CITATION: Envirofix Corporation v. Faber, 2023 ONSC 7197
COURT FILE NO.: CV-16-56432
DATE: 2023-12-27

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Envirofix Corporation	)	Peter Mahoney and Danielle Thomas,
	)	Counsel for the Plaintiff
Plaintiff	)	
	)	
- and -	)	
	)	
Joanne Faber, Estate Trustee in the Estate Of Herman Faber, Deceased and Van Der Woerd & Faber Professional Corporation	)	Brendan Bowles and Katie McGurk, Counsel for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** October 10, 11, 12, and December 13, 2023

THE HONOURABLE JUSTICE M. BORDIN

REASONS FOR JUDGMENT

Overview

[1] This action arises out of the expiry of the plaintiff's construction lien because its lawyer did not set the action down for trial within two years as required by s. 37 of the former *Construction Lien Act*, RSO 1990, c C.30. The plaintiff frames the claim in both breach of contract and negligence.

[2] The lien expired on March 20, 2010 and the plaintiff lost the ability to enforce the lien against the property. The property was sold in 2011 without any payment to the plaintiff. The plaintiff has never recovered the sum of $697,197.66 it was owed by the owner of the property. The plaintiff seeks that amount plus interest from the defendants.

[3] The defendants concede that Mr. Faber fell below the standard of care in allowing the lien to expire. The defendants say that the plaintiff has not established that it suffered any damages because of Mr. Faber's breach of the standard of care.

[4] At issue are causation and quantum of damages.

Background and Parties

[5] The parties tendered a 130-paragraph Agreed Statement of Facts (the "Agreed Facts"). I do not repeat the Agreed Facts in their entirety but set out the following summary.

[6] The plaintiff carries on business as an environmental contractor. Bijan Danesh is the plaintiff's sole director. Mr. Faber was the plaintiff's lawyer.

[7] 1139114 Ontario Limited ("113") owned 392 Silvercreek Parkway North, Guelph, Ontario (the "Property") between October 15, 1996 and August 15, 2011.

[8] Melvyn Finkelstein was the president of 113. Howard Steinberg was Mr. Finkelstein's and/or 113's lawyer.

[9] Mr. Faber passed away shortly before this action was commenced. Mr. Finkelstein passed away in September 2019.

[10] On September 26, 2002, 113 granted a mortgage in favour of CIBC Mortgages Inc. ("CIBC"). CIBC advanced $1,600,000 on the mortgage on September 26, 2002 (the "Mortgage").

[11] The Property was contaminated with petroleum hydrocarbons. The plaintiff began environmental remediation work on the Property on May 4, 2006. 113 wanted to remediate the Property to obtain a Record of Site Condition ("RSC").

[12] By July 2007, Mr. Danesh knew that 113 had a mortgage on the Property.

[13] By late 2007, 113 owed the plaintiff a significant amount of money. Mr. Finkelstein told Mr. Danesh that his financial situation did not permit 113 to make a payment to the plaintiff and that the plaintiff should put a lien on the Property.

[14] Between December 2007 and March 2008, the plaintiff and 113 attempted to negotiate a second mortgage agreement to secure amounts owing to the plaintiff.

[15] On February 5, 2008, Mr. Faber registered a claim for lien on behalf of the plaintiff in the amount of $691,467.82. The claim for lien stated the plaintiff's last date of supply of environmental remediation services to the Property was January 21, 2008.

[16] The plaintiff's lien was the only construction lien registered against the Property.

[17] This action was issued on March 25, 2008. A Certificate of Action was registered on March 25, 2008. 113 did not defend the action. On August 27, 2008, judgment was issued against 113 in favour of the plaintiff in the amount of $711,291.16, which included the lien claim of $691,467.82 and interest, plus costs of $945.23 (the "Judgment"). The Judgment did not include a declaration that the plaintiff was entitled to a lien against the Property.

[18] Mr. Faber recommended that the plaintiff register the Judgment against title to the Property and garnishment of the rent being paid by The Brick, one of 113's tenants. Mr. Danesh did not, at any time, instruct Mr. Faber and Faber Professional Corporation to garnish the rent being paid by The Brick.

[19] The plaintiff and 113 continued to negotiate directly with each other after the Judgment was obtained. They were ultimately unable to come to an agreement with respect to the plaintiff's unpaid invoices.

[20] Michael Markoff was the president of 2098060 Ontario Limited ("209") and a practicing lawyer. On August 15, 2011, 113 transferred the Property to 209 in exchange for 209 assuming the Mortgage. At the date of the transfer, the amount outstanding on the Mortgage was $457,960.88.

[21] At the time of the transfer, the Property was still contaminated, no Record of Site Condition had been filed, and the plaintiff's lien remained on title and was not discharged.

[22] On September 7, 2011, CIBC transferred the Mortgage to Esoog Commodities Limited ("Esoog"). Esoog paid CIBC $350,000 on the assignment of the Mortgage. 209 and Esoog are related entities.

[23] On February 28, 2012, 113 filed an Assignment in Bankruptcy, claiming total liabilities of $903,090.33 and total assets of $251,351. On April 9, 2012, Mr. Danesh brought the Notice of Bankruptcy to Mr. Faber's attention for the first time. On June 7, 2012, Mr. Faber arranged for a writ of seizure and sale to be issued.

[24] On August 7, 2013, on a motion brought by 209 without notice before Herold J., an order was granted declaring the plaintiff's lien expired.

