Court File No. CV-18-604993-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTIONS 97 AND 100 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990 c. C-43, AS AMENDED

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED

Respondents

BOOK OF AUTHORITIES OF FAAN MORTGAGE ADMINISTRATORS INC., IN ITS CAPACITY AS COURT-APPOINTED TRUSTEE OF BUILDING & DEVELOPMENT MORTGAGES CANADA INC.

Dated: December 14, 2018

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(as at October 11, 2018)

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ONTARIO
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IN THE MATTER OF SECTIONS 97 AND 100 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990 c. C-43, AS AMENDED

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED

Respondents

BOOK OF AUTHORITIES OF FAAN MORTGAGE ADMINISTRATORS INC., IN ITS CAPACITY AS COURT-APPOINTED TRUSTEE OF BUILDING & DEVELOPMENT MORTGAGES CANADA INC.

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Tab 1

2009 CarswellOnt 6
Ontario Superior Court of Justice

Ablesystems Mechanical Ltd. v. AER Comfort Mechanical Services Ltd.

2009 CarswellOnt 6, [2009] O.J. No. 6, 173 A.C.W.S. (3d) 355, 78 C.L.R. (3d) 236

ABLESYSTEMS MECHANICAL LTD. v. AER COMFORT MECHANICAL SERVICES LTD., DUFFERIN-PEEL CATHOLIC SCHOOL BOARD and PRE-ENG CONTRACTING LTD.

Van Melle J.

Heard: August 28, 2008
Judgment: January 2, 2009
Docket: CV-08-850-00

Counsel: Neil Kotnala for Plaintiff / Responding Party
Emilio Bisceglia for Defendants, Pre-Eng Contracting Ltd., Dufferin Peel Catholic School Board

Subject: Contracts; Corporate and Commercial

MOTION by property owner and general contractor for dismissal of action against them.

***Van Melle J.*:**

1 The defendants, Pre-Eng Contracting Ltd. and Dufferin Peel Catholic School Board are the moving parties on this motion. They are seeking an order dismissing the action against them on the ground that the plaintiff's Claim for Lien has been vacated due to the posting of security.

2 Dufferin is the owner of property described as PIN 14254-8005 (LT), Block 187, Plan 43M1674, city of Brampton, Registry Office for the Land Titles Division of Peel (No. 43). Pre-Eng was the general contractor in relation to the improvements to the Property. AER Comfort Mechanical Services Ltd. was the mechanical sub-contractor of Pre-Eng.

3 On February 15, 2008, the plaintiff, who was a sub-contractor of AER, registered a Claim for Lien against the property on account of payments owed to it by AER for services and materials supplied for improvements on the property.

4 On March 13, 2008 the plaintiff commenced an action for payment of $238,611.60 owed to it on account of materials and services it supplied for improvements on the property. In its Statement of Claim the plaintiff pled quantum meruit and unjust enrichment in respect of the materials and services it supplied for improvements on the property.

5 On March 13, 2008 Mr. Justice Lemon vacated the Claim for Lien against title to the property after AER posed security for the full amount of Ablesystem's claim.

6 The defendants Pre-Ang and Dufferin take the position that upon the Lien being "bonded off" Ablesystems is obligated to discontinue that action as against both the general contractor, Pre-Eng and the owner, Dufferin.

7 The plaintiff takes the position that the defendants' motion record contains no evidence confirming that the defendants have made all payments owing pursuant to their respective contracts with respect to improvements on the property.

8 The plaintiff takes the position that section 47 of the *Construction Lien Act* permits the court to make an order dismissing the action, but does not require the dismissal of an action in the event that a Claim for Lien has been vacated. The plaintiffs submit that no provision in the *Act* requires the dismissal of the action as against the defendants upon the Claim for Lien being vacated.

9 The plaintiff submits that section 38 of the *Act* is clear in that lien rights are in addition to and not in substitution of equitable remedies.

10 With respect, I cannot accede to the argument of the plaintiff. I agree with the authorities that state that once a lien has been vacated upon payment of security into court under s. 44(6), the action against the owners and in this case, the general contractor, should be dismissed. They are no longer necessary or proper parties to the action as there is no privity of contract between them and the plaintiff: *Concord Carriers Ltd. v. Alnet Holdings Ltd.*, [2005] O.J. No. 3748 (Ont. S.C.J.).

11 The effect of vacating the registration of a lien results in that particular lien claimant looking to the funds in Court as security instead of an interest in the premises. In other words, once vacated, the owner and lenders can deal with the lands as they see fit and the lien claimant no longer has a claim to the lands, and, instead, must assert his or her claim against the funds in Court.

12 The fact that there is no evidence confirming that the defendants have made all payments owing on the contracts does not prevent me from granting the defendants' motion. Whether the defendants have fully paid or not is irrelevant as the matter is between the plaintiff and the contractor (who has paid the security into court), not the plaintiff and the owner or the general contractor.

13 While s. 47(1) permits the court to make an order dismissing an action, but does not require the dismissal of any action where a claim for lien has been vacated. While that may be true, the ground relied on in this motion is a "proper ground" and in my view, directs me to dismiss the action.

14 Finally, the plaintiff relies on s. 38, which states that the expiration of a lien shall not affect any other legal or equitable right or remedy. However, as the defendants point out, s. 50(2) prohibits a trust claim from being joined with a lien claim. It does permit a trust claim to be brought in any court of competent jurisdiction and it is always open to the plaintiff to do so.

15 In the result, the action as against Dufferin-Peel Catholic School Board and Pre-Eng Contract Ltd. are dismissed without prejudice to the claims of the plaintiff pursuant to section 38 of the *Construction Lien Act*. If the issue of costs cannot be resolved between the parties, I will entertain written submissions, not to exceed two pages in length of argument in addition to a Bill of Costs. The defendants will have ten days to make their submissions, with the plaintiff to have a further ten days within which to reply.

Motion granted; action dismissed against property owner and general contractor.

End of Document

Tab 2

1996 CarswellOnt 5238
Ontario Court of Justice (General Division)

Benny Haulage Ltd. v. Carosi Construction Ltd.

1996 CarswellOnt 5238, 33 C.L.R. (2d) 44

Benny Haulage Limited, Aldershot Landscape Contractors Limited and Tiger Masonry Contractors Ltd. (Plaintiffs) and The Hamilton-Wentworth Roman Catholic Separate School Board and Carosi Construction Limited (Defendants)

Master Sandler

Subject: Contracts; Corporate and Commercial

MOTION by plaintiff for order discontinuing construction lien action against owner without costs.

