CITATION: S & K Construction v. North American Muslim Foundation., 2016 ONSC 1134
COURT FILE NO.: CV-12-463077-00
DATE: February 12, 2016

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Lien Act,* R.S.O. 1990, c.C.30

B E T W E E N:	
1790855 ONTARIO LIMITED o/a S & K CONSTRUCTION	Ann A. Hatsios, for the plaintiff, Tel.: 905-850-6116, Fax: 905-850-9146,
Plaintiff	Fawad Siddiqui, for the defendant, North American Muslim Foundation, Tel.: 416-847-4878, Fax: 416-847-4877,
-and-	
NORTH AMERCIAN MUSLIM FOUNDATION, ALI HUSSAIN carrying on business as ALI'S CONTRACTING and THE TORONTO DOMINION BANK	Shahzad Siddiqui, for the defendant, Ali Hussain cob Ali's Contracting, Tel.: 416-291-6786, Fax: 416-291-8784.
Defendants	
	HEARD: September 2, 3, 4, 8 and 9, 2015

Master C. Wiebe

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] The plaintiff, 1790855 Ontario Limited o/a S & K Construction ("S&K"), a subcontractor, has preserved a claim for lien in the amount of $35,690.99 in relation to certain lands owned by the North Amercian Muslim Foundation ("NAMF") at 4140 Finch Avenue East, Toronto ("the Property"). The contractor is alleged to be Ali Hussain c.o.b. Ali's Contracting ("Hussain").

[2] Hussain denies the S&K claim, counterclaims against S&K and crossclaims against NAMF. At the end of trial, Hussain's counterclaim for damages as against S&K was reduced to $100,000 for economic loss due to S&K's alleged delay, and its crossclaim against NAMF was reduced to $35,000 on account of alleged loss of profit and payment for an HVAC unit.

[3] NAMF also denies the S&K claim, counterclaims in its pleading against S&K for $76,020, and crossclaims in its pleading against Hussain for $91,020 plus contribution and indemnity for the S&K claim.

[4] The trial hearing of this case took place on the above noted dates. For the reasons stated herein, I have decided on a mixed result.

II. BACKGROUND

i. Case history

[5] I will review the relevant, undisputed facts. NAMF is a 40 year old community, non-profit organization. In 2007 it moved into the Property. There was a large old building (built in the 1960's) on the premises at that time. NAMF started using Hussain for certain renovation projects on the Property, such as the framing and drywall for a mosque hall, the framing, drywall and drop ceiling for 9 classrooms, the framing, drywall and tiling of floors for 3 classrooms and the tiling of the school hallway. The school facilities were on one side of the building and the mosque on the other side.

[6] In late 2010 NAMF asked Hussain to quote on a larger project for the renovation of the middle section of the building into a gym. Hussain provided a written quote in October, 2010 for flooring, HVAC, electrical and concrete wall and ceiling work in the gym space at a price of $296,752.12 (tax inclusive). NAMF accepted this quote. It applied for and obtained funding assistance from the Ontario government for half the cost of this project.

[7] The renovation of the gym space involved the removal of concrete block walls and beams and columns that had supported the existence of a separate room in the gym space. This removal created the need for 2 new beams and 4 new columns, a change that caused budgetary stress for NAMF. Hussain hired S&K in January, 2012 to do this work plus some painting and an overhead door. S&K did that work to Hussain's satisfaction.

[8] Hussain's quote had included the amount of $111,862.50 for a hardwood gym floor. NAMF's budgetary stress led NAMF to re-engage with Hussain in March, 2012 about the floor for the purpose of finding savings. Hussain had never done a gym floor. In October, 2010 Hussain had obtained a quotation from Flex Court Canada for a modular floor, a poured rubber floor and a rubber vinyl sheet floor. After a discussion, Hussain and NAMF agreed on an epoxy floor. There is a dispute as to whether NAMF wanted the installation to be a temporary one. There is no dispute that Hussain and NAMF agreed that the floor should be durable and smooth.

[9] Hussain then approached S&K's principal, Sonny Andrews, to quote on the epoxy gym floor. Mr. Andrews had done one epoxy floor, but no gym floor. S&K provided such a quote on April 2, 2012. It was in the amount of $38,413.80 (tax included). The quote was stated to be "based on existing conditions." It stated that there would be a 33% deposit. There is a dispute as to what Messrs. Andrews and Hussain agreed to concerning the final smoothness of the floor.

[10] On April 2, 2012 Hussain provided and installed two roof-top HVAC units. NAMF paid him for these two units. At some point thereafter (the time is not clear) Hussain also supplied a third roof-top HVAC unit, but was not paid for this third unit. Later, during the litigation, on February 13, 2014, Hussain rendered an invoice for this unit and related installation work in the amount of $11,978 (tax inclusive), which invoice remains unpaid.

[11] On or about April 27, 2012, Hussain paid S&K a deposit for the floor work. There is a dispute as to whether it was $10,000 or $13,500. S&K began working on the floor in the latter part of April, 2012. The floor grinding started on April 27, 2012.

[12] S&K retained Taylored Industrial Flooring ("Taylored") to grind the floor and apply the epoxy finish. The principal of Taylored is Richard Taylor. Taylored ground the floor over two days, and applied a primer in one day. Given the age of the building and the fact that the gym space had been two rooms at one point, there were several imperfections, namely indentations, small holes, divets, cracks and nicks in the floor. Taylored attempted to fill in the imperfections. It then cleaned the floor and, over two days, applied the first coat of epoxy. The epoxy cured over one day. Taylored attended again, cleaned the floor and applied the second coat of epoxy. The floor was not completely smooth.

[13] Mr. Andrews left on a three-week trip to Europe on May 11, 2012. On May 15, 2012 Hussain sent Mr. Andrews an email expressing concerning about the time it was taking to complete the floor. Mr Andrews returned in early June, 2012. The floor was not done.

[14] Hussain was not satisfied with the floor. He required that S&K re-grind areas of the floor and reapply epoxy. It did so. Mr. Andrews then sealed the floor and installed the gym lines, assisted by his worker, Dennis Liscombe.

