CITATION: JCL Concrete Pumping Ltd. v. SEMA Railway Structures Inc., 2024 ONSC 6419
COURT FILE NOS.: CV-22-685680 and CV-22-685681
DATE: 2024 11 19

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

B E T W E E N:	
JCL CONCRETE PUMPING LIMITED Plaintiff	R.C. Belsito, *for the plaintiff*
- and -	
SEMA RAILWAY STRUCTURES INC. and METROLINX Defendants	T. Obradovic, *for the defendant, SEMA Railway Structures Inc.*
A N D B E T W E E N:	
ONTARIO TRUCKING AND DISPOSAL LTD. Plaintiff	R.C. Belsito, *for the plaintiff*
- and -	
SEMA RAILWAY STRUCTURES INC. and METROLINX Defendants	T. Obradovic, *for the defendant, SEMA Railway Structures Inc.*
	HEARD: April 9-11, 2024 (remotely)

REASONS FOR JUDGMENT

Robinson A.J.

OVERVIEW

[1] These two lien actions in the reference before me arise from bridge rehabilitation work performed to a railway carrying bridge over a portion of the Rouge River, which divides Pickering

and Toronto. Metrolinx contracted SEMA Railway Structures Inc. ("SEMA") to perform the work, which took place over a two-day period on the weekend of April 23-24, 2022. Metrolinx shut down all railway traffic for the weekend to facilitate SEMA's work.

[2] SEMA's work included removing the original masonry back walls constructed at the approaches and embankments on each side of the bridge and replacing them with new precast concrete walls. SEMA's position is that its work required the supply and placement of Granular B Type II aggregate material as both sub-ballast and backfill.

[3] SEMA issued a single purchase order to "JCL Group Inc." to supply required stone material and aggregate as well as a stone slinger truck and telebelt truck to convey the delivered aggregate to the required locations. Ontario Trucking and Disposal Ltd. ("OTD") supplied the stone material and aggregate. JCL Concrete Pumping Limited ("JCL Concrete") supplied the rental equipment.

[4] The relationship between SEMA, JCL Concrete, and OTD on the facts of this case is somewhat unique. There is no dispute that SEMA's representative dealt with an individual who is involved with JCL Concrete and OTD in negotiating the supply of stone material and rental equipment for the project. There is also no dispute that SEMA issued a purchase order for that supply. There is equally no dispute that JCL Concrete and OTD were ultimately the actual suppliers of the materials and equipment contemplated by the purchase order. However, there is disagreement over what contracts were entered into and the parties to those contracts. SEMA's position is that it contracted with JCL Group Inc. JCL Concrete and OTD argue that I should find two separate contracts: one with each of them.

[5] Ultimately, the supplied aggregate material was rejected by Metrolinx and SEMA. Replacement Granular B Type II aggregate was sourced and supplied. The plaintiffs argue that they were given no real opportunity to address SEMA's concerns with the supplied aggregate and that SEMA wrongly continued to accept aggregate deliveries despite its concerns. SEMA disagrees.

[6] At the core of the parties' dispute is the legal relationship, if any, between SEMA, JCL Concrete, and OTD and, specifically, the impact of SEMA's purchase order being issued to "JCL Group Inc." The other main dispute is whether the aggregate material requested by SEMA had to comply with the requirements for Granular B Type II aggregate as set out in Ontario Provincial Standard Specification 1010 ("OPSS 1010"). The parties' agreed statement of facts confirms that OPSS 1010 is an industry standard requirement for Granular B Type II aggregate. SEMA argues that compliance with OPSS 1010 specifications for composition of Granular B Type II aggregate was required. The plaintiffs disagree, arguing that there was no specified requirement for aggregate as per OPSS 1010.

[7] JCL Concrete preserved and perfected a lien for $29,082.58 for a claimed supply of "concrete pumping", although at trial the amount was pursued for supply of the slinger and telebelt truck rentals. OTD preserved and perfected a lien for $21,657.94 for delivery of Granular B Type II aggregate. SEMA asserts a set-off against both claims for the sum of $53,865.51 in costs and expenses arising from the alleged non-conforming aggregate.

[8] Having considered the evidence and legal arguments, I find that there was no contract formed between either of the plaintiffs and SEMA. Since both plaintiffs withdrew their claims in *quantum meruit* and unjust enrichment prior to trial, I find no remaining legal basis for judgment against SEMA in favour of either JCL Concrete or OTD. Absent a contract with SEMA or a claim in *quantum meruit*, I also find that neither plaintiff is entitled to a lien under the *Construction Act*, RSO 1990, c C.30.

[9] I am accordingly dismissing both of the plaintiffs' actions, discharging their liens, and ordering the return of the lien security previously posted by SEMA. I am also dismissing SEMA's set-off claim against the plaintiffs, which SEMA conceded would fail if I found that no contract was formed.

ISSUES

[10] In advance of trial, the parties exchanged and submitted a summary of their positions on trial issues. Having considered the issues as framed by the parties and how the trial unfolded, I distill the disputed issues in this reference to the following:

(a) Was a contract formed between SEMA and JCL Concrete and/or OTD?

(b) If a contract was formed, on what terms? Specifically, was it a requirement that the aggregate material to be supplied comply with the specifications for Granular B Type II aggregate in OPSS 1010?

(c) If a contract was formed, then who breached the contract? Specifically, did the supplied aggregate comply with the specifications for Granular B Type II aggregate in OPSS 1010?

(d) If there was no contract between SEMA and either JCL Concrete or OTD, then do JCL Concrete or OTD have any non-contractual basis to support judgment against SEMA?

