

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SORECONI
ARBITRATION TRIBUNAL

N^o REF. / SORECONI : 050427001
N^o REF. / ARBITRATOR: 13 249-6

Montreal, July 29, 2005

B. CATA CONSTRUCTION SENC

“Builder” / Plaintiff

vs.

JOE TRAPANI

-and-

MARIA FAMA

“Beneficiaries” / Defendants

-AND-

**LA GARANTIE QUALITÉ
HABITATION**

“Plan Manager” / Mise en cause

ARBITRATION DECISION

AFTER HAVING READ THE PROCEEDINGS, HEARD THE PROOF AND ARGUMENTS OF ALL PARTIES, THE ARBITRATION TRIBUNAL RENDERS ITS DECISION ON THE PRELIMINARY OBJECTION RAISED BY THE PLAN MANAGER AS FOLLOWS:

1. FACTS AND PROCEEDINGS

The Beneficiaries bought the property located at 9225 Boulevard Viau in the borough of St-Leonard, City of Montreal, Province of Quebec, (“Property”) from the Builder. The Beneficiaries took possession of the Property on December 11, 2003. On April 5, 2004, the

Beneficiaries requested the Plan Manager to proceed with an inspection of the Property. The inspection took place on May 25, 2004, and the Plan Manager's decision and report were rendered on June 18, 2004 ("Report"). According to the Builder's admission, it received the Report on June 25, 2004.

The final page of the Report indicated the modalities of the arbitration process in the event of disagreement or dissatisfaction regarding the content of the Report. The three (3) accredited arbitration agencies are listed, as well as the prescribed arbitration fees. The fifteen (15) day delay permitted to make an arbitration application following receipt of the Report is clearly indicated.

On August 5, 2004 (Exhibit A-6), the Builder sent a letter to the Plan Manager in which it indicated that the required work was, as of that date, only partially completed, and that it was not accountable for some portions of the work which remained, as it was not its responsibility to complete.

On September 30, 2004 (Exhibit A-5), the Builder sent the Plan Manager a second letter, along the same lines as the previous letter.

On April 1, 2005 (Exhibit A-3), the Plan Manager sent a final notice to the Builder, giving the latter five (5) days to complete all of the required work, failing which the Plan Manager would assign the work to another Builder.

On April 15, 2005, the Builder filed an application for arbitration with SORECONI regarding the Report, some nine (9) months after receiving the Report.

2. QUESTIONS IN ISSUE

The questions in issue are:

- 1) Is the fifteen (15) day delay to appeal prescribed by the *Regulation respecting the guarantee plan for new residential buildings* (hereinafter "*Regulation*") *de rigueur*?

- 2) If the answer to question 1) is negative, do the circumstances in the present case justify an extension of the fifteen (15) day delay to appeal?

3. ANALYSIS AND DECISION

The attorneys for the Plan Manager and the Beneficiaries both acknowledge that, in accordance with the decision of *Takhmizdjian*¹, the delay of fifteen (15) days for the filing of an arbitration application is not *de rigueur*.

Nonetheless, the facts invoked by the person requesting an extension must reasonably justify the delay elapsed and support a granting of said extension, based on the principles of equity, pursuant to Article 116 of the *Regulation*. In the case at bar, the arguments of the Builder are as follows:

- The Builder has never before contested a decision of the Plan Manager, and therefore, is new to the process;
- The Plan Manager never explained what needed to be done in order to contest the decisions contained in the Report;
- The Builder sent two (2) separate letters to the Plan Manager, dated August 5, 2004, and September 30, 2004, which stated that the decisions in the Report regarded work for which the Builder was not liable and the Plan Manager did not respond to the contrary;
- As the Builder never received a reply to either letter, the Builder contends that the delay is imputable to the Plan Manager.

¹ *Takhmizdjian c. SORECONI*, REJB 2003-44527 (C.S.).

According to the evidence heard, the Builder has over thirty (30) years of experience in the construction field. As well, contrary to what was stated, the Builder does have prior experience in the arbitration process under the *Regulation*. Specifically, in September or October 2004, the Builder made inquiries regarding another report and learned that, through arbitration, it had the right to appeal the decision of the Plan Manager. The hearings in the other file occurred between December 2004 and the Spring of 2005.

Having given due consideration to the arguments on all sides, the Arbitration Tribunal grants the preliminary objection and dismisses the application for arbitration for the following reasons:

- The Builder has been aware of the appeal process to contest the Report of the Plan Manager since October 2004, at the very latest;
- The Builder, under oath, and on numerous occasions, declined to provide its current address, thus undermining its credibility and genuineness to execute its obligations;
- The appeal was made nearly nine (9) months after receipt of the Report of the Plan Manager, and at least six (6) months after learning about the appeal process;
- The appeal was only instituted once the Builder received final notice from the Plan Manager, stating that failure on the Builder's part to perform the required work within five (5) days would directly result, without further notice or delay, in the hiring of another builder to complete the required work;
- The arguments by the Builder for the contestation are, *prima facie*, not well-founded (fault of the subcontractors for work done improperly, not of the Builder);
- The Beneficiaries have been caused significant prejudice by the delay of the Builder to correct the problems and the granting of a further delay would be unacceptable, inequitable and would bring the administration of justice into disrepute;

- In omitting to exercise its right to appeal earlier in the circumstances, the Builder was negligent.

4. AMOUNT IN ISSUE AND APPORTIONMENT OF COSTS

The amount in issue in the present arbitration is approximately twenty-seven thousand dollars (\$27,000.00).

In accordance with article 123 of the *Regulation*, the Plan Manager and the Builder should bear the costs equally.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

GRANTS the Preliminary Objection of the Plan Manager;

DISMISSES the Arbitration Application;

CONDEMNS the Plan Manager and the Builder to pay the costs of arbitration in equal amounts of fifty percent (50%) each.

Mtre. Jeffrey Edwards, Arbitrator

For the Beneficiaries :

Mtre. George Tsanoussas

BISSONET, MERCADANTE

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For the Builder :

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Mr. Antonio Catania

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ARBITRATION DECISION – SORECONI

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For the Plan Manager:

Mtre. Avelino De Andrade

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Hearing: July 14, 2005

Arbitration Decision: July 29, 2005