Witnesses

[25] The plaintiff called Bijan Danesh and Toivo Heinsaar. Mr. Heinsaar was qualified as an expert to give property valuation opinion evidence.

[26] The defendants called Michael Wootton, who was qualified as an expert in real estate appraisals, and Doug Finlay. Mr. Finlay is a commercial real estate broker in Ontario and the United States who was involved in attempting to sell the Property between 2006 and 2010.

[27] In preparing to testify, Mr. Finlay found documents he had not produced to the parties until he provided them to defence counsel the night before he testified. The documents were

immediately provided to plaintiff's counsel. Both parties agreed the documents were relevant and examined Mr. Finlay on the documents.

Evidence of Mr. Danesh

[28] Mr. Danesh's evidence was internally inconsistent and fluid. At times it was inconsistent with the documents.

[29] Mr. Danesh's evidence was that when the plaintiff left the site in January 2008, the environmental remediation was "basically complete" and the only thing that remained was to obtain an RSC. This was based on the recommendation of URS Canada Inc. ("URS") in its report of October 31, 2007.

[30] However, saying that the remediation was "basically complete" based on the recommendation of URS is not the same thing as saying that the remediation had in fact been completed and was ready for testing for an RSC. The evidence from other witnesses and documentary evidence makes it clear that there was further remediation work to be done to the Property.

[31] A letter from Mr. Faber to Mr. Steinberg of October 3, 2008 states that remediation was stopped due to non-payment, not that it was completed. The letter further states that the plaintiff was willing to consider completing the remediation. The letter indicates it was copied to Mr. Danesh. Emails between Mr. Faber's office and Mr. Danesh confirm that Mr. Faber's letter was reviewed in draft by Mr. Danesh and approved by him.

[32] I do not accept that the remediation was basically complete in January 2008 and that all that was needed was to obtain an RSC. Further remediation work was required.

[33] At times Mr. Danesh said he had instructed Mr. Faber to go ahead with the garnishment and at times he said he did not instruct him to do so. The Agreed Facts states that no such instructions were given.

[34] Mr. Danesh was presented in cross-examination with Mr. Faber's letter of September 15, 2008, which states: "Pursuant to your instructions, we have not taken any steps to enforce this judgment." The letter goes on to recommend enforcement by registering the Judgment against title to the Property and to garnish the rent paid by the tenant of the Property. Faced with the letter, Mr. Danesh agreed that Mr. Faber's written recommendation was to enforce the Judgment. He was asked to confirm there is nothing in writing recommending that the plaintiff not enforce the Judgment. Rather than answering the question directly, Mr. Danesh suggested that counsel look at communication between Mr. Faber and Mr. Steinberg which Mr. Danesh asserted confirms that Mr. Danesh did provide instructions to enforce the lien because the letter said that if the agreement that the plaintiff was attempting to negotiate with 113 was not accepted, Mr. Faber was instructed to proceed with enforcing the lien.

[35] The letter referred to by Mr. Danesh is Mr. Faber's letter to Mr. Steinberg dated October 3, 2008. The letter encloses a copy of the Judgment, refers to the amount owing on the Judgment and that the construction lien and certificate of action remain outstanding. The

letter invites Mr. Steinberg to schedule a time to meet, failing which Mr. Faber was instructed to exercise his client's rights under the Judgment. It does not refer to the negotiation of an agreement.

[36] When presented with Mr. Faber's email to him of November 12, 2008, stating that Mr. Faber was awaiting further instructions regarding enforcement of the Judgment, Mr. Danesh agreed that as of November 12, 2008, he had not instructed Mr. Faber to enforce the Judgment. Mr. Danesh agreed that he never instructed Mr. Faber to file a writ or to garnish the rent, but again insisted that he told Mr. Faber that if the proposal for the second mortgage to secure the amount owing to the plaintiff was not accepted, he should enforce the Judgment. The documentary evidence does not support Mr. Danesh's testimony.

[37] Mr. Danesh was questioned about a message he left for Mr. Faber on July 15, 2009 that indicated it was urgent. He testified it was urgent because he had heard nothing further about the bankruptcy. The bankruptcy of 113 occurred on February 28, 2012, two and a half years after this message. When confronted with this fact, Mr. Danesh changed his story and said the urgency did not have to do with the bankruptcy, but with the proposed agreement with 113 because he was waiting for a response at that time. However, there was no evidence that those negotiations for a second mortgage were ongoing at that time. This was the second but not the last explanation proffered by Mr. Danesh of the reason for this message to Mr. Faber.

[38] Mr. Danesh testified that before July 15, 2009 he received a call from Mr. Findlay to meet at a hotel near Pearson International Airport with a potential purchaser who he identified as Mr. Markoff. Mr. Danesh says that at that meeting he was asked about the status of the remediation work, which he said would cost $150,000 to complete. He says that at the meeting he was asked if he would accept $250,000 to remove his lien, which he refused. Mr. Danesh says his message to Mr. Faber on July 15, 2009 was after this meeting with Mr. Finlay and the message was in reference to the meeting. This was the third explanation given by Mr. Danesh for this message to Mr. Faber.