(e) Are JCL Concrete or OTD entitled to a lien under the *Construction Act*?

(f) Is SEMA entitled to set-off for its expenses arising from supply of the allegedly non-conforming aggregate? If so, were those expenses properly mitigated?

ANALYSIS

Issue 1: *Was a contract formed between SEMA and JCL Concrete and/or OTD?*

(a) Relevant legal framework

[11] I have discussed the law around contract formation in my prior decision in *Bellsam Contracting Limited v. Torgerson*, 2023 ONSC 468. My prior summary of the law captures the legal principles in the cases put before me at this trial.

[12] An enforceable contract between parties has five elements: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship. A contract will be found where there is an offer by one party accepted by the other with the intention of creating a legal relationship, which is supported by consideration: *Bellsam, supra* at para. 35.

[13] Determining whether a concluded agreement exists does not depend the actual state of mind of one of the parties or on evidence of one party's subjective intention: *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894 at para. 103. Instead, it is assessed on an objective standard. The court will examine how each party's conduct would appear to a reasonable person in the position of the other party. In deciding if a contractual relationship existed, the court must examine the factual matrix between the parties. Ultimately, it does not matter that one party may have had no intention to enter a legally binding contract. Rather, what matters is whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Bellsam, supra* at paras. 36-37.

[14] It is important to remember that the party making an offer confers on the offeree the power to accept that offer. Certain actions that might be viewed subjectively by one party as an offer may be nothing more than an "invitation to treat" or an "invitation to make an offer". The understanding of the parties is important in deciding whether an offer that is capable of acceptance has been made. Mutual assent is not required, only a manifestation of mutual consent. Accepting an offer that is reasonably understood to be an offer will form a contract: *Eltaib v. Air Canada Vacations*, 2010 ONSC 834 at paras. 25-26.

(b) Was a contract formed with either JCL Concrete or OTD?

[15] The plaintiffs have the evidentiary onus of proving their claims. Since SEMA denies having any contract with either JCL Concrete or OTD, the plaintiffs accordingly have the evidentiary burden of proving that SEMA did enter into contracts with each of them.

[16] There is no dispute over the factual circumstances leading to SEMA issuing its purchase order and the delivery of aggregate and the equipment rentals. Many facts have been agreed and are set out in the parties' agreed statement of facts. The parties dispute is largely focused on the legal characterization of the underlying events and interactions.

[17] Communications about the potential supply of stone material and equipment were all between Jean-Phillipe Poirier, a supervisor for SEMA on the project, and Santo Costabile. Mr. Costabile identified himself in his trial affidavit and during cross-examination as the manager of JCL Concrete, but his signature in emails sent at the material times lists him as "Manager, JCL Group Inc."

[18] Jean-Phillipe Poirier was directed by Zain Jessani, a senior supervisor with SEMA, to source necessary Granular B Type II aggregate material for the project. Mr. Poirier was originally going to source it from Brock Aggregates. A telebelt truck was also required to move the aggregate. Undisputed evidence at trial is that Santo Costabile met with Mr. Poirier and another SEMA representative on site to discuss rental of a telebelt truck. It is Mr. Poirier's evidence that,

during the meeting, Mr. Costabile proposed that, in addition to renting their stone slinger truck and telebelt truck, SEMA should also purchase aggregate material from them for the west side of the railway bridge, which would help give SEMA the best pricing possible.

[19] Between April 8 and 12, 2022, Mr. Poirier and Mr. Costabile exchanged text messages and emails about SEMA's needs. During those exchanges, Mr. Costabile emailed Mr. Poirier two price lists for stone material and telebelt rentals. The former was on the letterhead of OTD. The latter was on the letterhead of JCL Concrete.

[20] On April 13-14, 2022, certain limestone material was delivered to the site. OTD issued two modest invoices for the supply: one for $2,521.53 and another for $664.18.

[21] On April 15, 2022, Zain Jessani from SEMA prepared a purchase order for telebelt rental and granular deliveries to "JCL Group Inc." It lists Santo Costabile as the contact person and specifically refers to supply of "Granular B type 2 per Ton (triaxle)". The pricing correlates to the two price lists provided by Mr. Costabile to SEMA. The purchase order was e-mailed by Mr. Jessani to Mr. Costabile, who acknowledged receipt of the purchase order the next day by reply email stating simply, "Great. Thank you." Mr. Costabile also sent a separate text message to Jean-Phillippe Poirier to confirm receipt of the purchase order, stating as follows:

> Good morning.
> Got the po.
>
> I'll stop in on Monday to see you, and we can go over the schedule.
>
> Happy Easter.

[22] In response, Mr. Poirier sought confirmation that "the granular" would be delivered on Monday morning. Mr. Costabile replied, "Yes sir".

[23] Two days later, on April 18, 2022, Mr. Costabile arranged for delivery of aggregate material to the project site. A telebelt truck and slinger truck were also provided to the site for use by SEMA.

[24] SEMA takes the position that the issued purchase order is the governing contract document. SEMA argues that it entered into a single contract with JCL Group Inc. for the supply of the services and materials, including the required aggregate and equipment rentals. The fact that the contractual supply was ultimately fulfilled by JCL Concrete and OTD does not change that there was no contract with either of them.

