

COURT OF APPEAL FOR ONTARIO

CITATION: Learmont Roofing Ltd. v. Learmont Construction Ltd.,
2022 ONCA 894
DATE: 20221223
DOCKET: C70608

Gillese, Tulloch and Roberts JJ.A.

BETWEEN

Learmont Roofing Ltd.

Plaintiff (Respondent)

and

Learmont Construction Ltd., Rino Pagliaroli,
2653389 Ontario Inc. and Anthonie Boer

Defendants (Appellants)

Mark Adilman, for the appellants

Daniel J. MacKeigan, for the respondent

Heard: December 13, 2022

On appeal from the judgment of Justice Lynne Leitch of the Superior Court of Justice, dated March 14, 2022, with reasons reported at 2022 ONSC 1635.

REASONS FOR DECISION

[1] This is an appeal from a judgment granting partial summary judgment in favour of the respondent.

[2] The appellants submit that the motion judge erred in: (1) finding that there were no genuine issues for trial; and (2) granting partial summary judgment without

considering the risk of inconsistent findings of facts being made in the ongoing counterclaims.

[3] We see no merit to the arguments and dismissed the appeal following the appellants' submissions, with reasons to follow. These are our reasons.

A. BACKGROUND FACTS

[4] The appellant, Learmont Construction Ltd. ("Construction") and respondent, Learmont Roofing Ltd. ("Roofing"), are not related.

[5] In August 2018, Construction was awarded a CCDC stipulated price contract for a commercial roof replacement project ("the project"). Mr. Pagliaroli signed the contract on behalf of Construction.

[6] Construction then entered into a subcontracting agreement with Roofing, in which Roofing agreed to perform all the work for the project. Importantly, the subcontract stipulated that Construction would receive 5 per cent of the gross amount on every invoice, and Roofing would receive the remaining 95 per cent.

[7] Construction received progress payments from the owner of the property on which the project was being carried out. The amount in each invoice was certified by a third-party engineer. After receiving each payment, Construction was to pay 95 per cent of the total invoice price to Roofing. Interest on overdue payments to Roofing would accrue at the rate of 9 per cent per annum.

[8] By January 2019, the work under the contract was completed. Based on five invoices, the owner paid Construction in full. There was no indication that the owner was in any way dissatisfied with the work done.

[9] Construction passed 95 per cent of the monies received on the first, second, third, and fifth invoices, by cheque, to Roofing. However, when Roofing tried to certify the cheque for the fourth invoice, it discovered that the cheque had been cancelled by Mr. Boer – the individual who controls 2653389 Ontario Inc., the controlling shareholder of Construction. When asked about the cancellation, Mr. Boer explained that Construction did not have the funds to pay for the cheque at the time.

B. THE PARTIAL SUMMARY JUDGMENT DECISION

[10] Roofing commenced an action to recover \$138,134.33, the amount owed to it pursuant to the fourth invoice. It brought a motion for partial summary judgment, which was subsequently granted by the motion judge as she found no genuine issues requiring a trial.

[11] In his affidavit, Mr. Boer deposed that he directed the stop payment on the cheque for the fourth invoice because the price for the contract had been “spiked”. More specifically, Mr. Boer explained that he first became concerned about the legitimacy of the price when Mr. Pagliaroli texted him and said: “We need to not

piss off [Mr. Sullivan, a lead engineer on the project]. Can we release that money to [Mr. Off, a principal of Roofing] please?”

[12] Mr. Boer stated that he was troubled by this text and asked to meet with Mr. Pagliaroli and Mr. Off. He deposed that at this meeting, he was told by both individuals that they had overcharged the contract by \$40,000. According to Mr. Boer, the contract had been “spiked” so that Mr. Sullivan, the lead engineer, could have a roof put on his own cottage by Mr. Off at no charge.

[13] Roofing denied these allegations. Mr. Off appended to his affidavit a cheque in the amount of \$59,019, representing full payment for Mr. Sullivan’s roofing project. He also appended an email from Mr. Sullivan expressing appreciation for the work and saying that he would pay Mr. Off in full.

