2013 NBBR 278, 2013 NBQB 278
New Brunswick Court of Queen's Bench

Maritime Temp Services (2005) Inc. v. Avant Garde Construction and Management Inc.

2013 CarswellNB 440, 2013 CarswellNB 475, 2013 NBBR 278, 2013 NBQB 278, 1058 A.P.R. 201, 232 A.C.W.S. (3d) 667, 408 N.B.R. (2d) 201

Maritime Temp Services (2005) Inc., Plaintiff and Avant Garde Construction and Management Inc., Defendant and Phillip Leblanc, Third Party

Stephen J. McNally J.

Heard: April 30, 2013
Judgment: September 4, 2013
Docket: MC/0193/10

Counsel: Vicky-Gina Doucette, for Plaintiff
Matthew R. Letson, for Defendant
No one for Third Party

Subject: Torts; Contracts; Civil Practice and Procedure; Estates and Trusts

Headnote

Torts --- Negligence — Vicarious liability — Miscellaneous

Plaintiff was in business of providing its clients with temporary employment or manpower services — Parties entered into agreement for provision of temporary workers to defendant's construction and project management company — Agreement provided that workers would be employees of, and on payroll of, plaintiff, who would in turn bill defendant for services provided by these employees — Plaintiff's claim related to employee F, who it had hired and assigned to work for defendant, but for whom it was not paid — Defendant claimed F was hired as part of fraudulent scheme by its project manager for which it was not responsible — Plaintiff brought action for $17,804 from defendant for reimbursement of manpower services plaintiff paid on behalf of defendant and at its request and for which payment had been refused — Action allowed — Project manager was authorized to contract with plaintiff for provision of employee's services — He issued purchase order numbers for these services for majority if not all invoices — Therefore, defendant was contractually liable to plaintiff for amounts claimed in its unpaid invoices — Defendant was also vicariously liable for dishonest and fraudulent conduct committed by project manager and losses incurred by plaintiff as result of project manager's fraudulent conduct — As between parties, it was defendant who should bear loss for project manager's dishonest conduct.

Contracts --- Performance or breach — General principles

Plaintiff was in business of providing its clients with temporary employment or manpower services — Parties entered into agreement for provision of temporary workers to defendant's construction and project management company — Agreement provided that workers would be employees of, and on payroll of, plaintiff, who would in turn bill defendant for services provided by these employees — Plaintiff's claim related to employee F, who it had hired and assigned to work for defendant, but for whom it was not paid — Defendant claimed F was hired as part of fraudulent scheme by its project manager for which it was not responsible — Plaintiff brought action for $17,804 from defendant for reimbursement of manpower services plaintiff paid on behalf of defendant and at its request and for which payment had been refused — Action allowed — Project manager was authorized to contract with plaintiff for provision of employee's services — He issued purchase order numbers for these services for majority if not all invoices — Therefore, defendant was contractually liable to plaintiff for amounts claimed in its unpaid invoices — Defendant was also vicariously liable for dishonest and fraudulent conduct committed by project manager and losses incurred by plaintiff as result of project manager's fraudulent conduct — As between parties, it was defendant who should bear loss for project manager's dishonest conduct.

Table of Authorities

Cases considered by *Stephen J. McNally J.*:

Bazley v. Curry (1999), [1999] 2 S.C.R. 534, 62 B.C.L.R. (3d) 173, *(*sub nom. *P.A.B. v. Children's Foundation)* 124 B.C.A.C. 119, *(*sub nom. *P.A.B. v. Children's Foundation)* 203 W.A.C. 119, *(*sub nom. *B. v. Curry)* 99 C.L.L.C. 210-033, 1999 CarswellBC 1264, 1999 CarswellBC 1265, 43 C.C.E.L. (2d) 1, *(*sub nom. *P.A.B. v. Children's Foundation)* 241 N.R. 266, 174 D.L.R. (4th) 45, [1999] 8 W.W.R. 197, 46 C.C.L.T. (2d) 1, [1999] L.V.I. 3046-1 (S.C.C.) — followed

ACTION by plaintiff for $17,804 from defendant for reimbursement of manpower services plaintiff paid on behalf of defendant and at its request and for which payment had been refused.