[25] JCL Concrete and OTD argue that SEMA's unilateral decision to issue the purchase order to JCL Group Inc. was a misnomer and that there were two contracts: one between SEMA and JCL Concrete and another between SEMA and OTD. Their position is that the purchase order is not the governing document. They do not argue that either or both of JCL Concrete and OTD operate as "JCL Group Inc." Rather, they argue that the purchase order names an incorrect party that is an unrelated entity to JCL Concrete and OTD with no common ownership or control. They submit that JCL Group Inc. thereby cannot have been the contracting party. They point to their price lists for services and materials sent to SEMA by Santo Costabile as forming the basis of the

pricing agreed between the parties, which they emphasize are clearly on letterhead for JCL Concrete and OTD.

[26] Contract formation starts with an offer made by one party to another that is objectively reasonably understood to be capable of acceptance. The plaintiffs' theory of the case requires me to find that, on a balance of probabilities, both JCL Concrete and OTD objectively made offers to SEMA that were accepted or that SEMA objectively made an offer to JCL Concrete and OTD that they accepted.

[27] A central factual dispute is on whose behalf Santo Costabile was objectively acting when dealing with Jean-Phillippe Poirier of SEMA prior to the purchase order being issued: on behalf of JCL Concrete and OTD, or on behalf of "JCL Group Inc." As discussed below, I reject the plaintiffs' arguments that SEMA ought to have known that JCL Group Inc. was not a proper party and that SEMA would be contracting directly with JCL Concrete and OTD. On a balance of probabilities, I find that, objectively, Santo Costabile held himself out as acting on behalf of JCL Group Inc. and that SEMA reasonably understood that it was dealing with JCL Group Inc. for the supply of stone material and equipment for the project. On the record before me, I find that the only offers capable of being accepted were objectively made by or to JCL Group Inc.

[28] As a preliminary matter, SEMA challenges the weight that should be given to the evidence from the plaintiffs' main witnesses, arguing that the way their evidence was tendered is improper. I agree that the framing of their affidavit evidence is problematic and does impact the weight of both that evidence and the testimony of those witnesses at trial.

[29] The plaintiffs tendered three primary witness affidavits: one from Laura Sciacca, the president of JCL Concrete and a director of OTD; one from Santo Costabile, the manager of JCL Concrete; and one from Claudio Sciacca, the president of OTD. The primary evidence was given by Ms. Sciacca, who swore a main affidavit that was adopted by the other two witnesses. Mr. Sciacca's affidavit fully adopts Ms. Sciacca's evidence with no additions. Mr. Costabile's affidavit similarly adopts Ms. Sciacca's evidence, with two additional paragraphs of evidence.

[30] Most of Laura Sciacca's affidavit is hearsay. It addresses matters for which she has no direct or personal knowledge, as confirmed during her cross-examination. Importantly, she tenders evidence on text and email communications to which she was not a party that deal with central disputed issues in this litigation. That includes key communications between Santo Costabile and Jean-Phillippe Poirier relevant to the issue of contract formation and other communications between Claudio Sciacca and Zain Jessani on the issue of composition of the supplied Granular B Type II aggregate. Many of the paragraphs in Ms. Sciacca's affidavit also contain improper argument.

[31] The plaintiffs submit that there should be no concern with hearsay because both Santo Costabile and Claudio Sciacca support and adopt Laura Sciacca's evidence. Having a primary affidavit from one witness adopted by other witnesses is argued to be a matter of proportionality in preparing the trial affidavits. The plaintiffs thereby submit that there should be no impact on the weight of the evidence of these three witnesses. I disagree.

[32] In Schedule A to Trial Directions #1, I set out various specific directions for trial materials. Paragraph 1(a) states expressly, "All affidavits must comply with Rule 4.06 of the *Rules of Civil Procedure* and the rules of trial evidence (such as the rules against hearsay, opinion evidence from a nonexpert witness, etc.)." Subrule 4.06(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 provides that an affidavit must be confined to statements of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court.

[33] In my prior decision in *Schindler Elevator Corporation v. Walsh Construction Company of Canada*, 2020 ONSC 433, I discussed the distinction between trial affidavit and other affidavits. I explained as follows at paras. 5-6:

> [5] Trials are distinct from motions or applications, where rules of evidence are often relaxed. For example, Rule 39.01(4) permits statements of a deponent's information and belief in affidavits tendered for use on a motion. To similar effect is Rule 39.01(5), which permits statements of a deponent's information and belief with respect to facts that are not contentious in affidavits tendered for use on an application. However, evidence that may otherwise be admissible in affidavits tendered on a motion or an application is generally only admissible at a trial if that evidence complies with the rules of evidence. It is for that reason that I made the order at paragraph 6b) in Trial Directions #7. That order expressly provides, "Affidavits of evidence in chief must comply with the rules of trial evidence. Notably, hearsay is not permitted."
>
> [6] Simply put, if a witness is not permitted by the rules of evidence to make particular statements during *viva voce* testimony at trial, s/he also cannot make those statements in affidavits tendered in lieu of *viva voce* evidence-in-chief.

[34] The more recent decision of *Lumberjacks Tree Service v. 407 East Construction General Partnership*, 2024 ONSC 1744, includes similar commentary on the purpose of trial affidavits. Specifically, at para. 5, Sutherland J. observed that trial affidavits are fundamentally different than affidavits used on motions and applications. They are used in lieu of oral testimony given in direct examination at trial, so the laws of evidence must be strictly complied with, such as the law of hearsay. To that end, it is important that trial affidavits be drafted with the purpose that the affidavits are testimony given at a trial.

[35] Laura Sciacca's' affidavit contains statements that are contrary to both my direction for affidavits and rule 4.06 of the *Rules of Civil Procedure*. She has given evidence on matters for which she has no personal knowledge. The fact that Santo Costabile and Claudio Sciacca adopt her evidence does not improve it. It is not their account of the dealings and occurrences that involved them. Moreover, they are also adopting portions of Ms. Sciacca's evidence on matters for which they similarly have no personal knowledge or involvement. Each of their affidavits ought to have been limited to outlining their personal knowledge and dealings.

