mr. Wang had probably written his expert report in violation of an order of the Discipline Committee of the Association of Professional Engineers of Ontario. Also, Mr. Juzkiw delivered Mr. Wang's resume much too late, namely no sooner than on May 6, 2024 in the middle of the trial. After getting instructions, Mr. Wang withdrew Mr. Wang as a witness on May 8, 2024.

[34] The defendants had also served and filed an affidavit sworn by Roostam Abdukhalilov, a representative of Build4Canada. However, on May 8, 2024 Mr. Juzkiw also withdrew him as a witness stating that "he is not available."

III. ISSUES

[35] Based on the evidence and submissions, I find that the following are the issues to be determined:

a) Was there a contract between the parties?

b) If so, which party breached the contract and how?

c) If not, is Continental entitled to *quantum meruit* recovery?

d) What is the remedy?

IV. WITNESSES

[36] Before I analyze the issues, I will comment on the credibility of the witnesses.

[37] I found all three witnesses poor in quality. Their affidavits were not detailed, not well corroborated and argumentative. They did not focus on the facts as they should have. Particularly frustrating was the fact that the survey delay, a significant issue, was not even addressed by the affidavits. It came up in cross-examination. I was left wondering what preparation the parties had done for these affidavits and indeed the trial hearing itself.

[38] Mr. Ajdarevic had the added problem of including much hearsay evidence in his affidavit, namely the evidence given him by Mr. Nessari about the financial issues between the parties. This evidence I largely ignored as a result. The useful part of his evidence boiled down to what Mr. Ajdarevic stated about the Starbucks meeting and the contract formation, as he was directly a part of that process. He also gave direct evidence about the construction work. However, given the absence of corroboration and his long-time employment with Continental, many of his assertions in this regard, such as the assertion about the Continental scope being 60% done by the end of July, 2019, seemed unreasonable and biased in nature.

[39] Mr. Nessari had greater credibility. As principal of Continental, Mr. Nessari attracted the usual concern about bias in favour of the plaintiff. But his evidence was consistent and plausible. He withstood cross-examination well. His story about the contract negotiation seemed reasonable. For instance, there was his assertion that the previous verbal contracts between the parties were not guides to what the parties did on this occasion, as this contract was much greater and more complicated that the earlier ones. That made sense. He also conceded that the focus of the contract discussions on May 27, 2019 was on scope and price, not schedule, and that there was no more than an "understanding" that the work would be done as soon as possible with a target of "a couple of months." This made sense within the body of all the evidence. There was no evidence (other than Mr. Lin's uncorroborated assertions) that the parties agreed on September 1, 2019 as the completion date with a liquidated damage penalty attached. Agreeing to such a penalty clause would have been an extraordinary step for Continental given its lack of control over such things as the locates and the survey.

[40] Mr. Nessari also made concessions against interest that bolstered his credibility. For instance, he admitted that Mr. Lin was consistently unhappy with the pace of construction. He implicitly conceded that materials were not being purchased and labour not being applied as he would have liked. Generally, despite the deficiencies in his affidavits, I found Mr. Nessari the most credible of the witnesses.

[41] Mr. Lin, on the other hand, was not at all credible. His evidence was full of contradictions. For instance, he stated in his affidavit that Mr. Nessari's contract document was nothing but an "offer," that the Starbucks meeting happened thereafter and that there was then a verbal agreement. Yet, at discovery and in cross-examination, Mr. Lin admitted that the meeting happened on May 27 or 28, 2019. Indeed, at discovery he even went further and admitted asking Mr. Nessari to send him a contract document no doubt embodying the agreement already reached at the meeting. In cross-examination, he asserted in a feeble and self-serving way that this discovery transcript was "inaccurate."

[42] There were other contradictions. For instance, Mr. Lin stated that the verbal agreement he alleged required that Chang pay Continental $30,000 on June 20, 2019; but he then stated that he paid that money because Continental pressured him to do so. Also, Mr. Lin's affidavit asserted that Continental applied for the locates no sooner than on June 13, 2019; but then he retracted that statement in cross-examination conceding it was "incorrect." Also, Mr. Lin asserted in cross-examination that Continental abandoned the project. This contradicted his statement at discovery that he had terminated the Continental contract and his other statement in cross-examination that he told Mr. Nessari "not to come back." Also, Mr. Lin stated in his affidavit that there was a bidding process that led to the Continental "offer," but then in cross-examination he admitted there was no bidding process. These contradictions seriously undermined Mr. Lin's credibility.

