

CITATION: Demikon Construction Ltd. v. Oakleigh Holdings Inc., 2024 ONSC 4472
COURT FILE NO.: CV-21-615
DATE: 20240814

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DEMIKON CONSTRUCTION LTD.)
) Robert J. Kennaley, Counsel for the Plaintiff
Plaintiff)
)
– and –)
)
OAKLEIGH HOLDINGS INC.,) Harris Khan as agent for Jonathan Goode,
AURELIA LIMITED PARTNERSHIP,) Counsel for the Defendants Oakleigh
WESTMOUNT GUARANTEE SERVICES) Holdings and Aurelia Limited
INC., and CENTURION MORTGAGE)
CAPITAL CORPORATION)
Defendants)
)
)
)
)
) **HEARD:** August 1, 2024

2024 ONSC 4472 (CanLII)

COSTS ENDORSEMENT

McCarthy J.

- [1] The court received submissions on the issue of costs of two motions heard by the court, the first being the “undertakings motion” (decision dated February 16, 2024), and the second being the “security motion” (decision dated April 12, 2024).
- [2] The Defendants Oakleigh and Aurelia (“the Defendants”) were successful on both motions. In the undertakings motion, the Plaintiff’s request for further settlement disclosure from the Magest settlement was denied. In the security motion, the Defendants were successful in obtaining an order for the reduction of their security posted by way of bond by more \$3.5 million.
- [3] The Defendants now seek costs of the undertakings motion on a substantial indemnity basis in the amount of \$20,712.60; the Defendants seek costs totalling \$258,901.81 for the security motion. These costs would be on a partial indemnity basis inclusive of disbursements of \$97,341.87.

- [4] The Plaintiff does not dispute that the Defendants are entitled to costs of both motions but opposes the request for substantial indemnity costs on the undertakings motion, arguing that it was nothing more than a contested motion carrying with it none of the features which would attract costs on any scale above partial indemnity.
- [5] The Plaintiff opposes the quantum of costs on the security motion for principally three reasons: i) the disbursement of \$83,387.50 for the M3 Development Consulting Fees for Review of Project Accounting Records (“the project review”) is not only exorbitant but a charge that the Defendants unnecessarily incurred to prove payments to sub-contractors; ii) the Defendants would have had to bring a motion to reduce the security regardless of whether it was opposed or not; and iii) the amount sought for fees is excessive.
- [6] I am not prepared to grant costs on a substantial indemnity scale for the undertaking motion. The motion itself was not unreasonable nor oppressive. The Plaintiff sought certain background in respect of the Magest settlement which it felt might impact upon the court’s determination of its counterclaim and the security motion. The court did not accept the Plaintiff’s argument as it pertained to the security motion but did not find it to be an unreasonable one; indeed, the court gave its decision without prejudice to the Plaintiff to renew the motion. I am not persuaded that the Plaintiff’s motion was vexatious or brought in bad faith. That said, the motion did involve complex arguments about settlement privilege and did delay the hearing of the security motion. As stated, the motion was successfully resisted by the Defendants. Reasonable costs should follow on a partial indemnity scale.
- [7] I would fix those costs at \$15,000 inclusive of HST.
- [8] The importance of the security motion to the Defendants cannot be overstated. The bond reduction resulted in costs savings and saw the Defendants receive credit for actual payments it made. The motion should not have been opposed once the Defendants served the project review showing the direct subcontractor payments. The evidence suggests that the principal of the Plaintiff lien claimant declined to even open the attachment containing that material. Moreover, the Plaintiff failed to update its lien accounting or to seriously challenge the Defendants’ calculations. The Plaintiff’s position in law and on the facts was rejected by the court. The Plaintiff’s arguments certainly added to the complexity of the motion.
- [9] Costs must be proportional to the result, and both the importance and complexity of the issues. The principle of indemnity requires the court to look at the experience of the lawyers and the rates and amounts charged. The Defendants’ primary lawyer was called to the bar in 2006. His hourly rate was \$600 at the time the motion was heard. The Defendants materials suggest that the actual rate amount incurred on the motion approaches \$240,000. The court may also consider the amount the unsuccessful party would expect to pay in costs.
- [10] Counsel for the Defendants suggested that the Plaintiff complicated a relatively straightforward motion which should have been akin to an accounting. I agree. By raising

the legal issues it did, the Plaintiff must have understood that the costs of the motion would far exceed what could be expected in a mundane arithmetic exercise.

- [11] At the same time, I agree that the project review and elevated consulting fees were not strictly necessary to obtain the relief sought. Simple proof of payments to the subcontractors or acknowledgments of payment would have sufficed; and would not have cost \$83,000 or anything close to it. However, the project review was highly probative and reliable; the court afforded it significant weight in granting the relief sought. Once in receipt of it and in the absence of any updated lien accounting of its own, the Plaintiff should have conceded that the direct subcontractor payments had been made and agreed to a security reduction. That said, it is undoubtedly true that a reduction of security would have required a motion and some kind of accounting in any event. The fees claimed in this motion must be reduced to allow for the notional fees which would have been required for that motion.
- [12] I also have regard to s. 86 of the *Construction Act* which stipulates the following in respect of costs:
- (2) Where the least expensive course is not taken by a party, the costs allowed to the party shall not exceed what would have been incurred had the least expensive course been taken. R.S.O. 1990, c. C.30, s. 86 (2).
- [13] A straightforward bookkeeping summary, even with back-up, showing direct subcontractor payments, would have been a far less expensive course in these circumstances. I find that this could have been prepared for no more than half the cost of the project review fees sought here. I would allow only \$41,693.75 for the project review consulting fees. I would allow the other claimed disbursements for a total of \$44,449.50 plus HST to arrive at \$50,222.94 for disbursements.
- [14] In the circumstances, a fair, reasonable, and proportional amount for legal fees for the security reduction motion is \$110,000 plus HST of \$14,300 for a sub-total of \$124,300. With allowed disbursements added, this brings the total for costs of the security motion to \$174,522.94.
- [15] The Plaintiff shall pay the Defendants the amounts of \$15,000 and \$174,522.94 for their costs of the undertakings motion and the security motion respectively. Those costs are fixed and payable forthwith.

Justice J.R. McCarthy

Released: August 14, 2024