CITATION.: 1579959 Ontario Inc. v. Sheikh et al., 2025 ONSC 185
COURT FILE NO.: CV-22-2722
DATE.: 2025 01 08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
1579959 Ontario Inc.	)	C. Zhang, for the Plaintiff
	)	
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
Sheikh, Shaukat Riaz, Sheikh, Neelofer Shaukat	)	B. Rashdi, for the Defendants
	)	
	)	
	)	
Defendants	)	
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	)	
	)	**HEARD:** July 2, 3, 4, and 5, 2024

REASONS FOR JUDGMENT

Trimble J.

Contents

Introduction

[1] In this lien action the Plaintiff (1579959 Ontario Inc. COB as Fusion Homes) sues for payment under its contract for $140,422.78 representing work done but not paid for ($125,713.78) plus the balance of the contract ($14,709.20) for renovations it contracted to perform on the Defendants' (the Sheikhs') home. The Sheikhs paid $91,598.06 up to 23 October 2021, notwithstanding that work continued to May 2022, and that Fusion issued an invoice for work done until then (although dated 12 February 2021) in the sum of $138,700.41. Fusion says that the Defendants breached the contract by refusing to pay the invoice.

[2] The original contract was for $163,841.80 ($104,925.00 for the original contract, and $58,916.80 for "Option A" selected in late 2020) plus approved extras of $68,179.06 for a total of $232,020.86.

[3] The Defendants acknowledge the contract. They say, however, that Fusion abandoned the work. The Sheikhs, after reducing the 12 February 2021 bill to reflect 88% completion (from 97% completion claimed by the Plaintiffs) to reflect the actual amount of work completed as of May 2020, deducting amounts paid to date, the credits listed in Option A the Plaintiff did not adjust for, the cost of

rectifying work poorly done, and the cost of finishing the job, say that Fusion owes them $17,086.82.

[4] Since the parties agree on the contract, I will address in these Reasons for Judgment only those items in dispute and how my resolution affects the 12 February 2021 invoice that Fusion sues over. There are some preliminary issues, as well. Hence I will deal with the issues as follows:

a) Procedural History
b) Evidence Issues
c) Credibility of the Witnesses
d) The Contract
e) Abandonment by Plaintiff or Breach by Defendant
f) Credits to the Contract Price
g) Extras
h) Miscellaneous Charges or Issues.

Procedural History

[5] This matter is a simplified lien trial has had a complex litigation history including a Default Judgment the Plaintiff obtained which was set aside on consent. The endorsements in the file indicate that the action has been riven with disagreements over things over which there should be no disagreement including whether the examinations for discovery were completed and undertakings

answered. Parties have refused to attend examinations. Motions were demanded, but timetables set by the Court were ignored with each party blaming the other.

[6] As Ricchetti, J. pointed out in his 8 January 2024 Endorsement, this matter has “gotten out of hand.” He ordered the matter to go to trial directly, without a case Settlement or Pre-Trial Conference. He set a timetable and ordered tht the parties were to agree to a book of agreed documents for authenticity and, if possible truth of the contents. The parties were ordered to communicate to arrive at an agreed statement of facts. A trial date was set, and limited to 4 days. Accordingly, the parties agreed that examination in chief would be by affidavit.

[7] These disputes extended to this trial. When the matter was called for trial on 16 April 2024, it had to be adjourned. The parties had not agreed to a book of documents nor to any agreed facts. Extensive affidavits and exhibits were filed with no bookmarks or hyperlinks. The parties had complied with neither Ricchetti, J.’s 8 January 2024 Endorsement nor the Central West Region’s Notice to the Profession and the Province-Wide Practice Direction regarding filing documents in Caselines.

[8] As I noted in my 16 April Endorsement, neither party took the initiative to do what Ricchetti, J. ordered. Neither party complied with the requirements regarding electronic documents. Each blamed the other for the situation. Each

agreed, however, that neither would bill their clients for the time thrown away spent preparing for the 16 April attendance since the Court's inability to prepare for the trial was counsels' fault, not their clients'.

[9] When the trial resumed it was clear that the parties could not agree to many documents. It was clear that the ill will between the parties was unabated.

Background

[10] The Sheikhs own 251 Oak Hill Road, Mississauga, Ontario. They purchased the home as a new build. In 2019 they decided to renovate to a) incorporate an uninsulated sunroom into their family room, and b) to install a glass section into the floor of the second floor to allow more sunlight into the enlarged family room below.

[11] The Sheikhs had an architect draw up plans. The plans provided that the sunroom would be a one-story room, although on the exterior, a gabled roof created by trusses would be placed on top of the sunroom and integrated into the buildings is this existing roof lines. The end of the gabled roof would be slanted backs towards the house and the whole roof covered in shingles. The Sheikhs retained Fusion to the construction, who provided a quote of $104,925.

[12] In October 2020, the Sheikhs decided to make the newly incorporated sunroom into a two-story room. This change involved raising the ceiling in the sunroom so that it was contiguous with the ceiling in the second story in the house, and installing windows at the furthest end of the sunroom that ran the full two stories of the room. Because of the increased windows in the room, the walk on glass flooring contemplated for the second floor in the original contract was deleted.

[13] On 22 November 2020, Fusion quoted an additional $58,916.80 for the changes which were contained in “Option A” to the earlier unsigned contract. Option A listed credits to the work and cost adjustments for those things in the 2019 work that were no longer necessary because of Option A.

[14] The contract was finalized on 15 April 2021. The work began the following September.

Issues of Evidence:

Defence Expert, Lawrence Jeffrey Clarke

[15] On Thursday, 4 July 2024, the defendants sought to have Lawrence Jeffrey Clarke qualified as an expert in home inspection, construction and renovation deficiencies, quantum of work done and work not done, the costs associated with rectifying deficiencies, and the costs of completing the work.

[16] After reviewing Mr. Clarke's Affidavit on his qualifications, reviewing his CV, and conducting a *voir dire* orally, I declined to qualify Mr. Clarke as an expert as proffered. I delivered brief oral reasons, with full reasons to be part of my Judgment. This section of the Judgment is those full reasons for not accepting Mr. Clarke as an expert as proffered by the Sheikhs.

[17] Mr. Clarke's affidavit, which attaches his CV and his report, was entered as Exhibit H.

[18] By his affidavit and report, Mr. Clark intended to give opinion evidence as follows:

a) As of May 2022, the work was 88% complete, not 97%;

b) He has determined:

1) the scope of work in the contract;

2) the valid extras;

3) the invalid extras;

4) the extent to which the work was completed;

5) deficiencies in the work including deficiencies in the HVAC system and its installation, finishing work, waterproofing, installation of lights, pot lights, and other electrical apparatus, adequacy of wiring, deck railings, cabinet installation, hardwood floor installation, obtaining or not obtaining permits and inspections;

c) he has evaluated the work required to complete the project; and

d) he has determined the cost of each of the above.

[19] It was intended that he would give evidence with respect to errors in invoices and other documents sent by Fusion including deductions or credits properly given and improperly not given.

[20] Based on Mr. Clarke's Affidavit, CV, and his examination and cross examination during the *voir dire*, I found that Mr. Clark is not qualified to provide opinion evidence on any issue before this court.

The Law

[21] The law on the admissibility of expert evidence can be found in Sopinka, Lederman, and Bryant. **The Law of Evidence in Canada** (6th ed.). LexisNexis (Toronto) 2022, beginning at page 896, paragraph 12.40.

