CITATION.: Conquest Steel Inc. v. Polar Racking Inc., 2024 ONSC 5029
COURT FILE NO.: CV-18-1702
DATE.: 2024 09 12

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Conquest Steel Inc., Plaintiff

AND:

Polar Racking Inc., Defendant

BEFORE: M.T. Doi J.

COUNSEL: Frank Pinizzotto, for the Moving Plaintiff

Romesh Hettiarachchi, for the Defendant

HEARD: March 13, 2024

ENDORSEMENT

Overview

[1] On this motion for summary judgment, the Plaintiff, Conquest Steel Inc. ("Conquest"), seeks to recover funds allegedly owed by the Defendant, Polar Racking Inc. ("Polar") for certain items or products that were custom-manufactured.

[2] For the reasons that follow, I find that the motion should be granted in part.

Leave to Amend Title of Proceedings

[3] As set out below, I find that leave should be granted under Rule 26.01 to amend the title of proceedings to reflect Conquest's change of name that resulted from an asset-purchase transaction that occurred after the action was commenced.

[4] The court is required to grant leave for a moving party to amend its pleadings unless the responding party would suffer non-compensable prejudice or the proposed amendment is abusive or does not disclose a reasonable or tenable cause of action: *16884444 Ontario Ltd. v. State Farm Fire and Casualty Co.,* 2017 ONCA 42 at para 25; *Platnick v. Bent,* 2024 ONSC 3943 (Div Ct) at para 12.

[5] On or about January 7, 2020, Conquest sold some of its assets to CSI Manufacturing Inc. ("CSI").[1] Thereafter, Conquest changed its name from "*Conquest Steel Inc.*" to "*The Roshan Group Inc.*" ("Roshan"), as required by the terms of the transaction. Accordingly, as part of the relief sought on this motion, Conquest is seeking to amend the title of proceedings to reflect the change of its name to Roshan.

[6] In responding to the motion, Polar claims that Conquest sold or transferred its interest in this litigation to CSI under the asset purchase transaction that removed any tenable cause of action. However, CSI's President expressly refuted Polar's claim, advised that CSI had negotiated the acquisition of specific assets from Conquest, and explained that CSI did not acquire Conquest's rights to this litigation or any of its accounts receivable or other assets associated with Polar. Having regard to this evidence, and as Polar did not lead meaningful evidence to suggest otherwise, I do not find that Conquest transferred or assigned its rights in this proceeding to CSI, or to any other entity, in a manner that would have removed its cause of action against Polar in this proceeding.

[7] From the evidence and submissions for this motion, I find that the requested amendment to reflect Conquest's current name will maintain a tenable cause of action and not result in any non-compensable prejudice to Polar or other concerns sufficient to justify a denial of the requested amendment: Rules 26.01, 5.04(2), and 1.04(1); *State Farm* at para 25. In my view, leave to amend is properly granted on a proper construction of the Rules to achieve timely and cost-effective civil justice: *Mazzuca v. Silvercreek Pharmacy Ltd.*, 2001 CanLII 8620 (ONCA) at para 23. However, as almost all of the documents in the record refer to Conquest as the Plaintiff, and as the parties used this name in submissions, I shall apply this name when referring to the Plaintiff in these reasons.

Background

[8] The Plaintiff, Conquest, is an Ontario company. At all material times, it carried on business as a manufacturer and distributer of various landscaping and building materials.

[9] The Defendant, Polar, is an Ontario corporation that carries on business by providing specialized installation racking for solar panels.

[10] Around the summer of 2016, Polar approached Conquest to inquire about fabricating certain prototypes products for its solar panel racking business with the intention of later making

large purchase orders of various custom manufactured products. Conquest agreed to manufacture some prototype products to specifications that Polar later found to be satisfactory. Thereafter, starting on July 13, 2016, the parties began to negotiate a set of terms and conditions to govern their future business relationship.

[11] On October 3, 2016, Polar provided a copy of its Purchase Order Terms and Conditions ("Polar's Terms") to Conquest for its consideration, which is attached to these reasons as Schedule "A" for convenience. Among other things, Polar's Terms set out the following provisions:

> 1. OFFER TO BUY: This purchase order constitutes an offer to buy goods or services according to the description and other terms set forth on its face and reverse side. Terms on the face shall govern where inconsistent with those on the reverse. No additional or different terms offered by the Seller [i.e., Conquest] shall be or become part of this order nor shall this order be modified, without the express written approval of the Buyer.
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> …
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> 18. PAYMENT: Seller's accounts receivable from the Buyer [i.e., Polar] will be paid monthly except where cash discounts apply or other terms are specified. If correct invoices do not reach Buyer within three (3) days from invoice date, payment deadlines and discount period will be calculated from the date of receipt of the correct invoice.
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> …
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> 22. EXTRA CHARGES: No extra charges of any kind will be allowed unless specifically agreed to in writing by the Buyer. [Emphasis added]

[12] On October 24, 2016, Conquest informed Polar that its Terms were not acceptable and proposed certain amendments and modifications (the "Amended Terms"). On October 28, 2016, the parties agreed to the Amended Terms that modified the correspondingly enumerated provisions of Polar's Terms as follows:

> 1. Additional Terms offered by the Seller [i.e., Conquest] will become part of the order as per acceptance of terms in quotation, sales order confirmation or written confirmation of the buyer [i.e., Polar].
>
> 2. Seller only warranted agreed upon tolerance range and as per samples previously provided and approved.
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> 4. The Seller reserves the right to reject any change orders should they be deemed not possible or if an equitable adjustment is not provided. Should the seller reject the change order, the buyer can choose to terminate the order as per the termination clause.

5. The required date will be the agreed upon pickup date as per sales order confirmations, not the requested date on purchase orders.

6. Termination costs will be settled within 30 days of termination date.

7. No Change.

8. Without volume purchase commitment contract, quantities shipped can vary from order quantity by up to +/- 5 percent to account for variances in coil purchasing and delivery due to spot material purchasing.

