

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

I-HSING ISABELLA CHEN)	
AND TODD CHIVERS,)	<u>Karen Poetker</u>
)	<u>Trevor Yakimchuk</u>
)	for the plaintiffs
plaintiffs,)	
)	
- and -)	<u>Clayton Salkeld</u>
)	on behalf of the defendants
7071788 MANITOBA LTD., 7071788)	
MANITOBA LTD. CARRYING ON BUSINESS)	
AS DESIGN HYPHEN BUILT, AND DESIGN)	
HYPHEN BUILT,)	
)	<u>Judgment Delivered:</u>
defendants.)	February 28, 2025

TOEWS J.

INTRODUCTION

[1] The plaintiff homeowners brought a claim against the defendant construction contractor, 7071788 Manitoba Ltd. ("Design Built") in respect of a residential construction contract. The defendant filed a statement of defence to the claim and also brought a counterclaim against the plaintiffs in respect of the same contractual relationship. This court granted leave to the plaintiffs and the defendant to bring motions for summary

judgment. For the sake of brevity, my reasons deal with both motions concurrently and my findings apply to both motions.

[2] The position of both plaintiffs in this proceeding is identical. Mr. Chivers was the primary contact between the plaintiffs and the defendant throughout the course of the construction and the litigation. The defendant is a corporate entity and is represented in this application by Clayton Salkeld. Mr. Salkeld is an officer and director of the defendant and the project manager on this construction site. He negotiated the terms of the contract between the parties for the construction of a residential dwelling (the “residence”) on behalf of the defendant. Mr. Salkeld is not a named party to the action.

[3] At the pre-trial conference on June 4, 2024, the parties agreed that this matter could proceed by way of a motion for summary judgment. Accordingly, I granted leave for each party to bring the motion. A schedule of filings was established and set out in the pre-trial memorandum of June 4, 2024. This included a timeline for cross-examinations on the filed affidavits. At that time, it was also stated that the parties could rely on their examination of the opposite party on discovery. The parties were also advised that the court could grant summary judgment in whole or in part or that the court may dismiss the application for summary judgment and order that the matter proceed to trial. None of the parties voiced any objection or otherwise disagreed with proceeding in this fashion.

[4] The terms of the contract between the plaintiffs are for the most part set out in a written document. The written terms of the contract, with some adjustments arising out of the discussions between the parties, are based on the defendant’s standard form

construction contract. The evidence establishes that the parties agreed to a payment structure based on cost reimbursement as well as an hourly rate for Mr. Salkeld's services. The cost reimbursement and hourly rate structure was adhered to by the parties until the differences between the parties over the construction of the residence led to the termination of the contract by the plaintiffs. The written contract itself was never formally executed, but there is no evidence to suggest that any other written terms were contemplated as a governing document.

[5] Mr. Salkeld stated that the defendant ceased operations in November of 2023. According to Mr. Salkeld, the defendant has no assets and is insolvent. The plaintiffs' motion for summary judgment and the action in general is being opposed by the defendant on the basis that while there were deficiencies or defects that occurred in the course of the construction of the residence, those deficiencies or defects were not significant and could have been corrected by the defendant had it been given the opportunity to do so. Furthermore, the defendant's motion material alleges a fundamental or material breach of contract by the plaintiffs. It states that the steps it took in the course of carrying out the terms of the contract were justified and asks for a dismissal of the plaintiffs' action.

[6] The defendant stated the damages of almost \$250,000 claimed by the plaintiffs could have been properly remedied by significantly less than that amount. It is also clear Mr. Salkeld is very concerned about the allegations made by the plaintiffs as they reflect adversely on his professional expertise and his ability to properly carry out the terms of the contract between the parties.

THE EVIDENCE

[7] As stated at the onset of these reasons, the evidence relied on by the parties is based on the affidavit material each of them has filed, along with any cross-examinations or discoveries undertaken by the parties. There is no significant dispute that there were certain defects or deficiencies in respect of the construction of the residence. While the defendant acknowledged many of those defects or deficiencies, in summary it takes the position that they were not substantial concerns or particularly unusual in the course of a construction project. The defendant argued that those defects or deficiencies could have been remedied by the defendant, had it been provided with the opportunity to do so, at a very small fraction of the cost incurred by the plaintiffs.