[22] An expert's function is to assist the trier of fact to draw inferences that are beyond the trier of fact's knowledge or experience. Expert opinion evidence is hearsay but is admissible only when the trier of fact is unable to draw an inference or form a conclusion because of its scientific or technical nature: *R. v Abbey*, [1982] SCR 24, at 42.

[23] In *R. v. Mohan*, [1991] 2 SCR 9 (adopted in *R. v. Abbey*, (2009) 97).R. (3d) 330 (Ont. C.A.) and *White Burgess Langille Inman v Abbott and Haliberton*

Co., [2015] 2 SCR 192), the Supreme Court listed the following criteria for qualifying an expert:

> a) the evidence is relevant to some issue in the case,
>
> b) the evidence is necessary to assist the trier of fact,
>
> c) the evidence does not contravene an exclusionary rule, and
>
> d) the witness is a properly qualified expert.

[24] With respect to each of these, the following principles also apply:

> a) Relevance – there is no minimum value for evidence to be deemed relevant. Relevance should not be confused with materiality and probative value. Something is either relevant or not. Relevance should not be confused with the credibility of the witness. If the proffered evidence tends to prove the existence or nonexistence of a fact or a matter, then it is relevant. There must be some nexus between the opinion proffered and an issue in dispute.
>
> b) Necessity – the evidence must provide information which is likely to be outside the experience or knowledge of the judge or the jury. It must assist the trier of fact to appreciate the facts due to their technical or complex nature. Evidence is necessary if the trier of fact is unlikely to be able to form a correct judgement or draw correct inference without it because the trier of fact lack specialized knowledge. Evidence that is merely helpful or might assist the trier of fact does not meet the necessity threshold. Thus, judge must determine whether the trier of fact is sufficiently knowledgeable about the subject and is capable of drawing inferences without the assistance of the expert. The judge must guard against the admission of opinion evidence which is the potential to mislead or confuse the trier of fact, is superfluous, or wastes time.

> c) Absence of an exclusionary rule - If the evidence is necessary and relevant, the court must decide whether there is an exclusionary rule which bars the receiving of the evidence, such as the bar to receiving evidence with respect to the bad character or distinctive behavioural characteristics of the group.
>
> d) A properly qualified expert witness - A properly qualified expert may acquire his or her qualifications through education, training, or experience to speak in the area of the evidence proffered. He or she must also be impartial, independent, and unbiased. The witnesses' expertise must be in the field in which the opinion is sought, should be confined to that area of expertise, and must relate to an issue.

[25] The onus is on the party proffering the expert to establish that the expert has the necessary qualifications to give the opinion evidence he or she proposes to give with respect to the specific issues in the litigation. Expertise can come by way of education, training, or experience. The party calling the expert bears the onus of satisfying the judge that the expert witness has acquired the necessary knowledge through one of the three means of acquisition: *R. V. Mohan*, at para. 27.

[26] The court should not apply an overly restrictive approach to qualifying a proposed expert at the qualification stage: *R. v. M,* 2020 BCCA 56. It is not sufficient, however, that the expert has simply more knowledge or is more knowledgeable than the trier of fact. The trier of fact must need the information proffered and the information must be reliable: *R. v. J (J-L),* [2000], 2 SCR 600, at para. 28.

[27] The fact that an expert has been qualified in one case does not mean the same expert should be qualified in another case. Whether an expert is qualified in any given case depends on the evidence presented to the court being asked to qualify the expert: *R. v. Abbey,* at paragraph. 73 to 77.

[28] Once the court has completed this analysis, the court must then exercise its gatekeeper function by weighing the benefits of admitting the evidence against the risks of doing so: *R. v. Abbey,* (2017) ONCA 640, at para. 48. This exercise requires the court to weigh the strength or cogency of the evidence against the potential prejudice that it may be used by the trier of fact for an in permissible purpose, may create unfair prejudice against one of the parties, or may confuse or mislead the trier of fact, thereby creating an unfair result or inefficient and costly trial: *White Burgess*, at para. 24.

[29] Notwithstanding that the plaintiff objected to the expert's evidence on relevance and necessity, I decided this matter based on the evidence before me of Mr. Clarke's qualifications.

Mr. Clarke's Affidavit

[30] In his affidavit, Mr. Clarke addressed his qualifications one paragraph in which he said:

> Since 1985 I have owned and operated Baker Street Home Inspection Services Inc. This company performs inspections for buyers and sellers transacting real estate. I am also president of Renologic and Renovation Dispute Specialists (RDS). Renologic performs inspections for clients with regards to problem solving and renovation consulting work. RDS performs consultations with regards to expert witness work. Renologic and RDS were both established in 2015.

Mr. Clarke's C.V.

[31] In his C. V., Mr. Clarke listed the following education and experience:

> A 1981 – George Brown College - completed apprenticeship for carpentry.
>
> A 1987 – Ryerson polytechnical Institute – introduction to business management
>
> A 1988 – Course in OBC (Ontario building code) part nine (technical requirements).
>
> A 1989 – George Brown College – HVAC course in heat loss/gain calculation, residential air duct design, administered by the heating, refrigeration, and air conditioning Institute of Canada.
>
> A 1989 – Centennial College – course in Construction Materials and Methods II
>
> A 1989 – Seneca College – course in applied physics
>
> A 1990 – Seneca College – three general computer courses.
>
> A 1990 – Seneca College – course entitled law and ethics relating to construction and engineering practices (Association Professional Engineers of Ontario).
>
> A 1991 – Seneca College – course on computer programming design.
>
> A 1991 – Seneca College – course on Construction Management.

> A 1992 – “OACETT (correspondence)” – course on Construction Contracts and Law.
>
> A 1996 – Seneca College – Ontario building code part three (technical requirements) (buildings branch course).

[32] Since 1988, Mr. Clark has been active in, and been the Vice President of the following associations: American Society of Home inspectors, Ontario Association of Home Inspectors, Ontario Association of Certified Engineering Technicians and Technologists. He has been on the advisory committee to Seneca College and the Ministry of Housing which proposed postgraduate diploma courses including building construction regulation administration and has been the Canadian Association of Home Inspectors’ representative on the Canadian Council of Building Officials Associations.

[33] Mr. Clarke listed his few publications. Four of them have no date. He is the author of “The Key To Your Home”, a report writing system for home inspectors, and “The Key To Your Home: Estimating and Budget Guide”, setting out typical costs of residential construction and home remodeling.

[34] On their faces, neither the brief statement in the affidavit nor the CV provided enough detail to qualify Mr. Clarke as an expert in the areas in which he was proffered.

Mr. Clarke’s *Voir Dire*

[35] Mr. Clarke’s examination in chief during the *voir dire* was perfunctory.

[36] Mr. Clarke said that he is a licensed carpenter and since 1985, and a licensed home inspector, operating his own home inspection business, Baker Street Home Inspections. In addition, through Renologic and RDS (his two other companies), since 2015 he has provided consultation services with respect to renovation projects and renovation dispute resolution services, respectively. He works for both homeowners and purchasers in his home inspections business but mostly homeowners in the renovation consultation business.

[37] Mr. Clarke indicated, as well, that he has been a certified engineering technician (CET) since 1992, a designation he received after taking courses through the Ontario College of Engineering Association of Certified Engineering Technicians and Technologists.

