

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Alan D. MacInnes
Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron

BETWEEN:

<i>HERITAGE ELECTRIC LTD.</i>)	
)	
<i>(Plaintiff) Respondent</i>)	
)	
<i>- and -</i>)	
)	
<i>STERLING O & G INTERNATIONAL CORPORATION and AESHU CORPORATION</i>)	<i>H. A. Khan</i>
)	<i>for the Appellants</i>
)	
<i>(Defendants and Plaintiffs by Counterclaim)</i>)	<i>A. W. Challis</i>
<i>Appellants</i>)	<i>for the Respondents</i>
)	
<i>- and -</i>)	
)	<i>Appeal heard and</i>
<i>HERITAGE ELECTRIC LTD., JACK MARINIC, WALLEY KOSTYCZ, RICK KLASSEN, BRIAN BERGEN, NELSON GARCIA, CON EL EN LTD. ROBERT MORRISON, MICHAEL MARK and THE CITY OF WINNIPEG</i>)	<i>Decision pronounced:</i>
)	<i>August 30, 2017</i>
)	
<i>(Defendants by Counterclaim) Respondents</i>)	

BEARD JA (for the Court):

I. THE ISSUE AND STANDARD OF REVIEW

[1] This is an appeal of a decision granting the motion for summary judgment by the plaintiff, Heritage Electric Ltd. (Heritage). In the result,

Heritage's claim was granted and the counterclaim was struck in its entirety. The appeal was dismissed with brief reasons to follow. These are our reasons.

[2] The issue on appeal, as set out in the written material of the defendants, Sterling O & A International Corporation (Sterling) and Aeshu Corporation (Aeshu) (together, the Sterling parties), is "whether [the] Learned Motions Judge erred in finding that the electrical work was done." The Sterling parties state that "The evidence before the Motions Judge was not sufficient to decide the matter on summary judgment and the Sterling Parties should not be denied their right to a trial of this matter."

[3] The applicable standard of review is that set out in *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61 at para 13. The Sterling parties have not argued that the motion judge applied the wrong law or the incorrect legal test in her determination of the summary judgment motion; rather, they take the position that she made palpable and overriding factual errors in coming to her decision and that her decision amounts to an injustice.

II. THE FACTS

[4] The underlying claim, as it relates to this appeal, is for the collection of a debt in the amount of \$26,850.88 alleged to be owing by Sterling to Heritage. It is uncontested that, in March 2012, Sterling hired Heritage to install an electrical distribution system in a semi-truck storage facility that Sterling was constructing on land owned by Aeshu. The original contract price was \$39,447.17, on which Sterling made a partial payment of

\$12,246.72. The claim is for the unpaid balance of \$26,850.88 plus pre- and post-judgment interest.

[5] Heritage sent progress bills to Sterling which were not paid. On one occasion, Sterling provided a cheque and then stopped payment, while, on another occasion, Sterling's cheque was dishonoured by its bank because there were insufficient funds. According to Heritage, it completed the work by March 2014 and sent an invoice dated March 17, 2014 to Sterling for the unpaid balance. Heritage states that Mr. Garcia, an inspector with the City of Winnipeg, inspected and approved the work on or about March 19, 2014.

[6] Sterling sent an email to Heritage on or about April 16, 2014, alleging that the work was not complete, the remaining work being "breakers missing and a panel not installed and the panel that is installed is Missing a drip cover." Heritage states that it completed the work that day. The Sterling parties take the position that those matters were not completed and that Sterling is not required to make any further payments until all of the work has been completed. They state in a late-filed affidavit that the cost of completing that work and, in addition, completing a fire wall and being compensated for the cost of a new electrical permit and new electrical drawings is \$25,000.

[7] In response to Heritage's motion for summary judgment, the Sterling parties stated that they wanted to cross-examine Heritage's witnesses on their affidavits. Heritage's counsel made significant efforts to schedule the cross-examinations, without success. Finally, an order was granted, precluding the Sterling parties from cross-examining the witnesses and setting the motion for hearing. That order has not been appealed.

