EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2015-054-000461
[2016] NZDC 11762

BETWEEN	PRECISION EARTHWORX (2013) LIMITED Applicant
AND	BURGESS CROWLEY CIVIL LIMITED Respondent

Hearing: 9 June 2016

Appearances: Counsel for Applicant - G Mason
Counsel for Respondent - T Wano

Judgment: 28 June 2016

RESERVED DECISION OF JUDGE G M ROSS

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[1] A plaintiff's summary judgment application, which is opposed.

[2] The applicant in its statement of claim of 10 November 2015 sought a judgment in the sum of $99,595.05 being the balance owing for work performed by the applicant for the respondent on a Fonterra worksite.

[3] The claim relied upon an initial agreement between the parties that the applicants would charge the respondents an hourly rate for labour and machinery on the waste water treatment plant site. More work was offered to the applicant by the respondent but on another site, the irrigation site.

[4] On 17 November 2014 Mr Mexted of the respondent agreed with Mr Howard of the applicant that the basis of the charge for the work on the irrigation site would be:

- $3/lm (linear metre) for trenching, placing and backfilling of trenches.

- That the respondent would have to provide extra men for putting together raisers etc.

[5] The previous agreement between the applicant and the respondent was of 13 October 2014 in respect of the waste water treatment plant on an hourly rate basis for labour and machinery. Two types of machinery were included, one at $125 per hour, another at $115 per hour, with a labour cost of:

> Labour/drain-layer @ $50 per hour split during machinery operation.

[6] It is the applicant's claim that it agreed with the respondent perhaps two days into the irrigation site part of the contract, that the work to be performed by the plaintiff would be varied. The applicant's claim is that at the time of the agreement of $3 per lineal meter, that this rate was for the trenching, placing, and backfilling of trenches. However, the applicant claims that upon the dismissal of another contractor Donnelly Contracting from the site, and the agreement between the applicant and the respondent that the applicant would undertake the work which Donnelly Contracting was to have done, that the basis for charging for the work would also vary. It is Mr Howard's deposition that he had been advised by Mr Mexted of the respondent that the bedding work would be done on the irrigation site by Donnelly Contractors. There appears to be no challenge to Mr Howard deposing (para 9 first affidavit) that the bedding work comprised of the installation of sprinklers, bends, corners, and connection tie-ins. He attributes the use of the word "raisers" by Mr Mexted in his email, set out in his affidavit, to mean "sprinklers etc or bedding work". The significance of this to the applicant is the requirement for a lot more work to be performed by it over and above the basic trenching, laying, and refilling.

[7] Thus, the applicant's basic case is, that as Donnelly Contractors were asked to leave the site, and there was no one else engaged and the work on the irrigation site was to proceed forthwith, that is when the discussion between Mr Howard of the applicant and Mr Mexted of the respondent took place. In fact, as an aside, on the day that the applicant was due to commence pipe-laying, the applicant claims there was no pipe present on the site to lay. So the discussion between Mr Howard and Mr Mexted, according to Mr Howard, and unanswered in this respect by Mr Mexted,

was that the applicant was instructed to organise the delivery of pipes and fittings so that the job could commence.

[8] Then it is the applicant's case that Mr Howard and Mr Mexted agreed that the applicant would do the work that Donnelly Contracting had been engaged to do, and that the applicant would do this in addition to the work for which they were originally engaged on the irrigation site, merely trenching, placing, and backfilling of trenches.

[9] Furthermore, the applicant's case is that two other matters were discussed between Mr Howard and Mr Mexted at this time. The first issue (see para 14 of Mr Howard's first affidavit) was for a different type of trenching in some places as stones in the ground meant that the chain trenching method was not appropriate. (Aggregate at additional cost being required to be laid before the pipes themselves could be laid).

The second issue was charges for the work on the irrigation site as the work to be done had now increased. Mr Howard's averment (para 15 first affidavit) is that the rate agreed upon for the waste water site (the hourly rate charging scenario) would apply to *all* work undertaken by the applicant on the irrigation site as well. This on account of the enlarged amount of work to be done on the irrigation site compared to what was originally envisaged to be done, because of the cessation of involvement of Donnelly Contracting.

[10] Thus in commencing and undertaking the agreed extra work on the irrigation site, from that date in October 2014 onwards, until the completion of the work, on or about 11 February 2015, the applicant charged out its work on what it understood and believed to be the agreed basis, the hourly rate for machines and labour as originally agreed for the waste water block, but subsequently agreed between Mr Howard and Mr Mexted to apply to the irrigation site as well.

