

CITATION: High Tech Power Inc. v. BDA Inc., 2024 ONSC 4327
COURT FILE NO.: CV-22-00002146-0000
DATE: 2024-08-01

SUPERIOR COURT OF JUSTICE – ONTARIO

491 Steeles Avenue East, Milton ON L9T 1Y6

RE: High Tech Power Inc., Plaintiff

AND:

BDA Inc., Defendant

BEFORE: Justice J. Mills

COUNSEL: Jaspal Sangha, for the Plaintiff
David Goodman, for the Defendant

HEARD: July 31, 2024, by video conference

ENDORSEMENT

[1] The defendant, BDA Inc. (“BDA”), seeks to replace the bond it has filed with the Accountant of the Superior Court on this construction lien matter. The plaintiff, High Tech Power Inc. (“High Tech”), agrees it would be appropriate to reduce the bond. The parties are unable to agree as to the appropriate quantum for the replacement bond.

[2] The issue in dispute is discrete. High Tech obtained an ODACC¹ adjudication determination on two invoices in the amount of \$316,960.26. The lien claim is for \$419,395.24. At the trial of this action, High Tech intends to pursue its entire claim, beyond the amount ordered paid pursuant to the adjudication determination.

[3] As required by s. 13.19(2) of the *Construction Act*², BDA promptly paid the required adjudication determination amount. However, the funds were not paid to High Tech. BDA paid

¹ Ontario Dispute Adjudication for Construction Contracts

² R.S.O. 1990, c C.30, as am.

the adjudication determination to its lawyers, to be held in trust. On consent, \$161,037.68 was released to satisfy a debt owed by High Tech to its unionized workers. The balance of the adjudication, \$155,922.58, continues to be held in trust by the lawyers for BDA.

[4] The remaining funds have not been paid because a claim has been commenced by Westport Insurance Corporation (“Westport”) against High Tech to enforce an indemnity agreement related to a performance bond. That action is proceeding before the Superior Court of Justice in Toronto. Westport has sought a preservation order and in the interim, has demanded BDA counsel retain the funds in trust.

[5] BDA submits the bond should be reduced to account for the full amount paid pursuant to the adjudication irrespective of the fact that approximately half of the funds continue to be held in trust.

[6] High Tech submits the reduction should only be in respect of the funds paid out on consent, arguing the balance of the funds held in trust by counsel cannot be considered as having been paid to High Tech. The security to vacate the lien must be for the full amount of the lien, less only those funds paid out with the consent of High Tech.

[7] Section 44(5) of the *Construction Act* grants authority to the court to reduce the amount paid into court as security for a lien. In exercising this authority, the court must be satisfied the evidence supporting the lien claim fails to establish a reasonable basis for the amount claimed.³ In this case, BDA bears the burden of establishing there is no reasonable basis for the amount claimed, and High Tech must provide evidence to demonstrate there is a reasonable basis for the amount claimed. Akin to a summary judgment motion, each party is required to put their best foot forward on the motion and the court is entitled to assume that the evidentiary record is that which would be presented at trial.⁴

³ *Demikon Construction Ltd. v. Oakleigh Holdings Inc. et al.*, 2024 ONSC 2151, at para. 15.

⁴ *Ibid.*, at para. 17

[8] I am satisfied the funds held by counsel cannot stand as security and they cannot be considered paid by BDA. High Tech is at risk of counsel taking instructions from their client to deal with the funds in a manner contrary to the interests of High Tech. That has already been demonstrated by counsel refusing to release the funds merely at the request of Westport, without seeking or requiring a court order to restrain payment.

[9] The *Construction Act* contemplates the funds be promptly paid on an adjudication determination to ensure the flow of money on construction projects is protected. It is an adjudicative process on an interim basis “to keep money flowing down the construction pyramid”.⁵ Paying funds into a lawyer’s trust account fails to achieve this fundamental goal of the Act.

[10] I also appreciate the financial burden being placed on BDA to continue funding a bond that covers the full amount of the adjudication determination which it considers as having been paid. However, a deposit to counsel’s trust account is not payment to the lien claimant. It is a payment to an agent of the respondent. The fact it is to a law firm is of no consequence. The lawyer is an agent for their client and is required to act on the instructions of their client.

[11] When the funds are in fact paid to the lien claimant, the respondent is provided credit for the payment against the adjudication determination. Once payment is received, the respondent is entitled to seek a reduction, or a return of the security posted to vacate the lien. The lien claimant will be estopped from seeking to again recover those funds at trial and therefore, no security for the payment is required.

[12] Therefore, based on the evidentiary record, I am not satisfied that BDA is entitled to a reduction in security to account for the funds held in trust with its lawyers. BDA has failed to meet its burden in this regard.

[13] High Tech readily concedes the bond posted as security should be reduced to account for the \$161,037.68 paid. Therefore, BDA shall post with the Accountant of the Superior Court a lien

⁵ *Arad Incorporated v. Rejali et al.*, 2023 ONSC 3949, at para. 26

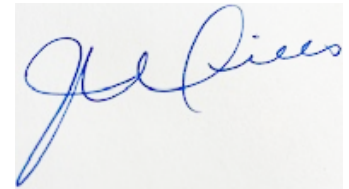
bond in the amount of \$322,946.95, calculated on an outstanding lien amount of \$258,357.56 plus the requisite 25% security. Once posted, the existing lien bond bearing Account No. 568751 may be returned to BDA.

[14] Having been successful on this motion, High Tech is entitled to its reasonable and proportionate costs.

[15] An offer to settle was provided to BDA on July 18, 2024. The offer is the same as the result achieved, arguably better, as costs were limited to \$1,500.

[16] Therefore, from the date of the offer to the date of the hearing, High Tech is entitled to costs on a substantial indemnity basis. As the offer was extended prior to the delivery of any responding materials, most of the costs incurred are at the substantial indemnity rate. Unfortunately, the Bill of Costs does not demarcate the time spent on “receipt and review motion materials”. I must assume the amount to be \$1,500 as reflected in the costs sought in the offer.

[17] High Tech shall forthwith have its costs in the amount of \$4,388 + HST. This amount is reasonable and proportionate having regard to the importance and complexity of the matters in issue. Having regard to the Bill of Costs filed by BDA, this amount is within the reasonable contemplation of the unsuccessful party.

A handwritten signature in blue ink, appearing to read "J. Mills", is positioned above the printed name.

Mills, J.