CITATION: BLDNG BLX Developments Inc. v. The Roasted Nut Inc., 2024 ONSC5444
COURT FILE NO.: CV-20-633938
DATE: October 1, 2024

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act,* R.S.O. 1990, c.C.30

B E T W E E N:	)	
	)	
	)	
BLDNG BLX DEVELOPMENTS INC.	)	Ian Perry for the plaintiff,
	)	Tel.: 416-579-5055,
Plaintiff	)	Email: ian@perrysllp.com;
	)	
-and-	)	
	)	
	)	
THE ROASTED NUT INC. and 2641582 ONTARIO INC.	)	Samuel I. Nash for the defendants;
	)	Tel.: 905-526-2106,
	)	Email: snash@georgestreetlaw.com;
Defendants	)	
	)	
	)	
	)	
	)	**DECISION:** August 20, 2024

Associate Justice Wiebe

COSTS AND INTEREST DECISION

[1] On August 20, 2024 I released my Reasons for Judgment concerning the trial in this case. The plaintiff ("BBD") asserted a claim for lien of $14,091.10, and the defendants asserted a counterclaim in the total amount of $386,047.87. In my August 20, 2024 decision I discharged the BBD claim for lien and dismissed its action, and I ordered that BBD pay The Roasted Nut Inc. ("TRN") $184,125.55 in damages on TRN's counterclaim.

[2] The defendants claim costs from TRN in the amount of $104.017.10. They rely on their offer to settle and the mandatory aspects of Rule 49.10. They also claim prejudgment interest on the overpayment judgment, $182,825.55, at the rate of 2% per annum commencing August 26, 2019, the date of TRN's final payment to BBD. They claim prejudgment interest at 2% per annum on the

$1,300 flood damage judgment commencing on the day of the flood, November 6, 2019. BBD claims costs from the landlord, 2641582 Ontario Inc. ("264") in the amount of $25,000 and no costs as between BBD and TRN. BBD took no position on interest.

Costs outlines

[3] There is a significant preliminary issue concerning the defendants' costs outline. In my trial management directions of July 31, 2023 I ordered that, if they were claiming costs, the parties had to file costs outlines at the end of the trial hearing. The initial last day of the trial hearing was March 27, 2024. At that time, Mr. Perry filed a costs outline for BBD that showed $76,066.18 in actual costs, $67,641.32 in substantial indemnity costs, and $51,440.43 in partial indemnity costs. Mr. Merrilees, who was the lawyer for the defendants at the time, filed a "bill of costs" that showed $66,940.15 in "full indemnity" costs, $60,246.13 in substantial indemnity costs and $40,164.09 in partial indemnity costs.

[4] On July 2, 2024 I emailed counsel advising that I wanted a ninety minute further argument on the issue that appeared to come up for the first time in closing argument on March 27, 2024, namely whether the parties by conduct amended the governing contract into a fixed price contract. I convened a trial management conference that took place on July 9, 2024. At that time, Mr. Nash appeared for the defendants and advised that he had replaced Mr. Merrilees. I scheduled the further argument for August 13, 2024 for ninety minutes.

[5] After the argument on August 13, 2024, and at the request of counsel, I gave both sides until August 16, 2024 to file updated costs outlines. On August 15, 2024 Mr. Perry filed an updated BBD costs outline that showed $89,767.59 in actual costs, $72,382,34 in substantial indemnity costs and $54,996.20 in partial indemnity costs. This represented an increase in actual costs of $13,701.41 from its earlier costs outline.

[6] On August 15, 2024 Mr. Nash filed an updated "bill of costs" for the defendants that showed $116,284.42 in "full indemnity" costs, $106,135.84 in substantial indemnity costs and $75,690.14 in partial indemnity costs. This represented an astonishing increase in actual cost of $49,344.27 from the first defendants' bill of costs, a 42% increase. In looking at this second bill of costs, it appears that no more than about $11,000 of these costs were shown has being incurred after March 27, 2024.

[7] What about the remaining $38,344.27 of the increased costs? In his reply written submissions on costs, Mr. Nash simply said that at the end of the argument on August 13, 2024, he advised the court that there was an error in the earlier bill of costs as the "totals were inaccurate." I have reviewed my notes of August 13, 2024 and they do not show such a statement. There were also no dockets filed by the defendants with both bills. Most importantly, there was no indication in either of these bills what amounts were allegedly overlooked in the calculation of the totals in the first bill of costs. The defendants left it to the court to do that detailed verification work.

