

Indexed as:

Fracchioni & DeFaveri Masonry Contractors Ltd. v. Chiarelli

Between

**Fracchioni & DeFaveri Masonry Contractors Ltd., Plaintiff, and
Charles Chiarelli and Filippo Ferrone, Defendants**

[1993] O.J. No. 1847

Action No. 19174/90

Ontario Court of Justice - General Division
Hamilton, Ontario

Lazier J.

June 18, 1993.

(5 pp.)

Construction contracts -- Breach -- Deficiencies.

Action and counterclaim by builders against owners of six dwelling units. At the outset of construction, the buildings were not staked according to plan. The set back was too close, thereby requiring more excavation and fill than was planned. There had been some settlement attempts.

HELD: Judgment was for the plaintiff for \$20,200.50 less the deficiencies counterclaim of \$15,745.

STATUTES, REGULATIONS AND RULES CITED:

Courts of Justice Act, R.S.O. 1990, c. C.43.

A. Camporese, for the Plaintiff.

C. Spitale, for the Defendants.

1 LAZIER J.:-- This action and counterclaim by builders against owners, involves the construction of six dwelling units in one building on Bigwin Road in Hamilton, Ontario. The parties reached

an agreement for the construction by the plaintiff of the building pursuant to a quotation filed as Exhibit 2. It is significant that Exhibit 2 includes this paragraph set forth at the end of the quotation:

"This price includes only the amounts listed above. Any extra work required due to site conditions or changes in the blueprints (i.e. deeper foundations; trucking away excess fill; or extra walls) will be additionally charged and payable in full."

2 The original plans showing the location and dimensions of the building were filed as Exhibit 1. There were indentations at each of the front corners of the building, facing Bigwin Road, of 1.2 metres or approximately four feet each defendant owners wanted the building "squared off" so these indentations would be eliminated. This was agreed upon and the original price of \$149,000. was reduced to \$148,000. because of the elimination of the extra wall that would have been needed for the indentations.

3 The position of the building was staked and as it turned out, after construction had commenced, the building was 1.2 metres or four feet closer to Bigwin Road than had been contemplated by the plans. Accordingly, instead of being 11 metres from the rear of the lot, the building was 12.3 metres as finally constructed. This change in the position of the building appears to have necessitated some extra excavation and consequently more fill and crushed stone were required in certain areas. The defendants are resisting payment of these extras over and above the contract price. However, in view of the quotation, it is quite clear that the plaintiff is entitled to these payments.

4 The parties had a meeting in either February or March of 1990 to try and settle the total amounts owing. As a result DeFaveri, a principal of the plaintiff, left the meeting satisfied with a final payment to be received by the plaintiff of \$4,283. This payment was mailed by the defendants forthwith, received and deposited on the 8th of March, 1990 by the plaintiff. The cheque for this final payment was marked "paid in full". This notation was scratched out on the cheque by the plaintiff before depositing it.

5 DeFaveri, on returning to his office after the settlement meeting, discovered some further charges that he had overlooked and he was not satisfied with the payment in full which he nevertheless deposited as set forth above.

6 Further discussions of settlement brought no result and this action was commenced. The defendants have a counterclaim for certain deficiencies in construction which will be dealt with later.

7 Accordingly, I find there is a balance owing to the plaintiff of \$20,200.50 which is arrived at as follows:

Contract Price		\$148,000.00
Received by plaintiff on account	\$141,427.00	

Payment made March 5, 1990	\$	4,283.00
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Door Frames agreed to be added

as extra	525.00
Extra fill and excavations shown	
Invoice 3548	7,890.00
Invoice 3554	1,807.50
Invoice 3586	3,588.00
Invoice 3608	4,100.00
Balance owing to Plaintiff	20,200.50

	\$ 165,910.50 165,910.50

8 The counterclaim for deficiencies may be considered under five headings which are:

1. Cracked Building Blocks
2. Poor Drainage of Garage Floors
3. Crooked Door Frames
4. Lack of Mortar on Dividing Walls
5. Parking Lot Excavated too Deep Requiring Extra Fill and Stone Base

9 Number 1 and 3. From the photographs filed as Exhibit 7, the cracked building blocks are quite obvious. Evidence was given of the amount to rectify this problem and to straighten the door frames. This is shown on Exhibit 9, the evidence of which I accept, totalling \$10,045. It is clear that these deficiencies were as the result of faulty construction by the plaintiff.

10 Number 2. The concrete floors in each of the six garages were laid in cold weather and were not properly installed as drainage does not flow out of the front of each garage so that after each rainfall there is an accumulation of surface water on the garage floors. To rectify this it will be necessary to redo each floor at a cost of \$950 for a total for the six units of \$5,700.

11 With respect to Number 4 the lack of mortar on the dividing walls does not appear to be a major problem and it has passed inspection by the appropriate municipal authorities.

