

2016 ONSC 7892  
Ontario Superior Court of Justice

Conterra Restoration Ltd. v. Kirsch

2016 CarswellOnt 19732, 2016 ONSC 7892, 275 A.C.W.S. (3d) 75

**CONTERRA RESTORATION LTD. (Plaintiff) and IRVING MOISHE  
KIRSCH (Defendant) and PANCON ENGINEERING LTD. (Third Party)**

P.J. Cavanagh J.

Heard: December 1, 2016  
Judgment: December 15, 2016  
Docket: CV-14-517321A1

Counsel: Jeffrey A.L. Kriwetz, for Plaintiff

**Barbara Green**, for Defendant

Megan Mackey, for Third Party

Subject: Civil Practice and Procedure; Contracts; Restitution

**Related Abridgment Classifications**

**Construction law**

**II Contracts**

**II.4 Payment of contractors and subcontractors**

**II.4.f Extras**

**II.4.f.ix Authorization**

**Headnote**

**Construction law --- Contracts — Payment of contractors and subcontractors — Extras — Authorization**

Defendant owner received work order from city requiring restoration work, including repairs to balcony slabs — Owner hired third party restoration engineer to determine scope of work and oversee repair, and third party negotiated price with plaintiff contractor — Contract contained both lump sum and unit prices, and estimates for number of through balcony slabs required — Contractor also provided estimate for waterproofing that did not form part of work to be done under contract — Work began and contractor discovered balconies were in worse shape than expected — Contractor and third party discussed matter and third party told contractor that owner authorized additional work and would pay — Contractor submitted progress invoices and detailed breakdowns of work and materials to third party, who passed them on to owner — Third party told project manager that owner wanted waterproofing and agreed to price — Owner paid contractor for amount described in contract for balcony repairs only, but did not pay \$109,451 for additional work on balconies or waterproofing and denied authorizing work or agreeing to prices — Third party deposed he spoke to owner about all additional work and was given go ahead — Contractor commenced action for \$109,451 and owner commenced third party claim for contribution and indemnity for any amounts found owing — Contractor brought motion for summary judgment; owner brought motion for summary judgment against third party; third party brought motion for summary dismissal of claim against it — All motions were dismissed — There was no material disagreement with respect to discussions between contractor and third party, but there was about discussions between third party and owner on key questions of whether additional work was authorized — Owner's evidence about knowledge of additional cost of slab repairs, waterproofing and

review of invoices submitted had to be assessed on viva voce evidence — Fair and just determination of merits could not be made without viva voce evidence from owner and third party, and credibility assessment.

## Table of Authorities

### Cases considered by *P.J. Cavanagh J.*:

*Hryniak v. Mauldin* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — referred to

### Rules considered:

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194  
R. 20.05(1) — considered

MOTION by contractor for summary judgment for monies owing for renovation work; MOTION by owner for summary judgment against third party; MOTION by third party for dismissal of claim against it.

### *P.J. Cavanagh J.*:

#### Nature of Motions

1 The Plaintiff Conterra Restoration Ltd. ("Conterra") is a contractor that focuses on the repair and restoration of buildings. The Defendant Irving Moishe Kirsch (Mr. Kirsch) is the owner of property at 182 Jameson Ave., Toronto, Ontario (the "Property"). Conterra performed restoration work on the Property. The Third Party Pancon Engineering Ltd. ("Pancon") is a building science and restoration engineer which oversaw the balcony restoration work that was performed by Conterra.

2 Conterra is claiming payment of the sum of \$109,451.35 from Mr. Kirsch for balcony restoration work that it performed on the Property. Mr. Kirsch has defended Conterra's action, and commenced a Third Party Claim against Pancon in which he seeks contribution and indemnity for any and all amounts which he may be ordered to pay to Conterra in the main action.

3 Conterra moves for summary judgment against Mr. Kirsch for payment of \$109,451.35. Mr. Kirsch opposes Conterra's motion, and moves for summary judgment against Pancon seeking contribution and indemnity for all amounts which he is ordered to pay Conterra in the main action. Pancon opposes Mr. Kirsch's motion for summary judgment, and seeks summary judgment against Mr. Kirsch dismissing the third party action.

