

Ontario Superior Court of Justice

J. DiLuca J.

Heard: May 25 and 29, 2017.

Judgment: August 29, 2017.

Court File No.: CV-15-122377-SR

[2017] O.J. No. 4494 | 2017 ONSC 5109

Between Ryu Electric Inc., Plaintiff, and Sam Bung Hong a.k.a Danny Hong, c.o.b. as Intaglio Design, Defendant

(59 paras.)

Case Summary

Construction Law — Payment — Time of payment — Deductions or credits — Action by subcontractor for payment of amounts owing by contractor allowed — Parties worked together for number of years — Subcontractor provided invoices but payments did not correspond to specific invoices and were applied by subcontractor to oldest invoices — Relationship between parties soured — Plaintiff claimed payment for last three projects — Amounts owed were single debt — Periodic payments were acknowledgement of debt and effectively re-set limitation period — Subcontractor awarded amount of \$77,437 — Limitations Act, s. 13(11) — Rules of Civil Procedure, Rule 76.

Civil Litigation — Limitation of actions — Time — When time begins to run — Extension, interruption, suspension and inapplicability — Acknowledgment or part payment — Action by subcontractor for payment of amounts owing by contractor allowed — Parties worked together for number of years — Subcontractor provided invoices but payments did not correspond to specific invoices and were applied by subcontractor to oldest invoices — Relationship between parties soured — Plaintiff claimed payment for last three projects — Amounts owed were single debt — Periodic payments were acknowledgement of debt and effectively re-set limitation period — Subcontractor awarded amount of \$77,437 — Limitations Act, s. 13(11) — Rules of Civil Procedure, Rule 76.

Action by the subcontractor, Ryu Electric Inc., against the contractor, Intaglio Design, for payment of amounts owing. Ryu Electric had performed work for Intaglio Design for a number of years. The dealings between the parties tended to be informal. Written contracts were not used, though some projects had a written quote. While invoices were supplied in relation to the various projects, payments received did not correlate to specific invoices. Ryu Electric generally credited payments to the oldest outstanding invoices. The relationship between the parties soured. Intaglio Design failed to make payments covering the last three projects. Ryu Electric sought payment of the amount of \$87,437. Intaglio Design denied that any amounts were owing. Intaglio Design submitted that approximately \$82,000 was paid on the projects, leaving \$17,000 unpaid. Intaglio Design argues that extras performed were unauthorized and/or inflated in value. Ultimately, nothing remained owing in relation to the projects. Intaglio Design argued that certain portions of the claim were statute-barred.

HELD: Action allowed.

The debt related to one project for which the limitation period was argued to have expired was not statute-

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barred. Ryu Electric's rolling accounting reflected a running total that was owed by Intaglio Design once the three latest projects were completed. In cases where a debtor made periodic payments on a running account, the balance was treated as a single debt with any periodic payment made in respect of entire balance. The periodic payment had the effect of an acknowledgment of the debt and served to re-set the limitation period. Ryu Electric proved its claim on a balance of probabilities. Ryu Electric was awarded the amount \$77,437 after accounting for a \$10,000 deposit that was paid for one project.

Statutes, Regulations and Rules Cited:

Construction Lien Act, R.S.O. 1990, c. C.30,

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, s. 13(11)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 76

Counsel

James H. Herbert, for the Plaintiff.

Tony N. Nguyen, for the Defendant.

REASONS FOR DECISION

1 J. DILUCA J.:-- This is a dispute between a contractor and a sub-contractor. At issue is \$87,437 that the sub-contractor, Ryu Electric, claims remains owing from the contractor, Intaglio Design. Ryu Electric bases the claim in breach of contract and in the alternative, *quantum meruit*.

2 Jeff Ryu is the owner/operator of Ryu Electric and Danny Hong is the owner/operator of Intaglio Design.

3 Intaglio Design is in the restaurant construction business and Ryu Electric was regularly contracted to deal with the electrical aspects of various restaurant construction projects. Over the course of 11 years, Ryu Electric provided approximately \$1,000,000 in electrical services to Intaglio Design.