[8] Mr. Chiver's evidence is that the construction began in late 2015 and involved excavating the property to prepare the site for foundation pouring and other preliminary tasks. He stated in his affidavit evidence that during the summer of 2016, a number of problems arose in the course of the construction and included delays, budget overruns, issues with both interior and exterior framing, issues with structural load bearing posts and beams, engineering deficiencies, and a compromised system of drainage.

[9] The plaintiffs state that as a result of these issues, they retained the services of other professionals to review the construction of the residence and in particular they retained an engineer, Kurtis Sawatzky of KNH Sawatzky ("KNH") to conduct the review. His report identified a number of drainage and structural concerns.

[10] Attempts to resolve the issues at the project failed and the plaintiffs ultimately terminated their relationship with the defendant on October 7, 2016. It is the position of

the plaintiffs that the termination was related to unresolved design and workmanship issues. They hired another company to complete the construction of the residence and remedy the concerns that had been identified.

[11] The defendant stated that the construction of the residence was delayed for a number of reasons, including delays arising out of disagreements or indecision related to the design process. The defendant agreed that there were challenges with the concrete basement wall construction and the weeping tile installation. He stated these problems arose as a result of the unseasonably rainy fall season. Nevertheless, the defendant stated that despite the challenges of the winter season, the immediate challenges were addressed with the adding of a second round of weeping tiles, as well as the waterproofing of the foundation walls, the backfilling and the commencement of framing.

[12] The defendant stated that after the majority of the framing was complete “multiple engineering deficiencies were identified.” (Motion brief of the defendant at paragraph 15). As admitted in the defendant’s material, these deficiencies included a sagging cantilever, a beam that was carrying more weight than the engineering plan had accommodated for, and an undersized interior beam on the residence’s second floor roof structure.

[13] The defendant stated that it took steps to identify solutions and request financial compensation for corrective measures to come directly from those parties it had retained, including an engineering firm. Nevertheless, at the same time the framing continued along with work being carried out in respect of the roofing, concrete slab placement,

window installation, soffit installations, plumbing, electrical, mechanical, radiant heat lines and continued project management efforts by the defendant.

[14] At that point, the plaintiffs grew increasingly reluctant to continue with the payment of the bi-weekly invoices presented to them by the defendant in accordance with their agreed upon arrangement. The defendant takes the position that this reluctance was based on Mr. Chivers' "inaccurate, inflated and ill-informed estimations of how much the project was over budget". (Motion brief, at para. 18). It is Mr. Salkeld's evidence that the project was overbudget by a relatively modest 11.9 percent as of June 26, 2016.

[15] The defendant takes the position that Mr. Chivers had:

... a pessimistically sour attitude toward the whole situation and consistently showed strong personal biases toward approaching challenges as something bigger than they were while mischaracterizing the realities of progress and the budget. He threatened design-built [sic] staff, both physically and financially, and was generally unpleasant in all transactions.

(See motion brief, at para. 19)

[16] The defendant stated that it took steps to correct all deficiencies in the project as well as proposing mechanisms that would protect the plaintiffs against future deficiencies. The plan was rejected by Mr. Chivers and the defendant stated that moving forward from that point, Mr. Chivers began to take over control of the management of the construction of the residence. The defendant stated that under the management of an inexperienced homeowner, the construction ground to a halt. On October 7, 2016, the plaintiffs terminated the contract.

THE LAW GOVERNING SUMMARY JUDGMENTS

[17] A judge hearing a summary judgment motion must grant summary judgment if satisfied that there is no genuine issue requiring a trial with respect to a claim or a defence. When making this determination, the judge must consider the evidence submitted by the parties, and may weigh the evidence, evaluate the credibility of the deponents, and draw any reasonable inference. Specifically, King's Bench Rule 20.03 provides as follows:

Responding evidence

20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

Granting summary judgment

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

Powers of judge

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

- (a) weighing the evidence;
- (b) evaluating the credibility of a deponent;
- (c) drawing any reasonable inference from the evidence;
unless it is in the interests of justice for these powers to be exercised only at trial.

Only genuine issue is amount

20.03(3) If the judge is satisfied that the only genuine issue is the amount to which a party is entitled, he or she may order a trial of that issue or grant judgment with a reference to determine the amount.

Only genuine issue is question of law

20.03(4) If the judge is satisfied that the only genuine issue is a question of law, he or she may determine the question and grant judgment accordingly.

