CITATION: University Plumbing v. Solstice Two Limited, 2019 ONSC 2242
COURT FILE NO.: CV-15-537832
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2019 ONSC 2242 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: UNIVERSITY PLUMBING & HEATING LTD., Plaintiff

– and –

SOLSTICE TWO LIMITED, DAVIES SMITH DEVELOPMENTS INC., GRAHAM CHALMERS and IAN SMITH, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Robert Harason*, for the Plaintiff
Evan Tingley, for the Defendants

HEARD: April 8, 2019

REASONS FOR JUDGMENT

[1] The Plaintiff is a mechanical systems contractor that constructed the plumbing, heating, ventilation, air conditioning and fire protection systems at a condominium building (the "Project") built by the Defendant, Solstice Two Limited ("Solstice"). The work was done pursuant to a contract dated April 28, 2008 and a Letter of Intent issued by Solstice's related company, the Defendant Davies Smith Developments Inc. ("DSD") (the "Contract").

[2] The Plaintiff seeks summary judgment pursuant to Rule 20.01(1) of the *Rules of Civil Procedure*. Between September 2008 and August 2012, the Plaintiff performed the required work for a total invoiced value of $6,996,027.21. Solstice paid the Plaintiff $6,892,979.73, leaving an unpaid balance of $102,071.83, plus interest at the Royal Bank of Canada prime rate plus 6% per year compounded monthly, in accordance with the Contract. The essential facts supporting the Plaintiff's claim are admitted pursuant to a Request to Admit dated May 25, 2017.

[3] The principal amount owing increased to $103,047.48 plus interest when the balance of the holdback was invoiced by the Plaintiff on April 17, 2014 and went unpaid. Counsel for the Defendants contends that at cross examination the Plaintiff's affiant was unsure of whether or how this last invoice was delivered, but the affidavit filed in support of the Plaintiff's motion states specifically that it was issued in the amount of $975.65 and was in fact delivered. In any

case, the Defendants do not deny that the monies were owing to the Plaintiff. As of today, the accumulated interest comes to $345,175.83.

[4] The Defendants, Graham Chalmers and Ian Smith, are directors and officers of Solstice and DVD. They are alleged to be in breach of trust under the *Construction Lien Act*, RSO 1990, c. C.30 (the “Act”).

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[5] Section 7(1) of the Act establishes a financing trust for the benefit of contractors where an owner receives funding to finance a construction project. Section 7(2) establishes all amounts payable and certified by the designated certifier as another trust for the benefit of contractor to whom the amounts are owed, and s. 7(3) creates a trust for the contractor’s benefit for the value of any unpaid balance on work substantially performed. Section 9 of the Act creates a trust for any unpaid contractor with respect to the net proceeds of sale of any unit sold by the owner. The facts establishing these various trusts are admitted by the Defendants here.

[6] According to the Defendants’ own bank records, the total amount of trust funds received by Solstice for the overall construction project was just over $177 million. Section 7(4) and 9(2) of the Act make the owner trustee of the trust funds until such time as the contractor is paid.

[7] There is an initial onus on the Plaintiff to prove the existence of the trust or trusts in issue. That onus has been satisfied here; the elements of the trusts are proven on the evidence in the record. The onus then shifts to the Defendants to prove that they have adhered to the terms of these statutory trusts or fall within an exception to the trust obligations: *St. Mary’s Cement Corp. v Construc Ltd* (1997), 32 OR (3d) 595, 600 (Gen Div). There is no evidence that the Defendants have satisfied this onus, and, indeed, there is ample evidence that the trust funds have been improperly used for purposes other than satisfying the debt to the Plaintiff as contractor. Among other things, the evidence establishes that the trust funds were paid for general overhead of Solstice and DVD and for management fees to Messrs. Chalmers and Smith.

[8] Chalmers and Smith, as directors and officers, signing authorities, and overall managers, are the directing minds of Solstice and DVD. Counsel for the Defendants submits that the Plaintiff could have made a corporate search to determine that Chalmers and Smith were speaking in corporate rather than personal capacities when they promised the Plaintiff that the debt would be paid: see *Aldine Construction v Brucegate Holdings Inc*., 2010 ONSC 3032. However, s. 13 of the Act makes them personally liable for the corporate breaches of trust both under the Act and at common law.

[9] The two individual Defendants controlled the trust funds and were the ones who decided which of the companies’ creditors to pay with the trust funds. In other words, they are liable for knowingly engaging in the breaches of trust. They have also failed to account for the trust funds in issue; instead of providing a detailed accounting they have simply said all along that they would like to pay the Plaintiffs but have limited funds. The Defendants effectively admit that no proper accounting has ever been done.

[10] In fact, in the Defendants’ own capital cost summary for the project it is indicated that construction management fees of over $1 million were paid to DVD out of the trust funds, as

were substantial funds for the design of the project, legal and administrative fees, and pre-development and development management fees. DVD, in turn, paid management fees in excess of $1 million to each of Mr. Chalmers and Mr. Smith. The signing authorities for all of these transactions were Messrs. Chalmers and Smith. They were both knowing payers and knowing recipients of the trust funds.