[39] The note from Mr. Faber dated July 16 appears to be attached to the July 15, 2009 message from Mr. Danesh to Mr. Faber. The July 16 note records in part "Realtor for Finkelstein – Doug Findlay – buyers/realtor" and "buyer wants to discuss lien claim – claim reg'd: settle?? – meeting last weekend : level of contamination – findings/cost estimates". The note does not reference 209 or Mr. Markoff. Mr. Findlay did not recall the meeting with Mr. Markoff and Mr. Danesh. There is nothing else in the evidence to suggest that 209 became involved with the Property more than two years before the date of the transfer of the Property to 209. While a meeting clearly took place, I do not accept Mr. Danesh's evidence that Mr. Markoff was at the meeting he had with Mr. Findlay.

Evidence of Mr. Wootten

[40] It is helpful to consider the evidence of the experts in the reverse order of their testimony. They gave opinion evidence on the retrospective value of the Property.

[41] Mr. Wootten gave a retrospective opinion of the value of the Property as of May 4, 2006. He was not cross-examined on his evidence. The plaintiff did not call opinion evidence as to the value of the Property as of May 4, 2006.

[42] Mr. Wootten's opinion was based on the information that would have been available to the plaintiff and 113 as of May 4, 2006. He acknowledged that he had to make assumptions about the condition of the property as of May 4, 2006 based on information from the documents that would have been available at the time.

[43] Mr. Wootten explained that the approach to valuing contaminated property is to first ascertain the value of the property without contamination and then to determine the cost of contamination and deduct it from the uncontaminated value to arrive at the impaired market value.

[44] Mr. Wootten's opinion was that the unimpaired value of the property as of May 4, 2006 was $4,050,000.

[45] To determine the cost effect of contamination on the Property, Mr. Wootten reviewed the remediation proposal from the plaintiff dated May 4, 2006 which estimated two months to remediate the property at a cost of $198,000 plus tax. He used this figure because he was basing his opinion on what was known as of May 4, 2006. Based on the proposal, there were additional costs not included in the quote. Mr. Wootten applied a 50 percent contingency to arrive at a total cost effect of $300,000 as of May 4, 2006.

[46] Mr. Wootten's opinion is that it is not sufficient to simply deduct the costs of clean up to arrive at the impaired market value. In the circumstances of the Property, in addition to the cost effect, an appraiser must also consider the risk effect. The risk effect includes that it could take longer to sell the Property and financing could be more expensive due to the environmental issues. Mr. Wootten considered the various factors and concluded that a $410,000 risk effect adjustment was required.

[47] After deducting the cost effect and risk effect totalling $710,000, Mr. Wootten arrived at an impaired market value of the property as of May 4, 2006 of $3,340,000. He was also of the opinion that 8-12 months was the appropriate exposure time because of the environmental contamination.

Expert Evidence of Mr. Heinsaar

[48] Mr. Heinsaar gave a retrospective opinion that the fair market value of the Property as of August 15, 2011, accounting for the contamination contingency, was $2,700,000. The defendants did not call opinion evidence of the value of the Property as of August 15, 2011.

[49] There are several issues with Mr. Heinsaar's opinion.

[50] Mr. Heinsaar acknowledged that because it was a retrospective valuation, he did not have available to him all the information that he would want when doing a valuation. He was required to estimate rental income for the Property based on MLS information and

information from when he worked in the marketplace in 2011. He was not aware that 113 had been trying to sell the Property but it did not sell.

[51] Mr. Heinsaar did not independently assess how much remedial environmental work remained to be done as of the date of his appraisal. He relied on the plaintiff or plaintiff's counsel for the costs of the environmental clean up and he factored those into his appraisal of value.

[52] Mr. Heinsaar's client (i.e. the plaintiff) advised him that the cost to remediate was $150,000. This was based on information that the plaintiff provided in 2023. Mr. Danesh's evidence is that the $150,000 figure came from minutes of a meeting between 113 and URS on October 3, 2007. This is almost four years before the effective date of Mr. Heinsaar's appraisal. Mr. Danesh was not at this meeting. The minutes also indicate that the estimate of $150,000 was for initial budget purposes and that the estimator would be willing to provide a detailed scope of work and costs estimate. No such document was tendered. Three months later when the plaintiff had completed an additional three months of remediation and left the site, the remediation was still not complete. I do not accept that the cost of remediation was only $150,000. The evidence suggests the costs to remediate in 2011 was at least twice that much.

[53] Mr. Heinsaar allowed for a 30 percent contingency allowance on the estimated remediation costs to estimate "reasonable" costs to remediate the property to the point of an RSC. This resulted in a cost to remediate of $200,000. This estimate of the cost to remediate is inconsistent with other evidence of the potential costs to remediate and was too low.

[54] Mr. Heinsaar agreed that the existence of contamination would impact the sale price of the property. Unlike Mr. Wootten, Mr. Heinsaar did not take into consideration the risk effect caused by the contamination.

[55] Mr. Heinsaar did not review the transaction records for the August 2011 transfer of the Property to 209 because he was not provided access to the documents. He did not speak to CIBC about how the environmental remediation impacted the value in 2011. He did not consider the transfer to 209 in August 2011 as relevant because it did not represent an open market transaction. He indicated it was an outlier and it could not be considered. He acknowledged that he did not address this transfer in his report or qualify it in any way and does not say it is an outlier in his report. The transfer in August 2011, which also involved CIBC, was at least some information that Mr. Heinsaar should have considered that there may have been more significant issues with the property than the $200,000 cost to remediate.

