Construction: An unwarranted contestation may be considered an abuse of procedure

December 5, 2022

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In the decision in *9058-4004 Québec inc.* c. *9337-9907 Québec inc*.[1] rendered on October 21, 2022, the court granted compensation to a subcontractor for its extrajudicial fees further to a general contractor's unfounded contestation of its claim as part of a hypothecary action.

The facts

In May 2019, Portes de garage Citadelle Ltée ("Citadelle") and general contractor 9337-9907 Québec inc. ("AllConstructions") concluded a contract for the provision of services and materials needed to install unloading docks in a building under construction. On May 16, 2019, notice of the contract was given to the building owner, 9058-4004 Québec inc. ("Transport Pouliot").

The first two phases of Citadelle's work were completed between June and August 2019. In late September 2019, AllConstructions allegedly vacated the worksite after a dispute with Transport Pouliot. The third phase of Citadelle's work was completed in October 2019. On November 25, 2019, Citadelle sent a statement of account to AllConstructions and registered a legal hypothec on the building two days later.

On December 23, 2019, after registering a prior notice of the exercise of a hypothecary right, AllConstructions brought a hypothecary action against Transport Pouliot in the Superior Court, claiming the sums it was owed.

For its part, Citadelle brought a hypothecary action against the owner, Transport Pouliot, and instituted legal proceedings against AllConstructions in April 2020.

It is important to note that during the proceedings, AllConstructions admitted that it had received payment from Transport Pouliot for the sums invoiced by Citadelle.

To justify its refusal to pay its subcontractor Citadelle, AllConstructions argued summarily that the services and materials provided were inadequate and did not meet standards.

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Despite its weak position and the lack of compelling evidence, AllConstructions maintained its argument. Citadelle had no choice but to pursue its legal proceedings and apply to have AllConstructions' action declared abusive in order to recover its extrajudicial fees.

AllConstructions' abuse of procedure

Citadelle claimed that AllConstructions' defence was unfounded, frivolous and intended to delay. AllConstructions only had testimonial evidence to support its allegations, and it failed to file any expert opinions or exhibits. The contract did not contain a "pay when paid" clause, and AllConstructions admitted in the proceedings that it had received payment from Transport Pouliot for the sums invoiced by Citadelle.

AllConstructions claimed that it had serious arguments to make in response to the application to have its action declared abusive. It stated that the work performed by Citadelle was inadequate and that the materials and services provided were not up to standards. It maintained its position, despite the fact that it had vacated the worksite a month before Citadelle's work was completed and, therefore, could not have verified the actual quality of the work performed.

In March 2022, AllConstructions ultimately abandoned its contestation of Citadelle's claim a few days before the trial and nearly a year and a half after the proceedings began.

The judge allowed Citadelle's application to have AllConstructions' action declared abusive. AllConstructions' defence was unfounded, frivolous and intended to delay. It had no solid factual or legal basis. The allegation that Citadelle failed to comply with standards in the performance of its contract is mere speculation, as AllConstructions left the worksite in September 2019.

Citadelle incurred unnecessary extrajudicial fees as a result of AllConstructions' unfounded contestation of its claim. The judge awarded Citadelle a sum of $9,000.00 as compensation for the legal fees that it had paid.

What it means

A general contractor that cannot justify a deduction from its subcontractor's claims after the work is completed but does so anyway risks having its contestation declared abusive. Jurisprudence has established that abuse of procedure may consist of *légèreté blâmable* [blameworthy conduct][2] or *témérité* [recklessness] resulting from allegations that do not stand up to careful analysis or are exaggerated beyond the scope of the dispute between the parties.[3]

A manifestly unfounded action is a civil fault that may be subject to legal proceedings and sanctions in accordance with article 51 of the *Code of Civil Procedure.*[4] A party that considers itself the victim of abusive proceedings may, in addition to applying to have the proceedings declared abusive, claim the reimbursement of reasonable legal fees it has paid.[5]

This is precisely what Citadelle did and what it obtained. AllConstructions irresponsibly managed its dispute with its subcontractor. It made arguments based only on unverified assumptions, even though the evidence set out in the application was relatively solid and complete. As a victim of abuse of procedure, Citadelle was granted a reimbursement of its legal fees in addition to the sums that it was owed by AllConstructions.

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1. Court file No. 760-22-011912-204
2. *Royal Lepage commercial inc.* c. *109650 Canada ltd.*, 2007 QCCA 915
3. *El-Hachem* c. *Décary*, 2012 QCCA 2071
4. *2741-8854 Québec inc.* c. *Restaurant King Ouest*, 2018 QCCA 1807 (CanLII)
5. Only extrajudicial fees deemed reasonable are reimbursed in full. The factors considered in establishing a total reasonable amount are summarized in paragraph 32 of the case at hand and are cited from *Groupe Van Houtte inc.*

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c. *Développements industriels et commerciaux de Montréal inc.*, 2010 QCCA 1970, and *Iris Le Groupe visuel (1990) inc.* c. *9105-1862 Québec inc.*, 2021 QCCA 1208

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