4 By all accounts, Ryu Electric's work product was competent and acceptable. Indeed, it appears that up until the dispute arose, Jeff Ryu and Danny Hong had a productive, mutually beneficial business relationship.

5 The business relationship was very informal. Written contracts were not used, though some projects had a written quote. The pricing of the various contracts was agreed upon verbally and some basic understandings developed. The pricing agreed upon was also subject to extras and changes which were not detailed or memorialized in any formal fashion. While invoices were supplied in relation to the various projects, payments received did not correlate to specific invoices. Follow up on outstanding amounts were not formally structured. In short, the business relationship appeared to be somewhat *ad hoc* and premised on unwritten and at times unspoken understandings of the nature of the construction business. It was also grounded in trust.

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6 Regrettably, the business relationship soured. Mr. Hong came to believe that Mr. Ryu was over-charging him for various projects. Mr. Ryu came to believe that Mr. Hong was under-paying him for services rendered. The dispute eventually came to a head and resulted in this litigation.

7 Ryu Electric claims that \$87,437 remains outstanding and supports this amount by reference to invoices relating to three projects; Fionn MacCool's, Turtle Jack's, and Burrito Boyz/Convenience Store. The invoices for these projects total \$99,886. Some of the invoices include extras that Mr. Ryu suggests were approved verbally by Mr. Hong. It is Ryu Electric's position that payments received from Intaglio Design were "on account" and that any payment received was allocated to the oldest outstanding invoice. The accounts receivable balance was generally kept on a rolling basis rather than a project by project basis. The balance remaining therefore relates to these projects which were the last projects completed by Ryu Electric.

8 Intaglio Design denies owing this amount and argues that the business arrangement involved a deposit being paid in relation to each project, with the balance paid at the completion of the project. On Intaglio Design's version of events, payments were verbally allocated in this fashion despite the absence of any notation on all but one of the cheques. Intaglio Design submits that approximately \$82,000 was paid on the subject projects, leaving \$17,000 unpaid. However, Intaglio Design argues that certain "extras" performed were unauthorized and/or inflated in value. Ultimately, Intaglio Design argues that nothing remains owing in relation to the three projects. Lastly, Intaglio Design raises a Limitations Act defence arguing that certain portions of the claim are statute-barred.

The Three Projects

9 The first project relates to a Fionn MacCool's Restaurant at 825 Britannia Road. The work was performed at this location between September 2012 and November 2012. While the contract between Intaglio Design and Prime Restaurants, the owner of the Fionn MacCool's, listed a cost of \$19,500 for electrical work, Mr. Ryu claims that he was not aware of the amount at the time and only discovered it during the course of the litigation. According to Mr. Ryu, he performed the services listed in his invoice dated November 22, 2012 and billed \$36,370 plus HST for a total of \$41,538.80. Mr. Ryu notes that the work completed exceeds the scope of the work contemplated in the contract between Intaglio Design and Prime Restaurants. The extra work relates to the installation of a fire alarm worth \$13,000 and approximately \$1,800 in other extras. Mr. Ryu states that these extras were approved by Mr. Hong. He further states that the \$13,000 amount in relation to the fire alarm was the product of negotiation between him and Mr. Hong and that he had initially quoted \$13,500 for the alarm.

10 According to Mr. Hong, Mr. Ryu agreed to perform the electrical services on this project for \$18,000 plus HST. Intaglio Design paid a \$10,000 deposit on September 21, 2012. Intaglio Design further authorized approximately \$1,760 plus HST in extras, for a total project price of \$19,760 plus HST. Intaglio Design claims to have never received the invoice for \$36,760 plus HST until after the litigation started and claims to have not authorized \$13,000 for the fire alarm. Nonetheless, Mr. Hong asserts that he paid a further \$30,000 on December 12, 2012 as full payment on this project.

