

✓ Court File No. CV-16-550095

✓ Date: 20170428

SUPERIOR COURT OF JUSTICE – ONTARIO

✓ RE: SIRRO BROTHERS CEMENT FINISHING & SPRAY LTD. (Respondent)

AND

SOMERSET WALLACE DEVELOPMENTS LIMITED ET AL (Appellants)

✓ BEFORE: R. D. Gordon RSJ

COUNSEL: A. Edward Tonello, for the Appellants

David Morawetz, for the Respondent

✓ ENDORSEMENTOverview

The Appellant Somerset Wallace Developments Limited ("Somerset") appeals the Order of Master Graham dated March 10, 2017 by which it was required to produce certain documents relating to the construction project out of which this litigation arises.

Background Facts

Somerset owns, developed and is constructing a condominium project of 167 townhouses, 20 commercial/Industrial units and a community centre, all with underground parking. The Royal Bank is funding construction of the project with a mortgage exceeding \$40 million.

Construction began in January of 2013 and is scheduled for completion late in 2017.

Somerset hired the Respondent Sirro Brothers Cement Finishing & Spray Ltd. ("Sirro") to complete some flooring work on the project. Sirro worked at the project for a few months beginning in May of 2015 before leaving. It is unclear why it left. Sirro says its contract was unlawfully terminated by Somerset. Somerset says Sirro simply left the jobsite with its work incomplete. Who is right is an issue for another day.

Sirro says it is still owed just in excess of \$50,000 for the work it completed. Somerset says Sirro is owed nothing and that certain of the invoices it has submitted are entirely fraudulent.

Sirro began this claim for damages and included a trust claim under the provisions of the *Construction Lien Act*. Somerset defended and a discovery plan was entered into in which Somerset agreed to produce a record or accounting of all funds received by it in respect of the project from the persons with whom it contracted.

Somerset subsequently retained new counsel and has since refused to produce all of these documents. Sirro brought a motion to compel production. Master Graham ordered Somerset to produce "all banking records reflecting receipt of funds in respect of the financing of the project commencing September 1, 2014 and ending April 30, 2016, being slightly more than 90 days after the plaintiff's last invoice dated January 28, 2016. In addition, the defendants shall produce their records with respect to all payments for work done on the project from April 1, 2015, being the beginning of the month in which the plaintiff began work, until conclusion of the project".

Somerset says the Master erred by failing to consider material evidence, making an order that is too vague and too broad, failing to account for the principle of proportionality, and making errors of law.

Standard of Review

In reviewing a decision of a Master, the judge hearing the appeal does not conduct a hearing de novo. Rather, the Master's decision is only to be interfered with if: (1) The Master erred in law; or (2) The Master exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error. [See *Zetoun v. Economical Insurance Group* 2008 CarswellOnt 2576, (Ont. Div Ct.)].

Analysis

In *St. Mary's Cement Corp. v. Construct Ltd.*, 1997 CarswellOnt 939, it was determined that a trustee of funds which arises by operation of the CLA must: (1) Account for all of the monies it receives; (2) Pay proper beneficiaries of the trust before appropriating trust monies for its own use; and (3) Only pay itself after all of its subtrades and suppliers have been paid.

In *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, 2010 ONCA 198, the Court of Appeal set out the four elements that must be established in respect of a breach of trust claim under the CLA: a) That the Defendant was a contractor or subcontractor or owner; b) That the Plaintiff supplied materials to the contractor, subcontractor or owner; c) That the contractor or owner received or was owed monies in respect of the subject construction project; and d) That the Plaintiff is owed money from the Defendant in respect of materials or services supplied to the subject construction project. Once these four elements are established, the onus shifts to the contractor or owner to prove that the funds received were properly paid out in accordance with its trust obligations.

Based on these principles the documents are clearly relevant to this litigation.

That determined, Rule 29.2.03 sets out the considerations to be taken in making a determination of whether a party must produce a document. In particular, the court is to consider: (i) Whether the time required for the party to produce the document would be unjustified; (ii) Whether the expense associated with producing the document would be unjustified; (iii) Whether requiring the party to produce the document would cause it undue prejudice; (iv) Whether requiring the party to produce the document would unduly interfere with the orderly progress of the action; (v) Whether the document is readily available to the party requesting it from another source; and (vi) Whether the order would result in an excessive volume of documents required to be produced.

It is clear from the decision of the Master that he specifically considered these provisions, along with the proportionality analysis contemplated by Rule 1.04(1.1). Indeed he specifically endorsed the concept of proportionality as it applied to trust claims under the CLA.

With proportionality in mind, he crafted an order that would give Sirro access to some but not all of the requested documents. His decision reflected an appropriate consideration of the law and is devoid of any palpable and overriding error.

Somerset argued that the Master's failure to consider the allegations of fraud against Sirro constitutes an error in principle. I disagree. Once a document is determined to be relevant, the considerations for production are set out in the Rule cited above. Although one can perhaps envision a situation in which production is contested based on objective proof that the Plaintiff's claim is fraudulent and without merit, this is not such a claim. The allegation of fraud is, at this point in time, little more than a bald allegation by the Appellants.

It seems there was also some confusion with respect to the requirements of the disclosure resulting from the Master's order. Upon discussion with counsel during the course of the motion it is clear that what Sirro expects is much less than what Somerset anticipated. What Sirro expects as compliance with the order is, for the timeframes outlined in the Master's order, the following: (1) Proof of deposits into the account(s) used by Somerset to fund the Project; and (2) A copy of Somerset's unredacted general ledger indicating what monies were paid out and to whom. This is not an onerous production order and reflects the proportionality principles that govern.

The Appellants also asked the court to consider bi-furcating the trial of this matter so that the trust issue would be dealt with only if and when the Plaintiff met with success in establishing the validity of its accounts. This relief was not sought before the Master. There was no motion before me requesting it. In these circumstances it is not an issue that is properly before me.

Conclusion

The Appeal is dismissed. If the parties are unable to agree on costs they may make written submissions to me within 45 days of this endorsement, limited to three pages plus attachments each.

Date: April 28, 2017



R. D. Gordon RSJ