CITATION: Tenoes Construction v. Pinto, 2024 ONSC 5119
COURT FILE NO.: CV-19-620873
DATE: 2024 09 16

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:	
TENOES CONSTRUCTION	No one appearing
Plaintiff / Defendant by counterclaim	
- and -	
RAFAEL PINTO and ANDREIA OLIVEIRA PINTO	C. Perera, *for the defendants/plaintiffs by counterclaim*
Defendants / Plaintiffs by counterclaim	
	HEARD: September 7, 2023 (by videoconference)

REASONS FOR JUDGMENT

Robinson A.J.

I. OVERVIEW

[1] This action and counterclaim stem from a renovation project at 66 Triller Avenue, Toronto. Raphael Pinto and Andreia Oliveira Pinto (the "Owners") purchased the property in October 2017 with the intention of renovating the existing building into seven rental units. The Owners had previously renovated and sold three other properties in Toronto. Tenoes Construction, a sole proprietorship operated by Jose Oliveira ("Tenoes"), was verbally contracted to perform certain work for the project.

[2] The Owners allege that Tenoes' work was significantly delayed. Disputes arose and, ultimately, Tenoes registered a claim for lien against title to the property. After the lien was

registered, the mortgagees called their loans. The Owners were able to secure new financing to vacate Tenoes' lien and, thereafter, payout the existing mortgages.

[3] This lien action was commenced to perfect Tenoes' lien under the *Construction Act*, RSO 1990, c C.30 and pursue payment of $100,400, which Tenoes claimed as the unpaid amount owing for the supply of services and materials to the project. The Owners take the position that Tenoes abandoned the job and is owed nothing. They argue that Tenoes is liable to them for $73,966.63 in costs incurred to complete outstanding work and rectify deficiencies, reimbursement of the full $60,000 paid to Tenoes for which they received no value, and a further $194,956.82 in damages incurred as a result of the improper lien, which they say caused their mortgages to be called and the need for new financing to vacate the lien.

[4] Prior to trial, following ongoing breaches of procedural orders and directions, I granted the Owners' motion to discharge Tenoes' lien, return security posted to vacate the lien, and dismiss Tenoes' action. I declined to strike Tenoes' defence to the Owners' counterclaim, though, and trial accordingly proceeded solely to address the counterclaim.

[5] For the reasons that follow, I find that Tenoes breached the two contracts for work at the premises by abandoning the job and, in doing so, failing to complete the work and rectify deficiencies. I further find that the Owners have proven part of their total damages claim and have established that Tenoes preserved a lien for an exaggerated amount at a time when any lien rights had already expired.

[6] I am granting judgment in favour of Raphael Pinto in amount of $71,159.00, including HST, for breach of contract. I am further granting judgment in favour of the Owners in the amount of $26,202.03 as damages pursuant to s. 35 of the *Construction Act* for Tenoes' exaggerated and invalid lien. The balance of the Owners' counterclaim is dismissed.

II. ISSUES

[7] Several issues must be decided, namely:

(a) Is the Owners' burden of proof lightened by reason of the trial being undefended?

(b) Did Tenoes breach the agreements for work at the property?

(c) Are the Owners entitled to reimbursement of the amounts paid to Tenoes?

(d) Was Tenoes work deficient and incomplete and, if so, what damages have the Owners incurred as a result?

(e) Is Tenoes' lien improper or exaggerated and, if so, have any damages been suffered by the Owners as a result?

III. ANALYSIS

a. Did Tenoes' failure to appear at trial lighten the Owners' evidentiary onus?

[8] Both Raphael Pinto and Andreia Pinto tendered substantively similar affidavits and gave brief oral examination-in-chief on video exhibits to those affidavits. The Owners' only witnesses at trial were themselves, despite their witness list including thirteen additional witnesses who had been proposed to testify on deficiencies, incomplete work, and the mortgage discharges. Because no one appeared on behalf of Tenoes, the Owners were not cross-examined on their evidence.

[9] During closing submissions, the Owners took the position that various questions I was posing would have been addressed had Tenoes appeared and cross-examined Mr. Pinto and Ms. Pinto. They argued that I should approach their evidence differently than would be the case on a default judgment motion, since I did not strike Tenoes' defence and it was unclear if Tenoes would be attending trial. The Owners submit that their evidence was prepared in that context, which I should consider in deciding this case.

[10] I am not convinced. I find no valid reason for approaching the Owners' evidence at this undefended trial any differently than would be the case had Tenoes been noted in default and the Owners either moved for default judgment or proceeded to an undefended trial following the noting in default.

[11] Despite my prior order discharging Tenoes' lien and dismissing the action against the Owners, Tenoes' defence to the Owners' counterclaim was not struck. Mr. Oliveira was afforded the opportunity to attend trial, cross-examine the Owners' witnesses, and make closing submissions. Neither Mr. Oliveira nor anyone on Tenoes' behalf attended the trial. As a result, the Owners' evidence and submissions are entirely unchallenged. Nevertheless, because Tenoes' defence was not struck, there are no deemed admissions of fact at this trial. The Owners did serve a request to admit in November 2021, but Tenoes provided a response denying most of the requested admissions. I was directed to no admissions that were made that assisted the Owners in proving their case.