#### Background

4 Mr. Kirsch is the owner of the residential apartment building located at the Property.

5 On April 18, 2011, the City of Toronto issued several work orders in respect of the Property. The work orders required repairs to be done to, amongst other things, the balcony slabs at the Property. The main action and third party claim relate only to the balcony work.

6 When the work orders came to the attention of Mr. Kirsch, he hired Pancon as an engineering company to determine the scope of work to be done and to oversee the work that was necessary to comply with the work orders. Pancon tendered the project and negotiated prices for the work with Conterra.

7 Conterra submitted a bid for the project that included a price of \$38,000 for waterproofing the balconies.

8 Conterra and Mr. Kirsch entered into a contract dated September 13, 2012 for the balcony restoration work (the "Contract"). Pancon is shown in the Contract to be the "Owner's Engineer Supervising the Construction and Certifying Progress Payment". The Contract incorporated other documents into it, including (a) the repair specification and tender documents prepared by Pancon for the balcony slabs; (b) the drawing details and plans prepared by Pancon; and (c) a table of repair items including the unit price and total price for each item as submitted by Conterra.

9 In the Contract, some of the items were priced as a lump-sum, and some of the items were priced on a per unit basis. In particular, the item described as "Isolated Total Through Slab, Top Side Repairs and Concrete Floor Slab Repairs" was priced on a per square foot basis. The unit rate for the through slabs in the Contract was \$76. Estimates of quantities for items that were priced on a per unit basis were included in the Contract, and the estimated quantity of through slab units was 100.

10 The evidence of Fabio Tedesco, Conterra's project manager, is that he was informed by Mohammad ("Mike") Panahi of Pancon that the initial estimate of quantities was based on a random visual and sounding inspection of the state of the balconies before any repair work began and that, as is typical in these types of projects, the full scope of the work and quantities of work to be performed would not be known and could not be determined until the repair work actually began. The evidence of Mr. Tedesco is that he was advised by Mr. Panahi that if more labour and materials were required to complete the repairs than originally quoted and stated in the Contract, Conterra would be paid for the additional work performed.

11 Prior to the date of the Contract, Pancon sent a letter to Mr. Kirsch dated August 21, 2012 that, among other things, advised that "[f]urther removal of concrete at balcony slabs beyond the front edge of slabs due to the age and condition of balconies may also be required".

12 Conterra's quote of \$38,000 to waterproof the balconies did not form part of the work to be done under the Contract.

13 Paragraphs 6 and 10 of the Contract provide:

**6. Change Orders**

Any additional work beyond the noted scope of work and quantities that may be required due to site conditions during construction is not included in this Contract Price. All additional work is to be reviewed by [Pancon] and any additional work that is deemed to be required shall be authorized by [Mr. Kirsch] AND [Mr. Kirsch's] engineer [Pancon] prior to commencement of the additional work.

Extras are payable upon approval of extras by [Mr. Kirsch] and [Mr. Kirsch's] engineer [Pancon] and by signing the Change Order.

**10. Contract Amount**

[Mr. Kirsch] and [Conterra] agree that where unforeseen items are uncovered during construction and anticipated repair quantities for the noted project are beyond the quantities set in enclosed table, the additional work is to be reviewed by [Pancon] and any additional work that is deemed to be required shall be authorized by [Mr. Kirsch] and [Pancon]. The cost of approved additional work authorized by [Mr. Kirsch] will be then additional to this contract as per unit rates noted in this contract. A Change Order shall be formed and signed by [Mr. Kirsch] and [Conterra] for authorized additional work and payment.

14 There were no direct discussions between Conterra and Mr. Kirsch with respect to the work under the Contract. All relevant communications took place between Mr. Panahi on behalf of Pancon and Mr. Fabio Tedesco, Conterra's project manager.

15 Once the balcony work commenced, Conterra discovered that the balconies were in worse condition than had been anticipated. Mr. Tedesco's evidence is that Mr. Panahi advised him to proceed with the additional work to complete the repairs to the balconies and that he would advise Mr. Kirsch of the quantity overruns and that Mr. Kirsch agreed to pay for the additional cost.

16 The cost for the additional quantities of through slab materials was detailed in progress draw spreadsheets which were provided by Mr. Tedesco to Mr. Panahi during the course of completion of the work. The total number of units supplied for this item was 1,059, exceeding the estimated number of units (100). There were some items where the number of units was less than the estimate, and where the estimated charge in the Contract for such items was higher than the amount actually charged by Conterra.