[38] Mr. Clarke's examination in chief did not establish that he was a suitably qualified expert with respect to the issues in this action. The following are examples of why the Defendants failed to meet their burden:

> a) Mr. Clarke was not examined on this C.V. or his qualification in sufficient detail that I could relate any of his education, training, or experience to the issues in this action.
>
> b) At no time was Mr Clark asked, nor did he give particulars about what a home inspector does, and how that would enable him to give the opinions expressed in his affidavit.

c) At no time was Mr. Clarke asked nor did he give particulars about what a Certified Engineering Technologist (CET) does and how that would enable him to give the opinions he expressed in his affidavit.

d) With respect to his education, he was asked the broad question of whether any of his education qualified him to give the opinions he expressed in his affidavit. He said that it all did. He conceded in response to my question that his first-year university courses in History, the History of Economics, Biblical and Mythological History, and Political Science were not relevant to his opinions in this case.

e) He was not taken through his C.V. in detail and asked how any of his education specifically qualified him to give the opinions in is affidavit. He conceded that while his CV made reference to a correspondence course he took with the OACETT, it did not contain any information about the OACETT, the courses he took to obtain his CET, the nature of those courses, and how they would enable him to give his proffered expert evidence.

f) With respect to his training, he was asked only the broad question of whether his training qualified him to give the opinions expressed in his report. He said yes. Mr. Clark was never asked, however, for details about these courses and how they enabled him to give the opinions in his affidavit.

g) Further, he indicated that he took many training courses and workshops throughout the 1990s, none of which were listed in his CV. He was not asked how any of those training courses and workshops enabled him to give the opinions expressed in his affidavit.

h) Mr. Clark was asked the broad question of whether his publications qualified him to give the evidence he intended to give. He said that they all did. He indicated that most of his publications stopped by 2020. He still publishes “The Key To Your Home: Estimating and Budget Guide”, which focuses on the cost of residential construction. He was not taken through those publications and asked to explain how his publications qualified him to give the opinions expressed in his affidavit.

> i) Mr. Clarke was asked the broad question of whether his experience qualified him to give the opinions expressed in his affidavit. He said it. He was not asked specifically about what in his experience qualified him to give the opinions in his affidavit.
>
> j) He conceded in cross examination that he was not an engineer, a plumber, or an electrician, that he has never been involved in construction projects from the ground up, and was not involved in the formulation or execution of the contract in this case. He has only done a couple of small addition and renovation projects himself, and those were between 1981 and 1985. He has never done renovations of the nature done in this case, any renovations in Mississauga, nor has he applied for any permits in Mississauga.

[39] Mr. Clark was asked if he had been accepted as an expert in "other cases like this". He said he was so qualified in two cases, *Galaxy Communities Inc. v. Chelliah,* 2024 ONSC 1947, and one other the name and outcome of which he did not remember. In *Galaxy*, at para. 18, Associate Justice Robinson qualified Mr. Clarke as an expert in home construction and renovation deficiencies and costing of home construction deficiency rectification and completion work.

[40] The party who proffers an expert to the court must establish that the witness has the necessary education, training, and experience to assist the Court with the specific issues in the action (see: Sopinka & Lederman, supra, para. 12.95, p. 920). This was not done with Mr. Clarke.

[41] Further, it is not sufficient, as was done in this case, to put into evidence the witness' CV and indicate that the witness was accepted on other cases. That an expert has been qualified in one case is not binding on a judge in another case. Whether to qualify a person as an expert is a highly fact-specific question. In this case, it was not sufficient to show that Mr. Clarke was is a home inspector or certified engineering technician in order to have him qualified to give expert evidence in this action without leading specific evidence about how his education, training, or experience relate to the issues in the action.

[42] The issues in this case concern the interpretation of the contract, scheduling in the work, deficiencies in work done, what is necessary to repair the deficiencies (including with respect to obtaining the necessary permits, electrical, structural and finish work, and code compliance), the costs of remedial work, the level of completion of the project, whether the Plaintiff left the job or the Defendants terminated the contract, and the cost of completing the work.

[43] The perfunctory examination in chief of Mr. Clarke during the *voir dire* did not satisfy me that Mr. Clarke had the necessary education, training, or experience to opine on the issues in this action, or to qualify him as requested by the Defendants.

Witnesses Who Did Not Testify

[44] Sana Sheikh did not testify. No reason was given.

[45] Ms. Sheikh is a key witness. She was the main contact between the Fusoin and the Sheikhs. All the emails, texts, Whatsapp postings, and other communications between the parties were from or to Sana.

[46] Mr. Sheikh he described Sana as little more than a conduit who relayed messages between the parties because she had computer skills and Mr. Sheikh did not. Initially, Mr. Sheikh stated that he and Sana drafted his Affidavit together, then said that Sana merely wrote down what he said, again, because she had computer skills and he did not.

[47] On the other hand, Mr. Sheikh's evidence indicates that Sana is more than a conduit for information and a scrivener. She was an active participant in discussions with Mr. Dattani and Mr. Sheikh. This conclusion is supported by the emails and Whatsapp postings filed at trial and is consistent with Mr. Dattani's evidence about Sana's involvement.

[48] I find that Sana was an independent, active participant in the negotiation of contract and in the dealings between Mr. Sheikh and Mr. Dattani. The failure to lead evidence from her leaves me with a lack of clarity on many points; for example, what of the evidence contained in Mr. Sheikh's affidavit really comes from her? ana's evidence, even if merely corroborative of Mr. Sheikh's, would have

been valuable, especially given my concerns with Mr. Sheikh's credibility. In saying this, I draw no specific adverse inference on any fact or issue from the lack of evidence from Sana.

Hearsay

[49] Hearsay in this case took two forms: estimates the Defendants submitted with respect to work done by others or remedial work, and texts and other written communications between the Plaintiff Sana Sheikh, the Defendants daughter and the main contact between the Plaintiff and the Defendants. Sana Sheikh did not testify.

Remedial Work Done and Estimates for Work

[50] I turn first to the Defendants' evidence concerning the cost of remedial work and estimates for work to be done.

[51] There were two witnesses at this trial, Mr. Dattani, Fusion's principal, and the Defendant, Shaukat Sheikh.

[52] As part of the Defence, Mr. Sheikh gave evidence that the Defendants made the following payments to remedy deficiencies in Fusion's work as contained in his accounting document (Ex. L). I have indicated where a specific document was provided in support:

a) $152.55 paid to repair a screen door. This is an email document between Mr. Sheikh and Mr. Woolvett of “Doctorscreen”. The estimate is handwritten. It is not stated who wrote the estimate portion. It was for “$135 + tax”. See Ex. K;

b) $10,170.00 to repair and re-stain hardwood floors damaged by the Plaintiff. The invoice is found at Sheikh Aff, Ex. BI, but without proof of payment;

c) $500.00 to replace a security camera damaged by the Plaintiff;

d) $5,650.00 paid to Electrician Al-Shaibomi (Ex. 56), and

e) $2,815 for replastering. There are only two documents to support this total, being two e-transfer statements at Sheikh Aff. Ex. BG totalling $640.00 made to Vision Contractor (drywall).

[53] The total of these sums is $19,287.55.

[54] It is uncertain on the face of Mr. Al Shaibomi’s invoice whether the work he did was to work within the Plaintiff’s scope of work. Since it is electrical work I have not allowed it. Under the contract, the Defendants retained the electrician.

[55] There are no invoices that accompany the $640.00 transfers to Vision Contractor (drywall). Notwithstanding that over $2,800 is claimed to repair defects in plastering, I have allowed only $640.00 as it is the only payment documented for this work.

[56] This documentary evidence is hearsay. However, it is relevant to Mr. Sheikh’s credibility assessment below.