***Stephen J. McNally J.*:**

1 In this action, the plaintiff, Maritime Temp Services (2005) Inc., claims it is owed the sum of $17,804.74 by the defendant, Avant Garde Construction and Management Inc., for the reimbursement of manpower services Maritime Temp paid on behalf of Avant Garde and at its request and for which payment has been refused.

2 Maritime Temp is in the business of providing its clients with temporary employment or manpower services in New Brunswick. Avant Garde is a construction and project management company with offices located in Saint John and Dieppe, New Brunswick. On October 12, 2006 the parties entered into an agreement for the provision of temporary workers to Avant Garde by Maritime Temp. It provided that the workers would be employees of, and on the payroll of, Maritime Temp who would in turn bill Avant Garde for the services these employees provided to it.

3 In or about June or July, 2007, Jeremy Randall, then a project manager for Avant Garde, asked Maritime Temp to hire one John Folkins so that he could be supplied to Avant Garde as a labourer. Mr. Folkins performed work for Avant Garde as an employee of Maritime Temp over the course of several weeks in the autumn of 2007 and into the year 2008. Avant Garde was billed by Maritime Temp for the work performed by Mr. Folkins in the autumn of 2007 and during the months of January and February 2008, and each of those invoices were paid. Maritime Temp is making no claim for this work.

4 Maritime Temp alleges that Avant Garde, through its authorized representative and project manager, Phillip LeBlanc, requested that Maritime Temp provide Mr. Folkins services for additional periods from March 1, 2008 to September 27, 2008, that these services were provided and Maritime Temp has not been paid. Avant Garde denies that Mr. Folkins services were provided to Avant Garde after March 1, 2008. It further alleges that its project manager, Mr. LeBlanc acted fraudulently in requesting that Maritime Temp provide Avant Garde with Mr. Folkins services and that he fraudulently obtained the money paid as salary by Maritime Temp for Mr. Folkins purported services. Avant Garde maintains that it is not vicariously liable for Mr. LeBlanc's fraudulent conduct.

5 The details of Mr. LeBlanc's fraudulent scheme are helpfully summarized at paras. 5 to 13 of Avant Garde's Third Party Claim that it filed against Mr. LeBlanc:

> 5. At all times material hereto, LeBlanc was employed as a Project Manager or a Job Superintendent by Avant Garde.
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> 6. LeBlanc's employment was terminated by Avant Garde on or about September 24, 2008, for just cause.
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> 7. From time to time, between March 15, 2008 and September 6, 2008, LeBlanc represented to Maritime that an individual by the name of John Folkins had performed work for Avant Garde, for which Maritime owed payment of wages to John Folkins, which statements and/or representations were untrue and fraudulently made by LeBlanc as John Folkins performed no work for Avant Garde during that period.
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> 8. During that same period, LeBlanc fraudulently provided Maritime with purchase order ("P.O.") numbers which he represented to Maritime constituted a contract by which Avant Garde agreed to reimburse Maritime in respect of payments made to John Folkins.
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> 9. LeBlanc was not authorized by Avant Garde to issue P.O. numbers to Maritime in respect to John Folkins, as John Folkins performed no work for Avant Garde between March 15, 2008 and September 6, 2008.

10. On each occasion that LeBlanc fraudulently told Maritime that wages were due to John Folkins, LeBlanc also fraudulently told Maritime that payments were to be made by Maritime to John Folkins by way of cash, which was to be delivered by envelope to LeBlanc, who fraudulently undertook to provide the cash payment to Folkins. In fact, LeBlanc retained the money delivered to him by Maritime on each occasion, and thereby stole, converted or obtained such funds by fraud.