11 The second project relates to a Turtle Jack's Restaurant at 360 Dundas Street. The work at this location was done between March 22, 2013 and April 29, 2013. The contract price between Intaglio Design and Tortoise Restaurant Group, the owner of Turtle Jacks, for the electrical services was \$19,500. Again, Mr. Ryu claims to have only discovered this after the fact. According to Mr. Ryu, this project involved many overtime hours and also a number of extras, both of which are corroborated by contemporaneous time sheets. On June 29, 2013, Ryu Electric issued an invoice for \$28,500 plus HST, for a total of \$32,205.

12 According to Mr. Hong, Mr. Ryu agreed to perform electrical services for \$18,000 plus HST on this project. This was the fixed price they had agreed to for these types of projects. Mr. Hong only authorized extras in the amount of \$5,500 plus HST. Mr. Hong again claimed to have not received the invoice relating to this project, though he claims

to have paid a \$10,000 deposit on March 23, 2013 and a further \$15,000 on March 6, 2013, leaving \$3,306 owing. It is unclear from the evidence how this purported amount owing is arrived at.

13 The third project consists of two parts: a Burrito Boyz Restaurant and a Convenience Store. The parts were completed at the same time. The contract prices between Intaglio Design and the owners of the projects listed electrical services at \$12,500 for the restaurant and \$6,500 for the store. Again, Mr. Ryu claims he only became aware of the contract price after the fact. However, Mr. Ryu did provide written quotes of \$9,575 plus HST and \$5,460 plus HST for each project, respectively. Mr. Ryu submitted an invoice for the restaurant on May 24, 2014 for \$16,775 plus HST, for a total of \$18,955. He explains that the extras relating to a new electrical panel, check meter, duct heater and conduit work make up the difference in price. These extras were approved by Mr. Hong. Mr. Ryu submitted an invoice for the store on May 24, 2014 for \$6,360 plus HST, for a total of \$7,186. The difference relates to a \$900 fee to clean up the site before the electrical work could be completed and pass inspection.

14 Mr. Hong argues that he only authorized extras in the amount of \$2,740 plus HST for the restaurant and \$500 plus HST for the convenience store. Mr. Hong denies that an extra in relation to the conversion of a duct heater from gas to electric was authorized and supports this position by reference to the evidence of the owner of the Burrito Boyz, Mr. Song, who indicates that the extras did not include this service. Mr. Hong also asserts that he never saw the invoices for this project until after the litigation started.

15 In all three cases, the amounts ultimately received by Intaglio Design from the various clients was higher than the original quotes provided by Intaglio Design.

16 In *no* case was there a timely complaint about the quality or completeness of the work done by Ryu Electric.

The Existence of "Old Debt"

17 Ryu Electric's claim is based in part on the existence of old debt. The old debt relates to amounts owing to Ryu Electric prior to the invoices relating to the three projects in question. In affidavits sworn October 12, 2016 and November 25, 2016, Mr. Ryu sets out charts with corresponding invoices, detailing the history of invoices and to payments by Intaglio Design. These charts suggest that at the end of August 2012, there was a balance owing of \$27,430 on account of old invoices that pre-date the subject projects.

General Credibility of the Parties

18 While I will address the specifics of each party's testimony in more detail below, I offer the following general overview of my credibility findings.

19 The evidence in chief was primarily tendered through affidavits with related exhibits. Both parties also gave brief oral testimony in chief, followed by cross-examination. The examinations were conducted within the time limits of the Simplified Rules, applied with some measure of flexibility.

