

**ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT**

BETWEEN:

TRI-GREEN CONSTRUCTION

Plaintiff

-and-

P.C.M. DIVISION OF QUALTECH

Defendants

REPRESENTATIVE FOR THE PLAINTIFF: Kevin Hodge, Paralegal

REPRESENTATIVE FOR THE DEFENDANT: Vince Finnegan

[1] The Plaintiff claims \$20,340.00 and costs against the Defendant arising out of a contract for the Plaintiff to perform excavation for a building owned by Nestle.

[2] The Plaintiff was a subcontractor for the Defendant.

[3] The Defendant's position is that the amount claimed by the Plaintiff is substantially above the actual cost and states that the Plaintiff would be unjustly enriched.

[4] In 2013 the Plaintiff was asked to give a quote for excavation services for the interior of two buildings to relocate a pipe for cleaning. The Defendant describes the work to be done as removing concrete from around a pipe protruding from the concrete floor, backfill and install the concrete on the interior of two buildings.

[5] The Defendant says that the work was to include excavation on the exterior to expose the pipe.

[6] The Plaintiff's representative John Rudden ("Rudden"), had discussed the contract with Paddy Finnegan ("Finnegan") and Kelly McInnes ("McInnes") the Defendant's project manager.

[7] The Plaintiff provided an estimate without the benefit of an engineering plan, after attending at the site. The estimate was for \$20,340.00 included HST.

[8] The owner of the building, Nestle, who contracted the Defendant to do the work, has paid the invoice submitted by the plaintiff to the Defendant in full. The Plaintiff was subcontracted by the defendant to complete the work.

[9] The Plaintiff commenced work based on an authorization to proceed in accordance with the estimate. Other than the estimate there were no written agreements.

[10] Rudden, principal of the Plaintiff knew Vince Finnegan, principal of the Defendant for over 20 years and they had dealt with each other professionally and had developed trust between themselves.

[11] An incident occurred on December 14, 2013 at a Christmas party in which employees of both parties appear to have been present. It resulted in an altercation between certain employees on each side and the police were called.

[12] This soured long-standing relations and led the parties to take significantly different views of their business relations and this contract in particular. There appear to have been no questions regarding the Plaintiff's account till then.

[13] Until the Christmas party, relations appeared to be cordial between employees of both parties.

[14] The Defendant pleads that after the estimate was given to the Defendant, the Defendant asked for additional work to be done, namely removing and installing a section of fencing outside and that the Plaintiff assured the Defendant that the estimate

need not be revised because of their outstanding relationship. The Plaintiff does not acknowledge that this was the case. The fencing work was never done.

[15] The Defendant's position is that the Plaintiff did much less work than contemplated and the Defendant sought a reduction in the bill. The Plaintiff states that this form of adjustment was never contemplated. The Defendant terms the original estimate a budgetary quote which was intended to be reviewed based on the actual work done. There appears to be no agreement initially on an hourly rate.

[16] The Defendant says that the Plaintiff is entitled to \$8,000.00, which is the amount that one Shaun Gregory of Iron Ridge Homes Inc., described by the Defendant as an industry expert, says the work is worth. The Defendant pleads that it would pay \$9,000.00 to the Plaintiff. The Plaintiff does not agree that this is the amount due.

[17] The question is whether the work was to be paid by a flat fee or on a times and materials basis.

[18] To date no payment has been made by the Defendant to the Plaintiff.

EVIDENCE OF JOHN RUDDEN

[19] Rudden is the principal of the Plaintiff and a friend of Vince Finnegan.

[20] He was asked by Defendant to excavate a building to facilitate the relocation of a water pipe.

[21] The initial consultation about this project was in March 2013. The Plaintiff disputes the suggestion that the \$18,900.00 was the maximum to be charged but if costs were less he would be paid less.

[22] They worked in two locations, patched holes, compacted and poured concrete and replaced the hole.

[23] When asked to do the work, Rudden was provided with no drawings, He was told that the work was of high priority and that the owner stood to lose \$100,000.00 a

day till the work was done. This was an important client for the Defendant. The Plaintiff's work was to facilitate the change in the direction of a pipe.

