

COURT OF APPEAL FOR ONTARIO

CITATION: Arcamm Electrical Services Ltd. v. Avison Young Real Estate
Management Services LP, 2024 ONCA 251
DATE: 20240409
DOCKET: M54497 (COA-23-CV-0602)

Gillese and Copeland JJ.A. and Wilton-Siegel J. (*ad hoc*)

BETWEEN

Arcamm Electrical Services Ltd.

Plaintiff
(Respondent/Moving Party)

and

Avison Young Real Estate Management Services LP and
4342 Queen St. Niagara Holdings Inc.*

Defendants
(Appellant/Responding Party*)

Michael Mazzuca and Alyssa Wiebe, for the respondent/moving party

Jeffrey Kaufman and Bradley Adams, for the appellant/responding party

Heard: February 6, 2024

Gillese J.A.:

I. OVERVIEW

[1] Arcamm Electrical Services Ltd. (“Arcamm”) sued Avison Young Real Estate Management Services LP and 4342 Queen St. Niagara Holdings Inc. (“Queen”) in an action brought under the *Construction Act*, R.S.O. 1990, c. C.30. Its statement of claim (the “Claim”) was filed, along with a certificate of action, as part of the

process for registering a lien against title to the property municipally known as 4342 Queen Street, Niagara Falls, Ontario (the “Property”).

[2] Arcamm moved under s. 50(2) of the *Construction Act* and r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, for summary judgment on all issues raised in its Claim.

[3] By judgment dated February 17, 2023 (the “Judgment”), Arcamm was granted summary judgment as against Queen pursuant to r. 20.

[4] Queen filed a notice of appeal with this court in which it seeks, among other things, to have the Judgment set aside.

[5] In the motion now before this court, Arcamm seeks an order quashing the Queen appeal for want of jurisdiction (the “Motion”). It submits that the Judgment is a final order captured by s. 71 of the *Construction Act* and, therefore, Queen’s appeal lies to the Divisional Court, not to this court. Section 71 provides that “an appeal lies to the Divisional Court from a judgment or an order on a motion to oppose confirmation of a report under this Act.”

[6] For the reasons that follow, I would dismiss the Motion.

II. BACKGROUND IN BRIEF

[7] On June 8, 2021, a sudden electrical failure involving the high-voltage electrical system at the Property caused a complete power outage. The Property requires power “24/7”.

[8] Arcamm is a commercial electrical contractor. It has been in business for over 30 years and is experienced in transformer replacement work. Within 24 hours of having been asked to restore power to the Property, Arcamm had sourced and installed temporary generators, and round-the-clock electrical power was restored to the Property. By November 1, 2021, Arcamm had permanently restored power to the Property. A final inspection that day established that its work was completed in compliance with the requisite codes and regulations. When Arcamm's invoices for the work performed in relation to the Property remained unpaid, it moved for summary judgment.

[9] The motion judge rejected Arcamm's argument that its invoices had to be paid under the "prompt payment" provision in s. 50(2) of the *Construction Act*. She found that Arcamm's invoices were not "proper invoices", as defined by s. 6.1 of the *Construction Act*. Therefore, the prompt payment provision did not apply.

[10] The motion judge then "considered only whether summary judgment can and should be granted pursuant to r. 20." She found that summary judgment was appropriate because there were no genuine issues requiring trial with respect to whether Arcamm was entitled to payment. She further found that Queen was an "owner", as defined in the *Construction Act*, and was contractually liable to Arcamm. It was on those bases the Judgment was granted.

III. THE PARTIES' POSITIONS

[11] Arcamm submits that Queen's appeal lies to the Divisional Court, pursuant to s. 71 of the *Construction Act*, and this court is without jurisdiction to hear it. It relies on the fact that its Claim was brought pursuant to the *Construction Act* and arose from unpaid invoices for which it registered a construction lien. It also relies on caselaw from this court which states that no right of appeal lies to it on a *Construction Act* matter.

[12] Queen submits this court has jurisdiction to hear its appeal. It notes that, in granting Judgment, the motion judge acted pursuant to r. 20 and r. 20 motions are not provided for in the *Construction Act*. Rather, r. 20 is promulgated pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. Further, the Judgment was based on Arcamm's non-statutory claim in contract. Therefore, because the Judgment is a final order of a judge of the Superior Court of Justice, pursuant to s. 6(1)(b) of the *Courts of Justice Act*, this court has jurisdiction to hear the appeal.

IV. ANALYSIS

[13] I accept Queen's submission for two reasons.

[14] First, the fact the Claim is styled as a proceeding under the *Construction Act* does not mean that the *Construction Act* automatically governs the appeal route. The jurisdiction of the court is governed by the substance of the order made: *Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 585, 82 C.B.R. (6th)

161, at para. 11, quoting *RREF II BHB IV Portofino, LLC v. Portofino Corporation*, 2015 ONCA 906, 33 C.B.R. (6th) 9, at para. 12. In *Dal Bianco*, the appeal of a *Construction Act* claim lay to this court because the substance of the order under appeal related to proceedings authorized by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[15] In this case, the Judgment was not made under the *Construction Act*. On the contrary, the motion judge refused to grant relief under that *Act*. Instead, the source of the motion judge's jurisdiction was r. 20, a rule promulgated pursuant to the *Courts of Justice Act*.

[16] Further, the relief granted was based on a claim for damages in contract for unpaid invoices, a non-statutory cause of action. The grounds of appeal highlight the significance of this point. Queen's primary ground of appeal is its contention that the motion judge erred in failing to find a genuine issue requiring a trial, specifically by failing to consider the defence of contributory fault and whether Arcamm's conduct caused or contributed to the same damages claimed in contract. Self-evidently, these issues are not matters governed by the *Construction Act*; they are specific to the application of the test under r. 20.

[17] Second, the cases on which Arcamm relies are fundamentally different from the present case. Arcamm referred to cases including *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.* (2001), 54 O.R. (3d) 76 (C.A.); *Great Northern*

Insulations Services Ltd. v. King Road Paving and Landscaping Inc., 2021 ONCA 367, 156 O.R. (3d) 1; and *Soo Mill and Lumber Company Ltd. v. Possebon et al.*, 2023 ONCA 215. However, all of these cases proceeded to trial on the construction lien track under the *Construction Act*. In this case, r. 20 was the source of the court's jurisdiction below; the Judgment was not made in reliance on the *Construction Act*.

[18] As the Judgment flowed from a r. 20 determination, Queen's appeal lies to this court.

V. DISPOSITION

[19] Accordingly, I would dismiss the Motion with costs to Queen fixed at \$18,000, all inclusive.

Released: April 9, 2024 "E.E.G."

"E.E. Gillese J.A."

"I agree. J. Copeland J.A."

"I agree. Wilton-Siegel J. (*ad hoc*)"