17 As work progressed, Conterra submitted progress invoices for work completed up to the date of each invoice that were sent to Pancon. Included with the invoices were detailed breakdowns of the work done to date including the quantities of material supplied to the date of each invoice. Pancon, in turn, sent a letter to Mr. Kirsch each time it received an invoice from Conterra and included the invoice and the breakdown. There were 11 such letters that were sent to and received by Mr. Kirsch.

18 According to Mr. Tedesco's evidence, after Conterra began doing the balcony work, he was told by Mr. Panahi that he would prefer to have the balconies waterproofed and that he would discuss once again with Mr. Kirsch the option of waterproofing the balconies. Mr. Tedesco then discussed with Mr. Panahi a revised price for the waterproofing work, and Mr. Tedesco advised Mr. Panahi that Conterra would perform the waterproofing work for \$36,000 plus HST. Thereafter, Mr. Panahi advised Mr. Tedesco that Mr. Kirsch had agreed to this price and that Conterra should proceed to complete the waterproofing work.

19 Conterra did complete the waterproofing work in two phases and rendered two invoices to Mr. Kirsch for this work. The first charge for \$18,000 was included with Conterra's progress invoice draw number seven which was sent to Mr. Kirsch under cover of Pancon's letter dated July 11, 2013. The second charge for \$18,000 was included with Conterra's progress invoice draw number 10 which was sent to Mr. Kirsch under cover of Pancon's letter dated October 18, 2013. Mr. Kirsch paid both invoices.

20 Mr. Kirsch has paid to Conterra the amount described in the Contract as "The Total Contract Amount for Balcony Slabs Rehabilitation" of \$560,600 plus HST (\$72,878). The amount charged by Conterra to Mr. Kirsch that remains unpaid is \$109,451.35. This is comprised of (i) the charge for the waterproofing work that was done (\$36,000), and (ii) the difference between the estimated "Total Contract Amount" (\$560,600) and the amount charged by Conterra based upon the number of units actually supplied for the variable items (\$621,459.60), including the additional through slab units, plus HST.

21 The details of Conterra's overall charges were included with Conterra's progress invoice number 11 which was included with Pancon's letter to Mr. Kirsch dated December 6, 2013.

#### **Evidence concerning Authorization, or Lack of Authorization, for the Additional Concrete Work and for Waterproofing Work**

22 Pancon does not dispute that it authorized Conterra to proceed to replace a significantly greater amount of through slab concrete than had originally been estimated, in order to safely repair the balcony slabs. Pancon also does not dispute that it authorized and directed Conterra to proceed with the waterproofing work on the balconies.

23 According to the evidence of Mr. Panahi, the additional through slab concrete work had to be done otherwise Pancon could not issue a completion letter and the City of Toronto would not lift the work orders. According to Mr. Panahi's evidence, if the City refused to lift the work orders, he would not have been paid by Mr. Kirsch because his

agreement with Mr. Kirsch was to oversee all work necessary to lift the work orders. Mr. Panahi said in his affidavit that Mr. Kirsch told him on the telephone that he would not pay Pancon until the work orders were lifted.

24 Mr. Panahi, in his affidavit, gave evidence that he spoke with Mr. Kirsch to tell him about the extra concrete repair work that needed to be done in order to repair the deficiencies and that, after some discussion, Mr. Kirsch told him to go ahead with the extra concrete repairs, and that he understood the unit rate and that the additional work should be charged at that rate. Mr. Panahi gave evidence in his affidavit that he had more than one conversation with Mr. Kirsch about the unit rate for additional concrete work.

25 Mr. Panahi's evidence is that when he was told to go ahead with the through-slab concrete repairs, Mr. Kirsch did not tell him that his signature on a change order would be required and Mr. Kirsch simply told him to have Conterra repair the delaminated concrete so that repairs would be completed and the work orders would be lifted. On the basis of these instructions, Mr. Panahi told Conterra to go ahead with the necessary through slab repairs, which would be charged at the unit price agreed to in the Contract.

26 According to Mr. Panahi's evidence, Mr. Kirsch was aware of the amount of concrete work being done because each invoice was accompanied by a spreadsheet which specified the work done and identified the quantity of through-slab repairs and the price to date for that work.

