

CITATION: Nikom v. The Block Inc., 2024 ONSC 4349
COURT FILE NO.: CV-19-00001586-0000
DATE: 2024/08/07

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
NIKOM CONSTRUCTION INC. and)
INVOICE PAYMENT SYSTEM)
CORPORATION)
)
Plaintiffs) Cameron Neil, Counsel for the Plaintiffs
)
- and -)
)
THE BLOCK INC.)
)
Defendant) Carol A. Dirks, Counsel for the Defendant
)
)
)
AND BETWEEN:)
)
THE BLOCK INC.)
)
Plaintiff by Counterclaim) Carol A. Dirks, Counsel for the Plaintiff by
Counterclaim)
)
- and -)
)
NIKOM CONSTRUCTION INC.)
)
Defendant to the Counterclaim) Cameron Neil, Counsel for the Defendant to
the Counterclaim)
)
) **HEARD:** September 11, 12, 13, 14, 15, 18,
) 20, 21 and 22, 2023
)
) **Written Submissions:** October 13, 27 and
) November 6, 2023

GIBSON J.

REASONS FOR DECISION

Overview

[1] In 2018, The Block Inc. ("The Block"), a construction company in Waterloo, Ontario, affiliated with Schembri Property Management ("SPM"), was constructing five, six-storey residential apartment/condominium buildings at the property known municipally as 275 Larch Street, in Waterloo (the "Lands"). The Block was the registered owner of the Lands.

[2] The Block contracted with one drywall contractor, Alcove Drywall, for Buildings B, F and G, which buildings were already underway. In October of 2018, The Block sought proposals from other drywall contractors for Buildings A and H, which included Nikom Construction Inc. ("Nikom"), now a plaintiff in this action.

[3] After some negotiation between the parties, on November 20, 2018, Nikom, as Contractor, signed two purchase orders (Nos. M-0020 and M-0021) with The Block, as Owner, by which Nikom agreed to:

Supply and Install all required expertise, labour, tools, equipment, materials and services to complete the installation of all Steel Studs/Drywall/Batt Insulation/Acoustics/Texture Ceilings and related firestopping for Building A/H.

[4] The work was to commence immediately, with the majority of work to take place over the winter months. It was a requirement that Nikom have a qualified labour force of its own to perform the work.

[5] The price of Purchase Order No. M-0020 for Building A was a fixed price of \$554,900 plus HST for a total price of \$627,037.

[6] The price of Purchase Order No. M-0021 for Building H was a fixed price of \$570,000 plus HST for a total price of \$644,100.

[7] Attached to the two purchase orders, and forming part of the agreement, was a Scope of Work, a Schedule of Values, and a List of Documents for Buildings A and H (collectively the "Contract"). Each page of the Contract was initialled by the owner/operator of Nikom, Milos Nikolic ("Nikolic").

[8] Nikom commenced work on the project in November 2018. As the project progressed, difficulties and disagreements between Nikom and The Block emerged. On August 21, 2019, Nikom withdrew its forces from the project. Litigation ensued.

[9] This is a lien action under the *Construction Act*. There are two plaintiffs in this action. One, Nikom, is a drywall contracting company. The other, Invoice Payment System Corporation ("IPSC"), is a factoring company. Nikom is suing on a series of 19 invoices for construction services and materials supplied. IPSC is a plaintiff only insofar as some of those invoices were assigned to it.

[10] The Defendant The Block advances a Counterclaim, seeking to offset what it says were a series of delay, remediation and completion costs and damages.

The Positions of the Parties

[11] Nikom claims that it performed its work as per the contract terms and that it was The Block who repudiated the contract by failing to pay Nikom's invoices.

[12] The Block resists the claims and asserts that it was Nikom who repeatedly breached the contract terms, and abandoned the project, causing a domino effect of delays, deficiencies, and resulting in significant costs ultimately being incurred by The Block to complete the project. It submits that the lack of a consistent workforce, proper daily site supervision by Nikom, and material delivery issues resulted in numerous deficiencies and poor quality of the work performed. The Block advances a Counterclaim in this regard.

The trial

[13] All of the parties were represented by counsel at the trial.

[14] The Court heard from four witnesses during the course of the trial. Milos Nikolic testified for the Plaintiff Nikom. Witnesses called by the Defendant included Joel Pearce and Stanislav Markovich, who were involved as supervisors for the project, and Gene Clarke, an employee of NG Marin, called as a participant expert. The parties made written final submissions.

Facts

[15] By way of two signed purchase orders dated November 20, 2018, Nikom contracted with The Block to provide all drywall, labour and material services for Building A and for Building H at the Lands, including supplying all labour and materials, based on a set scope of work and at a fixed price.

[16] Nikom's work proceeded from late November 2018 until August 21, 2019, when Nikom officially abandoned the project. Nikom's workforce had significantly dwindled in the weeks prior to this date, causing friction with the construction supervisors of The Block.

Lien Claims by the Plaintiffs

[17] The lien bearing instrument number WR12158851 (the “Nikom Lien”) appended to the Statement of Claim, consists of the following invoices and amounts totalling \$124,670.64:

Invoice No.	Amount	Amount Claimed
SI-86	\$20,340.00	\$2,034.00
SI-89	\$97,180.00	\$9,718.00
SI-91	\$13,560.00	\$1,356.00
SI-92	\$33,900.00	\$3,390.00
SI-96	\$12,656.00	\$1,265.60
SI-97	\$51,674.90	\$5,167.49
SI-105	\$6,610.50	\$661.05
SI-106	\$39,663.00	\$3,966.30
SI-111	\$12,882.00	\$1,288.20
SI-112	\$41,810.00	\$4,181.00
SI-129	\$69,608.00	\$69,608.00
SI-130	\$22,035.00	\$22,035.00
	Total:	\$124,670.64

[18] The lien bearing instrument number WR12158842 (the “IPSC Lien”) appended to the Statement of Claim, consists of the following invoices and amounts totalling \$277,965.48:

Invoice No.	Amount	Amount Claimed
SI-115	\$23,345.80	\$6,300.88
SI-119	\$74,407.79	\$74,407.79
SI-120	\$59,283.81	\$59,283.81
SI-123	\$17,628.00	\$17,628.00
SI-124	\$33,956.50	\$33,956.50
SI-127	\$39,324.00	\$39,324.00
SI-128	\$47,064.50	\$47,064.50
	Total:	\$277,965.48

[19] Each of the invoices claimed under the liens are also summarized in the Scott Schedule submitted by the plaintiffs.