[36] I reject the proportionality argument advanced by the plaintiffs for a single lead affidavit adopted by other witnesses. In my view, there is no reason why one trial witness should be providing hearsay evidence on transactions, communications, and occurrences involving another witness for which the affiant witness has no personal knowledge or involvement. Such paragraphs

should have been put in the appropriate witnesses' affidavit and revised, as necessary, to reflect their own personal observations and recollections of the relevant events. Put simply, in an ordinary trial, it would clearly be improper for one witness to take the stand and simply state, "I agree with the last witness," as their sole evidence in chief.

[37] As a result of the foregoing, I have generally preferred the evidence of Jean Philippe Poirier and Zain Jessani to the evidence of the plaintiffs' witnesses on dealings between representatives of SEMA and the plaintiffs. Both Mr. Poirier and Mr. Jessani gave direct evidence on their own involvement.

[38] Based on the evidence at trial, no one other than Santo Costabile had any dealings with SEMA on behalf of JCL Concrete or OTD for the bridge rehabilitation project prior to SEMA's purchase order being issued. As already noted, Mr. Costabile's email signature identified him as "Manager, JCL Group Inc." Importantly, there is no evidence before me, including from Santo Costabile's own testimony, supporting that he ever drew attention to distinctions between the related corporate entities or that he identified that different entities would be responsible for supplying the aggregate and the trucks.

[39] During cross-examination, Mr. Poirier was asked directly if it was his understanding when receiving the separate price lists from JCL Concrete and OTD that aggregate would be supplied by one company and the telebelt truck would be supplied by another company. Mr. Poirier testified that he was dealing with and making arrangements through one person: Santo Costabile. Mr. Poirier confirmed that he "did not pay attention" to where the material was coming from or if different companies would be supplying the material and equipment. He forwarded the price lists to Zain Jessani and Mr. Jessani was responsible for putting the purchase order together. Mr. Poirier confirmed that he was not involved in preparing the purchase order and did not recall whether he asked Santo Costabile to whom the purchase order should be addressed. Mr. Poirier was not asked about whether Mr. Costabile ever identified any differences between the companies.

[40] I accept Mr. Poirier's testimony. It is consistent with the text messages and emails exchanged between him and Mr. Costabile. The text messages deal with both the material supply and the equipment rentals together. There is no indication in any of them that there would be separate supplies or that the supply would require separate purchase orders or contracts. Similarly, nothing in Mr. Costabile's emails suggests that SEMA was or would be dealing with multiple entities.

[41] Zain Jessani's testimony is consistent that he understood Santo Costabile to be from JCL Group Inc., which he maintained during cross-examination. Mr. Jessani testified that he made out the purchase order to JCL Group Inc. based on Mr. Costabile's email and other documents referring to that entity, which gave him confidence that it was an umbrella corporation. When challenged about the price lists, Mr. Jessani maintained his understanding that SEMA's contract was with JCL Group Inc., stating that there were multiple sister companies identified in Mr. Costabile's email and it was not his responsibility to know how the organizational structure worked between the sister companies.

[42] Objectively, the text messages and emails exchanged with Santo Costabile all support that SEMA's representatives were dealing with Mr. Costabile in his capacity as the manager of JCL Group Inc. That includes the failure of Mr. Costabile (or anyone else) to raise concerns about the purchase order having been addressed to "JCL Group Inc." Mr. Costabile simply acknowledged receipt of the single purchase order, which clearly included both material supply and equipment rental, and proceeded to arrange the supply.

[43] Several pieces of evidence also support that it was objectively reasonable for SEMA to have believed that it was dealing and contracting with JCL Group Inc. Notably, the plaintiffs' own documents identify "JCL Group Inc." as a related entity in the same family of companies as the plaintiffs, including the following:

(a) As already discussed, Santo Costabile's email signature specifically identifies him as "Manger, JCL Group Inc.";

(b) Mr. Costabile's email address is "@jclgroup.ca";

(c) A logo for "JCL Group Inc." is on the delivery tickets for the stone material supplied to this project alongside logos for JCL Concrete, OTD, and other entities. That includes the delivery tickets for the material supplied by OTD prior to the purchase order being issued; and

(d) Invoices from OTD and JCL Concrete sent both prior to and after the purchase order was issued refer to a website of "www.jclgroup.ca".

[44] During cross-examination, Mr. Costabile tried to characterize the reference to "JCL Group Inc." in his email signature as referring to the "JCL group of companies". However, Mr. Costabile confirmed that he is not the manger for all companies in the group. Significantly, he specifically acknowledged in cross-examination that he was not a manager of OTD and has given no evidence about having any specific role with that company. There is no evidence before me supporting a finding that Mr. Costabile had any position with or authority on behalf of OTD.

[45] In my view, Mr. Costabile's explanation is convenient and lacks credibility, particularly when coupled with the various documents available to SEMA prior to issuing the purchase order that specifically note "JCL Group Inc." on them. The plaintiffs have failed to provide any cogent and convincing explanation for why Mr. Costabile was identified as "Manager, JCL Group Inc." in his emails, particularly given their position at trial that there was no such company affiliated with JCL Concrete and OTD. Laura Sciacca's testimony suggests only that it was a mistake. However, the suggestion that it was only intended to refer to the group of companies is inconsistent with the admission by Mr. Costabile that he was not a manager of all companies in the group, which his email signature reasonably represented him to be.

