

Date: 20231004
Docket: CI 22-01-34814
(Winnipeg Centre)
Indexed as: Green Key Builders Inc. and Meder v. Tsang
Cited as: 2023 MBKB 145

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

GREEN KEY BUILDERS INC. and)	<u>Jared M. Wheeler</u>
MATTHEW MEDER,)	for the plaintiff
)	
plaintiffs (defendants by counterclaim),)	
)	
- and -)	
)	
AMY TSANG,)	<u>On their own behalf,</u>
)	<u>assisted by Gary Strike</u>
defendant (plaintiff by counterclaim).)	for the defendant
)	
)	Judgment Delivered:
)	October 4, 2023

McKELVEY J.

INTRODUCTION

[1] The plaintiffs (defendants by counterclaim) seek a summary judgment pursuant to King's Bench Rule 20.01(1) as against the defendant (plaintiff by counterclaim). In terms of procedure, the following is necessary:

Granting summary judgment

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

Powers of judge

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

- (a) weighing the evidence;
- (b) evaluating the credibility of a deponent;
- (c) drawing any reasonable inference from the evidence;
unless it is in the interests of justice for these powers to be exercised only at trial.

[2] The parties have filed the following relevant materials subsequent to the pleadings:

- i. Affidavit of Matthew Meder, dated November 3, 2022;
- ii. Affidavit of Amy Tsang, dated November 7, 2022;
- iii. Affidavit of Matthew Meder, dated November 29, 2022;
- iv. Affidavit of Amy Tsang, dated January 31, 2023;
- v. Corrected version of Cross-examination on Affidavit of Matthew Meder, dated April 18, 2023;
- vi. Revised Cross-examination on Affidavit of Amy Tsang, date April 18, 2023;
- vii. Motion Brief of the Plaintiffs, dated July 17, 2023;
- viii. Motion Brief of the Defendant, dated August 14, 2023;
- ix. Reply Affidavit of the Plaintiffs, dated August 28, 2023;
- x. Reply Brief of the Defendant, dated September 1, 2023.

Further, *viva voce* evidence was heard at the summary judgment hearing from Matthew Meder, Amy Tsang, Jomar Briones and Juergen Giesbrecht. An Agreed Book of Documents with 50 tabs was also filed as Exhibit 1.

[3] I am satisfied, after considering all the evidence and submissions of the parties, that a genuine issue requiring a trial does not exist. Further, this case is appropriate for determination by way of the summary judgment process.

BACKGROUND

[4] This matter involves a dispute with respect to a stipulated fixed price contract (the "Contract") for the building of the Tsang residence in the City of Winnipeg (Exhibit 1, Tab 32). The plaintiffs (defendants to the counterclaim) (Green Key and/or Meder) and the defendant (plaintiff by counterclaim) (Tsang) entered into a written construction contract on November 2, 2021. Green Key agreed to be the general contractor, and contracted to provide construction work, services, and materials for the residence. The contracted price for the build was \$397,350.45, including tax (Article A.4). The Contract required that Tsang engage a qualified consultant which ultimately proved to be Arjom Design Tech Inc. ("Arjom") represented by Jomar Briones ("Briones") (Exhibit 1, Tab 8) (Contract GC 2.2; GC 8.1). A \$20,000 deposit was given to Green Key by Tsang, which was to be applied to the final invoice (Exhibit 1, Tab 9).

[5] The initial work at the residence site commenced in early November 2021 and included dealing with scattered rebar and snow removal, as well as other site preparation activities. Green Key then arranged for the drilling and pouring of 14

P1 piles, which were installed at a depth of 25 feet. Additionally, hook bars were supplied as well as other concrete foundational services. Supply and installation of exterior weeping tile was completed, along with related work in preparation for concrete pouring.

[6] Initially, Green Key was not to do any of the concrete work at the build site as Tsang had arranged for Jeurgen Concrete Inc. to perform that function (Exhibit 1, Tabs 2 and 20). That said, on October 15, 2021, Jeurgen Giesbrecht ("Giesbrecht") advised Tsang that his company would no longer undertake the concrete work (Exhibit 1, Tab 3, p. 3). As a consequence, Green Key agreed to perform the concrete work with pricing set at \$53,576.25. This included "All Concrete Work (weep tile, pit, rock, prep, DP & Ins)" as set out at Exhibit 1 (Tab 7).

