CITATION: P.R.W. Excavating Contractors Limited v. Cotton Inc., 2011 ONSC 6640
COURT FILE NO.: 10109/08
DATE: 2011-11-21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
P.R.W. Excavating Contractors Limited Plaintiff	Gary Enskat, for the Plaintiff
– and –	
Cotton Inc. and S & G 1929 Holdings Inc. Defendants	Peter Mahoney, for the Defendants
	HEARD: September 7 and 8, 2011 in Welland

MILANETTI J.

[1] Cotton Inc. hired P.R.W. Excavating for work on three projects:

1) 4430 Bridge Street, Niagara Falls - $3,675;

2) 10 Ormond Street, Thorold - $25,000 + $4,100 extra + $5,000 credit for concrete; and

3) 112 Oakdale Street, St. Catharines - $47,250.

[2] I would note that the case has been discontinued as against S & G 1929 Holdings Inc. before the trial began.

Set Off

[3] At the opening of trial there was a discussion as to the timing and relevance of a set off by Cotton for amounts owed them by P.R.W. for purchases of concrete.

In its opening P.R.W. acknowledged that it owed Cotton $16,804.04 for unrelated accounts but indicated it was not part of this lawsuit; not referenced in Cotton's Statement of Defence.

[4] Cotton takes a different view as it suggests that this amount has always relevant to this litigation whether formally referenced in the Statement of Defence or not. They point to their Request to Admit and the Response to the Request to Admit, (both of which reference these figures), as exemplary of same.

[5] If this sum were factored in by way of a set off, Cotton maintains that they owe P.R.W. $8,405.20. Cotton ultimately agreed that they owed P.R.W. that sum plus $5,000 credit for concrete from the Ormond work.

[6] The defendants thus brought an oral motion to amend the statement of defence to claim a set off. I allowed same on the understanding that neither party wanted to adjourn the trial at this point. The amendment was allowed on the express understanding that it would be without prejudice to anyone's argument as to costs ultimately.

[7] There seems to be concession between the parties as to the amount of the "set off" ($16,804.04).

[8] The dispute is whether it shall be treated as a separate debt by P.R.W. to Cotton or a number to be set off as against Cotton's indebtedness to P.R.W.

[9] The treatment of the sum is complicated further by the divergent answers of P.R.W. Vice President Diane McLeod on the issue. At discoveries she agreed it should be set off against indebtedness; at trial she took different position.

[10] It is clear to me, and I accept as fact, that these sums are for concrete and are not in any way related to any of the projects in issue in this lawsuit.

[11] As such, while I acknowledge that P.R.W. owes this amount to Cotton, it is for something entirely unrelated to the subject matter of this litigation. It thus, shall not be set-off against any ultimate indebtedness by Cotton in the case before me.

The Case Before Me

[12] It was conceded by the defendant Cotton that the first two jobs aforementioned (Bridge and Ormond), were completed in a satisfactory manner. This case derives from issues attendant to the third project – the demolition on an old school and attached steel building at 112 Oakdale Avenue.

[13] P.R.W. makes a claim for payment of all three outstanding accounts totalling $86,771 less payments of $29,646 for a net claim of $57,125.

[14] Cotton claims a set off for cleanup costs they say they incurred at the Oakdale property plus credit for delay in completion of this project – a delay that required them to reduce their own fees to the property owner by $28,500 (reduced from $68,500 to $40,000).

Plaintiff's Position

[15] I heard from the two principals of P.R.W. Excavating – Peter Wangler and his sister Diane McLeod (who is Vice President and does the books for the company) on behalf of the plaintiffs.

[16] I heard from Joe Ruggi, the manager of projects and equipment for Cotton, as well as Oakdale owner/developer, Sam Morabito for the defendants.

[17] Although money is still owed for the first two projects, it became clear that the dispute between these parties relates to Oakdale.

[18] I heard two versions of this contract and its completion.

[19] In short, the plaintiff maintains that they completed the work agreed to and thus should be paid in full. It is the position of the defendants that the plaintiff's left the property a mess, and took too long to complete the project.

[20] There was no paper contract for this project; it was a verbal deal between the parties. As such, I am left to decide whose version of events to accept; which makes most sense.

[21] Cotton maintains that this project was to be completed in 30 to 60 days – a requirement insisted upon by Mr. Morabito and communicated to P.R.W.

