

CITATION: Northbridge General Insurance v. PSA Construction Inc., 2023 ONSC 6536
COURT FILE NO.: CV-22-00685840-0000
DATE: 20231120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
NORTHBRIDGE GENERAL) Andrew Punzo and Evan Ivkovic, for the
INSURANCE CORPORATION) Plaintiff
)
Plaintiff)
)
- and -)
)
PSA CONSTRUCTION INC., PSA)
HOLDINGS INC ., PAUL ANDREWS and)
KIMBERELY ANDREWS)
)
Defendants)
)
)
)
) **READ: November 15, 2023**

2023 ONSC 6536 (CanLII)

PAPAGEORGIU J.

Overview

[1] The plaintiff Northbridge General Insurance Company (“Northbridge”) is a surety. The defendant PSA Construction (“PSA”) was a construction company. The defendant PSA Holdings Inc. (“Holdings”) is related to PSA and as the name implies, it is a holding company. The defendants Paul Andrews and Kimberly Andrews were directors and officers of PSA and Holdings.

[2] On March 6, 2019, the Defendants executed indemnity agreements in favour of Northbridge.

[3] In reliance on these indemnity agreements, Northbridge issued performance bonds and labour and material bonds with PSA as principal.

[4] Northbridge made payments pursuant to the bonds as a result of PSA’s default on various construction contracts.

[5] It seeks repayment of amounts paid pursuant to the bonds as well as amounts required to pay outstanding claims.

[6] The defendant failed to defend the proceeding and was noted in default.

[7] The plaintiff brings a motion for default judgment.

Decision

[8] For the reasons that follow I am granting the judgment as sought.

The Issues

[9] The main issues are:

- Issue 1: Do the materials provide a basis for a finding of liability?
- Issue 2: If so, what are the damages to which Northbridge is entitled?

Analysis

Issue 1: Do the materials provide a basis for a finding of liability?

Consequences of noting in default

[10] Pursuant to r. 19.02, having not defended the proceeding, a defendant is deemed to admit the truth of all allegations of fact made in the Statement of Claim.

[11] However, pursuant to r. 19.06 a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[12] In particular, r. 19.05 provides that a motion for judgment which involves damages shall be supported by evidence given by affidavit.

The test on a motion for default judgment

[13] The test on a motion for default judgment was set out in *Elekta Ltd. v. Rodkin*, 2012 CarswellOnt 2928 (ONSC) as follows: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiff, as a matter of law, to judgment on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitle it to judgment on the pleaded claim?

[14] I am satisfied that the plaintiff has established liability based upon the following deemed admissions in the Statement of Claim:

- On March 6, 2019 the Defendants each executed indemnity agreements in favour of Northbridge where they agreed to jointly and severally indemnify Northbridge for losses, charges, demands etc. in connection with the execution of surety bonds and defaults under the indemnities. In these indemnities, the Defendants agreed to indemnify Northbridge in respect of fees and disbursements of adjusters, consultants and counsel: Para 7
- The indemnities also required the Defendants to advance cash or collateral to allow Northbridge to cover any indemnity losses even before any payment was made by Northbridge to another party: Para 8
- In reliance on the indemnities, Northbridge issued performance and labour bonds with PSA as principal: Para 12
- Northbridge has paid certain amounts pursuant to the performance and labour bonds and incurred fees in respect of these. As at the date of the Statement of Claim, this amount was \$444,049.02: Para 23
- Northbridge has received labour and material bond claims in the amount of \$861,810 and has estimated that it will incur legal expenses in the amount of \$150,000 in respect of such claims: Para 24
- Northbridge has made demands for payment but the Defendants have refused payment: Para 26

Issue 2: What are the damages to which the plaintiff is entitled?

[15] Pursuant to paragraph 2 of the indemnity agreements filed, the Defendants must reimburse Northbridge for any amounts actually paid.

[16] The affidavit material filed shows that Northbridge paid such claims in the amount of \$513,844.39 inclusive of legal and consulting fees and net of recoveries.

[17] Pursuant to paragraph 9 of the indemnity agreements filed, the Defendants also had an obligation to, upon demand of Northbridge, advance cash or collateral sufficient to cover any possible indemnity losses including possible losses under any surety bonds issued by Northbridge.

[18] Ontario courts have recognized and enforced similar clauses in the following cases: *Fengar Investments Corp*, 1993 CarswellOnt 194 at para 95; *Zurich Insurance Co. v. Paveco Road Builders Corp*, 2009 CarswellOnt 1543 and *Royal & Sun Alliance Insurance Company of Canada v. Euro Landscape Construction & Grounds Inc.*, Released: 2019-07-10, Court File No. CV-180597968

[19] The affidavit material filed supports the existence of labour and material bond claims in the amount of \$1,011,810 inclusive of estimated legal expenses to be incurred.

[20] Northbridge is entitled to be compensated for the loss of bargain which means it is entitled to be placed in the same position it would have been in if the breaches had not occurred, or in other words as though the contract had been performed without any breaches.

[21] Therefore, Northbridge is entitled to payment of the quantum sought in the amount of \$513,844.39 for past claims paid and \$1,011.810 in respect of current claims on labour and material bonds inclusive of legal expenses.

[22] Order to go in accordance with the Judgment filed.

Papageorgiou

Released: November 20, 2023