III. THE MOTION JUDGE'S DECISION

[8] The motion judge stated that the affidavit evidence for Heritage, attested by its president and vice-president, provided a chronology of events from the date of the contract until its completion, supported by numerous exhibits, including photographs of work done and confirmation that power was turned on. She noted that their evidence attests to the fact that invoices were issued to Sterling and not paid.

[9] As regards the evidence for the Sterling parties, the motion judge stated:

. . . There are numerous references in the affidavit to actions of people unconnected with [Heritage]. There are also absurd assertions in it that [Heritage's witnesses] devised a scheme to extort money and to control the building process so as to be able to demand funds from the [Sterling parties]. Attached to [the Sterling parties' witness's] affidavit is an article on misfeasance in public office, which of course is not evidence and is irrelevant to [Heritage's] claim. The affidavit makes little sense and contains scandalous unsubstantiated allegations.

. . . [The assertion by the Sterling parties' witness] that there was \$25,000 worth of work to be completed is hard to believe in view of the fact that later in 2012 [*sic*] [2014] [the Sterling witness] attempted to hire [Heritage] to do additional electrical work. I find it impossible to believe that he would do this if the original work had not been completed to his satisfaction.

. . .

[The Sterling parties' witness] essentially acknowledged that there was no evidence before the court to refute the evidence of [Heritage] that the work was completed, but he says that in order to put that evidence before the court he would need to be able to cross-examine [Heritage's witnesses]. He was given ample opportunity to conduct those cross-examinations. It was only after

months of [Heritage's] counsel trying to arrange cross-examinations without success that Justice Simonsen finally said that [the Sterling parties] would no longer be allowed time to do so.

[10] In response to the Sterling parties' evidence on the motion for summary judgment, the motion judge stated:

When I take a good hard look at the evidence, it does not disclose a serious issue that the work done by [Heritage] was not completed to the satisfaction of the [Sterling parties]. Moreover, the scandalous allegations alleging criminality on the part of [Heritage's witnesses] that permeate all of the documents filed by [the Sterling parties' witness], including the assertions in the counterclaim against [Heritage] and numerous City of Winnipeg employees, undermine the credibility of his statements.

IV. THE PARTIES' POSITIONS

[11] The Sterling parties' position is that, on a hard look at the evidence, the motion is purely a contest of credibility. It argues that (i) there is no independent confirmation of Heritage's evidence; (ii) on Heritage's own evidence, the power was activated months before the work was completed; (iii) Mr. Garcia's evidence regarding the inspection should be rejected because it consists of unverified writing on a blank paper; (iv) the motion judge erred in saying that the two affidavits of the Sterling parties' witness were inconsistent regarding the alleged deficiencies in the work; and (v) Heritage failed to provide a certificate from an electrical engineer to confirm that the work, as approved in the electrical drawings, was completed in accordance with the City of Winnipeg, by-law No 104/2012, *Winnipeg*

Electrical By-Law, as repealed by the City of Winnipeg, by-law No 77/2015, *Winnipeg Electrical By-Law*.

[12] The Sterling parties say that, on close examination, Heritage's evidence consists of a bald assertion that the work was completed in April 2014. They say that the balance of Heritage's evidence relates to issues of delays, payment and quotations for other work that are not relevant to the issue of whether the work was completed.

[13] Heritage states that its evidence provided a detailed chronology of the contractual relationship between the parties and the progress of the work undertaken right up to completion.

[14] Heritage argues that this is in contrast to the evidence of the Sterling parties, which consisted of bald assertions and references to evidence such as emails and text messages that were not put before the court. As regards the electrical certificate, Heritage argues that, while it may be required to obtain an occupancy permit, it is not required to prove that the electrical work was completed. It also argues that the Sterling parties could have cross-examined its witnesses to challenge their assertions and the weight and veracity of their documents, but they failed to do so, so those documents stand before the court unchallenged.

[15] In summary, Heritage's position is that the motion judge had sufficient evidence before her on which to undertake a very limited weighing of the evidence and to conclude that the apparent disputes of fact did not disclose any genuine issue for trial as to the credibility of the witnesses.