[11] The amounts taken out of the trust by DVD, Chalmers, and Smith exceed the amount owing to the Plaintiff. This has all been confirmed in the cross-examination of Mr. Chalmers and in the examinations for discovery of Messrs. Chalmers and Smith, and is not rebutted or seriously contested by the Defendants.

[12] The Defendants do not take issue with any of the material facts relied on by the Plaintiff. Their only real defense is that the limitation period has passed. The Plaintiff's second-to-last invoice – that is, prior to the small invoice for the holdback amount delivered in April 2014 – was issued on August 30, 2012. The Defendants submit that the holdback invoice could have been submitted any time thereafter, and that August 30, 2012 was effectively the date that the debt sought in this action became payable. The action was commenced on October 6, 2015, some 3 years and 2 months after the August 2012 payment.

[13] The last payment made by Solstice to the Plaintiff was on September 5, 2012. There is written acknowledgment of the debt in the form of email correspondence by Mr. Chalmers to representatives of the Plaintiff on June 20, 2013, October 9, 2013, April 25, 2014, and August 8, 2014. Mr. Chalmers admits that he sent these communications and that they contained his electronic signature.

[14] According to ss. 13(1), (10), and (11) of the *Limitations Act*, *2002*, SO 2002, c. 24, Sched. B, these part payments and written acknowledgements bring the debt within two years of the commencement of the action. Under s. 13(8) these acknowledgments apply even though they may not contain specific promises to pay (although some of these communications do, in fact, contain such promises to pay the liquidated amount). The Court of Appeal has also confirmed that the acknowledgments do not have to specifically state the amount of the debt owing: *Middleton v Aboutown Enterprises Inc*., 2009, ONCA 466, at para 1; see also *Back v Gilroy*, 1977 CanLII 1548, at para 10 (Sask Dist Ct).

[15] This is especially the case where, like here, the actual amount is not a contentious issue: *Phillips v Rogers*, [1945] 2 WWR 53, at para 26, citing *Spencer v Hemmerde*, [1922] 2 AC 507, 518. As stated by the Saskatchewan Court of Queen's Bench in *I.D.H. Diamonds NV v Embee Diamond Technologies Inc*., 2017 SKQB 79, at para 21, "the court will look at the circumstances in which it was written, and will construe it in the way in which the writer intended it to be construed by the person to whom it is addressed."

[16] The Defendants make an issue of the fact that the written acknowledgements were digitally transmitted and were not signed by hand. Counsel for the Defendants points out that s. 13(10) of the *Limitations Act* states that signed written acknowledgments are what is required.

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However, the case law establishes that the issue in every case will be one of fact: *Lev v Serebrennikov*, 2016 ONSC 2093, at para 24.

[17] The communications here are virtually identical to those described in *Fleisher Ridout Partnership Inc. v Tai Foong International Ltd*., 2012] OJ No 4229, at para 16:

> I am of the view that the Emails are something more than a mere acknowledgment of the debt. Firstly, the defendant expresses regret and surprise that the invoices have not been already paid. In fact, not only does he not object or deny payment but he clearly and reservedly indicates that the invoices should have been paid already. Secondly, he agrees to take 'action' to pay them.

[18] As in *Lev*, at para 24, the "email[s] can satisfy the requirements of s. 13 of the [*Litmitations*] Act concerning acknowledgment." Context is everything in these situations. Counsel for the Defendants submits that if a limitation period is to be waived, formality is important to ensure that it was intended by the sender of the communication. Here, however, that is not a particularly contentious issue since the communications are repeated and fully acknowledged. The emails sent by Mr. Chalmers and Mr. Smith all contain digital signatures. Under different circumstances those might not amount to conscious acknowledgment of the debt, but here the two individuals who sent them specifically concede that they were intended to be unequivocal acknowledgments of the debt.

[19] Mr. Chalmers and Mr. Smith have admitted in discovery that Solstice repeatedly confirmed liability for the full balance owing. In an email dated September 18, 2015, Mr. Smith specifically stated that the debts remained owing and again reiterated an intent to pay. As already indicated, it is the Defendants' position that Chalmers and Smith were speaking strictly in their capacities as directors and officers of Solstice, and not of DVD or personally. However, under s. 13(6) of the *Limitations Act*, an acknowledgment by one trustee (i.e. Solstice) is an acknowledgment by any other person who is a trustee or later becomes a trustee (i.e. DVD, Chalmers, and Smith). "[D]irectors [who] had knowingly participated in a fraudulent and dishonest breach of trust…were therefore personally liable as constructive trustees": *St Mary's*, at 620.

[20] Mr. Chalmers only advised the Plaintiff that Solstice and DVD would not have the money to pay the Plaintiff on June 26, 2015. Until then, both Mr. Chalmers and Mr. Smith consistently advised the Plaintiff that money was supposed to be coming in to Solstice from Tarion, that the Defendants were taking steps to collect from Tarion, and that payment to the Plaintiff would be forthcoming as soon as those monies came in. Plaintiff's counsel submits that in these circumstances, it was only on June 26, 2015 that it first became appropriate for the Plaintiff to commence an action. Accordingly, their forbearing from doing so until that point does not start the limitation period running pursuant to s. 5(1)(a)(iv) of the Act.