[8] I am not prepared to do this detailed verification work. This is all part of a deeply troubling trend with the defendants where they have shown sloppiness and disregard of legal obligations. They produced the lease document no sooner than in the middle of trial. Their witnesses mischaracterized an agreement to lease as the lease. They did not call an engineer as a witness on a key alleged deficiency. But then they tried to file his report through the affidavit evidence of another witness,

which was clearly hearsay and improper. The landlord, 264, openly admitted twice not producing highly relevant documents and objects. It had only one document listed in its affidavit of documents. Now they produce an initial bill of costs they say contains gross miscalculations and they do so without identifying where those miscalculations occurred. Had it not been for my decision to reconvene the parties for further argument, the defendants would have had to live with their first bill of costs.

[9] I have lost patience with this. I have decided to hold the defendants to their first bill of costs and will add $13,000 to the shown actual costs in the first defendants' bill of costs to account for the additional work that was done for the reattendance on August 13, 2023. $13,000 is the equivalent of the increase shown by BBD in its second costs outline. That means that I will use the following cost numbers for the defendants: $79,940.15 in actual costs; $71,946.13 (90% of $79,940.15) in substantial indemnity costs; and $47,964.09 (60% of $79,940.15) in partial indemnity costs.

Result

[10] The defendants succeeded in defeating the entire BBD claim for lien and action. They also succeeded on one aspect of their counterclaim entirely (ie. the overpayment claim) and a fraction of the flood damage claim, namely 23%. The judgment in favour of the defendants of $184,125.55 is 47% of the $386,047.87 they claimed in their set-off and counterclaim. The defendants failed entirely in their claims for damages due to delay and deficiency correction. These issues consumed a considerable amount of the trial.

[11] As a result, I find that a costs award reflecting 47% of what the defendants would otherwise get in costs would be fair and reasonable due to their uneven success.

Offers to settle

[12] The defendants made what they call a Rule 49 offer to settle on August 11, 2022. This was a "walk away" offer, namely one whereby both parties would abandon all their claims and defences. August 11, 2022 was at the beginning of the reference. It was before production, the Scott Schedule, examinations for discovery and expert reports. The defendants argue that this was an offer to which Rule 49.10 applies and that, as they are the plaintiffs in their counterclaim and achieved a result in their counterclaim that is more favourable to them than the offer, they are entitled to partial indemnity costs to August 11, 2022 and substantial indemnity costs thereafter.

[13] The mandatory aspects of Rule 49.10 are not binding on this court as this action, including the counterclaim, is under the *Construction Act,* R.S.O. 1990, c. C. 30 ("*CA*"). The jurisdiction to award costs in this action, including the counterclaim, is *CA* section 86. The mandatory aspects of Rule 49.10 are inconsistent with the broad discretion to award costs conferred by *CA* section 86 and, therefore, pursuant to *CA* section 50(2), do not apply.

[14] However, the court in exercising its discretion on costs, can seek guidance from the application of Rule 49.10, as the court is always interested in promoting early settlements; *Luxterior Design Corp. v. Janna Gelfand*, 2015 CanLII 5715 (ON SC) paragraph 10. Indeed, I will consider all offers pursuant to Rule 49.13, a rule that is applicable as it is not inconsistent with *CA* section 86; see *Brian Stucco Construction Inc. v. Nili-Ardakani,* 2021 ONSC 8541 (CanLII) at paragraph 46.

[15] The defendants' offer of August 11, 2022 was a reasonable one, but it only became reasonable after discoveries and the expert reports and when I scheduled the trial. That is when the evidence and all its deficiencies should have been evident to the parties. I scheduled the trial on July 31, 2023. In the end, the defendants indeed obtained a result that is more favourable to them than this offer. I find that the defendants should get costs after July 31, 2023.

[16] BBD made two offers to settle, one on October 18, 2022 whereby BBD would be paid the all-inclusive amount of $18,000 and the other on December 21, 2023 whereby BBD would be paid the all-inclusive amount of $29,000. Neither of these have a bearing on the costs to be awarded. Mr. Perry argued that these offers should have been accepted by the defendants as being the least expensive course of action for the defendants given the legal costs the defendants incurred after the offers; see *CA* section 86(2). I do not accept that point as it would have involved the defendants conceding merit to BBD's claim which I have found does not exist given the evidence.