***Master Sandler*:**

1 This renewed notice of motion by the Plaintiff seeks, is part, an Order allowing Benny Haulage Limited to discontinue this action against the Board without costs. Counsel for the Board is here opposing this motion because it seeks its costs of this action. A complicating factor is that there were originally six lien claimants and five started their own actions and one was sheltering. The Benny lien was bonded off by the general, Carosi, on October 17, 1994, a month before this action was started by Benny in November, 1994. Nonetheless, the Plaintiff named the Board as a party Defendant, notwithstanding the provisions of Section 44(6) of the Act which provides that the lien ceases to attach to the premises or holdbacks, and becomes a charge on the security; and the owner shall be in the same position as if the lien had not been preserved i.e., no claim against the owner. The cases of *Bratti Mechanical Inc. v. Orlando Corp.* — Master Saunders, June 26, 1996 reported at Kirsh's Construction Law Case Finder paragraph 44.15, and *Delange Asphalt v. Gallagher*, Tobias J., April 20, 1993, reported in Kirsh, supra, at paragraph 44.15, 44.29, make it clear that once a general has posted security, an owner is no longer a required party at the suit of any lien claimant who's lien has been bonded off. If an owner is so named it should immediately seek an Order dismissing the claim against it to no further costs are incurred. Here the Board made some preliminary efforts to do this but never followed through to a motion before a Court seeking this relief.

2 There was a settlement meeting on March 21, 1995 which I have read. At that time it appeared that certain liens had been settled by Carosi (two). That left four liens — I am not clear if as of March 21, 1995, the other three liens had been bonded off. In this statement of settlement, it shows that the Board wanted out of the action and it would provide case law ("legal authority") to satisfy the claimants that the Board could be let out without prejudicing the lien claimants position. The cases are *Bratti* and *Delange*, supra, and Section 44(6). This was apparently never pursued to a conclusion.

3 On January 8, 1995 an Order was made for consolidation of the four remaining claims — three Plaintiffs plus a sheltering lien claimant — total four. Paragraph two of this Order gives carriage to Benny Haulage. The other actions no longer exist separately. And Mr. Schmuck then served this notice of motion seeking leave to discontinue this consolidated action against the Board without costs and served the other three lien claimant solicitors for today and they have not appeared so I assume from such default that they take no issue with the relief asked for, which of course will affect them since their claims had been consolidated with Benny's. Mr. Schmuck today says he only seeks an order re: Benny's claim but he cannot argue this in light of the Order of June 8, 1995 of the wording of the notice of motion.

4 Mr. Sullivan wants out, but wants his costs paid by someone. Mr. Schmuck says it shouldn't be his client. There are still crossclaims as between Carosi and the Board re: costs.

5 The solution is not to allow Benny Haulage leave to discontinue on terms under Rule 23.01(1)(b). The issue of costs should be dealt with at this stage by the Trial Judge who will have before him all the parties and can deal with these complex cost issues as between the four lien claimants, the Board and Carosi. The trial is coming up on June 17th. The Trial Judge can schedule the costs hearing so that the Board's solicitor doesn't have to sit throughout the trial. Mr. Sullivan will ask the Trial Judge for this Order.

6 In my view an Order dismissing these claims against the Board should have been issued months or a year ago by reason of Section 44(6). The Board started a process to get this Order, but never pursued it. Rather than grant leave to discontinue, my view is either a stay or outright dismissal is appropriate. I prefer outright dismissal based on the authorities, case law, and statutory, above referred to. And that is also the usual current practice here in Toronto.

7 So I refuse the Plaintiff's request, but rather, make an Order under Section 47(1)(d) dismissing this consolidated action against the Board, but on terms that the issue of costs as between the Plaintiffs and the Board and as between the Board and Carosi be reserved to be dealt with by the Trial Judge as he may see fit. Order accordingly. (Costs of this part of the motion also reserved to Trial Judge).

Order accordingly.

Tab 3

deficiency. Interest is *not* lienable — see s. 14(2) of the Act and see *Barber-Coleman v. Newlands*, unreported, a decision of Master Sischy. It is doubtful that costs are lienable and besides there will be security of $45,002.14 for costs, an amount surely sufficient to cover any award of costs to the plaintiff. Thus, I find the new proposed security to be adequate to cover the "lien" of the plaintiff that is permitted by the Act. I rely on *Reliance Electric v. G.N.S. Contractors Inc.*(1989), 35 C.L.R. 310 (Ont. S.C.) at p. 318 on this point.

I have read also *Northern Air Construction Ltd. v. York (Borough) Public Library Board* (1985), 13 C.L.R. 123 (Ont. Div. Ct.); *Soo Mill v. 499812 Ontario* (1984), 17 C.L.R. 306 (Ont. H.C.J.) and *Atlas Corporation v. 617430 Ontario Ltd.* (1988), 31 C.L.R. 201 (Ont. Master) in considering this case, but do not see these cases as standing in the way of making the order asked for.

I thus grant the order asked for, which shall provide that upon the defendant Bondfield filing with the court the new bond for $225,010.70 by the Wellington Insurance Co. in terms otherwise identical to the former bond, #101518, filed as Bond 11651, then the former bond is to be delivered up for cancellation.

Costs of this motion, as between plaintiff and the defendant Bondfield, to the defendant Bondfield in the cause, fixed at $250.

44.29
Delange Asphalt Paving, a division of Anderson Paving Ltd. v. W.G. Gallagher Construction Ltd.

Ontario Court of Justice (General Division) April 20, 1993.
Tobias J.

Cases referred to

M & S Roofing and Sheet Metal Ltd. v. Arthur J. Fish Ltd. (1988), 32 C.L.R. 148 (Ont. Master).

Statutes referred to

Construction Lien Act, R.S.O. 1990, c. C.30, ss. 36(3), 44(6), (7), (8).

John R. McCarthy, for plaintiffs.
Paul Ivanoff, for defendant W.G. Gallagher Construction.
John G. Gignac, for the Grey Sisters of the Immaculate Conception and the Penetanguishene General Hospital.

Endorsement of TOBIAS J.:—

The plaintiff registered a lien against certain lands for a sum owing to it from the general contractor. This contractor paid the claim and costs into court pursuant to s. 44 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

By reason of the application of s. 36(3)(*a*), the plaintiff was not required to register a certificate of action.