11. LeBlanc fraudulently concealed the payments by Maritime by fraudulently misrepresenting to Maritime that any invoices in respect to P.O. numbers provided by LeBlanc should be delivered to him.

12. LeBlanc subsequently destroyed and/or concealed all invoices received from Maritime between March 15, 2008 and September 6, 2008 in respect of John Folkins. LeBlanc further concealed his fraudulent activities, fraudulent misrepresentations, conversions of funds and theft from Avant Garde through deceit and fraud.

13. LeBlanc was a fiduciary of Avant Garde in that he had discretion in the hiring of workers for projects under his supervision as well as the issuance of P.O.'s, he could exercise that discretion to affect Avant Garde's interests and, as a result, Avant Garde was vulnerable to the misuse of that discretion. By fraudulently issuing P.O.'s to Maritime in respect of a worker who had done no work for Avant Garde during the relevant time period and subsequently converting the cash payments made by Maritime in respect of said P.O.'s, LeBlanc breached his fiduciary duty to Avant Garde (hereinafter "The Fiduciary Duty Breach").

6 These basic facts as pleaded by Avant Garde have been amply demonstrated and established on the balance of probabilities based on the evidence presented to me. I need not review the evidence relating to these facts in more detail at this stage as they do not appear to be contested or in issue. Despite these facts, Avant Garde maintains that it is not liable in contract to Maritime Temp or vicariously liable for the fraudulent acts performed upon it by Mr. LeBlanc.

7 Mr. LeBlanc did not file a defence to the Third Party Claim and was noted in default. He was not called as a witness by either party at trial.

8 On the contract issue, Avant Garde argues that its obligation to pay was only triggered upon the provision of the labour contracted for and not upon the issuance of invoices to Avant Garde. It submits that since Mr. Folkins did not in fact perform any work for it for the disputed period from March 1 to September 27, 2008, Avant Garde cannot be liable for the amount claimed.

9 Phillip Leblanc was authorized by Avant Garde to contract for the hiring of workers for projects under his supervision and to issue Purchase Orders for the supply of temporary or part time workers from placement companies such as Maritime Temp. He signed, on behalf of Avant Garde, the contract that it entered with Maritime Temp for the provision of temporary workers.

He clearly had the authority to agree to the terms of the original contract and appeared to have such authority from Maritime Temp's perspective and would also have been perceived as having authority to alter the terms of the original agreement and how it would be administered over the course of the relationship.

10 In this case, as is often the case with the provision of temporary workers according to the evidence, the parties developed the practice that Avant Garde, through its supervisor Mr. Randell originally and later Mr. LeBlanc, would deal directly with the employee and advise him when he was required. In turn Mr. Randell or Mr. LeBlanc would advise Maritime Temp at the end of the week of the amount of hours its employee worked so that the information could be entered in Maritime Temps payroll records and funds could be prepared to pay the employee.

11 Payment for services was made for the employee in cash with a copy of a pay stub to be provided to the employee when he received payment and this would be entered in Maritime Temp's payroll records to reflect that the cash advance was made to the employee. All of the employee deductions were recorded on the pay stub and in Maritime Temp's payroll records. An actual cheque was never issued to the employee. Cash is often preferred by the employee if they do not have a bank account and apparently it is not an uncommon method of payment for temporary labourers.

12 Further, as is often the custom in this business where labourers are often hired for short periods of time and are assigned to work outside of the Moncton area, the parties agreed that Mr. Randell or Mr. LeBlanc would arrange to pick up the cash envelope and pay stub on Friday and deliver it to the Mr. Folkins at the job site. This enables the employee to remain on the work site and avoids him having to travel into Moncton to pick up his pay which they often wish to receive at the end of each week.