[11] The respondent simply denies that there was any variation to the work to be carried out on the irrigation site. Through Mr Mexted, it does not accept that there were substantial variations to the work that it was agreed that the applicant would carry out. All the work agreed to be done, he says, was decided before agreement

was reached on the lineal meter rate. His recollection of matters differs from that of Mr Howard. He claimed the charging basis did not change

[12] Moreover, Mr Mexted deposes that Mr Howard had been to the site and seen the conditions and was aware of the scope of the work to be carried out, and he had seen the variable nature of the ground conditions, all before the lineal meter rate was agreed.

[13] This is an application for a summary judgment. Such is available to the applicant if there is no bona vide defence. The onus is on the applicant seeking summary judgment to show that there is no arguable defence. In practice, the Court must be left without any real doubt or uncertainly on the matter (*Pemberton v Chappell* [1987] 1 NZLR 1.)

[14] However, at this stage it is not for the Court to attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits. (See *Harry Carsales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21.

[15] Moreover, in determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with un-disputed contemporary documents or other statements, or inherently improbable. (See *Attorney General Rakiura Holdings Ltd* (1986) 1 PRNZ 12. And in assessing a defence, the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in affidavits filed in support of the notice of opposition *Middleditch v NZ Hotel Investments Limited* (1992) 5 PRNZ 392.

[16] And these matters are summed up by the Court of Appeal in *Krukziener v Hanover Finance Limited* (2008) NZCA 187 at para 26:

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that

> is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[17] In this case, the affidavit evidence has been from Mr Howard, in support of the interlocutory application, and in reply to affidavits sworn and filed in support of the opposition to the summary judgment application. Those affidavits are from Mr Burgess and Mr Mexted. Then there is a further affidavit of Mr Donnelly, sworn in support of the interlocutory application.

[18] The issues involved in the determination of this application revolve around first, whether or not there was a variation to the extent of the work to be done on the irrigation site. Second, the basis of charging for that work, before the job started. Third, whether the applicant has demonstrated that there is no arguable defence. Fourth, even if it is accepted that there is a disagreement in the evidence in the affidavits of Mr Howard and Mr Mexted, is this sufficient in the present case to engage the well known maxims from *Krukziener*, and *Pemberton* that on summary judgment, the Court would not normally resolve conflicts of evidence, or assess the credibility of deponents. The more so if the defence raises questions of fact upon which the outcome of the case may turn out in which event it would not often be right to enter summary judgment.

[19] However, there are a host of fairly basic reasons for the belief in the present case in the absence of a true and proper defence.

(i) I have already referred to the bare denial of the respondent and its claim that the $3 per linear meter charging basis applied at the

beginning of the irrigation site job and continued to apply throughout the applicants work on that site. This despite respondent knowledge that much more work was required of the applicant.

(ii) I was surprised by the absence of any reference by Mr Mexted to Donnelly Contracting's termination. This in my view is a curious omission in light of the assertion of the applicant that this was the cause of the variation of the irrigation site contract in the first place, requiring work which that company would have done to be performed by another. There can be no doubt that Mr Mexted knew and understood that if Donnelly Contracting was not to do the raisers and additional parts, that someone else had to do it, and as was pointed out in the email of 17 November, extra men would have to be provided for putting together the raisers. There was no evidence of any company other than Donnelly Contracting and the applicant being involved at this stage of proceedings on the irrigation site.

(iii) Then there is the improbability of the applicant electing to proceed to undertake a significant amount of additional work on the irrigation site after Donnelly Contracting had been discharged, at the same price that they agreed to do the work, without that additional work. The more so, when, according to Mr Donnelly, his company, in agreement with the respondent, would charge the respondent a "total fit-out rate" of $9.15 plus GST per lineal meter. Mr Donnelly's deposition was that after the first paddock, he told Mr Mexted that the lineal meter rate was not cost effective as the work was labour intensive. It appears to have been shortly before the discharge of Donnelly Contracting that it was agreed with the respondent that Donnellys would charge the respondent an hourly rate instead of a lineal rate. The point is made as to the improbability and illogicality of the applicant performing work for the respondent at one third of the agreed price between the respondent and Donnelly Contracting, when the higher figure for the later firm is on Mr Donnelly's evidence, uneconomic for them. Accepting the respondent's position then,

means adopting a proposition that the applicant would work for one third of the Donnelly rate but at the same time extending the nature and scale of the contract markedly.