[57] The Defendants claim the cost to complete the job, as below. These are estimates. The money has not been spent:

a) $14,475.00 – Floor heating. Ex. J appears to be an email communication between RQ Alliston and Mr. Sheikh estimating the floor heating at $4,465. This represents the purchase of the floor heating unit, but not parts and labour to install;

b) $2,000.00 – damage to a guard rail;

c) $5,425.00 – Estimate from Sparks lighting to supply and install 10 pot lights contracted for. See Ex. I;

d) $200.00 – for damage to a screen;

e) $9,040.00 – for various outside work. Estimate from Austin Jorday Home and Office Décor, Sheikh Aff, Ex. BF;

f) $635.00 – for a window lock; and

g) $937.25 – for duct cleaning. Estimate from Ontario Power Vac. See Ex. K.

[58] All the estimates, above, are opinions expressed by the writers as to the extent and necessity of the work to be done, and the cost. No one was called to give evidence with respect to deficiencies, the necessity of the repairs, what was required to complete the jog, and the cost of the above.

[59] In their Joint Book of Documents, the parties agree as to the authenticity of the estimates and repair documents but not to the truth of their contents. Therefore, documents are admissible as authentic but not for the truth of their contents. They remain inadmissible hearsay.

Messages or Documents from Sana

[60] As indicated, there were many messages or texts that passed between Mr. Dattani and Sana. Mr. Sheikh said that he was aware of and agreed with all of them all of them. In other words, he adopted the contents of the communications Sana sent. Therefore, they ceased to be hearsay.

Credibility

[61] There were two witnesses: Mr. Dattani and Mr. Sheikh. Their credibility is paramount in deciding this case.

[62] “Credibility” of the witness is determined by addressing two questions: is the witness “credible” and is the witness “reliable”? the major factors to consider in determining credibility of a witness are:

- The demeanor of the witnesses – Findings of credibility should not be made on demeanor, alone. There are too many variables that affect how a witness gives evidence to permit demeanor to be the sole criterion in determining credibility.
- Does the evidence make sense? - is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and condition? See: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).
- Internal Consistency – does the evidence have an internal consistency and logical flow? R. v. C.H., [1999] N.J. No. 273 (Nfld C.A.).
- Prior inconsistencies – is the evidence consistent with prior statements (e.g. Discovery evidence)? How significant are the

differences, and are they adequately explained? *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788.

- Is there independent confirming or contradicting evidence? *R. v. Khan*, [1990] 2 S.C.R. 531. (S.C.C.)
- Interest in the outcome and a motive to lie – does the witness have such motivation? Motivation to win or lose the case is not sufficient. The interest must be beyond that. *R. v. S.D, 2007* ONCA 243, 218 C.C.C. (3d) 323.

[63] No one of these factors is determinative.

[64] In addressing the credibility and reliability of each of the witnesses I have considered all these factors as they apply to each witness. .

[65] Both parties have credibility issues. As between them, I find Mr. Dattami more credible that Mr. Sheikh.

Minesh Dattani

[66] Mr. Dattani is the President of the Plaintiff, and the sole employee. His evidence in chief was by way of his Affidavit sworn 15 March 2024 (Ex. 45).

[67] Since 2008, he has been engaged in a) building, b) purchasing, renovating, and flipping, and c) renovating houses. In addition, from 2003 to 2019, he ran a banquet hall and catering service, and since 2008, he has been a broker specialising in exotic and semi exotic vehicle sales.

[68] Generally, Mr. Dattani gave his evidence in a direct manner, and weathered cross examination well. Two examples suggest that all of his evidence cannot be taken at face value.

[69] The first example is his invoicing. The final invoice on which the Plaintiff sues is dated 12 February 2021, and marked Ex. 2.

[70] Mr. Dattani was cross examined on five other invoices, all dated 12 February 2021, all with different figures, all sent to the client. He gave several explanations for the differences in these invoices, including:

> a) He had a third-party billing service do his billing so he could not offer any real explanation. Because of problems with that billing service, he terminated their services;
>
> b) Any change in the billing (an extra added, credit applied, or payment made) generated a new invoice. He would review the invoices for accuracy before they went out. He could not explain why these invoices went to the client;
>
> c) While the invoice was generated because of a change, he could not explain why they all had the same date.

[71] Mr. Dattani denied that the suggestion that he “cooked up” the numbers in his invoices. I accept that denial. I did not find Mr. Dattani evasive on this point. I do find that he was inattentive to his billing practices, something incredible for a person running a business that he says earned several millions of dollars.

[72] The second credibility issue relates to the fact that Mr. Dattani gave the Sheikhs two very positive reviews of Fusion’s work, including photographs. He

admitted that the photographs attached to one of those reviews were from his own home (not from the work he did for the client who prepared the review), and the photos attached to the other were a mixture of photos from his own home and another job (not from the work he did for the client who provided the review). Mr. Dattani denied that these reviews were false. He said that the reviews were real, but that the wrong photographs were attached to them. He could not explain why the photos were not of the work done for the specific client.

[73] This second example goes to Mr. Dattani's honesty. I do not accept his explanation that the incorrect photographs were attached to the review by mistake. It is too much of a coincidence. I am not satisfied, however, that Mr. Dattani's evidence with respect to the subject of this action was less than honest.

Mr. Sheikh

[74] I had difficulty accepting Mr. Sheikh's evidence accepting his evidence unless it was corroborated, for several reasons.

[75] First, I found him evasive. For example:

> a) He portrayed himself as a relatively unsophisticated person when it came to contracts and home renovations. I find that Mr. Sheikh is a sophisticated businessperson, working in areas in which contracts are important for the clarity they bring to the parties in terms of their rights and obligations. Before he retired, Mr. Sheikh was in sales in the oil and gas industry, ultimately achieving the position of manager. He has a B.A. in Journalism from a University in Pakistan. Since retiring, Mr. Sheikh has earned his income by renting 8 of the 9 properties he and his wife own.

Each of those houses was purchased using an agreement of purchase and sale.

b) He originally said that he owned 9 properties with a “partner”. In cross examination, he admitted that his “partner” was in fact his wife, his co-defendant in this action.

c) He minimized his experience with renovations, saying that he had no experience in renovations or renovation contracts, except insofar as minor repairs were required, for which he retained a handyman. Yet, he derives his retirement income from rent from tenants in 8 properties. Presumably, each property has a lease.

d) The parties, through counsel, agreed that the contract marked Ex. 1 to the trial was the governing contract. Mr. Sheikh indicated in his Affidavit that this was the governing contract (see his Ex. 2). In his examination at trial, however, after making the admission, Mr. Sheikh spent approximately 30 minutes minimizing the impact of his admission of the governing contract. He said that he had not read parts of the contract and was not familiar with construction contracts. He said that he had many issues with respect to the contract that he needed clarified and that he made many assumptions about the contract. He admitted that he did not raise his ‘many issues’ with the Plaintiff nor did he verify his assumptions. It was only after he confirmed in cross examination that he, his wife, and Sana were all well educated, and that he admitted that was bound by the terms of the contract that he asked for a recess to confirm that the contract was that which was marked as Ex. 1. After the morning break, Mr. Sheikh confirmed the contract as Ex. 1.

[76] Second, Mr. Sheikh’s evidence tented to be extreme, categorical, absolute, without factual foundation. He also gave opinions as a his evidence; opinions he was not qualified to give. For example:

a) In discussing the removal of the LVL Beam from the design plan, he stated that he could not believe that the City would approve and issue a permit in 2019 based on an LVL beam and posts to carry the load of the weight above the 1st floor ceiling, then approve and issue a permit in 2021 based on there being no LVL beam. In his opinion, the beam was necessary to carry the structural load once the rear wall of the house was opened.