[20] In January of 2019, Nikom entered into a factoring agreement with IPSC whereby Nikom assigned its invoices to IPSC in order for Nikom to get paid upfront. The Block had no agreement with IPSC and had no input in this decision. The evidence discloses that Nikom's factoring agreement with IPSC substantially changed the dynamics of the established payment approval process.

[21] The Block has paid all invoices issued by Nikom from December 2018 to the end of May 2019 (other than the 10% statutory holdback). The Block does not take issue with the value of services and materials in those earlier invoices. It seeks a set-off against the remaining 10% holdback amounts.

[22] The invoices issued for the months of June, July and August 2019 have not been paid by The Block, for what it says are the following reasons:

- The invoices were not accompanied by a site authorized completion slip;
- The invoices were not approved by an authorized representative of The Block;
- Nikom issued false statutory declarations attesting to payment of all labour and materials supplied on these invoices when that was not the case;
- There are significant deficiencies in Nikom's work, such that the value of the services and materials are not as stated in those invoices, and for which The Block is asserting its right to a set-off;
- Nikom breached the terms of its contract with The Block by failing to provide adequate manpower from June to August, despite Nikom's repeated promises; and
- Nikom repudiated the contract and The Block is seeking damages for the cost to complete the work by a third party, that Nikom failed to perform.

[23] On October 4, 2019, Nikom registered a claim for lien for \$124,670.64 and IPSC registered a claim for lien for \$277,965.48. The two liens were perfected by issuing this action and registering a certificate of action against title to the property.

[24] A third claim for lien was registered by its material supplier, Watson Building Supplies on October 11, 2019 for \$149,049.73. This lien was not perfected in accordance with the timelines under the *Construction Act* and was later vacated.

[25] The Block was required to post security initially for all three claims for lien. The security was later reduced to reflect the discharge of the Watson lien.

[26] The Block says it incurred hard costs to complete the exact same scope of work and to correct Nikom's deficiencies in Buildings A and H. Those hard costs, it submits, are \$1,298,477.73, as established by the invoices and proofs of payment produced. This is significantly more than was to be paid to Nikom. The Block seeks a set-off against any amounts owing to Nikom and IPS for the remaining invoices.

Issues

[27] This trial raises the following issues:

1. Who repudiated the Contract?
2. Are Nikom and IPSC entitled to damages? and,
3. Should The Block's Counterclaim succeed?

Law and Analysis

Contractual Terms Relevant to the Issues

[28] The following relevant provisions in the Contract are set out below [highlighting added]:

"Work" includes all labor, materials, equipment and services required of the CONTRACTOR, as shown, described or inferred in the Contract Documents. The CONTRACTOR is only to use its own forces and/or OWNER/CONSTRUCTION MANAGER approved sub-trades to undertake the Work. The CONTRACTOR may not

sub out further work without the prior written consent of the OWNER, such consent to be granted at the discretion of the OWNER.

The CONTRACTOR agrees to do all work in accordance with the plans, specifications, and performance standards; and in accordance with good building practice; adhering to any and all civic, municipal, provincial and federal laws and codes pertaining thereto; and to the satisfaction of the OWNER. The CONTRACTOR further agrees to obtain all licenses required in connection with his work and to inform the site superintendent of the date and time work will be ready for inspection as well as the nature of the inspection.

The CONTRACTOR shall provide and maintain, at his expense, a minimum of \$5,000,000 general liability insurance against claims made for damages for personal injury or property damage by reason of anything done or not done by the CONTRACTOR, its employees or agents, in connection with the performance of this Agreement. Proof that the OWNER and the CONSTRUCTION MANAGER are named insured is required upon successful awarding of the contract.

Upon award of this contract, the CONTRACTOR shall provide certification of WSIB registration and be in good standing, and a current letter of clearance. WSIB letters of clearance must be provided on a monthly basis thereafter. At any time during the term of this Contract when requested by the OWNER, the CONTRACTOR shall provide such evidence of compliance by himself and any or all of his Sub-Contractor's with all requirements with respect to payments and rules and regulations due under the Workers Compensation Act. The CONTRACTOR shall conduct weekly safety meetings and supply appropriate paperwork to the Site Superintendent as required by the Ministry of Labor.

The CONTRACTOR is responsible to familiarize themselves with the site and point out any potential problems before starting the job...

The awarding of this Contract shall be based on the assurance that **adequate qualified manpower will be provided to carry out this scope of work and work will be commenced and completed as per the Project Schedule as revised from time to time by the Construction Manager.**

The CONTRACTOR shall provide additional labor including safety personnel for overtime and Saturday work as required from time to time to comply with Project Schedule at no additional cost to the OWNER.

The CONTRACTOR shall schedule all work in accordance with and as directed by the **SITE SUPERINTENDENT**. As time is of the essence the schedule will be reviewed from time to time and is expected to be met.

The CONTRACTOR shall provide a list of detailed tasks to be performed and the time duration required to complete said tasks in accordance with all requirements of the contract documents to meet the Project Schedule deadlines within seven days of award of this agreement.

Failure to meet the Construction Schedule deadline and/or **provide additional crews requested by SITE SUPERINTENDANT and/or CONSTRUCTION MANAGER to maintain project schedule may subject the CONTRACTOR to back charges for additional labour brought in by OWNER and loss of profit by Owner if delay to the Construction Schedule is caused by this CONTRACTOR.**

The CONTRACTOR agrees to provide a **full credit to OWNER for deleted or incomplete work**. Value of credit to be calculated as a percentage of the total amount in the agreed schedule of values attached to this Contract.