20 Through no fault of the parties, the assessment of the evidence in this case was complicated by the manner in which it was presented. English is not the first language for either party, though both were proficient enough to testify without the assistance of an interpreter. It was apparent to me that the clarity and cohesiveness of the affidavit portion of each party's evidence was much higher than the clarity and cohesiveness of their respective *viva voce* testimony. This is likely a product of the involvement of counsel who, as is perfectly permissible, packaged and presented their respective client's evidence. That said, the clarity of the written evidence stood in stark contrast to the *viva voce* evidence which was fractured, disjointed and difficult to follow. I have re-listened to the audio recording of all the *viva voce* testimony in an effort to account for the fact that both witnesses testified in a second language.

21 Putting aside any issue relating to proficiency with the English language, neither Mr. Ryu nor Mr. Hong were

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good witnesses. However, where their versions differ, I prefer the evidence of Mr. Ryu. In my view, while Mr. Ryu's evidence was far from perfect, I was left with the impression that he was trying to be accurate in explaining matters, though he was often confused. On the other hand, I found that Mr. Hong had some questionable memory issues and engaged in gamesmanship while testifying, both of which left me more concerned about his evidence. Ultimately, and not without some reservation, I accept the version of events proffered by Mr. Ryu as probably true.

22 Mr. Hong presented as having a very selective memory. He was evasive, inconsistent and argumentative. He remembered certain things in his favour very clearly but that clarity was lacking when it related to certain facts not in his favour. Tellingly, when asked to confirm the list of invoices provided by Ryu Electric, Mr. Hong would not confirm any amounts, claiming that he did not have "contract papers" and therefore could not confirm the amounts. In effect, Mr. Hong took the position that unless something was in writing he would not confirm it. Given the informal nature of the working relationship between the parties, this position was overly convenient and struck me as a weak attempt to avoid the obvious.

23 In another instance, Mr. Hong was asked to look at an email sent between the parties in the Korean language which was ostensibly a demand for payment. He was then provided with an English translation that been prepared by the opposing side and asked to indicate whether the translation roughly accorded with the Korean version. He initially refused to look at the English version because it was not an "official" translation. It was only after some prodding by counsel and direction by me that he looked at the two versions and confirmed that the content was the same. This struck me as game playing in an attempt to avoid the potential implication of the content of the email. To be clear, this is not an instance where Mr. Hong could not read one or the other language. Indeed, he is proficient in both languages. Moreover, he was not being asked to certify the correctness of the interpretation. He was merely being asked whether the English version before the court was roughly the same as the Korean version. In my view, the resort to the need for a certified translation was an attempt to invoke formality as a shield to a difficult question.

24 When asked about certain invoices provided by Ryu Electric, Mr. Hong claimed that he never received them or at least could not remember receiving them. He made this claim despite the fact that the exhibits filed at trial clearly suggest that at least some of the invoices were sent to him by email. He further claimed that it was only when he later received the invoices that he noticed how high the amounts were and came to the conclusion that he was being over-billed.

25 In cross-examination, Mr. Hong was asked to explain how it was that he was making project specific payments, as opposed to payments on account, if indeed he had never received the invoices. He tried to explain this difficulty by suggesting that he and Mr. Ryu had verbally agreed upon fixed prices for all of the projects. The price for electrical was generally fixed at \$14,000 to \$15,000 per project, though for some it was higher. Therefore, he knew how much was owing as a deposit and final payment on each project. When pushed on this issue, he concluded that "next time" he will not pay "a penny" without a contract. His answers on this issue were wanting. The values for the various electrical projects were variable and often included extras. His evidence on this issue was an attempt to avoid the implication that he knew of the invoices and never voiced a complaint about the amounts charged until the litigation commenced.

26 On the whole, I was left with the distinct impression that Mr. Hong's evidence had a malleability and flexibility to it. His answers were geared towards rebutting potential arguments and supporting his claim regardless of the objective facts. He was not endeavouring to be truthful.

27 Turning to Mr. Ryu, he too was not a good witness. His testimony lacked clarity and cohesiveness. He was unable to explain his billing, invoicing and collection practices, with any degree of precision or consistency. As well, the various accounting documents produced were difficult to reconcile and at times inconsistent. It appears that the accounting practices adopted lacked rigour and had an *ad hoc* and perhaps even an *ex-post* quality to them.