[7] Green Key subcontracted with Ryman & Sons Contracting Inc. ("Ryman") to undertake the concrete work at a projected cost of \$53,576.25 (Exhibit 1, Tabs 13 and 37). The total amount ultimately invoiced to Green Key by Ryman was \$31,923.15, after its completion of a portion of the concrete work on the project. The remainder of the work was not done because of the early termination of the Contract. The invoice was paid in full by Green Key.

[8] It was an expressed term of the Contract (Article A-5, 5.1.1) that Tsang was obliged to make progress payments to Green Key while the work was being undertaken. In the event of default, interest would be charged at rates stipulated within the Contract.

[9] As indicated, between November 2 and 22, 2021, Green Key and its subcontractors undertook work, performed services, and supplied materials in compliance with the Contract. This included drilling and pouring concrete for all piles. The work undertaken resulted in an “improvement” to the property. There is no question that Green Key performed the outlined work; it is the value of that work that is in significant dispute between the parties.

[10] On October 21, 2021, Tsang communicated by e-mail with Green Key asking a number of questions with respect to the project after her receipt of a detailed category price list (Exhibit 1, Tab 6). Further, she had requested a reduction in the price quoted before the Contract was signed (Tsang Affidavit, January 31, 2023, pp. 7-8). Meder advised that it would take three to six weeks in order to secure firm pricing with respect to certain of the “extras” raised by Tsang (Affidavit of Matthew Meder, November 3, 2022, para. 18). Further, if additional work was required for those extras, there would be a possible price increase for the build (Matthew Meder Affidavit, November 29, 2022, paras. 23-26).

[11] The parties met to discuss the “extras” and project itself on November 17, 2021. The following day, Meder, on behalf of Green Key, forwarded an e-mail to Tsang with a multiple cost analysis for the “extras” and options that could be accomplished in order to ensure that the project remain closer to the cost stipulated in the Contract (Exhibit 1, Tab 14). In response, Tsang communicated her surprise and shock at what she regarded as being a request for more money. Her position was that an agreement on price had been reached as outlined in the

Contract (Tsang Affidavit, November 7, 2022, paras. 14-24). Consequently, she was not prepared to pay any additional funds beyond the Contract price. It is noteworthy that the “extras” were not accompanied by a change directive or change order as would be required under the Contract (Exhibit 1, Tab 32, GC 6.1.2, GC 6.2, GC 6.3). The fact there was no accompanying change order is indicative that Green Key was simply responding to Tsang’s questions and not unilaterally raising the price. Meder anticipated that it would be her decision as to whether any changes were to be incorporated into the build. Any such changes could have raised the cost and facilitated the necessity of a change order and communication with the consultant. Instead, on November 19, 2021, Tsang indicated, “... we are not prepared to pay any additional funds on this construction” (Exhibit 1, Tabs 14 and 35). On the same day, Meder, on behalf of Green Key, responded that he had endeavoured to contact Tsang on many occasions, without success, to discuss the matter and consequently, “We will not be doing anything after the concrete for this job”. As clear instructions had not been communicated, Meder also said (Exhibit 1, Tab 14, p. 4):

I have tried to call numerous times to set up a meeting with you. I have had no success at all. As a builder this is very concerning moving forward on a project. I currently have over \$40,000.00 into this project right now and without a meeting to resolve the issues with the build costs, building plans & the contractual documents, Green key Builders can not proceed any further on this project until these issues are resolved.

On November 23, 2021, Tsang, by way of e-mail, stated, “We agree that Green Key Builders should not do any more work on this project”. These exchanges resulted in the Contract’s termination.

[12] Green Key invoiced Tsang for the work accomplished on the project being \$36,285.90 with \$16,285.90 owing on November 25, 2021 (Matthew Meder Affidavit, November 3, 2022, para. 11). That amount reflected the application of the \$20,000 deposit in partial satisfaction of the invoice (Exhibit 1, Tab 38). Tsang has made no payments with respect to the \$16,285.90 invoice. As a consequence, a lien was registered against the property on December 6, 2022 (Exhibit 1, Tabs 42 and 43). Tsang was advised by Meder on November 25, 2021, that a lien would be filed against the property by Green Key (Exhibit 1, Tab 15).