12 Number 5. The parking lot excavation has already been dealt with above and I do not find any fault on the part of the plaintiff in this regard. They were faced with the land as they found it and had to construct the parking lot in a workmanlike manner, which they have done. There will be no allowance in this regard.

13 Accordingly, the counterclaim I find to amount to the above two items of \$10,045. and \$5,700. for the garage floors.

14 In the end result there will be judgment for the plaintiff for the sum of \$20,200.50 on the claim and for the defendants, on the counterclaim, of \$15,745.

15 Prejudgment interest will run on the claim from the 13th of December, 1989 and on the counterclaim from the 4th of May, 1990 at the appropriate rates in force on those respective dates in accordance with the Courts of Justice Act.

16 If there is a problem with costs, these may be settled on appointment.

LAZIER J.

Indexed as:
Tortola v. Tortola

Between
Anna Tortola, applicant, and
Joseph Tortola, respondent

[1996] O.J. No. 3240

13 O.T.C. 207

File No. V211/95

Ontario Court of Justice (General Division)
Hamilton, Ontario

Steinberg J.

Oral judgment: September 6, 1996.

(9 pp.)

Family law -- Marital property, distribution orders -- Equalization payments -- Custody and access -- Considerations in awarding custody -- Child's preference -- Divorce -- Corollary relief, maintenance and awards -- Retroactive awards -- Corollary relief, maintenance, enforcement -- Payment into court.

Application for an equalization payment, a contribution by the husband to tax arrears and support payments. The wife claimed spousal support in order to assist her to become more self-sufficient. The wife's income was \$2,050 per month. Upon separation, the husband had been fired from his job with his father-in-law's drywall company and had thereafter started his own company. The wife also worked for the drywall company, as a part-time bookkeeper.

HELD: No spousal support was awarded. The husband had suffered more financially from the breakdown of the marriage than the wife. The wife had already claimed the tax arrears as a debt on her financial statement, thereby reducing her liability for the equalization payment and it would have been unfair to require the husband to contribute to the arrears. Custody of the daughter was with the wife, with liberal access to the husband. Child support of \$900 per month was ordered, ret-

roactive to March 1996 until December 1, 1996, when payments of \$650 per month would begin. The husband was to pay the support arrears of \$7,200. The wife paid \$40,000 to the husband as equalization payment. The husband was ordered to pay \$10,000 into court as security for payment of the child support order.

Statutes, Regulations and Rules Cited:

Divorce Act, s. 15(5), 15(5)(a), 15(5)(b), 15(5)(c), 15(7), 15(7)(a), 15(7)(b), 15(7)(c), 15(7)(d).
Family Law Act, s. 24(1)(e).

Counsel:

A. Camporese, for the applicant.
J. Turingia, for the respondent.

1 STEINBERG J. (orally):-- First of all, I wish to compliment counsel on their efforts to keep this case short, to the point and on the issues. This action, having regard to the way in which the respondent was dismissed from Biasutti Drywall Services 1983 Limited, had the potential to be quite emotional and upsetting. The way each of you presented the evidence, and your efforts to settle the equalization payment has been quite beneficial I think, not only to the court, but also to each of your clients.

2 As you know, I pronounced a decree of divorce on September 4th, 1996. The parties had been separated since October 1994 when the applicant requested the respondent to leave the matrimonial home, which he did.

3 It is agreed that the oldest child, Joseph, born September 7th, 1979, is old enough and mature enough to decide with whom he wishes to live. In my judicial interview with him, with counsel present, all of which was recorded, he made it plain that he wishes to share time equally with each of his parents. It appears that up to now, or at least in the past year, Joseph has spent the majority of his time with his father since separation.

4 It is conceded that the child, Teresa, born May 10th, 1983, should be in the custody of her mother. The respondent is quite content that an order shall issue, providing that he has reasonable access to her. In that regard, I expect the present liberal access arrangements to continue.

5 On consent it will be ordered that the applicant pay to the respondent the sum of \$40,000.00 by way of an equalization payment, equalizing their net family properties. It is conceded that the said sum of \$40,000.00, or such lesser sum as may be payable to the respondent by way of set-offs, shall be paid forthwith. Mr. Camporese has sufficient funds in his trust account to cover any order that may be made in that regard.

6 The applicant has made a claim under section 24(1)(e) of the Family Law Act that the respondent should be ordered to reimburse her for part of the outstanding realty taxes on the house as of its sale. She argued that notwithstanding that she was the owner of the home, he had contributed to the taxes while they had cohabited.

7 Mr. Turingia has made the point that as of the date of separation, that is the valuation date, the outstanding taxes were \$12,900.00, and that she claimed them as a debt in her net family property statement. It would, in the circumstances he argued, be unfair to require him to make a contribution to those arrears, and I agree. By having claimed those arrears as a debt, as she was entitled to do, she reduced her liability in property equalization to the respondent by approximately one-half of the arrears. To make him further contribute to the arrears as of separation would result in him absorbing a disproportionate amount of those tax arrears.

