

**CITATION:** Insite Construction Management Inc. v. Da Silva, 2023 ONSC 2274  
**COURT FILE NO.:** CV-22-00001933-0000  
**DATE:** 2023 04 13

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** INSITE CONSTRUCTION MANAGEMENT INC.

**AND**

VILSON DA SILVA et al.

**BEFORE:** RSJ RICCHETTI

**COUNSEL:** SCHWARTZ, STEPHEN, for the Plaintiff  
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**HEARD:** April 3, 2023; In person

**ENDORSEMENT**

**THE MOTION**

[1] The Defendants bring this motion for an order under Rule 21.01(3) of the *Rules of Civil Procedure* for an Order dismissing/staying this action on the grounds that other proceedings are pending in Ontario between the same parties in respect of the same subject matter.

**BACKGROUND**

[2] This action is part of a number of actions involving Raymond Nicolini (“Nicolini”) and Vilson Da Silva (“Da Silva”), personally and through corporations owned and/or controlled by them.

- [3] Mr. Nicolini's companies include Insite Construction Management Inc. ("Insite"), King Station Facility Inc. ("King Station") and Sayward Investment Inc. ("Sayward").
- [4] Mr. Da Silva's companies include Leblon Carpentry Inc. ("Leblon Carpentry") and Leblon Drywall Inc. ("Leblon Drywall"). Mr. Da Silva is the husband of Daenn Loureiro.

### **The Barrie Action (CV-23-1448) ("Barrie Action")**

- [5] On October 23, 2020, Sayward commenced an action against Mr. Da Silva, Ms. Loureiro and Leblon Carpentry. Essentially, the Barrie Action is a debt claim by Sayward on a promissory note and mortgage.
- [6] Sayward states there were two advances under the loan which are subject to the promissory note and mortgage.
- [7] The Da Silva Defendants, admit the first loan advance was subject to the promissory note and mortgage but deny that the second loan advance was subject to the promissory note/mortgage but allege it was subject to an agreement to share profits on a specific construction project.
- [8] The Barrie Action is close or ready to be set down for trial.

### **The Brampton Lien Action ("Lien Action")**

- [9] Within a very short time after the Barrie Action was commenced, Leblon Drywall commenced an action against Nicolini's companies – Insite and King Station – claiming a lien in the amount of \$907,876.76 with respect to services and materials supplied to 10 Station Road, Bolton, Ontario (the "Bolton Property").
- [10] Insite and King Station denied the validity of the lien and counterclaimed for \$1,202,640.09 for alleged deficiencies, delay, exaggeration of the lien

and other contractual related breaches. All of which is disputed by Leblon Drywall.

- [11] Initially, Insite and King Station sought leave to add Mr. Da Silva personally to this Lien Action. This was initially opposed by Leblon Drywall. Eventually, Leblon Drywall withdrew its opposition to adding Mr. Da Silva as a defendant to the Lien Action.
- [12] However, Insite and King Station, instead, proceeded with a Summary Judgment Motion. That Summary Judgment Motion was dismissed.
- [13] Subsequently, Insite and King Station did not add Mr. Da Silva to the Lien Action.

#### **Insite v. Da Silva et al (“This Action”)**

- [14] Instead, Insite commenced This Action against Mr. Da Silva, Leblon Drywall and Leblon Carpentry.
- [15] The claim in This Action is for \$1,202,640.09 (plus punitive damages). The causes of action against these three defendants include oppression, misrepresentation, conspiracy, inducing breach of contract and intentional interference with economic relations. The underlying facts for these causes of action all stem from Insite’s allegation that the Lien Action was a retaliatory, direct response to the demand on the loan(s) which are the subject matter in the Barrie Action, resulting in a knowingly and deliberately registering an improper/invalid/grossly exaggerated lien.
- [16] Essentially, Insite repeats essentially the position taken in the Lien Action as a defence.

## **ANALYSIS**

- [17] The Da Silva Defendants submit that that this “action be dismissed on the basis of res judicata, cause of action estoppel, issue estoppel, and/or abuse of process.”
- [18] I have no hesitation rejecting the submission that the claims advanced in This Action are “res judicata or issue estoppel”. No final determinations have been made in either the Barrie Action nor the Lien Action. Dismissal of the summary judgment motion in the Lien Action is NOT a final determination but rather based on the evidentiary record on the motion and the applicable law to summary judgment motions.
- [19] Further, for the reasons that follow, the claims advanced by Insite in This Action are not duplicative of the claims made in the Barrie Action, the primary issue being a claim on an alleged loan. In particular, in the Barrie Action, there is no claim against Mr. Da Silva, Leblon Drywall nor Leblon Carpentry for the alleged misconduct of retaliation by registering a grossly exaggerated claim for lien.
- [20] As for the Lien Action, there is no counterclaim against Mr. Da Silva. There is no counterclaim against Leblon Carpentry. However, there is a counterclaim against Leblon Drywall which sets out the alleged loan (subject of the Barrie Action), alleges that the lien was a “retaliatory measure” and claims “damages” and expenses incurred to deal with the lien.

