

In the Alberta Court of Justice

Citation: Custom Delivery Solutions CDS v Unogwu, 2024 ABCJ

Date: 20240213
Docket: P2290100130
Registry: Calgary

Between:

Custom Delivery Solutions CDS, a Division of Metro Supply Chain (MTH) Inc.

Plaintiff

- and -



Paul Amedu Unogwu acting as Sure Movers

Defendants

- and -

Custom Delivery Solutions CDS, a Division of Metro Supply Chain (MTH) Inc.

Defendant by
Counterclaim

- and -

1076556 Alberta Ltd. operating as South Trail

Defendant by
Counterclaim

Reasons for Judgment of the Honourable Assistant Chief Justice D.B. Higa

[1] Custom Delivery Solutions CDS, a division of Metro Supply Chain (MTH) Inc. (“CDS”) seeks damages of \$25,599.79 arising from installation of a laundry unit by Mr. Unogwu’s delivery company, Sure Movers (“Sure”).

[2] Sure denies liability asserting that the damages were not caused by Sure. Sure further argues that CDS undertook responsibility for and arranged insurance coverages and accordingly, CDS cannot seek damages, reimbursement or indemnity from Sure.

[3] Sure filed a counterclaim against CDS and 1076556 Alberta Ltd. operating as South Trail (“South Trail”) seeking damages of \$30,000.00. Sure pleads that South Trail owed Sure a duty of care to provide the insurance coverages required by CDS. Alternatively, Sure asserts CDS was negligent in failing to obtain the necessary insurance policies and failing to provide South Trail with correct and material information, so South Trail could arrange necessary insurance coverages.

[4] South Trail submits it satisfied its duty of care to Sure and acted as a reasonably prudent insurance broker. Additionally, South Trail states that it was never advised Sure was providing installation services and required insurance relating to appliance installation. South Trail asserts that even if such request was made, Sure would not qualify for that type of coverage.

[5] CDS and Sure entered into a contract titled “Transportation Services Agreement” dated August 31, 2020 (the “Contract”). CDS relies on sections 10 and 11 in support of its claim.

[6] Section 10 states,

LIABILITY FOR DAMAGE TO CUSTOMER/THIRD PARTY PROPERTY

Delivery Partner shall be fully liable for any damage to or loss of the property of the Customer or any third party, including Customer’s client, that may occur during the performance of the Installation Services.

[7] Section 11 provides,

INDEMNITY

Delivery Partner shall protect, indemnify, and hold harmless, and at CDS’ option, defend, CDS, its directors, officers, agents and employees against and from any and all liabilities, losses, claims for property damage, injury, death and illness, actions, penalties, fines, charges, costs and expenses of any kind whatsoever, including reasonable lawyers’ fees and disbursements, and for greater certainty, including liability arising under Sections 9, 10 and 15 (collectively, “Losses”), relating to or arising out of, or in connection with any act or omission of Delivery Partner, its directors, officers, agents, employees, contactors and any persons for whom it is responsible at law (“**Delivery Partner Group**”), including but not limited to, loss, damage or delay of all or any part of a Shipment, personal injury, death and damage to property, clean-up costs from commodity spills and damage to the environment, breach of contract, negligence, and any representation or warranty which was misleading, inaccurate, incomplete or untrue. Delivery Partner shall promptly reimburse CDS for any and all such Losses, failing which, CDS shall be entitled to deduct all or any part of such Losses from any amount owed to Delivery Partner by CDS or may draw down against the Escrow Account pursuant to Schedule D.

[8] CDS’s success in this action depends on whether Sure is contractually responsible for the damages claimed by CDS.

[9] Section 10 provides Sure shall be liable for damage to or loss of property sustained by CDS’ customer or any third party, occurring during Sure’s performance of Installation Services, as defined by the Contract.

[10] Section 11 of the Contract states Sure shall indemnify CDS for liabilities, losses and claims relating to, arising out of or in connection with any act or omission of Sure, “...including but not

limited to, loss damage or delay of any part of a Shipment, personal injury, death and damage to property, clean-up costs from commodity spills and damage to the environment, breach of contract, negligence, and any representation or warranty which was inaccurate, incomplete, or untrue". (underlining is mine)

[11] Further, the indemnity obligations of Sure under Section 11 of the Contract, arise when a loss arises under Sections 9, 10 or 15 of the Contract. Section 9 of the Contract deals with loss and damage to cargo, which does not apply to the facts of this action. Section 15 of the Contract addresses the health and safety of workers, also not applicable to this action.