[13] On December 3, 2021, Tsang filed a small claim action against Meder and Green Key for the sum of \$10,481. That figure was said to represent a partial return of her \$20,000 deposit (Exhibit 1, Tab 21). A statement of defence and counterclaim to the small claims action was filed on December 20, 2021. That action was ultimately discontinued on April 25, 2022.

[14] On December 13, 2021, Meder was served with a Notice of Private Prosecution under s. 810 of the *Criminal Code* and a summons to show cause with respect to an application for a peace bond brought by Tsang. The peace bond sought was on the basis that Tsang alleged she was in fear of both Meder and his employees. The application for the peace bond was heard July 18, 2022, and dismissed (Meder Affidavit November 3, 2022, Tabs R and S).

RELIEF SOUGHT

[15] The plaintiffs are seeking:

- a) for breach of contract or unjust enrichment: \$16,285.80 plus interest

- b) for lost profit: \$9,933.76;
- c) for damages for abuse of process: \$30,000;
- d) a declaration that the Green Key lien is valid; and
- e) a declaration that Tsang is a vexatious litigant.

[16] The plaintiffs contend that the small claims action brought by Tsang, along with the protection order constitute an abuse of process and ask that Tsang be declared a vexatious litigant based on those filings and her litigious record with the courts. That record includes 23 actions filed since August 14, 2000 (Exhibit 1, Tab 47).

[17] Tsang denies the relief sought by Green Key and counterclaims for \$6,928.33 to be returned from her deposit.

WAS THERE A BREACH OF CONTRACT AND, IF SO, BY WHOM?

[18] As earlier indicated, the Contract was entered into between the two parties on November 2, 2021, for the stipulated fixed price of \$397,350.45. Prior to that time, Tsang had posed a number of questions to Meder, President of Green Key (October 21, 2021), with respect to certain details set forth in the build estimate. These included her stated preference for fibre glass rather than spray foam insulation; vinyl plank flooring as opposed to carpeting; the type of roofing to be utilized; a dislike of vinyl siding as well as other matters. Meder advised that a number of weeks were required in order to address the questions raised. The responses to those questions was provided by Green Key along with the accompanying costs which necessitated Green Key proposing alterations to the

contracted plan in order to maintain the original contracted price (Exhibit 1, Tabs 13 and 29). These were submitted to be proposals for Tsang's consideration and not additions and increases to the fixed contract price. In essence, these "revisions" were informational, as Green Key could not alter the fixed price without change orders/directives and conversations with the consultant. Further, Green Key required more shop drawings, as items such as upper kitchen cabinets were missing from the plans. Meder testified that Green Key was, at all times, prepared to honour the Contract for the stipulated price. He reiterated that there would have been a need to go through the change process as set out in the Contract in the event Tsang wanted to undertake any of the posed alterations or extras, albeit communications essentially terminated between the parties in this time frame. At no time did Green Key indicate an unpreparedness to go through with the original contract and price. What the builder required was confirmation of what Tsang wanted in terms of the build after receiving answers to her questions. Conversely, Tsang submits that the Contract was unilaterally terminated by Green Key as the price of the build was significantly increased. She testified that she made no change requests after the Contract was executed and wanted the build to go forward at the agreed upon fixed price (Tsang Affidavit, January 31, 2023, pp 15-71).

[19] The documentation set forth in Exhibit 1, Tab 14, demonstrates that Tsang would not communicate with Meder subsequent to November 17 and 18, 2021, as numerous telephone calls and requests to meet went unanswered. This resulted

in Green Key being unable to proceed with the project, which resulted in Tsang's "agreement" that Green Key should cease work. I am satisfied that much of what happened in and around November 17-25, 2021, involved serious miscommunications and misunderstandings primarily by Tsang as to what was transpiring compounded by her refusal to communicate and meet with Meder. The evidence and Meder's testimony, which I accept, shows that Green Key would have continued to honour the Contract at the agreed price, albeit without the modifications earlier queried by Tsang. In the event added and unanticipated costs were occasioned during the course of the build, Green Key would have been required to seek a change order/directive and sought contact with the consultant, as stipulated under the Contract, or bear the increased costs.