27 In his affidavit, Mr. Panahi gave evidence that Mr. Kirsch listened to his advice with respect to waterproofing the balconies, and instructed him to have Conterra waterproof the balconies. His evidence is that he had a number of telephone conversations with Mr. Kirsch over a two or three day period after which Mr. Kirsch instructed him to have Conterra waterproof the balconies. He recalls telling Mr. Kirsch that it would be a waste of money to perform extensive concrete repairs without waterproofing the slabs and that in order to protect his investment, he had to put a membrane on top of the balconies.

28 According to Mr. Panahi's evidence, he told Mr. Kirsch that he might be able to get him a discount on the waterproofing work and that Mr. Kirsch suggested that he may agree to waterproof the balconies if Conterra discounted their price. As a result, Mr. Panahi called Mr. Tedesco who agreed to do the waterproofing work for \$36,000 (instead of \$38,000 as had initially been quoted). Mr. Panahi's evidence is that he then called Mr. Kirsch back and gave him the \$36,000 price and, during that last phone call, Mr. Kirsch instructed him to have Conterra waterproof the balconies for a price of \$36,000. According to Mr. Panahi's evidence, Mr. Kirsch, when he gave these instructions, did not say that he would need to sign a change order in order for that work to go ahead.

29 In his affidavit, Mr. Kirsch stated that he never advised Mr. Panahi or anyone else at Pancon or Conterra that the additional work was to be completed, and he did not agree to pay the additional cost at the per unit price set out in the contract. Further, Mr. Kirsch's evidence is that he never authorized any waterproofing work at any price and, in fact, he had consistently informed Mr. Panahi that he did not want any waterproofing work on the balconies at the Property.

## **Positions of the Parties**

### ***Position of Conterra***

30 Conterra submits that Mr. Kirsch has acknowledged that Pancon was his "eyes and ears" on the project and that he knew that all communications between Conterra and him were conducted through Pancon.

31 Conterra submits that it was authorized by Pancon to proceed with the additional through slab concrete work and that, in any event, the Contract provided that the overall price could vary either up or down depending upon the number of units actually required for the items that were priced on a per unit basis.

32 With respect to the waterproofing work, Conterra submits that (i) Pancon authorized such work to be done, (ii) Pancon had the actual and/or ostensible authority to act as Mr. Kirsch's agent in the circumstances, and (iii) Conterra was

entitled to rely upon the instructions of Pancon as being those of Mr. Kirsch. Conterra submits that the waterproofing work was performed under a separate agreement between Conterra and Mr. Kirsch and that Mr. Kirsch is bound by Pancon's representations and authorizations, even if the Court were to find that Pancon acted beyond the scope of the actual authority granted to it by Mr. Kirsch.

33 Alternatively, Conterra submits that it is entitled to payment on the basis of unjust enrichment or *quantum meruit*.

***Position of Mr. Kirsch***

34 In response to Conterra's claim, Mr. Kirsch relies upon the fact that there were no change orders signed in respect of the work done on the balconies at the Property. His position is that, under the Contract, if additional quantities of materials were required during the course of the project beyond the estimates in the Contract, a change order was required. According to Mr. Kirsch's evidence, had Pancon provided him with a change order in respect of either the additional concrete work on the balconies or the waterproofing work, he would have refused to authorize that work.

35 Mr. Kirsch submits that Pancon was not his agent, its authority was contractually limited, and Conterra had notice of the limitation of Pancon's authority as a result of the Contract. On this basis, Mr. Kirsch disputes that Pancon had either actual or ostensible authority to act as his agent.

36 Mr. Kirsch submits that, through the Contract, he had preserved his right to approve in writing any change to the Contract that would result in payment of more than the estimated total contract amount.

37 Mr. Kirsch disputes that Conterra is entitled to payment pursuant to the doctrines of unjust enrichment or *quantum meruit* on the ground that a contract is a well-established category which constitutes a "juristic reason" for an alleged enrichment.

***Position of Pancon***

38 Pancon's position is that, under the Contract, for items that were priced at a unit amount based upon estimated quantities, a change order is not required and payment for work done is subject only to quantity verification. Pancon submits that written change orders are not applicable to quantity overruns because it is not possible to obtain a change order when one does not know the quantity that will be necessary. Because the quantities of concrete were verified by Pancon, Mr. Kirsch is liable to pay for the quantity overrun of concrete replacement.