### **Effect of the proposed motion to add Mr. Da Silva to the Lien Action**

- [21] The Da Silva Defendants make much of the fact that Insite sought to add Mr. Da Silva to the Lien Action but, then abandoned the motion to do so.
- [22] I reject the submission.

- [23] Section 55(2) (a) of the *Construction Lien Act* (which is the legislation that applies to this project), only permits counterclaims against named parties to the action. Therefore, any attempt by Insite to add Mr. Da Silva to the Lien Action would have been improper and a nullity. See *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355 at para. 15, and *Aqua Pools Ltd. v. Hanna et al.* 2019 ONSC 850 at para. 57.
- [24] The proper course is to bring a separate action (rather than a counterclaim) against non-parties to the Lien Action. See *Sedia Inc. V. Athena Donair Distributors Ltd.* 2021 ONSC 900 at para. 39.
- [25] Accordingly, Insite had no choice but to bring a separate action against Mr. Da Silva and Leblon Carpentry.
- [26] I will deal with the New Action claim against Leblon Drywall below.

### **The Claim against Mr. Da Silva in This Action**

- [27] Having reviewed the pleadings in the three actions, This Action must be permitted to proceed against Mr. Da Silva. Otherwise, Insite's claim against Mr. Da Silva for his alleged improper conduct for registering and exaggerating the lien (however you describe the cause of action) could not be brought against Mr. Da Silva in the Lien Action.
- [28] To suggest that Insite's claim against Mr. Da Silva relating to the registration and exaggeration of the lien must be brought in the Barrie Action disregards the fact that these claims are more closely tied to and dependent on the facts in the Lien Action – the alleged motivation for registering the lien in the amount claimed.
- [29] As a result, the claim against Mr. Da Silva in This Action is NOT duplicative of the claims made in the Barrie Action – where the issue is the alleged loan(s).

[30] I reject the submission that the claims in This Action against Mr. Da Silva amount to an abuse of process. The validity of these claims must still be tried on the merits.

### **The Claim against Leblon Carpentry**

[31] Leblon Carpentry is a party to the Barrie Action, but it is not a party to the Lien Action. I accept that the claim could not be brought against Leblon Carpentry in the Lien Action.

[32] As I stated above, the Barrie Action is a claim on the alleged loan by those defendants.

[33] While there is reference to the alleged loan in This Action, the claim against Leblon Carpentry is NOT with respect to the loan, but for the alleged motivation being the retaliation by registering the lien and for exaggerating the amount. But Leblon Carpentry didn't register the lien.

[34] I find no factual basis set out in the New Action for the claim against Leblon Carpentry. The real claim is against Mr. Da Silva, as the principal and controlling mind of Leblon Drywall in registering the lien.

[35] The conspiracy allegation against Leblon Carpentry (paragraphs 47-49) are bare allegations of conspiracy with no factual basis.

[36] The claim against Leblon Carpentry could have been brought in the Barrie Action, if necessary, through amendment to the counterclaim with specific factual allegations as required in conspiracy pleadings.

### **The Claim against Leblon Drywall**

[37] Section. 55 (2) (a) of the *Construction Lien Act* does not apply to prevent the claim against Leblon Drywall being made in the Lien Action since Leblon Drywall is a party to the Lien Action. This claim could have easily

been made in the Lien Action, if not already subsumed in the counterclaim in the Lien Action since there already is a claim against Leblon Drywall for \$1,202,640.09 by way of counterclaim. The counterclaim in the Lien Action relies on the allegations in Insite's Statement of Defence in the Lien Action, which allegations are repeated and relied on in This Action.

- [38] Simply formulating and calling the same factual basis as a new cause of action, is not a proper basis to commence another action. See *The Catalyst Capital Group Inc. v. VimpelCom Ltd.* 2019 ONCA 354 at para. 55.
- [39] In any event, the claims against Leblon Drywall in This Action are contrary to the purpose of the *Construction Lien Act* which is to resolve all of the issues between the parties to the Lien Action. That is particularly relevant given that Insite's factual basis for its claims relate to the registration of the lien. See s. 51 of the *Construction Lien Act*.
- [40] Given the same factual underpinning of the claims advanced against Leblon Drywall in the New Action, the claims against the Leblon Drywall, if considered necessary to be added, should be brought in the Lien Action.
- [41] No explanation was advanced why these claims were not brought in the Lien Action.
- [42] The claims against Leblon Drywall in the New Action are hereby dismissed without prejudice to such claims being brought in the Lien Action by way of counterclaim, if so advised.