The plaintiff did issue a statement of claim within the time prescribed by the act, however, it did not name the owner, but rather only the general contractor as a defendant. The defendant argues that the plaintiff has lost its rights to proceed against it under the *Construction Lien Act*, because the statement of claim does not going the owner as a party defendant, (see *M&S Roofing and Sheet Metal Ltd. v. Arthur J. Fish Ltd.* (1988), 32 C.L.R. 148 (Ont. Master)). I do not accept this argument by reason of the application of ss. 44(6), (7) and (8). In my opinion, once payment is effected, there is no necessity to join the owner in the statement of claim, for the interests of the owner in the land is no longer the subject of the *Construction Lien Act* action. There is no impediment, therefore, to the plaintiff proceeding against only the general contractor to recover judgment against the monies paid into court. The hospital shall have its costs of this day fixed at $300 on a party-and-party basis payable by the plaintiff but there shall be no other order as to costs.

The application of the plaintiff for an order joining the hospital is dismissed but, as this endorsement indicates, the plaintiff has the right to proceed in its action against the general contractor.

44.30
Com-Star Construction Ltd. v. Graduate Holdings Ltd.

Ontario Court of Justice (General Division) January 20, 1993.
Sandler Master

The owners obtained an order for vacating two liens on payment into court of security in the amount of $149,695, but the claims of eight other claimants totalled approximately $124,000, and the owners sought under s. 44(2), (5), to reduce the total security to $95,310.20, for all ten liens, alleging that the reduced amount constituted the proper holdback amount. None of the claimants had filed material on the motion to reduce the security, and the owners alleged that they were entitled to the order sought despite the dispute as to the proper holdback amount, where the claimants had failed to disprove the amount calculated by the owners.

Held; the motion was dismissed.

The owners might be entitled to such order if the amount of the holdback were undisputed, or there was some other reason that the claimants could not succeed over a certain amount, but they were not entitled to the order where the calculation was clearly disputed by all claimants. Section 44(5) was for determination of the proper security, and it was improper to attempt to use this provision for the determination of substantive disputed issues of fact or law. This issue should be determined at trial or under the summary judgment provisions of Rule 20 or s. 47(1)(a), (d).

A second motion for the provision of some alternative form of security was adjourned.

Costs of the motion to reduce security were fixed at $400 for each plaintiff, payable in any event of the cause, forthwith.

Tab 4

1994 CarswellOnt 950, [1994] O.J. No. 4206, 17 C.L.R. (2d) 187

Most Negative Treatment: Not followed
Most Recent Not followed: M. Sullivan & Son Ltd. v. Roche Ltée | 1998 CarswellOnt 2851, 39 C.L.R. (2d) 251, [1998] O.J. No. 2740, 74 O.T.C. 81, 80 A.C.W.S. (3d) 949 | (Ont. Gen. Div., Jun 22, 1998)

1994 CarswellOnt 950
Ontario Court of Justice (General Division)

Gilvesy Construction v. 810941 Ontario Ltd.

1994 CarswellOnt 950, [1994] O.J. No. 4206, 17 C.L.R. (2d) 187

Re CONSTRUCTION LIEN ACT, 1983, S.O. 1983, CHAPTER 6, AS AMENDED

GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC. v. 810941 ONTARIO LIMITED, GENERAL TRUST CORPORATION OF CANADA and MARVIN ALBERT CROGHAN

BERNARDO MARBLE AND TILE LIMITED v. 810941 ONTARIO LIMITED, GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

DEL-KO PAVING & CONSTRUCTION COMPANY LTD. v. 810941 ONTARIO LIMITED, GILVESY CONSTRUCTION LTD., GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

EDWARDS DOOR SYSTEMS LIMITED v. GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., 810941 ONTARIO LIMITED and GENERAL TRUST CORPORATION OF CANADA

FOSTER-ROSS MECHANICAL LTD. v. GILVESY ENTERPRISES INC., carrying on business under the firm name and style of GILVESY CONSTRUCTION, 810941 ONTARIO LIMITED, GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

GOLDER ASSOCIATES LTD. v. 810941 ONTARIO LIMITED, 585199 ONTARIO LIMITED, M.A.C. DEVELOPMENTS INCORPORATED and GILVESY CONSTRUCTION LTD.

THAMES GLASS LIMITED v. 810941 ONTARIO LIMITED, GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

VANDENBURG CONTRACTION (1982) LTD. v. GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., 810941 ONTARIO LIMITED, MERVIN ALBERT CROGHAN and GENERAL TRUST CORPORATION OF CANADA

JERRY O'DROWSKY PLUMBING & HEATING LTD. v. 810941 ONTARIO LIMITED, et al.

ANDER/COR CONSTRUCTION INC. v. 810941 ONTARIO LIMITED et al.

Carruthers J.

Judgment: April 29, 1994
Docket: Docs. 969/90, 256/90, 136/90, 1024/90, 31/90, 5527/90, 1147/90, 5663/90, 2123/90, 2255/91

Counsel: *Frank Angeletti* and *Elizabeth A. Hewitt*, for plaintiff Gilvesy Construction.
Robert E. Hutton, for plaintiffs Jerry O'Drowsky Plumbing & Heating and Ander/Cor Construction Inc.
Andrew Szemenyei, for plaintiffs Del-Ko Paving & Construction Company, Bernardo Marble & Tile Limited, and Thames

Glass Limited.
Norman M. Aitken, for plaintiff Golder Associates Ltd.
Leonard Finegold, for plaintiff Vandenburg Contracting (1982) Ltd.
J. Wayne McLeish and *Barbara F. Fischer*, for defendant General Trust Corporation of Canada.

Subject: Contracts; Corporate and Commercial

Determination of question respecting priorities as between lienholders and mortgagee.

***Carruthers J.* (Endorsement):**

1 In this matter, the general contractor, Gilvesy, entered into a construction contract with the owner on or about September 15, 1989. The construction contract price was $4,094,753. Earlier, in March of 1989 General Trust signed a commitment letter in favour of the owner to provide financing for the acquisition of the property and for the construction of a planned medical office condominium. This financing was in the amount of $4.9 million and was secured by a mortgage to General Trust in that amount dated September 17, 1989. General Trust also took other security, as set out in its commitment letter. The mortgage, therefore, was a building mortgage within the meaning of the *Construction Lien Act*, R.S.O. 1990, c. C.30. The first advance under the mortgage was for $350,000, on April 17, 1989, to assist in purchasing the property.