[56] Mr. Heinsaar agreed that his inability to inspect the building, other than The Brick showroom, was an extraordinary limiting condition as defined in his report which can affect valuation. He agreed that if the rest of the property was in bad condition it could affect his valuation. Mr. Heinsaar inspected the property 12 years after its transfer to 209 and he did not give evidence as to the actual condition of the property in August 2011.

[57] Mr. Heinsaar's opinion is also at odds with the evidence of Mr. Finlay who was involved with the property until early 2010.

[58] As a result of these issues, I do not accept Mr. Heinsaar's opinion that the Property was worth $2,700,000 as of August 15, 2011.

Evidence of Mr. Finlay

[59] Mr. Finlay was licenced in 1989 and began to work in real estate in 1991.

[60] Mr. Finlay gave his evidence in a straightforward and forthright manner. His recollection of events was aided by the documents he had in his possession. His credibility was not undermined on cross-examination. He acknowledged that the documents he produced were likely not all the documents that were in his paper file at one time. He is no longer able to retrieve the entirety of the file.

[61] Mr. Finlay was involved in marketing the Property between approximately mid-2006 and March 2010. The Property was never listed on MLS during that time, no signs were posted at the Property, and its sale was not advertised in any way. Instead, Mr. Finlay contacted his stable of clients and trusted brokers to attempt to find a purchaser. During the time he was involved with the Property, he showed it to potential buyers. It was clear from his evidence that he sought to control exposure of the Property for much of the time he was involved in marketing it.

[62] Mr. Finlay described the Property as challenged. The small office portion had mold and water damage. There were "different floor levels". It had environmental issues, was overgrown with weeds, had poor lighting in the showroom, and it showed poorly. Some work was done by Mr. Findlay's son to clean up the exterior of the Property.

[63] Mr. Finlay's evidence was that the environmental issues were never resolved during his four-year involvement with the property. Based on information from Mr. Finkelstein in January 2008, Mr. Finlay expected that the environmental remediation would be completed shortly. His evidence was that environmental contamination is always a problem for a buyer. Mr. Finlay's evidence and documentation indicated that in August 2008, remediation costs of between the low $300,000s and $600,000 were being discussed with a potential purchaser.

[64] Mr. Finlay's evidence disclosed that the expected market value of the property decreased significantly between 2006 and 2010.

[65] On August 11, 2006, Mr. Finlay was seeking a sale price of $3,600,000 for the Property after environmental issues had been addressed. This is fairly consistent with Mr. Wootten's retrospective opinion of value for the Property of $3,340,000 on May 4, 2006.

[66] The sale price of $3,600,000 was on instructions from Mr. Finkelstein. An offer for the Property in that amount was received on September 6, 2006. The offer contained a condition requiring 113 to provide the purchaser with a report stating that the existing

contamination had been cleaned up and the Property complied with the MOE guidelines or which set out the state of remediation, the work that remained, and the time to complete the work. The potential purchaser and 113 signed a mutual release on October 31, 2006, and November 7, 2006, respectively.

[67] In November 2006, Mr. Finlay sought authorization to list the Property at $4,000,000. He did not think it was a reasonable price, but it was the price that Mr. Finkelstein wanted.

[68] By December 19, 2007, Mr. Finlay was seeking a listing price of $3,575,000 for the Property. This was based on the offer that had been received in 2006 and what Mr. Finkelstein believed the property to be worth. Mr. Finlay thought the listing price was high.

[69] In early August 2008, 113 received an offer to purchase the Property for $2,000,000. Mr. Finlay responded to the offer by indicating that his client would like to realize a sale price of $2,750,000. He understood from Mr. Finkelstein that the remaining environmental remediation would cost in the low $300,000 range. This was communicated to the potential purchaser.

[70] On August 27, 2008, the potential buyer responded by letter offering $2,200,000 and that the buyer would pay the remaining environmental remediation at a cost of approximately $600,000. The buyer had obtained from TROW Associates Inc. a document indicating that 12 months of environmental remediation work were required with approximate costs of up to $600,000 (which included $72,800 in outstanding invoices) to reduce the petroleum hydrocarbon levels to below MOE standards. This is a standard that requires more remediation than an RSC.

[71] On or about September 18, 2008, the same potential purchaser submitted an offer of $2,300,000. This potential sale did not close.

[72] In November 2009, Mr. Finlay recommended to 113 a listing price of $2,500,000 on the basis that 113 would complete the environmental remediation and other work to the Property which was required.

[73] In January 2010, Mr. Finlay recommended a listing price of $1,500,000 on his understanding that a buyer would have to spend over $600,000 to complete the environmental work as well as hundreds of thousands of dollars in general upgrades to bring the Property to a reasonable standard. At this point, due to the status of the leases on the Property, Mr. Finlay was of the view that the Property was no longer a feasible investment property. He also thought that the environmental issues with the Property seemed to be an issue with no definitive conclusion. In March of 2010, Mr. Finlay again recommended a listing price of $1,500,000 for the Property.

[74] Mr. Finlay testified that the reason the recommended listing price dropped by $2,500,000 over the course of his four-year involvement in the property was that feedback from the market made it clear that the original listing prices were not warranted and there was an outstanding environmental issue. By 2010, Mr. Finlay was of the view that $1,500,000 was

a realistic price and the amount a prudent buyer would pay. He felt he could find a buyer at that price. His relationship with the owner ended around March 2010.

