

CITATION NO.: Nelco Mechanical Limited v. 2335213 Ontario Inc et al., 2023 ONSC 1521
COURT FILE NO.: CV-22-235
DATE: March 6, 2023

2023 ONSC 1521 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nelco Mechanical Limited, Plaintiff

AND:

2335213 Ontario Inc. and Pardeep Kumar Bhopal, Defendants

BEFORE: MacNeil J.

COUNSEL: *T. Marko* – Lawyer for the Plaintiff/Moving Party

P. Ezzatian – Lawyer for the Defendants/Responding Parties

HEARD: December 9, 2022 (via Zoom videoconference)

ENDORSEMENT

OVERVIEW

[1] The Plaintiff, Nelco Mechanical Limited (“the Plaintiff” or “Nelco”), makes this motion for an order to impose a discovery plan and to require the Defendants, 2335213 Ontario Inc. (“233 Inc.”) and Pardeep Kumar Bhopal (“Mr. Bhopal”) (collectively “the Defendants”), to produce certain corporate and financial documents.

BACKGROUND

[2] 233 Inc. owns a property located at 784 Bell Boulevard (“the Property”) on which it constructed a hotel (“the Hotel Project”). Construction began in 2017 and was completed in or about August 2020.

[3] Based on 233 Inc.’s corporate profile report, Mr. Bhopal appears to be the sole officer and director of the corporation and its Secretary and President.

[4] The Plaintiff carries on business as a mechanical contractor. It entered into a contract with 233 Inc. to supply materials and labour relating to plumbing for the construction of the Hotel Project (“the Contract”). Nelco was also a lender who provided financing to the Defendants with respect to the Hotel Project.

- [5] The Plaintiff sent 233 Inc. twenty-six invoices, between July 2017 and October 2020, in relation to materials and services it supplied under the Contract totaling \$277,652.90 (“the Outstanding Invoices”). The Plaintiff alleges that, despite repeated requests, 233 Inc. did not pay the Outstanding Invoices.
- [6] On February 28, 2022, the Plaintiff commenced the within action against the Defendants seeking payment of the outstanding balance. It bases its claim on the Contract or, alternatively, on *quantum meruit* or unjust enrichment. The Plaintiff also alleges that 233 Inc. has received money that was to be used in the financing of the Hotel Project and that such funds constitute trust funds for the benefit of Nelco pursuant to s. 7 of (what is now) the *Construction Act*, R.S.O. 1990, c. C.30 (“the *Construction Act*”). The Plaintiff claims that 233 Inc. has misappropriated or unlawfully converted the trust funds causing damage to Nelco. The Plaintiff alleges that Mr. Bhopal “participated in, assented to, or acquiesced in” the breach of trust by 233 Inc.
- [7] On or about May 25, 2022, the Defendants delivered their statement of defence. In it, they admit to receiving the twenty-six invoices from the Plaintiff but deny owing the amount of \$277,652.90; they also deny the breach of trust allegations.
- [8] The Plaintiff proposed a discovery plan, dated as of May 29, 2022, in respect of which the Defendants did not agree; the Defendants provided their comments on July 21, 2022. On August 11, 2022, the Plaintiff sent to the Defendants’ counsel a revised discovery plan.
- [9] Counsel for the parties could not ultimately agree on the discovery plan’s scope of documentary discovery and, specifically, on production of the following documents:

From the Defendants

1. 233 Inc.’s corporate minute book.
2. Any certificates of payment.
3. All mortgage documents, including any commitment letters or loan agreements, concerning the mortgages registered on title to the Property.
4. All documents evidencing monies advanced by the mortgagees to 233 Inc.
5. Unredacted bank statements from 233 Inc.’s BMO Account from the start of the Hotel Project up to the present.
6. Unredacted bank statements from 233 Inc.’s other bank accounts, if any, from the start of the Hotel Project up to the present.

From the Plaintiff

7. Evidence of the delivery of the Outstanding Invoices to 233 Inc.

(collectively “the Disputed Documents”).

[10] As a result, the Plaintiff brought the within motion.

ISSUES

[11] The following issues are to be determined on this motion:

- a. Should production of the Disputed Documents be ordered?
- b. Should a discovery plan be imposed that reflects the Plaintiff's proposed discovery plan?

[12] At the hearing, counsel for the Plaintiff advised that, in light of the Defendants' evidence that there is no certificate of substantial performance of the Plaintiff's contract, Nelco was withdrawing its request for production of the substantial performance certificate. However, the Plaintiff maintains that the substantial performance trust is still relevant to the scope of the bank statements to be produced.

ANALYSIS

[13] Given that the inability of the parties to agree on a discovery plan is directly related to the appropriate scope of documentary discovery, once that issue is determined, the matter of the discovery plan should be effectively resolved.

Relevancy

[14] Rule 30.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the scope of documentary disclosure. It provides that every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed (30.02(1)); and that every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, unless privilege is claimed (30.02(2)).