[20] There is nothing in the evidence demonstrating a breach of contract by Green Key. Indeed, Green Key would not have agreed to proceed with any of the proposed revisions without the appropriate change order/directive and a consultation with Briones, as the price of the build would have increased. Meder had advised Tsang that any increased work resulting from her questions would be accompanied by an enhanced cost. I have concluded that Tsang breached the Contract by virtue of her failure to pay for the work performed along with the other contractual obligations that existed and arguably were not complied with in full. Those included a failure to provide acceptable proof of funding; failure to secure all risk insurance; failure to set up a trust account; failure to provide complete building plans; and the termination of the Contract without cause (Meder Affidavit,

November 3, 2022, paras. 13-17). Additionally, the consultant retained was not providing the service requirements that were stipulated in the Contract (Exhibit 1, Tab 32, GC 2.2). Briones is a draftsman, albeit with architectural training. He at no time notified Green Key, in his capacity as a consultant, of any deficiencies, nor was there direct contact. Further, Green Key never contacted him in order to advise of an alleged price increase or other changes as would have been required under the Contract (GC 5.2). The reason being that no price increase was being agreed or undertaken. Additionally, Briones testified that he was unaware of any changes in the scope of the project; that there would have been upper kitchen cabinets; he was not a concrete subcontractor; the piles were placed at a 25 feet depth rather than 16 feet; and that he gave evidence at the Protection Order hearing that Green Key had done nothing wrong. Tsang's position with respect to the alleged non-compliance with her obligations under the contract, is:

- (i) a deposit balance of \$354,108.44 was being maintained in a High Rate Savings Account (Exhibit 1, Tabs 25 and 30). Additionally, no trust account was required;
- (ii) an insurance policy (Exhibit 1, Tab 26);
- (iii) a contention of completed building plans;
- (iv) no need to pay an inflated invoice;
- (v) unilateral termination of the Contract by Green Key through the raising of the build cost.

[21] As indicated, pursuant to the Contract, Green Key could never have unilaterally increased the price. Such cost alterations could only be done by agreement and with approval by the consultant, accompanied by a change order/directive.

[22] I am satisfied, as indicated, that there was a contractual breach by Tsang in terms of her unilateral termination of the Contract. Perhaps this was as a result of a language miscommunication or misunderstanding between the parties. However, that termination and the failure to pay the \$16,285.90 invoice is a breach of the Contract. I am also satisfied that the lien placed on the property was properly registered and is appropriate in that Green Key performed work on the project, provided services and supplied materials without payment (*The Builders' Liens Act*, C.C.S.M. c. B91 ("*BLA*"), ss. 13 and 38).

VALUE OF WORK ON THE PROPERTY

[23] Tsang does not dispute that Green Key did work on the property, provided services and supplied materials (Revised Cross-Examination of Tsang, April 18, 2023, pp. 22-23). That said, Tsang challenges the value of the work done on the property. (See Tsang Affidavits, November 7, 2022, paras. 25-41; January 31, 2023, pp. 31-37).

[24] Green Key has supplied a number of invoices indicative that the value of the work and other services performed on the property totalled \$36,285.90 (Exhibit 1, Tab 50). The principal area in dispute primarily relates to the costs of

installing piles and concrete along with certain other works done on the property, such as removal of scattered and unbranded rebar along with snow removal.

[25] Tsang has gathered information from various sources as to what, in her view, the appropriate costs should have been for the work performed by Green Key. These total \$9,684.55 (Motion Brief of Tsang, para. 62 and Exhibit 1, Tabs 16, 17, 20, 22, 23, 34). Much of this information gathered by Tsang amounts to hearsay evidence, albeit Giesbrecht testified with respect to the cost of piles being \$600 each, although that figure related to labour costs only (Exhibit 1, Tab 20). Further, in a January 19, 2023 e-mail, Giesbrech indicated that Green Key had overcharged as regards the undertaken concrete work (Exhibit 4). However, during his testimony at this hearing, Giesbrecht said that Tsang had advised him that she was being charged \$70,000 for the piles, which, understandably, would have constituted an overcharge. Additionally, he conceded that the costs of such work depends on the company who performs it, accompanied by an “upcharge” to cover their costs of up to 30 per cent. Other documentation supplied by Tsang is from Lafarge Ready Mix as well as others, including Kevin’s Concrete Pumping Ltd. who did no work on the project. It is unknown as to what they had been told in the context of their provision of information about the work and materials required as related to costs (Exhibit 1, Tabs 16 and 17).