[43] Mr. Lin also took unreasonable positions that were not corroborated. He asserted in his affidavit without support that Continental could have started the excavation before getting the locates. This was a dangerous proposition that he withdrew in cross-examination. He asserted that Continental was responsible for getting the survey and that it did not do so because it did not want to pay the surveyor. Yet, the evidence showed that the surveyor's contract was with 264 and it was 264 that had the responsibility to get and pay for the survey and to do so in a timely way. When asked about this in cross-examination, Mr. Lin gave an evasive and self-serving answer, namely that this was indeed the defendants' responsibility but only "at the preliminary stage" of the project.

[44] Mr. Lin also asserted that it was Continental that was responsible for getting the locates. The evidence is clear that it was Mr. Lin who delegated this responsibility to Mr. Nessari on May 28, 2019 when the contract was confirmed, thereby begging the question as to why Chang had not itself obtained the locates sooner. These positions made Mr. Lin appear as excessively biased in favour of the defendants and untrustworthy.

[45] For these reasons I decided to prefer the evidence of Mr. Nessari (and to a limited extent Mr. Ajdarevic) over that of Mr. Lin whenever they conflicted.

V. ANALYSIS

a) Was there a contract between the parties?

[46] Continental asserts that there was a contract between it and Chang, and this contract was embodied in the contract document Mr. Nessari emailed Mr. Lin on May 28, 2019, the document that contains Mr. Nessari's signature. Continental asserts that by instructing Continental to begin working, Chang accepted that document as the contract. The defendants deny this and assert that this document was only an offer that was not accepted, that the Starbucks meeting then took place on May 29, 2019 and that the parties reached a verbal agreement not reflected in the Nessari form of contract. In the alternative, the defendants assert that there was no contract as the parties never reached an agreement on the essential terms.

[47] What makes an enforceable contract? As stated by Associate Justice Robinson in *Bellsam Contracting Limited v. Torgerson*, 2023 ONSC 468 (CanLII) para. 35, an enforceable contract has five elements: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship. Determining whether a contract is formed is done through an objective assessment, namely a determination of how each party's conduct would appear to a reasonable person in the position of the other party; see *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga,* 2021 SCC 22 (CanLII), [2021] 1 SCR 868 para. 35. It does not matter whether a party does or does not subjectively intend to contract. It matters whether that party's conduct is such that a reasonable person in the position of the other party would conclude that the party intended to be bound by the contract; see *Ethiopian Orthodox, supra,* at paras. 37 – 38. The court must consider the factual matrix between the parties; see *Bellsom Contracting, supra,* at para. 36.

[48] What are the essential terms of an enforceable construction contract? It is well established law that an enforceable construction contract requires that there be a meeting of the minds between the parties on three elements: the scope of the work; the price; and the schedule. There must be a certain agreement on these elements; see *The Gatti Group Corp. v. Zuccarini*, 2020 ONSC 2830 (CanLII) at paragraph 71.

[49] Having reviewed the evidence, I find that Continental's position is more credible, and I accept it. Here are my reasons:

- In my view, the evidence shows that the Starbucks meeting where the parties worked out the specifics of a contract, happened in the evening of May 27, 2019 and that Mr. Nessari prepared and sent his contract document to Mr. Lin the next day, May 28, 2019. There were texts indicating that the meeting happened after 7 p.m. on May 27, 2019 and that the contract document was texted to Mr. Lin on May 28, 2019. Mr. Lin confirmed as much at

discovery even to the point of admitting telling Mr. Nessari at the end of the Starbucks meeting to send him a copy of the contract document. Mr. Lin subsequent denials of this version and his narrative of a subsequent meeting and a verbal agreement are self-serving, not corroborated and not credible.

- The Nessari text of May 28, 2019 containing the contract document therefore amounts to an "offer" but one made after the parties hammered out the particulars of the contract at the Starbucks meeting, not an initial offer. The document contains an exchange of consideration, namely a promise of work in exchange for payment. It also contains an agreement on scope and price and a payment schedule, and other clauses concerning delay, changes, non-payment, and debris removal. There is no doubt that this document, following as it does on the negotiation at the Starbucks meeting, shows an intention to create a binding legal relationship.