2 Gilvesy commenced work on the property in September of 1989, and, including nine subsequent draws, General Trust advanced a total of $4,541,139. A certificate of substantial completion was dated March 12, 1991. The attached schedule A [not included in this report] shows three different streams of resulting lien claimants. Nine sub-trades of Gilvesy registered liens from May 3, 1990, to March 25, 1991, for a total of $591,968.68. Gilvesy registered a lien on October 13, 1990, for $825,885.50.

3 A May 23, 1990 order pursuant to s. 44 of the Act vacated the first subcontractor's lien in the amount of $23,237, which had been filed by Golder, a Gilvesy sub-trade. The order was the result of the owner posting a letter of credit in the amount of $29,047.49.

4 On July 25, 1990, the lien of sub-trade Vandenburg was vacated by order issued pursuant to s. 44 on the posting of a bond by Gilvesy in the amount of $50,792.83, as was the lien of Foster-Ross upon Gilvesy posting another bond for $127,907.18.

5 Finally, by order dated April 1, 1992, the Gilvesy lien and the remaining liens of all sub-trades, including those of Boyle and Ander-Cor constituting two other separate classes of lienholders, were vacated on General Trust posting a letter of credit pursuant to s. 44 of the Act in the amount of $997,623.60. This action of General Trust was to permit it to sell the property free of liens pursuant to its power of sale under its mortgage, notice of sale under the mortgage having been issued by General Trust on December 5, 1990.

6 The property was sold for $4.7 million. The difference between the total of the advances and the sale price was $150,000 approximately. However, the interest owing and not paid up to the date of sale was, on the record, in excess of $150,000. General Trust also emphasizes that to facilitate the sale it was required to take back a mortgage of 75 per cent of the purchase price at annual interest rates of 0 per cent, 5 per cent, 7 per cent, 9 per cent, and 9 per cent respectively. See Record Tab 14. General Trust, regardless of this particular issue, has experienced substantial losses on this construction project. Finally, the parties also agreed the holdback that was to have been retained by the owner was $404,000, and General Trust admits the lien claimants have priority over it for the amount of the holdback, having regard to subs. 78(2) of the Act.

7 Accordingly, the questions before us and the court's answers are as follows:

(1) Can the sub-trades of Gilvesy claim against the owner's letter of credit? The owner did not appear in these proceedings, and all of the parties before us are in agreement that the sub-trades are so entitled. Accordingly, we find that they can.

(2) Can the sub-trades of Gilvesy claim against the General Trust letter of credit any additional moneys owing to them up to the agreed holdback amount of $404,000? All the parties before us are in agreement that they can and, accordingly, we concur.

(3) and (4) Is General Trust entitled as a credit against the holdback owing of $404,000 for the amount of the owner's letter of credit? All agree it is so entitled and that the answer to question 4 is $29,047.49. Accordingly, we concur on both accounts.

(5) Can the sub-trades of Gilvesy claim against the Gilvesy bonds for any further amounts of moneys owed to them on their principal claim agreed to be $419,110.79? All agree that they can on the principle of *Northern Air Construction Ltd. v. York (Borough) Public Library Board* (1985), 50 O.R. (2d) 201. See also, *Reliance Electric Ltd. v. G.N.S. Contractors Ltd.* (1989), 70 O.R. (2d) 364 (H.C.). Accordingly, we concur.

(6) Can the sub-trades of Gilvesy Construction claim against the Gilvesy bonds for such further amounts of interest and costs owing to them by Gilvesy Construction based upon their contractual agreements with Gilvesy Construction? All parties in their written submissions agreed that they can. However, in ar gument Gilvesy raised the wording of its bonds as a defense should it not prevail on its interest claim. It did not prevail but not because of any "wording" problem. Nevertheless, it is our view the wording of these bonds does not preclude recovery. Accordingly, this question is answered in the affirmative, having regard to the *Bird Construction* line of cases.

(7) In addition to the $404,000 paid to the sub-trades through the owner's letter of credit and the General Trust letter of credit, can Gilvesy Construction claim against the General Trust letter of credit for any additional sums owed to it for principal, interest, and costs? This is the main issue in dispute between the parties. We agree with General Trust that Gilvesy cannot claim against the General Trust letter of credit in this manner once the holdback is honoured by General Trust as required by subs. 78(2). In our opinion, the issue continues to be governed by the holding of and rationale behind *P. Michaud Roofing Ltd. v. National Trust Co.* (1979), 26 O.R. (2d) 482 (Div. Ct.); affirmed (1980), 30 O.R. (2d) 620 (C.A.). Section 14 of the Act makes clear that a lien is upon the interest of the owner and, of course, this interest can be subject to the giving of a mortgage. Subsections 78(3) and (4) also make clear that all building mortgages registered prior to the time when the first lien arose in respect of an improvement have priority over the lien arising therefrom unless the lien was preserved or perfected at the time of a subsequent advance or unless the mortgagee had received written notice. Thus, if the property was sold by judicial sale or simply sold by the mortgagee to a willing buyer on the understanding all proceeds would be paid into court, the mortgagee would have priority to Gilvesy and its sub-trades for the full extent of the moneys owing to it pursuant to its mortgage.

8 The rationale of *P. Michaud Roofing Ltd.* is that the legislation does not intend a different priority between lienholders and mortgagees based only on the fact a mortgagee moves under s. 44 to vacate all liens in order to facilitate a sale pursuant to its power of sale under the mortgage. Despite the able argument of counsel to the contrary, we can see no material change in subs. 44(9) of the current Act from its predecessor provisions subs. 29(4) of the *Mechanics' Lien Act*, R.S.O. 1980, c. 261 and the earlier subs. 25(4) of *The Mechanics' Lien Act*, R.S.O. 1970, c. 267, which latter provision was in effect when *P. Michaud Roofing* was decided. It is clear from the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* that no change from the *P. Michaud Roofing* principle was intended by that part of subs. 44(9)2, which reads "and shall be dis tributed among all lien claimants in accordance with the priorities provided for in section 80." See the *Report of the Advisory Committee* and *Re Urman* (1981), 128 D.L.R. (3d) 33 (Ont. S.C.). This language was to require a rateable sharing between all lien claimants in money or security paid into court instead of "the first charge" advantage for the vacated lien as required by the predecessor statute. There was no intent to affect or change the priority of mortgagees in the context of s. 44, where the mortgagee is using the section to facilitate its power of sale. There is no allegation that the mortgagee has used s. 44 to affect the lien claimants' interest in any surplus on the sale. There is no surplus. We also note that any other interpretation would fail to accord any meaning to the phrase, in s. 44(9)2, "to the same extent as if the amount paid into court or security posted was realized by the sale of the premises in an action to enforce the lien..." Further, s. 80 begins "except where it is otherwise provided by this Act" and, of course, s. 14 and subss. 78(3) and (4) "otherwise provide."

