COURT OF APPEAL FOR ONTARIO

CITATION: Krieser v. Seligman, 2024 ONCA 827
DATE: 20241113
DOCKET: COA-23-CV-1252

Lauwers, Brown and Coroza JJ.A.

BETWEEN

Shari Krieser and George Krieser

Plaintiffs (Appellants)

and

Gregory Evan Seligman*, Vintage Landscape Contractors Limited*,
Greenstone Gardens Inc.*, G.E.S. Construction Limited*,
Eduardo Leal*, 1415952 Ontario Inc. and John Doe No. 1

Defendants (Respondents*)

AND BETWEEN

Shari Krieser

Plaintiff (Appellant)

and

Gregory Evan Seligman*, G.E.S. Construction Limited*,
Greenstone Gardens Inc.*, 1665610 Ontario Inc.
and Bonavista Pools Limited

Defendants (Respondents*)

AND BETWEEN

G.E.S. Construction Limited and Greenstone Gardens Inc.

Plaintiffs by Counterclaim (Respondents)

and

Shari Krieser and George Krieser

Defendants by Counterclaim (Appellants)

Andrew Winton and Tyler Morrison, for the appellants

Michael Shell and Glenn Brandys, for the respondents Gregory Evan Seligman, G.E.S. Construction Limited and Greenstone Gardens Inc.

Heard: October 30, 2024

On appeal from the judgment of Justice Grant R. Dow of the Superior Court of Justice, dated October 23, 2023, with reasons reported at 2023 ONSC 2015 and from the supplementary cost judgment dated January 29, 2024, with reasons reported at 2024 ONSC 56.

REASONS FOR DECISION

OVERVIEW

[1] In 2003, the appellants, Shari Krieser and George Krieser, wished to construct a new home in Forest Hill, Toronto. They hired the respondent, G.E.S. Construction Limited ("G.E.S.") (which was owned by the respondent Gregory Seligman), to perform or arrange the work required to build the new house. That arrangement was memorialized by a 2004 Construction Management Contract (the "Contract") entered into between Shari Krieser, as "Owner", and G.E.S. Under the Contract, G.E.S. was appointed the "agent" of the "Owner" and G.E.S. was to have "complete control of the Work and shall effectively direct and supervise the

Work.” They also hired the respondent, Greenstone Gardens Inc., to perform the landscaping work for the project.

[2] Construction of the home proceeded over the next few years. By July 2006, construction had progressed to the extent that the Krieser family were able to move in. However, in early 2007 a dispute arose between the Kriesers and G.E.S., which led to the Kriesers withholding payment of some invoiced amounts. Ultimately G.E.S. withdrew its services from the project in February 2007. By that time, most of the construction of the home and associated landscaping had been finished and the Kriesers had paid more than $5 million to G.E.S. and its subtrades.

[3] Three lawsuits were commenced by the parties in May 2007: G.E.S. sought to recover payment of outstanding invoices; the Kriesers sought damages for a number of matters, including unremedied construction deficiencies.

[4] Although litigation started in 2007, the dispute was not tried until 2022 and 2023. The trial judge dismissed the Kriesers’ actions. He granted judgment in favour of G.E.S. in the amount of $92,589.90 and in favour of Greenstone Gardens Inc. in the amount of $20,084.95.

[5] The Kriesers appeal. They advance two main grounds of appeal.

[6] First, they submit the trial judge erred in finding that the Contract was breached on behalf of Shari Krieser by her spouse, George Krieser, by failing to make timely payments of invoices rendered by G.E.S.: at para. 80. Further, they

submit the trial judge erred in finding that the breach of the Contract disentitled the appellants from any relief for warranty claims or construction deficiencies: at para. 83. Finally, they contend that although the trial judge determined (and disallowed) some of their construction deficiency claims, he failed to address all the deficiency claims for which they sought damages. They submit that as a result a further trial should be ordered to adjudicate the remaining deficiencies.

[7] Second, the appellants submit the trial judge erred in dismissing their claim for damages for breach of fiduciary duty.

CONTRACT CLAIMS

[8] We see no error in the trial judge's finding that the appellants' failure to make timely payments breached the Contract. Section 4.1(a) of the Contract required the Owner to make progress payments for work performed "within 7 days of receipt by Owner of an invoice in respect of any Work performed by [G.E.S.]". There was no dispute that when the business relationship between the parties began to fray the appellants withheld payments as part of a strategy to negotiate a settlement of the dispute. Whatever the merits of that approach as a negotiating strategy, the withholding of funds clearly breached the Owner's payment obligations under s. 4.1(a) of the Contract.