16. As per above. New nonproprietary detachable tooling paid for Polar, that is tooling that is not a modification, adjustment, permanent attachment to our existing tools/equipment, will become the Buyers [sic, Polar's] Property. Replacement due to standard wear will be the Buyers [sic] responsibility on their tools.

17. Confirm with purchase order or modifications that have been accepted.

20. Except in condition of nonpayment.

24. Polar shall maintain liability for patent infringement for production based on their designs.

[13] In its responding materials, Polar acknowledged that the parties agreed on the Amended Terms but inaccurately stated that the Amended Terms did not alter ss. 5 and 6 of Polar's Terms. In fact, the corresponding Amended Terms modified both of these provisions, as noted above.

[14] The parties subsequently proceeded on the basis that Polar's Terms, as amended by the above-reproduced Amended Terms, served to govern their business relationship.

[15] After agreeing to the Amended Terms, Polar began to order and buy certain products that were custom-manufactured and sold by Conquest under the following arrangement. Polar would begin the process by asking Conquest to quote on any products that it wanted to order. Conquest would provide Polar with a quote for any products that it was able and willing to manufacture. Quotes were negotiated. Once the terms of a quote were agreeable, Polar would submit a purchase order ("PO") on its standard order form to Conquest. Each PO indicated that Polar would pick up the order from Conquest's facility, and that payment was due 30 days after pickup. Each PO was "*subject to Polar Racking's Standard Purchase Terms and Conditions*" that incorporated the provisions of Polar's Terms as modified by the Amended Terms, as discussed above.

[16] Once Polar submitted a PO, Conquest issued an order confirmation ("OC") to formally accept the order as set out in the confirmation. Each OC confirmed that payment was due 30 days from the pickup date. Despite some variations to each form, each OC set out further "Partial Terms and Conditions" that stated, "*[o]verdue accounts will be charged 2% per month, 24% per annum*," among other things. In addition, some but not all OC's stated, "*[o]rders not picked up within 10 days of completion will be shipped at customers' expense* " and "*[a]dditional charges will apply should actual information vary from provided information or extra services become required*." Furthermore, each OC contained a further term which stated that a "*[f]ull list of terms [is] available at http://www/conqueststeel.com/terms-and-conditions-of-sale/*." However, Conquest conceded in submissions that its business relationship with Polar was governed by Polar's Terms as modified by the Amended Terms, and expressly abandoned its earlier position that its terms and conditions as posted to its website would apply to its transactions with Polar.

[17] Once Polar accepted an OC, Conquest would buy raw materials, manufacture the product required for the OC, and advise Polar when the product was ready to be picked up. Polar would then attend Conquest's facility to collect the product and get an invoice at the pick-up.

[18] Each invoice that Conquest issued to Polar had terms and conditions that, among other things, confirmed that overdue accounts would be charged 2% per month, or 24% per annum.

[19] Under this arrangement, Conquest sold $166,500.43 worth of goods to Polar from October 2016 to November 2017. Polar ultimately paid for most of the goods that it ordered but was persistently late in paying its account despite Conquest's repeated efforts to seek timely payments. Polar typically paid Conquest's invoices within 70 days instead of the 30-day period as agreed. Occasionally, Polar needed considerably more time to pay an invoice, with some payments taking as long as 193 days. Over time, as Polar's account grew chronically delinquent, Conquest came to red- flag its POs and removed some orders from its manufacturing schedule until Polar paid its overdue accounts. Although Polar's account remained delinquent, it pressed Conquest to supply it with custom-manufactured goods to meet the various needs of its own customers. Despite having reservations, Conquest regularly accommodated Polar's requests and ended up supplying various manufactured products while repeatedly asking Polar for overdue payments on its account.

Amounts in Dispute

[20] On this motion, Conquest is seeking payment from Polar in the following amounts:

a.	Invoiced Products	$50,207.26
b.	Non-Invoiced Products	$27,717.54
c.	Lost Profit for PO 3126	$31,752.48
d.	Tooling and Set-up Costs	$10,576.26
e.	Storage Fees	$75,000.00
	Total	**$195,253.54**

[21] As discussed further below, Polar has conceded Conquest's $50,207.26 claim for invoiced products. Polar disputes the balance of Conquest's claims in this matter.

Legal Principles for Summary Judgment

[22] The court shall grant summary judgment if satisfied that there is no genuine issue requiring a trial with respect to a claim or defence: Rule 20.04(2)(a).

[23] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers: (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence: Rule 20.04(2.1).

[24] The Supreme Court extensively reviewed these powers in *Hryniak v. Mauldin*, 2014 SCC 7 at para 66 where it laid out a two-part roadmap for summary judgment motions:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[25] Even with the extended powers, a summary judgment motion will only be appropriate if the record allows the court to make necessary findings and apply relevant legal principles to

resolve the dispute: *Hryniak* at para 50: *Mason v. Perras Mongenais*, 2018 ONCA 978 at para 44. There will be no genuine issue requiring a trial when the court on a summary judgment motion is able to reach a fair and just determination on the merits, which will be the case when the process (1) allows the court to make the necessary findings of fact, (2) allows the court to apply the law to the facts, and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hryniak* at para 49.

[26] Each side must "put their best foot forward" with respect to the existence or non-existence of material issues to be tried and must "lead trump or risk losing": *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753 at para 9; *Ipex Inc. v. Lubrizol Advanced Materials Canada*, 2015 ONSC 6580 at para 28; *Levinson v. Joseph-Walker*, 2024 ONSC 2880 at para 49.

[27] To defeat a summary judgment motion, the responding party must adduce some evidence to show a genuine issue requiring a trial. A responding party cannot rest solely on mere allegations or denials in its pleading but must establish a genuine issue for trial by showing specific facts with evidence: *Sweda Farms Ltd. v. L.H. Gray & Son Limited*, 2013 ONSC 4195 at para 27, leave to appeal refused 2014 ONSC 3016 (Div Ct).

