

CITATION: LH North Ltd. v. Albert Building Industries Inc, 2023 ONSC 4001
COURT FILE NO.:CV-22-0237-00
DATE: 2023-07-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LH North Ltd., Plaintiff, moving party
v.
Albert Building Industries Inc. O/A Betontec Precast Products, Defendant

HEARD: July 4, 2023

BEFORE: Fitzpatrick J.

COUNSEL: *J. Clark*, for moving party plaintiff

No one attending for the defence, as they have been deemed to be noted in default

Endorsement on Motion for Assessment of Damages

Introduction

[1] At the conclusion of the hearing in this matter I signed judgment in favour of the plaintiff in the amount of \$977,433 plus prejudgment interest in the amount of \$14,233.04 plus costs on a partial indemnity basis fixed in the amount of \$30,000.00 inclusive of disbursements and HST. This amount was consistent with the amount claimed in the statement of claim.

[2] I advised written reasons for this judgment would follow. Here are those reasons.

[3] The plaintiff moves for an assessment of damages further to a claim that arises in a commercial dispute.

[4] The plaintiff, LH North Ltd. (“LH”) is a contracting company that specializes in the building and rehabilitation of highway bridges. The defendant, Albert Building Industries Inc. O/A Betontec Precast Products (“Betontec”) is a fabricator of pre-cast concrete products used in the rehabilitation and construction of highway bridges.

Procedural Background

[5] LH commenced its action against Betontec on September 17, 2020. Betontec defended and counterclaimed. On March 30, 2023 Betontec formally withdrew its statement of defence. By operation of Rule 23.06(2) where a defendant withdraws the whole of its statement of defence it is deemed to have been noted in default. Counsel for Betontec confirmed by email dated March 31, 2023, that the counterclaim too “was at an end”. I note that Rule 27.09(1) provides;

Where a defendant does not dispute the claim of the plaintiff in the main action but asserts a counterclaim, the court may stay the main action or grant judgment, with or without a stay of execution, until the counterclaim is disposed of

[6] In my view counsel’s email of March 31, 2023, is confirmation that the withdrawal of the defence was intended to also dispose of the counterclaim as it would not be pursued.

[7] Rule 19.05 entitles a plaintiff to move for judgment against a defendant noted in default. Rule 19.02(1)(a) provides that a defendant noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim.

Material provided to the Court

[8] The plaintiff is moving for an assessment of damages as the defendant has been deemed to have been noted in default. The motion was supported by a detailed affidavit of a project manager of LH, an affidavit from the Business manager of LH and an expert report concerning damages and cost calculations in respect of the alleged breach of contract by Betontec.

[9] The expert report was prepared by Richard Fogarasi. He is a professional civil engineer. His report was accompanied by a Form 53 acknowledgement of Expert's Duty as required by Rule 57. I have reviewed Mr. Fogarasi's curriculum vitae. I am satisfied Mr. Fogarasi is qualified to give this court expert opinion evidence on the quantification of damages in contracts involving bridge rehabilitation projects, and the quantification of damages for delay in the completion of construction contracts.

Findings of Fact

[10] Based on the affidavit evidence of the two representatives of LH, I make the following findings of fact in this matter.

[11] LH was awarded a bridge rehabilitation contract by the Ontario Ministry of Transport ("the MTO Contract") in the spring of 2020. The total contract price for the work was \$3,467,000.00. LH carried a bid for some precast concrete fabrication work by Betontec with its bid on the MTO Contract. Betontec had represented and agreed in writing with LH that it would and could supply a precast concrete slab, an approach slab and sleeper slabs for the MTO Contract for a cost of \$328,329.92 inclusive of taxes. The subcontract work by Betontec was to be completed by May 29, 2020 or at the latest June 9, 2020.

[12] The bridge that was the subject of the MTO Contract was located in Northwest Ontario. The MTO Contract provided the work was to be completed by October 16, 2020. Given the notorious weather conditions in this part of the province, I find it was within the contemplation of the parties that any delays in contract compliance could lead to significant additional costs to LH due to winter conditions. Further the MTO Contract provided explicitly that time was of the essence for contract performance.