39 Pancon submits that the paragraph 10 of the Contract provides only for a Change Order where "unforeseen" items are uncovered during construction. Pancon submits that the additional units of through slab concrete were not unforeseen, but were foreseen. Therefore, it submits, a change order for additional units was not required under the Contract.

40 With respect to the claim for waterproofing, Pancon submits that where a party has, by their conduct, varied the terms of a construction contract, the party cannot rely on the contract and require extra cost to be authorized in writing. Pancon submits that extra work requested outside the scope of a construction contract constitutes waiver by conduct of the strict terms of the contract and should be paid for, and that verbal requests for extra work outside the scope of the contract establishes a waiver of the strict terms of the contract.

41 Pancon submits that payment for work outside of the scope of a written contract can be recovered as an extra, or on a *quantum meruit* basis, without a written change order.

**Analysis**

42 In order for me to grant summary judgment in favour of Conterra on its motion, I must be satisfied that I am able to reach a fair and just determination on the merits of the Conterra motion. This will be the case when the process

allows me to make the necessary findings of fact, allows me to apply the law to the facts, and is a proportionate and more expeditious and less expensive means to achieving a just result.

43 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that he or she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including oral testimony where appropriate, is often sufficient to resolve material issues fairly and justly. On a motion for summary judgment, the judge should first determine if there is a genuine issue requiring a trial based only on the evidence before him or her, without using the new fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the new fact-finding powers: *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.), at paras. 49, 57.

44 On these motions, there is no material disagreement in relation to the relevant communications between Mr. Tedesco of Conterra and Mr. Panahi of Pancon. There is, however, a conflict between the evidence of Mr. Panahi and that of Mr. Kirsch with respect to key questions, whether the work that was performed by Conterra in relation to (i) the through slab concrete work on the balconies that required additional units, and (ii) the waterproofing work, was authorized by Mr. Kirsch.

45 Further, the evidence of Mr. Kirsch with respect to his knowledge of the additional cost of the through slab repairs on the balconies and his knowledge of the waterproofing work that was undertaken by Conterra, as well as his review of invoices provided to him by Pancon, needs to be assessed on the basis of Mr. Kirsch's *viva voce* evidence as opposed to affidavit evidence, even with cross-examination on his affidavit having been conducted.

46 On the evidentiary record before me, I am not satisfied that I am able to reach a fair and just determination of the merits of Conterra's motion for summary judgment and the summary judgment motions by Mr. Kirsch and by Pancon without assessing the evidence to be given through *viva voce* testimony by Mr. Kirsch and by Mr. Panahi and making findings of credibility.

47 I therefore dismiss the motions for summary judgment brought by Conterra, by Mr. Kirsch and by Pancon.

#### **Directions for Trial**

48 Under Rule 20.05(1) of the *Rules of Civil Procedure*, where summary judgment is refused, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just.

49 Through the evidence filed on these motions, and the written and oral submissions that were made, counsel for the parties have substantially prepared already for what should be a short trial.

50 In *Hryniak*, the Supreme Court of Canada wrote that, where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

51 In this case, I will remain seized of the main action and the third party action. I direct counsel for the parties to confer with each other and try to reach an agreement on terms for a short trial that will take advantage, to the greatest extent possible, of the work that has been done for these motions. These terms could include (i) use of affidavits as evidence in chief, (ii) use of transcripts of cross-examinations in lieu of examinations for discovery, and (iii) an agreed statement of facts for all non-contentious facts.

52 Counsel are directed to arrange, through my assistant, to attend a telephone case conference with me at 8:30 a.m. on a day during the week of January 16, 2017, if possible, and no later than the end of January 2017, to discuss directions

for the trial of the main action and the third party action. If the parties are unable to agree on such directions, I will give directions after hearing submissions from counsel.

### **Costs**

53 In my view, the steps taken by the parties in relation to these motions for summary judgment significantly advanced the litigation. The work that has been done to assemble documentary evidence, prepare affidavits, conduct cross examinations and prepare submissions of fact and law would have been necessary to prepare for a trial, even had motions not been brought for summary judgment. Each party brought a motion for summary judgment, and each motion was dismissed. I do not consider it to be appropriate to award costs of these motions until the trial decision has been made.

54 I therefore order that costs of the three motions for summary judgment be reserved to be decided by me as trial judge at the trial of the main action and the third party claim.

*Motions dismissed.*