[15] It is unclear whether the epoxy floor was finished. The S&K witnesses discussed an intention to apply two clear coats. Nevertheless, S&K rendered an invoice (dated "April 2, 2012") to Hussain for the floor work in the amount of $38,413.79.

[16] S&K performed four other items of work in the gym space in June, 2012. On June 5, 2012, it leveled the interior stairway wall due to deficiencies from a previous contractor, and rendered an invoice of $1,582 (tax inclusive) for this work on June 6, 2012. On June 7 and 8, 2012 it tiled the wall of the stairway and the area above the front of the stairs, and rendered an invoice of $1,943.60 (tax inclusive) for this work on June 8, 2012. On June 15, 2012, it constructed a stage in the gym space, and rendered an invoice of $2,576.40 (tax inclusive) for this work on June 15, 2012. On June 23, 2012, it constructed an aluminum gate at the stairway leading to the exterior of the gym, and rendered an invoice for this work of $1,175.20 (tax inclusive) on June 23, 2012. The total invoiced for these four items was $7,277 (tax inclusive). Hussain denies authorizing any of this work.

[17] NAMF was dissatisfied with the floor. It convened a meeting with Hussain in July, 2012. The exact date of the meeting is unclear. On July 9, 2012, in advance of the meeting, Hussain, dissatisfied with S&K, obtained a quotation from Peter Lazaro of Epoxyguys for the repair of the epoxy gym floor, which quotation was in the amount of $26,500 plus HST.

[18] At the meeting with NAMF, Hussain claims he offered to pay for the floor repair himself, and that NAMF rejected his offer and terminated his contract. NAMF claims that it wanted Hussain to commit in writing to repair the floor, that Hussain refused to do so, and that Hussain abandoned the contract. On July 15, 2012, Hussain presented NAMF with an invoice for the gym floor in the amount of $58,760 (tax inclusive), which remains unpaid.

[19] On July 15, 2012, NAMF obtained a quotation from a firm called Gym-Con Sports Flooring ("Gym-Con") for the supply and installation of a "Pulastic floor system" for a price of $51,000 plus HST. Gym-Con also quoted $3,000 plus HST to remove the epoxy. Gym-Con was hired to do this work, and did it by the end of August, 2012, rendering four invoices totaling $61,020 (tax inclusive).

ii. Litigation history

[20] On July 13, 2012, S&K registered a claim for lien in the amount of $35,690.99. On September 10, 2012, S&K purported to perfect its lien by commencing an action and registering a certificate of action. On November 12, 2012 NAMF delivered its statement of defence, counterclaim and crossclaim. In its initial pleading, in addition to its other claims as noted above, NAMF claimed $100,000 in damages for loss of reputation as against both S&K and Hussain. NAMF subsequently removed that claim. On December 18, 2012, Hussain delivered his statement of defence, counterclaim and crossclaim.

[21] Pleadings eventually closed. On April 18, 2013, S&K obtained a judgment of reference from Justice J. MacDonald. The matter came before me for a first trial management conference on July 22, 2013. I conducted five trial management conferences in this reference on the following dates: July 22, 2013, February 4, 2014, March 17, 2014, October 1, 2014 and January 15, 2015. All, with the exception of the first, were by phone.

[22] I also heard two motions, with the first one being a motion by NAMF on March 17, 2014 concerning certain S&K discovery undertakings and a change in the deadline for expert reports, and with the second one being motions by S&K and NAMF on July 14, 2014 concerning discovery undertakings and refusals and the amendment to the NAMF pleading withdrawing the loss of reputation damages claim.

[23] Of note, I gave several directions concerning the delivery of expert reports when in the end none of the parties called an expert witness who was not a part of the factual matrix. On October 1, 2014, I ordered that the trial hearing proceed as a summary trial over five days in September, 2015.

[24] There is one issue to be dispensed with at this stage. In his pleading, Hussain alleged that he had been improperly named as a defendant in this action, and that his company, ASAII Contracting Inc., should have been named. However, Hussain did not pursue this issue at trial, and I will, therefore, not deal with it.

III. ISSUES

[25] This case raises the following issues:

a) What was in the contract between NAMF and Hussain concerning the floor?

b) Was there a breach of that aspect of the contract?

c) What, if any, damages flow from that breach?

d) What was in the subcontract between Hussain and S&K concerning the floor?

e) Was there a breach of that subcontract?

f) What, if any, damages flow from that breach?

g) Were there subcontracts for the non-floor work done by S&K?

h) Is Hussain entitled to be paid for the third HVAC unit?

IV. WITNESSES:

[26] Before I discuss the issues, I will make some general comments about the witnesses who were called at the trial hearing. Mr. F. Siddiqui brought to my attention the comments of Justice Cameron in *Prodigy Graphics Group Inc. v. Fitz-Andrews* [2000] O. J. No. 1202 at paragraph 46. I have applied the criteria described in this case.

[27] S&K called Messrs. Andrews, Liscombe and Taylor. NAMF called Farooq Khan, the executive director of NAMF and the one with responsibility for the gym project, Sheharyar Shaikh, the current imam for NAMF and a member of the NAMF board of directors at the relevant time, Joe Wilson, the vice-president of Gym-Con and the one who supervised the installation of the Pulastic floor system, and Emilio Leoni, the president of Laurentian Athletics Industries (1970) Ltd. ("Laurentian") and the one who supervised the installation of two swinging basketball nets in the gym. Hussain called only himself.

[28] I found each one of these witnesses, with the possible exception of Messrs. Taylor and Leoni, had credibility issues emanating from a close association with the parties and the issues in this case. This was certainly the case with Messrs. Andrews, Hussain and Khan, each of whom represent the parties in the case. It was also the case with Mr. Liscombe, a long-time and continuing employee of S&K. Mr. Wilson, although not representing a party in the action, did represent the contractor that gave an opinion to NAMF about the condition of the epoxy floor that led NAMF to hire Gym-Con. All of these witnesses were, therefore, "invested" in the outcome of this case to a considerable degree.

