

CITATION: New Tec Building Envelopes Ltd. v. Deciantis Construction Limited, 2015 ONSC 5462

NEWMARKET COURT FILE NO.: DC-14-00748-00 & DC-14-00749-00

DATE: 20150901

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:)	
)	
NEW TEC BUILDING ENVELOPES LTD.)	P.R. McKenna, for the Plaintiff (Appellant)
)	
Plaintiff (Appellant))	
)	
– and –)	
)	
DECIANTIS CONSTRUCTION LIMITED, JOHN DECIANTIS and ROCCO DECIANTIS)	S.A. Veltri, for the Defendants (Respondents)
)	
Defendants (Respondents))	
)	
)	
)	HEARD: August 13, 2015

**On Appeal from the Orders of Deputy Judge Gonsalves with
Respect to Motions Heard on November 5, 2014**

VALLEE J.

Nature of the Appeals

[1] These appeals relate to two Small Claims court actions with respect to different construction projects. The parties are the same. One project involved work at St. Patrick’s Catholic Elementary School and the other related to work at St. Cosmas and Damian Catholic Elementary School. The plaintiff did not register liens. In both actions, the plaintiff claimed for money owing consisting of holdback, construction funds and loss of profit. The trial judge dismissed the plaintiff’s claims on the basis that they were commenced outside of the applicable limitation periods. The appellant (plaintiff) appeals these decisions.

The issues as set out by the appellant are the following:

1. Did the Trial Judge err by failing to recognize the correct payment date for holdback money held pursuant to the *Construction Lien Act*, R.S.O. c. C. 30?
2. Did the Trial Judge err by not acknowledging that the *Act* directs holdback funds to be paid after substantial certification of the construction project and is silent with respect to a limitation period?
3. Did the Trial Judge err in failing to recognize that holdback funds are trust funds, that the holder of trust funds has a fiduciary obligation to the persons entitled to those funds and that the confines of limitation periods may not be strictly applied?
4. Did the Trial Judge err in failing to recognize that all money owed by general contractor to a subcontractor by way of invoice is held in trust for the subcontractor and that a failure to pay money is a breach of trust? Limitation periods are not applicable to a trustee.
5. Did the Trial Judge err in failing to conclude that a limitation period for a debt owing begins when a party refuses to pay the debt?
6. Did the Trial Judge err in awarding costs of \$800 in favour of the respondents when Rule 15.07 of the *Rules of Small Claims Court* provides that costs for a motion shall not exceed \$100?

Standard of Review

- [2] The standard of review for decisions in small claims court is determined by the principles outlined in *Housen v. Nikolaisen*, 2002 S.C.C. 33. On pure question of law, the standard of review is correctness. Findings of fact or mixed fact in law are reviewable only for palpable and overriding error.

Limitations Act

- [3] The relevant section of the *Limitations Act*, 2002, S.O. 2002, c.24, Schedule B is as follows:

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

- (iii) that the act or omission was that of the person against whom the claim is made, and
- (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[4] Significant dates regarding the St. Patrick's project

- (a) The appellant's last invoice for contract work is dated March 13, 2012.
- (b) The certificate of substantial performance was published on April 16, 2012.
- (c) The appellant's invoice for holdback funds of \$8,835.01 is dated April 24, 2012.
- (d) The appellant's claim was issued on May 22, 2014.

[5] Significant dates regarding the St. Cosmas and Damian project

- (a) The appellant's last invoice for contract work is dated August 25, 2011.
- (b) The respondent's last payment was made on December 6, 2011.
- (c) The certificate of substantial performance was published on October 29, 2012.
- (d) The appellant sent an invoice on April 15, 2014; however, it appears to be only for financing charges.
- (e) The appellant's claim was issued on May 22, 2014.

Analysis

[6] It is important to bear in mind that holdback funds and contract funds must be considered separately as different limitation periods may apply to each of them.

St. Cosmas/Damian project

[7] The appellant claimed a total of \$24,586.97. In paragraph D the statement of claim, the appellant states, “Defendant failed and refused to pay Plaintiff amount of \$10,586.97 including holdback money as per Construction Lien Act.” It is not clear whether the appellant claimed that the amount of holdback owing was \$10,586.97 or whether holdback was included, along with other amounts claimed together in the sum of \$10,586.97. In either event, it is clear that the appellant did claim payment of holdback funds.

Did the Trial Judge fail to recognize the correct payment date for holdback funds pursuant to the Construction Lien Act?