The CONTRACTOR confirms that he is an **expert in this field of work and is fully knowledgeable and experienced** in all aspects of procedures, methods, regulations, codes

and municipal requirements and the CONTRACTOR further acknowledges that the OWNER is relying on this expertise.

The CONTRACTOR shall be **responsible to site measure and layout all work** according to the architectural drawings. The SITE SUPERINTENDANT must be notified of any discrepancies immediately and they must be resolved prior to commencing with additional work. The CONTRACTOR shall proceed with layout work from an agreed reference line. Layout work shall not wait for exterior walls/windows to be installed.

The CONTRACTOR is responsible to provide **on-site supervision at all times for their workers** and will work directly with the SITE SUPERINTENDANT to insure optimum scheduling and workmanship.

[29] The Scope of Work listed 47 items of drywall work which Nikom was responsible to complete. There was to be a one-year warranty for all drywall assemblies commencing on the final occupancy date of the building.

[30] On the issue of progress payment invoicing, the signed Purchase Order expressly stated:

Payments are based on monthly draw submissions, unless otherwise stated. Original invoice must be received and accompanied with site authorized completion slip match to the approved itemized draw schedule prior to submission for payment.

Payment will be made upon approval of quantities. Any applicable holdback will be released once released by owner.

[31] Further, the Scope of Work to the Contract also provided as follows:

The CONTRACTOR acknowledges that he shall have his itemized draw schedule as per Exhibit 2, prepared and approved prior to the commencement of work and submitted on a monthly basis by the 25th of each month. The CONTRACTOR understands that payments are made based on recommendations made by the cost consultant. Work that is billed for but not completed or work that is deficient will not be paid until such work is complete and then will be paid on the subsequent draw. Delivered but uninstalled materials do not count as completed work and are not eligible to be drawn against. All invoices must be accompanied by a site authorized completion slip. Draw payments are usually made by the 15th of the month following the draw submission.

[32] The Block does not take issue with the value of the services and materials supplied by Nikom on Invoices SI-86, SI-89, SI-91, SI-92, SI-96, SI-97, SI-105, SI-106, SI-111, SI-112 and

SI-115 for which only the ten percent holdback has not been paid. As set out below, The Block seeks a set-off against that holdback amount.

[33] All of these invoices were paid by The Block to Nikom and IPS on a timely basis and in compliance with the payment terms in the Contract.

[34] The only remaining unpaid invoices of Nikom (the "Invoices") are as follows:

Inv. SI-119	Building H	\$56,210.00 plus HST	Issued June 25, 2019 / Due July 25, 2019
Inv. SI-120	Building A	\$50,510.00 plus HST	Issued June 25, 2019 / Due July 25, 2019
Inv. SI-123	Building A	\$15,600.00 plus HST	Issued July 16, 2019 / Due August 26, 2019
Inv. SI-124	Building H	\$30,050.00 plus HST	Issued July 16, 2019 / Due August 26, 2019
Inv. SI-127	Building A	\$34,800.00 plus HST	Issued August 6, 2019 / Due September 5, 2019
Inv. SI-128	Building H	\$41,650.00 plus HST	Issued August 6, 2019 / Due September 5, 2019
Inv. SI-129	Building H	\$61,600.00 plus HST	Issued August 23, 2019 / Due August 23, 2019
Inv. SI-130	Building A	\$19,500.00 plus HST	Issued August 23, 2010 / Due August 23, 2019

[35] Other than SI-119 and SI-120, the other invoices were not due for payment (as per the due date in Nikom's own invoices) when Nikom abandoned the project.

[36] Nikom has the evidentiary burden of establishing, on a balance of probabilities, the value of services and materials that it supplied and, accordingly, the debt owing pursuant to the Contract or on a quantum meruit basis. Nikom has not met its onus. Where the contractor fails to produce the necessary evidence, it fails to discharge that burden and the court cannot determine a reasonable compensation.

[37] Where the contract structure is a fixed price contract, and installment payments are in the form of progress payments tied to the percentage of work completed, the contractor is required to provide proof of its cost and percentage of completion throughout the project. The phrase “actual value of the work done” means the value of the services and materials, as measured by the contract.

[38] Nikom relies principally on the oral testimony of its principal, Milos Nikolic, and its internal field reports and photographs to prove the value of its services and materials Nikom supplied to the Lands. The evidence indicated that Nikolic was not regularly on site, nor did he supervise Nikom's labourers.

[39] I agree with the Defendant that the best method of valuing services and materials supplied to the Lands is to refer to the actual invoices for materials and for labour, and/or time sheets. Nikom has not produced any invoices for any of the materials supplied to the Lands. Further, Nikom has not produced any invoices for labour, and has produced some time sheets (only for the period until June 7, 2019 when Nikom's site supervisor Rob Majszki left the project).

[40] Further, there are no field reports produced by Nikom for any materials or services completed after June 7, 2019. There are only some rather cryptic and sporadic handwritten "journal notes" prepared by another Nikom worker, Zvonko Frangic, for July 2, 12, 15, 16, 17, and August 6, 8, 12, 12, 14, 15 and 16. Mr. Frangic did not give evidence at the trial. These documents do not describe in any detail who was on site, what work was performed, or any issues affecting Nikom's work.

[41] There are no time sheets for any labour hours for Nikom workers on the project after June 7, 2019.

[42] Nikom put into evidence various photographs which are said to have been taken by Zvonko Frangic on August 21, 2019, the date that Nikom gave notice that it was abandoning the project (the "Photos"). The Photos were put forward as evidence to show the value of the services and materials to support its Invoices. The Photos fail to show such value.

[43] Based on the last invoices issued by Nikom (SI-129 and SI-130), Nikom asserts that: 70% of the framing was completed in Building A on levels 2 and 3; 90% of the taping was completed in Building H on levels 4, 5 and 6; and 60% of the drywall completed on level 3.

[44] From the Photos, Joel Pearce of SPM Construction ("Pearce") identified multiple examples where the stated values of the completed work were not as Nikom claimed.

