1967

*Dec. 15, 18

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Apr. 1

ARNOLD ALKOK (*Plaintiff*) .....APPELLANT;

AND

ISSIE GRYMEK and YETTA GRYMEK (*Defendants*) ....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Building contract providing for payment by instalments upon architect's certificate—Breach of term requiring builder to satisfy architect that subcontracts had been paid—Contract terminated by owners—Builder not in breach of term going to root of contract—Damages—Quantum meruit.

The plaintiff, a building contractor, entered into a contract in writing with the defendants to build a house for $57,500. It was provided that the defendants were to "make payment on account thereof upon the architect's certificate (when the architect is satisfied that the payments due to subcontractors have been made)" according to a schedule set out in the contract. The plaintiff proceeded with the contract and the defendants paid the first two instalments and one-half of the third, which amounts totalled $22,000, without requiring that the plaintiff satisfy

*PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

the architect that the payments to the subcontractors had been made. Later when the plaintiff pressed for payment of the balance of the third instalment, the defendants required the plaintiff to comply with the provisions of the contract and to so satisfy the architect. After several conferences, the plaintiff failed to so satisfy the architect and in addition there were complaints from the defendants and the architect that there were defects in the construction and that the construction was delayed. Although the plaintiff was willing and anxious to continue the work, the defendants terminated the contract and engaged others to complete the building.

In an action brought by the plaintiff under the provisions of *The Mechanics Lien Act*, the Master dismissed the plaintiff's claim and allowed a counterclaim by the defendants in the amount of $6,075. On appeal, the Court of Appeal allowed the plaintiff's appeal in part, finding that the plaintiff was entitled to a lien and personal judgment against the defendants in the amount of $1,125 and dismissing the counterclaim of the defendants. The plaintiff further appealed to this Court and the defendants cross-appealed.

Held: The appeal should be allowed and the cross-appeal dismissed.

The Court agreed with the Court below that the defendants had not shown sufficient grounds to support their termination of the contract. The plaintiff was not in breach of a term going to the root of the contract. While it was true that he was in breach of the term requiring him to satisfy the defendants' architect that the subcontracts had been paid this was a mere ancillary term which could be enforced perfectly by the defendants simply refusing to make payments until they were satisfied, as indeed the defendants were refusing. As to the additional alleged breaches, *i.e.*, defective work and delay, the Master had found that these defects were minor, easily rectified and certainly not such as to go to the root of the contract, and that despite any delay the contract could have been completed substantially at the time completion was required by its provisions. These findings were accepted by the Court of Appeal.

On the matter of damages, the contractor's right to recover was what he could prove on a *quantum meruit* basis. Accepting that the plaintiff was entitled to the balance of the third draw and the whole of the fourth draw, less certain deductions, the Court found that the *quantum meruit* claim proved was $11,042.50. Adding thereto $2,495 for repair of storm damage and $950 for extras supplied at the request of the defendants, but deducting therefrom liens in the amount of $2,320 paid by the defendants, the total amount due to the plaintiff was $12,167.50. The defendants, however, were entitled to claim a reduction for the cost of correcting the defects in the work done by the plaintiff, such amount to be determined upon a reference to the Master.

Northern Lumber Mills Ltd. v. Rice (1917), 41 O.L.R. 201, referred to.

APPEAL by plaintiff and CROSS-APPEAL by defendants from a judgment of the Court of Appeal for Ontario[1], varying a report of D. W. Rose, Q.C., Master, in a mechanics' lien action. Appeal allowed and cross-appeal dismissed.

[1] [1966] 2 O.R. 235. 56 D.L.R. (2d) 393.

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C. E. Woollcombe, for the plaintiff, appellant.

D. I. Bristow, for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] pronounced on February 21, 1966.

The Master of the Supreme Court of Ontario had tried this mechanics' lien action pursuant to a judgment of reference made by Morand J. on October 4, 1963. By his report made on June 24, 1964, the learned Master had dismissed the plaintiff's claim for lien and had allowed a counterclaim by the defendants in the amount of $6,075.

By the judgment of the Court of Appeal for Ontario this was varied to allow the plaintiff (there appellant) a lien on the premises owned by the defendants in the sum of $1,125 together with the costs of the action and dismissing the counterclaim of the defendants-respondents.

The plaintiff as appellant in the Court of Appeal further appealed to this Court and the defendants cross-appealed.

The appellant is a contractor in the City of Toronto. He entered into a contract with the respondents dated May 14, 1956, whereby he agreed to

(a) provide all the materials and perform all the work shown on the drawings and described in the specifications entitled "proposed residence for Mr. I. Grymek" which have been signed in duplicate by both the parties and which was prepared by Edward I. Richmond, M.R.A.I.C., acting as and hereinafter entitled "the architect" and

(b) do and fulfill everything indicated by this Agreement, the Specifications, and the Drawings.

