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Reno contracts should never be taken lightly

Ruling highlights need to ensure 16 key points are itemized

A decision of the Ontario Superior Court released late last year provides a useful lesson to homeowners on entering into a contract for the renovation of a house.

In May 2004, Peter Polito signed a written agreement with his contractor, William Mandel, for the addition of a sunroom to the Polito home in Cambridge.

Mandel's company, Tri-Bear Construction, agreed to build the room for $50,000.

Polito expected the room would be built during the summer of 2004, but construction could not commence until the plans and a building permit were approved by the city of Cambridge.

Revised plans were tentatively agreed upon by the owner and contractor at the end of September, and the building permit was finally issued on Oct. 27, 2004.

Polito apparently expected construction to start immediately, while Mandel was under the impression that construction would be delayed until the next spring.

Following a breakdown in the relationship between the parties, Polito sued the contractor in Small Claims Court, claiming cancellation of the agreement and return of his $4,000 deposit.

Tri-Bear counterclaimed for $4,384 as payment for construction designs and plans.

The case came before deputy judge James Breithaupt for trial in December 2006.

One of the main points in dispute was whether the agreement complied with the provisions of the Consumer Protection Act.

That legislation dictates the requirements for what is known as a "future performance" contract.

It says that if the consumer does not receive a copy of the contract which complies with the regulations, he or she may terminate the agreement within one year.

Under the applicable regulations, a future performance contract must itemize 16 different requirements, including the suppliers' business address, and the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur.

Deputy judge Breithaupt reviewed the contract between Polito and Tri-Bear Construction, and ruled that those necessary details were not contained in the document.

The judge also found other reasons to conclude that a final and binding agreement was never entered into between the parties.

The judge granted judgment in favour of Polito and dismissed the Tri-Bear counterclaim.

Tri-Bear and Mandel appealed to the Superior Court of Justice and the matter was heard by Justice Robert Reilly last November.

The question for him to decide was whether the decision of the trial judge was correct or whether there was a palpable and overriding error.

If there was, the appeal court could reverse the decision or order a new trial.

Justice Reilly read the transcript of the Small Claims Court trial, and quoted a Supreme Court of Canada decision, which states that it is not the role of appeal courts to second-guess the evidence given at trial.

He ruled that there was sufficient evidence for the trial judge to reach the decision he did, and he dismissed the contractor's appeal.

The court's decision in the case of Polito v. Tri-Bear is available online at canlii.org. It is filed as http://www.canlii.org/en/on/onsc/doc/2007/2007canlii54969/2007canlii54969.html and see below.

Homeowners entering into renovation contracts should ensure that the contract complies with legal requirements set out in section 24 of the regulations attached to the Consumer Protection Act, available online at www.e-laws.gov.on.ca.

For consumer information and advice, call the Consumer Protection department of the Ministry of Government and Consumer Services at 416-326-8800, or check the ministry website for a brochure on home renovations at http://www.gov.on.ca/mgs/graphics/050457.pdf .

Its also important to remember that many municipalities, including Toronto, require building renovators to be licensed. Information on whether a contractor is licensed is available at 416-392-6700.

One final reminder: depending on the scope of the work, home renovations may require plans to be submitted to the municipality to obtain a building and plumbing permits. In addition, the Electrical Safety Authority has jurisdiction on electrical applications, permits, and inspections.

Check with your local municipality and make sure the renovation contract specifies who is responsible for obtaining and paying for any necessary permits.

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- English

Polito v. 1201553 Ontario Ltd. (Tri-Bear Construction), 2007 CanLII 54969 (ON S.C.)

PDF Format
Date: 2007-12-04
Docket: DC1/07
URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii54969/2007canlii54969.html
Reflex Record (noteup and cited decisions)

Noteup

[Search for decisions citing this decision]

COURT FILE NO.: DC1/07

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
PETER POLITO	)))	Jennifer Breithaupt, for the Respondent/ Plaintiff/Defendant by Counterclaim
	)	
Respondent/Plaintiff/Defendant by Counterclaim	))	
	)	
- and -	)	
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	)	
1201553 ONTARIO LTD. o/a TRI-BEAR CONSTRUCTION, 1201553 ONTARIO LTD. o/a BLUE DOOR REMODELLING AND CONSTRUCTION CO. and WILLIAM MANDEL also known as BILL MANDEL	)))))))	Richard van Buskirk, for the Appellants/ Defendants/Plaintiffs by Counterclaim
	)	
Appellants/Defendants/Plaintiffs by Counterclaim	))	
	)	
	)	**HEARD:** November 5, 2007

THE HONOURABLE MR. JUSTICE R.D. REILLY

JUDGMENT ON APPEAL

[1] This is an appeal by the defendants from the judgment of the Honourable Deputy Judge J. Breithaupt of the Superior Court of Justice Small Claims Court dated December 14, 2006. At trial, Deputy Judge Breithaupt granted judgment in favour of the plaintiff and dismissed the defendants counterclaim.