[45] For example, Pearce testified that the Photos showed only one layer of compound over all joints on levels 4, 5 and 6 indicating only preliminary taping work, with only a handful of units with two layers. He also identified multiple units where no drywall beading installed.

[46] As per the Contract, the "taping" component was to consist of the following:

29. The CONTRACTOR shall ensure the finished drywall surfaces are smooth and unblemished with a homogeneous appearance. Three passes of compound over all joints at a minimum of 16 " wide feathered is required. Each coat must be thoroughly dry prior to application of the next coat. Conspicuous joints or fasteners will not be accepted. Avoid raised fibers on the paper face due to over sanding. The CONTRACTOR is responsible for touch ups and sanding after the primer coat of interior paint has been applied to the walls and shall also be responsible for final touch-ups. THE CONTRACTOR IS NOT RESPONSIBLE FOR DAMAGED WALLS. CONTRACTOR SHALL COMPLETE THE FINAL TOUCH UPS ONLY IF NEEDED DUE TO WORKMANSHIP ISSUES CAUSED BY THE CONTRACTOR. CONTRACTOR SHALL COMPLETE ONE ROUND OF TOUCH UPS AFTER PRIMER.
30. The CONTRACTOR shall install the appropriate drywall beads as per the manufacturer's recommendations. All windows, archways, acrylic tubs & showers and closet openings to have finished beaded drywall returns. All beads must be installed smooth and straight with no hairline cracks. Perforated metal corner beads are not acceptable.

[47] Pearce also testified that there was no framing and drywall in several areas, including in the hallways of Building H.

[48] There is no evidence put forward by Nikom of any independent valuation of the services and materials actually supplied by Nikom.

[49] Nikom has failed to satisfy its evidentiary burden to establish the value of the service and materials supplied to the Lands for the Invoices totalling \$363,307.60.

[50] Nikom's own schedule of values from invoices SI-129 and SI-130 dated August 23, 2019 states that the percentage of work completed on Building A was only 41% and Building H was 58%.

Payment approvals by Nathan Hallman

[51] Nikom relies on the emails sent by The Block's employee Nathan Hallman ("Hallman") as certification of the value of Nikom's Invoices. The Block contends that any approvals by Hallman are not binding on The Block and certainly do not constitute proof of the value of the services and materials supplied by Nikom. This disagreement constitutes one of the central issues in this trial.

[52] The Contract is clear that Nikom was to submit a monthly invoice for Building H and for Building A by the 25th of each month, together with a completed Schedule of Values ("SOV") and a site authorized completion slip from the Block to match the approved itemized draw. All invoices were to be submitted to bills@schembripm.com.

[53] As per the site meeting minutes, all contractors were required to provide a current WSIB certificate with each progress invoice, and a sworn statutory declaration attesting to the payment of all labour and materials.

[54] Nikolic confirmed his understanding of the process and what was required to be submitted. Nikolic also testified his understanding that Pearce would then do a walk through to approve the values in the SOV for payment.

[55] On cross-examination, Nikolic acknowledged the purpose of swearing a statutory declaration and that he knew this attestation was being relied upon by The Block in issuing any payments to Nikom, and later to IPSC.

[56] The only person authorized to approve payments on behalf of The Block was Pearce or, alternatively, Gordon Schembri, the owner of The Block. The Block submits that Nikolic admitted that this was his understanding, which is supported by the fact that all of his communications in regard to any invoice issues from either Nikon or IPSC from December up until June 24, 2023 were only with Pearce. I agree with this assessment. Nikolic specifically directed IPSC to Pearce if there were "questions in regard to the validation of the invoices".

[57] Nikom's continuing financial difficulties throughout the project, and Nikolic's need to receive payment from IPSC within 48 hours of invoice approval from The Block, led Nikolic to press Pearce to approve invoices even before they were received from IPSC.

[58] Pearce testified that he went out of his way to accommodate Nikolic by conducting special site walkthroughs to be able to approve Nikom's invoices much earlier than for other trades. By

doing so, Pearce said that The Block was taking a substantial risk, especially if the cost consultant failed to approve the values later in the month.

[59] Pearce testified about an in-person meeting with Nikolic on Friday June 21, 2019, to discuss concerns as to Nikom's progress, including Nikom's inadequate workforce, before Pearce left for vacation. Nikolic was aware that Pearce would be away. Pearce's evidence was that he did not authorize anyone to approve Nikom's invoices while he was away. Further, Nikolic never inquired with Pearce about the approval of Nikom's invoices in his absence.

[60] On Monday, June 24, 2019 at 8:28 a.m., knowing Pearce had left for vacation, Nikolic emailed Invoices SI-119 and SI-120 (not through IPSC) directly to Hallman. Hallman expressly advised Nikolic in an email on June 25, 2019 at 2:52 p.m. that he will need to wait until Pearce is back and that "I don't have the authority to issue payment".

[61] On June 25, 2019 at 4:00 p.m., IPSC sent invoices SI-119 and SI-120 to bills@schembripm.com. No approved site authorized completion slip was attached to the SOV. At 4:27 p.m., Nikolic forwarded the invoices to Hallman and Markovich asking them to confirm. Markovich replied on June 26, 2019 at 10:50 a.m. advising Nikolic to "Send to bills".

[62] On June 26, 2019, Nikolic replied at 11:16 a.m. to Hallman and Markovich stating:

Hey guys,

Typically Joel responds to clientcare@invoicepayment.ca saying that he approves the invoices and that they will be paid to IPS at the next payment cycle.

Just make sure you mention Invoice numbers Si-120 and Si-119.

[63] I find that Nikolic orchestrated having Hallman send an email to IPSC clearly knowing that Hallman was not authorized to do so. He did this deliberately so that he could get funds immediately from IPSC.

[64] Without any authority, Hallman obliged and sent the email to IPSC as requested by Nikolic, counting on Nikolic's assertions that Nikom would progress in its work.

[65] The same conduct was repeated by Nikolic in July for Invoices SI-123 and SI-124 on July 19, 2019. Pearce appears to have been deliberately excluded, despite being no longer on vacation. When IPSC sent a document to Hallman for signature, IPSC was specifically alerted to Hallman's lack of ostensible authority by Nikolic who emails back "Also is Nathan supposed to sign this".