[28] The court may assume that it has all the evidence that would be available at trial related to the matters at issue: *Portuguese Canadian Credit Union v. Pires*, 2011 ONSC 7448 at para 11, affirmed 2012 ONCA 335. In addition, the court may draw an adverse inference that a party could not obtain any more or better evidence than it filed on the summary judgment motion: *Travelers Insurance Company of Canada v. LCL Builds Corporation*, 2018 ONSC 1805 at para 46. A party cannot avoid an adverse result by suggesting that other information would be forthcoming if more opportunity were given: *S.N.S. Industrial Products Limited v. Omron Canada Inc.*, 2018 ONCA 278 at para 5.

[29] Partial summary judgment should only be granted in the clearest of cases with issues that can be readily bifurcated, where risks of delay, expense, inefficiency, and inconsistent findings do not arise: *Truscott v. Co-Operators General Insurance Company*, 2023 ONCA 267 at para 54. In considering whether to grant partial summary judgment the court must consider whether (i) there is a risk of duplicative or inconsistent findings at trial; and (ii) whether granting partial summary

judgment is advisable in the context of the litigation as a whole: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 at paras 27-28.

Legal Principles for Contractual Interpretation

[30] The basic rules of contractual interpretation require a determination of the intention of the parties in accordance with the ordinary and grammatical words used, in the context of the entire agreement and the factual matrix known to them when the contract was formed, and in a fashion corresponding with sound commercial principles and good business sense: *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847 at para 52. The context of the agreement (i.e., also referred to as the "surrounding circumstances" or "factual matrix") almost always matters as words rarely have meaning apart from their context: *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517 at paras 30. Whether a concluded agreement exists hinges on an objective reading of the language chosen by the parties to reflect their agreement, not on an inquiry into the actual state of mind of a party or on the parole evidence of a party's subjective intention: *Lozon v. Lozon*, 2023 ONCA 645 at para 15; *Olivieri v. Sherman* 2007 ONCA 491 at para 44.

[31] Recently, in *Glaxosmithkline Inc. v. Pharmascience Inc.*, 2024 ONSC 2366 at para 31, Papageorgiou J. identified the following main principles of contractual interpretation that I adopt in considering this motion:

> [31] The main principles of contractual interpretation are as follows:
>
> • Contractual interpretation involves a search for the objective intention of the parties based upon the words they used. A court cannot consider evidence of the parties' subjective intentions: *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540 at para 25; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at paras. 26-31.
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> • The court must "read the contract as a whole" in light of its "purpose and commercial context" and give the words "their ordinary grammatical meaning": *Corner Brook* at para. 20, citing *Sattva Corp v. Creston Moly Corp*., 2024 SCC 53 at para 47; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, at para. 64.
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> • The court must give meaning to all of the agreement's terms and avoid an interpretation that renders some terms meaningless: *Bellwoods Brewery Inc. v. 1896842 Ontario Limited*, 2023 ONSC 2845, at para. 13.
>
> • The court should take into account surrounding circumstances known or reasonably known to the parties or which ought reasonably to have been known at the time of the contract: *Sattva* at paras 56 to 61.

> • Where there is ambiguity, a court may have regard to the parties' subsequent conduct: *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd* (1995), 1995 CanLII 438 (ON CA), 24 O.R. (3d) 97 (C.A.), at para. 23; *Thunder Bay (City) v. Canadian National Railway Company***,** 2018 ONCA 517, 424 D.L.R. (4th) 588, at paras. 62-32; *London Medical and Dental Building Ltd. v. Middlesex Condominium Corp. No. 83*, 2016 ONSC 6141, at paras. 93-95; *Newman v. Beta Maritime Ltd*, 2018 BCSC 1442, at paras. 31-32; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 [at para 35], 404 D.L.R. (4th) 512.

Analysis

[32] For the reasons that follow, I am satisfied that Conquest's claims against Polar should be granted in part.

[33] Based on the evidentiary record as filed, I find no genuine issues for trial and accept that the summary judgment process affords the evidence required to fairly and justly adjudicate the disputed issues in a timely, affordable, and proportionate manner in light of the litigation as a whole.

a. The Undisputed Invoices

[34] I am satisfied that Conquest should have judgment for the amount of $50,207.26 in respect of its invoices that are undisputed by Polar. In submissions, Polar did not oppose judgment being granted in respect of Conquest's claim for these invoiced amounts.

[35] Between November 2017 and December 2017, Polar submitted four POs as set out below for which Conquest later issued corresponding CO's and invoices as follows:

PO	Date of OC	Invoice	Date of Invoice	Amount Due
3323	October 31, 2017	12943	November 21, 2017	$21,121.06
3294	October 27, 2017	12944	November 21, 2017	$13,498.53
3294	October 27, 2017	13006	December 4, 2017	$4,400.67
3280	September 21, 2017	13007	December 4, 2017	$11,187.00
			Total	**$50,207.26**

[36] The subject invoices relate to products that Conquest manufactured after Polar submitted PO's that were confirmed with OC's through the parties' established business practices. When Polar picked up these products, Conquest rendered invoices that were due within 30 days of each

invoice date. Overdue amounts bear interest at the rate of 2% per month (i.e., 24% per annum), as indicated in each OC and invoice, respectively, as previously discussed.

[37] As it candidly concedes, Polar to date has not paid the above-noted four invoices totaling $50,207.26. In submissions, Polar acknowledged the debt and indicated that it does not oppose Conquest's claim for summary judgment in this amount.[2] From the record, I am satisfied that the above-noted amounts are owed with interest accruing at a rate of 2% per month starting 30 days from the date of each invoice, respectively.

b. Claim for Uninvoiced Products that Polar Did Not Pick-Up

[38] For the reasons that follow, I find that Conquest should have judgment for $27,717.54 in set- up and manufacturing fees on order contracts that Polar repudiated.