[15] Rule 30.03(1) requires parties to serve affidavits of documents "disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power". An affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit (30.03(3)).

[16] A document is deemed to be in a party's power if that party is entitled to obtain the original document or a copy, and the other party is not so entitled. A party is obligated to produce all documents which that party can obtain through reasonable effort. This includes an obligation to obtain relevant documents which are in the possession or control of another person or consent to their production to the party to the litigation: see *FCMI Financial Corp. v. Curtis*

International Ltd., 2003 CarswellOnt 4582, 126 A.C.W.S. (3d) 767 (Ont. S.C.J. [Commercial List]), at para. 15.

Proportionality

[17] Proportionality is also a governing principle as it relates to the production of documents in an action, especially under the *Construction Act*: see *Lecompte Electric Inc. v. Doran (Residential) Contractors Ltd.*, 2010 ONSC 6290, at para. 4.

[18] As Perell J., in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2014 ONSC 660, at para. 84, explained:

Common sense and proportionality are the drivers. Common sense recognizes that the Discovery Plan is only a part of the pre-summary judgment or pre-trial procedures or steps of an action. Common sense says that while a Discovery Plan may avoid or reduce some of the controversies that may arise during oral examinations, a Discovery Plan is not meant to be some sort of advanced ruling on the proper scope and propriety of the questions on the examinations for discovery nor is a Discovery Plan meant to take over the work that is more productively and efficiently done at the examination for discovery.

Construction Act

[19] The Plaintiff's claim for breach of trust is based on sections 7 and 13 of the *Construction Act*.

[20] By s. 7, all amounts received by an owner that are to be used in the financing of an "improvement" – which includes construction on land – constitute a trust fund for the benefit of a contractor who supplies services or materials to the improvement. Amounts certified as payable, pursuant to a certificate of payment or of substantial performance, also are subject to a trust. As the trustee of the trust fund, the owner is not to "appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner". In *Structural Contracting Ltd. v. Westcola Holdings Inc.*, 2000 CanLII 5740 (ON CA), at para. 19, in discussing what monies may be excluded from being considered part of a *Construction Act* trust fund, the Ontario Court of Appeal held that "[t]he strictures of a trust apply to any and all money coming in to the hands of the owner, up to the amount owing to the contractor".

[21] By s. 13, a director, officer or person with effective control of the owner is liable for a breach of trust if they assented to or acquiesced in "conduct that he or she knows or reasonably ought to know amounts to breach of trust".

Discussion

- [22] One of the main issues for trial in this proceeding is whether the s. 7 trust provisions set out in the *Construction Act* apply to the Defendants based on the facts of this case and, if so, to what extent. In light of the allegations made by the Plaintiff relating to breach of trust, documents relating to the receipt, deposit and transfer of funds used to finance the Hotel Project, and the role of Mr. Bhopal in 233 Inc., appear to be relevant.
- [23] The Defendants argue that the Plaintiff did not amend its Notice of Motion in order to seek the additional relief of production of documents that are in the possession of the Defendants' architect; and that Nelco has not provided any evidence to suggest that the architect is in possession of any of the requested documents. Accordingly, they submit that this relief is not properly before the court and should be denied. I do not accept the Defendants' submission in this regard. A party has an obligation to list all relevant documents in their affidavit of documents and to produce every document relevant to the matters in issue in the proceeding. To the extent there are relevant documents within the possession of a non-party, such documents are still producible whether through the party obtaining a copy of them or through a Rule 30.10 motion.
- [24] In determining the appropriate scope of documentary discovery, I have considered the nature of the Plaintiff's claims and the relief being sought, and the principles of proportionality and relevance. I make the following rulings in respect of the Disputed Documents for the purposes of the parties' discovery plan:

1. 233 Inc.'s corporate minute book.

- a. The Plaintiff submits that the minute book is relevant because, in paragraph 6 of the statement of defence, the Defendants allege that Mr. Bhopal was not in effective control of 233 Inc. as it relates to the handling of the alleged trust funds.
- b. The Defendants take the position that the minute book is irrelevant to the issues raised in the litigation.
- c. I am not satisfied that the Plaintiff has shown that the complete corporate minute book for 233 Inc. is relevant to the issues which are to be the subject of the examination. I find that the relief sought is too broad.
- d. I order that Mr. Bhopal (or other 233 Inc. representative being examined) shall familiarize himself with the contents of the minute book and bring it to the examination to be consulted as necessary.