[8] The certificate of substantial performance for this project was published on October 29, 2012. The Act provides that holdback funds may not be released until the time period in which any lien claimants might register a lien has expired. Regarding this project, the expiry occurs 45 days after the earliest of the following events: (i) publication of the certificate of substantial performance, and (ii) the date when the person last supplies services or materials. These provisions set out dates by which a lien claimant must register its lien.

[9] As noted above, the certificate of substantial performance was published on October 29, 2012. The holdback was payable 46 days later. Accordingly, the limitation period began to run on day 46 being December 14, 2012. It expired two years later on December 14, 2014.

[10] The appellant’s claim was issued on May 22, 2014.

[11] Accordingly, I find that the trial judge made in error in law in finding that the appellant’s claim for holdback funds was issued outside of the applicable limitation period.

Did the Trial Judge err by not acknowledging that the Construction Lien Act is silent with respect to a limitation period relating to claims for holdback funds?

[12] Many Acts do not specify limitation periods. The Legislature enacted the Limitations Act, 2002 in order to clarify limitation periods that apply to proceedings. The fact that the Construction Lien Act is silent with respect to the limitation periods relating to holdback is irrelevant. Accordingly, the trial judge made no error in this regard.

Did the Trial Judge err in failing to recognize that holdback funds are trust funds, that the holder of trust funds has a fiduciary obligation to a payee and that the confines of limitation periods may not be strictly applied?

- [13] The *Act* sets out a comprehensive procedure relating to liens, holdback funds and trust funds among other things. Strict compliance with the *Act* is required. The *Act* sets out a specific point in time when holdback funds are payable as noted above. The appellant is correct that a payor holds holdback funds in trust for a payee. Limitation periods provide reassurance to parties that they will not be exposed to claims after a certain period of time has passed. The appellant suggests that there is no limitation period with respect to making a claim for holdback fund because they are trust funds. This position is contrary to the principles of certainty and finality which underlie the *Limitations Act*. Accordingly, I find that the trial judge made no error in this regard.

Did the Trial Judge err in failing to conclude that a general contractor who owes funds to a subcontractor by way of invoice holds those funds in trust?

- [14] The appellant stated that failing to pay funds constitutes a breach of trust. Limitation periods are not applicable to a trustee.
- [15] The appellant relies on *Anron Mechanical Ltd. v. L'Abbe Construction (Ont.) (Ltd.) (Trustee of)*, 1991 CarswellOnt 181, para. 11 where the court stated,

The trust created by the Act is for the benefit of all unpaid subcontractors. The fact that some or all of them have not pursued their remedy thus far is of no real consequence...the trust created is a continuing one. The unpaid subcontractors remain entitled to the monies so long as the funds remain clearly identifiable or have not been paid out in accordance with an order of the court.

- [16] The facts in *Anron* can be distinguished from the facts here. A bankrupt party committed a fraudulent preference. The trustee was able to recover some of the funds. The trustee, the bank and the applicant all claimed the funds with the applicant stating that he had a greater entitlement to them in contrast to other beneficiaries of the trust because he had pursued the remedy.
- [17] In the case at hand, there is no allegation of a breach of trust. In *Anron*, the court was commenting on the fact that the trust was created for the benefit for all unpaid subcontractors. The applicant in issue did not have a greater entitlement to the funds simply because the other unpaid subcontractors had not pursued the remedy to the extent that he had. The court in *Anron* did not state that there is no limitation period applicable to a claim for trust funds.
- [18] In simple terms, a breach of trust occurs when an owner pays a contractor for a subcontractor's work but instead of paying the subcontractor, the contractor uses those funds for another purpose.

- [19] Non-payment of an invoice does not amount to a breach of trust. There could be good reasons for non-payment such as poor workmanship or an inflated invoice.
- [20] The appellant did not allege that the respondent used the trust funds for another purpose. I find that the trial judge made no error in this regard.

Did the Trial Judge err in failing to conclude that the limitation period for a debt owing begins when a party refuses to pay the debt?