[29] None of these witnesses allayed my concern about their credibility with any significant degree of detail, balance and corroboration in their evidence. Much of the affidavit evidence in

chief was not corroborated. When conflicting details came out at trial, therefore, the thinness of the evidence was exposed. This was certainly the case with Mr. Andrews, who for instance had to admit in cross-examination that the installation of the epoxy floor did not take three weeks, as he stated in his affidavit, and that he in fact went on a three week vacation to Europe before the floor was done. The evidence of Messrs. Khan and Shaikh about the timing of their critical meeting with Mr. Hussain made no sense when placed against the timing of the quote Mr. Hussain obtained for the repair of the epoxy floor. Hussain's unsubstantiated assertion about having paid S&K a deposit of $13,500 and not having authorized the four extras was undermined by the S&K invoices for the extras, which were contemporaneously dated, had time sheets attached and referred to a $10,000 deposit. The credibility of Mr. Liscombe's evidence about overhearing statements from Mr. Khan authorizing the stage and approving the floor was undermined by his later statement that the clear coats of epoxy had "probably" been applied, something none of the other witnesses confirmed. Mr. Wilson's credibility was undermined when it came out that he was essentially a salesperson and promoter of Gym-Con product, and when he then was quick to call anyone who described the epoxy floor as a gym floor a "lier."

[30] As a result, when it came to determining issues that depended on the evidence of these witnesses, I relied heavily on what the documentation corroborated, what seemed reasonably to have taken place in the circumstances, and whether there were other objective factors that lent credence to their evidence.

[31] I found that Messrs. Taylor and Leoni were the most forthright and believable. They appeared to have the least amount "invested" in the case. They were prepared to concede points that did not help the parties that called them. For instance, Mr. Taylor conceded that his grinding produced much dust and "small craters and nicks," that Mr. Andrews instructed him to make the floor only "look like a basketball court," and that the clear coats of epoxy would not fill in holes. He conceded that the floor in the end did not have a consistent look, was not smooth and "was not a great floor." Mr. Leoni's evidence was not critical to the case. But he conceded that from 30 to 40% of elementary schools had epoxy gym floors. Therefore, I gave the evidence of these witnesses more weight on points to which their evidence applied.

V. ANALYSIS

a) What was in the contract between NAMF and Hussain about the floor?

[32] The following are the issues that need to be determined in relation to the contract between NAMF and Hussain ("the Head Contract"):

i. Was Hussain to advise NAMF as to the options for the floor?

ii. Was the epoxy floor to be a temporary installation?

iii. Was the floor to be "smooth"?

a.i Was Hussain to advise NAMF as to the options for the floor?

[33] As to whether Hussain was contractually obligated to advise NAMF as to the options for the floor, I have concluded from the evidence that there was this obligation. Hussain made an original proposal for the gym project in October, 2010 that included a hardwood floor. He had obtained a quotation from Flex Court Canada as to options for the floor at that time. After all, Hussain had never done a gym floor in the past. NAMF accepted that quotation, but subsequently encountered unexpected costs concerning new beams and columns. In March, 2012 Mr. Khan approached Hussain again about creating savings through another form of floor that was not as expensive as the hardwood. In oral evidence, Hussain confirmed that there was such a discussion, although he did not know when it happened. He stated that he presented epoxy as an option along with the other options he had previously obtained because epoxy was both more durable and less expensive than hardwood and these other options.

[34] This evidence indicates to me that the Head Contract for the gym project, as originally agreed upon, was amended orally in March, 2012 to require that Hussain provide NAMF with advice as to the proper floor to be used to meet NAMF's requirements as to durability and price.

a.ii Was the epoxy floor to be a temporary installation?

[35] As to whether the epoxy floor was supposed to be a temporary installation, I have come to the conclusion that it was not. Hussain alleged in his affidavit that NAMF told him that it "wanted a temporary epoxy floor" and that NAMF wanted to replace the existing building. Mr. Khan denied this assertion. On balance, I believe Mr. Khan here for the following reasons. First, there was the financial reality confronting the owner concerning the gym project. NAMF is a non-profit organization that survives on donations and public monies. Concerning the gym, it had a firm budget that was based on Hussain's original price. It was on the basis of that budget that NAMF obtained public funding assistance. It was in part because of a crisis in that budget that NAMF elected to go with an epoxy floor. This is all evidence of an owner that did not have the resources for the replacement of the floor in the near future.

[36] Second, the eventual conduct of NAMF is consistent with its position. When the epoxy floor did not work out, NAMF chose in mid-July, 2012 to have a pulastic floor system installed. This is only four months after it chose to install the epoxy floor. There was no dispute that the pulastic floor system was a permanent installation. Indeed, Mr. Khan confirmed that NAMF is still using that floor at present, over 3 years after the installation. I was not made aware of any change in the other aspects of the construction of the building. This all indicates to me that the owner wanted a permanent floor installation from the beginning.

[37] There are two additional reasons. There is no document that corroborates the evidence of Messrs. Hussain and Andrews about the alleged temporary nature of the epoxy floor. I would have thought that these two experienced contractors would have confirmed this vital aspect of the project in some document, such as an email. They did not. Also, I note that the cost of the pulastic floor to the owner was comparable to what Hussain charged for the epoxy floor. Why would an owner pay so much for only a temporary installation?

a.iii Was the floor to be "smooth"?

[38] As to whether the Head Contract required the floor to be "smooth," I have concluded that it did, at least to the point of being capable of being used as a gym (with true ball bouncing capacity) and not a tripping hazard. At one point in his cross-examination, Hussain acknowledged that what was understood to be the contractual standard was "smoothness," although he added that he told NAMF that the floor could never be 100% smooth due to its age and previous use. NAMF's position was that it contracted for 100% smoothness.

[39] In my view, given the age and condition of the existing concrete floor, what the parties would have agree to, acting reasonably, was a standard of smoothness that allowed the floor to be used properly for gym activities and without being a tripping hazard. That is what I find.

b) Was there a breach of the floor aspect of the Head Contract?