V. ANALYSIS

[16] We agree that the main issue in this case is whether Heritage completed the work and, further, that both parties led some evidence on this issue. While this sets up as a credibility contest, which is not to be determined by way of summary judgment, a court is still required to take a hard look at the evidence to see whether there is really an issue of credibility or whether the evidence is so overbalanced in one direction that the credibility issue evaporates. The cogency of the evidence that the parties provide must be considered in light of the significance of the matters at issue, the cost of litigation and the need for proportionality that was endorsed by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, and adopted by this Court. (See *Caisse Populaire de la Salle Credit Union Ltd v River Ridge Properties Ltd*, 1997 CarswellMan 67 at para 11 (CA); *Manitoba Hydro Electric Board v John Inglis Co Limited et al*, 2000 MBQB 218 at para 20; *Haji-Hamzeh v Wawanesa Mutual Insurance Co*, 2005 MBCA 17 at para 4; *Lenko v The Government of Manitoba et al*, 2016 MBCA 52; 2016 MBCA 84; 2016 MBCA 85; and *Janz et al v Janz et al*, 2016 MBCA 39 at paras 45-46, 49.)

[17] As she was required to do, the motion judge took a hard look at the evidence of both parties in determining whether the evidence was so overbalanced in one direction that the credibility issue evaporated. While the evidence and documents supporting Heritage's motion for summary judgment could have been stronger, there was some independent evidence before the motion judge of the completion of the work, being the notes attributed to Mr. Garcia. While the Sterling parties have challenged the use of that document,

in the end it stood unchallenged on cross-examination or by way of contrary independent evidence. On the other hand, she was correct in finding that there was no independent evidence to support the assertions in the Sterling parties' affidavits that the work had not been completed.

[18] The Sterling parties argue, in particular, that the motion judge made a palpable and overriding factual error in relying on the fact that the power had been turned on as evidence that the contract had been completed, when it is clear from Heritage's own evidence that the power was turned on in 2013 and the work was not completed until 2014. A close reading of her reasons does not support this interpretation of her findings. While she did refer to the power being turned on, she did not find, as a fact, that that was evidence of the completion of the contract; rather, she referred to the power being turned on in the context of providing a brief overview of the evidence. While her summary of this evidence could have been clearer, there is no indication that she relied on any erroneous finding in coming to her conclusions regarding the completion of the work.

[19] Further, the motion judge was entitled to consider the entire proceeding in determining whether there was, in reality, any credibility issue. This includes the Sterling parties' extreme allegations of collusion and corruption between the principals of Heritage and the City of Winnipeg inspectors, the fact that that counterclaim had been dismissed on the basis that it did not disclose any cause of action, and the very serious allegations of many criminal acts attributed to the Heritage witnesses for which there was absolutely no evidence.

[20] The Sterling parties' failure to follow through with any cross-examination of the evidence produced by Heritage raises issues as to whether they were seriously challenging that evidence or merely stalling on the hearing of the motion.

[21] Finally, as stated earlier, the cogency of the evidence that is provided by the parties must be considered in the context of the issues in the case, the cost of a full trial and the need for proportionality, which was recognized as an important legal principle by the Supreme Court of Canada in *Hryniak*.

[22] What is at issue here is a simple claim for the payment of a debt in the amount of \$26,850.88. We agree with the motion judge that Heritage provided credible evidence that it had completed the work that it agreed to do. The burden fell to the Sterling parties to provide evidence that there was a genuine issue for trial. Faced with this evidence, it would have been easy for the Sterling parties to obtain some evidence to show that the work had not been completed, if that was the case. Its assertion, supported by no evidence, that the work had not been completed, when considered together with the manner in which it has pled and conducted the entire proceeding, was certainly sufficient to support the motion judge's conclusion that the credibility issue had evaporated and the Sterling parties had not raised any genuine issue for trial.

[23] The motion judge did not make any palpable and overriding errors of fact. Her decision to grant summary judgment was a discretionary decision that is to be reviewed on a deferential standard and cannot be reversed on appeal absent a finding that it was so clearly wrong as to amount to an injustice. In our view, the decision that she made was open to her and, in

coming to that decision, she was not clearly wrong and there was no injustice to the Sterling parties.

VI. RESULT

[24] For the above reasons, we dismissed the appeal with costs pursuant to the tariff to Heritage.

Beard JA

MacInnes JA

Cameron JA