[46] The plaintiffs rely heavily on their price lists, which are on letterhead of JCL Concrete and OTD, and the invoices from OTD for limestone supply to SEMA that were issued on April 13 and 14, 2022, prior to the purchase order being issued on April 15, 2022. In my view, these are circumstantial pieces of evidence in context of the overall dealings.

[47] I acknowledge that the price lists, which were used in preparing the purchase order, do not indicate "JCL Group Inc." and are solely on the letterheads of JCL Concrete and OTD. However, those facts cannot be divorced from the circumstances under which they were provided to SEMA. Notably, they were provided to Jean-Phillipe Poirier under cover of an email from Santo Costabile, in which he identified himself as "Manager, JCL Group Inc." His email is brief and says nothing about JCL Concrete and OTD. It states only as follows:

> Good morning JP.
>
> Attached are the 2 price lists..
>
> Stone and telebelt.
>
> I have also CCed Sarah in our office who will follow up with a credit app
>
> Thank you
>
> Santo Costabile
>
> Manager
>
> JCL Group Inc

[48] The document filenames for the two price lists sent are, in my view, important. The pdf price lists were forwarded by Jean-Phillippe Poirier to Zain Jessani by email. That email is appended to Zain Jessani's affidavit, which identifies the two files as "JCL QUOTE sheet - SEMA.pdf" and "JCL PUMP NEW - SEMA railway.pdf". Both refer to "JCL" despite the plaintiffs' position that one was in respect of OTD's material supply. Both price lists are also signed by Santo Costabile, the "Manager, JCL Group Inc." per the covering email. Given these contemporaneous facts, the letterhead on the price lists is far from being dipositive on the objective understanding of the parties.

[49] The credit application referenced in Mr. Costabile's email was not tendered by any of the plaintiffs' witnesses in their evidence in chief. It was introduced during the cross-examination of Jean-Phillippe Poirier, together with a covering email from Sarah Jewell. Ms. Jewell is identified in the email as being with the credit department of JCL Concrete and OTD, but was not called as a witness. Mr. Poirier testified that he did not recall receiving the email or credit application. He also did not know why it was not signed and returned. He testified that it would have been passed on to the supervisor.

[50] The credit application shows the logos of JCL Concrete and OTD. It does not refer to JCL Group Inc. In the body of the text, though, it refers to authorizing another company, Ontario Stone Slingers Ltd., to conduct a credit information search. Given Mr. Poirier's lack of recollection, the evidentiary value of the email and credit application is limited. There is no evidence from the plaintiffs on the document. There is similarly no evidence that anyone at SEMA reviewed or considered it, or even acknowledged that it did not refer to JCL Group Inc., at or around the time it was sent. It is undisputed that SEMA did not complete the credit application.

[51] In my view, SEMA's knowledge that the supply of stone material and rental equipment was coming from JCL Concrete and OTD is not material to whether, objectively, Jean-Phillippe Poirier of SEMA was reasonably dealing with Santo Costabile as a representative of JCL Group

Inc. A contractor may subcontract the supply of certain materials and equipment to a particular supplier with full knowledge that they will, in turn, be obtaining the contracted supply from third party suppliers. That knowledge does not create privity of contract between the contractor and the ultimate suppliers.

[52] With respect to the two invoices from OTD rendered before the purchase order was issued, they reflect a small part of the total stone material supplied. As already noted, they each refer to the website "www.jclgroup.ca". The related delivery tickets also note "JCL Group Inc." as one of the related companies. I am unconvinced that the fact that OTD invoiced SEMA for part of the stone material supply prior to the purchase order being issued materially changes my assessment of the objective evidence. It is, in my view, circumstantial evidence that does not override the totality of other evidence.

[53] The plaintiffs argue that SEMA ought to have clarified the proper contracting parties. I reject that argument. There is no cogent objective evidence supporting that Santo Costabile was acting on behalf of each of JCL Concrete and OTD separately. A single purchase order was issued by SEMA to one entity for the supply of all materials and equipment that the plaintiffs say was always to have been supplied by separate legal entities. Despite that position, neither Santo Costabile nor anyone else on behalf of JCL Concrete or OTD pointed out that there would be separate supplies from separate corporations, and that there should be separate purchase orders or contracts. Instead, Mr. Costabile acknowledged receipt of the purchase order identifying "JCL Group Inc." without comment on it.

[54] In support of their position that naming "JCL Group Inc." is an immaterial misnomer, the plaintiffs rely on *G.C. Rentals Ltd. v. Falco Steel Fabricators Inc.,* 2000 CarswellOnt 1040 (Div Ct) and *Stubbe's Precast Commercial Ltd. v. King & Columbia Inc.,* 2018 ONSC 995. Both are cases dealing with misnomer in the naming of a lien claimant. In my view, neither case assists the plaintiffs.

[55] In *G.C. Rentals Ltd.*, the Divisional Court overturned a decision of Master Sischy discharging two liens on the basis that the named lien claimant, which matched the name of the party as written in the agreements at issue, was a non-entity. Master Sischy held that the liens were thereby nullities. In granting the appeal, the Divisional Court held that the liens were not nullities and that there was a misnomer. Significant in the decision was that there was no evidence supporting that anyone was "misled, prejudiced or acted to his, her or its detriment" (para. 10) and, specifically, that the defendants themselves were not mislead and "knew that claims were being made against them by the 'other party' to the contract" (para. 11).

[56] *G.C. Rentals Ltd.* is distinguishable from the facts of this case. Unlike the named lien claimant in that case, JCL Group Inc. is an existing entity, just one that the plaintiffs say is not related to them. Moreover, there is evidence from SEMA's witnesses supporting an understanding that the contract was with JCL Group Inc.