[40] The following are the issues to be determined as to whether there was a breach of the Head Contract in relation to the floor:

i. Was the floor in the end as "smooth" as was required?

ii. If not, was Hussain given a proper chance to repair the floor?

iii. Should Hussain have advised NAMF to install a pulastic-like sports floor?

b.i Was the floor in the end as "smooth" as was required?

[41] As to whether the floor was as "smooth" as was required by the Head Contract, I have concluded that it was not. I draw this conclusion largely from the evidence of Mr. Taylor. He frankly discussed the difficulties he had in grinding this old and brittle floor. He confirmed that the grinding removed many stones from the concrete, produced 50 bags of dust and created indentions and holes. He confirmed that there were many changes in elevations of the floor. He stated that he tried to smoothen out the floor using epoxy paste, but he added immediately that he might have missed holes and that the floor in the end "wasn't a great floor." He stated that the floor "looked like a basketball court," as opposed to being a real basketball court.

[42] Mr. Taylor's testimony was consistent with other evidence on this point. Most telling were the photographs Mr. Khan took in June, 2012 of the floor. The photographs show a floor with such significant undulations that the bouncing of a ball on the floor would not have been true. Furthermore, the floor appears to have been a tripping hazard in places, such as at the front of the door. The existence of a "bump" at the door was confirmed by Messrs. Shaikh, Khan and Hussain. Finally, and most importantly, Mr. Andrews acknowledged in cross-examination that only 30% of the indentations in the floor were removed, that only 20% of the niches were removed, that over 40% of the considerable number of divots in the floor remained in the end, and that the floor presented a tripping hazard in places. I give considerable weight to this frank evidence from Mr. Andrews because it was against his company's interest in the case.

[43] Ms. Hatsios and Mr. S. Siddiqui argued that the onus of proving this deficiency rested with the one asserting it, namely NAMF, and that NAMF did not produce an expert to opine on the epoxy floor. They argued that neither Messrs. Wilson nor Leoni were expert witnesses and that their opinions of the floor should not be accepted. Ms. Hatsios presented the decision of Justice Lalonde in *Safe Step Building Treatments Inc. v. 1382680 Ontario Inc.* 2004 CarswellOnt 4060 (S.C.J.). This case is similar to the one before me. A contractor had installed an epoxy cover over newly made concrete floors in a construction project. Discoloration and cracks along seams appeared in the epoxy, and expert evidence was called as to whether the epoxy cover was defective. Mr. Siddiqui presented the Supreme Court of Canada decision in *Swift v. MacDougall,* [1976] 1 S.C.R. 240, a slip-and-fall case where one of the issues was whether a stairway had been constructed defectively. The Court drew an adverse inference from the absence of expert evidence on the issue of the defective stairway.

[44] I accept that Messrs. Wilson and Leoni were not experts. They were not qualified as such, they did not present an expert report, and they did not swear an acknowledgment of expert's duty. But there are times when the assistance of an expert is not necessary. Given the compelling nature of the evidence concerning the floor, I find this to be such a case. It appears that all of the witnesses were of the view that the floor was, in Mr. Taylor's words, "not a great floor." Furthermore, the issue is a relatively straight forward one, namely whether the floor was smooth enough to function as a gym floor and not be a tripping hazard. That issue is not of such a technical nature as to require expert evidence. I distinguish both the *Safe Step* and *Swift* cases on this basis. In those cases, the issues were the discoloration and delamination of epoxy and the proper construction of a stairway, issues for which technical assistance was necessary. That is not the case before me. Finally, I note that an expert witness would have looked at the same documents that the court examined. Therefore, I do not find the absence of expert evidence to be fatal to NAMF's position that the floor was defective.

[45] Hussain asserted in his affidavit that the floor was not finished when it was replaced. He asserted that two clear coats of epoxy were yet to be applied and that these two coats would have provided the necessary smoothness. Mr. Andrews did not corroborate this. He stated that the two clear coats were not necessary, and were to be done only to accommodate NAMF's concerns. He stated that he painted the lines because the floor was "basically done." Mr. Taylor, the one who applied the epoxy, stated that the clear coats would not have filled in the holes and divots. I accept the evidence of Messrs. Andrews and Taylor evidence here, primarily, again, because these are statements against the interest of the party calling those witnesses.

[46] Finally, Messrs. Andrews and Liscombe asserted that Mr. Khan approved of the floor. Mr. Khan denied these assertions, and there was nothing that corroborated them. I find them to be self-serving and lacking in credibility. I give them no weight. I find that the floor work was finished, but that the floor was not as smooth as required by the Head Contract.

b.ii Was Hussain given a proper chance to repair the floor?

[47] It is well established law that a contractor should be given a reasonable opportunity to repair its deficiencies. As to whether Hussain was given such an opportunity to repair the floor, I

have concluded that he was. Mr. Andrews confirmed that after Taylored left the project and an inspection was done of the floor by Hussain and Mr. Khan, he, Mr. Andrews, was required to perform additional grinding in certain areas, which he then did. He testified that he, himself, returned to do spot repairs on the floor. This would have been in June, 2012. Mr. Andrews described in his oral evidence the frustration he felt when there was evidence of scuffing of the floor between attendances. But he confirmed that this scuffing did not affect the smoothness of the floor. This evidence confirms that NAMF gave Hussain and S&K an opportunity to repair the floor.

[48] Hussain stated that he wanted to perform other repairs and was not given that opportunity. In my view, that would have been a reasonable position if Hussain could show two things: that these additional repair options had a reasonable prospect of success, and that he showed NAMF these reasonable prospects of success.

[49] The first of these other repair options was the two clear coats of epoxy. At one point in his evidence, Hussain described the two clear coats as in effect a "repair" option that NAMF did not allow. I have already discussed this point. Whether the clear coats were a part of the Hussain original scope of work or were a repair option, I find that they would not have adequately addressed the smoothness problems for the reasons already given above.