- [21] With respect to the St. Cosmas project, the appellant issued its last invoice for project work on August 25, 2011. The invoice states that the term is “net 30” and that “interest charges at 2% per month or 24% per annum on past due amounts.” The appellant considered the amount overdue 31 days after the date of the invoice, being September 26, 2011.
- [22] The appellant sent a letter to the respondent dated July 23, 2012, eight months later, requesting payment on the account which it described as “well overdue.” On the same day, the respondent replied that the invoice would not be paid because there were issues with respect to completion of the work and quality of the material supplied. The appellant argues that the limitation period starts on July 23, 2012 when the respondent refused to pay. This was when the appellant first discovered that the loss occurred.
- [23] As noted above, s. 5(b) of the *Limitations Act*, 2002 states that a limitation period begins when a reasonable person in the appellant’s circumstances first ought to have known that the loss or damage had occurred. Accordingly, the appellant is required to exercise due diligence. (see *Carmen Drywall Limited v. BCC Interiors Inc.*, 2013 ONSC 644, para. 12)
- [24] The applicant’s invoice states that the amount is due within 30 days. A claimant may be allowed a reasonable period of time to deliver an invoice to a defendant and account for a reasonable time for the defendant to pay that invoice. (see *Hugh Munro Construction Ltd. v. Donald Moschuk*, 2011 ONSC 3271, para. 31)
- [25] A reality of the business world is that invoices are not often paid until 60 days pass. Sixty days from the date of the invoice, August 25, 2011, is October 25, 2011. Accordingly, the limitation period with respect to the claim for contract funds began to run at the latest on October 26, 2011 and expired on October 26, 2013. The claim for contract funds which was issued on May 22, 2014 was brought outside of the applicable limitation period.
- [26] With respect to the plaintiff’s claim for loss of profit, the plaintiff ought to have been aware of this loss on August 20, 2011 when it stopped working on the project. Therefore, the trial judge did not err when she dismissed the balance of the plaintiff’s claim with respect to contract funds and loss of profit.

St. Patrick’s Project

- [27] The appellant claimed a total of \$20,959.58. It sent an invoice for holdback in the amount of \$8,356.01.
- [28] On this project, the certificate of substantial performance was published on April 16, 2012. The appellant issued an invoice for payment of holdback; however, the date of that invoice is irrelevant. For the reasons stated above, payment of holdback was due 45 days

after publication date being May 31, 2012. The limitation period began to run on June 1, 2012 and expired on June 1, 2014. The plaintiff's claim was issued on May 22, 2014. Accordingly, the plaintiff's claim with respect to the holdback was issued inside the limitation period.

- [29] The plaintiff's last invoice for project work, aside from its invoice for holdback, was dated March 13, 2012. If sixty days are allowed for payment, the limitation period began to run on May 13, 2012. It expired on May 13, 2014. The claim was issued on May 22, 2014. Accordingly, the claim with respect to contract funds and loss of profit in this action was issued outside of the applicable limitation period.

Summary

- [30] In both actions, the portion of the appellant's claims for holdback funds were issued within the applicable limitation periods; however, the portion of the appellant's claims for contract funds for work performed were issued outside of the limitation periods.
- [31] The trial judge's decisions are set aside only with respect to the appellant's entitlement to holdback funds. The trial judge's decision regarding the appellant's claims for contract funds are upheld. The appellant's claims shall be remitted to the Small Claims court for trial regarding only the appellant's entitlement to holdback funds.

Costs

Did the Trial Judge err in awarding \$800 in costs in favour of the respondent with respect to the motion?

- [32] A trial judge awarded \$800 in costs for both actions combined. The appellant states that the trial judge erred in doing so because rule 15.07 of the *Small Claims Rules* states that costs are not to exceed \$100 for motions unless there are special circumstances. According to *Michael Pilling v. Lowerys Limited*, 2014 CanLII 77027, p. 6, on small claims court motion, the deputy judge stated that their success on a motion does not constitute special circumstances. Nevertheless, the court in *Barry Camm v. Grant Kirkpatrick*, 2013 CanLII 53193 stated that the motion involved a request for a finally dispositive order and some complexity in legal research was involved. This constituted special circumstances. Accordingly, the court awarded the successful party \$1,500 in costs including disbursements.
- [33] The respondent points out that in this matter, the amount of disbursements was \$160. Accordingly, \$640 was allowed for legal fees including HST.
- [34] I find that while the deputy judge reasonably exercised her discretion in awarding costs of \$800 based on her conclusion that both claims ought to be completely struck, the appellant has been partially successful. The holdback amounts appear to be approximately 50% of each of the claims. Therefore, I reduce by 50% the costs awarded to by the trial judge resulting in an award of \$400 for both actions combined.

Conclusion

[35] I find that the deputy judge made an error in fact in law when she concluded that the appellant's claim for holdback for both projects were made outside of the applicable limitation period. She was correct in concluding that the appellant's claims regarding contract funds and loss of profit were statute barred.

[36] The appeals are allowed with respect to only the claims for holdback. The matter is remitted to the Small Claims court for trial of the holdback claims.

Costs

[37] Given the divided success on the appeals, no costs are awarded.

VALLEE J.

Date: September 1, 2015