[26] Tsang disputed that snow removal was necessary by Green Key at the build site, albeit the Government of Canada daily data weather report in and around the time this work was being performed showed that from November 10-13, 2021,

total precipitation amounted to 42 millimetres (Exhibit 3). That said, it is possible that some melting occurred resulting in “mucky” conditions at the residence. In any event, I am satisfied as to the cost charged for snow removal from the excavation site.

[27] Green Key was invoiced by Ryman for the sum of \$31,923.15 (Exhibit 1, Tab 37). That invoice was paid by Green Key and was included in the invoice to Tsang (Exhibit 1, Tabs 38 and 50). Green Key, pursuant to the Contract, is required to pay for the performance of subcontracted work (Exhibit 1, Tab 32, GC 3.8.1). Consequently, even if some credence is given to the documentation provided by Tsang as to what others may have charged for services and/or materials, it is of no consequence. Further, Tsang had no privity of contract with Ryman (Exhibit 1, Tab 32, GC 1.1.2). Green Key was obligated to pay its subcontractor and did so.

[28] As previously indicated, there was no indication or evidence of deficiencies as regards the work performed. That said, Tsang testified that there were deficiencies, albeit Green Key was never advised of such by the consultant nor by her in accordance with the Contract as she wanted no contact with the company (Tsang Affidavit, November 7, 2022, para. 45). Tsang was in agreement with the \$53,000 cost for concrete work shown in the Contract by virtue of her execution of that document. The entire \$53,000 cost was not realized as a consequence of the termination of the Contract before all the concrete work was completed.

UNJUST ENRICHMENT

[29] I am satisfied that Tsang unilaterally breached the Contract with Green Key. However, if I am wrong in that assessment, I find that she was unjustly enriched in the circumstances. The work done on the property has value and Green Key was not paid for its undertaken efforts. The piles and other invoiced work have been utilized for the project.

POTENTIAL LOSS OF PROFIT BY GREEN KEY AS A RESULT OF TERMINATION

[30] Meder's Affidavit dated November 3, 2022, indicates that Green Key is a "... pretty small General Contracting/Project Management Operation. We have 4 employees, including myself" (para. 3). Meder further said in his affidavit that the Tsang contract was to be completed by July 15, 2022. Consequently, before the project was terminated, other projects had been turned down. Green Key submits, based upon the decision of *M. Block & Associates Ltd. v. Telus Communications Inc.*, 2014 MBQB 153, that a logical basis can be utilized by the trier of fact to estimate damages suffered which may be regarded as "speculative" in nature. The Court held that it was better that a "... damaged party receive a reasonable, if not mathematically measurable, amount than that there should be no compensation for the loss" (para. 104).

[31] Green Key submits that it was to be paid \$397,350.45 for eight months of work under the Contract. On a monthly average, that would constitute a figure of \$49,668.80. It was suggested by Meder that a general contractor would make an approximate 10 per cent profit on a contracted price. Accordingly, a reasonable

estimate for Green Key's profit per month was \$4,966.88. Green Key seeks two months' lost profits, which totals \$9,933.76.

[32] Tsang submits that in the event Green Key lost profit, it was through its own actions and should not be compensated. That said, this area was not challenged on an evidential basis.

[33] There is no evidence before the court as to when Green Key first secured work subsequent to the termination of the Contract, albeit it is likely that some lost profit occurred. That said, without evidence in that regard, it is difficult to award a loss of profit beyond a minimal amount approximating \$2,500.

IS MEDER ENTITLED TO DAMAGES AS AGAINST TSANG FOR ABUSE OF PROCESS?