9 It was argued that subs. 78(10), an entirely new provision, now provides the practical alternative for a mortgagee that was missing under the old legislation, an absence which inspired the decision in *P. Michaud Roofing Inc.* However, subs. 78(10) in no way addresses the situation at hand in that it does not provide for the vacating of liens and responds only to liens

arising from an improvement which have a priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. The position on the meaning of s. 44 taken by Gilvesy and its sub-trades in these proceedings would expose General Trust to liability beyond any deficiency in the holdback required to be retained by the owner. This position, as was previously held in *P. Michaud Roofing Inc.*, is at odds with the scheme of the Act when read as a whole. See also *Bernard J. Kamin Ltd. v. Blue Mountain Capital Corp.* (1990), 43 C.L.R. 100 (Dist. Ct.). A mortgagee is not a general insurer for all contractors and subcontractors on a project to which a mortgage relates. See *J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc.* (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.). Accordingly, the answer to Question 7 is "no." Questions 8, 9, and 10 do no require answers given our response to Question 7.

10 We also find Gilvesy and its trades are not entitled to interest on the $404,000 from General Trust, at least in the circumstances before us. We note until very recently General Trust was reasonably asserting that none of the liens had been perfected according to the requirements of s. 37. Moreover, the sale of the property was not on particularly favourable terms. Accordingly, awaiting the determination of a court in these proceedings was not unreasonable in the circumstances. See generally *Boehmers v. 794561 Ontario Inc.* (1993), 14 O.R. (3d) 781 (Gen. Div.) and see, as well, *Trus Joist Canada Ltd. v. Princess Gardens Inc.* April 24, 1992, unrep. decision [1992] O.I. No. 902 (Gen. Div.) [now reported 5 C.L.R. (2d) 146].

> (11) Is General Trust entitled to pay any moneys found to be owing by it without resorting to the General Trust letter of credit, acknowledging the right of the sub-trades to claim against the General Trust letter of credit in the event that the moneys are not paid by General Trust. All parties have answered yes and, accordingly, we so find.

11 Judgments are also to issue in accordance with paras. 29 and 30 of the stated case. And, finally, on agreement actions No. 2255/91 (Ander-Cor) and No. 2123/93 (O'Drowsky) are dismissed.

Order accordingly.

End of Document

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Tab 5

2007 CarswellOnt 5121
Ontario Superior Court of Justice

JCP Construction Co. v. 1520705 Ontario Inc.

2007 CarswellOnt 5121, 159 A.C.W.S. (3d) 345, 64 C.L.R. (3d) 144

JCP CONSTRUCTION COMPANY LTD. v 1520705 ONTARIO INC. et al

Master Albert

Judgment: August 14, 2007
Docket: 05-CV-289302

Counsel: P. Starkman for Plaintiff
N. Walton for Defendant, 1520705 Ontario Inc.

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure

ASSESSMENT of costs in construction lien action.

***Master Albert*:**

1 JCP Construction Company Ltd. ("JCP") claimed $76,581.45 as the balance owing on a construction contract. On or about May 7, 2007 the defendant 1520705 Ontario Inc. ("152") accepted JCP's April 20, 2007 offer to settle the action for $70,000 plus costs. Counsel attended on July 13, 2007 to make submissions on costs of the action.

2 The parties agree that prejudgment interest is $4258.30 and disbursements are $5096.72 for a total of $9355.02. The plaintiff asks for costs of $36,008.20 (including GST) up to April 20, 2007 plus $16,964.06 (including GST) since April 20, 2007 plus disbursements and prejudgment interest of $9355.02 for a total of $62,327.28. The defendant proposes it pay costs of $15,000 (including GST) plus disbursements and prejudgment interest of $9355.02 for a total of $24,355.02.

3 The plaintiff also asks the court:

> a) to amend the claim and add as parties to the action two individuals who are principals of one of the defendant corporations; and
>
> b) to order the defendant to pay costs to the plaintiff for 152's motion to release the mortgagee GLF Associates Inc. (and all defendant mortgagees) from the action.

4 The motion was first returnable May 25, 2007. JCP asked the court to refer the issue of costs to an assessment officer. I declined because the judgment of reference of Mr. Justice Cullity dated July 19, 2006 directs the referee to determine all issues, including costs. 152 asked to adjourn the motion for Ms Walton time to prepare cost submissions. I adjourned the motion to July 13, 2007 with an endorsement that included the following:

> Over plaintiff's objection the issue of costs is adjourned to July 13, 2007 at 10:00am, 1.5 hours reserved. The plaintiff asks to adjourn the issue of adding parties as defendants. The issue may be academic and if the plaintiff proposes to proceed I will hear argument on July 13, 2007 after the costs are determined, on whether I have jurisdiction to hear such a motion once the action has settled by acceptance of an offer.

The accepted offer

5 The accepted [1] offer to settle provides in part that:

> a) the defendants, 152 and GLF Associates Inc. ("GLF"), together or individually, will pay to the plaintiff costs on a partial indemnity basis up to the date of the offer (April 20, 2007);
>
> b) the defendants, 152 and GLF, together or individually, will pay to the plaintiff costs on a substantial indemnity basis after April 20, 2007; and
>
> c) the action will be dismissed on consent on a without costs basis.

Proportionality and reasonableness

6 Costs should follow the event. JCP was successful and is entitled to costs. Generally costs should be proportionate to the amount in issue and within the reasonable expectation of the losing party. Here, JCP asks for costs of $62,327.28 [2] on a recovery of $70,000. Counsel for JCP argues that this case is an exception to the principle of proportionality for the same reasons as in *Bellissimo Excavating Ltd. v. Ding* [3] and *Crownwood Construction Ltd. v. Omartech Construction Inc.* [4].