[14] In regard to the text that Mr. Boer received, Mr. Pagliaroli explained that he was afraid that Construction would lose future business with Mr. Sullivan’s engineering firm if it was discovered that Construction was not paying its subcontractors. As such, Mr. Pagliaroli texted Mr. Boer prompting him to pay Roofing. The motion judge found this explanation reasonable.

[15] Overall, the motion judge held that Mr. Boer’s “speculative allegation” regarding the contract price being spiked was not a genuine issue requiring a trial. The CCDC contract had been awarded to Construction after a tender process. The owner paid the contract in full. There is no evidence that the price was inflated to

benefit Mr. Sullivan, or that Mr. Sullivan failed to perform his professional duties as a lead engineer in certifying the value of work done. There were also no alleged “credibility issues” raised by the appellants.

[16] The motion judge found there was no evidence supporting the claim that Roofing was not entitled to the monies held in trust by Construction. This issue initially arose because Mr. Off gave evidence in cross-examination that a company which he controlled played a role in the project. As such, the appellants argued that Roofing did not complete their contracted work or, in the alternative, was overpaid for their services. The trial judge rejected this argument, finding that the evidence did not raise a genuine issue for trial on this matter.

[17] In addition, it was clear that Mr. Boer was liable for the breach of the appellants’ trust obligations under the *Constructions Act*, R.S.O. 1990, c. C.30, as he failed to remit the amount owed to Roofing. Mr. Boer’s explanation for cancelling the cheque – Construction “did not have the funds” – was “obviously disingenuous.” The motion judge found that the funds were diverted by Mr. Boer for his personal benefit, or on behalf of 2653389 Ontario Inc. to protect its investment in Construction. As such, Mr. Boer and 2653389 Ontario Inc. were held severally and jointly liable for the amount owing to Roofing.

C. ANALYSIS

[18] On appeal, the appellants raise two issues:

1. The motion judge erred in finding no genuine issue for trial for Roofing's trust claim, because she failed to consider numerous significant facts and credibility issues.
2. The motion judge erred in granting partial summary judgment because she did not consider how it might lead to inconsistent factual findings in the ongoing counterclaims.

[19] Partial summary judgment is a "rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner": *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 418 D.L.R. (4th) 657, at para. 34. The more important credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a partial summary judgment basis: *Cook v. Joyce*, 2017 ONCA 49, at para. 92.

[20] The standard of review on an appeal from a summary judgment ruling, including partial summary judgment rulings, was summarized by this court in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at para. 30:

In *Hryniak [v. Mauldin]*, 2014 SCC 7, [2014] 1 S.C.R. 87], at para. 81, Karakatsanis J. ruled that the exercise of

powers under the new summary judgment rule attracts appellate deference. The question as to whether there is a genuine issue for trial is a question of mixed fact and law; in the absence of an extricable error in principle, or palpable and overriding error, this determination should not be disturbed on appeal.

[21] In our view, the motion judge demonstrated a proper appreciation for the legal principles governing partial summary judgments. We see no error in her decision to grant it in the present case. We agree that the appellants raised no genuine issues requiring a trial. Further, after reviewing the evidentiary record, the motion judge concluded that it did not give rise to any credibility problems. We see no palpable and overriding error justifying appellate interference with the motion judge's findings.

[22] We also find that the motion judge properly considered and rejected the risk of inconsistent factual findings. The motion judge recognized that the appellants have "a myriad of counterclaims" against the respondent, including allegations of fraud, misrepresentation, and conversion. However, these did not "prevent the plaintiff from moving forward to recover the outstanding amount owing to it on invoice #4" through a partial summary judgment motion. The motion judge's reasons referenced an earlier case management endorsement by Nicholson J., on August 4, 2021, who observed that "the counterclaims appear to involve entirely separate claims from the claim being made by [Roofing]."

[23] We agree with the motion judge's assessment. The counterclaims are not intertwined with Roofing's trust claim in a manner which would lead to factual inconsistencies. Consequently, we find that, on the facts of the present case, it was appropriate for the motion judge to grant partial summary judgment.

D. DISPOSITION

[24] Accordingly, the appeal is dismissed.

[25] The appellants shall pay costs to the respondent in the agreed-on amount of \$25,000, all-inclusive.

"E.E. Gillese J.A."
"M. Tulloch J.A."
"L.B. Roberts J.A."