[12] Rule 19.06 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 deals with the evidentiary burden on a plaintiff when seeking default judgment. It provides that a plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment. Put another way, a plaintiff seeking default judgment must still prove all facts necessary to support a judgment, although may rely on deemed admissions of fact in doing so.

[13] If a plaintiff must establish factual entitlement to judgment when a defendant has been noted in default and is deemed to admit pleaded facts, then why would the evidentiary requirement be any lower at an undefended trial with no deemed admissions?

[14] The fact that this trial of the counterclaim was undefended does not excuse the Owners from the evidentiary burden of proving their claims. In doing so, they were obliged to tender evidence necessary to meet that burden. The Owners elected to tender only their own direct

evidence. Had Mr. Oliveira appeared, there would have been no requirement for him to cross-examine the Owners on their affidavits. Tenoes having failed to appear or cross-examine does not somehow improve the Owners' evidence, other than it being unchallenged. The facts entitling them to judgment must still be proved by the evidence tendered. If not done, then judgment cannot be granted.

[15] I have accordingly assessed the evidence as tendered by the Owners in deciding whether the Owners have proved the facts entitling them to judgment on their counterclaim.

b. Was Tenoes in breach of contract?

[16] The undisputed evidence at trial is that Raphael Pinto, who works in the construction industry, was introduced to Jose Oliveira by a roofing contractor that Mr. Pinto had worked with on a previous construction project.

[17] Mr. Pinto's evidence is that he entered into two separate agreements with Mr. Oliveira:

(a) an initial verbal agreement made in October 2018, by which Mr. Oliveira agreed to complete framing work at the premises for a total price of $42,500, with the work to be completed within three weeks; and

(b) a subsequent verbal agreement made in November 2018, by which Mr. Oliveira agreed to perform additional work at the premises for a total price of $19,000, namely (i) various work in the basement, including redoing the existing concrete floor, excavating and lowering the floor to adjust the ceiling height, supplying drains, service lines, weeping tile, a sump pit and a sump pump, and waterproofing the perimeter; and (ii) excavating the south side of the property.

[18] The Scott Schedule exchanged by the parties in the litigation, which is appended to both of the Owners' affidavits, indicates that Tenoes took a different position on the scope of work and price for the agreements in the course of litigation. Nevertheless, the Owners' affidavits were served on Mr. Oliveira, who did not appear at trial to challenge the Owners' evidence on the agreements. I accordingly give Tenoes' Scott Schedule position no weight in my decision.

[19] Mr. Pinto's evidence is that Tenoes commenced work on October 14, 2018. His affidavit outlines that, by that time, demolition work had already been completed in anticipation of Tenoes commencing the framing work. Excavation of the basement floor started on November 5, 2018.

[20] Absent any evidence or submissions from Tenoes to dispute the Owners' position and evidence on the two agreements, I find that Raphael Pinto and Jose Oliveira entered into two contracts for Tenoes to complete the framing, basement, and excavation work at the premises as set out above, the first contract being for $42,500 and the second contract being for $19,000, with a term that the work was to be completed within three weeks. The Owners' affidavits do not support a finding that Andreia Pinto was involved in any discussions with Mr. Oliveira or that Mr. Pinto was acting as her agent in the course of discussions and negotiations. I accordingly find that Ms. Pinto was not a party to the contracts.

[21] Mr. Pinto's affidavit outlines that Tenoes failed to meet the agreed three-week timeline. The Owners' common evidence is that they had planned a trip to Portugal in December 2018 and, prior to leaving, Mr. Oliveira agreed that the work would be substantially complete by the time they were expected to return in mid-January 2019. The Owners' undisputed evidence is that, when they returned in January 2019, much of the work remained incomplete and there were deficiencies in the work that had been completed.

[22] By January 26, 2019, the work was still not complete and deficiencies had not been addressed to the satisfaction of the Owners. Mr. Pinto's evidence is that he spoke with Mr. Oliveira and told him that Mr. Pinto and a "friend" (who is not identified in Mr. Pinto's affidavit and who did not testify at trial) would take over aspects of Tenoes' scope of work. Specifically, they would be rectifying deficient plumbing rough-ins in the basement, pouring the concrete basement floor, framing the basement, canopy, cathedral, landings and various partition walls, and cleaning up the property.