[50] The other repair option was the one that Hussain obtained in advance of the July, 2012 meeting he had with NAMF about the floor. On July 9, 2012, Hussain obtained a quotation from Peter Lazaro of Epoxyguys for a complete redo of the epoxy floor. The quoted price was $26,500. The quote appears to contain some additional minor repair work on the landing. Hussain stated in his evidence that he presented this repair option to NAMF at the meeting and added that he would pay for this repair "out of [his] own pocket."

[51] This would have been a reasonable request by Hussain had he brought Mr. Lazaro to the meeting to explain to NAMF in detail how this proposed work would repair the epoxy floor. Hussain did not do that. Indeed, he did not bring Mr. Lazaro to the trial. I note that Hussain included Mr. Lazaro in the witness list for the trial that I prepared at the October 1, 2014 trial management conference. But Mr. Lazaro was not produced at trial. Mr. S. Siddiqui advised in closing argument that Mr. Lazaro had been "difficult to get" and would have been an "adverse witness." Mr. Siddiqui tried nevertheless to have me accept the quotation as a business record. I do not do so, as it was not a document that was produced in the ordinary course of business. It was a quotation on a specific job, and needed to be explained. I not only reject the admissibility of the document, but I also draw a negative inference from Mr. Lazaro's absence and Mr. Siddiqui's description of Mr. Lazaro as a potentially "adverse witness" that Mr. Lazaro's evidence would not have assisted Hussain on this point. Given the work that was done on the floor by the original epoxy installer, S&K, NAMF and the court needed to hear from Mr. Lazaro as to how his proposed work would have brought the floor up to the contractual standard. That was not done. I do not accept the Epoxyguys quotation as a reasonable repair option.

[52] This leads to a discussion about whether the Heard Contract was properly terminated by NAMF at the July, 2012 meeting. For the record, I accept Hussain's version of what happened at

this meeting. The reason is the timing of the meeting. The timing of the meeting must have been after Hussain obtained the Epoxyguys quotation on July 9, 2012. Otherwise, Hussain would not have wasted his time in getting that quote. This means that the meeting happened at about the time NAMF first approached Gym-Con. In the Gym-Con quotation dated July 13, 2012, Mr. Wilson referred to an earlier meeting and site visit. The reasonable inference to be draw from this chronology is that NAMF had already made up its mind to terminate the Head Contract when the meeting happened, which is what Hussain asserted. I accept that assertion. I find that the version of the meeting presented by Messrs. Shaikh and Khan not credible. Given his long relationship with NAMF, Hussain would not have stormed out of the meeting simply because he was asked to sign a document.

[53] However, I am not prepared to find that this contract termination was unreasonable. The owner had given Hussain a reasonable opportunity to repair the epoxy floor, and Hussain had failed to perform a repair and had not produced proof that he could perform a repair. In the circumstances, I find that the NAMF acted reasonably in terminating the Head Contract.

b.iii Should Hussain have advised NAMF to install the pulastic-like sports floor?

[54] In his final argument, Mr. F. Siddiqui argued that Hussain breached the Head Contract by failing to advise NAMF to install a sports floor that was like the Gym-Con pulastic floor. I do not accept that argument. First, the evidence showed that Hussain did in fact advise NAMF about such options. In cross-examination by Mr. S. Siddiqui, Mr. Wilson acknowledged that the Flex Court Canada options that Hussain obtained and reviewed with NAMF were legitimate sports floors. Mr. Wilson added that these options were not as superior as the pulastic floor because of what he described as maintenance and durability concerns. However, there was no expert evidence from NAMF that the Gym-Con pulastic floor was so commonly used as to be one that anyone charged with researching sports floor options should have become aware of.

[55] Second, I do not accept NAMF's argument that the epoxy floor was not a sports floor at all, and that Hussain should not have presented it as an option to NAMF as a result. This what Mr. Wilson maintained, but I found those statements to be self-serving and not credible. Mr. Leoni, the one who referred Mr. Wilson to NAMF, acknowledged in his oral evidence that in his experience epoxy floors are commonly used as gym floors in elementary schools. The gym floor in issue here would have been used by elementary school children as well as adults.

[56] In any event, even if there was a breach here, there was no credible evidence that NAMF would have agreed to have Hussain install a pulastic-like floor. This was due to economic considerations. NAMF was in the budgetary crisis in early 2012. It was looking for cost savings. The cost of the Flex Court Canada options (without the Hussain markup) was roughly comparable to what the Gym-Con installation eventually cost NAMF. With the Hussain standard 20 to 22% markup, the Flex Court Canada cost would have been too expensive for NAMF at that time. The only reason NAMF was able to get the pulastic floor installed in the end at a cost that was comparable to the Flex Court Canada cost was because it did not have to pay the Hussain markup.

[57] I do not find that Hussain breached the Head Contract by failing to advise NAMF to install a pulastic-like sports floor.

c) What, if any, damages flow from this contract breach?

[58] To reiterate, I find that Hussain was in breach of the Head Contract for failing to deliver a smooth epoxy gym floor. What damages flow from this breach?

[59] Hussain claimed from NAMF the loss of his approximately $20,000 markup (ie. profit) on the gym floor work as damages. I reject this claim. First, the Hussain markup on the epoxy floor was not this high. Hussain gave evidence that his standard markup on this project was from 20 to 22%. S&K charged $38,413.80 (tax included) for the floor. 22% on that amount was only $8,451.04. Second, as noted above, Hussain failed to deliver the floor he contracted to deliver. I only add here that Hussain volunteered at the July, 2012 meeting to essentially forgo his markup by paying for the Epoxyguys repair himself. This provides another reason to reject this damages claim. Had he completed the floor, Hussain would have had no profit.

