SUPREME COURT OF NOVA SCOTIA
Citation: *Liteco v. Nova Scotia (Transportation and Infrastructure Renewal)*, 2017 NSSC 304

Date: 20171128
Docket: Hfx No. 432442
Registry: Halifax

Between:

Rexel Canada Electrical Inc., carrying on business as Liteco

Plaintiff

v.

Minister of Transportation and Infrastructure Renewal, representing Her Majesty the Queen in Right of the Province of Nova Scotia, Dora Construction Limited and Robert Barkhouse, carrying on business as R.W. Barkhouse Electrical Contracting, a sole proprietorship

Defendants

Decision

Judge: The Honourable Justice M. Heather Robertson

Heard: October 31, 2017, in Halifax, Nova Scotia

Counsel: Tim Hill, Q.C., and John Snow, for the Plaintiff (Rexel Canada Electrical Inc.)

Caitlin Regan-Cottreau for the Defendant (Dora Construction Limited)

Cory J. Withrow, for the Defendant (Robert Barkhouse)

Robertson, J:

[1] This is the Motion of Dora Construction Limited ("Dora") for the determination of two questions of law pursuant to *Civil Procedure Rule* 12.

[2] Rexal Canada Electrical Inc, carrying on business as Liteco, ("Liteco"), resists the application arguing that there are too many contested facts to proceed under Rule 12, characterizing the issues as "mixed fact and law."

[3] R.W. Barkhouse Electrical Contracting ("Barkhouse") supports Dora's application.

Background

[4] Dora was the general contractor for the construction of a Junior High School in New Glasgow, located at 93 Albert Street. Barkhouse, completed the electrical contract for Dora on the project and received all of its materials from the Plaintiff, Liteco, as required to carry out its contract.

[5] On condition of supplying the materials, Liteco required a Joint Cheque Payment Agreement signed by Barkhouse and Dora, where in all funds payable to Barkhouse for the projects were to be issued by Dora as joint cheques to Barkhouse and Liteco.

[6] The affidavit of Jamie Miles dated October 16, 2017, outlines the arrangement at para. 10 and Exhibit "T".

[7] The affidavit of Robert Barkhouse dated August 20, 2017, indicates that $1,379,072.60 was paid by Dora to Barkhouse for his project work (paras. 13 and 14). From those funds $743,422.58 was paid by Barkhouse to Liteco.

[8] Liteco allocated a significant portion of the project funds received from Barkhouse to unrelated accounts between Barkhouse and Liteco for other projects, instead of applying the funds to the accounts relating to the project. (See Miles affidavit of October 16, 2017, para. 11 and Exhibit "U"; and Leona Penney's affidavit dated October 23, 2017, Exhibit "F".)

[9] By the time Dora terminated Barkhouse, alleging poor workmanship and delay, Liteco had received hundreds of thousands of dollars from Dora, through Barkhouse and the accounting reveals that Liteco was paid more than it supplied to

the project. Liteco attributed only a small portion of the funds they received to the invoices relating to materials provided to the project.

[10] Claiming it was unpaid on the project, Liteco liened the project lands, forcing Dora to post security to remove the liens. Dora says it has had $600,000 sitting in court since 2014.

[11] Liteco advances its claim on the basis of equitable assignment.

[12] Dora asks the Court to answer two questions of law:

> Question 1
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> When a creditor (Barkhouse) assigns its debt to a third party (Liteco) by way of an equitable assignment, is the debtor (DORA) liable to pay the assignee if:
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> i) it has already directly paid the creditor more than the amount of the creditor's debt to the assignee, and
>
> ii) the creditor has actually already paid the assignee in full, and
>
> iii) the assignee accepted those payments directly from the assignor/creditor, contrary to the terms of the equitable assignment agreement?
>
> DORA submits that the answer to this question is no.
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> Question 2
>
> Is a supplier permitted to apply payments from a contractor on a project pursuant to the *Builders' Lien Act* to other older, unrelated debts owed by the contractor, and then claim a lien on the project lands?
>
> Again, DORA submits that the answer is no.

[13] *Civil Procedure Rule* 12 states:

> Separation
>
> 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expenses of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain in issue after the determination.

