

Messiha v EA & S Plaster Co Pty Ltd [2010]
QCAT 277

PARTIES:

Sherif Messiha

v

EA & S Plaster Co. Pty Ltd

APPLICATION NUMBER:

BD275-09

MATTER TYPE:

Building matters

HEARING DATE:

On the papers

HEARD AT:

Brisbane

DECISION OF:

Dr Bridget Cullen Mandikos

DELIVERED ON:

11th March 2010

DELIVERED AT:

Brisbane

ORDERS MADE:

Application by Respondent to dismiss the Applicant's Domestic Building Dispute Application pursuant to either section 47 or section 48 of the Queensland Civil and Administrative Tribunal Act 2009, or pursuant to res judicata principles, is dismissed.

QCAT has jurisdiction to hear the Application.

CATCHWORDS:

Section 100, Building and Construction Industry Payments Act: jurisdiction of QCAT to hear related domestic building dispute.

APPEARANCES and REPRESENTATION (if any):

On the papers.

REASONS FOR DECISION

1. Mr Sherif Messiha ("Mr Messiha") lodged a Domestic Building Dispute Application with the former Commercial and Consumer Tribunal ("CCT") on 15 June 2009. The CCT has amalgamated into the Queensland Civil and Administrative Tribunal ("QCAT"). QCAT now hears and decides all matters previously dealt with by the CCT: section 256 *Queensland Civil and Administrative Tribunal Act 2009* ("QCAT Act").
2. Mr Messiha's Application seeks "relief from payment" and "compensation for defective work to be fixed as per attached quotes from professional plasterers".
3. The Respondent, EA&S Plaster Co. Pty Ltd ("EA&S Plaster") performed work at Mr Messiha's property, located at 9 Ben Dalley Drive. That work was the subject of a claim made by EA&S Plaster pursuant to the *Building and Construction Industry Payments Act 2004 (Qld)* ("BCIPA Act"), following which Mr Messiha was ordered to make payment for the work performed by EA&S Plaster. It is this same work that is the subject of this Application.
4. Mr Messiha was not a stranger to the CCT, as EA&S Plaster has noted. He has made several applications against other building contractors, also arising out of building work also performed at Ben Dalley Drive. One of these applications, in matter BD 152-09, also brought against EA&S Plaster, is relevant to the present application.
5. In Matter 152-09, then Member Lohrisch ordered that: (1) The Tribunal does not have jurisdiction to determine the application; and (2) The application is dismissed. I agree with the submissions of Mr Messiha's Counsel that this was a decision that was neither adverse, nor favourable, to Mr Messiha, and which did not result in the merits of his contractual claim being determined.
6. Matter 152-09 involved an attempt by Mr Messiha to review the BCIPA Act adjudication decision in favour of EA&S Plaster. It did not involve adjudication of the contractual matters between Mr Messiha and EA&S Plaster, which are the subject of the present Application.
7. It is also clear that an adjudication made pursuant to the BCIPA Act does not extinguish rights that exist pursuant to a contract:

100 Effect of pt 3 on civil proceedings

(1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract--

(a) may have under the contract; or

(b) may have under part 2 in relation to the contract; or

(c) may have apart from this Act in relation to anything done or omitted to be done under the contract.

(2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal--

*(a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
(b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.*

8. I am satisfied the work in issue falls within the definition of "*domestic building work*" under the *Domestic Building Contracts Act 2000 (Qld)*. QCAT has jurisdiction to determine the dispute pursuant to sections 75 and 77 of the *Queensland Building Services Authority Act 1991* ("QBSA Act") and section 9 of the QCAT Act.
9. While Mr Messiha has been a frequent litigant in the CCT, that does not, as EA&S Plaster asserts, in and of itself mean that he is vexatious. As I've explained above, the contractual matters relating to what work EA&S Plaster was engaged to perform, and the standard of the work performed, have not previously been determined by the Tribunal. Thus, the *res judicata* argument advanced by EA&S Plaster must fail.

ORDERS:

10. Application by EA&S Plaster to dismiss Mr Messiha's Domestic Building Dispute Application pursuant to either s 47 or s 48 of the QCAT Act, or pursuant to *res judicata* principles, is dismissed.
11. QCAT has jurisdiction to hear Mr Messiha's Application.
12. The parties to bear their own costs of the matter.