[57] *Stubbe's Precast Commercial Ltd.* is also factually distinguishable. In that case, the lien claimant was incorrectly named with "Ltd." instead of "Inc." Like *G.C. Rentals Ltd.,* the named lien claimant was thereby a non-existent entity at the time that the claim for lien was registered.

Stubbe's Precast Commercial Ltd. was subsequently incorporated. Ultimately, the court dismissed the motion on the basis that "[b]oth parties knew with whom they were dealing."

[58] In this case, I am unconvinced by the plaintiffs' arguments that SEMA always knew with whom it was dealing. The separate legal personality of corporations is a fundamental principle of corporate law. SEMA's position is that it dealt and contracted with JCL Group Inc. The plaintiffs' position is that there were contracts with JCL Concrete and OTD. All three corporations are separate legal entities. The plaintiffs do not suggest otherwise. Laura Sciacca, the president of JCL Concrete and a director of OTD, gave evidence that the two entitles operate independently. However, the plaintiffs' argument would seem to require that those related entities be fluidly interchangeable given the manner in which Santo Costabile dealt with SEMA.

[59] In my view, this case is unlike *G.C. Rentals Ltd.* or *Stubbe's Precast Commercial Ltd.* There is no evidence before me that JCL Group Inc. does not exist. To the contrary, Laura Sciacca gave evidence that it is an existing company, just not one controlled by anyone operating JCL Concrete, OTD, or their related companies. However, no evidence was properly tendered at trial to corroborate that statement.

[60] JCL Concrete and OTD argue that it was obvious that JCL Group Inc. was not a corporation controlled by them. The only proper evidence before me supporting that argument is the cross-examination testimony of Laura Sciacca that JCL Group Inc. "isn't our company" and that it was an error to use that name. The plaintiffs sought to corroborate Ms. Sciacca's evidence in closing submissions by relying on the corporate profile report for JCL Group Inc., which was included in SEMA's document book. However, that document was not tendered at trial through any witness and is therefore not properly considered as part of the evidentiary record before me. I expressly advised counsel when marking the document books as exhibits that I would be considering only those documents put to witnesses, and that the remaining documents would not form part of the evidentiary record for trial.

[61] It would perhaps have been advisable for me, prior to closing submissions, to have clearly struck out the documents that had not been referenced in trial affidavits or put to a witness. However, the way in which the parties' document books would be marked and used at trial was clearly discussed at the time of entering them as exhibits and prior to any witness being called. In my view, there was no confusion that only documents that had been tendered into evidence by a witness or put to a witness on cross-examination would be considered.

[62] I also find it significant that the plaintiffs did not take the position that JCL Group Inc. is an unrelated entity to the plaintiffs until trial. Laura Sciacca's own trial affidavit states that Santo Costabile was the "manager of JCL Group Inc." That evidence stood until the first day of trial, at which time Ms. Sciacca corrected her affidavit prior to being cross-examined. She stated that it ought to have read "JCL Concrete Pumping Limited". However, although Ms. Sciacca corrected her affidavit, neither Mr. Costabile nor Claudio Sciacca was asked to clarify their affidavits. They continue to adopt the sworn statement that Mr. Costabile was a manager of JCL Group Inc.

[63] During cross-examination, Mr. Costabile confirmed that he agreed with everything stated about him in Laura Sciacca's affidavit. Although Mr. Costabile's own affidavit identifies him as

the manager of JCL Concrete, that does not necessarily preclude him from being a manager of both. The discrepancy was never reconciled in his testimony.

[64] JCL Concrete and OTD also rely heavily on the Divisional Court's comments in *G.C. Rentals Ltd.* about lack of prejudice. They point specifically to the lack of any evidence of prejudice to SEMA from naming "JCL Group Inc." on the purchase order. SEMA understood that it was contracting for the supply of aggregate and equipment. It received the supply of aggregate and equipment. There is a certain logic to the argument, but it ignores the factual matrix in *G.C. Rentals Ltd.*, which as already discussed is not the factual matrix in this case.

[65] Also, prejudice was discussed by the Divisional Court in context of s. 6 of the former *Construction Lien Act.* That section provides essentially that minor irregularities in instruments required by the legislation do not invalidate those instruments unless a person has been prejudiced by them, and then only to the extent of the prejudice suffered. It does not override established law on contract formation.

[66] No case law is before me supporting that the presence or lack of prejudice is properly a factor in deciding with whom a contract may have been formed, particularly where there is objective evidence supporting a finding that a defendant reasonably believed they were dealing with an existing non-party. That was not the factual situation in either *G.C. Rentals Ltd.* or *Stubbe's Precast Commercial Ltd.*, in both of which the named lien claimant was a non-entity (at least, in the latter case, at the time of lien preservation). The facts in both cases were such that there was no genuine confusion regarding the true contacting parties. I am unable to find, on a balance of probabilities, that the same is true here.

[67] To accept the plaintiffs' position that there were two separate contracts would require me to strain, if not contort, the evidence before me. I would need to ignore the singular way in which Santo Costabile communicated and dealt with Jean-Phillipe Poirier about the supply of both stone material and equipment. It would also require me to put undue weight on the fact that two separate price lists from JCL Concrete and OTD were provided to SEMA, despite the already-discussed circumstances surrounding delivery of those price lists and the blended way in which Mr. Costabile dealt with SEMA.