- There is no schedule in this document. Mr. Lin asserted that schedule was critical to him because of the liquidated damages clause he maintained was in the prime contract, and that the parties therefore agreed that Continental would complete its work on or before September 1, 2019 subject to a similar liquidated damages clause. I do not accept that the liquidated damages clause was in the prime contract. It was in the Renovation Contract that contained only Mr. Lin's signature. Peter Leung was on the defendants' witness list but was not called to give evidence and confirm Mr. Lin's evidence in this regard. Mr. Leung is the principal of the defendant 264. There was no explanation offered by the defendants for not calling him to confirm Mr. Lin's evidence. I draw an adverse inference against the defendants on this point as a result, namely that Mr. Leung would not have confirmed that the Renovation Contract was a part of the prime contract; see *Lane v. Lock,* 2015 ONSC 1972 at para.3. There was also no other document that corroborated Mr. Lin's insistence on the existence of a liquidated damages clause in the prime contract. Therefore, I find that there was none. Without such a liquidated damages clause in the prime contract, Mr. Lin would have readily reached an "understanding" with Mr. Nessari in the Starbucks meeting that the work would be done as soon as possible with a target of "a couple of months," as Mr. Nessari asserted. That is what I find.

- With this "understanding" as to schedule, the Nessari contract document of May 28, 2019 had all the elements of an enforceable construction contract except for the fact that the document needed to be "accepted." Mr. Lin did not sign the document. However, his conduct, looked at objectively by a reasonable person in the position of Continental as is required by the law, had all the trappings of "acceptance." Both Messrs. Nessari and Ajdarevic stated that Mr. Lin's instruction to them to start working on May 28, 2019, following as it did upon Mr. Lin's instruction at the Starbucks meeting to send him a contract document and his receipt of same, was to them acceptance. Mr. Lin did not deny giving this instruction. He did not deny accepting the contract document at the time, only later in the middle of the litigation. This denial was not credible as a result. An instruction to commence working without reservation is, in my view, confirmation of acceptance. There was indeed corroboration of this acceptance. Mr. Nessari ordered the locates on May 28, 2019. That is the date that appears in the locates as the order date. Mr. Nessari no doubt did this because there was a subcontract in place. That is what I find.

- The defendants argued that Chang did not pay the up-front deposit as required by the contract document, and that this was proof that the document was not accepted. Mr. Nessari made it clear in his affidavit that Mr. Lin had a habit of paying late and that this explained this non-payment. Mr. Lin did not deny the allegation of a habit of late payment. I therefore accept Mr. Nessari's evidence, particularly given my view of his superior credibility.

- The payment aspects of Mr. Lin's alleged verbal contract made no sense. These aspects specified that Continental would be paid any contract money by Chang (ie. $30,000) no sooner than three weeks into the contract work, and then $10,000 at the end of "phase one" (which was not defined) and the remainder of the contract price at no clear milestones, namely at "different steps and installments." No reasonable subcontractor would have agreed to take on all the risks of starting the project and paying for the material costs without a deposit and with no clear pathway for payment of the contract price.

- Mr. Lin insisted that a verbal contract, such as the one he described in this case, was consistent with what the parties had done with construction contracts in the past. I accept Mr. Nessari's evidence in response. Those earlier contracts were much smaller in size, namely with contract prices of less than $50,000. This point was not denied by Mr. Lin. Mr. Nessari said that with the size of this subcontract, namely with a price over four times larger at over $200,000, he wanted a contract in writing. That made sense and I accept it.

[50] Mr. Juzkiw argued in his written closing submission that silence cannot be taken as acceptance. He referred me to the decision of Justice Himel in *Toronto Airport Marriott Hotel Ltd. Partnership (Receiver of) v. Kozma*, 1999 CanLII 14944 (ONSC) at paragraph 43. I have reviewed this case and it does not assist the defendants. The Court held that the question of acceptance is a factual matter. While silence is generally not considered acceptance, there are cases where the acceptance is implied given the circumstances and the conduct of the offeree when looked at objectively. The judge referred with approval to the decision of the Supreme Court of Canada in *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.*, 1964 CanLII 88 (SCC), [1964] SCR 614 where the Court found an enforceable contract when the offeree simply started using the tug boats without formally authorizing the written contract that had been offered. In the case before me, I find that Mr. Lin's instruction to commence work the day after the intense contract negotiation between the parties at which they both thought they reached an agreement, Mr. Lin's request to Mr. Nessari at that meeting to send him, Mr. Lin, a form of contract for him to review, Mr. Lin's receipt of Mr. Nessari's form of contract the next day, and Mr. Lin's immediate and unconditional instruction to commence work, when looked at objectively, amounted to acceptance.

