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Hover v. Degraaf Excavating Ltd.

John Vincent Hover Carrying on Business Under the Firm Name and Style of JVS III Farms, Appellant (Defendant) and Degraaf Excavating Ltd., Respondent (Plaintiff)

Alberta Court of Appeal

Moore J. (ad hoc), O'Leary J.A., Picard J.A.

Heard: June 6, 1995
Judgment: June 6, 1995
Docket: Calgary Appeal 14895

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Counsel: *J.T. Huzil*, for Appellant.

*R. **Low***, for Respondent.

Subject: Contracts; Civil Practice and Procedure

***O'Leary, J.A.* (for the Court):**

1 The Respondent is an excavating company carrying on business in Lethbridge and vicinity. At trial it recovered a judgement against the Appellant for $9,473.00 (less a $1,500.00 set-off) in respect of excavating work done on the Appellant's property.

2 The Appellant operates a ranch and farm property which borders on the Oldman River. The parties entered into an arrangement under which the Respondent agreed to excavate two dugouts on the Appellant's property.

3 There was a dispute at trial as to the method of payment. The Trial Judge made a finding of fact and resolved that. He found that the price was to be calculated on the basis of $1.00 per pubic metre of material removed. He found that the amount removed was 9,473 cubic metres and, thus, the gross award to the Respondent.

4 The Trial Judge found that the agreement between the parties was that the dugouts would be excavated pursuant to P.F.R.A. specifications. Those specifications had four components which are germane to this case. Firstly, the volume of each dugout was to be at least 2,000 cubic metres. Secondly, the dugouts were to be a

minimum of 4 metres in depth. Thirdly, there was a requirement that the slope of the sides be of a certain design. Finally, the spoil piles were to be a minimum of 15 yards from the edge of the dugouts. The job was commenced and during the course of the work the Respondent encountered bedrock which prevented it from reaching the specified depth of 4 metres. There was evidence, which the Trial Judge accepted, of Mr. Degraaf (principal of the Respondent) to the effect that when bedrock was reached he contacted Mr. Barry, the Appellant's ranch foreman, and reported the problem to him. Degraaf's evidence was that he understood that Barry contacted the P.F.R.A. and received authority to expand the other dimensions of the dugouts in order to compensate for the shallower depth. In other words, the P.F.R.A. related its specifications. The work was completed on that basis in early December, 1988. The job was invoiced in March, 1989. At that time the Appellant had an inspection done by the P.F.R.A. The result of that inspection indicated that the depths were to specifications, although it is clear from both parties that the depths were not 4 metres minimum. In any event, certain P.F.R.A. grants were made to the Appellant on the strength of the dugouts meeting P.F.R.A. requirements.

5 As a result of the P.F.R.A. inspection, the Respondent returned in June, 1989 and did some work in respect of bringing spoil piles up to specifications. The Trial Judge found that that was not properly completed, that there was a deficiency in meeting that specification, and he allowed $1,500.00 as a set-off for that.

6 We have considered the reasons for judgment of the Trial Judge, the evidence on which it was based, and the submissions of counsel. In our view the appeal must be dismissed. We are satisfied that the Trial Judge made a proper finding as to the nature of the contract originally made. That is really not disputed. More importantly, the Trial Judge concluded that after bedrock was reached the contract was varied as the result of Mr. Degraaf's contact with the ranch foreman, Mr. Barry. Mr. Barry denied that he had made any such accommodation with Mr. Degraaf. Mr. Hover testified that Barry had no authority to make that arrangement in any event. It is clear from his judgment that the Trial Judge found that such an arrangement had been made and that the contract had been varied in that manner. In making that finding, it is apparent that he found that Barry did in fact have authority, either actual or ostensible. The fact that the P.F.R.A. made grants to the Appellant on the strength of the dugouts meeting specifications indicates that the P.F.R.A. was satisfied with the specifications. It may be that the P.F.R.A. was mistaken in that regard.

7 That does not affect the finding of the Trial Judge, express or implied, that the original contract had been varied with respect to the depth. In summary, we are satisfied that the Trial Judge's conclusions about the terms of the contract are supported by the evidence.

8 We turn to the issue of volume of material removed which was also in dispute. Evidence was presented that the volume of material removed was less than 9,473 cubic metres. The latter figure is the calculation of the Respondent. The Appallant through his expert, Mr. Miller, calculated a lesser amount, close to a thousand cubic metres less. It is obvious that the Trial Judge accepted the Respondent's calculations and awarded judgment on that basis. There was evidence to support that finding and there is nothing to justify interference with it. The Trial Judge set off $1,500.00 for the deficiency in respect of the spoil piles. We are not prepared to disturb that.

9 Accordingly, we dismiss the appeal with respect to the question of liability and with respect to the amount awarded.

10 We are not prepared to alter the award of pre-judgment interest. Pre-judgment interest was awarded from the date of the invoice, although that is not stated in so many words in the reasons for judgment. That is accepted and we would not change the time of commencement. Interest will therefore run from the date of the invoice

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in March, 1989.

11 In summary, the appeal is dismissed with costs. Counsel, anything arising?

12 Counsel: Costs will follow the event, my Lord?

13 O'Leary, J.A.: Yes.

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