7 In *Bellissimo* the owners had failed to retain any holdback. Had they done so the subcontractor's entire claim would have been satisfied and litigation avoided. Bellissimo, as owner, vigorously defended the claim notwithstanding the absence of any meritorious defence. The owners had refused to accept the subcontractor's offer to settle for $15,000 made early in the litigation and ultimately the plaintiff recovered more. Just before the motion for summary judgment, to which the owners had no defence, they paid the amount claimed. Then the owners argued that the principle of proportionality should be applied to limit costs to the amount of the claim. I ordered costs of over $30,000 on the basis of the subcontractor's entitlement to substantial indemnity costs from the date of the first pretrial, since had the owners complied with their statutory holdback obligation there would have been no litigation costs at all. I found in *Bellissimo* that there was nothing that the plaintiff had done to add to the complexity of the litigation; that he had not launched a multi-faceted attack that prolonged the litigation; and that from the outset the plaintiff had behaved in a straightforward manner.

8 In *Bellissimo* I also considered whether the principle of proportionality applied by Justice Wilson in a simplified rules case, *Trafalgar Industries of Canada Ltd. v. Pharmax Ltd.* (2003), 64 O.R. (3d) 288 (Ont. S.C.J.), applied to modest cases under the *Construction Lien Act* and concluded that it did not. (See: *Bellissimo*, *supra*, at para.24-26). I remarked that:

> It would be unfair to saddle Bellissimo with costs when he did everything properly. To do so would be to suggest that he should walk away from his claim of $15,242.15 when he saw that the costs were escalating, when he tried repeatedly to settle the claim on a reasonable basis. That would send the wrong signal to construction lien claimants for whose protection the *Construction Lien Act* was enacted.

9 Applying these principles to the present case, I note the similar and distinguishing factors, as follows:

> a) In both cases the lien claimant's case was a strong one, resulting in full recovery in *Bellissimo* and 92% recovery in *JCP*, on a settled basis.
>
> b) In *Bellissimo* the owner had no legal or factual defence: an owner is required to hold back 10% of the price for the benefit of sub-trades and the owner failed to do so. There being no other lien claimants the holdback would have given the sub-trade 100% recovery and there should not have been any litigation costs.
>
> c) In JCP the defences of delay and deficiencies advanced by 152 are not as clear. The parties were facing many days of trial and an uncertain result. The strength of the lien claimant's case and the absence of any substantive defence were not obvious in the present case as they were in *Bellissimo*.

10 In the *Crownwood* case the plaintiff subcontractor was entirely successful at trial and, as in *Bellissimo*, the owner, a church, had failed to retain any holdback. The owner did not participate in the trial but failed to pay the holdback into court. I ordered judgment in favour of the subcontractor for $41,034 and costs of $60,241 plus disbursements of $17,595.23, following a four and a half day trial. I agreed with Justice Lane in *163972 Canada Inc. v. Isacco* [5], who said:

> That the costs significantly exceed the amounts at stake in the litigating is regrettable, but it is a common experience and is well known to counsel as one of the risks involved in pursuing or defending a case such as this to the bitter end rather than finding a compromise solution. To reduce the plaintiff's otherwise reasonable costs on this basis would simply encourage the kind of intransigence displayed by the defendants in this case.

11 Counsel for JCP urges the court to apply these principles to the present case, citing several instances of intransigence on the part of the defendant 152. I review and comment on each of these alleged instances:

a) Allegation: 152 could have settled for a lower amount earlier (there had been earlier offers to settle by the plaintiff made and then withdrawn).

Comment: Clearly 152 could have extricated itself from the litigation earlier by accepting an earlier offer. This is not exceptional in litigation and I do not find such conduct intransigence. In fact 152 accepted the offer that resulted in this settlement while still at the discovery stage of the action.

b) Allegation: 152 alleged delay and deficiencies without providing particulars.

Comment: The statement of defence and counterclaim is not a bald pleading of allegations; rather it provides details of the delay and deficiencies alleged. This is not intransigence.

c) Allegation: 152 is in breach of court orders, having failed to comply with 41 outstanding undertakings, particularly regarding the allegations of delay and deficiencies. JCP alleges that it is unreasonable conduct for the defendant to string the case out and then concede when pushed by the court to substantiate their allegations with hard evidence.

Comment: The deadline for 152 to comply with undertakings had passed. However, once it accepted the plaintiff's offer to settle the answers were no longer required. Litigation often settles at this stage, particularly when the parties begin gathering the information required to comply with undertakings. JCP asks the court to find that the defences of delay and deficiencies were simply smoke and mirrors designed to delay the inevitable result and financially exhaust the plaintiff. The evidence does not support such a finding.

d) Allegation: 152's strategy was to financially exhaust JCP and cause it to abandon the litigation in circumstances where 152's principal acted as its counsel (presumably at no cost) whereas JCP was incurring the expense of retaining counsel. Mr. Starkman argued that this was unconscionable conduct by152.

Comment: There is an element of validity to this argument. 152 dismissed its counsel in 2005 and Ms Walton has had carriage of the action since then, presumably at no cost to 152 [6] other than her time away from her duties as a lawyer for paying clients. JCP, on the other hand, has had to finance the litigation from the beginning to the present. I do not find this to be unconscionable conduct. With the high cost of litigation many parties act in person or seek leave for a corporate officer to represent the company. Whether Ms Walton appears as counsel or as principal seeking leave, it would not justify an extraordinary cost award as in *Bellissimo* and *Crownwoood*.

e) Allegation: By memo of June 23, 2005 Master Sandler cautioned the parties that legal fees to litigate would be high and he recommended the parties participate in mediation.

Comment: That legal fees to litigate would be high is self evident.

f) Allegation: In the same memo Master Sandler recounted that the owner 152 sought court time to move to have the lien removed from title on an urgent basis. Given that court time was not immediately available Master Sandler suggested that the owner bond off the lien. In fact the lien was not bonded off until some 8 months later on March 1, 2006. Mr. Starkman argues that this shows 152's bad faith because they waited so long to bond off the lien.

Comment: There are reasons other than bad faith why the need to remove a lien from title might be urgent one day but not the next. Ms Walton provided an explanation that I find reasonable. There is no evidence that the owner acted in bad faith in seeking motion time in 2005 on an urgent basis.

g) Allegation: The general contractor, GLF, agreed with the quantum of the claim and admitted that the deficiencies had been corrected (cross-examination transcript, page 63 AT Q. 301 and page 73 at Q. 377). In this litigation GLF cross-claims against 152 for the amount JCP claims as subcontractor against it and does not deny JCP's claim. JCP argues that this suggests that 152 has no defence and ought not to have defended the claim for two years.