13 This is the methodology that the parties adopted in the present case and for the payment of other temporary employees provided by Maritime Temp to Avant Garde during this time period. It was agreed to by Mr. Folkins and it worked without any problems or incident throughout the early part of the relationship and until the month of March 2008 when Mr. LeBlanc began to advise Maritime Temp that Mr. Folkins was working at jobs in Sussex and Hopewell Cape when in fact that was not occurring. On the basis of these representations and the issuance of purchase order numbers by Mr. LeBlanc to Maritime Temp it prepared the regular cash envelopes for Mr. Folkins which were picked up by Mr. LeBlanc to be delivered to him. In turn, Maritime Temp billed Avant Garde accordingly, based upon the services that LeBlanc confirmed were provided by Mr. Folkins and after payment in cash for Mr. Folkins was delivered to Mr. LeBlanc as directed and agreed.

14 Mr. LeBlanc was authorized to contract on behalf of Avant Garde for the provision of Mr. Folkins services, he issued purchase order numbers for these services for the majority if not all of the invoices. In situations where he did not provide a purchase order he provided apparently

untruthful excuses or explanations to Susan Steeves, Maritime Temp's manager, as to why he was unable to give a PO number such as new accounting systems and not having a purchase order book on hand. Nevertheless, he assured Maritime Temp that the services were provided, Maritime Temp believed him and in my view it was reasonable do so in the circumstances of this case. On the basis of Mr. LeBlanc's representations and issuance of purchase order numbers on behalf of Avant Garde, it is contractually liable to Maritime Temp for the amounts claimed in its unpaid invoices.

15 With respect to the vicarious liability issue, Avant Garde submits that Mr. LeBlanc was acting outside of his authority and only for his own benefit when advising Maritime Temp that Mr. Folkins was performing services for Avant Garde and in taking, for his own use, the cash salary payments from Maritime Temp to be delivered to Mr. Folkins. It also argues that it did not authorize Maritime Temp to send invoices to the attention of Mr. LeBlanc at the Dieppe office rather than to Saint John as had been the previous practice.

16 In summary, Avant Garde submits that Mr. LeBlanc's wrongful acts were unrelated to his employment with Avant Garde and although it admits that his employment with Avant Garde provided Mr. LeBlanc with the opportunity to commit these wrongful acts it argues that an employer cannot be held vicariously liable when it merely provides the opportunity for wrongdoing that is otherwise unconnected with the employees work. Counsel relies upon the decision of the Supreme Court of Canada in *Bazley v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.), paras. 35, 36 & 40, in support of this proposition.

17 In the *Bazley* decision the Supreme Court of Canada was, for the first time, called upon to address the issue of an employer (that was a non-profit organization) could be held vicariously liable for an employee's sexual assault of a child placed in the employer's residential care facility.

18 In concluding that the employer was vicariously liable in *Bazley*, the Court first reviewed the underlying principles relating to the traditional situations where courts held employers vicariously liable for the unauthorized torts of employees. These were grouped into three general categories: "(1) cases based on the rationale of 'furtherance of the employer's aims'; (2) cases based on the employer's creation of a situation of friction; and (3) the dishonest cases" — para 17. After discussing the first two situations, the Court turned its' attention to the dishonest employee cases beginning at para. 20 and 21, and returned to a discussion of the more general underlying principles upon which vicarious liability is based at para. 22:

> 20 Neither furtherance of the employer's aims nor creation of situations of friction, however, suffice to justify vicarious liability for employee theft or fraud, according to cases like *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 (H.L.), and *The Queen v. Levy Brothers Co.*, [1961] S.C.R. 189. The language of authority, whether actual or ostensible, is inappropriate for intentional, fraudulent conduct like the theft of a client's property. A bank employee stealing a client's money cannot be said to be furthering the bank's aims. Nor does the

logic of a situation of friction apply, unless one believes that any money-handling operation generates an inexorable temptation to steal. Nevertheless, courts considering this type of case have increasingly held employers vicariously liable, even when the employee's conduct is antithetical to the employer's business: see, e.g., *Boothman v. Canada*, [1993] 3 F.C. 381 (T.D.) (unauthorized intentional infliction of nervous shock by supervisory employee on his subordinate found to invoke vicarious liability for the employer, albeit it based on statutory, as opposed to common law, principles).