> Determination
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> 12.03 (1) A judge who orders separation must do either of the following:
>
> (a) proceed to determine the question of law;
>
> (b) appoint a time, date, and place for another hearing at which the question is to be determined.

[14] This Rule is considered in *Korecki v. Nova Scotia (Minister of Justice)*, 2013 NSSC 312.

[15] Dora argues that the facts Dora relies on in this application do not hinge on credibility and are not contradicted by other witnesses.

[16] The facts they rely upon are stated in their brief as para. 7:

> The facts which DORA relies on, for the purposes of this hearing, do not hinge on credibility. They are not contradicted by other witnesses.

They say:

- There was a joint cheque agreement whereby DORA agreed to pay Barkhouse by cheques made out to Barkhouse and Liteco, jointly;
- DORA paid Barkhouse for his work on the Project, which included the costs of materials provided by Liteco for the Project;
- Liteco accepted and deposited over $500,000 from DORA (through Barkhouse), though it knew that only the first cheque adhered to the joint cheque agreement;
- Liteco applied the majority of these funds to other debts owed by Barkhouse;
- Liteco liened the Project lands, claiming DORA owed it the balance of Barkhouse's account on the Project (an outstanding balance that was the unnatural result of Liteco allocating the funds it received from Barkhouse to other non-Project-related debts).

[17] In this equitable assignment claim, Barkhouse is the creditor/assignor, Dora is the debtor and Liteco is the third party assignee.

[18] The doctrine of equitable assignment in the form of a Joint Cheque Agreement, permits the third party to sue the debtor in certain circumstances. In this case only the first cheque was made jointly by Dora to Barkhouse and Liteco. The second cheque was endorsed by Barkhouse to Liteco. The Barkhouse affidavits and discovery, chronicles how Barkhouse called Liteco to inquire what amounts were

owing for materials invoiced on the project and then sent funds by cheque to Liteco. The only known source of funding Lietco was aware of, was funds coming from Dora, as Barkhouse had no other contracts at the relevant times. Dora funds made their way to Liteco. Liteco was content to receive payment of funds in a variety of modes, while not insisting on adherence to the Joint Payment Agreement.

[19] The outline of payments is summarized on Schedule "A" to the Applicant's brief, and supported by the sworn evidence before the court. Liteco does not deny these figures.

[20] Dora relies on Fridman's explanation of the doctrine of equitable assignment in *The Law of Contract in Canada*, (2011 Edition) at 650:

> Whether the chose in action which is being assigned by the equitable assignment is legal or equitable, the assignee only acquires title to the assigned chose "subject to equities". The assignee steps in the shoes of the assignor, than whom the assignee can have no greater rights. This means that in any action brought by the assignee to enforce his rights, the debtor or other defendant may raise against the assignee whatever defences would have been available against the original assignor. This would include a claim for unliquidated damages which the debtor might have counterclaimed and if successful, set off against the assignor, as long as the damages in question arise out of, and are inseparably connected with the contract which has been the source of the assignment.

[21] Dora argues in its brief that:

> Liteco looks to *Aluminex Extrusions Ltd v Wallace Sign-Crafters West Ltd* for the authority that a debtor who makes payment directly to a creditor, ignoring an assignment agreement to make the payments out to the creditor and some third party jointly, does so at its peril and may be liable to pay the third party (essentially, to double-pay) if the creditor absconds with the funds.
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> However, the uncontested evidence is that Barkhouse received money from DORA and then immediately turned it over to Liteco. The amount of money that Barkhouse paid Liteco, out of funds he received from DORA, actually exceeds the amount which Liteco invoiced Barkhouse on the Project. The creditor did not abscond with the funds – he paid the funds in full.
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> Liteco does not dispute that it received a total of $845,528.01 from DORA through Barkhouse. Of those funds, it allocated $316,372.05 to the Project (Miles affidavit Exhibit "U"). The balance of funds it chose to allocate to various other debts Barkhouse owed. It then sued DORA for an additional $514,450.30.
>
> There is nothing equitable about permitting an assignee to claim against a debtor (DORA) when the creditor (Barkhouse) has already paid the assignee in full.

[22] Additionally, Dora says the funds received by Liteco were trust funds pursuant to the *Builder's Lien Act*.

