JT 0971

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-028360-058

DATE: OCTOBER 16, 2008

BY: THE HONOURABLE DANIEL H. TINGLEY, J.S.C

SYNDICAT DES COPROPRIÉTAIRES DE L'USINE MONT-ROYAL (Syndicat)
Plaintiff
v.
9119-7129-QUÉBEC INC. (9119 Québec)
Defendant

JUDGMENT
(in respect of the Defense of "chose jugée")

THE ISSUE

[1] The Court is asked to determine if a transaction entered into by the parties in May 2002 to resolve an action brought in Superior Court record no. 500-05-056881-004 [First action] resolves as well the action [Second action] brought in this case in November 2005, since both actions are between the same parties, involve defects to the renovation of the same building (Project) and arise out of the same series of sales of condominium and commercial units.[1]

[2] The transaction is in reality a "Receipt, Release and Discharge" signed only by the Syndicat (Plaintiff) confirming a settlement of the First action. It states:

> We, the undersigned, SYNDICAT DES COPROPRIÉTAIRES DE L'USINE MONT-ROYAL, (the "Releasor") herein represented by BETTY COHEN, administrator, duly authorized by a resolution of the Board of Directors, a

certified extract of which is annexed hereto, do hereby acknowledge receipt of the sum of $27,500.00 in full and final settlement of any and all claims against 9022-2555 QUEBEC INC. or its officers, agents, sub-contractors or employees (the "Releasees") which we now have or may have in the future in connection with any matters related to the facts alleged in the action bearing the number 500-05056881-004 of the files of the Quebec Superior Court for the District of Montreal, in connection with the property located at 4517 Hôtel de Ville, known as l'Usine Mont-Royal (the "Property").

Furthermore, the Releasor acknowledges to have received at its satisfaction copy of the plans for the Property.

The Releasor understands and agrees that the said sum is paid entirely without any admission of liability or responsibility but purely for the purpose of executing a transaction within the meaning of the *Civil code of Québec.*

The Releasor further confirms and declares that the present settlement document has been reviewed by its own legal counsel, and that the Releasor has been advised of its rights in connection therewith.

The Releasor has expressly requested that these presents be drafted in the English language. *Le signataire a expressément exigé que les présentes soient rédigés(sic) dans la langue anglaise.*

AND I HAVE SIGNED AT Montreal, this 24 day of May 2002

SYNDICAT DES COPROPRIÉTAIRES DE L'USINE MONT-ROYAL

(s)

BETTY COHEN, administrator

THE FACTS

[3] In March 2000, the Syndicat brought its First action against 9119 Québec claiming the estimated cost to complete or repair certain "vices de construction, déficiences, anomalies et autres problèmes existants" in the Project that the members[2] of the Syndicat had purchased from 9119 Québec. The Project involved the transformation of an old industrial building (Usine Mont-Royal) into 35 residential units and several commercial establishments on the main floor; work that was done from 1998 to 2000.

[4] The "vices de construction, déficiences, anomalies et autres problèmes existants" in the Project that are the subject matter of the First action were itemized in a six page annex to Exhibit P-4 – problems with ventilation, plumbing and sprinkler fixtures, garage doors, ceilings and walls, garbage chute, floor finishes, painting of stairs, metal doors and garage doors, elevators, terrace, the garage heating system, condominium doors and lighting – and summarized with cost estimates at paragraph [24] of the declaration as follows:

P-13	Finition des planchers des espaces communs	41 728,72 $
P-14	Finition murs et escaliers des espaces communs	26 409,00 $
P-15	Finition des portes dans les espaces communs	2 080,08 $
P-16	Aménagement de la terrasse (meubles)	7 626,96 $
P-17	Plaque pour les égouts	1 097,82 $

P-18	Fenêtres condamnées plus fenêtres commerciales	10 467,28 $
P-19	Insonorisation des portes	7 280,28 $
P-20	Gradateur	4 622,40 $
P-21	Frais d'électriciens relativement au local commercial	1 200,00 $
P-22	Isolation du mur de la sortie sud	693,36 $
	TOTAL :	**103 205,90 $**

[5] More than a year after the First action was settled, in the summer of 2003, several members of the Syndicat complained of water leaking into the building through window units. An engineer was hired to determine the source of these "infiltrations" and later to recommend the appropriate remedies.

[6] The engineer discovered damage to the exterior walls of bricks and mortar surrounding the building requiring repairs to joints and repointing. Window lintels had also sustained premature damage requiring immediate attention.

