

Construction Law

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Doing Work When No Contract is in Place: Navigating the Risks in Construction Contracts

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1473662 Ontario Limited v. Avgroup Consulting Services Limited

On May 5, 2011, the Ontario Superior Court of Justice released its reasons for dismissing a motion for summary judgment in *1473662 Ontario Limited v. Avgroup Consulting Services Limited*. In this case, the plaintiff, 1473662 Ontario Limited, also known as Dyson Electric, provided electrical contracting services to Avgroup, the general contractor of a 121-room hotel and 83-room residential development in Sudbury, Ontario owned by Vrancor Development Corporation (“Vrancor”).

With no formal contract in place between the two parties, the case had as a major component, the contractual dispute as to what contracting terms prevail. The court held that the issue of which terms prevailed was a matter of credibility and required evidence from witnesses at a full trial. The court indicated that issues surrounding alleged deficiencies, extras and breach of trust allegations were also genuine issues requiring a trial.

Facts

The facts of the case as they relate to the nature of the agreement that existed between the parties are as follows:

1. No formal contract existed between Dyson Electric and Avgroup. Although the two sides entered into negotiations, no final agreement was reached, and a formal subcontract was never signed.
2. During the course of negotiations, Avgroup is alleged to have sent Dyson Electric a copy of a “sample contract,” which contained a “pay when

paid” provision. Avgroup claimed that the parties were bound by the terms of the sample contract.

3. As a matter of practicality, Dyson Electric proceeded with work without signing a formal subcontract. Instead, Dyson Electric provided to Avgroup an invoice that included Dyson Electric’s standard terms. There was no “pay when paid” provision included in the invoice. Dyson Electric claimed that the parties were bound by the terms of the invoice.
4. From time to time throughout the project, Dyson Electric submitted invoices to Avgroup, and payment was made. Avgroup alleged that payments were made to Dyson Electric following receipt of payment from Vrancor, pursuant to the “pay when paid” clause. Dyson Electric alleged that payments were made pursuant to the terms of the Invoice.
5. On termination of the project, Dyson Electric was owed \$313,755.42 by Avgroup, who, in turn, has not received payment in full from Vrancor.

The Decision

This case illustrates the complexities that arise where no formal contract is in place. In this case, work was carried out, some payments were made, but when money was outstanding upon completion of the project, there was no consensus as to what contractual terms were in place.

Motions for summary judgment provide that a court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial. On these motions, the moving party (in this case Dyson Electric) has the onus of establishing that a trial is unnecessary in order to truly, fairly, and justly resolve the issues.

In this case, the facts were sufficiently complicated that it was not possible for the court to make a determination on a summary basis based on the limited evidence before the motion’s court judge. The absence of a formal contract meant that significant oral evidence would be necessary in order for the court to determine the actual agreement that existed between the parties and that governed their relationship. As a result, the terms of the contract, including the existence and potential applicability of the “pay when paid” clause, were found to be genuine issues requiring a trial and the motion for summary judgment was dismissed.

Goodmans^{LLP} Update

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