28 He was specifically asked about a \$10,000 payment that was purportedly made as a deposit in relation to the

Fionn MacCool's project. Mr. Ryu's evidence vacillated between agreeing that the payment was a deposit specifically in relation to the project and a payment made on account. On this issue, his evidence was unclear and at times contradictory. While he ultimately agreed that it was a deposit, my sense is that he was not certain one way or the other.

29 He was also asked about a cheque in the amount of \$10,000 from Intaglio Design which had a notation on the cheque stating "417 Danforth". It was pointed out to Mr. Ryu that on his accounting documents, this payment was not allocated to 417 Danforth, as set out on the "re" line of the cheque, but rather was allocated to two other projects, 1126 Finch Ave. and Fionn MacCool's. It was also pointed out to Mr. Ryu that this seemed inconsistent with his evidence that payments specifically allocated to a project were made to that project. Mr. Ryu attempted to explain this inconsistency by suggesting that this was a mistake and that he simply was relying on the overall balances as set out in the documents prepared.

30 The questions about the project at 417 Danforth, a project not directly related to this litigation, produced a lengthy and hard to follow series of questions and answers which revealed that the accounting process adopted was not nearly as straightforward and consistent as he initially suggested. The best that can be said is that the accounting process itself was flexible and at times inconsistent.

31 While Mr. Ryu's evidence was far from perfect, I find that he was attempting to be truthful despite the fact that he was at times confused. I also find that while his memory was not perfect, it was generally better than Mr. Hong's on key issues. I also find that he was prepared to admit matters that were not in his favour, including the \$10,000 deposit. On the whole, I am satisfied that his version of events is probably true.

Allocation of Payments

32 The central issue in this case relates to the allocation of payments. Over the years Ryu Electric submitted a number of invoices and Intaglio Design made a number of payments.

33 Ryu Electric argues that the payments were made "on account" and that the balance owing therefore relates to the final invoices issued. Intaglio Design argues that payments were directed to specific projects and that amounts properly owing in relation to the three subject projects have been satisfied.

34 Common law principles of debtor/creditor law hold that a debtor may allocate a payment towards a particular debt and a creditor must apply it accordingly, see *Colautti Construction Ltd. v. Ashcroft Developments Inc.*, 2011 ONCA 359 at para. 55, citing *Cory Brother & Co. v. "Mecca" (The)*, [1897] A.C. 286 (Eng.H.L.), at p. 293, and see *Malva Enterprises Inc. v. Rosgate Holdings (1993)*, 104 D.L.R. (4th) 167 (Ont.C.A.). However, in the absence of a plain and irrevocable expression of an intended allocation by the debtor, the creditor is free to apply a payment to an outstanding balance as it sees fit. Additionally, in cases where a creditor applies a payment to a particular invoice but does not communicate the allocation to the debtor, the creditor remains free to subsequently make a different allocation. A creditor is bound only by a communicated allocation of a payment, see C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd Ed., (Toronto: Carswell), at p. 24. Lastly, where neither the creditor nor the debtor apply a payment, the law generally appropriates the payment to the oldest debt.

35 Intaglio Design argues that the *Colautti* decision referred to above reflects a development in the law and stands for the proposition that in cases where a debtor does not make an allocation, the creditor has a duty to make reasonable inquiries of the debtor before allocating the payment. It is only when the debtor fails to respond to reasonable inquiries that the creditor is free to allocate the payments as it sees fit.