Comment: That the general contractor admits that JCP has not been paid, agrees with the quantum claimed and sues the owner for the same or a similar amount on the basis of indemnification suggests that GLF was not paid by the owner so it in turn did not pay its subcontractor JCP. It does not address the owner's claim of deficiencies and delay and does not help the court assess whether 152's conduct was unreasonable in the litigation.

12 In essence, JCP argues that 152's conduct in this litigation has caused JCP to incur high legal fees, applying gamesmanship to financially exhaust JCP and cause it to back away from its claim. For the reasons given I do not agree.

Quantifying costs

13 As part of their settlement the parties agreed on partial indemnity costs to April 20, 2007 and substantial indemnity costs thereafter.

14 Several specific items included in Mr. Starkman's two Costs Outlines [7] require comment. I address these elements indivdually and provide my comments:

a) Hourly rates: Mr. Starkman was called to the bar in 1995. He claims an hourly rate of $300 on a partial indemnity scale and $350 on a substantial indemnity scale, on the basis that his actual hourly rate is $400. I find these rates high, taking into account that the case was not complex and that Mr. Starkman is at the lower end of the "10 to 20 year" experience scale. More appropriate rates are $250 and $300 for partial and substantial indemnity fees respectively.

b) Default proceedings against GLF: JCP signed default judgment against GLF, the general contractor. In its costs outline JCP claims costs for 22.4 [8] hours in respect of legal services to unsuccessfully oppose GLF's motion to set aside the default judgment. The motion was heard by Master Polika who ordered costs of $1200. Consequently JCP is not entitled to claim costs of this motion again from 152.

c) Interlocutory motion for further and better affidavit of documents: JCP successfully moved for a further and better affidavit of documents. JCP was awarded costs of the motion fixed at $500 from each of 152 and GLF. In its costs outline JCP claims costs for 8.2 [9] hours for this motion. JCP is not entitled to claim costs of this motion again.

d) Costs claimed for legal services performed after JCP accepted the offer: JCP continued to incur legal fees by its counsel docketing time towards bringing a motion to add parties and amend the claim, and to move to strike 152's statement of defence. These fees were incurred unnecessarily. Mr. Starkman explains that these

steps were required because his client was entitled to continue the litigation against GLF to recover costs not covered by the amount paid into court to vacate the lien.

The accepted offer provided for payment by either or both of 152 and GLF. 152 accepted the offer, agreeing to pay the settlement sum for the litigation plus costs. Legal fees to prepare motions against other parties after the case settled with 152 are not 152's responsibility. I find it unreasonable to claim the cost of continuing the litigation against GLF solely to recover any costs shortfall that JCP is unable to collect from 152, especially when the cost shortfall, if any, arises from the litigation costs incurred by counsel to prepare the motions for the indirect purpose of recovering a costs shortfall, if any. The motion to strike 152's defence became unnecessary upon 152 accepting the offer to settle. These costs are not recoverable from 152.

e) Lawyer's time claimed for work performed by clerk: Comparing Mr. Starkman's dockets to the time recorded by himself and his clerk as timekeepers I find that Mr. Starkman claims costs based on his hourly rates of $300 (partial) and $350 (substantial) per hour, for work performed by his clerk at $100 or $120 per hour. Mr. Starkman could not explain the discrepancy at the hearing. I invited him to request a re-attendance to address the issue. By letter of July 16, 2007 Mr. Starkman declined a re-attendance.

In the absence of any reasonable explanation I find that Mr. Starkman was either careless or deliberate (hopefully the former) in claiming clerk's time as his own, resulting in an inflated costs claim. In either case the court would have been mislead had Ms Walton not demanded to see the dockets and file them with the court. As the supervising lawyer Mr. Starkman is responsible for the accuracy of his documents and his representations to the court. The number of hours for which an inflated claim is made is significant: 14.6 hours for the period up to April 20, 2007 and 10 hours for the period subsequent to that date. The amount over-claimed is $5220 [10] + GST = $5533.20. As a sanction for this careless or deliberate error I direct Mr. Starkman to (i) credit to his client payment of $5533.20, (ii) provide a copy of these reasons to his client with this paragraph highlighted, and (iii) file proof of service that he has done so within 10 days of release of these reasons.

f) Counsel fee: The counsel fee of $1400 claimed for court attendances on each of March 6, 2006 and June 12, 2006, for two hours on each date, are disallowed. Neither the case history [11] nor the dockets show a court attendance on March 6, 2006. There was an attendance on March 1, 2006 when the default judgment against GLF was set aside. For reasons already given JCP is not entitled to claim costs from 152 for that motion.

The motion on June 12, 2006 before Master Polika was to compel 152 to provide a further and better affidavit of documents. Master Polika ordered 152 to pay costs of the motion to JCP fixed at $500. Additional costs in the form of a counsel fee cannot be claimed here.

JCP claims counsel fees of $2350 for two hour attendances on each of May 25, 2007 and July 13, 2007. The attendances were for the motion for costs and for Mr. Starkman's motion to strike 152's defence, to amend the claim and to add parties. I find neither counsel fee appropriate because:

> (1) entitlement to costs for the attendance to argue costs depends to some extent on the degree of success;
>
> (2) Mr. Starkman opposed the adjournment on May 25, 2007 notwithstanding his last-minute service of motion materials on Ms Walton;
>
> (3) the quantum of $2300 for a half day attendance, even on a substantial indemnity scale, is excessive. More appropriate taking into account Mr. Starkman's 13 years' experience and the lack of complexity of the event, would be $1000; and

(4) the motion to strike 152's defence on grounds that 152 is in breach of orders to comply with undertakings and an obligation to produce a witness for examination are unnecessary motions in light of the settlement. No costs are warranted for unnecessary motions.

15 Mr. Starkman argued that Ms Walton has no standing to make submissions to the court because 152 is in contempt of court, not having complied with outstanding undertakings. He relies on *Paul Magder Furs Ltd. v. Ontario (Attorney General)* [12]. In that case the convicted party expressed an intention to continue to defy the Sunday closing laws. The Court of Appeal found that it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey a court order. I find the *Magder* case distinguishable because it concerned ongoing defiance of a court order. In the present case, once the offer to settle was accepted, the outstanding undertakings became moot because the claim against 152 was not proceeding to trial. Consequently if 152 was in contempt (a finding which I have not made) then such contempt was purged upon accepting the settlement. The argument that Ms Walton has no standing by reason of contempt fails.