[51] Therefore, I find that there was an enforceable construction contract between the parties in accordance with the contract document Mr. Nessari sent Mr. Lin on May 28, 2019. I will call this contract "the Subcontract."

b) Which party breached the Subcontract, and how?

[52] Continental asserts that Chang breached the Subcontract by not paying Continental in accordance with the Subcontract and by wrongfully terminating the Subcontract without just cause on July 30 or 31, 2019. Continental asserts that the Chang contract termination was a fundamental breach of the Subcontract. Chang in turn asserts that it was Continental that fundamentally breached the Subcontract by not applying enough resources and delaying the project, by not doing its work

properly, all of which justified Mr. Lin's actions on July 30 or 31, 2019 in terminating the Subcontract.

[53] The law of fundamental contract breach in construction contracts is well-known and well summarized by Justice Perell in *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171 (CanLII) at paragraphs 49 to 56. In paragraph 49 His Honour had this to say about fundamental contract breach by an owner: "Owner breach: if the owner without justification ceases to make required payments under the contract, cancels it, or through some act without cause makes it impossible for the contractor to complete its work, then the owner has breached the contract and it has no claim for damages, and the contractor is justified in abandoning the work and the contractor is entitled to enforce its claim for lien to the extent of the actual value of the work performed and materials supplied up until that time, and the court may award the innocent contractor damages for breach of contract or damages on a *quantum meruit* basis in lieu of or in addition to damages for breach of contract." This is essentially Continental's position as against the defendants.

[54] On the other hand, in paragraph 53, His Honour had this to say about a contractor's fundamental contract breach: "Contractor breach: if a contractor abandons the contract, repudiates the contract, fundamentally breaches the contract, or performs the contract in a way that it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work, the owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligations to pay including any obligation to pay on a *quantum meruit* or for work already performed." This is essentially the defendants' position as against Continental.

[55] Having reviewed the evidence and heard submissions, I accept Continental's position. The following are my reasons for doing so.

[56] Concerning payment, Continental has the onus to prove that it was not paid by Chang in accordance with the Subcontract and that Continental's efforts to get paid were justified. I find this it has done so.

[57] Subcontract contained a payment schedule. The first specified payment was a deposit of $41,000 plus HST, namely $46,330, that was to be paid by Chang "on the day the work commences." The second payment was $61,500 plus HST, namely $69,495, when the excavation, demolition, footings and foundation were done. On page 2 of the Subcontract, Continental was entitled to stop working if it was not paid in accordance with the schedule: "Client [Chang] agrees that if payment is not made according to the above plan, Builder [Continental] has the right to stop all work until such time as the payments have been brought current."

[58] It is undisputed that Chang did not pay the deposit in full. It made no payment at all when the work began. Nevertheless, Continental proceeded with the work in good faith. Mr. Nessari made it clear, as I stated earlier, that Mr. Lin had a habit of delaying payment and that Mr. Nessari relied on that past practice to start the work expecting the payment would be made shortly. However, there was no evidence that Continental waived its contractual right to stop working due to non-payment. I reiterate that I accept Mr. Nessari evidence here.

[59] The evidence then shows that Mr. Lin paid Continental $30,000 on June 20, 2019. He asserted that this was done in accordance with the verbal contract he alleged Chang had with

Continental. I have found that there was no such verbal contract. Indeed, Mr. Lin in cross-examination admitted that he made this payment under pressure from Continental.

[60] There was then an issue about whether $6,000 of this payment was on account of a past debt Chang owed to Continental on another project. Mr. Nessari stated that there was this debt and that, as was the case in the past between these two parties, the $30,000 payment was to be applied first to pay this past debt. Mr. Lin did not deny the debt or the past practice between the parties; but he did deny that this payment was to be applied to this debt. I accept Mr. Nessari's evidence here as it seemed reasonable and consistent with the parties' admitted past practice, and as Mr. Lin's assertion was patently self-serving. I also reiterate that I generally found Mr. Nessari more credible that Mr. Lin. That means that this $30,000 payment was short of the amount required for the deposit by $46,330 – ($30,000 - $6,000) = $22,330. This was just under half of the required deposit. If the $6,000 was exclusive of HST, the unpaid deposit was exactly half of the required amount.