[60] NAMF claims a return of the $15,000 deposit it paid Hussain for the floor work on account of Hussain's failure to deliver a smooth epoxy floor. The pleaded basis for this claim is unjust enrichment. In reviewing the evidence, I am not prepared to find that Hussain has been unjustly enriched by this deposit. I am not prepared to find that Hussain's work gave no value to NAMF. Mr. Wilson went on at length in his evidence, both in his affidavit and orally, about the work his firm did to make the floor smooth before it applied the pulastic floor system. But this evidence was not consistent with the Gym-Con quotation and the Gym-Con invoices. The Gym-Con quotation of July 13, 2012 specifies that Gym-Con was to do only $3,000 worth of work to "get the paint off of the concrete." There is no reference in the quotation to having to smoothen out the floor. The remainder of the quotation concerned the installation of the pulastic floor system. All of the four Gym-Con invoices referred only to doing shot blasting to "remove all paint." Finally, while I concede that there may have been some filling in of holes and divots by Gym-Con, I am not of the view that it was a substantial amount of work, particularly given all of the grinding and patching work that Taylored and S&K had previously done. Therefore, I do not award NAMF a return of its deposit.

[61] Finally, NAMF claims as damages the $61,020 (tax included) it paid to Gym-Con. The argument was that this is the cost of having the floor repaired and replaced. I accept only some of that claim. The base measure of NAMF's loss is what it paid for the floor in the end minus what it contracted to pay. Requiring the contractor to pay for the entire floor replacement when the contractor was only paid a fraction of its original contract price represents a windfall to the owner.

[62] What then was this "excess payment"? The cost charged by Hussain for the epoxy floor was $48,864.83, namely the S&K charge of $38,413.80 plus the Hussain standard 22% markup of $8,451.04. I note that the final Hussain bill for the floor dated July 15, 2012 contained non-gym floor work, and therefore is not a true reflection of the floor cost. The final cost to NAMF of

the floor was $76,020, namely the $61,020 (tax included) that NAMF paid to Gym-Con plus the $15,000 NAMF paid to Hussain. The "excess payment" is, therefore, $27,155.17.

[63] Of this figure, $3,390 represents the cost NAMF incurred to remove the epoxy from the floor. Gym-Con specified as much in its quotation and its invoices. As such, this is a compensable head of damage that must be paid to NAMF by both S&K and Hussain, as they are both responsible for the defective floor. The remainder of the Gym-Con invoices represents the installation of the pulastic floor.

[64] Deducting $3,390 from $27,155.17 produces that figure of $23,765.17. Is this also a compensable head of damage? In my view, it is not. The question here is one of "betterment." The pulastic floor was an enhancement of value to the owner.

[65] The onus of establishing whether a new product is not a betterment rests on the party that decides to use the new product instead of the old one, see *Pylon Paving Ltd. v. Roman Catholic Episcopal Corp. of Archdiocese of Toronto,* 1984 CarswellOnt 733 (H.C.) at paragraph 12. That would be NAMF in this case. I find that NAMF has not discharged that onus. The evidence shows that the pulastic floor was not at all comparable to the epoxy floor both in quality and price. Mr. Wilson was clear in his evidence that the quality of the epoxy floor as an all-purpose sports floor was not comparable to that of the pulastic floor. I find from Mr. Leoni's evidence that, at best, the epoxy floor was suitable for elementary school gyms. But NAMF wanted a gym floor that could be used by all of its members. Furthermore, the S&K cost of the epoxy floor was only about 2/3 the cost of the Glym-Con pulastic floor. To save money, NAMF initially decided on the epoxy floor instead of options that were comparable to a pulastic floor. It would be a windfall to NAMF if it now were to pay for a pulastic floor at the same price it would have paid for an epoxy floor.

[66] As to Mr. F. Siddiqui's argument that Hussain should be liable for the full cost of the pulastic floor due to his alleged failure to advise NAMF to get such a floor in the first place, all I need to say, and do say, at this point is that I have found that Hussain was not in breach of that part of the Head Contract.

[67] In the *Safe Step* decision, Justice Lalonde described in detail the way the betterment deduction should be calculated. Suffice it to say here that I heard nothing in the evidence that would detract me from making a full deduction of the $23,765.17 "excess payment."

[68] I, therefore, find that the only damages NAMF can claim against Hussain, and S&K, is the above noted $3,390 for the epoxy paint removal cost.

d) What was in the subcontract between Hussain and S&K concerning the floor?

[69] The following are the two issues to be deal with here:

i. What level of floor smoothness was required by the Floor Subcontract?

ii. What was the schedule for the floor work?

d.i) What level of floor smoothness was required by the Floor Subcontract?

[70] The only issue for me concerning this question is whether Hussain agreed with S&K to have S&K install an epoxy floor with the level of smoothness that was not in accordance with the floor smoothness required by the Head Contract. Any contractor acting reasonably would not have made such an agreement, as otherwise it would in effect be left potentially "holding the bag" with S&K without recourse to NAMF. Hussain was an experienced contractor. Therefore, I place an evidentiary onus on S&K to show that such a lower standard was in fact agreed upon by Hussain and S&K.

[71] Having reviewed the evidence, I do not conclude that there was such a lower standard in the subcontract between S&K and Hussain ("the Floor Subcontract"). Mr. Andrews consistently stated that he advised Hussain that the floor could not be made perfectly smooth with epoxy, given the floor's age and prior usage. Hussain conceded in his evidence that the floor could not be made perfectly smooth.

[72] As stated earlier, I have found that the Head Contract required that the floor not be perfectly smooth, but smooth enough to function as a gym floor without being a tripping hazard. I found nothing in the evidence to indicate that this was not the same standard in the Floor Subcontract. Messrs. Andrews, Liscombe. Taylor and Hussain all conceded that they knew the floor would be used by elementary school children and adults, and as a gym floor. The only conclusion to be drawn from this is they all knew the floor had to be made functional as a gym floor without being a tripping hazard. No reasonable subcontractor or contractor would agree to do a job that he or she knew could not be done.

[73] I note that the S&K quotation does contain the following clause: "Quote is based on existing condition." However, I do not view this clause as detracting in any way from the standard of floor required by the Floor Subcontract. If S&K were to be held to lesser standard, it had to make that lesser standard explicit in its contract documents. It did not.