2. **Any certificates of payment, including in the possession of 233 Inc.'s architect.**

- e. The Plaintiff submits that the certificates of payment are relevant because such certificates trigger the imposition of a trust pursuant to section 7(2) of the *Construction Act*. The Plaintiff submits that the contract between Nelco and 233 Inc. specifically provided that the Plaintiff's applications for payment would be submitted to the consultant for certification. To the extent any certificates are in the possession of the Defendants' architect, they are producible as they are within 233 Inc.'s "power".
- f. The Defendants refuse to produce any payment certificates on the basis that, according to Mr. Bhopal, he does not have any certificates in his "possession".
- g. I am satisfied that any certificates of payment are relevant to the issues in the proceeding. Given the relationship between 233 Inc and its architect, I find that these records would be within the power of the Defendants. The Defendants cannot simply refuse to produce the certificates on the basis that they do not possess them. The obligations of disclosure go further than that.
- h. I order that the Defendants shall make reasonable efforts to obtain any certificates of payment from any third party that may have them and produce them to the Plaintiff. If the Defendants are unable to obtain any certificates of payment, they shall advise the Plaintiff of that information and the reason why.

3. **All mortgage documents, including any commitment letters or loan agreements, concerning the mortgages registered on title to the Property.**

AND

4. **All documents evidencing monies advanced by the mortgagees to 233 Inc.**

- i. The Plaintiff submits that six parties were granted mortgages on the Property by 233 Inc. and that the requested documents are relevant to determine the amount of money that is impressed with a trust in favour of the Plaintiff under s. 7(1) of the *Construction Act*. The Plaintiff submits that, contrary to the Defendants' contention, it is not always the case that the amount advanced pursuant to a charge is equal to the consideration shown on a registered instrument, particularly on a construction project. The Plaintiff submits that, even assuming that it is true that all mortgage advances were deposited by 233 Inc. into its BMO Account, and that all payments to trades were made from that Account, that does not mean that money sitting in, or passing through, another account is not impressed with a trust in favour of Nelco.
- j. The Defendants argue that the request for loans and advances documentation is too broad and irrelevant. They argue that the loan amounts are ascertainable from the

registered charges on title to the Property. The Plaintiff has filed no evidence to support the relevance of this documentation.

- k. I am satisfied that the Plaintiff is entitled to more documentation than just the title search, and that it is entitled to information that enables it to identify any potential trust funds.
- l. I order that the Defendants shall produce all documents evidencing monies received by 233 Inc. from any mortgagees, including by way of loans or advances, to be used in the financing of the Hotel Project, from commencement of the Hotel Project to the present.

5. Unredacted bank statements from 233 Inc.'s BMO Account from the start of the Hotel Project up to the present.

AND

6. Unredacted bank statements from 233 Inc.'s other bank accounts, if any, from the start of the Hotel Project up to the present.

- m. The Plaintiff submits that the unredacted bank statements are relevant because any funds in 233 Inc.'s bank accounts, or passing through them, may be impressed with a trust pursuant to ss. 7(2) and/or 7(3) of the *Construction Act*. Further, Nelco contends that any revenue received by 233 Inc. in the course of its hotel business, right up to the present, may be impressed with a trust in its favour: see *Structural Contracting Ltd.*, at para. 17.
- n. The Defendants argue that the Plaintiff's request is too broad and would require the production of irrelevant documents. It is Mr. Bhopal's evidence that all relevant transactions regarding the Hotel Project were made through the BMO Account. The Defendants have proposed to produce records from the BMO Account for the period from the commencement of construction to the date of its completion.
- o. I am satisfied that the Plaintiff is entitled to information that enables it to identify any potential trust funds.
- p. I order that the Defendants shall review the banking statements for all of 233 Inc.'s bank accounts, from commencement of the Hotel Project to the present, and produce any transactions that are related to monies received by 233 Inc. to be used in the financing of the Hotel Project.

7. Evidence of the delivery to 233 Inc. of the Outstanding Invoices.

- q. With respect to the Defendants' request for production of evidence of delivery of the Outstanding Invoices, the Plaintiff argues that such proof is unnecessary since the Defendants have admitted that the Plaintiff sent 233 Inc. the invoices.
- r. While I accept that the Defendants have admitted that these invoices were sent and received, documents proving delivery of the invoices are still clearly relevant and may contain other useful information relevant to the issues raised in the action.
- s. I order that the Plaintiff shall produce evidence of the delivery to 233 Inc. of the Outstanding Invoices.

(b) *Should a discovery plan be imposed that reflects the Plaintiff's proposed discovery plan?*

[25] By Rule 29.1.05(2) of the *Rules of Civil Procedure*, the court may establish a discovery plan.

[26] I am satisfied that it is just in the circumstances to order that examinations for discovery be conducted in accordance with a discovery plan that reflects the scope of documentary discovery in accordance with my rulings in paragraph 24 above, and including the documents previously agreed upon by the parties as indicated in the motion materials filed.

DISPOSITION

[27] For the foregoing reasons, the Plaintiff's motion is granted, in part. This is without prejudice to the Plaintiff seeking in the future, on further and better evidence, the documents that I have declined to order be produced on this motion.

COSTS

[28] I am of the view that success between the parties has been divided. Accordingly, I order that each party shall bear their own costs of the motion.

MacNEIL J.

Released: March 6, 2023