[61] The evidence shows that Mr. Nessari kept pressing Mr. Lin for payment and that Mr. Lin kept deferring payment to extract more work from Continental. Mr. Lin admitted doing this. In mid-July, 2019 the project was finally ready for excavation and Mr. Lin pressured Continental to start. On Friday, July 12, 2019, Mr. Nessari sent a text to Mr. Lin stating that he had told Mr. Lin on Monday and Tuesday of that week to "get the cheque ready." Mr. Nessari stated in cross-examination that this referred to the unpaid deposit. Mr. Lin did not respond to that statement. Nevertheless, Continental carried on.

[62] Finally, on July 30 and 31, 2019, Mr. Nessari met with Mr. Lin and verbally threatened to cease working unless the deposit was paid. This, in my view, was simply an assertion by Continental of its contractual right to cease working if the payment schedule was not complied with, and to resume working only when payments were brought current. It was not a contract abandonment or Subcontract breach, as asserted by the defendants.

[63] Concerning delay, Mr. Lin relied on Continental's alleged delay to justify his Subcontract termination at the end of July, 2019. Chang therefore has the onus to prove that Continental delayed the project. I find that it failed to do so. I find that there were two causes of delay and that both were the fault of the defendants.

[64] First, there were the locates. As stated earlier, these must be obtained before excavation can be done. As the principal of the general contractor, Chang, Mr. Lin could have started this process as early as May 15, 2019 when he learned that the building permit would be issued in two to three weeks, and called Mr. Nessari asking for a quotation. Mr. Lin did not do so. Instead, he waited until the Subcontract was agreed upon two weeks later on May 28, 2019, and then off-loaded this responsibility onto Continental. Mr. Nessari wasted no time in applying for the locates. The fact that it took three weeks for the critical gas and hydro locates to arrive was not the fault of Continental. Had Mr. Lin applied for the locates in mid-May, 2019 this three-week delay in the gas and hydro locates would have been largely of no consequence. This three-week delay in the locates caused an equivalent delay in the project, as the excavation was clearly on the critical path of Continental's scope. Other than demolition, nothing could be done until the excavation was done.

[65] Second, there was the survey. It is undisputed that the survey was necessary to locate exactly where the excavation was to be done and that the excavation could not proceed without it. The survey for the excavation did not come until Mr. Nessari requested it on July 19, 2019. Mr. Lin

blamed Continental for this problem, stating that, since Continental was responsible for 80% of the overall project, it should have pursued the surveyor for a timely survey for the excavation. This allegation had no credibility. It came out in the cross-examination of Mr. Lin that the surveyor was Mandarin Surveyors Limited. The initial survey report on the lot for the purpose of the permit was done by Mandarin on October 19, 2018 and was stated to be done for "2646576 Ontario Inc." Mr. Lin in fact admitted in the end calling the surveyor and paying him to get the excavation survey delivered. Clearly, the surveyor reported to 264 (or Chang), and the defendants should have as a result made sure of a timely excavation survey. That was not done. As a result, the excavation was delayed further until July 19, 2019.

[66] There was evidence that Continental's work in the meantime was slow. Demolition proceeded during these delays. It was not clear when the demolition was completed, but it was clearly slowly done. That is evident from the photographs produced during the trial. Mr. Lin complained throughout his evidence that Continental did not supply sufficient manpower to the project. In his affidavit, he stated that there were only 2 to 3 men on site when there should have been 4 to 5. There was no corroboration for these statements. Mr. Nessari denied that Continental unreasonably slowed down given the above noted delays and the non-payment of the deposit in full. I find that there was a slowdown in the demolition work, but that it was of no consequence to the project schedule given the delays in the locates and the survey. The evidence showed that the excavation could not begin until the locates and survey were in place.

[67] After the work on the excavation, footings and foundation finally started in mid-July, 2019, there was evidence of delayed purchase of materials. Mr. Nessari noted that that the deposit was intended primarily for material costs. That evidence seemed reasonable as materials are immediately necessary and their cost usually cannot be deferred. I accept it. Mr. Nessari then noted that the non-payment of the deposit in full caused Continental by mid-July, 2019 not to purchase necessary materials such as the rebar and concrete for the footings. I accept this explanation as it is reasonable given the deposit's purpose.

