

# COURT OF APPEAL FOR ONTARIO

CITATION: Asco Construction Ltd. v. Epoxy Solutions Inc., 2014 ONCA 535

DATE: 20140708

DOCKET: C58200

Sharpe, Simmons and Benotto JJ.A.

BETWEEN

Asco Construction Ltd.

Plaintiff/Respondent

and

Epoxy Solutions Inc.

Defendant/Appellant

Angela Assuras, for the appellant

Stéphane Bond, for the respondent

Heard and released orally: June 27, 2014

On appeal from the judgment of the Divisional Court (Justices MacDougall, Valin and Rady) dated June 12, 2013.

## ENDORSEMENT

[1] The respondent is a contractor who had been hired by the City of Kingston to renovate the Grand Theatre.

[2] The appellant was the successful bidder for the epoxy flooring. The appellant's bid was based on a sketch provided by the respondent in accordance with the tender process. The sketch depicted the elevations of the theatre. After the bid was accepted, but before commencing its work, the appellant retained a

surveyor to confirm the elevations. The elevations were found to be inaccurate. The appellant sought an increase in the contract price. The respondent refused and asked that the work be done in accordance with the contract insisting that any adjustment to the price could be made later. The appellant refused to do the work without an assurance that the contract price would be adjusted and the respondent sued for breach of contract and damages. The appellant counter-claimed for loss of profits.

[3] The appellant was successful at trial. The key findings of the trial judge were:

- a) The error was the fault of the respondent;
- b) The appellant gave the respondent adequate information about the inaccuracy of the sketch and the increased costs that would result;
- c) The respondent insisted that the appellant proceed with the work without adequate assurance that the appellant would be compensated for the extra work.

[4] The respondent's claim for damages for breach of contract was dismissed. The appellant was awarded damages for the loss of the profit it would have received had the contract been fulfilled.

[5] The respondent appealed to the Divisional Court. The Divisional Court did not disturb the trial judge's findings of fact. However, the Divisional Court on its

own initiative determined that the doctrine of common mistake applied and rendered the contract void. The appeal was allowed.

[6] The issue of common mistake was not pleaded or argued at any stage. The parties became aware of this theory for the first time when the decision of the Divisional Court was released.

[7] For the following reasons, the appeal is allowed.

[8] It is established law that the court should not decide matters on grounds which were not advanced by the parties: see *Rodaro v. Royal Bank of Canada*, (2002) 59 OR 74 (Ont. C.A.), at para 61. The issue of common mistake was not pleaded, no evidence was led on the point and no argument was made. The Divisional Court did not provide either party with the opportunity to address this issue.

[9] In any event, the Divisional Court erred in law in applying the doctrine of common mistake for the following reasons:

(a) It was found as fact by the trial judge and accepted by the Divisional Court that the mistake was the fault of the respondent. A party at fault cannot rely on its own mistake to avoid a contract: See *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422, 86 O.R. (3d) 161.

(b) We agree with the appellant that tender documents represent an implied representation to compliant bidders that the work described in the tender documents could be built as described. Those bidders are entitled to rely upon the accuracy of design information prepared by the owner or its engineers. A bidder does not have to duplicate design and analysis prior to submitting a bid: See *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206.

[10] Moreover, by asserting its claim for damages against the appellant, the respondent elected to affirm the contract and thereby disentitle itself from relying on the doctrine of common mistake.

[11] Accordingly, the appeal is allowed. The decision of the Divisional Court is set aside and the trial judgment is restored.

[12] The appellant is entitled to its costs on this appeal, the motion for leave to appeal and the proceedings before the Divisional Court in the total amount, for all proceedings, fixed at \$35,000 inclusive of disbursements and applicable taxes.

“Robert J. Sharpe J.A.”

“Janet Simmons J.A.”

“M.L. Benotto J.A.”