[7] It is the cost to repair or replace portions of the exterior walls and lintels that is the subject matter (object) of the monetary claims made in the Second action, aggregating some $340,000. These claims are all characterized in the Second action as amounts necessary to pay for repairs or replacements of latent defects.[3]

DISCUSSION

A. Deficiencies vs Defects

[8] It appears evident from the allegations contained in the First action that the amounts claimed by the Syndicat against 9119 Québec were to pay for work not yet done or work done that had to be redone in relation to the retrofit and renovation of the Usine Mont-Royal from an industrial building to residential units, completed in 2000. The work that had to be redone was defective or not in accord with specifications discovered on final inspection. In this sense, they were apparent defects.[4]

[9] It is equally clear from the allegations of the Second action that the amounts claimed are to pay for repairs to and replacement of portions of brick walls and lintels that had failed prematurely due to latent defects discovered by an engineer some 3 years after the retrofit was completed.

[10] The latent defects described in the Second action are unrelated to the apparent defects or unfinished work claimed in the First action. The Syndicat did not know of the latent defects when it settled the First action.

B. "Matters"

[11] The Receipt, Release and Discharge signed by the Syndicat to settle the First action was intended to cover a settlement of "all claims" now or in the future "in connection with any matters related to the facts alleged" in the First action and having to do with the Project. The expression "matters" perforce refers to the work that had to be finished or redone following what amounted to a final inspection of the Project.

[12] The question for determination therefore is whether these "matters" extend to cover the latent defects claimed in the Second action. With respect the Court does not think that they do.[5] It may be that the trial judge will decide that some or all of the so-called latent defects are in reality apparent defects, as is alleged in the Defense and Cross-Demand. Such findings may well affect the quantum of the Syndicat's claims but not their existence or the right to invoke them.

C. Cause

[13] Arguably, the cause giving rise to the First action is not identical to the legal basis for the Second action, as alluded to in paragraphs [7] and [8] above,[6] albeit both actions proceed from the acquisition of the renovated Usine Mont-Royal.

D. Conclusions

[14] In sum, the First action was concerned with apples while the Second action deals with oranges. The objects are not the same.[7] The Syndicat did not know of the latent defects discovered by an engineer more than a year after it settled the First action dealing with defects known at the time to everyone.

[15] The Court is at a loss to appreciate how 9119 Québec could invoke the rule of *res judicata* to escape its obligation as a vendor/renovator to warrant the Syndicat that the Project is free of latent defects that were not known by it when the First action settled, especially given the qualified language used in the form of Receipt, Release and Discharge - "matters related to the facts alleged in the [First] action".

[16] **FOR THESE REASONS, THE COURT:**

[17] **DISMISSES** the Defense of the Defendant based upon *res judicata* as set out in paragraph III of the summary submissions of its Defense and Cross-Demand.

[18] **THE WHOLE** with costs.

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DANIEL H. TINGLEY, J.S.C.

Me Marc Lanteigne
DE GRANDPRÉ JOLI-COEUR
Attorney for Plaintiff

Me Leonard E. Seidman
SEAL SEIDMAN, senc
Attorney of Defendant

Date of hearing: October 3, 2008

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[1] Invoking articles 2631 and 2633 C.C.Q. which provide: ***2631.*** *Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising*

in the execution of a judgment, by way of mutual concessions or reservations. ***2633.*** *A transaction has, between the parties, the authority of a final judgment (*res judicata*). A transaction is not subject to compulsory execution until it is homologated.*

[2] That is, the co-owners of the condominium and commercial units comprised in the Project.

[3] See article 1726 C.C.Q.

[4] See article 2111 C.C.Q.

[5] Bearing in mind that *res judicata* (chose jugée) only covers what the parties agreed be covered. See article 2848 C.C.Q. and Professor Jean-Claude Royer, La Preuve civile, Cowansville, 2003 at pages 585 and 586: *La chose jugée ne vise que ce qui a été convenu entre les parties. Elle ne couvre pas ce qui ne fait pas l'objet de la transaction ou ce qui en a été exclu.*- Citing Labrecque c. Comité du Chemin des Belvédères, J.E. 2000-396 (C.S.); Pelletier c. London Life, compagnie d'assurance-vie, J.E. 99-2174 (C.S.); 164618 Canada inc. c. Compagnie Montreal Trust, [1998] R.J.Q. 2696, 2700 (C.A.).

[6] See Rocois Construction v. Québec Ready Mix, (1990) 2S.C.R. 440 at page 456 where Mr. Justice Gonthier explains: *Two statutory provisions based on different legal principles cannot give rise to identical causes since the fact regarded as the source of liability will necessarily be different; the legal characterization of the factual situation will similarly be different.*

[7] Unlike the situations in Elomari c. L'agence spatiale canadienne, S.C.M. 500-17-023875-050; 2005-07-12, at paragraphs [20], [50], [51] and [60] to [62] inclusive; Contrôle technique appliqué Ltée c. Le Procureur général du Québec et al, (1994) R.J.Q. 939, at pages 948 and 949; or Isolation Manson Inc. c. Tran Long Sinostar International Ltd.,S.C.M. 500-17-015828-034; 2003-10-10, at paragraphs [23] to [25] inclusive and [37].