Conduct

[17] BBD argued that it should be awarded $25,000 as against 264 due to 264's conduct. As stated earlier, the principal of 264, Sabir Moosa, displayed a shocking disregard for due legal process. He swore an affidavit of documents that contained one document. Then, at trial, he appeared surprisingly with a file full of relevant documents. This caused me to adjourn the trial to have these documents produced and examined. Then, when the trial resumed, Mr. Moosa openly admitted he had other relevant documents and objects (ie. the pipes in dispute) that still were not produced. It is as if he had received no legal advice, or, if he had legal advice, ignored it.

[18] But, on the other hand, the defendants have a valid point. BBD was not justified in joining 264 to this action in the first place. There was no evidence that BBD had a contract with 264. There was no evidence that 264 was an "owner" as defined by *CA* section 1(1). There was no evidence that 264 paid for all or part of the improvement under the governing lease. 264 should not have been a defendant at trial. Therefore, I believe that the fairest result is an award of no costs as between BBD and 264. That is what I find.

[19] Concerning TRN, as was evident from my Reasons for Judgment, I found the tone and substance of the evidence of Huwaida Rabba and Victor Rabba troubling. It evidenced a mindset seeking revenge for what the Rabbas perceived was a wrong perpetrated by Mr. Harvey on their son, Justin. They kept accusing Mr. Harvey of having taken advantage of Justin.

[20] In this regard, I note that what TRN put forward as evidence concerning their significant claims for delay damages and deficiency correction costs appeared to be thinly corroborated, after-the-fact evidence with little merit. It appeared to be an attempt to "pile the pain" onto Mr. Harvey. During the project, there was no complaint against BBD about delay or deficiencies. This evidence, therefore, had the definite flavour of being for an improper purpose.

[21] While I have found that Mr. Harvey was sorely mistaken about the substance and execution of his own form of contract, he was a person I found in the end worked in good faith to complete the project. He had a friendship with Justin, but, in my view, he did not take advantage of Justin. Indeed, I believe the result will leave Mr. Harvey's company without compensation for work done. This should be a lesson to him.

[22] The defendants in turn had valid issues concerning overpayment, accounting and the flood damage. Those issues should have been the only focus of the trial. They were not. That they were not, is a significant reason I have decided not to award TRN substantial indemnity costs.

Quantum

[23] Mr. Perry made a valid point about the quantum of the TRN claim. It includes the work Mr. Nash did in preparing his 26-page written submission he filed on August 9, 2024. I did not require written submissions for the attendance on August 13, 2024 and this work should not have been done. I did not use it.

[24] The TRN costs claim also includes no doubt the work Mr. Nash did to educate himself (at his higher rate) on the file that had been run by Mr. Merrilees. This would have included much review of trial transcripts. Such duplication work should not be compensated.

Costs award

[25] Considering all of these factors, I find that the fairest and most reasonable award of costs in this case is as follows: no costs as between BBD and 264; BBD must pay TRN **$25,000** in partial indemnity costs, namely half of the above noted partial indemnity costs amount.

Prejudgment interest

[26] As stated earlier, TRN proposes two calculations of prejudgment interest: one for the overypayment judgment in TRN's favour in the amount of $182,825.55 running from August 26, 2019, the last date TRN made any payment to BBD; and the other on the flood damage judgment in favour of the TRN in the amount of $1,300 running from November 6, 2019, the day of the flood. The applicable rate for both would appear to be 2%, as that is the prejudgment rate specified by section 128 of the *Courts of Justice Act,* R.S.O. 1990, c. C. 43 for the first quarter of 2020. The statement of claim in this action was issued on January 7, 2020. None of this was disputed by BBD. That is what I find.

[27] This prejudgment interest will run until the date my report is confirmed. The post-judgment rate that will apply at that point will then apply to both judgments going forward.

Released: October 1, 2024

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ASSOCIATE JUSTICE C. WIEBE

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B E T W E E N:

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Plaintiff

- and -

The Roasted Nut Inc. and 2641582 Ontario Inc.

Defendants

COSTS AND INTEREST DECISION

Associate Justice C. Wiebe

Released: October 1, 2024