[9] Section 15.2 of the Contract set out the warranty provided by G.E.S. It stated, in part, that:

> [T]he Contractor agrees to arrange for the correction of defects or deficiencies in the Work which appear prior to and during the period of one (1) year from the date of Substantial Performance of the Work, as set out in the certificate of Substantial Performance of the Work, or such longer periods as may be specified for certain products or work. The Owner agrees to pay the costs of such corrections, unless such corrections are covered by warranties of the relevant Subcontractors, or Other Contractors, in which case such corrections shall be performed at the expense of the Contractor.

[10] By the time G.E.S. terminated the Contract in February 2007, over 95% of the overall Contract price had been paid by the Kriesers. While in those circumstances we strongly query whether the Kriesers' withholding of payment of several outstanding invoices would disentitle them to the benefit of the warranty for work for which they had already paid, it is unnecessary for us to decide that issue. That is because the trial judge went on, at para. 83, to state: "It should be noted, had I found the reverse, I would not have been satisfied with the evidence about many of the Kriesers complaints which appear to have resulted from either little or poor maintenance."

[11] In his reasons, the trial judge examined and did not accept the "big ticket" deficiency claims advanced by the Kriesers. Those claims concerned the HVAC system, snow melt system, driveway cracks, bedroom leaks, garage floor slope, missing operational manuals for the home's systems, the spa Dry-O-Tron and cleaning systems, various cracks, and air conditioning unit mounts.

[12] Those items were part of a list of 63 deficiencies attached to the 2016 expert report of Mr. Stephen Blaney of CCI Group (the "Blaney Report") upon whom the appellants relied to establish their deficiency claim. As the trial judge noted about that report, at para. 49 of his reasons:

> The [Blaney Report's] list of deficiencies contained 63 items with issues identified and the proposed solution with a cost to repair in separate columns. Twelve of these items were not pursued at trial. More than one-half of the items listed had a cost to repair of less than $5,000. 15 of the items claimed had no known or a zero cost repair. At least 7 of the items listed included the word "maintenance" in the "solution" column. The Kriesers chose not to submit or claim invoices for expenses or other repair costs incurred. The focus of the evidence was on the following areas of concern.

[13] Although at trial appellants' counsel only elicited testimony from Mr. Blaney about the more significant deficiencies that were addressed by the trial judge in his reasons, the record is clear that trial counsel relied on the Blaney Report for the remaining deficiencies and that report was marked as an exhibit. As well, in their written closing submissions, the appellants clearly indicated that they sought damages for all the deficiencies identified in the Blaney Report.

[14] The appellants submit that the trial judge's failure to address and determine each of their 63 deficiency claims requires a new trial for the deficiencies he failed to consider. We disagree. While a more extensive treatment of the deficiency claim by the trial judge was merited, the lack of such analysis did not give rise to "some substantial wrong or miscarriage of justice" that would permit us to order a new

trial: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6). That is because of the state of the record in this case.

[15] We are not persuaded that the appellants placed before the trial judge the evidence needed to determine the deficiency claim. As Mr. Blaney made clear in his report, he was retained to assess the "estimated costs required to correct a list of alleged deficiencies that you have provided to us." The "you" to which Mr. Blaney referred was the appellants' former counsel, WeirFoulds LLP.

[16] The list of alleged deficiencies provided to Mr. Blaney by trial counsel was marked as Ex. 31 during Mr. Blaney's evidence. Although it identifies deficiencies, it does not provide any information about when a specific deficiency appeared. Mr. Blaney made two site visits, but only in 2016, almost a decade after the dispute between the parties emerged.

[17] In his report, Mr. Blaney wrote that he had been asked to provide an opinion on (i) "[t]he cost of performing rectification work with respect to the provided list of alleged deficiency/warranty repair item" and (ii) "[w]hether the costs of the work above would have been the same if performed between March of 2007 and December of 2008" (emphasis added).

[18] It is patent from the scope of work described in the Blaney Report that Mr. Blaney's mandate did not include offering an opinion on whether any of the deficiencies listed in his appendix appeared prior to or during the one-year period

covered by the warranty in s. 15.2 of the Contract. At the hearing of the appeal, appellants' counsel acknowledged that the record did not contain any evidence that assigned those deficiency items to G.E.S.; the appellants were simply relying on inferences drawn from the Blaney Report.

[19] In our view, the absence of evidence to establish whether a given deficiency appeared prior to or during the one-year contractual warranty period and therefore was covered by the warranty means that the trial judge's failure to deal with all 63 alleged deficiencies did not result in some substantial wrong or miscarriage of justice.

FIDUCIARY DUTY CLAIM

[20] As to the appellants' submission that the trial judge erred in dismissing their claim for breach of fiduciary duty, when his reasons are read as a whole we are not persuaded that any such error was committed.