### **Other Submissions by "Da Silva's" Counsel**

- [43] I reject Mr. Kersten's submission that the determination in this proceeding is going to be determined in the Barrie Action and the Lien Action. If Leblon Drywall's lien is found to be valid, then the claim in This Action against Mr.

Da Silva and Leblon Carpentry for improper registration of a lien claim or for exaggerating the amount of the lien will become moot. On the other hand, if Leblon Drywall's lien is found to be invalid or exaggerated, then Insite will still have to establish that Mr. Da Silva's knowledge and participation in knowingly registering an invalid lien or grossly exaggerating the lien, will have to be proven. What if the lien is out of time? Then the claim in the New Action may still have to be decided. What if the court finds that there is a valid lien for a portion of the amount claimed? These and other questions will have an impact on whether Insite's claim in the New Action might succeed.

- [44] Mr. Kersten also submits that the Court would nevertheless have the jurisdiction to award damages for an exaggerated or false claim for lien under s. 35 of the *Construction Lien Act*. That may be possible and cover some of the claims made by Insite in This Action, but the factual matrix includes many non-lien related matters which may impact on the alleged wilful nature of Mr. Da Silva's conduct: the alleged loan(s) to Da Silva et al., the agreement regarding a sharing of profits (from this project), the alleged breach of a termination agreement. And then there is the claim against Leblon Carpentry.

**No Pending Proceeding/ No Prejudice to deal with these claims.**

- [45] Given the above, I am not persuaded that there are pending proceedings with respect to similar or duplicative claims justifying the court granting a stay or a dismissal of This Action.
- [46] I find no prejudice or injustice to Mr. Da Silva or his companies to permit these claims to be advanced, although not necessarily in the New Action. Having to defend new or additional claims is not, by itself, "injustice".

[47] I find there is no “abuse of process”. To find otherwise, would deprive Insite from bringing these actions against Mr. Da Silva, and amend the counterclaim in the Barrie action against Leblon Carpentry.

**How should these actions proceed?**

[48] The court has broad powers and discretion to control its process to avoid the multiplicity of actions, judicial economy and avoid inconsistent findings. Essentially, the court is guided by what is the fairest mode of adjudicating the issues and efficiency in the administration of justice. While there is no motion to transfer the Barrie Action to Brampton (as required), this court has jurisdiction to dispense with Rule 13.1. pursuant to R. 2.03 of the *Rules of Civil Procedure*. I am satisfied that it is in the interests of the administration of justice that the Barrie Action be transferred to Brampton.

[49] These goals are best be advanced if all three proceedings are tried together or one after the other as the trial judge determines. The trial of the three actions can be expedited. This would avoid amendment to the Barrie Action, amendment to the Lien Action and the continuation of the New Action.

[50] I order the following:

- a) The Barrie Action is transferred to Brampton.
- b) The Barrie Action, Lien Action and the New Action are to be tried together or one after the other as the trial judge may direct.
- c) Counsel are to agree on a timetable to complete all the necessary steps to have these three actions expedited and ready for trial. If the parties cannot agree on an expedited timetable, I will hear submissions at a conference on a timetable. I confirm that Insite’s

counsel has agreed that no additional production to make nor discoveries are required from Insite with respect to This Action.

## **COSTS**

- [51] There has been mixed success. While I make no comment on the validity of the claims, the current procedural quagmire appears to be the result of litigation driven by the two main parties, without regard to efficiency, appropriateness nor compliant with goal of a just, most expeditious, least expensive and efficient adjudication of the necessary issues to be decided by the court on the merits. See R. 1.04(1).
- [52] I will entertain written submissions as there may be Offers that might impact on a cost award.
- [53] Either party who seek costs shall deliver written cost submissions (3 page max) within 2 weeks. A Bill of Costs and Offers may be attached.
- [54] Any party against whom costs have been sought, shall have a further 2 weeks to deliver responding cost submissions (3 page max) and may append their Bill of Costs and Offer(s).
- [55] No reply submissions.

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**RE:** INSITE CONSTRUCTION  
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SILVA et al.

**COUNSEL:** SCHWARTZ, Stephen, for the  
Plaintiff, Insite Construction  
Management Inc.

KERSTEN, Matthew &  
MENARD, Dominique, for the  
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Leblon Drywall Inc. and Leblon  
Carpentry Inc.

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**ENDORSEMENT**

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RSJ RICCHETTI

**Released:** April 13, 2023