Mr. Sheikh did not alter his view, above, notwithstanding that a) the City approved the 2021 design (without the LVL beam), b) one could not determine the necessity of the LVL beam until the rear wall of the house was opened to the full two stories, c) the engineer retained by the plaintiff said that the LVL beam was not necessary, and d) he retained no engineer to opine on the subject.

b) Mr. Sheikh testified that it was the Plaintiff's obligation to obtain a permit for various pieces of electrical work and obtain a certificate of compliance with respect to the permitted worked. He maintained this position notwithstanding that it was clear in the contract that he would retain and pay the electrician directly, not the Plaintiff. He insisted that the Plaintiff's obligation to obtain permits and certificates of compliance was part of the contract. When he could not point to a provision in the contrast to this effect, he said that it was the "law of the land" and was required by ESA rules. HE led no expert evidence in this respect.

c) He disagreed with the Plaintiff's view that the work was 97% complete, by May 2022, and therefore disagreed that the Plaintiff was entitled to render the 3rd account on the work, bringing the cumulative billing to 80% of the contract price. His view was that 97% of the work was not completed. He insisted on begin provided with a Scott Schedule for the work showing what was completed, notwithstanding that the contract did not provide for one. When the Plaintiff refused to provide one, he obtained an expert report, which was not allowed at trial.

[77] Mr. Sheikh was not qualified by the Court as an expert in engineering or permits.

[78] These examples also illuminate Mr. Sheikh's overall approach to the litigation: that he is correct, regardless of evidence to the contrary.

Analysis

The Contract

[79] The contract is not in doubt. It is the contract found at Exhibit 1. I find that the contract provided that the work would cost $104,925, plus an additional $58,916.80, for Option A, extras of $68,179.06 for a total contract value of $232,020.86. HST was in addition to the contract price.

[80] The Sheikhs paid $91,598.08, inclusive of HST.

[81] The real issues in this action are who terminated the contract, whether the 'credits' arising from Option A were already considered in the $58,916.80 price of Option A or had yet to be deducted from that sum, the extras charged, the extent of the work as of May 2022, cost of deficiencies, and costs to complete the work.

[82] The principles for interpretation of contracts were summarized by Lauwers J.A. at paras. 15-16 in *Prism Resources Inc. v. Detour Gold Corporation,* 2022 ONCA 326:

[15] The parties agree that the Supreme Court's decision in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, sets out the governing principles of contractual interpretation. The relevant principles are also addressed in this court's decisions in *Weyerhauser Co. v. Ontario (Attorney General),* 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, per Brown J.A., rev'd on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60, 444 D.L.R. (4th) 77; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corp*., 2021 ONCA 592, at para. 46, per Jamal J.A.; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24, per Blair J.A.; and *Dumbrell v. The Regional Group of Companies Inc.,* 2007 ONCA 59, 85 O.R. (3d) 616, at paras. 52-56, per Doherty J.A.

[16] These principles were conveniently summarized by Brown J.A. in *Weyerhauser,* at para. 65. A judge interpreting a contract should:

> i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
>
> ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd

result, objectively assessed. The plaintiffs say that the defendants terminated the contract and were in fundamental breach of the contract because they did not pay the amounts due representing 60% of the contract price with extras as required by the payment schedule.

Abandonment by Fusion or Breach by the Sheikhs?

[83] The Sheiks take the position that the plaintiff abandoned the project in May 2022 when his account rendered at 97% completion (according to the plaintiff) was not paid. Their position is that the work, up to that point, was shoddy amounting to a fundamental breach. The relationship became combative because the Sheikhs confronted Mr. Dattani repeatedly with their allegations of lack of quality, lack of safety, and permits, which the plaintiff resented. Fusion's position is that the Sheikhs breached the contract, and in doing so repudiated it.

The Law

[84] In addition to the general law of contractual interpretation, I have considered the following principles as applicable:

a) Repudiation of a contract arises where words or conduct are used by one of the parties which show an intention to not be bound by the contract, that there is either a substantial failure of performance of the work, or a refusal to pay for it. See: *Dirm v. PSI,* 2017 ONSC 2174 (Master Albert) at para. 306 to 308.

b) There are five factors that should be applied when determining a substantial failure to do the work:

1) How much of the contract did the contractor perform?

2) How serious was the breach for the client?

3) What is the likelihood that the contractor would repeat the breach?

4) How serious are the consequences of the breach?

5) How much of the contract work has yet to be performed?

b) The test as to breach is objective, based on all the circumstances, including professed desires to continue with the contract. See: *Kaplun v Mihhailenko* (2005), 43, C.L.R. (3d) 223 at para. 130.

c) Where the contractor's work is so woefully done or if he walks away, the owner is entitled o terminate the contract . See*: DM Steel Ltd. V. 51 Construction Ltd*., 2018 ONSC 2171, at para. 53

Termination

[85] I find that the defendants terminated the contract unreasonably on 21 May 2022, and in so doing, repudiated the contract.

[86] The Final account (rendered at 97% completion) was dated on 12 February 2021. This is an error. The entries indicate that the account was delivered in the first instance shortly after 21 May of 2022, and updated by monthly interest charges until August 2022. Fusion continued on the job until 21 May 2022.

[87] In a series of emails dated 21 May 2022, the parties discussed the state of the project. Mr. Dattani indicated that aside from painting baseboards and some exterior caulking and other minor matters, excluding deficiencies, the work was 97% complete in February 2021, which entitled him to Bill. The Sheikhs took the

position that the work was not 97% complete and intended to retain an expert to opine on this. They had not produced such a report by May 2022. Mr. Dattani promised to finish the job but could not do so without payment. Sana Sheikh emailed in reply that:

> a) the onus was on Mr. Dattani, not the Sheikhs, to prove that the work was 97% complete, which was then subject to review by the Sheikh's consultant.
>
> b) no payment was going to be made without an or accounting with respect to each item in the 12 February 2021 invoice, given that there was disagreement with respect to the extras and credits.
>
> c) she said "*If you wish to continue to complete the remaining portion of the work per contract scope, you need to inform us. Failing to reply on this aspect, despite several reminders, we require you to use site pictures and remove your tools and materials from the site. We will need to look at alternative options to complete the project and finally end this 9 month ordeal to the family if you continue to ignore this. And for our information, we have every intention of seeking damages after professional consultation for causing the family mental anguish for a protracted period of time and exposing us (including a 3 year old child) to an unsafe work environment and practices…*" Following this, she listed examples such as threatening to walk off the job unless paid more money, leaving nails exposed, leaving drywall sheets leaning against a wall on the front porch, not completing the work "*preventing us from having any peace or having social calls*", and allowing an animal infestation by leaving soffits open, causing the child to have a sleepless night. She finished by saying "*If you persist in being intransigent, we will have to discontinue this discourse, remove your tools/materials from our home and exercise alternate options as said above*."

[88] I find that by this email thread, Sana, speaking for the Sheikhs, made it clear that they did not intend to make any further payments notwithstanding suggesting that the Plaintiffs may continue with the job. They intended to sue regardless. This is a clear statement of intent to breach.

[89] In his evidence in chief and cross examination, Mr. Sheikh advised that the following additional dangerous defects:

a) “massive plywood boards” on which the dumpster sat were left lying on in the driveway once the debris was removed.

b) bags of insulation were left in the backyard “for weeks”.

c) the Defendants treated the construction site as a dump site.

d) tools were left lying about.

e) once, a door was left open by a sub-contractor.

f) tarps used to prevent the wind and dust from entering the portion of the house in which the family lived, became disconnected.

g) there was dust and debris on the site.

h) the workers tracked mud, snow, and salt into the house on the boots.

i) the Plaintiffs removed a railing from the back deck to facilitation moving construction materials and never blocked of access to the deck for the 6 months that the railing was down.