[39] Polar did not pick up certain custom products that Conquest manufactured according to timelines that the parties agreed upon after exchanging quotes, PO's, and OC's for them. Conquest is claiming $27,717.54 for these products and associated set-up fees as follows:

PO	OC	Item No.	Quantity	Amount Due
3280	2017-10547	300124003	960	$7,622.40[3]
3294	2017-10778	3001224008	1200	$9,828.00[4]
3294	2017-10778	300124015	960	$6,278.40[5]
3294	2017-10778	set-up fees		$800.00[6]
HST				$3,188.74
			Total	**$27,717.54**

[40] Conquest has reduced its claim for the above-noted products and set-up fees (i.e., from the initial figures in OC's 2017-10547 and 2017-10778, respectively) to reflect the reduced production runs that Polar requested after the OC's were issued. Although Polar's account was delinquent, Conquest performed the set-ups and custom manufactured the products to meet their agreed-upon production timelines in good faith after Polar gave payment assurances. However, Polar did not collect the items after they were manufactured. Given its practice of invoicing Polar when it picked up its orders, Conquest never invoiced Polar for these set-ups or manufactured products after Polar effectively abandoned the orders on December 7, 2017 when it emailed Conquest to advise that it no longer required the items and lacked the funds to buy and stock them.

[41] Relying on the fact that it was never invoiced, Polar submits that it should be relieved of any requirement to pay for the orders by asserting that Conquest breached its contractual obligation to issue invoices under s. 18 of Polar's Terms, which states as follows:

> 18. PAYMENT: Seller's accounts receivable from the Buyer will be paid monthly except where cash discounts apply or other terms are specified. If correct invoices do not reach Buyer within three (3) days from invoice date, payment deadlines and discount periods will be calculated from the date of receipt of the correct invoice.

[42] Respectfully, I do not accept Polar's submission on this point. In my view, Polar repudiated the order contracts by advising Conquest that did not need the orders and would not pay for them. In turn, I find that Conquest was relieved of any contractual obligation to invoice the orders.

[43] An anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention to not be bound by the contract before performance is due: *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at para 37, leave to appeal refused [2008] SCCA No 151; *Roalno Inc. v. Schaefer*, 2024 ONCA 262 at para 41.

[44] The test for anticipatory repudiation is objective: *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at para 45; S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at para 620. In assessing whether the party in breach has evinced an intention to repudiate the contract, the court is to consider whether a reasonable person would conclude that the breaching party no longer intends to be bound by it: *Remedy* at para 45; *Spirent* at para 37. The analysis considers the party's words and conduct, what they say about future performance of the contract, and whether they reveal an intention to breach a term of the contract that, if actually breached, would constitute a repudiation of the contract: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at para 149. The same principles guide both anticipatory repudiation and repudiation, that are often interchangeable terms as alleged repudiations frequently occur before the time for performance has arrived: *Remedy Drug Store* at para 44. In this analysis, it is important to consider the surrounding circumstances including the nature of the contract, the parties' motives, and the impact of one party's conduct on the other: *Potter* at para 164; *Remedy Drug Store* at para 46.

[45] When confronted by an anticipatory repudiation or breach, the innocent party may accept the repudiation and treat the agreement as being at an end or decline to accept the repudiation and insist on performance. As noted in *Semelhago v. Paramadevan*, [1996] 2 SCR 415 at para 15:

> In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement.

[46] As a general rule, the innocent party must make an election and communicate it to the repudiating party within a reasonable time: *Chapman v. Ginter*, [1968] SCR 560 at 568.

[47] I am satisfied that Polar's email sent on December 7, 2017 reasonably showed its intention not to be bound by its contracts with Conquest as it no longer needed the products it ordered and no longer was able to pay for them: *Potter* at para 149. The fact that Polar chose to not pick up the items from Conquest's facility as arranged further supports an objective finding that it abandoned the orders, repudiated the contracts, and did not intend to be bound by the agreements: *Spirent* at para 37; *Roalno* at para 41.

[48] OC's 2017-10547 and 2017-19778 both state that "*[o]rders not pick[ed] up within 10 days of completion will be shipped at customer's expense.*" Despite this term, Conquest did not ship the orders and instead stored the manufactured items at its facility and inquired with Polar after it did not collect them. From the record, I am satisfied that Polar repudiated the contracts while Conquest remained willing and able to conclude these transactions. As Polar's account was delinquent, I accept that Conquest not unreasonably kept the items at its facility (i.e., where they remained available for pick up, as arranged) to avoid incurring shipping costs that might not be recovered due to Polar's cash-flow issues. On December 7, 2017, Conquest learned that Polar no longer needed or wanted the items that it could not sell nor afford to stock. Subsequently, on February 2, 2018, Polar asked Conquest for more time to work out a payment plan for its account. But Polar then stopped responding to Conquest's communications and ceased making further payments on any of its outstanding orders. In light of this, I find that Polar repudiated its contracts with Conquest. After sending Polar a demand letter that failed to resolve the matter, Conquest bought this action for damages. I am satisfied that Conquest accepted Polar's repudiation of the order contracts and treated them as having come to an end: *Semelhago* at para 15. In my view, Conquest's election on this was made within a reasonable period of time: *Chapman* at 568.

[49] Given Polar's repudiation of the order contracts, I accept that Conquest was relieved of any obligation to further perform under the contracts either by shipping the ordered items to Polar or invoicing for the items.

[50] I am satisfied that Polar agreed to pay Conquest for the tooling and set-up fees set out in the various order confirmations that it accepted.

[51] During negotiations, Polar agreed to pay Conquest for the tooling costs and associated set-up fees for manufacturing products that did not exceed a minimum batch of 100,000 parts per year. Although Polar asserts that there was no agreement reached regarding the tooling and set-up costs, I am satisfied that Polar specifically agreed with Conquest (i.e., in an exchange of email messages on September 22 and 30, 2016, respectively) that it would be responsible for these tooling and set-up costs if the minimum production threshold was not met in the various runs for these custom-manufactured items. There is no dispute that the minimum production threshold was not met.