[68] On a balance of probabilities, I find that the evidence and surrounding circumstances all support that Mr. Costabile was objectively acting on behalf of JCL Group Inc. in negotiating the supply of both stone and aggregate. I find that he was reasonably understood by SEMA to be acting as such and not as a direct agent for either JCL Concrete or OTD. That objective understanding is significant when assessing who made or received an offer capable of being accepted. JCL Group Inc. is, in fact, an existing corporate entity. Based on the objective evidence, it was represented to be an affiliated corporation to JCL Concrete and OTD.

[69] There is disagreement about whether the price lists sent by Santo Costabile were an offer or simply invitations to treat. I need not decide that. If they were an offer, then my findings above support that it was an offer objectively made on behalf of JCL Group Inc. with respect to supply to be obtained from related corporations. If the price lists were not an offer, then SEMA's purchase

order was an offer issued to JCL Group Inc. In either case, the foregoing supports, and I find, that no offer capable of being accepted was made by or to JCL Concrete or OTD.

[70] That finding is dispositive of the contract formation issue. Without an offer that was objectively capable of being accepted being made either by or to JCL Concrete and OTD, there cannot have been a contract with either of them.

Issue 2: ***If a contract was formed with either of the plaintiffs, then what were the terms?***

[71] Given my finding above that there was no contract between SEMA and either JCL Concrete or OTD, I need not address the parties' arguments on the terms of the contract. That includes whether the contract required the supply of Granular B Type II aggregate in accordance with the specifications outlined in OPSS 1010.

[72] In my view, whether the supplied aggregate was actually or reasonably required to meet all specifications for Granular B Type II aggregate as set out in OPSS 1010, and whether it did meet those requirements, only needs to be decided if the plaintiffs have a contract or other legal basis to pursue SEMA. I have found that they do not have a contract and, as discussed below, I find that they have no other remaining cause of action against SEMA.

[73] For the above reasons, I am unconvinced that making findings on the Granular B Type II aggregate composition issue is necessary to a proper disposition of these actions. I thereby need to address the trial evidence on that issue, including the evidence of Binyam Haile Gebregziabher and Michael Szewczyk on behalf of SEMA, and of Anthony Ferritto on behalf of the plaintiffs. The evidence of those three witnesses was focused entirely on the Granular B Type II aggregate dispute.

Issue 3: ***If there was no contract with the plaintiffs, do they have another legal basis on which to pursue SEMA for judgment?***

[74] Issues in an action are framed by the pleadings. Although not cited by either side, the Court of Appeal has held that it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings: *Rodaro v. Royal Bank of Canada* (2002), 59 OR (3d) 74, 2002 CanLII 41834 (ON CA) at para 60.

[75] In their respective lien actions, JCL Concrete and OTD claim damages for breach of contract or, alternatively, in *quantum meruit* and unjust enrichment. No amendment to the claim was sought at or prior to trial. The plaintiffs have accordingly not pleaded any other cause of action or basis for a claim against SEMA.

[76] Each of JCL Concrete and OTD take the primary position that have direct contracts with SEMA. I have found that there were no such contracts. Nevertheless, where a plaintiff claiming a direct contract has failed to prove that contract, it may still seek to recover on a *quantum meruit* basis for the value of services and materials that it supplied.

[77] In the event that I found there was no contract (as I have), the plaintiffs argued in closing submissions that they should recover on the basis of *quantum meruit* and unjust enrichment, with their invoices and price lists used as a basis to fix the reasonable value of services and materials supplied. However, SEMA argues that I should not consider that argument since both JCL Concrete and OTD unequivocally withdrew their claims in *quantum meruit* prior to trial. I agree that they did. The withdrawal is set out in the agreed statement of trial issues and in the plaintiffs' statement of law.

[78] The language used in the joint statement of trial issues and the plaintiffs' statement of law is clear and unequivocal. In the statement of trial issues, issue no. 5 is identified as "Are JCL or OTD entitled to any amounts or damages on a *quantum meruit* or unjust enrichment basis?" The position of the plaintiffs is stated as follows (emphasis added):

> This claim was directed at Metrolinx which has since been discontinued. <u>This claim is withdrawn</u>.

[79] In the plaintiffs' statement of law, the *quantum meruit* or unjust enrichment issue is outlined with the same language. At para. 6, the plaintiffs submit as follows (emphasis added):

> This claim was directed at Metrolinx which claim has been discontinued. <u>Accordingly, this claim is withdrawn by the Plaintiffs</u>.

[80] During closing submissions, the plaintiffs sought essentially to rescind their withdrawal of their alternative claims in *quantum meruit* and unjust enrichment to argue recovery on that basis. I find that it would be procedurally unfair to SEMA for me to consider those claims. They had been clearly withdrawn prior to trial and no notice was given before conclusion of the evidentiary phase of trial that the plaintiffs would still be pursuing recovery on a *quantum meruit* basis in the alternative to a contract (or contracts) being found.

[81] Trial proceeded based on the alternative claims by JCL Concrete and OTD having been withdrawn. I accept SEMA's submissions that different questions may have been posed to witnesses and a different approach may have been taken at trial had SEMA known that *quantum meruit* was still being pursued.

[82] I acknowledge that there is no dispute that JCL Concrete and OTD were the parties who actually supplied the stone materials and rental equipment, for which they were not paid. It may, at first blush, seem inequitable to deny them the ability to argue recovery in *quantum meruit.* However, this is a case where the existence of a contract with the plaintiffs was squarely in issue and hotly contested. The purchase order was issued by SEMA to an entity that the plaintiffs argued was not the correct contracting party. There was no certainty that a contract with either plaintiff would be found. Nevertheless, for their own reasons, the plaintiffs opted to withdraw their claims in *quantum meruit* on the basis that they had been targeted solely at Metrolinx.