[18] The law setting out the elements of a hearing of a motion for summary judgment in Manitoba is found in ***Dakota Ojibway Child and Family Services et al. v. M.B.H.***, 2019 MBCA 91 (CanLII), which provides at paras. 108-11:

[108] At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

[109] If those requirements are met, the responding party must meet its evidential burden of establishing “that the record, the facts, or the law preclude a fair disposition” (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.

[110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).

[111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

[19] Although there are a number of disputed facts in the present case, the substantive issues in this dispute relate primarily to whether the plaintiffs took the appropriate steps in terminating the services of the defendant, and whether the costs the plaintiffs incurred

in rectifying the deficiencies and defects were inflated. In my opinion, if there is any genuine issue here, it is the amount to which the plaintiffs are entitled.

[20] In most cases where there is a significant disparity between the positions of the parties as to amount, I would be reluctant to proceed on the basis of summary judgment in that respect. Generally, I would follow the direction found at King's Bench Rule 20.03(3) which provides that if the judge is satisfied that there is a genuine issue as to the amount to which a party is entitled, the judge may order a trial of that issue or grant judgment with a reference to determine the amount.

[21] However, the facts here justify that I exercise the discretion afforded a judge by King's Bench Rule 20.03(3) in favour of proceeding on a summary manner in respect of all issues, including the issue of the quantum of the damages. Based on the agreement of the parties at the pre-trial of June 4, 2024, to proceed by way of summary judgment, and based on the principle of proportionality, it is my opinion that the entire matter should be resolved on the basis of a summary judgment hearing. My decision to proceed in this fashion is in accordance with the principles set out in King's Bench Rules 1.04 (1) and (1.1) which provide:

General principle

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:

- (a) the nature of the proceeding;
- (b) the amount that is probably at issue in the proceeding;
- (c) the complexity of the issues involved in the proceeding;

(d) the likely expense of the proceeding to the parties.

[22] Ordering a summary judgment hearing to resolve this matter is proportionate to the principles set out in King's Bench Rule 1.04. Among all of the factors that I have considered in applying the principles of proportionality, I have considered the fact that the defendant advises that it is insolvent and accordingly the expense of this proceeding almost certainly outweighs the likelihood of the plaintiffs realizing on a judgment against the defendant in the event of success. A full trial would simply impose an unnecessary financial burden on some or all of the parties here.

THE POSITION OF THE PLAINTIFFS

[23] The specific concerns raised by the plaintiffs are set out in detail in the plaintiffs' motion brief. The brief refers extensively to the affidavit of Kurtis Sawatzky, affirmed July 29, 2024, who identified numerous drainage and structural concerns in his engineering report to the plaintiffs. These findings were summarized by Mr. Sawatzky as follows (See motion brief of the plaintiffs at para. 46 relying on the affidavit of Kurtis Sawatzky):

- a) Based on our site review, there are significant structural concerns pertaining to the current as-built condition of this residence;
- b) There are concerns pertaining to the long term structural integrity of the foundation walls based on the lack of proper lateral support for the top as well as concerns pertaining to the quality and strength of the concrete in the ICF foundation walls; and
- c) There are significant concerns pertaining to the as-built condition of the sub-surface moisture collection and discharge system that require specific remedial measures. The contractor should verify that the entire sub-surface moisture collection and discharge system is removed as required and replaced with code compliant components for effective moisture collection and de-watering.

[24] Additional specific concerns are set out in Mr. Chivers' affidavit and Mr. Sawatzky's affidavit and are summarized at paragraphs 47-59 of the plaintiffs' motion brief. It would serve no purpose to repeat that information here other than to state that on the basis of the professional opinion of Mr. Sawatzky, the defects and deficiencies are of significant severity.

THE POSITION OF THE DEFENDANT

[25] The defendant's position in opposing the plaintiffs' claim for summary judgment and requesting the dismissal of the plaintiffs' action is based on various arguments, including:

- a) That the defendant and Mr. Salkeld and its other employees who carried out the day-to-day responsibility of completing the construction of the residence were sufficiently qualified and experienced to fulfill the contract;
- b) That Mr. Chivers did not have the qualifications and experience to take over the construction management of the construction of the residence;
- c) That there was a material breach of the contract when the plaintiffs failed to continue with the bi-weekly progress payments stipulated by the contract between the parties. The defendant was in urgent need of the payment to continue working on the project and to actively pursue the identification and remediation of any deficiencies. Without payment or appropriate measures taken to secure the significant outstanding account balance, the defendant was under no obligation to continue with the construction as this constituted a fundamental breach of the contract;

- d) The plaintiffs failed to fulfill their duty to mitigate the damages, including failing to gather multiple quotes before awarding the contract to a subsequent party to complete the construction of the residence; and
- e) Failing to accurately identify deficiencies and implementing the most appropriate, effective, and efficient corrective measures.