[74] I find that the Floor Subcontract required the same standard of floor smoothness as did the Head Contract.

d.ii) What was the schedule for the floor work?

[75] In his closing argument, Mr. S. Siddiqui raised the issue of S&K delay. This requires a determination first as to what, if any, schedule was mandated by the Floor Subcontract. I was given no document showing such a schedule. The witnesses also did not deal with this issue.

[76] Therefore, the most I am prepared to find is that S&K and Hussain agreed that the floor work would be done in a reasonable amount of time. What that reasonable time was can be inferred from certain pieces of evidence. For instance, Mr. Andrews stated in his affidavit that the entire process for S&K, from grinding to painting the gym lines, took three weeks. This statement was proven later to be inaccurate during Mr. Andrews' cross-examination as the schedule was interrupted by repair work and his trip; but this gives some idea of a reasonable

contractual schedule for the work. I note also that Gym-Con took about three weeks to do its work.

[77] I find, therefore that a reasonable time for the S&K work would have been between three and four weeks.

e) Was there a breach of the Floor Subcontract?

[78] The following are the issues to be dealt with here:

i. Was the floor as smooth as was required by the Floor Subcontract?

ii. Was there a delay by S&K in its floor work?

e.i) Was the floor as smooth as was required by the Floor Subcontract?

[79] For the reasons stated earlier, I find that S&K did not deliver an epoxy floor with the smoothness required by the Floor Subcontract. Also for the reasons stated earlier, I find that S&K was given a reasonable opportunity to repair the floor, and that S&K failed to do so.

[80] As a result, I find that S&K was in breach of the Floor Subcontract.

e.ii) Was there a delay by S&K in its floor work?

[81] The evidence indicates that S&K was indeed working on the floor into June, 2012. Much of the time spent after the three weeks Mr. Andrews initially stated it took for S&K to do the work was, it appears, on account of the deficiencies in the floor.

[82] As a result, I also find that S&K was in breach of the Floor Subcontract for delay.

f) What, if any, damages flow from this Floor Subcontract breach?

[83] On account of its breach of the Floor Subcontract for failing to deliver a proper epoxy gym floor, I find that S&K is not entitled to that portion of its claim for lien that concerns work on the floor. That would be the amount of $38,413.79 - $10,000 (deposit) = $28,413.79.

[84] There was a dispute at trial as to the amount of the deposit that Hussain paid to S&K. Hussain alleged that it was $13,500, namely the $15,000 deposit he received from NAMF less the $1,500 basic holdback. Mr. Andrews asserted that the deposit was only $10,000. I accept Mr. Andrews' position as it is corroborated by S&K's April 2, 2012 invoice, which states that there was "a deposit of $10,000 cash received on April 27, 2012 . . . ." Mr. Hussain's statement has no corroboration. Therefore, the amount contained in the S&K claim for lien was properly described as $28,413.79. I reiterate that I deny this portion of the S&K claim for lien.

[85] In his pleading, Hussain claimed the following two heads of damages from S&K: the $61,020 NAMF was claiming from Hussain due to the replacement of the floor as essentially a "flow through" claim; and the return of the $13,500 deposit Hussain says he paid to S&K on

account of S&K's alleged unjust enrichment resulting from S&K's failure to deliver a proper floor. Neither of these claims was brought up by Mr. S. Siddiqui in his closing argument. For the record, I would not have awarded these claims to Hussain in any event. Concerning the floor replacement costs, I have found that NAMF cannot claim these damages from Hussain. Therefore, there is no loss for Hussain to claim against S&K. Concerning the deposit, I have found that the deposit was $10,000, not $13,500. Furthermore, I am not prepared to order that the $10,000 be repaid for the same reasons that I refused to order that the original NAMF deposit with Hussain of $15,000 be repaid. In my view, the evidence shows that neither Hussain nor S&K were unjustly enriched by these deposits. Their work did give some value to the owner, for the reasons stated above.

[86] In closing, Mr. S, Siddiqui argued that S&K was in breach of the Floor Subcontract because of its delay of the floor work, and that this caused Hussain the damage of losing his potential future contracts with NAMF for the remainder of the construction on the site. Evidence came out at trial that NAMF planned at the time to do considerable additional work on the site in the mosque area and elsewhere. This was called the "grand plan." Mr. Khan in his evidence had indicated that the cost of this additional work was approximately $500,000. Hussain claimed in his oral evidence at one point that this cost was in the order of $5 million. Mr. Andrews claimed that it was $2 million. No corroboration for these positions was presented.

[87] Mr. S. Siddiqui argued that, if Hussain had been retained by NAMF for the "grand plan" and if he had recovered his usual profit margin on this work, he would have gained a considerable profit. The argument was that this profit would have been either the usual 20% margin on Mr. Khan's $500,000 cost figure or a more "conservative" 15% margin on a higher cost figure that Mr. S. Siddiqui suggested, $700,000. Both calculations produced a potential profit to Hussain of about $100,000. The argument was that this $100,000 was a damage that Hussain suffered due to the lost opportunity of working on the "grand plan" that S&K caused due to its delay. Mr. S. Siddiqui referred me to two cases that concerned economic loss in negligence and breach of contract cases: *Canadian Faces Inc. v. Cosmetic Manufacturing Inc.* 2011 ONSC 6171 (S.C.J.) and *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 S.C. R. 102.

[88] I do not accept this claim. As stated by Justice Stinson in *Mason Homes Ltd. v. Oshawa Group Ltd.* 2003 CarswellOnt 3728 (S.C.J.) at paragraph 256, there are three requirements in proving damages for loss of opportunity: the claimant must show that the contract breach caused the alleged loss of opportunity; the lost opportunity had a reasonable prospect of materializing; and the damages for the lost opportunity must be valued.