36 In my view, the *Colautti* decision does not change the basic principles of debtor-creditor law. The *Colautti* decision dealt with funds that were held in trust under the *Construction Lien Act* in a dispute between contractors and developers. Where monies are held in trust, different obligations arise and the general rule is that trust monies paid on a particular project are to be applied against the price of goods or services rendered for that particular

project and not simply applied against the oldest outstanding accounts, see *St. Mary's Cement Corp. v. Construc Ltd.* (1997), 32 O.R. (3d) 595 (Ont. Ct. (Gen.Div.)) and *Ross Gibson Industries v. Greater Vancouver Housing Corp.* (1985), 21 D.L.R. (4th) 481 (B.C.C.A.). It is within this context that the need to make reasonable inquiries arises. As such, where trust monies are received the application of the general rule in the *Mecca* case is only permitted where reasonable inquiries regarding the intended allocations have been made.

37 Intaglio Design argues that since Ryu Electric admits to hiring sub-contractors to perform services on the projects, any funds received were funds, at least in part, held in trust. In my view, there is insufficient evidence before me on which I can find that Ryu Electric held any funds in trust under the *Construction Lien Act* or otherwise. The extent to which Mr. Ryu hired help is entirely unclear from the evidence. At best, he may have hired help on occasion and as needed, effectively as casual or piece work employees. While there is no doubt that Mr. Ryu had an obligation to pay whomever he hired, I do not find that any of the money he received from Intaglio Design was held in trust for this purpose.

38 I turn next to examining the nature and context of the payments made by Intaglio Design and the evidence relating to the purported allocation of the payments.

39 The cheques advanced by Intaglio Design to Ryu Electric are almost all in round numbers. By my count, between 2008 and 2014 there were over 50 payments from Intaglio Design to Ryu Electric. There are only three instances where the number is not rounded to the nearest thousand dollars. As well, the dates of the payments do not roughly correspond with the dates of the invoices. Lastly, only one cheque has a written notation relating it to a specific project. Interestingly, this one cheque was *not* applied in accordance with the direction on the face of the cheque.

40 Mr. Hong testified that it was his practice to pay a deposit roughly equivalent to 40% to 50% of the contract price to Ryu Electric in advance of the work being done and that the balance would be paid at the end. According to Mr. Hong, the deposit and final payment were done on the basis of verbal agreements between him and Mr. Ryu and specifically related to each project. Mr. Hong's view was that if the deposit was not paid, Mr. Ryu would not do the work contemplated.

41 I reject Mr. Hong's evidence on this issue. If Mr. Hong's evidence relating to the nature of the deposits and final payments was correct, one might expect a round number for the amount of the initial deposit provided but not a round number for the final payment, which presumably would relate to the balance owing reflected in the final invoice. As well, one might also expect the date of the final payment to roughly match, perhaps within 30 or 60 days, the date of the related invoice. That is not the case.

42 Mr. Hong's evidence suffers from a further significant failing. On a reconciliation prepared by Mr. Hong and tendered as Exhibit 9, he claims that he overpaid the Fionn MacCool's project by \$17,671.20. This evidence is obviously problematic. First, Mr. Hong denied receiving the invoice for this project, yet claims to have paid \$40,000 to Mr. Ryu Electric on the basis of a quote for \$22,238. This makes little sense. Why would he ever pay \$17,671 extra? If Mr. Hong's evidence on this issue is correct, it follows that the extra amount paid was likely a payment on account relating to other debt. Conversely, assuming, as I have found, that Mr. Hong actually received the invoices for Fionn MacCools which totalled \$41,538.80, a payment of \$40,000 was not in full satisfaction of that account, though in the absence of a complaint it suggests that the work done on the Fionn MacCool's project was satisfactory. Neither version advances Mr. Hong's claim. On balance, I find that the \$30,000 payment, which followed the \$10,000 deposit on the Fionn MacCool's project, was a payment on account. I pause to note, that had Mr. Hong's evidence been that he received the invoice from Ryu Electric on this project and that he had paid the \$10,000 deposit as well as the \$30,000 second payment in satisfaction of that invoice, my findings might have been different. That said, this was not his evidence.

43 Mr. Hong also points to a document obtained from Ryu Electric, which purports to provide a project by project allocation of payments in relation to the three projects at issue in this litigation. According to Mr. Hong, this

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document, found at Tab "A" to Mr. Hong's September 30, 2016 affidavit, is proof that the payments were specifically allocated to the projects.