[52] Based on the foregoing, I find that judgment for $27,717.54 plus HST should be granted to Conquest for the set-up and manufacturing fees under the above-described order contracts that Polar repudiated. The general measure of damages for breach of contract is the amount that will, in so far as money can, put the injured party in the same position it would have if the wrong had not occurred: *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847 at para 44; *Ticketnet Corp. v. Air Canada* (1997), 154 DLR (4th) 271 (ONCA) at para 97. The analysis is focused on the injured party's loss and the measure of compensation to restore it to its position had the contract been performed: *Rougemount* at para 44; *642947 Ontario Ltd. v. Fleischer* (2001), 56 OR (3d) 417 (CA) at para 41; *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 246 DLR (4th) 595 (ONCA) at para 53; *Western Larch Limited v. Di Poce Management Limited,* 2013 ONCA 722 at para 73, leave to appeal refused 2014 SCCA No 32. Taking this all into account, I am satisfied that Conquest should have $27,717.54 (i.e., inclusive of HST) for lost profits in respect of the uninvoiced products to restore it to the position it would have had given the value of these contracts.

[53] As noted earlier, the OC's that Conquest issued in this matter provided that overdue accounts would bear interest at the rate of 2% per month, or 24% per annum. By accepting the OC's, I am satisfied that Polar accepted Conquest's rate of interest. Throughout the duration of

the commercial relationship, Polar never raised any objection to the rate of interest set out in the OC's. Importantly, Conquest's invoices also prescribed the same rate of interest for Polar's overdue accounts. Conquest's unchallenged evidence is that the uninvoiced products were ready for Polar to pick up by December 15, 2017 when invoices would have been issued (i.e., when the products were collected). As the parties had agreed on "net 30" payment terms, interest was to accrue 30 days after Polar had a reasonable opportunity to collect the manufactured products from Conquest's facility. Accordingly, I find that interest on the value of the un-invoiced products (i.e., $27,717.54 inclusive of HST) should start to accrue as of February 1, 2018, which is a fair and reasonable date that allows for an appropriate period for Polar to have collected the products along with a 30-day grace period in which Polar could have paid for the items without incurring interest.

c. Claim for Purchase Order No. 3126

[54] As discussed below, I do not find that Conquest has proven its claim for damages in relation to the balance of PO 3126 that Polar terminated on December 7, 2017.

[55] In or around March 2017, Polar submitted PO 3126 for three different items to be manufactured. Conquest responded by issuing OC 2017-9394 to confirm the order that amounted to $72,654.48 in manufacturing costs and related set-up fees. Polar accepted the OC and Conquest purchased the raw material that it required to manufacture the items for the order.

[56] In or around June 2017, Conquest removed PO 3126 from its manufacturing cycle as it had flagged Polar's account for being overdue and delinquent. Conquest promptly asked Polar to bring its account into good standing. After negotiations, Conquest agreed to manufacture a rush batch of product (i.e., that comprised a portion of the order in PO 3126) to accommodate Polar's immediate business needs. Thereafter, at Polar's request, Conquest put the balance of PO 3126 on hold until Polar paid its outstanding accounts and gave instructions for completing the balance of the order. As a result, the remaining raw material for PO 3126 was not used. Conquest followed up with Polar on several occasions for instructions to run the remaining raw material to finish the manufacturing required for PO 3126, but Polar did not respond. Although Polar continued to submit other PO's to Conquest, it ignored its communications about the balance of PO 3126, albeit without cancelling or terminating the order for some period of time.

[57] In or around late November 2017, Conquest told Polar that it would not keep the remaining raw material for PO 3126 indefinitely and would need it to be put into production to complete the order by December 15, 2017. Later, by email sent on December 7, 2017, Conquest asked Polar for specific instructions on PO 3126, observed that the raw material for the order had been in its inventory since March 2017, and reiterated that it needed the raw material to be cleared from its production facility by December 15, 2017. Polar promptly responded that day by advising that its projected sales were lower than expected, that it no longer required the products in PO 3126, and that it previously had tried to cancel the order. Polar also asked Conquest how the raw materials in its inventory might be re-purposed to manufacture other products or items.

[58] I am satisfied that Polar's email on December 7, 2017 gave Conquest adequate notice to terminate the unmanufactured balance of PO 3126 by stating that the order was no longer needed. In my view, Polar's response to Conquest's request for instructions on PO 3126 gave sufficient notice that the remaining order was terminated pursuant to the notice requirement under s. 6 of Polar's Terms that, along with the corresponding term in the Amended Terms, provide as follows:

> 6. TERMINATION: The Buyer may terminate work on this order for its own convenience in whole or in part by written notice at any time. In that event, any claim arising out of such termination shall be settled by negotiation on the basis of the Seller's costs and commitments properly incurred or made and supported with the appropriate documentation with due allowance for salvage value.
>
> Termination costs will be settled within 30 days of termination date.

[59] Polar's email response to Conquest on December 7, 2017 also asked about re-purposing the remaining raw material for PO 3126. I find that this likely reflected an effort by Polar to negotiate and settle Conquest's costs related to the termination, as required by s. 6 of Polar's Terms.

[60] In their subsequent exchanges, the parties never agreed to set aside or otherwise invalidate Polar's notice to terminate the balance of PO 3126 as set out in its email sent on December 7, 2017. On December 8, 2017, Conquest proposed several options to Polar in an effort to re-negotiate how the production run for PO 3126 might be completed at some future date, or how the surplus raw material (i.e., consisting of raw coiled steel) remaining in inventory could be re-purposed (i.e., to manufacture other products) or otherwise disposed of. On January 30, 2018, Conquest tried to

follow up on its December 8, 2017 proposal to Polar. However, none of these efforts impacted the termination notice that Polar gave on December 7, 2017.