[26] The defendant takes issue with the engineering report prepared by Mr. Sawatzky. Given that there were two engineering firms involved in the project, including the engineering firm it relied upon, the defendant argued that the parties could have been “collectively relied upon to validate existing conditions and design corrective measures for any deficiencies.” (Motion brief of the defendant at paragraph 47.3.3). In the words of Mr. Salkeld, “deficiencies could have been addressed ‘in stride’”. (See motion brief of the defendant at para. 47.3.4)

[27] It is further the position of the defendant that the plaintiffs failed to provide the defendant with a “reasonable right to remedy” the defects and deficiencies. It stated that while Design Built demonstrated a consistent, solution-oriented approach aimed at securing its financial position so that it could remain committed to its contractual obligations, the plaintiffs failed to negotiate in good faith the outstanding balance owing under the contract. It stated that this failure constituted a material breach of the contract as it prevented the defendant with a fair and reasonable opportunity to remedy deficiencies.

DECISION

[28] The evidence demonstrates that there was sufficient cause for the plaintiffs to have significant concerns about the deficiencies which became evident in the course of the construction of the residence. The defendant may be correct that certain concerns such as the cost overruns were not particularly significant given the general nature of the construction industry and various unforeseen factors beyond its control. However, in my opinion, the totality of the factors here are more than sufficient to have caused the plaintiffs to lose faith in the ability of the defendant to properly construct the residence and complete it on a timely basis somewhere in the neighbourhood of the initial budget.

[29] The evidence establishes that these deficiencies included building code violations, shortcomings in the engineering plans of the firm retained by the defendant to carry out the construction, structural problems, and issues with respect to workmanship as well as budget overruns and delays. I find that one or two of these issues considered in isolation may not on their own have been sufficient for the plaintiffs to withhold payment under the contract and cause the plaintiffs to re-examine their relationship with the defendant. However, the cumulative effect of the defects and deficiencies justified the plaintiffs' course of action in respect of this project which ultimately led to the plaintiffs terminating the contract and proceeding to remedy the situation by retaining a different contractor.

[30] The steps the plaintiffs took, generally speaking, were reasonable in the circumstances. This includes retaining Mr. Sawatzky of KNH to prepare an engineering opinion and assessment of the status of the construction. It was not unreasonable for

the plaintiffs to withhold payment of further money under the contract as the extent of the defects and deficiencies became apparent.

[31] However, I do have a concern regarding the extent to which Mr. Chivers directly involved himself in the management of the construction project. While Mr. Chivers understandably was concerned about what was happening on site, there is no evidence that he had any experience or practical ability to properly take over the management of the project. In my opinion, he should have acted more promptly to find someone to provide that service. While his failure to do so, or his failure to make further payments under the contract do not constitute a material breach of the contract between the parties, at the same time there is no basis to justify the claim advanced by the plaintiffs in the amount of \$43,430 for general contracting services by Mr. Chivers. I would not allow that portion of the claim.

[32] In respect of the remainder of the claim, I am satisfied that the plaintiffs are entitled to damages for the heads of damage set out at paragraph 64 of the plaintiffs' brief. I accept, however, the defendant's submission that aspects of the claim for damages appear to be excessive, especially in light of the plaintiffs' failure to seek out financial quotes for the cost to recommence and complete the construction from a number of contractors. I have reviewed the evidence and without specifically attributing an excessive amount to any particular head of damages, including the costs of the drainage system which the defendant was particularly concerned about, I am satisfied that on a global basis the plaintiffs' claim for \$206,072.91 should be reduced by 25%. Accordingly, I would allow the plaintiffs' claim in the amount \$154,554.68. In light of the

delay in bringing this matter to trial, I will not award any pre-judgment interest but the plaintiffs shall have their costs as against the defendant on the basis of the applicable tariff. The plaintiffs shall have post-judgment interest on this judgment at the applicable rate of interest as determined by the interest rates fixed by the court.

[33] For the reasons set out above, the defendant's motion for summary judgment and its counterclaim in the action is dismissed.

_____ J.