[22] Mr. Wangler says timing was never discussed; he would not have agreed to do the project for this price, on this basis. His quote for $47,250 was based on P.R.W.'s ability to salvage the steel frame for re-use (the pre-engineered building and the open web steel joists).

[23] Salvaging takes more time than straight demolition. Time was never an issue with Mr. Ruggi as far as Mr. Wangler was concerned. Had time been articulated as an issue, Mr. Wangler could have demolished the building quickly, but his price would have been higher as he would have received no benefit from the salvaged materials.

[24] Mr. Wangler spoke of the systematic dismantling required. As well, demolition revealed the presence of asbestos; something that made the job somewhat trickier and the going somewhat slower. Mr. Ruggi did not deny that asbestos was involved. He did not know for certain but had no reason to disbelieve Mr. Wangler when he said that there was asbestos in the project.

[25] The demolition was also made more difficult by the poor condition of the roof sheets. They were thin and thus had to be removed carefully with attention paid to the underlying insulation. As this demolition was located in a residential neighbourhood, both of the asbestos and the insulation mandated careful and systemic removal to prevent airborne contamination.

[26] P.R.W. was not provided the required environmental report prior to their work. I heard that this was the responsibility of the owner; something that should have been done, and would, I infer, have eliminated the guess work relating to the location of such materials as asbestos and insulation that could easily become airborne.

[27] Mr. Wangler said that Mr. Ruggi first discussed the timing of the project at Christmas of 2007. When he learned that urgency was an issue, Mr. Wangler worked through the holiday season, taking only Christmas and New Years Day off. He also tried to work longer hours and go faster, but this proved difficult owing to the cold weather.

[28] Mr. Wangler asked Mr. Ruggi why timing was suddenly an issue. He was told that Mr. Morabito wanted it that way; that he is old. Mr. Wangler explained to Mr. Ruggi that he could not take it down fast and still salvage what he wanted.

[29] Mr. Ruggi never offered to pay more to take the buildings down more quickly – without salvage.

[30] Mr. Wangler said that Mr. Morabito drove by the site daily – they talked often – the owner knew and liked that they were salvaging parts of the building.[1]

[31] It was Mr. Wangler's evidence that he quoted and started work on this project in October 2007; finishing it before March of 2008 (they picked up their machines in early March).

[32] Despite Mr. Wangler's evidence that he first attended the site in October (not in July or August), he was effectively cross-examined with a document that confirmed that his quote was provided in July. When faced with this contradiction, Mr. Wangler answered quite reasonably that it could have been possible after all.

[33] I found Mr. Wangler to be quite a credible witness. That being said, he became argumentative in cross-examination.

[34] As well, I wondered as to the substantial trial time focused on the "switcheroo"[2] as well as repeated references to the failure to provide an environmental report.

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[1] Mr. Wangler noted that two years later nothing had happened on the project by way of development and so he did not understand what the urgency was at the time.
[2] The request from Cotton to change invoices ascribing work done earlier to a later project.

[35] I was left to assume that these issues were raised to infer that the defendant had not been above board in all of their dealings. I understand this tactic, but prefer to base my decision on the evidence of what occurred on the Oakdale property. That being said, I do accept that the evidence as to the "switcheroo" does have an impact on the total amount outstanding as fees for services rendered on the earlier completed projects were comingled with his Oakdale property making it somewhat confusing.

[36] While I heard from Diane McLeod, she did little but confirm the billing and payment arrangements as this is her domain at P.R.W.

[37] Her largest contribution dealt with the explanation of the billing changes directed by Cotton. She was asked by Mr. Ruggi to take $20,000 from the Ormond Street invoice and add it as a deposit to the Oakdale quote making that job now worth $47,000 ("plus $20,000 from Ormond") plus tax for a total of $68,900. Ms. McLeod was asked by Cotton to provide revised invoices reflecting these changes.

[38] The Ormond property had really been for $30,846 plus a $5,000 credit. It was completed and had been billed at the time these new invoices were requested. As a result of Cotton's request the invoice for the Ormond property was reduced to $9,646 plus the $5,000 credit with the balance transferred to the Oakdale invoice.

[39] P.R.W. was not paid for its Ormond Street work until after the invoices were revised. Ms. McLeod referred to this revision of invoices as the "switcheroo".

