CITATION: I.C. Improvements v. Town of Oakville et al, 2013 ONSC 414
COURT FILE NO.: 4958/11
DATE: 2013-01-17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
I.C. IMPROVEMENTS INC.	)	Derek A. Schmuck, Counsel for the Plaintiff
Plaintiff	)	
– and –	)	
THE CORPORATION OF THE TOWN OF OAKVILLE and GATEMAN-MALLOY INC.	)	Jeremy A. Forrest, Counsel for the Defendant Gateman-Milloy
Defendants	)	
	)	**HEARD:** December 12, 2012

REASONS FOR JUDGMENT

MURRAY J.

[1] I.C. Improvements Inc. (hereinafter referred to as the "plaintiff ") brings a motion for summary judgment against the defendant\plaintiff by counterclaim Gateman-Milloy Inc. (hereinafter referred to as the "defendant") for all or part of amounts claimed and for an order that Gateman-Milloy Inc., as plaintiff by counterclaim post security for costs.

The Plaintiff's motion for Summary Judgment

[2] In its motion for summary judgment, the plaintiff relies on the affidavit of Ivan Couto, the president of the plaintiff Corporation. In his affidavit, Mr. Couto states the following:

1. The sole asset of the plaintiff company is the money owed to it by the defendant;

2. It would be grossly unfair to force the plaintiff to pay monies into court in order for it to collect a significant sum owed by the defendant;

1. The plaintiff is owed $42,973.87 by the defendant for the St. David's project;

2. The plaintiff is owed $6,320.52 by the defendant for the RIM project;

3. The plaintiff is owed $60,922.22 by the defendant for the Bronte Athletic Park project;

4. The plaintiff has sent the defendant an invoice for the installation of a logo, dated November 24, 2010; that the plaintiff is owed $439,483.65 on the Christ the King project;

5. There was only approximately $11,000 worth of work left to do by the plaintiff when the plaintiff left that project;

6. The defendant and its other subcontractors did not finish their preparatory work or pass the field over to the plaintiff on that project until September 30th. As of September 15th, there were adjustments/charges to the layout of the field and so the plaintiff could not order its turf until September 16th. The defendant agreed the plaintiff would start installing the turf on October 4th;

7. The plaintiff was working for the defendant on other projects in late September and early October. The weather started to get poor which made it impossible for the plaintiff to finish the Christ the King project any earlier;

8. The defendant insisted the plaintiff put forces on the RIM project rather than Christ the King; and

9. The defendant and its new turf installer did not finish the project until the spring of 2011.

[3] The defendant filed an affidavit sworn by Mr. Peter Hersics, vice-president of finance for the defendant company. In his affidavit Mr. Hersics sets out a history of the litigation and the nature of the dispute as contained in the pleadings. Mr. Hersics deposes that the plaintiff commenced this action pursuant to the *Construction Lien Act* in September of 2011, and further that in December of 2011, the plaintiff commenced an action in Hamilton (court file number 11-31878). According to the affidavit both actions arise out of disputes between the plaintiff and the defendant on a total of four construction projects in which the defendant acted as a general contractor and the plaintiff was a subcontractor. The plaintiff advance claims in the two actions in the combined amount of $725,066.90. The defendant has responded with counterclaims in both actions. On February 29, 2012, Madam Justice Miller ordered that the two proceedings were to be consolidated and continued under the title of this proceeding.

[4] Mr. Hersics in his affidavit argues that it is evident from the statements of claim and the statement of defence and counterclaims that the resolution of these proceedings will require the determination of a substantial number of issues of significant complexity.

Analysis

[5] In *Combined Air Mechanical Services Inc. v. Flesch* 108 O.R. (3d) 1, 2011 ONCA 764, at para. 56, the Court of Appeal confirmed that by adopting the full appreciation test, there is continued recognition of the established principles regarding the evidentiary obligations on a summary judgment motion. The Court of Appeal in *Combined Air* reiterated the applicability of the well-established principle articulated by Sharpe J. in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, that "[e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried." Further, at para. 63 of *Combined* Air, the Court of Appeal held the party who moves for summary judgment must be in a position to present a case capable of being decided on the paper record before the Court.

[6] In the case at bar, it is impossible for the Court to grant summary judgment on the basis of the evidence filed by the plaintiff. It is incumbent on the plaintiff to set out all the facts which establish the cause of action and the right of the plaintiff to claim monies owed. The plaintiff has not done so. As noted above, the evidence of the plaintiff is contained in one affidavit, that being the affidavit of Mr. Couto. The factual information set out in Mr. Couto's affidavit is merely conclusory and falls far short of what is required to warrant judgment in favour of the plaintiff. The affidavit does not set out the contractual relationship between the plaintiff and the defendant, whether there was one contract or multiple contracts or the terms of such contract(s). The affidavit does not provide the court with any evidence about what work was to be performed by the plaintiff pursuant to the contract(s), whether work was performed by the plaintiff, when such work was performed, whether the work was performed in accordance with the terms of the contract, the dates of completion, the value of such work, and whether invoices have been provided by the plaintiff to the defendant and whether the defendant has refused to pay for services performed in accordance with the contract.

[7] The evidence of the plaintiff is that monies are owed by the defendant. The plaintiff has not put its best foot forward. The plaintiff has not presented a case capable of being decided on the paper record before the court. The plaintiff is not entitled to succeed on its motion.

[8] Given the decision with respect to the merits of the plaintiff's motion for summary judgment, I will not comment on the deficiencies of the material filed by the defendant except to say that a bare recital of allegations contained in pleadings coupled with argument is not of assistance to the court in deciding a summary judgment motion. See: *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 and *Dawson v. Rexcraft Storage and Warehouse Inc.*, 164 D.L.R. (4th) 257 (OCA), *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995) 21 O.R. (3d) 547 (C.A.). It is well-established in the jurisprudence that parties cannot rely on mere allegations or the pleadings but must rely on proof.

The Plaintiff's Motion for an Order Requiring the Defendant/Plaintiff by Counterclaim to Post Security for Costs

[9] There is no factual foundation established by the plaintiff warranting an order requiring the defendant/plaintiff by counterclaim to post security for costs.

Conclusion

[10] The motions brought by the plaintiff are dismissed.

Costs

[11] The defendant is entitled to its costs. If the parties are unable to agree, I will entertain brief written submissions with respect to both scale and quantum of costs. The defendant shall serve and file its submissions by no later than January 31, 2013. The plaintiff shall have responding submissions served and filed by February 14, 2013.

MURRAY J.

Released: January 17, 2013

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BETWEEN:

I.C. IMPROVEMENTS INC.

Plaintiff

– and –

THE CORPORATION OF THE TOWN OF OAKVILLE and GATEMAN-MALLOY INC.

Defendants

REASONS FOR JUDGMENT

MURRAY J.

Released: January 13, 2013