21 At the heart of the dishonest employee decisions is consideration of fairness and policy: see Laski, supra, at p. 121. As P. S. Atiyah, Vicarious Liability in the Law of Torts (1967), at p. 263, puts it, "certain types of wilful acts, and in particular frauds and thefts, are only too common, and the fact that liability is generally imposed for torts of this kind shows that the courts are not unmindful of considerations of policy." The same logic dictates that where the employee's wrongdoing was a random act wholly unconnected to the nature of the enterprise and the employee's responsibilities, the employer is not vicariously liable. Thus an employer has been held not liable for a vengeful assault by its store clerk: *Warren v. Henlys, Ltd.*, [1948] 2 All E.R. 935 (K.B.D.).

22 Looking at these three general classes of cases in which employers have been held vicariously liable for employees' unauthorized torts, one sees a progression from accidents, to accident-like intentional torts, to torts that bear no relationship to either agency-like conduct or accident. In search of a unifying principle, one asks what the three classes of cases have in common. At first glance, it may seem little. Yet with the benefit of hindsight it is possible to posit one common feature: in each case it can be said that the employer's enterprise had created the risk that produced the tortious act. The language of "furtherance of the employer's aims" and the employer's creation of "a situation of friction" may be seen as limited formulations of the concept of enterprise risk that underlies the dishonest employee cases. The common theme resides in the idea that where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong.

23 If employers are vicariously liable for acts like employee theft, why not for sexual abuse? ...

19 Following its discussion of the principles underlying the imposition of vicarious liability in these three types of situations, the Court summarized these principles at paras. 37 to 40:

3. From Precedent and Policy to Principle

37 Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only

where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

38 Where the risk is closely associated with the wrong that occurred, it seems just that the entity that engages in the enterprise (and in many cases profits from it) should internalize the full cost of operation, including potential torts. See generally A. O. Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" (1988), 101 Harv. L. Rev. 563. On the other hand, when the wrongful act lacks meaningful connection to the enterprise, liability ceases to flow: *Poland v. John Parr and Sons*, [1927] 1 K.B. 236 (C.A.) (noting that the question is often one of degree). As Prosser and Keeton sum up (Prosser and Keeton on the Law of Torts (5th ed. 1984), at pp. 500-501), when the harm is connected to the employment enterprise:

> The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

39 The connection between the tort and the employment is broad. To say the employer's enterprise created or materially enhanced the risk of the tortious act is therefore different from saying that a reasonable employer should have foreseen the harm in the traditional negligence sense, making it liable for its own negligence. As Fleming explains (supra, at p. 422):

> Perhaps inevitably, the familiar notion of foreseeability can here be seen once more lurking in the background, as undoubtedly one of the many relevant factors is the question of whether the unauthorized act was a normal or expected incident of the employment. But one must not confuse the relevance of foreseeability in this sense with its usual function on a negligence issue. We are not here concerned with attributing fault to the master for failing to provide against foreseeable harm (for example in consequence of employing an incompetent servant), but with the measure of risks that may fairly be regarded as typical of the enterprise in question. The inquiry is directed not at foreseeability of risks from specific conduct, but at foreseeability of the broad risks incident to a whole enterprise.

[Emphasis added.]

40 On the other hand, this analysis's focus on what might be called "general cause", while broader than specific foreseeability, in no way implies a simple "but-for" test: but for the enterprise and employment, this harm would not have happened. This is because reduced to formalistic premises, any employment can be seen to provide the causation of an employee's tort. Therefore, "mere opportunity" to commit a tort, in the common "but-for" understanding of that phrase, does not suffice: *Morris v. C. W. Martin & Sons Ltd.*, [1966] 1 Q.B. 716 (C.A.) (per Diplock L.J.). The enterprise and employment must not only provide the locale or the bare opportunity for the employee to commit his or her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable. Of course, opportunity to commit a tort can be "mere" or significant. Consequently, the emphasis must be on the strength of the causal link between the opportunity and the wrongful act, and not blanket catch-phrases. When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role _____ for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse _____ the opportunity provided by the employment situation becomes much more salient.