[61] In any event, I am not persuaded that Conquest has established its damages claim arising from Polar's termination of the balance of PO 3126. Pursuant to s. 6 of Polar's Terms, Conquest's claims from the termination of PO 3126 are to be resolved based on its costs and commitments properly incurred with appropriate documents and due allowances for salvage value. For reasons that are unclear, Conquest did not file any records to show its costs or commitments for the remaining raw coiled steel. Instead, Conquest simply claimed the remaining value of PO 3126 as being $31,752.48 (i.e., based on its lost profit for the order) which is a figure that I accept exceeds its costs for the raw materials.[7] On a motion for summary judgment, the court may assume that it has all the evidence that would be available at trial on the matters at issue: *Pires* at para 11. In addition, it is open for the court to draw an adverse inference that a party to a summary judgment motion could not obtain any more or better evidence that it filed on the motion: *Travelers* at para 46. Furthermore, a party to a motion for summary judgment must put its best foot forward or "lead trump or risk losing" and cannot avoid an adverse result by suggesting that other information would be forthcoming if more opportunity were given : *Mazza* at para 9; *Omron* at para 5. Taking this all into account, I am satisfied that Conquest has not proven its termination claim in respect of PO 3126. Accordingly, this part of Conquest's claim is dismissed.

d. Storage Fees

[62] I am not persuaded that Conquest is contractually entitled to charge any storage fees under its agreements with Polar. Each of Conquest's quotations dated October 25, 2017 contain a term that provides, "*[o]rder must be picked up within 10 days or storage fees will apply*." Relying on this, Conquest submits that Polar was entitled to ten days of free storage for completed orders after which storage charges were to apply.[8] But neither Conquest's quotes nor its OC's expressly set out any fees that Conquest would charge to store Polar's uncollected orders. In addition, Conquest's OC's expressly provide that, "*[o]rders not picked up within 10 days of completion will be shipped at customer's expense.*" Accordingly, I am satisfied that Polar never contemplated storage fees, or otherwise agreed to incur any such fees, as Conquest's own confirmations provided for uncollected orders to be shipped to Polar at its expense. Notably, ss. 1 and 22 of Polar's Terms and the Amended Terms require Polar's express written approval in order for Conquest to levy any charges. Having

regard to the objective intention of the parties based on the terms of their agreement as a whole and given the surrounding circumstances at the time of the contract, I find that it was not open for Conquest to unilaterally impose any storage fees (i.e., regardless of industry practice or otherwise) that Polar did not accept or agree to incur: *Sattva* at para 47 and 56-61. Accordingly, I decline to award any damages for storage fees related to uncollected orders.

e. Mitigation Efforts

[63] I accept that Conquest satisfied its duty to mitigate its damages.

[64] A plaintiff has a duty to mitigate its loss and cannot recover losses that it could have avoided. *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579 at para 112, leave to appeal refused 2023 CanLII 36978 (SCC). Although the duty to mitigate is on the plaintiff, the onus is on the defendant to prove a failure to mitigate: *Ibid*; *Bowman v. Martineau*, 2020 ONCA 330 at para 31, citing *Janiak v. Ippolito*, [1985] 1 SCR 146 at 163.

[65] From the record, I accept that Conquest custom-manufactured the uninvoiced products specifically for Polar and that these manufactured products only had any real use or utility for Polar due to their very specialized characteristics (i.e., that were tied to its solar panel racking systems). From Conquest's unchallenged evidence, I accept that it tried to sell the uncollected items in the open market but found no interested buyers. In addition, I accept that the return for any scrapped uninvoiced products would, at best, be nominal, and that the associated costs and labour could well serve to outweigh any return generated from such efforts. Accordingly, I find that Conquest acted reasonably and appropriately by keeping the uninvoiced items at its production facility in the hopes of eventually negotiating their sale or use with Polar or some other future client.

[66] Without offering any evidence to meaningfully rebut Conquest's mitigation evidence, Polar argued that Conquest improperly interfered with its efforts to prove a failure to mitigate by refusing to disclose what assets it sold to CSI or whether it deferred all or part of the tax consequences that would have arisen on the transaction through a rollover agreement pursuant to s. 85 of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp). However, Polar led no evidence to demonstrate or explain how Conquest's sale of assets to CSI in 2020 would have impacted its duty to mitigate its damages, particularly given Conquest's uncontested evidence that the un-invoiced products and remaining raw coiled steel have no resale or scrap value. In any event, the President of CSI gave evidence

that CSI did not purchase or accept an assignment of Conquest's rights to the action or its accounts receivable or products that constitute the subject matter of this motion. In the circumstances, I am not persuaded that Polar has established that Conquest failed to mitigate its damages.

Outcome

[67] Accordingly, the motion is granted in part as follows:

a. Leave is granted for the Plaintiff to amend the title of proceedings to reflect its change of name;

b. Judgment is granted to the Plaintiff on the following four (4) invoiced amounts, being:

i) $21,121.06 on Invoice 12943 dated November 21, 2017;

ii) $13,498.53 on Invoice 12944 dated November 21, 2017;

iii) $4,400.67 on Invoice 13006 dated December 4, 2017; and

iv) $11,187.00 on Invoice 13007 dated December 4, 2017

(i.e., for a total of $50,207.26 in invoiced amounts) with interest to accrue at a rate of 2% per month on each amount starting 30 days from the date of each invoice, respectively;

c. Judgment is granted to the Plaintiff for the value of the un-invoiced products totaling $27,717.54 (i.e., inclusive of HST), with interest to accrue at a rate of 2% per month starting on February 1, 2018; and

d. the balance of the Plaintiff's claim is dismissed.

[68] Should the parties be unable to resolve the issue of costs for the motion, Conquest may deliver written costs submissions of up to 2 pages (excluding any bill of costs or offer(s) to settle) within 15 days, and Polar may deliver responding submissions on the same terms within a further 15 days. Reply submissions shall not be delivered without leave.

M.T. Doi J.

Released Date: September 12, 2024

[1] The asset-purchase transaction occurred after this action was commenced on April 24, 2018.