[24] He gave a quote and started the work on October 30, 2013 and completed it on November 7, 2014. The work was done as described in the estimate.

[25] When he started work, he noticed that there was another contractor working outside.

[26] When the work was completed, he invoiced it. He did all the work he was asked to do and did it well. There were no complaints.

[27] The invoice was for \$18,000.00 plus HST. He never received payment.

[28] In cross-examination Rudden said that the work had to be done quickly and he was told to make sure that he covered himself. The estimate covered the work, contingencies and profit.

EVIDENCE OF PATRICK FINNEGAN

[29] Finnegan is the Ontario sales manager for the Defendant and Vince Finnegan is his father. He has worked for the company for 18 years.

[30] The Defendant had a contract with Nestle to clear the pipeline in the subject premises. He contracted with the Plaintiff to have him dig the floor and clear the lines.

[31] The work was authorized at a meeting between Patrick Finnegan and John Rudden in October 2013. Before the completion of the project no further discussions took place regarding the price or the scope of the work. In cross-examination Patrick Finnegan said that there was no agreement in writing because of the fluid nature of the project. Nestle paid for the work and did not object to the bill.

EVIDENCE OF KELLY MCINNES

[32] McInnes is the project manager for the Defendant and has worked there for 15 years.

[33] He stated that the Plaintiff was to expose the pipe, remove the fence to provide access and remove the dirt from around the site. He was there every day and says that the Plaintiff did not do everything they were supposed to do such as the fence removal and replacement.

[34] McInnes suggested to Vince and Pat Finnegan that they ask John to give money back.

[35] In cross-examination McInnes acknowledged that he did not speak with Rudden regarding prices.

EVIDENCE OF VINCE FINNEGAN

[36] Finnegan is the owner of the Defendant and knows Rudden for 20 years.

[37] He states that Rudden told him that he would issue a new invoice to reflect the actual time and effort spent on the job. Rudden denies this. Finnegan called the Quebec office which issues payments and told them to ignore the invoice as a new one was coming.

ANALYSIS OF THE EVIDENCE

[38] There was a contract. The Defendant asked the Plaintiff to do work. The plaintiff did work. The Defendant agrees that the Plaintiff is to be paid.

[39] What were the terms of this contract? Did the estimate constitute the contract? Or was there another oral contract on terms other than those in the estimate.

[40] The evidence of the parties diverges as to what was to be done. The Defendant agrees that the Plaintiff was to do the work that the Plaintiff did, but the Defendant says that the Plaintiff should have done more. There is no letter or fax or written memorandum prior to December 2013, to support the Defendant's position. The sole description of the work to be done can be confirmed by reading the estimate.

[41] The Plaintiff understood that the Defendant relied on the estimate to have the work proceed and the Plaintiff completed the work based on this understanding.

DECISION

[42] The estimate provided by the Plaintiff was the only written document evidencing the terms of the agreement between the parties. At no time before December 2013 was there any discussion that the plaintiff would bill on a *quantum meruit* basis. The Plaintiff was told to provide a quote that would include the Plaintiff's disbursements, HST, contingencies and profit. If the time or cost to do the work or the effort required extended beyond the amount quoted, there is no evidence that the Defendant would have paid more.

[43] The Plaintiff undertook the work on the understanding that he would be paid on the basis of the estimate.

[44] The Defendant's proposal to pay less was made after the altercation at the Christmas party which influenced the Defendant's position regarding the amount due.

[45] The Plaintiff did the work and is entitled to be compensated.

[46] Judgment is therefore awarded to the Plaintiff for \$18,990.00 plus HST for a total of \$21,458.70. Plaintiff is awarded interest on the amount awarded from the date of issuance of the Claim and postjudgment interest thereafter both at the statutory rate.

[47] If the parties cannot agree on costs, the Plaintiff shall make its written submission on costs no later than July 1, 2015 and the Defendant no later than July 15, 2015. Submissions are not to exceed three pages 12 font double spaced.


Marek S. Malicki
Deputy Judge

JUN 19 2015