44 The document is at first blush troubling. However, I am not satisfied that the document supports the position advanced by Intaglio Design. First, the document only came to the attention of Intaglio Design during the discovery process. It was an internally created document prepared by a bookkeeper, Mr. Brandon Koh, and was not communicated to Intaglio Design prior to the commencement of litigation. As well, I am satisfied with Mr. Ryu's explanation that this document was created by the bookkeeper who was new to the job and was simply trying to get the books in order. I accept that document was effectively created in error and did not reflect the accounting practices at Ryu Electric.

45 In relation to the nature of the payments, Mr. Ryu testified that he received periodic payments that were not specifically allocated to any particular outstanding invoice. He did, however, acknowledge that on some occasions he received deposits from Intaglio Design and, in particular, acknowledged receiving a deposit of \$10,000 in relation to the Fionn MacCool's project. As well, Mr. Ryu accepted that other payments were allocated to certain projects, presumably on the basis of a verbal direction.

46 I find that when viewed in the context of the nature of the business relationship between Ryu Electric and Intaglio Design, the general practice was for Intaglio Design to make recurring payments on account. While this was the general practice, there were some exceptions, including the \$10,000 deposit paid on the Fionn MacCool's projects and the payments relating to the project on 1126 Finch Avenue, a project which was not the subject of this litigation but was the subject of a lien in favour of Ryu Electric.

47 As a result, I am satisfied that the rolling accounting provided by Ryu Electric reflects the running total that was owing by Intaglio Design once the three subject projects were completed. Apart from the extras discussed below, there is no real dispute about the nature of the contract and the quality of the work done by Ryu Electric. I am therefore satisfied that Intaglio Design is in breach of contract for the services provided by Ryu Electric.

The Limitations Act Issue

48 Intaglio Design argues that since the action was only commenced on April 9, 2015, the claim relating to Fionn MacCool's, which is based on an invoice dated November 22, 2012, is statute-barred even allowing for a reasonable time frame within which payment on the invoice could be expected.

49 Ryu Electric argues that when the nature of the business relationship is properly viewed in context, the periodic payments made by Intaglio Design were payments "on account." The effect of the partial payments on account is that the entire debt owed is considered as a whole, and therefore the limitation period would only start to run two years after the final payment which was made on October 21, 2014. Ryu Electric relies on the authority of section 13(11) of the Limitations Act, which provides that partial payment serves as a substitute for an acknowledgment of debt and therefore "re-sets" the start of the limitation period to the date of the acknowledgment of the debt.

50 The starting point for determining this issue is my finding that the periodic payments made by Intaglio Design were generally made "on account", as opposed to specifically related to a particular invoice. In cases where a debtor makes periodic payments on a running account, the court will treat the balance as a single debt and the periodic payment as being made in respect of the entire balance, see Justice Graeme Mew et al., *The Law of Limitations*, 3d ed. (Toronto: LexisNexis, 2016) at p. 226-227. As such, a periodic payment in relation to the entire balance owing on account has the effect of an acknowledgment of the debt and serves to re-set the limitation period.

51 The scenario would have been different, if I had found that the nature of the relationship between the parties was such that the various invoices were treated as separate or discrete debts. Were that the case, Ryu Electric

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would have been free to allocate specifically unallocated payments to statute-barred debts, but the allocation by Ryu Electric would not have had the effect of re-setting the limitation period, see *Burton v. Hunter*, [1931] S.J. No. 11 (Sask. C.A.) at para. 7.

52 That said, in view of my finding that the payments were generally made "on account", I am satisfied that the debt relating to Fionn MacCool's project is not statute-barred. I acknowledge that one of the few allocated payments in this case was the \$10,000 deposit towards the Fionn MacCool's project. However, as I have indicated, I am not satisfied the \$30,000 second payment was specifically directed to Fionn MacCool's, rather I find that it was a payment on account.