[12] At paragraph 11 of the Civil Claim, CDS specifically pleads that Sure was negligent in the installation of the laundry unit. In paragraph 9, CDS asserts that Sure failed to attach the drain hose to the laundry unit.

[13] Accordingly, the primary issue before the Court is whether Sure was negligent in the installation of the laundry unit.

[14] The parties agree that on January 13, 2021 personnel of Sure attended at Unit 2213, 2280 68th St NW (the "Residence"), to deliver and install a laundry unit for a customer of CDS. The parties further agree that on January 13, 2021 the Residence sustained water-related damage.

[15] Mr. Ytsma, CDS's General Manager for Calgary testified he was advised there was a water leak at the Residence and instructed Mark Omell, the Calgary Operations Manger to investigate. Mr. Ytsma did not attend at the Residence.

[16] Mr. Omell testified he attended at the Residence on January 14 with another employee of CDS. Mr. Omell stated when arriving at the condo building there were restoration vans parked outside. Upon entering the Residence, Mr. Omell observed two individuals from the restoration company in the Residence, floorboards were ripped up and drying machines operating. Mr. Omell entered the laundry room and Mr. Omell testified the laundry unit was "sitting there in the middle" and the restoration company had "guttled around the area".

[17] Mr. Omell further stated the drain hose was not immediately located. Upon inspection, the drain hose was found buried under the resident's laundry.

[18] Mr. Unogwu testified that Sure completed the installation of the laundry unit. Following CDS procedures, upon completion of the installation, pictures of the delivered unit and installation were taken and uploaded to a CDS app. The pictures were taken by Brad, a Sure employee. Brad did not testify, nor was Mr. Unogwu involved in the installation of the laundry unit.

[19] However, it is CDS's burden to prove that Sure was negligent in the installation of the laundry unit. CDS not only failed to prove it was the actions or inactions of Sure that caused the water damage in the Residence, CDS failed to prove that the water damage was actually caused by failure to attach the drain hose. CDS simply assumes and speculates that the water damage was caused by failure to attach the drain hose. CDS assumes and speculates that Sure employees failed to attach the drain hose.

[20] Mr. Ytsma's testimony does not assist as he did not attend the Residence.

[21] Mr. Omell attended the Residence, the day after the water damage was reported to CDS. When Mr. Omell arrived remedial and restoration work was well underway. As Mr. Omell stated, the restoration company had ripped up floorboards and had gutted the area around the laundry room. The laundry unit was sitting in the middle of the laundry room.

[22] Just as CDS speculates that the drain hose was not attached by Sure, one could equally speculate that employees of the restoration company disconnected the drain hose during their restoration activities.

[23] Significantly, no individual from the restoration company was called to testify. The owner of the Residence has passed away. Mr. Ytsma nor Mr. Omell spoke to the installation app discussed by Mr. Unogwu. The pictures Mr. Unogwu stated that were taken and uploaded to CDS's installation app were not produced or tendered at trial. CDS did not call any witness, qualified to opine it was failure to attach the drain hose that caused the water damage.

[24] The Court reiterates that Mr. Omell attended the Residence one day after the damage was detected, after significant remedial and restoration work had been completed, and after the laundry unit had been moved to the middle of the laundry room.

[25] Having failed to prove the cause of the water damage and negligence of Sure in the installation of the laundry unit, CDS cannot rely on Section 10 and 11 of the Contract.

[26] CDS further pleads that Sure failed to maintain insurance coverages as required pursuant to Section 12 of the Contract. Sure argues it cannot be responsible for any alleged failure to maintain the required insurance coverages, as CDS, on behalf of Sure, took over the obligation and responsibility to obtain the required insurance coverages.

[27] The Court agrees that if there was a deficiency in the insurance coverages, it was due to the actions of CDS. The issue regarding insurance arose from the nature of the work and services Sure was to provide for CDS. Sure was retained by CDS to transport and install appliances for clients of CDS and required insurance to cover installation activities.

[28] Sure initially contacted its insurance broker, South Trail, to obtain the insurance coverages required under Section 12 of the Contract. A Confirmation of Insurance document was issued by The Co-operators Insurance Company ("Co-operators") dated September 21, 2020.