8 With regard to the balance of arrears, that is those accruing after separation, they amount to \$9,648.00. I agree with Mr. Turingia that some of the arrears accrued as a result of the applicant unduly delaying listing the house, and when she did list the house it was for an amount greatly exceeding the value of the property. The respondent should not be required to subsidize that activity which delayed the sale of the properties. I accept that. In any event, I believe that any potential contribution to those arrears, if appropriate, could be best dealt with in a support context.

9 The applicant claims spousal support. Mr. Camporese has conceded, in his argument, that support for Mrs. Tortola if ordered ought not to be permanent or indefinite, but rather of a nature to assist her to become more self-sufficient.

10 Section 15(5) of the Divorce Act with regard to the ordering of spousal and child support provides,

"In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

- (a) the length of time the spouse cohabited;
- (b) the functions performed by the spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of the spouse or child."

Subsection (7) also states,

"An order made under this section that provides for the support of a spouse should

- (a) recognize an economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time."

Now, at the present time Mrs. Tortola receives an income, approximately \$2,050.00 a month. This includes the sum of \$1,600.00 a month she declared in her financial statement, approximately \$200.00 a month in child tax credits, and \$250.00 a month she receives from her gentleman friend

for whom she works part-time in his delicatessen cafe. She also has the benefit of a car and all expenses of maintaining and operating it paid for by her father's new company in which she is a shareholder. Based upon her proposed expense budget she appears to be running a deficit of about \$675.00 a month.

11 In reviewing the policy considerations under section 15(7) of the Divorce Act, it should be noted that Mrs. Tortola has had the same job for many years and is quite content with it. She keeps the books of her father and brother's drywall company. For many years she has worked only two or three hours a day at the job, with the exception of Thursdays when she works all day preparing the payroll. Since separation she has not sought other additional work, save working a few hours a day at the delicatessen cafe for minimum wage. She has sought out no retraining or skills upgrading, even though she has been separated for over two years.

12 I am not being critical of Mrs. Tortola. She appears extremely content with her economic lot in life, and in fact, with adequate child support she will be self-sufficient.

13 The breakdown of the marriage caused hardship no doubt for both spouses, but I think on balance the husband, Mr. Tortola, incurred a more immediate negative loss, that is to say his job. It has taken him some time to organize and learn to operate his own drywall company. Recent mistakes in bidding have cost him substantially. I cannot find that the applicant, having assumed the primary care of her children during the marriage, suffered any extraordinary financial consequence as a result. Her work or career ambitions were not thwarted in any way by her duties to her children, which I am sure she carried out in an exemplary way.

14 For these reasons, notwithstanding the length of the marriage, I cannot find that henceforth the respondent should pay any further spousal support to the applicant.

15 It should be noted that on July 18th, 1995 Justice Mendes da Costa made an interim order against the respondent requiring him to pay support to the applicant and the children in the sum of \$900.00 a month "without prejudice to argue the retroactivity of the support order."

16 The respondent concedes that he drew \$3,000.00 a month from his company from March of 1995 to the end of December 1995. He also cannot account for most of the proceeds of the disposition of some R.R.S.P.'s during that period. It is common ground that the respondent only made two payments of \$900.00 after the order was made.

17 In my view, Justice Mendes da Costa's order should be made retroactive to March 1996.

18 I accept the respondent's evidence that because of his mistakes his company has earned no money thus far in 1996, but in three months or so he will begin to turn a profit after he has recovered from those errors.

19 The interim order of Justice Mendes da Costa will be terminated as of January 1st, 1996. In the result, the respondent owes the applicant on that order the sum of \$7,200.00.

20 Commencing December 1st the respondent shall pay child support for Teresa in the sum of \$650.00 a month. This order reflects the fact that each party will be absorbing expenses for Joseph, and the fact that Teresa has extraordinary figure skating expenses, most of which are assumed by the applicant.

21 I am concerned about the ability of the applicant to collect on the child support order. The respondent was unable to satisfactorily account for the disposition of his R.R.S.P. monies, and con-

cedes that he has at least a modest penchant for gambling on football games. He admits to placing two or \$300.00 in bets per month, notwithstanding his impoverished circumstances. I therefore wish to secure the payment of the child support to the extent of \$10,000.00.

22 I therefore make the following orders:

- (1) Custody of Teresa shall be with the applicant with liberal access to the respondent.
- (2) The applicant shall pay to the respondent forthwith the sum of \$40,000.00 in full and final satisfaction of the equalization of the net family properties.
- (3) The respondent shall pay to the applicant forthwith the sum of \$7,200.00, being arrears outstanding on the order of Justice Mendes da Costa dated July 18th, 1995.
- (4) The respondent shall maintain the child Teresa in the sum of \$650.00 a month, first payment December 1st, 1996.
- (5) The respondent shall pay into court to the credit of this action the sum of \$10,000.00 as security for the payment of the child support order made against him.
- (6) The usual support deduction order will issue.

qp/s/mii/mjb/DRS/DRS