[66] Only two weeks later, on August 6, 2019, Nikolic again asked Hallman to approve Invoices SI-127 and SI-128 less than ten minutes after IPSC has sent them to bills@schembripm.com to assist Nikolic to "bridge the gap". Nikolic was relentless in pressuring Hallman to approve those invoices the very next day when Hallman had not responded.

[67] None of the contract requirements for the processing of payment of the Invoices by The Block were complied with by Nikom, which included invoicing more frequently than once a month.

The Indoor Management Rule does not apply

[68] Nikom and IPSC take the position that The Block is bound by the email approvals sent by Hallman for the Invoices based on the application of the indoor management rule.

[69] At common law, a person contracting with a corporation was precluded from relying on the indoor management rule if the circumstances were such as to put him or her on inquiry which they failed to make: *Sherwood Design Services Inc. v. 872935 Ontario Ltd.*, 1998 CanLII 3116 (ON CA) at p. 18; *Froom v. Lafontaine* 2023 ONCA 519 (CanLII) at para. 46.

[70] Section 19 of the *Ontario Business Corporations Act* is a codification of the indoor management rule, and reads as follows:

19. A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,
(d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;
Except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect. [Emphasis added].

[71] Specifically, the indoor management rule was not intended to protect parties who knew or ought to have known that the person signing on behalf of the Corporation did not have the authority to do so.

[72] Further, the common law indoor management rule will not apply where circumstances surrounding the authority are suspicious: *AOD Corporation v. Miramare Investment Incorporated*, 2021 ONSC 4280 at para 35.

[73] Nikolic had clear knowledge of Hallman's lack of authority. I agree with the Defendant that he used Hallman, as a new employee on the project, and deliberately orchestrated Hallman's approval in order to get paid knowing that Pearce was away and was the only person authorized to

approve Nikom's invoices. Hallman specifically told Nikolic in an email that only Pearce or Schembri could approve payments to Nikom. Nikolic incentivized Hallman by promising to bring more labourers on site if he sent the requested emails to IPSC approving the invoices.

[74] On the facts in evidence, Hallman's position as Senior Project Manager did not give him authority to approve invoices for Nikom or any other trade.

[75] Nikom cannot rely on the indoor management rule when it was the party that arranged for Hallman to sign, knowing that he had no such authority. Nikom also had a contractual duty to have made IPSC aware of this fact. Nikom was driven by its need to get monies advanced by IPSC on an expedited basis.

[76] Similarly, IPSC failed to make any inquiries of The Block or Nikom about Hallman's authority. Nikolic alerted IPSC by inquiring of IPSC if "Nathan was supposed to sign this", referring to the Notice of Assignment document.

[77] IPSC, as a Plaintiff, failed to give any evidence at all at trial to support that it relied on Hallman's emails in advancing payments to Nikom. In failing to make appropriate inquiries, IPSC assumed the risk that Hallman was not authorized to approve invoices on behalf of The Block.

[78] The Terms and Conditions which Nikom signed with IPSC provides that:

8. Credit Risk: IPS will not assume any risk of non-payment of invoice(s) for any reason whatsoever and IPS may chargeback the amount of any invoice(s) or require **The Company** to repurchase any invoice(s) which has not been paid within 90 days of the invoice(s) date for the face amount of the invoice(s) and accrued fees.

11. Indemnity: **The Company**, covenants with **IPS** that it will at all times hold **IPS** harmless from any and all liability, obligations, claims, losses, damages, actions and suits, costs and expenses incurred in any way relating to or resulting from this Agreement and shall indemnify **IPS** on account of any action that may be commenced or prosecuted in respect of the invoice(s) herein assigned.

Nikom Repudiated the Contract

[79] In making the assessment of which party is at fault in the failure of a contract to be completed, the Court is to apply an objective test: *Kaplun v. Mihhailenko* (2005), 43 C.L.R. (3d) 223, at para 130:

Where each party to a contract is alleging fundamental breach and repudiation by the other, the court must determine which party committed a substantial breach which amounts to repudiation, ie. evidencing an intention no longer to be bound by the terms of the contract. In making this assessment, the test is an objective one, and even a direct or indirect intention by party allegedly in breached that it wished to continue the contract is not necessarily conclusive in rebutting a finding of repudiation of the contract. A party made by found to have repudiated a contract even when the party honestly believes it wants to continue with the contract to completion.

[80] Nikom takes the position that The Block repudiated the Contract by failing to make payments of the Invoices, and thereby entitling it to abandon the project on August 21, 2019. This is not supported by the evidence. Nikom is the party who repudiated the Contract.

[81] Justice Perell summarized the law of construction contract repudiation in the 2018 case of *D&M Steel v. 51 Construction Ltd.*, 2018 ONSC 2171, at paragraphs 49-54:

[49] Owner breach: if the owner without justification ceases to make required payments under the contract, cancels it, or through some act without cause makes it impossible for the contractor to complete its work, then the owner has breached the contract and it has no claim for damages, and the contractor is justified in abandoning the work and the contractor is entitled to enforce its claim for lien to the extent of the actual value of the work performed and materials supplied up until that time, and the court may award the innocent contractor damages for breach of contract or damages on a *quantum meruit* basis in lieu of or in addition to damages for breach of contract.

[50] In a *quantum meruit* claim, deficiencies in the work actually performed are deducted from the value of the work done, but no account is taken of the owner's costs to complete.

[51] Contractor breach: mere bad or defective work or insignificant non-completion will not, in general, entitle an owner to terminate a contract, but the owner will have an obligation to pay for the work and make a claim for damages for the defective work. An owner will not be able to terminate the contract because of some minor or inconsequential failure to complete, although the owner may have a claim against the contractor for damages for non-completion or for defective workmanship, which will generally be the cost of completing the non-completed items or remedying any defects. If the contractor breaches the contract, an owner who alleges that the work performed or the materials supplied are defective must provide proper evidence on the basis of which his or her damages can be assessed.