[83] The plaintiffs bear the evidentiary burden of proving their case at trial. The risk of withdrawing claims in *quantum meruit* and unjust enrichment when the existence of a contract was a core disputed issue properly falls on the plaintiffs who elected to withdraw them. Had the plaintiffs sought to revive those alternative claims prior to any witnesses being called, or possibly

even during ongoing witness examination by way of *voir dire*, the result may have been different. However, that did not occur.

[84] In my view, any unfairness to the plaintiffs from denying them leave to revive the *quantum meruit* and unjust enrichment claims during closing submissions is outweighed by the procedural unfairness and prejudice to SEMA of permitting such a revival after the conclusion of evidence, particularly in the context of summary lien proceedings.

Issue 4: ***Are JCL Concrete or OTD entitled to a lien under the Construction Act?***

[85] The right to a lien arises from s. 14 of the *Construction Act*, which provides that a person who supplies services or materials to an improvement for an owner, contractor or subcontractor has a lien upon the interest of the owner in the premises improved for the price of those services or materials. "Price" is a defined term in the act. The relevant definition is found in s. 1(1), which states as follows (excluding subsection (b), which does not apply on the facts of this case):

> "price" means,
>
> (a) the contract or subcontract price,
>
> (i) agreed on between the parties, or
>
> (ii) if no specific price has been agreed on between them, the actual market value of the services or materials that have been supplied to the improvement under the contract or subcontract, and

[86] "Contract" is defined to mean "the contract between the owner and the contractor, and includes any amendment to that contract." "Subcontract" is defined as "any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement."

[87] I have found that there was no subcontract between SEMA and either of the plaintiffs. The plaintiffs withdrew there claims in *quantum meruit* and unjust enrichment. No cogent argument was advanced at trial for how the plaintiffs are still entitled to a lien in the absence of a contract or a claim in *quantum meruit*. No case law is before me supporting a lien in such circumstances.

[88] The *Construction Act* requires a contract or quasi-contract relationship to support a lien. In my view, it would be contrary to the language and scheme of the *Construction Act* to find that a person having no contract or subcontract and no subsisting claim in *quantum meruit* to nevertheless have a valid lien. In my view, without either of them, there is no remaining basis upon which to find that the plaintiffs were entitled to a lien or to award judgment in their favour against SEMA.

[89] Given my finding on the contract issue and the plaintiffs' decision to withdraw their claims in *quantum meruit*, I accordingly find that neither of the plaintiffs is entitled to a lien. Their liens shall accordingly be discharged and the lien security posted for those liens shall be returned to SEMA.

<u>Issue 5:</u> Is SEMA entitled to set-off for its expenses arising from supply of the allegedly non-conforming aggregate?

[90] SEMA claims set-off against JCL Concrete and OTD under s. 17 of the *Construction Act* and s. 111 of the *Courts of Justice Act*, RSO 1990, c C.43. Specifically, SEMA asserts that it incurred $53,865.51 in costs and expenses arising from improper aggregate being supplied, namely $2,260 for testing, $17,760.49 to move and ultimately dispose of the aggregate, $16,807.25 in personnel costs, and $17,037.77 for replacement Granular B Type II aggregate material that complied with OPSS 1010.

[91] I need not address the set-off claim. SEMA agreed in closing submissions that its set-off claim would fall away if I were to find that no contract was formed with either plaintiff. Given that concession and my findings, I am dismissing SEMA's set-off claim.

CONCLUSION

[92] For the above reasons, the claims by JCL Concrete and OTD against SEMA are hereby dismissed. SEMA's set-off claims are also dismissed. I further order that the plaintiffs' respective liens be discharged and that the lien security previously posted by SEMA to vacate the liens be paid out of court to SEMA.

COSTS & REPORT

[93] The parties should make earnest efforts to resolve costs of the two actions themselves. If they cannot, then written submissions shall be exchanged and filed. Submissions shall not exceed five pages, excluding any attachments such as offers to settle and case law. Given the result, SEMA shall serve its costs submissions first by December 20, 2024. The plaintiffs shall serve responding submissions by January 24, 2025. SEMA shall be entitled to brief reply, if any, not exceeding two pages to be served within seven (7) days of being served with the plaintiffs' responding costs submissions. All costs submissions shall be submitted by email to my Assistant Trial Coordinator (ATC), Christine Meditskos, with proof of service.

[94] Both the *Construction Act* and the *Rules of Civil Procedure* require that the results of this trial be embodied in a report. I encourage the parties to discuss an appropriate form of draft report, which shall be filed with my ATC, in Word format, by the deadline for reply costs submissions. If the parties cannot agree on a form of report, then my ATC should be so advised and each side shall submit the version of the report that they propose. I will then settle the form of report following my decision on costs.

ASSOCIATE JUSTICE TODD ROBINSON

Released: November 19, 2024

CITATION: JCL Concrete Pumping Ltd. v. SEMA Railway Structures Inc., 2024 ONSC 6419
COURT FILE NOS.: CV-22-685680 & CV-22-685681
DATE: 2024 11 19

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:

JCL CONCRETE PUMPING LIMITED

Plaintiff

- and -

SEMA RAILWAY STRUCTURES INC. and METROLINX

Defendants

A N D B E T W E E N:

ONTARIO TRUCKING AND DISPOSAL LTD.

Plaintiff

- and -

SEMA RAILWAY STRUCTURES INC. and METROLINX

Defendants

REASONS FOR JUDGMENT

Associate Justice Todd Robinson

Released: November 19, 2024