[90] From the evidence overall, I reject the Sheikh’s submission that Fusion’s work sufficiently shoddy that it amounted to a fundamental breach of the contract.

I accept that only two of the issues the Sheikhs complained of were situations of danger or of an improper workplace. The other issues the Sheikhs complained of were minor and do not justify the Sheikh's not paying for work rendered.

[91] The first issue of merit the Sheikhs raised pertained to birds and squirrels entering the space between the interior ceiling and the roof deck. There is no evidence that squirrels or birds in the insulation was a danger or a fundamental breach of the contract. In any event, the first time this occurred the Sheikhs' called an exterminator for which the Plaintiffs reimbursed them.

[92] The second issue of merit pertained to the removal of the deck's railing. I accept that the lack of the railing on the deck was an unusual or dangerous condition on a construction site.

[93] I find that the lack of a railing was transitory, and limited to such time as was necessary to bring supplies into the house. I say this for two reasons. First, the documents Mr. Sheikh referred to in his affidavit in support of his position with respect to the lack of the railing do not support his broad statement in his Affidavit or oral evidence of the existence of the defect for 6 months. Mr. Dattani admitted that the railing was taken down to permit access to the house with construction materials, but said, and I accept, that proper hording or other protection was in place. Second, if the absence of a railing or barrier to stop people from entering

the area from which the railing was missing was dangerous because of the Sheikhs' grandchild's presence in the house, that is an issue of supervision of the child, not of the construction site.

[94] I find that all other issues the Sheikhs raised with respect to the construction site were either minor and normal for a construction site, and in any event were remedied in a timely way. Most of the Sheikhs' complaints related to the tidiness of the site, all of which were to be expected on a construction site, even one in which the construction was proceeding while the family lived in the remainder of the house.

[95] I find that the Sheikhs also terminated the contract by imposing extra-contractual terms as an excuse for not making payments under the contract. By their actions and words, especially the May 2022 email Sana Sheikh sent, made it clear that the contract was at an end. I say this because:

> a) They complained about delay and insisted on a schedule for the construction once the 60-90 day estimated time for the renovation passed. Such a delay is not unusual. The construction took place during the worst phase of the COVID 19 pandemic. The Pandemic delayed delivery of the Muskoka Windows in particular. In any event, the contract does not provide for such a schedule.
>
> b) They raised questions about the Plaintiff not applying the "credits" under Option A to the final total, when (as I discuss below), it was clear that they were applied in calculating the price of Option A.

c) They demanded that the price be kept to their liking yet made constant demands of the contractor because they had unreasonable expectations of the Plaintiff. For example, they expected no disruptions to their lives because of the construction. They complained that their grandchild was in danger, when he was not had they supervised him adequately. They complained of cold air entering the house when a) the construction was conducted in the fall and winter, b) they continued to live in the house and c) there was no evidence that using tarps to separate the lived in portion of the house from the construction zone was unreasonable. They complained of the dust in the house when there was no evidence that the Plaintiff's steps to prevent dust from crossing the tarp barrier was other than the norm.

d) They interfered with the contractor's job by making demands of trades, directly, without approaching the contractor to have work done which was outside the scope of the contract.

e) They agreed as part of the contract that they would retain the electrician directly. They blamed the Plaintiffs for problems with the electricians' work when the Plaintiffs had no contract with the electricians, and no obligation under their contract with the Sheikhs to supervise the electricians' work.

f) They complained that the Plaintiff failed to obtain permits, or proper permits, when obtaining permits was an extra to the contract. Ultimately, the Plaintiff agreed to obtain the building permit from the City of Mississauga and charged for it. It had no obligation to obtain the ESA permit for the electrical work (as discussed below).

[96] In conclusion, I find that the Sheikhs breached the contract. I find that Fusion committed substantial breach of the contract by the Plaintiff.

97% Complete

[97] I find that by May 2022, the work was substantially complete. The only evidence of the state of completeness of the work was Mr. Dattani's, which was

that it was 97% complete thereby triggering 4th, or pre-delivery invoice as contemplated by the contract.

[98] Mr. Sheikh expressed the view that the work was only 88% complete and therefore, Fusion was not entitled to make the 4th billing. Presumably, Mr. Sheikh's evidence was based on the advice of the expert he consulted, whom I ruled could not testify. Mr. Sheikh was not qualified to give that evidence.

[99] I accept Mr. Dattani's evidence that the work was 97% complete. Some painting and staining, and other minor matters remained to be done. There were deficiencies to be addressed. Mr Dattani was entitled to submit the pre-inspection account, which was the final account rendered on this job.

Credits to the Contract Price – Already In or Out?

[100] Mr. Dattani testified that there were credits that for work that was originally contemplated in the 2019 unsigned contract that was eliminated when the Sheikhs decided to expand the work in 2021. Those credits were listed under Option A and were: $2,952.00 for removing the door between the sun room and the family room, $6,147.00 for work related to the glass floor on the 2nd floor, and $20,658.00 for the windows as originally designed in the 2019 scope of work (because the Sheikhs agreed to purchase the windows directly from the manufacturer). They total $30,774.00.

[101] Mr. Dattani testified that rather than recalculate the $104,925 of the unsigned 2019 contract to reflect from the cost of the work eliminated when the Sheikhs decided to accept Option A in 2021, Mr. Dattani left the original price for the 2019 work, and deducted from the cost of Option A those costs eliminated from the original contract by the work in Option A. In other words, the $58.916.80 price of Option A, was net of the credits listed in Option A relating to work eliminated by Option A. No further deduction is required.

[102] The Sheikhs' position is that the clear intention of the contract is that the credits referred to in Option A ought to have been deducted from the $58.916.80 price

[103] I find that the only reasonable interpretation of the contract and the evidence is that the credits for work in the unsigned 2019 contract that were eliminated by Option A were already included in price for Optoin A. I say this because:

a) All the provisions dealing with Option A are contained in a discrete section of the contract beginning at the bottom of page 1 (drawings excluded).

b) The price for Option A is given in that section and is not noted to be subject to further reductions.

c) The credits are listed within that discrete section. Although they are not noted to have been already deducted from the price for Option A, that, in context, is the only reasonable inference.

[104] I find no basis in the evidence or on a reasonable interpretation of the contract for the Sheikhs' position.

Extras

The Beam

[105] There was a great deal of evidence concerning the installation of a LVL beam as part of the work. The contract quoted as an extra the total cost of $30,674.00 (plus an additional 20% Constructions Management fee) for the work. As part of Option A, he included a $5,000.00 deposit against the work related to the LVL beam.

[106] Mr. Dattani testified that as part of Option A, the new room would be two stories tall. This meant increasing the opening in the rear wall of the home from a single story opening to two stories. He was concerned that if there the rear wall of the house was structural, removing more of the rear wall would mean that the existing beam holding up the 2nd floor over the existing opening would not be sufficient to carry the load of the 2nd floor opening. This would require removing the existing beam supporting the weight of the 2nd floor over the opening to the existing sunroom, and installing a larger LVL beam to take the load of the 2nd floor.

[107] Mr. Dattani said that whether the existing wall was structural would only be known once the exterior skin of the rear wall of the house was opened.

[108] Mr. Dattani engaged an Engineer. Once the rear wall of the home was opened, It was decided that removing the original beam under the 2nd floor and replacing it with a larger LVL beam was not required. Structural issues would be addressed by adding additional columns and framing to the existing structure, which was done. The structural design also included increased framing to take the load of a larger HVAC/heat pump unit necessary because the area to be heated/cooled increased under Option A by 30%. A permit was issued and complied with. In their final invoice (Ex. 2) the Plaintiff's charged $25,674.00 (after credit for the $5,000.00 deposit charged in the price for Option A).