[52] If there are defects in a contractor's workmanship, but not enough to amount to a fundamental breach entitling the owner to terminate the contract, the contractor should be permitted to remedy the defects and failure by the owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim to remedy the defects as a result of its failure to mitigate.

[53] Contractor breach: if a contractor abandons the contract, repudiates the contract, fundamentally breaches the contract, or performs the contract in a way that it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work, the owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligations to pay including any obligation to pay on a *quantum meruit* or for work already performed.

[54] Contractor breach: if the contractor demands payment before it is due under the contract or if a contractor refuses to proceed unless paid this may be conduct that evidences an intention no longer to be bound by the terms of the contract amounting to a fundamental breach or repudiation of the contract.

[82] On August 21, 2021 at 4:22 p.m., the day following a project site meeting, Nikolic sent the following email to Pearce:

Due to the lack of communication and non payment on invoices that are due I have removed all personel from the project as of today.

[83] Stan Markovich, a former employee of SPM Construction, testified that Nikom had already removed the majority of its labourers from the project the previous week.

[84] For the reasons set out below, I conclude that it was Nikom who repudiated the Contract.

[85] The Block was not delinquent in making progress payments to Nikom or IPSC. Nikom and IPSC were paid all amounts up to the end of May in a timely manner and consistent with the payment terms in the Contract.

[86] As per the Contract, payments were to be "usually made by the 15th of the month following the draw submission" and as testified by Pearce could be even later depending upon the release of the construction financing.

[87] As per Nikom's own invoices, payment was not due until July 25, 2019 (SI-119 and SI-120), August 26, 2019 (SI-123 and SI-124), September 5, 2019 (SI-128 and SI-129). The only invoices that The Block was technically "late" in making payment was invoices SI-119 and SI-120. The Block had some justification in doing so given the lack of workforce and performance issues.

[88] Further, The Block's non-payment of SI-119 and SI-120 did not make it impossible for Nikom to complete its work. Nikolic testified that Nikom had been paid for these invoices by IPSC and therefore Nikom was contractually obligated to complete the work.

[89] By demanding payments that were not yet due under a contract, the contractor had acted unreasonably and repudiated the contract: *Heyday Homes Ltd. v. Gunraj* [2003] O.J. No. 429 at para 353; *Homewood v. 2010999*, 2013 ONSC 4441 at para 76; *Gokdenz Construction Ltd. v. Dlakis* [2011] O.J. No. 5393, at 33.

[90] Nikom also received payment from IPSC for invoices SI-123, SI-124, SI-128 and SI-129. It was paid and was obligated to complete its work.

[91] Despite being paid by IPSC, Nikom repeatedly failed to have "adequate qualified manpower" and to provide additional labour when required as it was contractually obligated to do. In particular, for the period from the end of June to August 21, 2019, there were serious issues with Nikom's lack of labour on site. The impact of Nikom's deficient labour force was magnified by the fact that there was no Nikom supervisor regularly on site after June 7, 2019 to oversee the drywall trades and what they were doing.

[92] As per the Contract, Nikom was responsible to ensure that all workers were familiar with all drawings, specifications and design details in performing its work. Nikom was to use its own work force and any subcontractors brought in by Nikom were to have been approved in writing by The Block. Pearce testified that this contract provision was not just for safety reasons to know who was onsite, but also to ensure a level of quality of the work being performed.

[93] On cross-examination, Nikolic repeatedly denied not having sufficient labour on the project. This testimony was not credible and was contradicted the evidence of Pearce and Markovich, as well the multiple contemporaneous email exchanges in evidence. In more than one such email, Nikolic himself acknowledged that he did not have workers on site. On July 24, 2019, Hallman wrote, and Nikolic responded:

On Wed., Jul. 24, 2019, 8:06 a.m. Nathan Hallman, <Nathan@schembripm.com> wrote:

Hi Milos

I thought today was the day we would finally see some tapers on site. It's about 8am and most taping crews would have started by now.

We cannot continue like this Milos. Are you able to get the man power needed to get this building done?

Further, there are only two guys installing board on the 5th! This is not the process we were expecting from Nikom.

We need to meet to discuss this serious issue. When are you available to meet on site?

Nathan

Good morning Nathan,

That was the plan but as we can both see it did not happen. I scheduled the guys but in this industry it is unfortunate that when someone promises me something and then I make plans around that, make a promise to you - they do not fulfil their commitment and it is my fault. I am doing my best to keep the buildings going and I am constantly looking for more man power. There were supposed to be 6 drywallers there this morning, but again they decided not to fulfil their commitment. We can meet on site at 9:30 if you are available.

[94] Pearce emailed Nikolic on August 1, 2019 after there was no improvement in Nikom's labour force:

Hey Milos,

What is happening at The Block? I keep hearing every day that you don't have anyone working on site.

We need to get these buildings completed so I need you to get men on site, we can't be losing time because of a lack of manpower from Nikom.

Please get this resolved asap!

Thanks

Joel Pearce | General Manager

[95] Nikolic asserted that he had multiple workers on site in Building H, working on the boarding on the 6th floor. However, the photographs taken by Hallman and sent to Pearce that same day confirmed that there had been no such progress. Nikolic also made excuses that materials had not been delivered.

[96] Nikolic asserted on his examination that The Block was attempting to "sabotage" Nikom so as not to pay him. This is not consistent with the numerous communications to Nikom sent by

Pearce, Hallman and Markovich who all were making every effort to have Nikom continue with what it had contracted to do. Pearce testified that the last thing The Block wanted was for Nikom to abandon the project because it would only result in further delays and more cost to The Block.

[97] There were a number of reported deficiencies in Nikom's work which were not being addressed. As per the Contract, any deficiencies reported to Nikom by the SPM site superintendent were to be corrected before proceeding with other work.