[2] The facts are set out in some detail in the reasons for judgment of the trial judge and the facta of the parties. They need not be repeated in such detail for purposes of this judgment. I will simply summarize by noting that in late May, 2004 the plaintiff, Peter Polito, and his spouse met with the appellant/defendant William Mandel at their home in Cambridge to discuss the construction of a sunroom edition to their home. On June 9, 2004 Mr. Mandel returned to the Polito s residence, at which time they entered into an agreement for the construction of the sunroom to be built by Mr. Mandel s company, Tri-Bear Construction. The price for the addition was to be $50,000. The agreement, signed by the parties, was introduced as an exhibit at trial.

[3] From this point on, with few exceptions, the evidence of the plaintiff and the defendants was significantly in conflict at trial. At the risk of overly summarizing that evidence, Mr. Polito and his spouse, Kelly Polito, testified that the agreement was to construct the sunroom over the summer months. Otherwise expressed, construction was to commence almost immediately. The evidence of Mr. Mandel was quite different. He testified that the plans changed over the summer months at the request of the Politos; that the sunroom grew in size and complexity. It is clear that construction could not begin until plans were approved and a building permit was issued by the City of Cambridge.

[4] In any event, the parties met again on September 29, 2004, at which time revised plans were tentatively approved (I use these terms advisedly as they would not accord precisely with the evidence given by the parties at trial). Apparently Mr. Mandel submitted plans for the addition to the City of Cambridge on October 8, 2004 and a building permit was issued on October 27, 2004.

[5] Mr. and Mrs. Polito take the position that given the previous delay, Mr. Mandel promised, and they expected, that construction of the sunroom addition would be commenced immediately and completed expeditiously. Mr. Mandel took the position at trial that as a result of discussions with the Politos it was agreed that given the season and the inclement weather expected, construction would be delayed until the following spring.

[6] There was a further conflict in the evidence at trial as to communication or attempted communication between the parties during the fall and winter months. In any event, the plaintiff issued his statement of claim on February 14, 2005 claiming a recision of the agreement and the return of the $4,000 deposit which had been given to the defendants.

[7] At trial Deputy Judge Breithaupt decided that the agreement entered into by the parties was indeed voidable for its non-compliance with the *Consumer Protection Act*. Specifically, by regulation 17/05(s. 24) of the *Act* an enforceable agreement requires the correct address of the premises from which the supplier conducts business and the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur. These details clearly did not form part of the agreement entered into between the parties on June 9, 2004. The trial judge found other reasons to conclude that a final agreement was never entered into between the parties.

[8] It would appear from his reasons that the trial judge also found on the facts that in accordance with s. 18 of the *Consumer Protection Act* the plaintiff was entitled to rescind the contract as a result of an unfair practice on the part of the defendants, specifically pursuant to s. 14(2), paras. 8 and 9 of the *Act*. Further, the trial judge found, as he was entitled to, that the defendants 1201553 Ontario Ltd. and William Mandel were jointly and severally liable to compensate the plaintiff, pursuant to s. 18(12) of the *Act*.

[9] It is trite law to observe that the standard of review with respect to a matter of law is one of correctness . The standard of review with respect to the facts is whether the trial judge made a palpable and overriding error regarding to the facts. With respect to his interpretation of the law, I conclude that the learned trial judge was correct in his interpretation of the *Consumer Protection Act*. At the time the agreement was signed between the parties, it was clearly an executory contract and should have been in compliance with the *Consumer Protection Act*. The other conclusions of the trial judge are fact based. It is not for this appeal court to reconsider the evidence or the weight of the evidence as long as such evidence permits the conclusions arrived at by the trial judge. The Supreme Court of Canada stated in *Housen v. Nikolaisen*, [2002] S.C.R. 235, after reviewing the reasons for giving deference to the opinion of a trial court judge with respect to the facts stated at para. 23:

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

[10] I have carefully read the transcript of evidence of the trial before Deputy Judge Breithaupt. It is not appropriate for this court to say what conclusions I might have come to on that evidence. Deputy Judge Breithaupt was the trial judge and he was entitled to come to his own conclusions based on the evidence before him as long as there were facts that would justify his conclusions. Indeed there were. This court must therefore give deference to his conclusions.

[11] I have some concern, however, with respect to the counterclaims of the defendants based on unjust enrichment and quantum meruit. They claim a total of $4,384 for the construction designs which they commissioned, anticipating construction of the sunroom. There is arguably some merit to these clams, depending upon whether the plaintiff received some benefit from these plans, as argued by the appellants/defendants. This too, however, depends at least to some extent on facts determined by the trial court judge. I might observe that at trial there was no specific evidence of any benefit to the plaintiff (at least as yet) as a result of the defendants creation of these plans.

[12] Dealing (apparently) with the counterclaim, the trial court judge stated simply the defendants proceeded over some months with expenses for plans and other accounts and did so at their own risk . It would have been preferable if the trial judge had expressed cogent reasons in some greater detail for dismissing the counterclaims based on unjust enrichment and quantum meruit. However, from his statement I conclude that the trial judge determined that the plaintiff did not derive a benefit from the plans which the defendants commissioned. While further reasons would have been preferable, I conclude they were not necessary in the context of a Small Claims Court action and their absence does not justify a direction for a new trial.

[13] In the result, the appeal is dismissed. I wish to thank both counsel for their considerable assistance in dealing with these issues and commend them for their preparation and their advocacy. If the parties wish to address the issue of costs, they may do so briefly in writing, directed to me at chambers within 30 days of publication of this judgment.

R.D. REILLY J.

Released: December 4, 2007

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