

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No. 17

BETWEEN:

(1) ELLIE LEIGHTON
(2) PETER LEIGHTON

Appellants

-and-

CNC AUTOMATED CARPENTRY LIMITED

Respondent

Before: Assistant Justice Diel

Appearances: Peter Leighton, In Person, for the Appellants

S. Froomkin, QC, Christopher E. Swan & Co., for the Respondent

Date of Hearing: 14 November 2018

Date of Judgment: 10 December 2018

JUDGMENT

Construction agreement – claim for invoices not listed – invoices not signed off by both parties – whether Contractor can claim for invoices - not complying with terms of the agreement – errors in invoicing

1. This is an appeal from a decision of Acting Magistrate, N Stoneham, dated 18 December 2017.
2. The Appellants' grounds are variously set out in their Notice of Appeal dated 18 April 2018 and by way of a letter dated 24 July 2018. I will refer to the latter document which sets out four grounds of appeal which are in essence:-

- (1) Failure by the Learned Acting Magistrate to hold the agreement to settle outstanding matters between the parties dated 30 April 2014 was not binding.
 - (2) Failure by the Learned Acting Magistrate to hold that there was evidence that clearly showed errors in the Respondent's billings.
 - (3) Reference by the Magistrate to facts as undisputed when they clearly were.
 - (4) Her ruling in relation to the "point issue" was based solely on the Respondent's evidence.
 - (5) Complaints that the contents of the Statement of Claim accurately represented what was due and owing.
3. Mr Froomkin, QC Counsel for the Respondent, who was somewhat hamstrung by not having conducted the trial at first instance, nevertheless was of considerable assistance in his submissions both oral and written.
 4. To deal with points 4 and 5 of the Appellants' grounds, I agree with Mr Froomkin, QC that it is not for me to interfere with the Learned Acting Magistrate's findings in relation to credibility. I did not hear the witnesses and see no reason to interfere with her findings on credibility. Accordingly, I dismiss Ground 4. As to Ground 5, this is to a large extent a variation of Grounds 1 to 3 above and so I dismiss that ground of appeal.

Ground 1

The Agreement

5. The parties on 30 April 2014 doubtless both becoming frustrated by the issues of outstanding invoices and looking to move forward with the construction project entered into an Agreement where they agreed, inter alia, what invoices were outstanding and how future invoices were to be dealt with. Paragraph 6 of the Agreement lists the outstanding invoices and paragraph 7 states that future

invoices will not be binding unless supported by change orders signed by both parties.

6. The Learned Acting Magistrate dealt with the issue of the effect of the Agreement in this fashion at paragraph 28 of her Judgment:-

“I also reject the Defendants assertion that they are not bound to pay for any invoices not expressly contained in the list contained in the Agreement, in particular outstanding invoices which pre-date the Agreement. The Agreement was drafted by the 2nd Defendant, and I suspect that he was well aware that particular invoices were not included in the list.”

7. The Learned Acting Magistrate gives no reasons for her rejection of the Appellants’ desire to rely upon the provisions of this Agreement save for the final sentence. Respectfully, whether or not the Appellant(s) drafted the Agreement is neither here nor there. This is not a *contra proferentem* issue and a suspicion that the Second Appellant deliberately left invoices out of the Agreement was not dealt with in the pleadings nor does it seem to have been raised in evidence.
8. Mr Froomkin, QC in the appeal, in my view, quite rightly and properly accepted that the Agreement dated 30 April 2014 is valid and binding and I agree with him.
9. On review of the Respondent’s claim as set out at page 33 of the Record the following complaints/observations were made by the Appellants:-

- (i) **Invoice 3638 in the sum of \$5,955.00**

This invoice pre-dated the Agreement and was not included in the Agreement. 60% of this was paid leaving a claim of \$3,594.00. The Learned Acting Magistrate erred in including this invoice in the amount awarded to the Respondent.

- (ii) **Invoice 3737**

This postdated the Agreement and was not signed by both parties. However the Respondent did state in his comments to this Court that the work was “not complete”. I must therefore accept that some of the work on that invoice was in fact done. I see no reason why I cannot award some of this claim to the Respondent despite noncompliance with the Agreement on a quantum meruit basis and do so on an admittedly rough and ready basis of 50% or \$1,190.00.

(iii) **Invoice 3755 in the sum of \$1,360.00**

This invoice points up the confusing practice of the Respondent “billing” the Appellants for work which had yet to be completed or even started. This practice in fact was more accurately an estimate and the Appellants accepted the estimate by paying 60% of that estimate. In the case of invoice 3755 this was rendered on 16 July 2014. It is clear from the Record (page 48) and a subsequent e-mail from the Respondent to the Appellants admitting that the work on this invoice was not done some two months later. The Second Appellant in his evidence at page 178 of the Record states in fact the work was never done. This does not appear to have been contradicted by the Respondent in their evidence. Accordingly I find that the Learned Acting Magistrate erred in finding for the Respondent on this invoice.

Ground 2

The Errors of the Respondent in Claiming for Sums Due

10. Some of this has been dealt with above but the Respondent relies in addition to an e-mail from the Respondent (page 69 of the Record) dated 4 September 2014 which states:-

“This is the invoice 3725 is not your invoice mistake on my end was.....”

Despite this and the other issues of the Respondent claiming invoices that (for example) pre-dated the Agreement of 30 April 2014 the Learned Acting Magistrate stated at paragraph 27 of the Judgment (page 9 of the Record):-

“Further, I reject the Defendants’ assertions that the Plaintiff’s statements contained accounting errors, as there is no evidence before me to support this.”

11. It is difficult to reconcile that finding against the clear evidence that showed there were errors made. It is possible that one explanation may be in the time between hearing and delivering judgment, some 23 months later, that certain facts may have slipped the Learned Magistrate’s mind. In any event, the amount on that invoice was for a relatively small amount of \$289.96 and I accordingly find the Learned Acting Magistrate erred on the facts in granting judgment for this amount.
12. Accordingly, the Respondent claimed some \$5,073.96 over and above that which he was entitled. The judgment award was for the sum of \$5,784.69 at first instance.
13. Accordingly, I allow the appeal in part. I set aside the Learned Acting Magistrate’s award of \$5,784.69 and replace it with one of \$710.73.
14. In the circumstances, I propose to make no order as to costs here or below unless either party wishes to address me on this issue.

Dated the 10 day of December 2018

Mark A C Diel
Assistant Judge