Causation

[75] The plaintiff asserts that due to Mr. Faber's breach of the standard of care, it suffered damages in that it lost its lien rights on the Property and therefore lost the right to enforce the lien against the Property. The plaintiff says there was sufficient equity in the Property for the plaintiff to recover all or some of its losses.

[76] The defendants say that the true cause of the plaintiff's damages is that the plaintiff failed to follow Mr. Faber's recommendation in 2008 to enforce the Judgment. Further, the defendants assert that the plaintiff has failed to establish that it has suffered any damages because there were no sale proceeds available to satisfy the plaintiff's claim for lien when the Property was sold in 2011.

[77] The defendants properly concede that mitigation is not in issue because the duty to mitigate did not arise until Mr. Faber and the plaintiff learned of Mr. Faber's failure to preserve the lien. By this time, the property had been sold and the lien vacated.

[78] Whether the plaintiff has established that Mr. Faber's breach of the standard of care caused its damages requires a determination of:

a. the priorities between CIBC and the plaintiff;

b. whether the plaintiff's failure to enforce the Judgment was the cause of its loss;

c. the market value of the property on or after August 2011; and

d. what position the plaintiff would have been in had Mr. Faber met the standard of care.

Priorities between CIBC and the plaintiff

[79] The plaintiff does not dispute that section 78(3) of the *Act* applies to the Mortgage. CIBC advanced $1,600,000 under the Mortgage on September 26, 2002, well before the lien arose. I find that the market value of the Property on May 4, 2006, was $3,340,000. Therefore, the Mortgage enjoyed priority over the lien up to $1,600,000. The amount outstanding at the time of the transfer in 2011 was $457,960.88. I find that CIBC had priority over the plaintiff's lien in the amount of $457,960.88 in August 2011. The Mortgage had priority over the lien to the extent of the principal remaining outstanding prior to August 2011 or any lesser amount that would have been owing after August 2011.

Plaintiff's failure to enforce the Judgment

[80] The defendants assert that the true cause of the plaintiff's damages is that the plaintiff did not act reasonably in not following Mr. Faber's recommendations to enforce the Judgment

in 2008. The defendants say that if the plaintiff had taken enforcement steps either by garnishing the rental income or issuing writs of seizure and sale to force a Sheriff's sale of the property, the plaintiff would have recovered some or all the amounts owing to it.

[81] Mr. Danesh testified that Mr. Faber recommended that the plaintiff pursue enforcement through a sale by the Sheriff or by garnishing rent. In September 2008, Mr. Faber confirmed that he had not taken steps to enforce the Judgment based on the plaintiff's instructions. He recommended that the plaintiff "register this judgment against title." While it is not clear what Mr. Faber meant by this, based on Mr. Danesh's evidence, I infer that he was referring to registering a writ of seizure and sale. Mr. Faber also recommended and sought instructions from the plaintiff to garnish the rent paid by the Brick. I find that Mr. Faber recommended that the plaintiff enforce the Judgment by way of a sale pursuant to a writ of seizure and sale and by garnishing rent and the plaintiff did not instruct Mr. Faber to pursue enforcement.

[82] The defendants say that because the Mortgage principal was $1,600,000 in September 2002 and was $457,960.88 in August 2011, I can infer that the principal on the Mortgage had declined since CIBC first advanced funds. I agree this a reasonable inference to draw on the evidence.

[83] The defendants say that the value of the Property in late 2008 was sufficient to cover the outstanding Mortgage principal and the amount owed to the plaintiff under the Judgment. On August 27, 2008, a potential buyer was willing to pay $2,200,000 for the Property with the buyer paying for the remaining environmental remediation costs. On or about September 18, 2008, the same buyer increased the offer to $2,300,000. Although the offers were not acceptable to 113, this suggests that there is a reasonable possibility that the property could have sold in the fall of 2008 for $2,300,000 if the Judgment had been enforced.

[84] Assuming reasonable disposition costs of five percent, the net proceeds from a sale in the fall of 2008 would have been approximately $2,185,000 based on a sale price of $2,300,000. The Judgment owing at that time, including interest, would have been approximately $712,000, leaving $1,473,000 to ensure payment of the Mortgage which had priority over the Judgment. I find that the amount owing on the Mortgage would be less than that based on the opening balance six years earlier in 2002 and the balance owing three years later in August 2011. No evidence is before me that there were other secured creditors who would have ranked in priority to the plaintiff. I find that there would have been sufficient equity for the plaintiff to recover on the Judgment in the fall of 2008.

[85] Mr. Faber searched title to the Property on April 10, 2012. The lien was still registered on title. The defendants say that it is reasonable to infer that Mr. Faber had no cause for concern because the lien remained on title, he assumed that it was still a valid charge against the Property, and Mr. Faber did not understand he had not complied with s. 37 of the *Act*. I agree.

[86] I find that prior to discovering that the lien was no longer valid or not registered on title, Mr. Faber believed the lien was valid and enforceable. This would certainly be the case in 2008. As a result, he would have believed that the plaintiff's judgment was "secured" by the lien. This no doubt influenced the advice he would have given the plaintiff. I have no evidence from Mr. Faber of what he told Mr. Danesh with respect to the security offered by the lien. Mr. Danesh testified that Mr. Faber told him that the lien would provide security on the Property and it could not be sold or financed unless the plaintiff was paid or the lien was dealt with. I find that Mr. Faber told the plaintiff that the amount owed to the plaintiff was secured by the lien. This would have affected the decisions made by the plaintiff as to enforcement of the Judgment in 2008 and until he learned that the lien had been vacated and the Property sold.