[29] Upon review of the confirmation document, Madhu Dagar an employee of CDS determined the stated coverages were not adequate to cover appliance installation. Ms. Dagar is employed in the compliance department of CDS. On September 29, 2020, Ms. Dagar emailed Mr. Ytsma and stated "Sure mover's insurance certificate is not as per our requirement. Please ask DP if I can talk to his broker to add the rest coverages." (sic)

[30] Mr. Ytsma, then emails Mr. Unogwu, copying Ms. Dagar, "Can you please provide the information for your broker to madhu and she can ensure you get the proper coverage." (underlining is mine)

[31] Ms. Dagar on September 30, 2020 communicates directly with Mr. Jack of South Trail stating,

Please send me the Certificate of Liability Insurance (not certificate of insurance) with the following coverage.

Commercial Liability \$2,000,000.00 (provided)

Non-owned vehicle \$1,000.00 (provided)

Third Party Cargo damage, loss & installation \$75,000.00 (need same wording)

Employer Liability \$1,000,000.00 (same wording)

[32] Accordingly, on September 30, 2020 Mr. Jack sends to Ms. Dagar, copied to Mr. Unogwu a revised Confirmation of Insurance. The revised confirmation adding, “Notes: Property coverage listed is specified as Third Party Cargo Damage, loss & installation”. (underlining is mine)

[33] The referenced documentary evidence indicates that CDS took control of the process to ensure Sure’s contractual insurance requirements were satisfied.

[34] Additionally, Mr. Ytsma testified the revised Confirmation of Insurance dated September 30, 2020 was issued after CDS spoke to South Trail. Mr. Ytsma further confirmed that Ms. Dagar made the request of South Trail to add installation coverage.

[35] In relation to Ms. Dagar’s email of September 29, 2020, when asked what he understood by the words “...to add the rest coverages”, Mr. Ytsma replied that the insurance certificate was inadequate and needed to be updated and include installation. In follow up by counsel, Mr. Ytsma was presented with the proposition that CDS “...are the ones who contacted the broker to update the insurance?”. Mr. Ytsma responded, “That’s what it looks like”.

[36] Lastly, Mr. Ytsma stated in his email of September 29 to Ms. Dagar, “So to confirm, sure movers is good to go?” Mr. Ytsma testified he sent that note to Ms. Dagar to ensure, “...they [Sure] have provided an updated insurance certificate as per the minimum requirements of the delivery partner agreements.”

[37] Sure was initially not permitted to install appliances, however, after Ms. Madhu contacted South Trail and upon receipt of the Confirmation of Insurance dated September 20, 2020, CDS allowed Sure to deliver and install appliances.

[38] From the evidence tendered at trial, it is clear CDS undertook full control and responsibility to address the insurance requirements pursuant to Section 12 of the Contract. Sure understood and consented to having CDS deal directly with its broker to obtain the proper insurance coverage. Having taken the actions it did, CDS can not now blame Sure for lack of proper insurance to cover the damages claimed.

[39] The Civil Claim is dismissed.

[40] Sure filed a counterclaim seeking damages of \$30,000.00 from CDS and South Trail. The effect of dismissal of the Civil Claim results in Sure suffering no damages, arising from the matters raised in the Civil Claim. Additionally, Sure did not tender evidence to establish any other cause of action against CDS or additional claim for damages, in relation to both CDS and South Trail. The Counterclaim is dismissed.

[41] Without Sure establishing and proving damages in relation to the Counterclaim, it is unnecessary to address the liability of South Trail. However, Sure did not tender any evidence to demonstrate that South Trail breached a duty of care to Sure. The original Certificate of Insurance was based on the information disclosed to South Trail at the time. The material “change of risk” relating to Sure’s involvement in installing appliances, was not disclosed to South Trail.

[42] In summary, the Civil Claim is dismissed. The Counterclaim is dismissed.

[43] If the parties are unable to agree on costs, the parties may make brief cost submissions. Submission are not to exceed three pages and be submitted to the Clerk of the Court within 30 days of these reasons. The Court reminds the parties of the Court's *Tariff of Recoverable Costs*.

Heard on the 22nd day of January, 2024.

Dated at the City of Calgary, Alberta this 13th day of February, 2024.



D.B. Higa
Assistant Chief Justice of the Alberta
Court of Justice

Appearances:

Counsel, Logan Maddin
for the Plaintiff and Defendant by Counterclaim, CDS

Counsel, Uba Anya
for the Defendant/Plaintiff by Counterclaim, Paul Amedu Onogwu

Counsel, Noah Hodgson
for the Defendant by Counterclaim, South Trail