The contract provided that the owner would pay to the contractor $57,500 and

(b) Make payment on account thereof upon the Architect's certificate (when the Architect is satisfied that payments due to Sub-Contractors have been made), as follows:

i) Upon completion of the sub-floor $6,000.00;

ii) Upon completion of the roof $12,000.00;

iii) Upon completion of the brown coat of plaster $8,000.00;

iv) Upon completion of the white coat of plaster, including all plumbing and electrical work $12,000.00;

v) Upon completion of trim $8,000.00;

vi) the sum of ELEVEN THOUSAND, FIVE HUNDRED DOLLARS ($11,500.00) . . .

[1] [1966] 2 O.R. 235, 56 D.L.R. (2d) 393.

The appellant commenced work of erecting the house in accordance with the said contract and from time to time the respondents required the addition of certain extras which the appellant added and which the Court of Appeal for Ontario found were of the value of $950. The respondents paid to the appellant the whole of the first two instalments of $6,000 and $12,000 respectively, and one-half of the third instalment, *i.e.*, $4,000, and did so without requiring that the appellant comply with the provisions of para. (b) aforesaid by satisfying the architect that the payments due to the subcontractors had been made.

Later when the appellant pressed for the payment of the balance of the third instalment, the respondents required the appellant to comply with the provisions of the contract and to so satisfy the architect. After several conferences, the appellant failed to so satisfy the architect and in addition there were complaints from the respondents and from their architect Mr. Richmond that there were defects in the construction and that the construction was delayed. The solicitor for the respondents who had drafted the original contract and who had been present at the various conferences when an attempt was made to satisfy the architect that the subcontractors had been paid, wrote to the appellant on November 10, 1956, complaining of the progress of the work and of certain defects expressing the fear that mechanics' liens would be registered against the property and concluded with this paragraph:

> Unless all of the building infractions, which are your responsibility, have been remedied, and the work carried on at a proper pace, my clients shall have no alternative than to employ their own specific trades to complete your portion of the uncompleted work, and any moneys or expenses incurred by my clients in employing tradesmen for either work done or materials supplied shall be deducted from the contract price herein.

Six days later, on November 16, 1956, the said solicitor wrote again to the appellants in which he said:

> Further to the above matter, in confirming my conversation with you yesterday, I hereby advise you on behalf of my clients Issie Grymek and Yetta Grymek that they are terminating their contract with you as of todays date.
>
> They intend to complete the lands and premises in the manner in which they believe the work should be done.

In accordance with that letter the appellant ceased work on the contract though Mr. Richmond, the architect for

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the respondents, has testified that the appellant was willing and anxious to continue it. The respondents proceeded to complete the building themselves through the intervention of other contractors and material men.

It was the view of the learned Master that the respondents were entitled to terminate the contract at the time and in the fashion aforesaid.

The Court of Appeal for Ontario, however, came to the conclusion that sufficient grounds for the termination of the contract had not been established. McGillivray J.A., in his reasons for judgment, quoted Anson's Law of Contract, 21st ed., at p. 424, as follows:

> The question to be answered in all these cases of incomplete performance is one of fact; the answer must depend on the terms of the contract and the circumstances of each case. The question assumes one of two forms—Does the failure of performance amount in effect to a renunciation on his part who makes default? Does it go so far to the root of the contract as to entitle the other to say, "I have lost all that I cared to obtain under this contract; further performance cannot make good the prior default"?

That proposition needs no support by citation from judgments and I accept it as expressing the proper test which the Court must apply here. As pointed out by McGillivray J.A., in his reasons, the contract as between the parties was for the contractor to build a house and for the defendants to pay for it. The contractor had proceeded with the building although not in accordance with the pace which the owners believed he should be proceeding and had been guilty of what the Court of Appeal for Ontario has found were certain minor defects in construction. The owners having paid two instalments and part of the third were refusing to pay the balance of the third instalment or those which would become due thereafter, and in so doing were relying upon the provision of the contract which required the appellant as contractor to satisfy the respondents' architect that the payments to the subcontractors had been made. They were entitled to require that the appellant continue his work upon the contract and to refuse to pay him until he did satisfy that provision. If the appellant had refused to proceed on that basis then, of course, he would have been in breach of the provision of the contract going to the root thereof and the respondents would have been entitled to terminate the contract. The

appellant did not indicate by word or conduct an intention to so act or not to be bound in every way by the contract. The appellant, therefore, did not give to the respondents the opportunity to terminate the contract on the ground that the appellant had been in breach of a term going to the root of it. It was true that he was in breach of the term requiring him to satisfy the respondents' architect that the subcontracts had been paid, but, with respect, I agree with McGillivray J.A.'s view that this was a mere ancillary term which could be enforced perfectly by the respondents simply refusing to make payments until they were satisfied, as indeed the respondents were refusing. I am, therefore, in accord with the view of McGillivray J.A., that the respondents have not shown sufficient grounds to support their termination of the contract.