[34] The plaintiffs seek damages on the basis of an abuse of process. The doctrine of abuse process has been well set out in Justice Grammond's decision in ***5976511 Manitoba Ltd. et al v. Taylor McCaffrey LLP et al***, 2020 MBQB 7. It is submitted by the plaintiffs that Tsang instituted two proceedings that were doomed to failure from the outset because of a lack of merit. Those proceedings were brought for improper and malicious purposes as against Meder personally. In these circumstances, it is noteworthy that Tsang is a self-represented litigant, albeit with some familiarity of the court processes. Tsang instituted a small claim action against Green Key and against Meder personally despite the fact that his involvement with Tsang was as the principal of the corporation. Consequently, I am satisfied that he should not have been sued in his personal capacity. The small claims action was undertaken subsequent to Tsang learning that a lien would be

filed by Green Key against her property. Further, Tsang brought a private prosecution in provincial court against Meder personally. This action was based on the fact that the fence at the build site had been knocked down and rebar had been cut. In her peace bond particulars, Tsang said on December 7, 2021, that, “So, I don’t have any direct evidence that it was Matthew Meder from Green Key Builders, or one of his workers, but I highly suspect that he was involved” (Exhibit 1, Tab 44). Tsang also testified at this hearing for the first time that Meder threatened both her and her family, saying he could not guarantee what his workers would do to the family or their property. Meder seeks \$30,000 for punitive damages as a result of an abuse of process.

[35] The court has a residual jurisdiction to prevent an abuse of its processes. This includes when court processes are used for an ulterior motive other than what they are intended. Meder indicates that he has been harassed as a result of the noted and inappropriate litigation and further submits it is an abuse of process with respect to him and on the court’s integrity.

[36] Tsang denies Meder’s entitlement to damages for abuse of process. The inclusion of Meder in the small claims action was said to have been a result of his signature on the Contract on behalf of Green Key. Tsang claimed to be unaware that it was inappropriate to name him personally in the small claims action (without endeavouring to pierce the corporate veil). I accept her contention in that regard. Further, Tsang submits that Meder is named as a plaintiff in the statement of claim

brought in these proceedings and, consequently, was an appropriately included party in the small claims action.

[37] I find that Meder's inclusion as a plaintiff in this Court of King's Bench proceeding is appropriate as he is seeking compensation and an award against Tsang in his personal capacity and separate from that of Green Key of which he is the president and has signing authority. The "personal" compensation for damages relates to the abuse of process claim and that Tsang be declared a vexatious litigant.

[38] While Tsang's actions particularly involving the application for a peace bond were misguided, I am not satisfied that this is an appropriate case in which to award damages. This conclusion has been reached in part because Tsang is a self-represented litigant and has experienced miscommunications and/or misunderstandings with respect to this matter. Further, I am not satisfied that Tsang inappropriately used the court's processes. In the event I am in error with respect to this conclusion, I would have awarded the sum of \$10,000.

SHOULD TSANG BE DECLARED A VEXATIOUS LITIGANT?

[39] The plaintiffs submit that because of Tsang's actions in filing a small claims action for the return of a portion of her deposit, as well as the peace bond application, that she should be declared a vexatious litigant. This is further supported by the fact Tsang has been involved in 23 civil actions commencing in August 2000. Tsang has referenced herself as a "landlady" in her affidavits and, accordingly, is involved in litigation related to the collection of rental payments.

[40] The declaring of a vexatious litigant is governed by s. 73(1) of ***The Court of King's Bench Act***, C.C.S.M. c. C280. It is submitted by the plaintiffs that both the private prosecution with respect to the peace bond and small claims action were initiated by Tsang to defeat the Green Key lien on the property, accompanied by her proclivity to engage in the filing of legal actions.