[109] Mr. Sheikh agreed with Mr. Dattani's evidence that the necessity of the LVL beam considered in Option A could not be assessed until the rear wall of the home was opened. His objection to the question of the beam, however, is not clear. It appears that he objected to being charged for the expenses related to the LVL beam when one was not installed.

[110] Mr. Sheikh misunderstands the evidence. I accept Mr. Dattani's evidenced and find that once the wall was opened it was determined that the load of the 2nd floor was adequately carried by the existing beam spanning the gap above above the opening on the 1at floor, and that the new LVL mentioned in Option A was not required.

[111] I also accept Mr. Dattani's evidence that a) the new LVL was not necessary, b) it was necessary to frame around the opening on the 2nd floor to transfer the load above that opening and increase the capacity of some columns, and c) that this framing consumed the money quoted for the structural work involving the LVL as mentioned in Option A.

[112] In addition, Mr. Sheikh also raised this issue as another example of the Plaintiffs' unprofessional dealings with the Sheikhs.

[113] I find that identifying the issue of a possible structural problem, providing a quote for the work, keeping $5,000.00 as a deposit as part of the price of Option A, the work that the Plaintiffs did to resolve the structural question, accounting for the deposit of $5,000.00, and charging only for the balance of the extra was all professional and reasonable.

HVAC/Heat Pump Upgrade

[114] The Plaintiffs' final invoice has two charges relating the heating for the renovation: "Heat pump upgrade" at $1,100.00 and "As per section 14a of the contract, extra tonnage, upgraded heat unit."

[115] The Sheikhs asked for a heat pump to be added to the HVAC system. They do not contest this.

[116] Mr. Dattani says that the Sheikhs also agreed that the size of the HVAC unit had to be increased. Option A listed as an at cost adjustment, “increase capacity of split AC system “. The contract referred to a Daikin system as the recommended system.

[117] Mr. Dattani said that the Sheikhs agreed to the increase in the tonnage of the HVAC system. He could not obtain the Daikin system so he installed another manufacturer’s more expensive system but did not charge for that manufacturer’s higher price.

[118] Mr. Sheikh took no issue with the increased tonnage. His position was that since he was not provided with the Daikin system as specified, he should not have to pay for the system as installed.

[119] The parties discussed this issue in a series of a Whatsapp chats, in May and in August 2022. The Sheikhs did not like the option of installing larger ducts from the existing HVAC system to meet the increased heating and cooling demands of the expanded family room as it would have involved removing drywall in the basement running new ducts. This as too expensive for them.

[120] Sana took exception to the look of the unit that Mr. Dattani installed. Mr. Dattani told her that the aesthetics of the machine were not important, the increased tonnage was. He admitted that he took it upon himself to install the

more expensive unit. Sana ultimately said that she did not object to the increased capacity or upgrade but objected to the fact that the Sheiks were not given options in the units available from which to chose. In that Whatsapp discussion, Mr. Dattani advised of the prices of the Daikin and the unit he installed. He admitted to Sana that he had installed the more expensive unit but that he had absorbed the additional cost.

[121] I find that Mr. Dattani installed the more expensive unit (approx.. $6,000.00), but charged only for the less expensive unit ($4,150).

[122] I do not accept Mr. Sheikh's argument that because the unit installed in fact was not the one specified, he should not have to pay for the HVAC unit. This is another example of Mr. Sheikh's extreme positioning in this litigation. Mr. Sheikh received a much better unit that specified, but at no additional expense. Quantum meruit would require him to pay for the value he received. The amounts charged for the HVAC and Heat Pump are appropriate under the contract, and as an extra.

Upgrade to Floor Insulation

[123] The invoice charged $900.00 to upgrade the floor insulation in the new room. This is appropriate. The Sheikhs agreed.

Eavestrough Upgrade

[124] The Homeowners dealt directly with the eaves trough and siding workers, asking for changes to the downspouts, among other things. This was done without Mr. Dattani's knowledge and resulted in the eaves trouigh installers charging an extra to its subcontract of $1,000.00. Mr. Dattani passed this cost on to the Sheikhs as an extra. This was appropriate.

Miscellaneous Issues

$2,500 for Electrical Panel

[125] Notwithstanding that the Sheikhs contracted directly with the electricians Mr. Dattani recommended an electrician to them. The Sheikhs paid that electrician $2,500.00 for a new sub panel. The electrician never did the work. Mr. Dattani credited the Sheikhs for their lost payment February 2021 invoice. He was not required to but felt obliged to.

$4,114.28 Garbage Overage

[126] Mr. Dattani charged as an extra $4,114,28 which he said was necessary because of the increased cost of dealing with garbage on the site. He testified that the Sheikhs dumped their garbage into the rented bins, including concrete and landscaping garbage from previous work at their home. Further, their neighbours used the bins as well.

[127] The contract is silent on garbage removal fees. Mr. Dattani discussed this issue with Sana and said that while he estimated approximately 50 cubic yards of waste, in fact, he paid to have 144 cubic hards hauled away.

[128] I do not allow this extra. The contract was fixed price. Mr. Dattani was very specific in his evidence on the point, but referred to no documents supporting his oral evidence, or supporting his oral assertion that the incurease was due solely to the non renovation generated waste from the Defendants or the neighbours.

$635 Window Lock

[129] The City required that a lock be placed on one of the windows in the new room because of the way it opened. How that window opened was discussed with Mr. Dattani. The Sheikhs accepted his recommendation. That recommendation resulted in the requirement for the lock. This is an appropriate expense for the Plaintiffs to pay.

Pest Control

[130] In December 7 2021, a squirrel entered the site. The Sheikhs hired pest control to remove the squirrel. Mr. Dattani credited the Sheikhs $475 for this expense. Another squirrel incident occurred on 23 December, which Mr. Dattani says was not his responsibility. I agree. In any event, the cost of the second pest control event was not proved.

Window Credit

[131] The credit for the windows in the 2019 design was accounted for as a credit applied before reaching the price for Option A.

[132] There was an issue about the credit the Plaintiff gave once the Sheikhs decided to contract directly with manufacturer of the Muskoka windows in Option A.

[133] Option A indicated that the cost of the Muskoka windows was $42,765.30, with no construction management fee applied. This price reflected the manufacturer's 18 October 2021 invoice comprising $37,844.54 for the windows and $4,919.79 for HST.

[134] The Plaintiffs' February 2021 invoice, however, credited the Sheikhs only $37,205.50.

[135] Mr. Dattani testified that arrived at this figure by reducing the window manufacturer's price by the HST. This represented his cost, which he passed on to the Sheikhs.

[136] Mr. Dattani's calculations are in error. He appears to have reduced the pre-tax cost of the windows by 13%. The window manufacturer's invoice indicates that the pre-tax cost was $37,844.54. Mr. Dattani's credit to the Sheikhs was $639.54 less than it ought to have been. The Sheikhs are entitled to the difference.

Cost of Rectifying Deficiencies.