I should point out that while I have referred only to the alleged breach by the appellant in his failure to satisfy the architect as to payment of subcontractors, there were two additional breaches alleged: firstly, defective work, and secondly, delay. The learned Master found that the defects were minor, easily rectified and certainly not such as to go to the root of the contract, and that despite any delay the contract could have been completed substantially at the time completion was required by its provisions. The Court of Appeal for Ontario accepted these findings and they seem to be based on the evidence of Mr. Richmond, the architect called as a witness by the respondents, who testified as follows:

> Q. Are you saying that what you saw in November could not have been finished on the inside by the middle of February of the following year?
>
> A. It would be pretty close to it, if the builder would, say, have 3 or 4 groups on the job, and carried his work along at a reasonable pace. I would say about the latter part of February and he could have gotten out of there.

The contract between the parties provided in para. 4:

> Interior to be completed no later than February 15, 1957, so that owner can take possession thereof.

Once it is determined that the respondents' action in terminating the contract had not been justified, one must turn to the question of what, if any, damages the appellant is entitled to recover.

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It was said in Macklem & Bristow on Mechanics' Liens in Canada, at p. 47:

> If the owner ceases to make payments under the contract, cancels it or, through some act of his own and without cause, makes it impossible for the contractor to complete then the contractor is justified in abandoning the work and is entitled at that time to enforce his claim for lien to the extent of the actual value of the work performed and materials supplied up until that time.

The contractor's right to recover therefore would seem to be what he could prove on a *quantum meruit* basis. In the present case, the Court of Appeal for Ontario was of the opinion that the plaintiff had quite failed to prove any *quantum meruit* basis. The plaintiff had attempted this by two alternative methods: firstly, the plaintiff proved the total amount due under the contract, *i.e.*, $57,500, and agreed to the deduction therefrom of the amounts already paid on account, *i.e.*, $22,000; the amounts which the respondents were required to pay in satisfying certain mechanics' liens registered against the property, and also the amount which he, the plaintiff, testified would have been required to complete the building, *i.e.*, $18,195.

As I have said, the defendants (here respondents) did proceed to complete the building at a cost of $48,231.21. Deducting therefrom the sum of $1,400 for an air conditioning unit which the Master found was not included in the original cost, the defendants' costs of completion, therefore, were $46,882.31. The learned Master found on the evidence of Mr. Richmond that those costs had represented about 15 per cent more than would have been required by an efficient builder and therefore, found that the proper cost of completion was $39,850.31. There is such a gross discrepancy between the plaintiff's estimated cost of completion and the defendants' actual cost of completion that neither the learned Master nor the Court of Appeal could place any reliance upon that method of proof. It should be noted in addition that this method fails to adduce the evidence necessary to establish a *quantum meruit* claim. The use in the calculation of the final contract price must include an element for a contractor's profit and what the plaintiff would be entitled to upon a *quantum meruit* proof in a mechanics' lien action is a payment for the work and materials provided up to the time of the termination not

such a profit as he might have contemplated making had the contract been completed: *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, s. 5.

The plaintiff's second method of calculation was this. The plaintiff alleged that at the time the contract had been terminated he had completed all the work which entitled him to the third draw, of which he had been paid only one-half, and substantially all the work which would have entitled him to the fourth draw. It was his submission that these draws were calculated to keep pace with the construction and that therefore the completion of the work which would entitle the plaintiff to demand the payment of the instalment would automatically demonstrate the proportion of the work which had been completed, and would, therefore, prove the amount of the *quantum meruit* to which, subject to adjustments, the plaintiff would be entitled. On this basis, the appellant submitted to the Court of Appeal and to this Court that it should be entitled to the balance of the third draw of $4,000, the whole of the fourth draw of $12,000 less deductions to which he agreed to submit in the following amounts:

Balance of plumbing	$2,262.50
Balance of electrical work	800.00
Repairs to plaster	910.00

In *Northern Lumber Mills Ltd. v. Rice*[2], an action was brought under the provisions of *The Mechanics' Lien Act* as here to enforce a lien for the material supplied for the erection of a house. The price of those materials was to be paid for in three payments. Before the action, the first two had become payable but the third had not. Meredith C.J.C.P. said at p. 202:

> A cause of action arose upon default in payment of each of these instalments; and so, apart from the provisions of the enactment, the action would have been properly brought as to the first two, but improperly as to the third...