[41] The Manitoba Court of Appeal in the ***College of Registered Nurses of Manitoba v. Hancock***, 2023 MBCA 70 has well set out the "phenomenon of the vexatious litigant" (para. 1). Justice Mainella, speaking for the court, said as follows:

[2] The courts have long thought it "unwise" to lay down a rigid definition of the legal term "vexatious" as it can arise in innumerable ways and, therefore, the concept is a flexible one (*McHenry v Lewis* (1882), [1883] 22 ChD 397 (CommonLII) at 407-8 (CA UK)). The term "vexatious" can be used to describe either the nature of a legal claim or a litigant personally. Central to either manifestation is evidence of the attempted abuse or significant misuse of the court process which, if allowed to continue unabated, would bring the administration of justice into disrepute. At the core of vexatiousness is conduct that has no discernable basis in law which, if not stopped, would result in real harm to another or the system itself. While a party's motivation(s) or the proportionality of their conduct may bear on the determination of vexatiousness, the egregiousness of the conduct in the given context is the controlling question.

[3] When discussing vexatiousness in relation to a litigant personally, the concern is that, irrespective of their motive(s), a vexatious litigant abuses their civil rights by bombarding the courts with proceedings having no merit. The result is that chaos ensues: defendants are inconvenienced, harassed and financially taxed, and the limited resources of the courts, which face challenges in affording justice without unreasonable delay to genuine grievances, are diverted and strained to deal with this nuisance.

.....

[88] It is well accepted that many self-represented litigants are "confused or overwhelmed" by the legal system (Kennedy at p 742). There is, however, a qualitative difference between an unrepresented litigant who needs "extra attention and assistance" (*Simon v Canada (Attorney General)*, [2019 FCA](#)

[28](#) at para [13](#)) from the courts to allow them to meaningfully participate in the process and have a reasonable opportunity to present their case, and those who are “ungovernable” (at para 14) or “simply harmful” (at para 15) in their approach and therefore open to a finding of being a vexatious litigant.

[89] The Canadian Judicial Council’s Statement of Principles on Self-represented Litigants and Accused Persons (Canadian Judicial Council, “Statement of Principles on Self-represented Litigants and Accused Persons” (September 2006), online (pdf): <cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf> (date accessed 22 August 2023)), which has been endorsed by the Supreme Court (see *Pintea v Johns*, [2017 SCC 23](#) at para [4](#)), makes several comments about vexatious litigants that are helpful (at pp 5-6, 9):

...

Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

...

Judges and court administrators have no obligation to assist a self-represented person who is disrespectful, frivolous, unreasonable, vexatious, abusive, or making no reasonable effort to prepare their own case.

...

Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

[42] As previously indicated, Tsang is a self-represented litigant in this matter and has been on other occasions before the courts. Accordingly, she has an appreciation of the court Rules and procedures as can be seen by the filing of her materials and the content of those materials. There are sections of her affidavits and briefs that are replete with hearsay, rhetoric and unfounded and unnecessary attacks on the plaintiffs and on legal counsel. There is no evidence as to the nature and content of the other actions filed by Tsang since the year 2000, beyond

her comment as to being a “landlady” and requiring the collection of rents. The existence of 23 actions over a 23-year period does not appear, on its face, to be abusive or excessive, particularly in circumstances where rental agreements and breaches of such agreements may exist.

[43] Tsang’s appearances before me have been courteous and she has in no way acted in an aggressive or contentious manner. While the small claim action has been viewed by the plaintiffs as being a method to defeat the lien, I have no doubt that Tsang clearly believes in her entitlement to the return of a portion of the deposit paid to Green Key and the invalidity of the lien. Again, miscommunications or misunderstandings of what transpired between these two parties is likely behind her actions. As indicated, the seeking a peace bond was misguided, particularly when there was admittedly no solid evidence that the actions on the property could be tied to Meder or his employees. Her seeking the peace bond was simply based on unfounded speculation. However, in all the circumstances, I am not prepared to declare Tsang to be a vexatious litigant. The *Hancock* decision was particularly helpful in making this determination.

CONCLUSION

[44] As I have found no genuine issue for trial exists, the plaintiffs are entitled to summary judgment as follows:

- (i) the sum of \$16,285.90 with interest. That interest must be calculated in accordance with the stipulated rates in the Contract;
- (ii) loss of profit: \$2,500;

(iii) costs to the plaintiffs in accordance with the Tariff;

(iv) a declaration that the lien is valid.

[45] I am not prepared to find Tsang is a vexatious litigant, nor do I conclude that a damage award for abuse of process payable to Meder personally is appropriate. The counterclaim is dismissed.

_____J.