[40] While not happy about doing this manoeuvre, Ms. McLeod did what Cotton asked as P.R.W. was just "a peanut" compared to Cotton, and she wanted to be paid for their work.

Ormond Street was completed on July 19th, 2007 but was not paid until October 2007. As such, P.R.W. was not paid until the "switcheroo" was complete.

[41] Ms. McLeod was effectively cross-examined about a gap in her evidence. At trial she said that her brother Pete kept a log book from which she prepared invoices for work done at each site. She had been aware of the book for 25 years. Despite this, when asked at examinations for discovery if Pete kept any journals or diaries, she said, "I don't know what kind of paperwork he does…" As such, no diary was ever produced to the defence.

[42] These are clearly two different answers. I had no explanation for same but was asked to draw an adverse inference from the failure of the plaintiffs to admit and ultimately produce Peter Wangler's diary. I would draw such inference but I am uncertain what ultimately is to be drawn from same.

Defence Position

[43] Joe Ruggi testified for the defence. He has been employed by Cotton as manager of trucking and equipment for 13 years.

[44] He was the individual involved in the dealings with P.R.W. and Peter Wangler for all three of the Bridge Street, Ormond Street, and Oakdale projects. He also seems to have been the Cotton individual who dealt with the Oakdale property owner Sam Morabito.

[45] As mentioned previously, the contract for Oakdale was never reduced to writing. Mr. Ruggi said that all of his dealings with Mr. Wangler were oral.

[46] Mr. Ruggi said that Cotton were forced to reduce their account to Mr. Morabito from $68,300 to $40,000 as a result of P.R.W.'s delay in completion of the demolition.

[47] Mr. Ruggi maintains that he told Mr. Wangler that Mr. Morabito wanted the demolition done quickly. That said, Mr. Ruggi provided me no evidence of an agreed completion date, or even a time frame for demolition (in view of the agreed salvage). His evidence on timing was far from clear. Mr. Ruggi he did not know if they discussed the exact amount of time – he thought it would take a couple of weeks at most to take down the school.

[48] I was told that Mr. Morabito wanted the front building taken down immediately. Mr. Ruggi said he communicated this to P.R.W. but "I was never told why this was so very important". Mr. Wangler told Mr. Ruggi he needed more time to take down the steel structure at the back. Mr. Ruggi told him that as long as he opened up the rear steel building, he could take as much time as he needed to remove the steel structure.

[49] Mr. Ruggi said that he saw machines on site the second or third week in September but that issues developed right away as he saw no progress on site. He was told that P.R.W. were doing internal dismantling – hand work to detach the front building from the rear before demolition. Mr. Ruggi urged them to take the front building down first as this was what the owner wanted. Mr. Ruggi made numerous calls through October and November and was told that Mr. Wangler had spoken to Mr. Morabito himself and he was fine.

[50] By December, Mr. Morabito insisted that P.R.W. be taken off the project (fired) or provide an exact date when the front building would be cleaned up.

[51] I was provided no explanation as to why Cotton did not take over the excavation themselves if P.R.W.'s work and timing were so problematic.

[52] The defendants called Mr. Morabito. He was quite a colourful character; an individual who evidently is well known in the Niagara Peninsula for his development savvy.

[53] His evidence, in my estimation, hurt the defence, as he speaks to the sequence of events. Mr. Morabito sought several quotes for the Oakdale demolition. Cotton bid and included P.R.W.'s quote to them which I find was based on P.R.W.'s salvaging of the steel building. When Mr. Morabito got Cotton's quote he told them they would get the job if they could get it done in 30 days. That said, he could live with 60 days but had a potential buyer and was concerned about the buildings.

[54] Mr. Morabito's discussion about timing occurred after he received Cotton's quote (predicated upon P.R.W.'s quote to them). Cotton agreed to Mr. Morabito's terms.

[55] I did not hear from anyone that Cotton then went back to P.R.W. to discuss this issue. Perhaps Mr. Wangler would have agreed; perhaps he would have changed his quote or changed his mind about the salvage.

[56] I find that Mr. Wangler provided his quote before Cotton agreed to the timing terms imposed by Mr. Morabito.