The Court held that the action under the provisions of *The Mechanics' Lien Act* was not premature as to any of the three instalments.

At the trial, there was produced in cross-examination of Mr. Richmond, called as witness for the defendants, a

[2] (1917), 41 O.L.R. 201 (App. Div.).

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statement which he had drawn up in preparation of an answer to the evidence of the plaintiff (here appellant) as to the costs of completion, and the appellant is submitting to the deductions in the amounts set out by Mr. Richmond in his statement items 16, 17 and 18, *i.e.*,

16—Plumbing	$2,262.50
17—Plastering	910.00
18—Electrical	800.00

Mr. Richmond was cross-examined on these various items as well as all the others in the said statement. It is true that also to be completed before the plaintiff was entitled to the fourth draw were, of course, roofs, and Mr. Richmond had deducted that $228 for repair of roofs. He admitted, however, that if the roofs were in need of repair then, of course, the roofing contractor who had supplied the roofs only a short time before under guarantee should have been approached and required to make good his guarantee and that he had not done so.

As to item 16, Mr. Richmond testified that when the plaintiff left the job the rough plumbing was all done and that it represented about 50 per cent of the plumbing contract.

As to electrical work, about 65 per cent had been done at the time the plaintiff left the job.

As to plastering, all the white plaster had been completed but it was necessary to repair some. As I have pointed out, the appellant has accepted Mr. Richmond's amounts of these three items. The appellant, however, has not agreed to any deduction for heating. Heating, of course, would have had to have been installed before the white plaster was put on and that white plaster was required by the terms of the contract to have been completed before the fourth instalment was due.

Mr. Richmond in his statement gave a figure of $2,385 as being the amount necessary to complete the heating, but he agreed in his evidence that of that amount $1,400 was paid for an air conditioning unit not part of the original contract and he agreed also with the suggestion of counsel for the plaintiff at the trial that "a little less than $1,000 was charged in respect of heating". Deducting the $1,400 from $2,385 one finds a balance of $985 and I am of the

opinion that the appellant must also submit to a deduction of that sum. Therefore, I am of the opinion that the appellant has proved a *quantum meruit* as follows:

Balance of third draw		$ 4,000.00
Fourth draw		12,000.00
		$16,000.00
Deduct:		
Heating	$ 985.00	
Balance plumbing	2,262.50	
" plaster	910.00	
" electrical	800.00	
		4,957.50
		$11,042.50

Therefore, the *quantum meruit* claim proved was $11,042.50. In addition, the appellant is entitled to two amounts: Firstly, the amount of $2,495 for repair of storm damage, and secondly, $950 for extras supplied at the request of the respondents. The Court of Appeal found in favour of the appellant in both of these items and such a finding would seem to be in accordance with the evidence. The appellant admits that the respondents have paid mechanics' liens in the amount of $2,320 which sum must be deducted from any recovery of the appellant. Therefore, allowing to the appellant his *quantum meruit* proof of $11,042.50 and adding thereto the storm damage of $2,495 and the extras of $950 but deducting therefrom the liens paid by the respondents one reaches a total amount due to the appellant of $12,167.50.

This would appear to dispose of the issues in this appeal with one exception. As I have pointed out, the learned Master found that the defects in the work done by the appellant were minor and easily rectified, and McGillivray J.A., in the Court of Appeal adopted this finding. The respondents are, however, entitled to claim a reduction for the cost of correcting such defects. Therefore, I would allow the appeal and direct that the report of the Master be amended by the deletion of the sum of $1,125 appearing in the first paragraph of the report and replacing that sum with the sum of $12,167.50 unless within thirty days of the delivery of this judgment the respondents proceed with a reference before the Master of the Supreme Court of

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Ontario to determine the costs of the correction of the said minor defects. In that event the sum to be inserted should be the said $12,167.50 less the cost of correcting the defects found by the Master upon such reference. The cost of the reference should be determined by the Master in his report.

The appellant is entitled to the costs granted to him by the order of the Court of Appeal for Ontario and to his costs in this Court. The cross-appeal is dismissed without costs.

Appeal allowed with costs; cross-appeal dismissed without costs.

Solicitors for the plaintiff, appellant: Day, Wilson, Campbell & Martin, Toronto.

Solicitors for the defendants, respondents: Timmins & Bristow, Toronto.