[98] Nikom's deficiencies were largely attributable to its lack of a consistent labour force and the lack of on-site supervision which included:

- Failure to fire tape the demising walls behind the tubs and showers;
- Electrical and mechanical rooms not built;
- Construction of fire-rated bulkheads;
- Door frames not matching the dimensions on the drawings;
- Not running drywall behind the steel studs that intersect the fire-rated walls to ensure the necessary fire-rating;
- Vents not cut-out for the electrical and venting (four in each unit) and water valves not being marked for future access; and
- Construction of the vented gas-line shafts.

[99] As per the Contract, Nikom was responsible for any incomplete or deficient work which is to be applied as a value credit to the amounts in the Contract.

[100] On August 26, 2019, The Block delivered formal notice to Nikom of its breach of the Contract, in not being on site for over a week and delay (the "Notice").

From: [Stan Markovich](#)
To: [Milos Nikolic \(milos@nikomconstruction.ca\)](mailto:milos@nikomconstruction.ca)
Cc: [Joel Pearce \(joel@schembripm.com\)](mailto:joel@schembripm.com)
Subject: Notice of Delay
Date: August-26-19 3:19:00 PM
Attachments: [Block Inc Meeting Minutes 053 - August 20, 2019.pdf](#)
Importance: High

Good afternoon Milos,

As the most items in them minutes are past due after committed dates as well as there is no activities on site over week, please consider this email as notice of delay of the project, due to breach of contractual obligations and failure to meet the project schedule.

[101] This was not the first warning notice given to Nikom. Markovich had previously warned Nikom on July 25, 2019, that Nikom's breach would result in a claim for costs by The Block against Nikom to have the scope of work completed by another company.

[102] The above facts, when viewed objectively, lead to the conclusion that Nikom was refusing to, and/or unable to, provide the labour and materials it was contracted for, and to perform its contractual obligations. These actions by Nikom guaranteed that the contract would come to an untimely end.

[103] Nikom never replied to the Notice, nor did it ever seek to return to work on the project. There is no evidence that Nikom intended to correct its deficiencies. Nikom demonstrated no intention to be bound by the terms of the Contract after it abandoned the project.

[104] In doing so, The Block was justified in not releasing any further payments to Nikom or IPSC and to terminate the Contract and seek its damages.

Set-off against monies owed to Nikom or IPSC

[105] Section 17(3) of the *Construction Act* provides for a right of set-off against any amounts that an owner may be liable to pay under a lien.

[106] The Block has a right of set-off against any amounts that may be found to be owing to Nikom and to IPSC under the two constructions liens.

[107] A set-off at law requires the fulfillment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations: *Armenia Rugs – Tapis Ltd. v. Axor Construction Canada Inc.*, 2006 CanLii 8035 (ONSC) at para 29.

[108] The fact that Nikom assigned invoices to IPSC, and assigned its lien rights, should not operate to prevent The Block from setting-off its damages against any amount which may be found to be owing to IPSC under the invoices. This would otherwise allow for a contractor to avoid liability for damages to an owner merely by the assignment of their invoices.

[109] The Block relies on the doctrine of equitable set-off in this regard. The legal requirements for an equitable set-off are set out in Spry, *Principles of Equitable Remedies* 6th Edition 2001 at p. 176:

What must be established is a relationship between the respective claims of the parties, which is such that the claim of the defendant is so closely connected with the rights that are relied on by the plaintiff, that it would be unjust that he could proceed without permitting a setoff.

The practical difference between a right of set-off and counterclaim is usually that a judgment may not be obtained against a party that has a right to set off an amount against the amount claimed, whereas when a counterclaim is made, judgment may be obtained on the initial claim subject to the discretion to grant a stay of execution. The right to an equitable set-off exists at common law, unless the right to set off is specifically waived in the contract.

[110] As stated by the Supreme Court of Canada in *Holt v. Telford*, [1987] 2 SCR 193, equitable set-off is available:

...where there is a claim for a money sum whether liquidated or unliquidated...It is available where there has been an assignment. There is no requirement of mutuality...[C]ourts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set-off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set-off against the assignee a money sum which arose of the same contract or series of events which gave rise to the assigned money sum or was closely connect with that contract or series of events.

[111] The objective of equitable set-off is to avoid the injustice to a party who has had mutual dealings with a party, who has become bankrupt or assigned their rights to a third party, to pay in full what the party owes to the bankrupt or assignor, while having to be content with only partial recovery of what the bankrupt or assignor owes to that party: *Johanns v. Fulford*, 2021 ONSC 8513 at para 23.

[112] In this case, it would be unjust for The Block to have to pay to IPSC in full for the amount of Nikom's invoices, while not being able to set-off against those amounts for any incomplete work, deficiencies or damages caused by Nikom.

[113] The absence of an expert report does not prohibit a judge from assessing the claim and determining the appropriate amount of any set-off. Even where damages are difficult to assess,

the court must do the "best it can" in the circumstances: *Martin v. Goldfarb* (1998) Canlii 4150 (ONCA). Where the party has proved facts upon which the set-off is estimated, the difficulty of assessment is no ground for refusing damages, even if that involves some guess work: *Mount Royal Painting Inc. v. Unifor Canada Inc.*, 2022 ONSC 6316 at paras 51-52.

[114] In this case, The Block seeks a set-off against both Nikom and IPSC for its cost to complete the scope of work as out below.

The Block's costs to complete and correct deficiencies

[115] Almost immediately after Nikom abandoned the Project, The Block mitigated its damages by re-tendering to complete the scope of work and to correct Nikom's deficiencies.

[116] Pearce testified that none of the drywall contractors which The Block had previous dealings were willing to bid on the cost to complete Nikom's work because they were extremely uncomfortable with what they were getting into. It not uncommon in the construction industry for contractors to be reluctant to complete the work of other subtrades.

[117] Pearce was referred to NG Marin, another drywall company, with whom neither he nor The Block had any prior dealings. NG Marin was ultimately contracted by the Block to rectify the deficiencies and to complete the work of Nikom. The Block issued two purchase orders to NG Marin for this work, one for Building A and Building H. The exact same scope of work was attached to each of these purchase orders, as had been the case with Nikom.

[118] Gene Clarke ("Clarke"), with over 25 years of experience in drywall construction and on multiple large-scale projects, gave evidence on behalf NG Marin. He had never met Nikolic and had no prior dealings with Nikom.