[68] Mr. Lin complained about the size of the excavator Continental used and the manpower it applied. As for the excavator, Mr. Nessari denied supplying an undersized excavator for the work at hand. Chang produced no expert evidence as to what the appropriate excavator should have been. Mr. Lin also again produced no corroboration for his complaint about the insufficient manpower. I do not accept his evidence as I found Mr. Lin generally of inferior credibility, as stated earlier. I find in the end that there was no cogent evidence of further delay after the excavation started in mid-July, 2019, certainly no delay that was the fault of Continental. Any delay that may have occurred was the result of the Chang non-payment.

[69] This all leads to my following conclusion. Chang fundamentally breached the Subcontract by failing to pay Continental the complete deposit and by then terminating the Subcontract when Continental exercised its right in the Subcontract to cease working until it was paid. Furthermore, Chang was not justified in terminating the Subcontract because of Continental's alleged delay as I find that it was the defendants who were at fault for this delay for the reasons stated above. Continental had no choice but to accept this fundamental breach by Chang as Continental was evicted from the site. However, Continental can claim breach of contract damages and a lien for the work it did.

c) Is Continental entitled to quantum meruit recovery?

[70] Having found that Continental is entitled to breach of contract damages from Chang, I do not have deal with the issue of *quantum meruit* recovery, and, therefore, do not.

d) What is the remedy?

[71] As indicated in *D & M Steel Ltd., supra,* para. 49, Chang, having fundamentally breached the Subcontract as described above, has no claim for damages as against the innocent party, Continental. That is what I find. There was no evidence concerning the 264 claim for damages as against Continental, and I deny it as well.

[72] Continental, on the other hand, has a claim for breach of contract damages as against Chang. First, there is its claim for compensation for the alleged unpaid work it did. This also forms its claim for lien. The amount claimed is $35,000. Continental has to the onus to prove this claim.

[73] The evidence in support of this claim was sketchy to say the least. There was no expert evidence on the matter. At one point in his cross-examination, Mr. Nessari stated that Continental completed between 46% to 47% of its "phase one" work, which he described as including demolition, excavation, footings and foundation. The contract price (including the deposit) allocated to this phase one work totaled $115,825 (HST incl.). Therefore, the calculation of the value of the unpaid work would be as follows: (46% x $115,825) - $30,000 (payment) = $23,279.50. In closing argument, Ms. Hanxhari said that Continental would be satisfied with such a finding.

[74] Mr. Lin's consistent position was that Continental completed no more than 10% of phase one of the Subcontract scope of the work. This calculation would be as follows: 10% x $115,825 = $11,582.50. Again, there was no corroboration for this position. $11,582.50 is much less that the $30,000 Chang paid Continental. Therefore, this position would leave Continental with no claim.

[75] I have decided to accept Mr. Nessari's evidence, and not Mr. Lin's. First, as stated earlier, I found Mr. Nessari generally more credible than Mr. Lin. Second, Mr. Nessari's position correlates very closely with the about $23,000 I found was owed to Continental on the deposit, a deposit that should have been paid at the outset of the work. In short, this figure is a measure of the breach of contract damages for the earned and unpaid contract price.

[76] Third, the evidence also suggests that this figure of $23,279.50 reflects the amount of Continental's earned and unpaid contract price regardless of the deposit obligation. As stated earlier, Mr. Nessari's evidence was that the deposit was intended primarily to be used to purchase materials. I accept that evidence, as stated earlier. By the end of July, 2019, according to Mr. Nessari, Continental had run out of money from the paid $30,000 to buy materials, such as the rebar and concrete for the footings. By this point, the end of July, 2019, Continental had obviously spent considerable labour as well. The proffered photographs showed the following work: the demolition was largely done; the excavation was well underway; and the footings were being installed. This indicates that much more than $30,000 worth of phase one work had been done. Therefore, I find that Continental has met it onus and proved its claim for $23,279.50 in damages for breach of contract on account of the work done.

[77] This figure, $23,279.50, is also the amount of Continental lien. For the reasons stated, it represents the unpaid price for the materials and services that were supplied. This amount must,

therefore, by paid entirely from the cash that was posted by both defendants for the Continental claim for lien pursuant to the order of Master Robinson (as he then was) dated January 9, 2020.

[78] Continental also claims $130,000 in breach of contract damages for alleged lost profit and lost business opportunities. There was no evidence tendered to support this claim. In closing argument Ms. Hanxhari tried to refer to me to documents in the filed affidavit of documents of Continental; but I stopped this process advising her that affidavits of documents are not trial evidence in this court. Therefore, I deny this claim.