[2] See para 28 to Polar's factum dated March 1, 2024.

[3] OC No. 2017-10547 dated September 21, 2017 confirms an order for 2,000 window deflector units (Part #300124003) at $7.94 per unit for a total of $15,880.00 plus HST worth of product: Caselines A91.

[4] OC No. 2017-10778 dated October 27, 2017 confirms an order for 1,140 window deflector units (Part #300124008) at $8.19 per unit for a total of $9,336.60 plus HST worth of product: Caselines A232.

[5] OC No. 2017-10778 dated October 27, 2017 confirms an order for 1,000 window deflector units (Part #300124015) at $6.54 per unit for a total of $6,540.00 plus HST worth of product: Caselines A232.

[6] OC No. 2017-10778 dated October 27, 2017 confirms a set-up fee for four (4) parts at $400.00 per part for a total of $1,600.00 plus HST in set-up fees: Caselines A232.

[7] Based on Conquest's unchallenged evidence on this point, I am satisfied that there is no salvage value to the raw steel that it acquired in or around March 2017 to manufacture the products set out in PO 3125.

[8] See Caselines A103, A106, and A108.

SCHEDULE A

A53

Purchase Order Terms and Conditions

1. OFFER TO BUY: This purchase order constitutes an offer to buy goods or services according to the description and other terms set Forth on Its face and reverse side. Terms on the face shall govern where inconsistent with those on the reverse. No additional or different terms offered by the Seller shall be or become part of this order nor shall this order be modified, without the express written approval of the Buyer

2. WARRANTY: The Seller shall maintain an Inspection and process control system acceptable to the Buyer. The Seller warrants that all articles covered by this Purchase Order will be in strict accordance with the specifications, drawings, and other descriptions furnished by the Buyer, and Free from defects in material and workmanship. Steel castings shall not be welded without the Buyers consent Consent shall not relieve the Seller of its warranty responsibility. In the event of a recall, by the Buyer or the Buyer's Customer, necessitated by a defect in material or workmanship in a Seller's part the Seller will assume full financial responslbllity for the cost of the recall as well as replacement parts.

3. CONSIGNED GOODS: Any material furnished by the Buyer on a "No Charge" basis shall remain property of the Buyer and be fully accounted for, including scrap. Any such material scrapped because of defective workmanship of Seller shall, at the Buyer's discretion be replaced or paid For by the Seller.

4. CHANGES: The Buyer may at any time by a written order make changes within the general scope of this order, in any one or more of the following: 1. drawings, designs or specifications where the goods to be furnished are specifically manufacturer for the Buyer in accordance therewith. 2. method of shipping or packing. 3. place of delivery and 4. the amount of Buyer-furnished property. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any such work under this order, whether changed or not changed, an equitable adjustment shall be made in the contract price or delivery schedule or both, and the order shall be modified In writing accordingly. The Seller shall proceed with the order as changed unless such changes will result in an increase in the cost or extension of the time of performance. If such changes will so affect the cost and/or time of performance, the Seller must notify the Buyer in writing to that effect within five (5) working days after receipt of changes (such notification will include an estimate of the extent of the effect of the changes on the cost and/or time of performance) so that Buyer can determine if it wishes to proceed with the changes in view of the impact on cost and/or time of performance. After such notification the Buyer shall specifically instruct the Seller In writing to proceed or not proceed with the changes. Any claim by the Seller for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Seller of notification from the Buyer to proceed with the changes provided, however, that the Buyer if it so chooses may receive and act upon such claim asserted at any time prior to the final payment under this purchase order. Nothing in this clause shall excuse the Seller from proceeding with the order as changed. Where the cost of property made obsolete or excess as the result of a change Is Included in Seller's claim for adjustment, Buyer shall have the right to prescribe the manner of disposition of such property.

5. CANCELLATION: The Buyer, without waving any other legal rights, reserves the right to cancel without charge or to postpone deliveries of any of the articles covered by this order which are not shipped in reasonable time to meet the required date, provided however, that in the event the Seller suffers delay in performance due to causes beyond reasonable control, such as act of God, war, act of the Government, act of the Buyer, fire, flood, strike, sabotage, or delay in transportation, the required date shall be extended a period of time equal to the period of such delay. If the Seller gives the Buyer notice in writing of the cause of the delay within a reasonable time after the beginning of thereof.

6. TERMINATION: The Buyer may terminate work on this order for its own convenience In whole or in part by written notice at any time. in that event any claim arising out of such termination shall be settled by negotiation on the basis of the Seller's costs and commitmenlS properly incurred or made and supported with the appropriate documentation with due allowance for salvage value.

7. INDEMNIFICATION AND INSURANCE: Seller will indemnify and save harmless Buyer, Its employees, agents and Invitees from and against all liability, demands, claims, loss, cost, damage, and expense by reason or on account of property damage, death and personal injury whatsoever nature or kind arising out of. as a result of or in connection with the performance of this order which is occasioned by the actions and omissions of Seller or its suppliers, Seller will maintain and carry liability insurance which includes but is not limited to employer's liability, workers compensation, general liability, public liability, property damage liability, product liability, completed operations liability and contractual liability in amounts set forth in this purchase order with carriers approved by the Buyer but in no event shall such amounts be less than the minimum statutory requirements, if any. Seller will, if requested by Buyer, furnish certificates of insurance indicating the foregoing coverage. The Seller agrees to perform the work in accordance with the safety rules of the Buyer and all applicable laws and regulations.

8. QUANTITIES: **Is it** the Seller's responsibility to furnish the proper quantity called for on this order. No variation in the quantities specified herein will be accepted as compliance with this order, except by prior written agreement. The Buyer may retain any overshipments and consider them as having been delivered within the total price set forth in this order.

9. COMPLIANCE WITH TERMS: Any waiver of strict compliance with the provisions of this order shall not be deemed as a waiver of the Buyer's right to insist upon strict compliance with this order thereafter.