20 The Court then continued with providing the principles that the courts should be guided with when determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent was inconclusive, and more specifically in the area of sexual assaults committed by an employee.

21 In applying the relevant principles to the facts of the case at hand, I conclude that Avant Garde, apart from its contractual liability, should be held vicariously liable for the dishonest and fraudulent conduct committed by its employee and project manager, Philip LeBlanc, and the losses incurred by its supplier, Maritime Temp as a result of Mr. LeBlanc's fraudulent conduct.

22 In my view, the facts of this case fall within the third group of cases identified by the Supreme Court in *Bazley*, the "dishonest employee" decisions, where the courts have generally imposed vicarious liability upon an employer for frauds and thefts.

23 Moreover, in my view, Avant Garde's enterprise, and Mr. LeBlanc's authorized role within it, created or materially enhanced the risk of Mr. LeBlanc defrauding Maritime Temp as he apparently did in this instance. Although Mr. Leblanc may not have been authorized to issue purchase order numbers for services that were not provided by Mr. Folkins or to appropriate for his own use the funds Maritime Temp forwarded through him to be delivered to Mr. Folkins, he was a project manager who was authorized by Avant Garde to enter into contractual relations with suppliers such as Maritime Temp for the provision of temporary labourers to job sites and to determine how the terms of the contract would be administered or carried out between the parties. Mr. LeBlanc

was authorized to issue purchase order numbers for the supply of these services which he did in this case and which were relied upon by Maritime Temp. As between Avant Garde and Maritime Temp, it is Avant Garde who, in the circumstances, should bear the loss of Mr. LeBlanc's dishonest conduct.

24 In his oral submissions, counsel for Avant Garde, suggested that Maritime Temp was contributorily negligent in that it continued to accept Mr. LeBlanc's assurances that its bills would be paid after being advised by Avant Garde's payables clerk in June of 2008 that she had not received any of the bills forwarded by Maritime Temp for the period involved. Counsel submitted that this might be a novel approach and submission. I agree with that assessment. Moreover, Avant Garde did not plead contributory negligence or seek to amend its Statement of Defence to plead it. That being the case, it is not an issue I can consider in coming to my decision. In any event I note that Maritime Temp would have had no more reason to suspect Mr. Leblanc's dishonest conduct than Avant Garde would. Avant Garde took no steps to make inquiries concerning Mr. LeBlanc's conduct in June of 2008 despite being advised by Ms. Steeves at that time of the substantial invoices Maritime Temp had sent which remained outstanding.

25 Avant Garde also contested the amount of damages claimed and suggested that some invoices may have been issued by Maritime Temp only after it was advised that Mr. Folkins did not do any work for Avant Garde from the month of March 2008 and beyond. On this point, I accept the testimony of Ms. Steeves who confirmed that Maritime Temp was informed by Mr. LeBlanc that Mr. Folkins worked at all the times for which Maritime Temp paid his salary and delivered the payments to Mr. LeBlanc for delivery to Mr. Folkins at the job site as had been the parties' prior practice. In my view, Ms. Steeves' credibility was not impeached although it was challenged by counsel for Avant Garde. In short, Ms. Steeves and Maritime Temp were the victims of the dishonest conduct of Mr. LeBlanc, an apparently skilled fraudster, an employee and project manager of Avant Garde, who, as a result of the authority that position vested in him was able to perpetrate the fraud upon Maritime Temp as well as his employer.

26 In the result, Maritime Temp shall have judgment in the amount claimed of $17,804.74 plus simple interest on this amount at 3% per annum from September 6, 2008. It is also entitled to costs of $1,575.00 under Scale 1 of Tariff A and its taxable disbursements. Avant Garde shall have judgment on its Third Party Claim against Phillip LeBlanc for this same amount plus an additional $1,575.00 for its costs as well as its taxable disbursements.

Action allowed.