VI CONCLUSION

[79] For these reasons, I find and declare that Chang is personally liable to pay Continental $23,279.50 in damages for breach of contract, and that Continental has a lien for the same sum, which lien must be paid from the cash deposited in court by both defendants. I dismiss the remainder of Continental's claim and the entirety of the defendants' set off and counterclaim.

[80] Concerning costs, at the end of the argument on May 17, 2024, I ordered that costs outlines for the reference be served, filed and uploaded on or before May 24, 2024. On May 28, 2024 the defendants filed and uploaded a costs outline that showed totals of $49,149.45 in partial indemnity costs and $77,957.43 in substantial indemnity costs. The plaintiff did not file a costs outline, at all.

[81] While preparing this decision in October, 2024, I noticed that the plaintiff had not filed a costs outline. On November 1, 2024, concerned that the plaintiff's costs outline was misplaced by the court, I circulated an email inquiring as to the status of the document. Later that day, November 1, 2024, I received an email from "reception" at Ms. Hanxhari's firm containing the plaintiff's costs outline signed by Ms. Hanxhari with the signing date shown as being "May 28, 2024." It showed $56,668.36 in substantial indemnity costs and $37,778.91 in partial indemnity costs. I circulated an email demanding clarification from Ms. Hanxhari as to when this document was served and filed. Ms. Hanxhari emailed explaining that the problem was a "gross miscommunication" between her and her clerk. She said that she had entrusted the task of serving and filing the costs outline to her clerk and that her clerk failed to do so. Ms. Hanxhari impliedly admitted her own failure to follow up and ensure that this task was done, doing so only in response to my November 1, 2024 email, over five months after the deadline.

[82] By further email, I asked for Mr. Juzkiw's position. He responded with an email on November 1, 2024 arguing that the costs outline should not be accepted. He pointed out rightfully that there was no corroboration for the May 28, 2024 date beside Ms. Hanxhari's signature on the plaintiff's costs outline and no good explanation for the huge delay in serving and filing the costs outline. The suggestion appeared to be that Ms. Hanxhari fabricated the date on the document, and that the plaintiff had an unfairly lengthy time to prepare, serve and file its costs outline. Ms. Juzkiw's other comments were about the contents of the plaintiff's costs outline.

[83] Having considered the matter, I have decided to accept the plaintiff's costs outline. To not accept the costs outline would mean denying the plaintiff costs. That was made clear in my third trial management directions of December 5, 2022 when I made my first trial schedule. While Ms. Hanxhari's explanation for this gross delinquency lacked the particularity I would have liked, I am not prepared to ascribe to her the deviousness suggested by Mr. Juzkiw. I accept her explanation that this costs outline was prepared on May 28, 2024 and through gross lawyer inadvertence not

served and filed until November 1, 2024. As a result, the defendants should not be prejudiced by my acceptance of the document. Furthermore, a lawyer's inadvertence should not be visited on a client when the opposing party is not prejudiced. I will, however, consider this matter when making my final award of costs.

[84] I encourage the parties to try and resolve the issue of costs and interest in light of the result. Should they fail to do so, I order that written submissions on costs and interest be served, filed and uploaded in accordance with the following schedule:

- Continental must serve, file and upload written submissions on costs and prejudgment interest of no more than three (3) pages on or before November 20, 2024;

- the defendants must on or before December 2, 2024 serve, file and upload responding written submissions on costs and prejudgment interest of no more than three (3) pages;

- Continental must serve, file and upload reply written submissions on costs and prejudgment interest of no more than one (1) page on or before December 5, 2024;

- the parties are reminded that these submissions must also address the prejudgment interest rate to be charged and its calculation.

Released: November 8, 2024

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ASSOCIATE JUSTICE C. WIEBE

CITATION: Continental Homes Inc. v. 2646576 Ontario Inc., 2024 ONSC6219
COURT FILE NO.: CV-19-632358

ONTARIO
SUPERIOR COURT OF JUSTICE
In the matter of the *Construction Act, R.S.O. 1990, c. C.30*

B E T W E E N:

Continental Homes Inc.

Plaintiff

- and -

2646576 Ontario Inc. and
8682470 Canada Inc. o/a Chang Xin Construction

Defendants

REASONS FOR JUDGMENT

Associate Justice C. Wiebe

Released: November 8, 2024