[87] Mr. Danesh says he did not instruct Mr. Faber to enforce the Judgment because Mr. Faber told him not to do so in order to allow the rent to continue to pay down the balance of the Mortgage. While that may have been why the plaintiff did not pursue the enforcement of the Judgment, it is contrary to Mr. Faber's written communications to the plaintiff seeking instructions as to enforcement of the Judgment.

[88] I find that Mr. Faber did not recommend that the plaintiff not enforce the Judgment so as to allow the rent to continue to pay down the balance of the Mortgage. I also consider that Mr. Danesh was aware that 113 was attempting to sell the Property in the fall of 2008 and the summer of 2009.

[89] However, the plaintiff's decision not to enforce the Judgment was based, at least in part, on Mr. Faber's erroneous belief that the lien was a valid charge on title which led the plaintiff to believe that its ability to collect against the Property was secure. The plaintiff was entitled to act in accordance with the understanding and belief that Mr. Faber had ensured the lien was in force and that the lien provided security for the amount owed to the plaintiff.

[90] Therefore, I find that the plaintiff did not act unreasonably in not enforcing the Judgment in 2008 or 2009.

[91] However, it is clear from the Agreed Facts and Mr. Danesh's testimony that he understood that the Mortgage had priority over the Judgment and the lien, and that any payment to the plaintiff would depend on the equity remaining in the Property after the Mortgage was paid. As a result, the plaintiff assumed the risk that the value of the Property might not be enough to pay the amount owing on the lien or Judgment.

Value of the Property in August 2011

[92] The plaintiffs say that in August 2011 the Property was worth $2,700,000 and that the transfer price of the Property of $457,960.88 does not represent its value.

[93] The defendants say that I must base the value of the Property on what a willing buyer would pay to 113 as a willing seller. They urge me to find that the value of the Property in August 2011 was the consideration paid by 209 for the Property. This would fix the value of the

Property at $457,960.88, which was the face value of the Mortgage, or $350,000 which was the amount accepted by CIBC to transfer its Mortgage shortly thereafter.

[94] The plaintiff says that if I do not accept the value of the Property was either $2,700,000 or $457,960.88, the court must do the best that it can on the evidence to establish a value for the property. However, the plaintiff submitted that it is not advancing a loss of chance damages argument.

[95] On the other hand, the defendants say that I cannot speculate – I must accept the value of the Property was one of those two amounts. I do not agree with the defendants.

[96] There are gaps in the evidence as to the condition of the Property in August 2011, the costs to complete the environmental remediation, and the motivation of CIBC, 209 and 113 in the transfer of the Property. However, there is some evidence available on these issues.

[97] The Property was not publicly marketed between 2006 and 2010. It was marketed through Mr. Findlay's contacts and clients. Nevertheless, there is no reason to question the offers received and Mr. Findlay's evidence on the appropriate list price for the Property.

[98] For the reasons set out above, I do not accept Mr. Heinsaar's opinion of value. I accept Mr. Findlay's evidence that the Property should have been listed at $1,500,000 in early 2010 on the basis that the purchaser would pay for the environmental remediation and costs to upgrade the Property to bring it to a reasonable standard. By that time, 18 months had passed since offers of $2,000,000 to $2,300,000 on those terms had been made. This does not mean that the Property would necessarily sell for $1,500,000. 113 had intended to sell the Property since 2006, once the environmental clean up was completed. Despite offers and negotiations, 113 was not able to sell the Property.

[99] The evidence of the potential costs to complete the environmental clean up ranged from a low of $150,000 to $600,000 as of 2010. The realistic additional cost to remediate, not including outstanding invoices, appears to have been between $300,000 and $525,000.

[100] There is no evidence that the Property was listed at the time of the sale to 209. 113 was not, on the evidence, connected or related in any way to 209. However, there was no competitive sale process used in arriving at the August 2011 sale price. I cannot say on the evidence that the price paid by 209 reflected what a willing purchaser would pay to a willing vendor.

[101] There is no evidence that in the 17 months between March 2010 and August 2011 the costs to remediate the environmental contamination increased over the above estimates. There is no evidence whether the Property's condition deteriorated during that time. On the evidence it is possible to infer there may have been some continued decline in the condition of the Property. However, this does not explain how the potential sale price of the Property declined from approximately $1,500,000 to $458,000 in 17 months, especially considering the rental income of the Property.

[102] Notwithstanding that there is conflicting evidence on the expiry date of The Brick's lease, the parties concede that The Brick remained a tenant for many years. Moreover, their evidence is that the rent on the property was sufficient to meet most of the carrying costs of the Property.

[103] Between 2002 and 2011, the Mortgage did not go into default. The Agreed Facts state that Mr. Finkelstein told Mr. Danesh that he was paying all the rent money toward the debt on the Property. The Amended Statement of Adjustments indicates that as of August 15, 2011, monthly rent collected was $43,087.88 (inclusive of HST). The Mortgage principal owing was $457,960.88. Annual taxes were $65,456.73. The list of 113's creditors in its bankruptcy indicates that the only debts that appear to be directly related to the property are amounts owed to the plaintiff, TROW, and $41,300 owed to Hydro One. The experts agree that rental income factors into the value of the property. It is difficult to comprehend how the value of the property in August 2011 could be the equivalent of one year's rental income on the Property.