The claim as pleaded

[21] In her May 4, 2007 Statement of Claim alleging a breach of the Contract (Action 07-CV-332316PD2), Ms. Krieser described G.E.S. and her husband, George, as her agents: paras. 8, 14, and 17. Her statement of claim pleaded that "George negotiated and administered the Construction Management Contract on behalf of Shari, as her agent": para. 17. She further pleaded that both "Seligman

and G.E.S., were fiduciaries of Shari and her agent George, and owed each of them the duty of a fiduciary": para. 18.

[22] Ms. Krieser further alleged that the Contract contained several implied terms, including an implied term that Seligman and G.E.S. "would act at all times in the interests of Shari, and would not prefer their own interests to hers" and they "would throughout act loyally to Shari." Paragraph 18 pleaded the nature of the alleged fiduciary relationship:

> The Construction Management Contract or G.E.S.'s work created a relationship between Shari and G.E.S. wherein G.E.S. would be a trustee and Shari the beneficiary for the due performance of the services under the Construction Management Contract and to deal with all funds provided by Shari as hereinafter pleaded for construction of the House.

[23] Finally, Ms. Krieser's pleading alleged that G.E.S. and Seligman did not properly perform the Contract but "instead, by means of the wrongful conduct hereafter pleaded, breached the Construction Management Contract, and breached their respective duties as agents, fiduciaries, and trustees of Shari, all as more particularly pleaded hereafter." Her pleading then went on to identify the wrongful conduct of G.E.S. as (i) its failure to keep proper accounts for the work performed, (ii) rendering improper invoices for the work performed by the site supervisor, (iii) inducing contractors not to honour their warranties thereby causing work to be left unfinished, (iv) billing the Kreisers for work performed at other construction sites, (v) misuse of construction funds, and (vi) obtaining warranties

only in favour of G.E.S., not Ms. Kreiser. The latter allegation was the only one expressly pleaded as being contrary to the fiduciary duties owed by G.E.S.

The claim as presented to the trial judge

[24] Fifteen years after Ms. Krieser issued her claim, the trial commenced. At its start, the Kriesers filed a list of “Issues for Trial” that identified ten issues, none of which involved a claim for breach of fiduciary duty. Instead, they described as Issue 5 whether Seligman or G.E.S. were “culpable for a breach of the duty of Good Faith Performance of the contract with the Plaintiff?” However, by the time of their written closing submissions, the Kriesers advanced claims for both breach of good faith and honest performance, as well as breach of fiduciary duty.

[25] In their written closing submissions, the Kriesers submitted that the Contract designated G.E.S. as Ms. Krieser’s agent and that Seligman held himself out as her agent when he signed contracts with the trades. This, the Kriesers argued, gave rise to a *per se* fiduciary relationship between G.E.S. and themselves. Alternatively, they argued that an *ad hoc* fiduciary relationship existed in which G.E.S. undertook to act in their best interests, as evidenced by the control over the project granted to G.E.S. by the Contract and the reliance the Kriesers placed on G.E.S. to complete the construction of their house.

[26] The Kriesers’ written closing submissions alleged that Seligman and G.E.S. breached their fiduciary duty through several types of conduct: (i) improper billing;

(ii) preventing trades from returning to the site to perform servicing or maintenance; (iii) charging a management fee for landscaping work and the spa without the plaintiff's agreement; and (iv) dishonest conduct, including transferring doors and a gate to another construction site: Closing Submissions of the Plaintiff, para. 301. The Kriesers sought an order that Seligman and G.E.S. disgorge profits and benefits obtained in the amount of $135,000.

Analysis

[27] The appellants submit the trial judge failed to address their claim for breach of fiduciary duty as he dismissed their claim with one brief sentence in the section of his reasons headed "Good Faith and Honesty": "On this basis, I also find no fiduciary relationship arose": at para. 93. In their factum, the appellants contend that the trial judge did not meaningfully analyze the alleged breaches of fiduciary duty after finding that no fiduciary duty existed.

[28] We disagree. When the trial judge's reasons are read as a whole, as they must be, it is apparent that at various points in his reasons the trial judge dealt with the key aspects of the appellants' breach of fiduciary duty claim.

[29] First, the trial judge's placement of his dismissal of the breach of fiduciary duty claim in the section of his reasons dealing with "Duty of Good Faith and Honesty" is understandable given the way the appellants framed the issues for trial and presented their final argument.