[57] Perhaps Cotton "assumed" that the time frame would not be a problem for P.R.W.; I cannot conclude that they appropriately communicated that timing was so fundamentally important before Mr. Wangler agreed to do the work in accordance with his quote.

[58] This break in the chain of communication continued as Cotton made a deal with Mr. Morabito to reduce their account from $68,300 to $40,000.

[59] This reduction was done without consultation with P.R.W. (who had done the lion's share of the work on the site) and most importantly without obtaining any evidence of the expenses said to have been occasioned by Mr. Morabito as a result of the delay. Mr. Ruggi said that he had been told there were increased taxes, insurance and other expenses but he did not seek any back up documentation relating to same.

[60] Moreover, while Cotton asserted that Mr. Morabito lost a potential buyer as a result of the delay, Mr. Morabito himself said that he had refused offers made to him during the demolition for reasons unrelated to the demolition. It is relevant to me that he still owns the land and is planning to develop it currently.

[61] I find that Cotton last made a pragmatic decision to reduce their account based on Mr. Morabito's complaints to them. Mr. Ruggi thought that the complaints were well founded and decided it was sensible to reduce the account in accordance with Mr. Morabito's own suggested value of $40,000.

[62] Cotton is clearly entitled to make such a business decision for its own reasons. It cannot, however, then hope to foist this decision on its sub trades without any evidentiary foundation or consultation. Perhaps it was expedient for a large company to make a deal with a prominent developer. This cannot then, be passed onto a sub trade without written warning or any involvement by them in the deal making.

[63] I do not accept that P.R.W. should be faced with $28,300 deficiency agreed to by Cotton for its own reasons, in the absence of any evidentiary base. This is not reasonable.

[64] Cotton also contends that P.R.W. left the worksite in a mess – there was garbage and construction debris on site requiring clean up by Cotton.

[65] Mr. Ruggi suggests that Cotton expended a $4,065.76 (less $317.50 credit). These are internal costs for use of Cotton's own equipment and manpower (I heard that their dozers, for instance, were charged at $75 per hour; fees that include profit over and above expense for such as gas). I had no specific evidence as to work Cotton allege was left undone (no photos for instance) merely accounts that Cotton says are reflective of their clean up of the site after P.R.W. left.

[66] I had no independent evidence of what work had to be completed by Cotton that had been P.R.W.'s responsibility. This is particularly tricky as Cotton agreed that they did have their own work to do on site at the same time (they were responsible, for instance, to pump water and remove debris from the basement before going on to back fill it).

[67] In short, I am really unable to delineate which of the invoices presented represent work that Cotton was mandated to do, and which represent the remedial work they say was required by P.R.W.'s incomplete clean up of the site.

[68] Moreover, and from a practical perspective, I do not accept that P.R.W. would have jeopardized any further relationship with this large company by doing a shoddy job with something as simple as site cleanup. This does not make sense to me.

[69] I must say that I did not find Mr. Ruggi non credible; rather I found a complete absence of evidence substantiating specificity regarding timing, justification for the substantial reduction in the invoice price (1/3), or of the remedial work that Cotton says was required.

Conclusion

[70] At the end of the day, I prefer the evidence of the plaintiff over the evidence of the defendant. I find that Cotton owes the plaintiff $57,475 (I note that that sum is different than that which was initially put forward by the plaintiff but it the sum agreed to by counsel by the end of the trial).

[71] I further find that P.R.W. owes Cotton the sum of $16,804 reflective of concrete purchases entirely unrelated to these three projects.

[72] I will not set the two figures off as there may well be independent interest calculations relating to each. While each sum reflects money owed by one company to the other, I find that there is no causal relationship between the two sums.

[73] Judgment shall issue in favour of the plaintiff in the sum of $57,475 plus interest. If agreement as to costs cannot be arrived at, the parties might provide me with written submissions (limited to two pages plus any relevant offers) within 20 days of the date of this decision.

MILANETTI J.

Released: November 21, 2011

CITATION: P.R.W. Excavating Contractors Limited v. Cotton Inc., 2011 ONSC 6640
COURT FILE NO.: 10109/08
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

P.R.W. Excavating Contractors Limited

Plaintiff

– and –

Cotton Inc. and S & G 1929 Holdings Inc.

Defendants

REASONS FOR JUDGMENT

Milanetti J.

JAM:mg

Released: November 21, 2011