[104] Despite the ability of the rent to carry the Mortgage and taxes, CIBC, an institutional lender, was willing to forgo a portion of the Mortgage and ultimately accepted $350,000 in full satisfaction of the Mortgage. CIBC may have done so because of the environmental contamination, of which CIBC was aware since the time it advanced the Mortgage, and the challenges of selling the property under power of sale given the issues with the Property. However, there is no evidence that the Mortgage was in default. To the contrary, the evidence indicates it was being paid. I do not have before me the full extent of the discussions between 209 and CIBC.

[105] 113 did not have the means, as early as 2008, to pay the plaintiff. 113 never completed the environmental remediation. The parties agreed that by February 28, 2012, 113 claimed total liabilities of $903,090.33 and total assets of $251,351. About 75 percent of 113's liabilities consist of the amount owed to the plaintiff.

[106] As of August 2011, 113 had been told the Property should be listed for $1,500,000. If the Property had listed for $1,500,000 as recommended by Mr. Findlay, it would likely have sold for somewhat less than that. Disposition costs would have to be paid from the proceeds. Considering reasonable disposition costs of five percent, if the property had sold for $1,400,000, disposition costs would be approximately $70,000, leaving proceeds of approximately $1,330,000 on a best case scenario.

[107] At the time of the sale, 113 owed the plaintiff over $711,000 and CIBC over $457,960.88 for a total of approximately $1,169,000. Money was also owed to TROW. There may have been little incentive for 113 to attempt to sell the Property on the open market given all of this. However, that does not mean the Property was worth only the $457,960.88 owing on the Mortgage.

[108] Whether or not 209 believed the lien was valid could impact the transaction price in 2011. The plaintiff asks me to infer that the buyer was content to take title to the Property subject to the lien.

[109] The plaintiff says that Mr. Markoff must have known the lien was valid in 2009 when he allegedly discussed the amount outstanding with Mr. Danesh. The lien was indeed valid at this time. I have found such a discussion did not take place. Even if it had, Mr. Markoff may have known about the lien and known it was valid in 2009, but this does not assist in establishing whether Mr. Markoff knew the lien was valid two years later when it had in fact expired.

[110] The plaintiff also says that when the lien was vacated in 2013, a search of court records would have disclosed that the action had not been set down for trial. The plaintiff correctly notes there is no evidence that such an investigation was done. The plaintiff says this supports an inference that Mr. Markoff was not aware that the lien had expired by 2011 and that he did not become aware of the expiry of the lien until sometime shortly prior to the motion to vacate in August 2013. I do not agree.

[111] The defendants assert that a more reasonable inference is that 209 knew that the lien was expired and so paid no attention to it. They say if the lien had been valid, then the buyer, properly advised, would have insisted that the lien be vacated from title before closing. I do not agree. It is equally plausible that 113 acquired the Property for the price it did because it believed it had to deal with the lien.

[112] The lien and certificate of action were registered on title. They would have been found on a search of title at the time of transfer in 2011. Mr. Markoff was a lawyer and the president of 209. He would have understood the significance of the lien and certificate of action. I have no evidence of whether inquiries as to the validity of the lien were made or whether Mr. Markoff had such information. What is known is that 209 waited a further two years to remove the lien from title. This could have been because Mr. Markoff believed the lien was valid or it could have been for other reasons.

[113] Considering all the evidence, I find that it is more likely than not that Mr. Markoff knew of the lien in August 2011. I cannot determine one way or another if he knew the lien had expired. I infer that 209 was aware that a lien was registered on title in favour of the plaintiff, the amount of the lien, and that money was owed to the plaintiff. The evidence also establishes, and Mr. Markoff would have known, that the Property continued to be used and rented to commercial tenants. I find that all of this was taken into consideration in establishing the acquisition price of the Property by 209 in August 2011.

[114] Considered with the other evidence of value of the Property, the August 2011 transaction price strongly suggests that at a minimum, the existence of the lien affected the price 209 paid for the Property. In other words, the price took into account the amount owing on the lien. As noted above, adding the Mortgage and the lien together brings the purchase price close to what Mr. Findlay believed was a reasonable sale price for the Property a little over a year earlier.

[115] I find that the value of the property was more than the $457,960.88 paid for the Property by 209 but less than $1,500,000.

Position of the plaintiff if Mr. Faber had met the standard of care

[116] There can be no dispute that if Mr. Faber had met the standard of care, the plaintiff would have had a valid lien at the time the Property was transferred to 209 in August 2011. I must determine the plaintiff's position had the lien been valid.

[117] If the lien had been valid when 209 acquired the Property, it would have remained on title to the Property when acquired by 209, and 209 would have had to deal with the lien and pay the plaintiff or could have refused to proceed with the acquisition of the Property.

[118] The defendants say that a reasonable inference is that had the lien been valid, 209, if properly advised, would have insisted that the lien be vacated from title before closing. The defendants say that CIBC would have vacated the lien by payment of funds into court pursuant to s. 44 of the *Act*, proceeded with the sale of the Property, and would have been successful on the priority dispute with the plaintiff. The defendants say that because the amount outstanding on the Mortgage was greater than the sale proceeds the plaintiff would not have recovered anything and CIBC would have received a return of the funds it paid into court under s. 44.

[119] There are several problems with the defendants' position.