[137] Mr. Sheikh gave evidence that the Defendants made the following payments to remedy work the Plaintiff performed. These were contained in his accounting document (Ex. L). I have indicated where in Mr. Sheikh's affidavit there is a specific document in support of each claim:

a) $152.55 paid to repair a screen door. There is an email document between Mr. Sheikh and Mr. Woolvett of "Doctorscreen". The estimate is handwritten. It is not stated who wrote the estimate portion. It was for "$135 + tax". See Ex. K;

b) $10,170.00 to repair and re-stain hardwood floors damaged by the Plaintiff. The invoice is found at Sheikh Aff, Ex. BI, but without proof of payment;

c) $500.00 to replace a security camera damaged by the Plaintiff;

d) $5,650.00 paid to Electrician Al-Shaibomi (Ex. 56), and

e) $2,815 for replastering. There are only two documents to support this total, being two e-transfer statements at Sheikh Aff. Ex. BG totalling $640.00 made to Vision Contractor (drywall).

[138] The total of these sums is $19,287.55.

[139] It is uncertain on the face of Mr. Al Shaibomi's invoice whether the work he did was to work within the Plaintiff's scope of work. I not accept this invoice. It is clear that under the contract, the Defendants retained the electrician. With respect to the claim for the plasterer, the only documents produced in support are two transfers totalling $640.00 to Vision Contractor (drywall). I have allowed

only that amount. Otherwise, I allow the other deficiency claims because they are supported by invoices, and because Mr. Sheikh said that the expenses were necessary because of deficiencies, and because he paid these invoices or quotations. The total amount I allow for the cost to rectify deficiencies is $10,962.55.

Cost of Completing the Work

[140] The Defendants claim the cost to complete the job, which has not been spent, comprises:

a) $14,475.00 – Floor heating. Ex. J appears to be an email communication between RQ Alliston and Mr. Sheikh estimating the floor heating at $4,465. This represents the purchase of the floor heating unit, but not parts and labour to install;

b) $2,000.00 – damage to a guard rail;

c) $5,425.00 – Estimate from Sparks lighting to supply and install 10 pot lights contracted for. See Ex. I;

d) $200.00 – for damage to a screen;

e) $9,040.00 – for various outside work. Estimate from Austin Jorday Home and Office Décor, Sheikh Aff, Ex. BF;

f) $635.00 – for a window lock; and

g) $937.25 – for duct cleaning. Estimate from Ontario Power Vac. See Ex. K.

[141] I allow none of these claims for the following reasons:

a) All the estimates, above, are opinions expressed by the writers as to the extent and necessity of the work to be done, and the cost. None of the authors of those documents were called to give evidence. The estimates are hearsay.

b) In their Joint Book of Documents, the parties agreed as to the authenticity of the estimates and repair documents but not to the truth of their contents. Therefore, documents are admissible as authentic but not for the truth of their contents. They remain inadmissible hearsay.

c) The proposed expert who addressed the cost of completing the work in his report, was not qualified to give evidence as an expert.

$4,389.60 Inflation Increase

[142] Mr. Dattani said that because of the Pandemic, there was a substantial increase in the cost of materials, far in excess of the $2,800 allowed in the contract. Mr. Dattani calculated this sum by applying the increases in the Consumer Price Index to his costs of materials. The $4,389.60 represents that increase in excess of the $2,800.00 originally allowed for.

[143] This claim is not allowed. The contract was amended a year into the Pandemic. An allowance of $2,800 for inflation was incorporated. No exception or other contingency for inflation was included. This aspect of the claim was never discussed with the clients and reduced to writing.

Project Management Fee

[144] The contract contemplates a 15% construction management fee, although 20% is permitted in circumstances not applicable here. A 20%

construction management fee was allowed with respect to the removal of the existing beam and replacing it with an LVL.

[145] In the February 2021 invoice, all construction management fees are calculated at 20%.This is in violation of the contract. Further, the construction management fee for the structural work on the opening in the rear wall should be 15%. The 20% construction management fee for structural work related to the increased size of the opening of the rear wall of the home was limited to removing the existing beam and replacing it with an LVL. Since the beam work was not done, the framing that was done attracts only a 15% construction management fee.

[146] For those construction management fees for extras which I have approved, and the structural work, the Sheikhs were overcharged $1,741.20, and are entitled to a credit for that amount.

Interest

[147] In the February 2021 account, the Plaintiffs claim interest at 1.5% per month “As per Section 4 of the Renovation Agreement”. Section 4 of the general terms and section 4 of Option A do not speak to interest, nor does any other clause to which I was directed. These charges are inappropriate.

[148] Prejudgment interest on the revised final amounts owing, from 12 February 2021at the rates provide for in the Courts of Justice Act.

[149] Mr. Sheikh complained of a number of other issues problems which were never charged for because either they were not done, or Mr. Dattani provided the service without charge. There is no need to address them.

Balance of the Contract Price

[150] Mr. Dattani testified that the balance of the contract price after the final invoice, was $14,709.20.

[151] Having found that the Sheikhs improperly terminated the contract, Fusion is entitled as damages to recover the unpaid balance of the contract. The pre-delivery invoice under the contract was done at 97% completion. Total billings on the project according to the contract, represents 80% of the total contract value. I accept Mr. Dattani's evidence that the remaining amount to be billed after the final bill rendered in t his case is $14,709.20.

Calculation of the Judgment

[152] Based on my decisions, above, the Plaintiffs are entitled to judgement against the Defendants based on the following re-calculation of the final invoice (Ex, 2):

Description	Amount	Total
Final Invoice Ex. 2	$138,700.41	
Unpaid Balance on Contract	$14,709.20	

Total Claim Subtotal	$153,409.61	$153,409.61
HST Charged	($31,070.83)	
Interest Charged	($6,035.76)	
Inflation Charge	($4,389.60)	
Window Credit Adjustment	($639.54)	
Garbage Charge	($4,114.28)	
Const. Mg't Fees on Garbage Charge	($822.85	
Repair of Deficiencies	($10,962.55)	
5% overcharge on Const'n Mg't Fees	($1,741.20	
Total Reductions	($59,776.94)	($59,776.94)
Subtotal		$93,632.67
HST on Subtotal		$12,172.25
Total Net Owing		$105,804.92

[153] Interest, as above, is calculated at 2% p.a., from 21 May 2022, when it was clear that the Sheikhs breached the contract. Prejudgment interest to 10 January 2025 is $5,642.93.[1]

[154] If there are arithmetical errors contained in these Reasons for Judgment, I will amend them if they are on consent. If there disputes, these will

[1] $105,804.92 x .02% per CJA = $2,116.10 p.a., , /12 = $176.34 per Month, x 32 Months = $5,642.93.

be addressed orally, by way of a Zoom conference, not to take more than 30 minutes, to be held at 9:00 or 4:30 pm, any day I am sitting.

Costs

[155] Unless the parties can agree on costs, I will decide the question of who pays whom costs, and in what amount, based on written submissions, limited to 10 double spaced pages, excluding Bills of Costs and Offers to Settle. The Plaintiffs' submissions are to be served, filed, and uploaded to Case Centre by 4 pm, 28 February 2025, and the Defendants by 4 pm, 28 March 2025. There will be no right of reply.

[156] Once costs are determined, I direct counsel for the Plaintiff to consult with counsel for the Defendants and prepare a consent draft order giving effect to these Reasons for Judgment, paying out any funds paid into Court, and discharging the lien.

Jamie Trimble

Digitally signed by Jamie Trimble
Date: 2025.01.08 16:36:23 -05'00'

Trimble, J.

Released: January 8, 2025

CITATION.: 1579959 Ontario Inc. v. Sheikh et al., 2025 ONSC 185
COURT FILE NO.: CV-22-2722
DATE.: 2025 01 08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

1579959 Ontario Inc.

Plaintiff

- and –

Sheikh, Shaukat Riza,
Sheikh, Neelofer Shaukat

Defendants

REASONS FOR JUDGMENT

Trimble J.

Released: January 8, 2023