Factors Relevant to Costs

16 Rule 57.01 sets out factors relevant to fixing costs. I have considered these factors including the following, upon which I provide my comments and findings:

(a) Settlement offers: JCP made several settlement offers, and as part of the accepted settlement the parties agree to the scale of costs.

(b) The amount claimed and recovered: JCP recovered $70,000 of its claim for $76,581.45, achieving 92% recovery. This is substantial success.

(c) Apportionment of liability: As between 152 and JCP 152 accepts full responsibility for payment. Its arrangement, if any, with GWL is not known.

(d) Whether any step was taken through mistake or excessive caution, unnecessarily lengthening the duration of the proceeding: Both JCP and 152 engaged in conduct that tended to lengthen and complicate the litigation, increasing costs. I find that JCP engaged in more of this type of conduct. For example, JCP 's opposition to setting aside the default judgment against GWL was destined to fail. Also, drafting and bringing motions to amend the claim and to strike the defence of a party with whom JCP had settled the claim and counterclaim, is futile. Further, failing or refusing to let the mortgagee out of the litigation after the amount of the lien plus costs had been paid into court to vacate the lien was unreasonable, creating the need for a motion to let the mortgagees out of the action. As for 152, its delay in providing particulars and evidence to support its allegations of deficiencies and delay prolonged the litigation and increased expenses, particularly in view of the ultimate settlement amount.

(e) A party's denial or refusal to admit anything that should have been admitted: On March 8, 2006 the lien was vacated upon payment into court of $95,726.81. JCP ought to have let the mortgagee out of the action at that point. It did not. Also, JCP ought to have consented to set aside the default judgment against GWL once the circumstances were known.

(f) Complexity: The litigation was not complex. It is a collection action. The contractor claimed payment for work performed. The defendant 152 took the position that the contractor was not entitled to recover the amount claimed because the work was deficient and it was not completed in time, causing 152 to incur unexpected expense and loss of income. Particulars of the defence were provided but 152 never got to the point of producing evidence to support its allegations. The extent to which its defence could have been substantiated is not known.

(g) Importance of the issue: To a small contractor the inability to collect $76,000 for work performed is significant. To a small business the cost to rectify deficient work and the cost of losing business because of delay is also significant. I find that the issues were important to both JCP and 152.

Conclusion

17 JCP asks the court to fix costs at $62,327.28 [13], including the agreed amount of $9355.02 for disbursements and prejudgment interest. Based on my findings as set out herein, that amount must be reduced by the amounts overclaimed (i) for motions where costs were already fixed and ordered, (ii) amounts claimed inappropriately for counsel fees, and (iii) by the amount overstated in claiming lawyer time for clerk's work. These amounts are: $7123.20 + $2607.60 + $7,844.00 + $5,533.20 = $23,108.00. Consequently the starting point for Mr. Starkman's claim for costs should have been $39,219.28 (including GST, prejudgment interest and disbursements), not $62,327.28.

18 From this starting point I take into account and adjust the amount JCP is entitled to for costs by the additional factors described, allow $1000 costs for the attendance on July 13, 2007 to make submissions on costs and find that an appropriate quantum of fixed costs for this litigation is $29,300 including GST, prejudgment interest and disbursements.

19 On March 8, 2006 $95,726.81 was paid into court to vacate the lien. According to the accountant's statement of July 6, 2007 this amount had grown to $99,877.57 [14]. Consequently, out of the funds held in court to the credit of this action the amount of $99,300 shall be paid out to JCP and the balance shall be refunded to the party that paid the money into court.

Order

20 Accordingly, THIS COURT ORDERS that:

a) 1520705 Ontario Inc. shall pay costs to JCP Construction Company Ltd. fixed at $29,300 including GST, prejudgment interest and disbursements.

b) Out of the funds held in court to the credit of this action the amount of $99,300 shall be paid out of court to JCP and the balance shall be refunded to the party that paid the money into court.

c) As a sanction for claiming lawyers fees for clerk's work Mr. Starkman shall (i) credit or refund to his client the sum of $5533.20, (ii) provide a copy of these reasons to his client with this paragraph and paragraph 14(e) highlighted, and (iii) file proof of service that he has done so within 10 days of release these reasons.

d) JCP's motion to amend the claim and add parties is adjourned sine die; and

e) JCP's motion for costs of the defendant's motion to release the mortgagees from the action is dismissed.

Order accordingly.

Footnotes

1 Accepted by 152 only, but not by GLF Associates Inc.

2 Inclusive of GST, disbursements and prejudgment interest

3 [2004] O.J. No. 2430 (Ont. Master), motion to deny confirmation dismissed by Justice Sanderson October 13, 2004: [2004] O.J. No. 4172 (Ont. S.C.J.); motion for leave to appeal denied by Justice Pitt December 23, 2004: [2004] O.J. No. 5276 (Ont. Div. Ct.)

4 [2006] O.J. No. 2466 (Ont. Master)

5 [1997] O.J. No. 838 (Ont. Gen. Div.), file 95-CU-85498

6 There is no evidence to the contrary.

7 One Costs Outline was submitted for the period prior to April 20, 2007, on a partial indemnity scale; a second Costs Outline was provided for the period from April 20, 2007 on a substantial indemnity scale

8 22.4 hours × $300 per hour = $6720 + GST = $7123.20

9 8.2 hours × $300 per hour = $2460 + GST = $2607.60

10 ($300 × 14.6) — ($100 × 14.6) = $2920 plus ($350 × 10) — ($120 × 10) = $2300 = total: $5220

11 the court record of court appearances

12 [1991] O.J. No. 2025 (Ont. C.A.)

13 $36,008.20 (including GST) up to April 20, 2007 plus $16,964.06 (including GST) since April 20, 2007 plus disbursements and prejudgment interest of $9355.02 for a total of $62,327.28.

14 This amount includes interest on the funds held in court and deducts the accountant's fees.

End of Document

IN THE MATTER OF SECTIONS 97 AND 100 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C-43, AS AMENDED

Court File No. CV-18-604993-00CL

FIRM CAPITAL MORTGAGE FUND INC.	- and -	**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED**
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF FAAN MORTGAGE ADMINISTRATORS INC., IN ITS CAPACITY AS COURT-APPOINTED TRUSTEE OF BUILDING & DEVELOPMENT MORTGAGES CANADA INC.

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