[21] The Plaintiff held off in commencing an action in return for Chalmers and Solstice agreeing to collect the Tarion money and using it to pay the Plaintiff. While creditors are, of course, under a duty to do due diligence and cannot rely on their own tardiness or inaction in

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forbearing from commencing an action, *Longo v MacLaren Art Centre*, 2014 ONCA 526, this promise effectively induced the Plaintiff to forbear from commencing the action. It thereby prevented the running of the limitation period: *Shook v Munro*, [1948] SCR 539, 542; *Employment Professionals Canada Inc. v Steel Design*, 2016 ONSC 1722, at para 14.

[22] It is only when the Defendants advised that they were ceasing to try to satisfy the debt that it became appropriate for the Plaintiff to commence litigation. The Court of Appeal has stated that “parties should be discouraged from rushing to litigation”: *Markel Insurance Company of Canada v ING Insurance Company of Canada* (2012), 109 OR (3d) 652, at para 34. Counsel for the Plaintiff submits, and I agree, that had the Plaintiff commenced an action while the Defendants were attempting to collect the money to pay them, they would certainly have been “rushing to litigation” and it would not have been appropriate for them to have done so. This is the very reason that the word “appropriate” qualifies the steps that the Plaintiff must take before the debt is formally crystallized for *Limitations Act* purposes: *407 ETR Concession Company v Day*, 2016 ONCA 709, at para 48. Before Mr. Chalmers wrote his June 26, 2015 email, it would not have been appropriate to start an action in the sense used by s. 13 of the *Limitations Act*.

[23] Finally, Plaintiff’s counsel submits that where officers and directors of a corporate trustee misuse or fail to account for trust funds, they commit a wrongdoing which survives a bankruptcy should one ensue: *Bankruptcy and Insolvency Act*, RSC 1985, c/ B-3, s. 178(1)(d). This is the case, and can be the subject of a declaration, even in advance of a bankruptcy: *Sunwell Investments v Cheung*, 2013 ONSC 483.

[24] The Plaintiff shall have judgment largely in the form that it has requested. Accordingly, it is entitled to its costs. Master Short has already awarded $5,000 in the cause to the Plaintiff on a motion dated September 2, 2016. The Costs Outlines with respect to the motion itself shows that the parties are not far apart on quantum of costs. The Plaintiff is seeking $50,000 on a partial indemnity basis and $71,600 on a substantial indemnity basis.

[25] Breach of trust cases generally give rise to substantial indemnity costs: *Maintemp Heating & Air Conditioning Inc. v Momat Developments Inc*., (2002) Can LII 49469, at para 66 (SCJ). I see no reason to deviate from that here. The Defendants know that they owe the money, used it for non-trust purposes, never did an accounting of trust monies held, and simply tried, unsuccessfully, to run out the clock. Substantial indemnity costs are in order here.

[26] Since this is a summary judgment motion, the Plaintiff is also entitled to the costs of the action other than the motion. In his Bill of Costs he seeks another $54,000 on a partial indemnity basis and $73,500 on a substantial indemnity basis. While these figures are significant, especially in proportion to the amount of the debt at issue, they are not beyond what anyone (including the Defendants) should expect. The Construction Lien Act provides effective remedies to creditors in the position of the Plaintiff here, but the cases are not simple matters when it comes to documentation and proof. Counsel for the Plaintiff was put to substantial effort in investigating and prosecuting the action through the pleadings and discovery stage. Again, given that breach of trust has been established, substantial indemnity costs are appropriate.

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[27] Rounding the figures off, the Plaintiff is entitled to $5,000 in respect of the Masters motion, $70,000 in respect of the summary judgment motion, and another $70,000 in respect of the action other than the motions

[28] The Plaintiffs shall have a judgment that contains the following:

- An Order that the Defendants pay the Plaintiff a total of $345,175.83, including the principal debt plus interest to date. Post-judgment interest shall run at the Royal Bank of Canada prime rate plus 6% per year, compounded monthly.

- A Declaration that the Defendants are trustees of trust funds in the amount of $177,391,624 received in respect of the construction project in issue and that the Plaintiff is a beneficiary of this trust, and that the Defendants have breached this trust by appropriating or converting these trust funds to their own use or to a use not authorised by the trust.

- A further Declaration that Mr. Chalmers and Mr. Smith are liable for the breaches of trust committed by Solstice and that they acquiesced in conduct which they knew or reasonably ought to have known amounted to a breach of trust by Solstice and as such are liable to the Plaintiff pursuant to s. 13 of the Act. The Declaration shall further state that this liability for breach of trust survives any bankruptcy of Solstice.

- A further Declaration that the claims made in the Statement of Claim are not barred by the provisions of the *Limitations Act, 2002*.

- An Order that the Defendants, jointly and severally, are liable to pay the Plaintiff a total of $145,000 in costs, inclusive of all fees, disbursements, and HST.

Date: April 8, 2019

Morgan J.

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