(iv) I have already referred to the absence of evidence of other contractors staff being on the site. There is no suggestion that there were employees on the irrigation site apart from those engaged by the applicant. That more labour was required is affirmed by the respondent in the email of 17 November 2014.

(v) In light of the strength of the opposition to the claim for summary judgment, I have to express some surprise that there has been no contemporaneous response in challenge to accounts rendered, as they have been rendered, and, for the most part, paid, the challenge only coming when the respondent was pressed for payment. I would normally not attach particular weight to lateness in payment or unwillingness to pay, or avoiding payment, except that in this case there are a number of recurring themes, which, taken together, might point to an evasiveness and delay over account payment. Without more, such are not defences to an application such as the present.

This arises not only in respect of the applicant, the unchallenged deposition evidence is that they left the job in mid to late February 2015 for not being paid. But Mr Donnelly suffered the same fate. And between the present parties, that despite the approval of the accounts for payment by being countersigned both by the applicant and by staff on behalf of the respondent, there were at least two attempts to vary the payment regime at a time when accounts were due, and long after the variation in work and payment basis agreement to which Mr Howard deposes. Those were the "back to

lineal measure" suggestions of Mr Mexted, and the proposal that the $50 per hour labour rate be reduced to $35 per hour. The latter, if it be necessary, is in its own way another indication of confirmation of the variation in the charging method for the irrigation site work.

(vi) In the circumstances of the present case, I regard it as somewhat lame of the respondents to endeavour to reconcile the daily dockets to linear meters completed, with what appears to be a proposal that might have operated as a reduction to the account, again, apparently endeavouring to negotiate the price downwards after the job was done. Until then all of the dockets had set out the hours of both labour and machinery. As I pointed out earlier, the hourly charging basis, which is the foundation of the applicant's claim, had been the subject of accounts issued, checked, and paid up until at least mid January 2015.

(vii) An issue is made with a credit which was given by the applicants to the respondents, but this was in response to a claim that some time was spent in relation to errors in applicant's invoices. In respect of the particular example, it is answered at para 20 of Mr Howard's reply affidavit. In the present circumstances, there is nothing in it.

(viii) The affidavit of Mr Burgess, a co-director and co-owner of the respondent company, was read. There was a challenge to its admissibility – apart from some background and his authority details, the contents of this affidavit largely comprise his observations upon other people's documents and his undocumented memory of discussions he had with his own employee, (at that time) Mr Mexted. His affidavit does not take the respondents case any further, nor can it meaningfully engage in the argument in light of his second hand involvement with the applicant at the time.

[20] Then there was some criticism about inconsistencies between the statement of claim, and this interlocutory application. I agree that the pleadings are, when read in conjunction with the application and the supporting affidavits, clumsy. However, this has not prohibited a meaningful understanding of what the case is about, nor what the respondent has to answer. My assessment is that it is not necessary to amend the statement of claim and look at the application afresh in that light.

[21] In its statement of defence, the respondent raises two issues which I understand it to generally support its claim of the unsuitability of the application for a summary judgment by the applicant. The first is in respect of repair work, in the sum of $10,723.75. The second is in respect of a claimed unpaid account in the sum of $1,995 for the hire of the respondent's Caterpillar Grader. These claims are short of any further detail or substance presently and do not alter my view and the overall picture which I take of this case. Unsupported as they are, I do not take them into account any further, but note that they are each well within the jurisdictional limit of the Disputes Tribunal.

[22] In terms of para 19 of the statement of defence, I have entered judgment at the date of hearing in favour of the applicant against the respondent, in the sum of $6,000, on the respondents admission that this sum was owed to the applicant for GST amounts unpaid by the respondent on invoices rendered to it by the plaintiff.

[23] The outcome, then, is that I find the application is properly brought, that the applicant satisfies me that there is no arguable defence, and that the Court is left without any real doubt or uncertainty on the critical issues. The outcome thus is that the application is successful and a summary judgment is now entered in favour of the applicant plaintiff against the respondent defendant in the sum of $93,595.05. This is the net sum claimed after the deduction (and earlier entry of judgment) of the $6000 referred to in the preceding paragraph .Interest is also to be added to the judgment sum, as pleaded in the Statement of Claim.

[24] Disbursements will be as approved by the Registrar. Costs to the applicant on a 2B scale.

G M Ross
District Court Judge