[13] Almost immediately after the award of the MTO Contract, problems arose between LH and Betontec. Primarily, Betontec advised its precast plant did not have the necessary Canadian Standards Association (“CSA”) approval for products produced at its plant. It was a requirement of the MTO Contract that all precast elements be fabricated at a plant certified by the CSA. I find that as at the date Betontec provided its bid to LH, it knew or ought to have known, that its precast plant was not CSA compliant, and therefore it could not perform its end of the bargain as it represented. This was an act of negligent misrepresentation by Betontec by which LH has suffered damages. Betontec was in breach of its contractual obligations by not being able to produce precast items in a plant that was CSA approved.

[14] Despite representations by Betontec, it was not able to remedy its default at the date it was required to provide the precast components to LH. On March 10, 2020, LH gave Betontec a purchase order for the precast components as required by LH for completion of the MTO Contract. The purchase order was for \$290,557.45 plus HST. Betontec did not fulfil the purchase order. LH gave Betontec proper notice of its default and an opportunity to remedy the default on June 24, 2020. Betontec provide a written correction plan on July 6, 2020. Betontec’s plant was not

CSA certified as of July 17, 2020. Betontec did not supply any of the precast components to LH as it had agreed. In my view, Betontec breached its contract with LH as its plant was not certified, it had not taken proper steps to obtain the certification, was not able to be CSA certified in any event and it did not provide any product as it had agreed. On July 17, 2020, LH terminated the contract as the result of the breaches by Betontec. Any claim for prejudgment interest would run from this date.

[15] Further, I find that the timing of the supply of the precast product by Betontec was material to the critical path to complete the project before the onset of winter. The pre-cast elements were essential to the rehabilitation project for the bridge and were critical for the expected long term use of the bridge.

[16] Prior to the termination of the contract, LH had made an advance payment to Betontec in the amount of \$26,297.36. This payment was not made gratuitously. It was made in consideration of assisting Betontec perform its obligations.

[17] In my view, LH suffered damages as the result of Betontec's breach and as the result of circumstances that followed July 17, 2020.

[18] In order to mitigate its losses as the result of Betontec's breach, and to fulfill its contractual obligations, LH approached Miller Precast Ltd ("Miller"). Miller was the second lowest bidder for precast in the tender process leading to the formation of the MTO Contract. On July 17, 2020 LH provided a purchase order to Miller for \$705,679.00, an amount consistent with the original tender bid by Miller. Miller completed the precast work in accordance with the new purchase

order. The precast product was delivered August 27, 2020. For all its services and materials LH paid Miller \$743,915.51.

[19] The difference between the Betontec contract and the Miller contract with LH was \$367,774.78 which LH was required to pay to complete the MTO Contract.

[20] While awaiting Miller's delivery of product, LH had deployed its forces and incurred standby costs of \$132,322.50. Further, in order to mitigate its losses LH was required to perform some work that Betontec should have completed and which was directed at facilitating Miller providing its precast product in a timely way. This additional cost was \$121,385.65 plus additional material costs of \$62,985.00. The additional materials were installed directly on the bridge at issue.

[21] The work could not be completed by the October 16, 2020 deadline. LH attempted to meet the deadline by paying overtime to its forces throughout September and early October. This cost LH an additional sum of \$41,360.20. However, I am exercising my discretion to reduce this amount somewhat to the amount of \$35,429.75. Despite those efforts the work could not be completed before winter came to Northwest Ontario. LH was required to demobilize its forces and then remobilize them in the spring of 2021. These additional demobilization/remobilization costs were \$71,763.88. Ultimately LH completed the MTO Contract on June 10, 2021.

[22] I find all these additional costs arose as the result of the breach of contract and negligent misrepresentations of Betonec.

Expert Evidence

[23] The expert opinion evidence tendered by Mr. Fogarasi speaks to the issue of delay in the MTO Contract and the differences between the work required and provided by Miller as contrasted to that which was to be provided by Betontec. Mr. Fogarasi opined that the delay caused by Betontec was from June 25, 2020 to August 27, 2020, or about 2 months. Ultimately the delay in completion was 237 calendar days, from October 16, 2020 to June 10, 2021. The MTO did not seek liquidated damages from LH for the winter shutdown period from October 30, 2020 to April 19, 2021. However, MTO did withhold \$162,500.00 from LH for delay for the period October 17, 2020 to October 29, 2020 and for the period April 20, 2021 to June 10, 2021. These withholdings commenced in October 2020 and were ultimately withheld over four progress payments.