[89] I have found that Hussain has failed the first and third tests. First, there is no clear line of causation between the S&K delay and Hussain's failure to secure future work from NAMF. Mr. Siddiqui argued that, but for the S&K delay, Hussain could have been able to placate NAMF's concerns about the floor. I do not accept that proposition. As discussed above, I have found that Hussain did not come up with viable repair options for floor. NAMF terminated the Head Contract (and any opportunity for future Hussain work with NAMF) because Hussain could not fix the floor. Second, even if Hussain were to overcome the considerable causation hurdle as

described above, I find that there was no credible evidence that Hussain, had he done the future NAMF work, would have recovered any profit. Hussain did not produce any evidence of his financial history which would demonstrate that he consistently recovered a 15 to 20% profit on jobs. Furthermore, I note that the NAMF future work was considerably greater in size than anything Hussain had done to that point. There was no evidence that Hussain had the knowledge and wherewithal to take on such work successfully and make a profit. Finally, the evidence as to what would have been paid by NAMF to Hussain on the "grand plan" was entirely speculative. The evidence of Messrs. Andrews, Hussain and Khan diverged radically on this point and was unsubstantiated. I find that Hussain's claim against S&K of $100,000 in damages for lost profit on future NAMF work fails for want of a proper line of causation and for being too speculative in nature.

[90] I find that neither Hussain nor S&K suffered any damages as a result of the Floor Subcontract breaches.

g) Were there subcontracts for the non-floor work done by S&K?

[91] As stated in my discussion about the background, S&K performed four non-floor items of work in the gym space in June, 2012. I will not repeat what these items of work were. It is undisputed that S&K performed the work. The quantum of what was charged for these four items, which totaled $7,277.20, was not in dispute. The only issue was whether this work had been authorized by Hussain.

[92] Hussain did not deal with this issue in his affidavit. In cross-examination, he simply denied authorizing this work. He asserted that he was not aware of the S&K invoices for this work before this litigation. Mr. Khan dealt only with the stage item. He asserted that this was a "gift" from S&K to NAMF, presumably for having delayed the floor work. He was supported in this by Hussain. Messrs. Andrews and Liscombe were clear that all of this work had been authorized by Hussain, and that none of it was a "gift."

[93] I do not accept the positions of Hussain and NAMF on this matter. It makes no sense that a business like S&K would in effect "gift" work to Hussain and the owner, at least without clear evidence of a business incentive for such a gift and the fact of such a gift. There was no such evidence other than the self-serving statements of Hussain and Mr. Khan. In fact, the corroborating evidence was to the contrary. Most telling for me was the fact that for each item of work there was an S&K time sheet describing the work that was done on the day it was done followed by an S&K invoice to Hussain rendered on the same day or the next day. This is not the behavior of a trade that does not expect to be paid for the work. These invoices appear to have the wrong address for Hussain, which may explain why Hussain did not receive them until the litigation. But all of that does not negate the validity of the S&K claims. I would only add that in cross-examination, Mr. Khan acknowledged that none of this S&K work has been torn down. Indeed, all of it, including the stage, was subsequently used and enjoyed by the owner. Therefore, it needs to be paid for.

[94] I find that Hussain is liable in contract to pay S&K this $7,277.20. NAMF is also liable should Hussain not pay because the amount falls within NAMF's basic holdback obligation. NAMF is also the one ultimately liable to pay this amount because of the Hussain claim for contribution and indemnity for any of the S&K claim. This is proper as a matter of equity because it is NAMF who is enjoying the fruits of this S&K work.

h) Is Hussain entitled to be paid for the third HVAC unit?

[95] Finally, there is the issue of the third HVAC that was supplied by Hussain to the gym area. In his affidavit, Mr. Khan did not deny that Hussain had delivered the unit. The first reason Mr. Khan gave for not paying for this work was that an invoice had not been rendered by Hussain. In response, Hussain pointed to the invoice dated February 13, 2014 he had rendered for this work, which invoice was for the amount of $11,978 (tax included). The second reason Mr. Khan gave for not paying was that the work was not done. Hussain denied this in his affidavit. In cross-examination, Mr. Khan back-tracked from this position. He said that he had been advised by counsel not to pay the invoice and that he was in fact "willing to pay for it now."

[96] I find that NAMF must pay Hussain $11,978 on account of the third HVAC unit.

VI. CONCLUSION

[97] I, therefore, find that S&K has a valid claim for lien of $3,887.20, being the $7,277.20 for the non-floor work less the $3,390 for the NAMF cost of removing the epoxy. Both Hussain and NAMF are liable to pay S&K this amount. If Hussain pays, he is to be reimbursed by NAMF. If NAMF defaults in paying this amount, its interest in the Property may be sold, and the purchase money may be used to pay for the S&K claim for lien.

[98] I also find that NAMF must pay Hussain $11,978 for the third HVAC unit.

[99] As to prejudgment interest, the parties are to address this issue in their written submissions on costs, as discussed below. All other claims, other than costs, are dismissed.

VII. COSTS

[100] I asked for and received costs outlines from the parties on the last day of the trial hearing. The S&K cost outline showed a partial indemnity amount of $57,391.17. The NAMF costs outline showed a partial indemnity amount of $23,127.50 and a substantial indemnity amount of $39,297.50. Hussain's costs outline shows what appears to be partial indemnity figure of $20,373 plus HST.

[101] If the costs cannot be agreed upon, all those seeking costs must serve and file written submissions on costs of no more than two pages on or before February 26, 2016.

[102] Any responding costs submissions cannot be longer than two pages and must be served and filed on or before March 11, 2016.

[103] Any reply costs submissions cannot be longer than one page and must be delivered on or before March 16, 2016.

MASTER C. WIEBE

Released: February 12, 2016

CITATION: S & K Construction v. North American Muslim Foundation., 2016 ONSC 1134
COURT FILE NO.: CV-12-463077-00
DATE: February 12, 2016

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

1790855 Ontario Limited o/a S & K Construction

Plaintiff

- and -

North American Muslim Foundation, Ali Hussain carrying on business as Ali' Contracting and The Toronto Dominion Bank

Defendants

REASONS FOR JUDGMENT

Master C. Wiebe

Released: February 12, 2016