[23] Liteco says it only seeks the opportunity to claim any funds owing by Dora to Barkhouse to satisfying the indebtedness of Barkhouse to Liteco for previous indebtedness.

[24] Liteco disagrees with Dora's summary of facts and says while some of the material facts are undisputed, there is inadequate evidence before the court to permit a Rule 12 analysis, particularly with respect to Liteco's knowledge as to the source of the funds paid to it, relying on *Burgess v. Yellow Pages Group Co.*, 2012 NSSC 390, at para. 64, and *Aluminex Extrusions Ltd. v. Wallace Sign-Crafters West Ltd.*, 1988 CarswellBC 1547 (BCSC).

[25] It is for me to decide if there is a factual scaffolding necessary to determine the proposed questions of laws without a trial.

[26] These facts are gleaned from the affidavits of Jamie Miles, Robert Barkhouse, Leona Penney, and the discovery examination of Robert Barkhouse, and through Dora's own admissions.

[27] In the circumstance of this case I accept that there is a sufficient scaffold of undisputed relevant facts to allow consideration of the two questions of law to be answered by the Court.

[28] With respect to Question No. 1, the answer is no. Notwithstanding the assignment, which Liteco did not insist upon adherence to, Dora is not liable to pay the assignee Liteco in the circumstances. Dora has actually paid Liteco in full and has been paid more than the amount of the invoiced materials supplied.

[29] With respect to Question No. 2, the answer is also no. Liteco appropriated payments to satisfy older unrelated accounts in circumstances where the funds were impressed with a Trust pursuant to the *Builder's Lien Act*, s. 44B(1) and (2).

[30] This is supported by *Tempo Building Supplies Ltd. v. Villa Cathay Care Home Security*, (1980) 5ACWS 2d 44, 67 BCLR 44 (BC Co. Ct); and *Ross Gibson Industries Ltd. v. Greater Vancouver Housing Corp.*, (1985) 21 DLR (4th) 481, 67 BCLR 55 (BCCA); and *Standard Prestressed Structures Ltd. v. Bank of Montreal*, [1968] 2 OR 281, 69 DLR (2d) 183 (Ont H Ct. J.).

[31] *Standard Prestressed Structures Ltd.*, *supra*, addressed the Trust characteristics at paras. 29-32:

> 29 In the instant case the fund was impressed with the trust. Neither the bank nor Asma had any power to pay or appropriate except for purposes of the trust and the rule in *Clayton's Case* is therefore inapplicable: *Agricultural Insurance Co. v. Sargeant*, *supra.*
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> 30 In paying to Lawson, the payments were being made in so far as the amount in issue is concerned, to someone entitled to share in the fund. Even if it is assumed that, contrary to the view I have expressed, that until it had notice of the trust, Lawson could appropriate to the earlier accounts there is no evidence from which any such appropriation can be inferred. Normally, a creditor can appropriate when he likes: *The "Mecca", supra*; however, that does not apply to permit a creditor to apply funds, subject to a trust of which he has notice, to a purpose outside the trust. No such intention should be attributed at a trustee: *Re Hallett's Estate* (1879), 13 Ch. D. 696. This would be equally true of anyone taking with notice of the trust.
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> 31 Both as a matter of intention presumed from the circumstances and because the moneys retained their character of trust property, I am of opinion that the payments must be appropriated to Van Wagner's Beach project. There are no circumstances giving rise to an estoppel against the appellant or making it inequitable to so apply these payments.
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> 32 I am also disposed to the view that the same result could be reached by a different approach. If the matter were in form simply a claim of Lawson to rank against the fund it would seem to me the appellant could rely on the principle that he who seeks equity must do equity. The fund is one being distributed on equitable principles. It would seem obviously inequitable that Lawson having received a payment from the trust fund should be permitted to apply it on an account not entitled to share therein, and then to claim against the fund, without giving credit for that payment, thus putting both Asma and the appellant in breach of their fiduciary duty.

[32] Liteco knew the funds it was receiving from Barkhouse were project funds and were impressed with a trust pursuant to the *Act*.

Dated at Halifax the 28th day of November, 2017.

Justice M. Heather Robertson