[24] From this evidence I accept Mr. Fogarasi's opinion and the evidence of the LH fact witnesses that Betontec caused delay to the project, that LH was assessed a delay penalty by MTO as a result, and that the work done by Miller was necessary and appropriate to allow LH to complete the MTO Contract.

The Law

[25] Damages for breach of contract are calculated by placing the innocent party in the same position as would be the case had the contract been performed. The value of performance promised is generally limited to damages that would fairly and reasonable be considered to arise naturally from the breach and which would have reasonably been within the contemplation of the parties.

[26] The innocent party has a duty to mitigate its losses. Its efforts to mitigate must be reasonable. Damages can be recovered for the reasonable steps taken in mitigation of loss provided

the costs and expenses are reasonable and were in fact incurred in mitigation of the damages suffered.

[27] In a circumstance where parties contractually stipulate that time is of the essence, delay in completion of the contract indicates that the parties contemplated damages could be suffered by an innocent party due to the delay of the at fault party. In the decision *Total Meter Services Inc v. Aplus General Contractors Corp*, [2015] O.J. No. 3166 at para .29 E. Quilan J. set out the factors a plaintiff must establish to recover for delay as follows:

- (a) the cause of the delay must be isolated and defined;
- (b) the delay must be analyzed to determine whether it is excusable or the responsibility of the contractor;
- (c) if the delay is the contractor's responsibility, the contractor must bear the cost. If it is excusable, the extent of the delay must be determined;
- (d) the contractor must prove that actual or constructive notice of the delay was given if required by the contract;
- (e) it must be established whether the delay affected items on the critical path or whether it merely reduced or eliminated the float;
- (f) the contract must be reviewed to assess whether it provides that the contractor is entitled to a remedy of extension of time only or time and compensation; and
- (g) the quantum of compensation must be determined.

Judgment

[28] For reason set out above, I have found;

- i. Betontec breached its contract with LH.;
- ii. Betontec negligently misrepresented its ability to perform the contract, and LH relied on that representation to its detriment;

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- iii. LH took reasonable steps and incurred reasonable costs to mitigate its loss arising from the breaches by Betontec;
 - iv. completion of the MTO Contract was delayed solely by the failure of Betontec to deliver the precast components in a timely way as it had agreed;
 - v. the delay was not excusable as Betontec failed to obtain CSA certification and did not otherwise source the precast product it had contracted to provide;
 - vi. the project was delayed for 65 days on its critical path and caused additional delay due to the onset of winter for which LH was required to expend additional amounts;
 - vii. LH gave Betontec proper and due notice of the delay;
 - viii. LH was assessed liquidated damages by the MTO for the delay;
 - ix. LH has properly quantified its damages with persuasive and clear evidence.

[29] Therefore, based on my findings of fact, LH is entitled to an award of damages against Betontec in the amount of \$983,364.00 plus prejudgment interest and costs. However, counsel on this motion has decided to seek a slightly lesser total of \$977,433.55 consistent with the amounts included in the original statement of claim made up as follows;

- a) \$367,774 plus HST for the difference between the original contract price and the third party contractors retained by LH to complete the MTO Contract;
- b) \$184,370.65, plus all applicable taxes, for the cost to supply, install and modify new materials related to the installation of deck joint assemblies;
- c) \$35,429.75 for the cost of weekend premiums paid in an effort to mitigate the delay to the Project;
- d) \$204,086.38 for standby costs and additional remobilization/demobilization costs incurred by the Plaintiff as a result of the delay caused by the Defendant; and
- e) \$23,272.00, plus all applicable taxes, for the advanced payment made to the Defendant;

f) prejudgment interest to July 4, 2023 in the amount of \$14,233.04 which was calculated using the rate for the third quarter of 2020 of .5%

[30] Betontec shall pay costs of the action on a partial indemnity basis fixed in the amount of \$30,000.00 inclusive of HST and disbursements payable forthwith.

[31] Judgment to go in terms of these amounts and as signed by me on July 4, 2023.

“original signed by”
The Hon. Mr. Justice F.B. Fitzpatrick

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**ENDORSEMENT ON MOTION FOR
ASSESSMENT OF DAMAGES**

Fitzpatrick J.

DATE: July 5, 2023