The Extras and the Claim of *Quantum Meruit*

53 In relation to the first project, Fionn MacCool's, Intaglio Design accepts that the extras relating to fluorescent light fixtures, "relamps" for outside lights and rewiring for a dishwasher, were all proper. In relation to the fire alarm, Intaglio Design does not dispute that the alarm was approved of but claims that the price should have been \$8,000 instead of \$13,000. I reject Mr. Hong's testimony on this issue. His evidence on this issue amounted to effectively an assertion that fire alarms can be installed for less than the price charged by Ryu Electric. While that may be true, the chain of emails tendered, while not directly addressing the price for the fire alarm, support Mr. Ryu's version of events as to how the discussions revolving around the fire alarm unfolded. In particular, they support the view that a specific type of alarm was requested and authorized by the owners of the restaurant. I accept Mr. Ryu's evidence that this is the alarm that was installed. In addition, I note there was no complaint regarding the invoiced price of the alarm at the time. I pause to note that I reject Mr. Hong's evidence that he never received the invoice. I find that he did. That being the case, one wonders why, on his own evidence, Mr. Hong paid \$40,000 toward this project if indeed the alarm portion of the invoice was \$5,000 higher than had been agreed upon.

54 In relation to the second project, Intaglio Design agrees that approximately \$5,500 in extras were approved but disputes the balance of approximately \$4,750. The invoice submitted by Ryu Electric does not set out the cost of the various extras performed. However, I accept that the extras were authorized and that the dispute is about the value. On this issue, I note that there were no complaints about the work done and no complaints about the amount reflected on the invoice. As a result, I accept Mr. Ryu's evidence that extras in the amount of approximately \$10,250 were approved by Mr. Hong.

55 In relation to the third project, Mr. Hong agrees that he authorized extras in the amount of \$3,069 for the Burrito Boyz Restaurant and \$600 for the Convenience Store. Mr. Ryu maintains that he received authorization for \$8,136.75 for the former and \$900 for the latter. With one exception, it is agreed that the extras were performed as invoiced. The dispute is over the price. On this issue, I accept Mr. Ryu's evidence. The work was completed and invoiced without complaint, and I infer that had there been an issue Mr. Hong would have raised it. In relation to a \$1,200 charge for a duct heater, there is a dispute about whether the item was ever authorized. There is evidence before me that owner of the Burrito Boyz Restaurant never requested the conversion of the duct heater from gas to electric. However, I am not satisfied that Mr. Hong never approved it. I accept Mr. Ryu's evidence that the work needed to be done, was done and was approved by Mr. Hong.

56 As a result of the foregoing, I need not address the issue of *quantum meruit*. I accept Mr. Ryu's testimony that all the extras were approved by Mr. Hong. I rely on my findings that Mr. Ryu provided invoices for the work done, including the extras. I also rely on the fact that there were no contemporaneous complaints about the extras, or indeed any of the work performed Ryu Electric.

Conclusion

57 I am satisfied that the Plaintiff has proven his claim on a balance of probabilities. That said, having found that the Plaintiff acknowledges that a payment of \$10,000 was specifically allocated as a deposit towards the Fionn MacCool's project, I deduct that amount from the balance owing. The \$10,000 was not properly allocated and given

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that the action, as framed, relates to a breach of contract for the three specified projects, I find that \$10,000 has already been paid towards one of those projects.

58 As a result, I award the Plaintiff \$77,437.30 plus pre and post judgment interest.

59 If the parties cannot agree on costs, the Plaintiff is to file written submissions within 15 days of the date of the release of this judgment. The defendant is to file written submissions within 30 days of the date of the release of this judgment. The written submissions are to be no longer than 3 pages double spaced. If no submissions are received by the 31st day after the release of these Reasons, there shall be no order as to costs.

J. DiLUCA J.

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Nathan Korenberg