[119] Clarke testified that he conducted two separate walkabouts of Building A and H before determining a price, which included an assessment of each floor and room. Clarke stated that after he began reviewing the plans and details, he discovered a number of issues with Nikom's work, such as doorways not being where they should be, and no make-up air unit shaft. As a result, NG Marin quoted a somewhat higher price to fix the deficiencies because NG Marin was taking a big risk by not knowing what they were getting onto.

[120] Clarke, who was regularly onsite, described Nikom's work as being a "complete mess" and identified the following deficiencies:

- In many cases, the layout installed was not what was on the drawings, including doorways framed in the wrong location which had to be moved over by 2-3 inches;
- Doors were framed in the wrong height and in the wrong location;
- For the suite entry doors, the double layers do not go in behind the door frame and would not pass Code;
- The demising walls behind the bathtubs were not fire taped which resulted in the tubs having to be ripped out and re-installed;
- Incorrect framing on the bathtubs (65 inches instead of 60 inches);

- Walls which were to be fire-rated with two layers of 5/8 inch drywall, but which only had ½ inch of drywall, and which required the installation of an additional two layers of drywall to be compliant; and
- Most bathroom walls were an incorrect length.

[121] All of these deficiencies were noted in the various emails that were sent by Markovich and Hallman from May to August 2019.

[122] Clarke testified that he was required to have 5 to 6 labourers working full-time correcting deficiencies in Nikom's work, over a period of three months. Building A was easier to correct because there was little to no drywall installed and the workers could visually identify incorrect layout or assemblies, such as the fire-rated wall.

[123] Clarke testified that much of the drywall in Building H had to be ripped out and redone. As the subsequent contractor, he was worried that any deficiencies in Nikom's work would "come back to bite " NG Marin in the end, especially from a safety perspective.

[124] Notwithstanding some gaps and shortcomings, Clarke's evidence at trial was straightforward and credible as to the state of the project after Nikom's abandonment of the job.

[125] The Block paid NG Marin \$705,924.56 to complete Building A and \$550,449.84 to complete Building H. NG Marin's invoices have all been produced, along with proof of payment.

[126] In addition, Pearce also testified to contracting with Alcove Drywall, and Black and White Roofing, for work that could not be delayed after Nikom abandoned the project. The invoices

issued by Alcove Drywall and Black and White Roofing, and proof of payment of these invoices in the total amount of \$19,077.56, have also been put into evidence.

[127] In total, The Block incurred \$1,298,477.73 to correct and complete Nikom's work. These are hard costs which establish The Block's damages. The Block had no other option but to correct Nikom's deficiencies and complete the work.

The Block's claim for delay

[128] The party alleging delay has the onus of proving delay.

[129] There was evidence of delays by Nikom in completing the chalk layout for the steel framing, and also in the construction of the parapet for Building H which led to delays in the completion of the roof during the winter months.

[130] Nikom has also alleged delays that are attributable to work by other trades not being completed as scheduled. This is not a case where The Block was insisting on strict compliance with a completion date that was no longer applicable because of circumstances beyond the control of the contractor. The Block acted reasonably in adjusting Nikom's timelines to be consistent with the coordination of other trades.

[131] The Block is not seeking damages for delay beyond the costs it has incurred to complete Nikom's scope of work in Buildings A and H and to correct the deficiencies. These costs are set out in the following chart:

<u>The Block Contract Summary Reconciliation</u>								
					Price	HST	Total	
Contract - Building A					\$ 554,900.00	\$ 72,137.00	\$ 627,037.00	
Contract - Building H					\$ 570,000.00	\$ 74,100.00	\$ 644,100.00	
Change Orders - Building A					\$ 1,953.55	\$ 253.96	\$ 2,207.51	
Change Orders - Building H					\$ 12,037.60	\$ 1,564.89	\$ 13,602.49	
				Subtotal	\$1,138,891.15	\$ 148,055.85		
TOTAL VALUE OF CONTRACT								\$ 1,286,947.00
SET-OFF CLAIM								
				Inclusive of HST				
LESS - payments made to Nikom - Building A				\$ (106,235.82)				
LESS - cost to rectify deficiencies and complete the work - Building A				\$ (720,414.32)				
LESS - payments made to Nikom - Building H				\$ (208,057.86)				
LESS - cost to rectify deficiencies and complete the work - Building H				\$ (555,037.64)				
LESS - cost of security posted to vacate liens				\$ (23,025.77)			\$ (1,612,771.41)	
AMOUNT DUE AND OWING TO THE BLOCK								\$ 325,824.41

Conclusion

[132] Nikom repudiated the Contract. The Plaintiffs are not entitled to damages.

[133] Nikom and IPSC's action is dismissed.

[134] The Counterclaim of The Block will be granted in part.

Order

[135] The Court Orders that:

1. The plaintiffs' action is dismissed;

2. The Nikom and IPSC claims for lien are discharged;
3. The security posted by The Block shall be returned;
4. The plaintiffs shall pay the amount of \$325,824.41 to The Block; and,
5. The Plaintiffs shall pay pre-judgement interest pursuant to the *Courts of Justice Act*.

Costs

[136] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Defendant/Plaintiff by Counterclaim, The Block, may have 14 days from the release of this decision to provide its submissions, with a copy to the Plaintiffs/Defendant by Counterclaim; the Plaintiffs/Defendant to the Counterclaim a further 14 days to respond; and the Defendant/Plaintiff by Counterclaim a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after the Defendant/Plaintiff by Counterclaim's initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

M.R. Gibson J.

Date: August 7, 2024

CITATION: Nikom v. The Block Inc., 2024 ONSC 4349
COURT FILE NO.: CV-19-00001586-0000
DATE: 2024/08/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

NIKOM CONSTRUCTION INC. and INVOICE
PAYMENT SYSTEM CORPORATION

Plaintiffs

– and –

THE BLOCK INC.

Defendant

REASONS FOR DECISION

M.R. Gibson J.

Released: August 7, 2024