[30] In that section of his reasons, the trial judge directly dealt with the key allegation of the appellants: namely, that the Contract and dealings between the parties created a fiduciary relationship between G.E.S./Seligman and Ms. Krieser – either by their designation as her agent under the Contract or by way of an undertaking in which they agreed to act in her best interests. The trial judge rejected that submission stating, at paras. 90-93:

> The Kriesers raise this issue in submissions and relied on the reasons of the Supreme Court of Canada decision being *Bhasin v. Hrynew*, 2014 SCC 71 and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.
>
> I reject that the conduct of Greg Seligman in his role as the owner of both G.E.S. or Greenstone was of a nature that equated the conduct that occurred in those decisions. Both parties in this dispute acted in their own best interests. To that end, I would adopt the statements in *Bhasin v. Hrynew, supra* (at paragraph 70) "The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest". That paragraph concludes and I am guided by "The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties".
>
> To the contrary, I find George Krieser's unilateral decision to determine what amounts he would pay and when closer to the type of conduct requiring judicial intervention as considered in these Supreme Court of Canada's decision.

[31] That then led the trial judge to conclude, in para. 93, that "[o]n this basis, I also find no fiduciary relationship arose."

[32] While that statement was more conclusory than explanatory, elsewhere in his reasons the trial judge examined and assessed the conduct by G.E.S. and Seligman that the appellants, at para. 301 of their written closing submissions, had alleged was wrongful and in breach of the respondents' fiduciary duty.

The improper billing allegation

[33] The trial judge accepted the evidence of G.E.S. and Seligman about the state of the accounts between the parties holding, at paras. 81 and 82:

> The contract was negotiated between the parties. The Kriesers had their own lawyer review the terms and provide input as to changes requested. The contract contained clear statements of when invoices for work performed were to be paid (Clauses 3.3 and 4.1), the rates which the Kriesers agreed to pay for a G.E.S. Supervisor and Labourers (Clause 5.1 – Appendix C) and an entire agreement provision (Clause 18.6). Pursuant to Clause 12.1, this undermines the claim by G.E.S. for payment of the additional management fee of $36,607.96 despite my accepting Greg Seligman's evidence over that of George Krieser that George Krieser agreed to pay same. That claim is dismissed.
>
> As a result, I find in favour of G.E.S. for the outstanding amount as set out in the Statement of Account (Exhibit 19, tab 2) subject to deductions detailed below.

The spa allegation

[34] The appellants argued the respondents charged a management fee for the spa without their approval. The trial judge rejected that argument; he found the appellants agreed to the fee, holding, at paras. 25 and 26:

> During the construction, a decision was made to have the whirlpool and spa become part of the interior of the house located on the upper level of the basement. This change was so significant that it required Committee of Adjustment approval which does not appear to have occurred until early 2006 given the first invoice with regard to the spa from Bonavista Pools was dated February 21, 2006 (Exhibit 16, Tab 2). Greg Seligman's evidence was this change was made one year after construction started. Greg Seligman testified this was not part of the Construction Management Contract and confirmed same with George Krieser and which George Krieser approved (Trial Transcript, January 31, 2023 at pages 23-24). The additional cost of this modification was about $360,000 and this is consistent with G.E.S Construction Spa Management's ten percent management fee invoice dated May 2, 2007 for $36,607.96.
>
> George Krieser disputed his agreement to pay that amount at trial. In this regard, I prefer and accept the evidence of Greg Seligman. However, no amendment was made to the Construction Management Contract to reflect same.

The interference with the trades allegation

[35] The trial judge rejected the appellants' allegation that G.E.S. prevented trades from returning to the house to provide follow-up servicing and maintenance: at paras. 73-79. He stated, at para. 97:

> The Kriesers maintain that Greg Seligman prevented trades from returning to their home to complete or service work done by them after March, 2007. The evidence, summarized above is to the contrary.

The dishonest conduct allegation

[36] Finally, the trial judge rejected the appellants' submission that Seligman acted in a fraudulent or dishonest manner: at para. 89.

[37] When the reasons are read in their entirety, together with the provisions of the Contract, we are not persuaded that the trial judge erred in dismissing the appellants' breach of fiduciary duty claim.

LEAVE TO APPEAL THE COST AWARD

[38] The appellants also seek leave to appeal the trial judge's award of costs in the amount of $477,703.14 in favour of the respondents. We are not persuaded that the appellants have demonstrated any error in principle or unreasonableness in the trial judge's cost award. He gave detailed reasons explaining how he exercised his discretion in arriving at the cost award. His discretionary decision is entitled to deference.

DISPOSITION

[39] For these reasons, we dismiss the appeal and deny leave to appeal costs. The parties agreed that the successful party would be entitled to its costs of the appeal fixed in the amount of $35,000, inclusive of disbursements and applicable

taxes. Accordingly, we order the appellants to pay the respondents that amount of costs.

"P. Lauwers J.A."
"David Brown J.A."
"S. Coroza J.A."