1a. DELIVERY: Shipment must be made to meet the specified schedule. Goods shipped to the Buyer in advance of schedule may be returned at the Seller's expense, Alternatively, and at the Buyer's discretion, payment may be withheld and the discount period will begin from the scheduled date of receipt. Late shipments caused by the Seller's failure to perform must be expedited. Any additional charges for overtime, expedited freight, or other unusual cost shall be at the Seller's expense.

11. PACKING SLIPS: Ali shipments must contain packing slips giving part number, description of material, quantity, and the purchase order number. if shipment is not made F.O.B. destination, the original Bill of Lading must be furnished with Invoices. Buyer's count shall be accepted as final on all shipments not accompanied by packing slips.

Purchase Order Terms and Conditions

12. PACKAGING AND LABELLING: Buyer's purchase order number shall appear conspicuously on each package, box, keg, bale, bundle, or other type of container. When shipping by weight, the tare weight of the containers should be permanently marked on each container. If this order covers stationary or printing, a label must also be placed on the outside end of each package showing buyer's purchase order number, date ordered, quantity and form number.

13. EXPORT REQUIREMENTS: All export shipments must be adequately boxed or crated, with any special handling marked, and contents waterproofed, rust protected, and otherwise packaged to prevent damage in transit, and must meet all export shipping requirements. When applicable the Buyer must be supplied with a proper certificate of origin complying with customs regulations and all proper export documents for customs clearance. Seller Is to fax necessary paperwork to Buyer's custom broker/agent at port of entry.

14. ROUTING INSTRUCTIONS: The Seller shall make shipments as instructed. In the absence of specific routing instructions, shipments are to be routed "Best Way". Title and risk of loss pass to the Buyer at the F.O.B. point designated by It.

15. DIRECT SHIPMENTS: When material is invoiced by Seller but shipped by another company the invoice shall bear the name of the shipper and the point from which shipment originated.Local and warehouse shipments of steef and bar stock should be marked or tagged In a suitable manner to permit prompt identification upon request.

16. TOOLING: All tools, gauges, dies, fixtures and patterns furnished by the Buyer or which the Buyer specifically authorized the Seller to acquire for work on this order, shall be and remain the property of the Buyer. They shall be listed and maintained in suitable condition due to the work, by and at the expense of the Seller, and returned to the Buyer at any time upon request, F.O.B. Seller's plant. All tooling, dies, etc, shall be maintained and/or replaced as required to produce dimensionally capable products, at the Seller's expense. Seller shall not dispose of Buyer's tooling, dies, etc., without the express written approval of the Buyer.

17. REJECTIONS: All articles received by the Buyer may be subject to inspection. At the Buyer's discretion, any or all of the goods in a lot. in which there are articles which do not conform with the terms and conditions of the purchase order may be returned at the Seller's expense. Due to schedule or other constraints, the Buyer may elect to sort and/or repair the non-conforming articles at the Buyer's facility, in which case all inspection, sorting and repair costs shall be at the Seller's expense. When Seller receives consigned goods on Buyer's behalf, the Seller in responsible for completing appropriate incoming inspection with respect to count. verification, and any quality inspection that may be required as negotiated with the Buyer. If a count discrepancy occurs. Seller must notify Buyer within two (2) working days. Failure to do so may result in the Seller being responsible for the cosl of any related material variances. Failure of the Seller to provide adequate material certification when required by order specification shall deem the goods to be rejected and the receipt date delayed until adequate material certification is provided.

1B. PAYMENT: Seller's accounts receivable from the Buyer will be paid monthly expect where cash discounts apply or other terms are specified. If correct Invoices do not reach Buyer within three (3) days from Invoice date, payment deadlines and discount periods will be calculated from the date of receipt of the correct invoice.

19. TAXES: Any taxes whether sales, goods and services, value added or otherwise shall be shown separately on the invoice.

20. ASSIGNMENT: This order or monies due thereunder may not be assigned In whole or in part without written consent of the Buyer.

21. SET-OFF: Buyer shall be entitled at all times to set off any amount owing at any time by Seller to Buyer of their respective affiliated companies against any amount payable at any time by Buyer in connection with this order.

22. EXTRA CHARGES: No extra charges of any kind will be allowed unless specifically agreed to In writing by the Buyer.

23. ADVERTISING: Seller shall not, without first obtaining the written consent of Buyer, in any manner advertise or publish the fact that Seller has contracted to furnish Buyer the goods or services herein ordered, or use any trademarks or tradename of Buyer in Seller's advertising or promotional materials. In the event of Seller's breach of this provision, Buyer shall have the right to cancel the undelivered portion of any goods or services covered by this order and shall no't be required to make further payments except for conforming goods delivered or services rendered prior to cancellation.

24. PATENTS: Seller shall pay all costs including attorney's fees and any damages finally awarded in any suit for which the Buyer in law may be responsible to the extent based upon findings that the design or construction of the goods as furnished infringe an American or Canadian patent (except infringement occurring as a result of incorporating a design or modification at the request of the Buyer, provided that Buyer promptly notifies Seller of any charge of infringement and Seller is given the right to settle such charge and to defend or control the defence of any suit based upon such charge at its expense), This paragraph sets forth the Seller's exclusive liability with respect to patents.

25. CHOICE OF LAW AND JURISDICTION: The Buyer and Seller agree that the courts of Ontario shall have jurisdiction for all purposes. The International Sales of Goods Act shall not apply.

CITATION.: Conquest Steel Inc. v. Polar Racking Inc., 2024 ONSC 5029
COURT FILE NO.: CV-18-1702
DATE.: 2024 09 12

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: Conquest Steel Inc., Plaintiff

AND:

Polar Racking Inc., Defendant

BEFORE: M.T. Doi J.

COUNSEL: Frank Pinizzotto, for the Moving Plaintiff

Romesh Hettiarachchi, for the Defendant

ENDORSEMENT

M.T. Doi J.

Released Date: September 12, 2024