[120] The defendants rely on *P. Michaud Roofing Ltd. v. National Trust Co.* (1979), 103 D.L.R. (3d) 523 (Ont. Div. Ct.) and *Gilvesy Construction v. 810941 Ontario Ltd* ., [1994] O.J. No. 4206 (Gen. Div.). These cases are distinguishable in that they involved a mortgagee exercising power of sale. That is not the case before me.

[121] There is no evidence that the Mortgage was in default or was in danger of going into default in August 2011. The evidence establishes that The Brick continued to be a tenant and the Mortgage was kept in good standing. Accordingly, I find that it was not likely that CIBC would have taken steps to enforce its Mortgage.

[122] In *Gilvesy*, there was no surplus over and above the amount owing on the mortgage. The defendants say that is the case before me. The defendants' position is based on the Mortgage being greater than the value of the Property. I have found this was not the case. Even if CIBC had proceeded by way of power of sale, the Property would have been put on the open market and achieved more than the price paid by 209.

[123] Accordingly, I find that 209 would either have acquired the Property with the lien and would have had to deal with the plaintiff or would not have proceeded with the acquisition of the Property.

[124] If 209 chose not to proceed with the acquisition of the Property, then title would have remained with 113, and the Mortgage principal would have continued to have been paid down until the eventual sale of the Property in the bankruptcy sometime after February 2012. CIBC would have been paid out in priority to the plaintiff. Although the Mortgage principal would have continued to decrease, the sale price would likely have been less in a

sale by a trustee in bankruptcy. The plaintiff would have recovered the amount remaining after sales expenses and payment of the Mortgage funds.

[125] Had the lien been valid and enforceable, the plaintiff would have had the opportunity to at least negotiate for the recovery of some of the amount outstanding on the lien or would have received some, if not all, of the amount owing on the lien following a sale.

Conclusion

[126] There has been a breach of the standard of care and a breach of contract by Mr. Faber. The plaintiff has not established the precise value of the Property in 2011, nor that it would have recovered the full amount of the lien. However, the plaintiff has established that it suffered a loss as a result of Mr. Faber's breach. The loss is a real loss that has a value tied to the value of the Property. In my view, on the evidence, the damages are not nominal damages.

[127] I must do my best to assess the damages suffered by a plaintiff on the available evidence even where difficulties in the quantification of damages render a precise mathematical calculation of a plaintiff's loss uncertain or impossible: *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1, at para 61. As noted in *TMS Lighting* at para 61:

> The controlling principles were clearly expressed by Finlayson J.A. of this court in *Martin v. Goldfarb*, 1998 CanLII 4150 (ON CA), [1998] O.J. No. 3403, 112 O.A.C. 138, at para. 75, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 516:
>
> > I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

[128] The difficulty in determining the precise amount of the plaintiff's damages arises from a combination of factors. There is no direct evidence from 209 as to its understanding and motivation. There is no evidence as to the value of the Property if it had been sold by a receiver as a result of 113's bankruptcy. The plaintiff did tender evidence as to the value of the Property in August 2011. I do not accept that evidence. As discussed above, there is, however, evidence that establishes a range of value for the Property. Fixing damages also must account for various possibilities as to what would have happened if the lien had been valid in August 2011.

[129] I have found there was some value in the Property over and above the amount owing on the Mortgage. Any purchaser of the Property would have had to deal with the lien if it had

been preserved. 209 would have had to deal with the lien in some way, or not proceed with the acquisition of the Property, leaving it open for the lien to be dealt with by a different purchaser.

[130] On all the evidence and taking into account the above findings, I fix the plaintiff's damages at $472,000. This is based on a market value of $979,000, which is roughly the mid-point between the amount owing on the mortgage of $457,960.88 and $1,500,000. Less disposition costs of five percent, the net proceeds would be approximately $930,000. Once the Mortgage is paid, the remaining balance to pay the plaintiff's lien is $472,000.

[131] The statement of claim in the lien action sought prejudgment interest. The plaintiff seeks prejudgment interest at the rate of 0.8 percent. In the circumstances, I exercise my discretion to award prejudgment interest at 0.8 percent commencing the date of the registration of the lien, February 5, 2008.

Costs

[132] The parties are encouraged to resolve the issue of costs. If they are unable to do so, they may submit a bill of costs and make written submissions consisting of not more than three double-spaced pages in length, together with any relevant offers to settle and excerpts of any legal authorities referenced, according to the following timetable:

a. The plaintiff shall serve its costs submissions, if any, by no later than January 15, 2024.

b. The defendants shall serve their costs submissions, if any, by no later than January 22, 2024.

[133] All submissions are to be filed with the court, with a copy to the judicial assistants at: St.Catharines.SCJJA@ontario.ca, by end of day January 22, 2024.

[134] If no submissions or written consent to a reasonable extension are received by the court by January 22, 2024, the matter of costs will be deemed to have been settled.

M. Bordin, J.

Date: December 27, 2023

CITATION: Envirofix Corporation v. Faber, 2023 ONSC 7197
COURT FILE NO.: CV-16-56432
DATE: 2023-12-27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Envirofix Corporation

Plaintiff

- and -

Joanne Faber, Estate Trustee in the Estate
Of Herman Faber, Deceased and Van Der Woerd &
Faber Professional Corporation

Defendants

REASONS FOR JUDGMENT

M. Bordin, J.

Released: December 27, 2023