[23] By February 2019, Tenoes had been paid a total of $60,000 under the contracts. Mr. Pinto's evidence is that, on February 14, 2019, he and Mr. Oliveira had an argument over further payment. I am satisfied from the evidence and find that this dispute involved discussing incomplete work and deficiencies. Both of the Owners state that Mr. Oliveira "stormed off the property" and failed to return to the site after that date, other than a few occasions where he attempted to or did enter the building. Videos were taken of Mr. Oliveira attending the site on April 10 and 16, 2019. On April 16, 2019, he is seen entering the building and watching what appears to be excavation work at the front of the premises. The videos do not show any work being performed by Mr. Oliveira. Mr. Pinto's evidence is that he sought a peace bond against Mr. Oliveira because of his ongoing unauthorized attendances and entry at the property.

[24] Tenoes does not appear to have prepared an invoice until March 31, 2019. That invoice asserts various work totalling $160,400, from which the $60,000 in payments is deducted. The Owners' common undisputed evidence, though, is that they were not given the invoice and did not become aware of it until their real estate lawyer provided them with a demand letter from Tenoes' lawyer in May 2019. That letter included Tenoes' invoice and a copy of the claim for lien.

[25] Tenoes' reasons for ceasing work are not before me, but I am satisfied from the evidence and find that Mr. Oliveira did cease work on February 14, 2019. No evidence before me supports a finding that Tenoes intended to or did return to site to complete any outstanding work or to rectify deficiencies after that date. I draw an adverse inference against Tenoes for failing to appear and tender, or seek to tender, any evidence on these points. I find that Tenoes either had no intention of completing the contracts or refused to complete them.

[26] I accordingly find that, on a balance of probabilities, Tenoes abandoned its contract work on February 14, 2019, at which point the work was not yet complete and contained numerous known deficiencies. I further find that Mr. Oliveira did not return to the site to perform any work after that date, having only re-attended in April to attempt entry and to observe the site. Tenoes accordingly breached the contracts with Mr. Pinto by abandoning the work.

c. Are the Owners entitled to reimbursement of the amounts paid to Tenoes?

[27] The Owners claim reimbursement of the $60,000 paid to Tenoes as damages for unjust enrichment. The Owners argue, and it is their common evidence, that they received no value from Tenoes' work, despite having paid him nearly the full amount of the two contracts.

[28] Three payments were made to Tenoes, each in the amount of $20,000. As already noted, they are acknowledged in Tenoes' invoice. The payments were made by cheques dated November 15, November 20, and December 15, 2018. Each of those cheques were made out and drawn from an account held by Denis Pacheco. Mr. Pacheco held a mortgage over the property at the time. The three payments are argued by the Owners to have been made on their behalf under that mortgage as payments for the construction. However, that is not stated anywhere in either of the Owners' affidavits, which only state that they provided the payments to Tenoes with cheques in Mr. Pacheco's name.

[29] The Owners' affidavits do not address the reasons for Mr. Pacheco making the payments. The mortgage terms indicate that Mr. Pacheco provided a mortgage of $120,000 for a one-year term commencing on December 7, 2018. The purpose of the loan is not discussed. Although not addressed in either of the Owners' affidavits, the title abstract provided discloses that the mortgage was discharged just over one month later on January 16, 2019. There is no evidence on what, if any, funds were advanced under the mortgage, how those funds were used, and the circumstances of the discharge.

[30] Mr. Pacheco was not tendered as a witness at trial, although was included in the Owners' witness list. Mr. Pacheco's mortgage is acknowledged in each of the Owners' affidavits. However, their evidence supports that a construction loan was obtained from Doralice Ferreira, not Mr. Pacheco. The Owners have not correlated the payments made to Tenoes by cheques from Mr. Pacheco to any advanced mortgage funds. It is unclear if the payments had anything to do with the mortgage.

[31] In my view, the unjust enrichment argument fails on this basis alone. I accept that Tenoes has been enriched by the payments. However, absent a clear explanation in evidence for why Denis Pacheco was making payments to Tenoes on the Owners' behalf, and whether and how the Owners reimbursed Mr. Pacheco or were otherwise liable to him for those payments, I am unable to find that the Owners have suffered any corresponding deprivation to Tenoes' enrichment. I thereby need not address whether there is any juristic reason for the deprivation.

[32] Even if I am wrong in the foregoing, the facts of this case do not support damages by repayment of the amounts paid to Tenoes. In my view, the Owners' claim for reimbursement of all amounts paid to Tenoes is in conflict with their claim to recover their costs of rectifying deficiencies and completing Tenoes' work. The claim for reimbursement is a request for restitution damages, whereas the balance of the Owners' claim seeks compensatory damages. Those are competing theories of damages that were not reconciled in closing submissions.

[33] Although not cited by the Owners, the Supreme Cour of Canada has set out that contract damages are determined in one of two ways: expectation damages and restitution damages.

Expectation damages (a form of compensatory damages) are the usual measure of contract damages. They focus on the value which the plaintiff (or plaintiffs by counterclaim in this case) would have received if the contract had been performed. Restitution damages are more infrequently employed and focus on the advantage gained by the defaulting party as a result of their breach of contract: *Bank of America Canada v. Mutual Trust Co.,* 2002 SCC 43 at para. 25.

[34] It is, in my view, well-established law that restitution damages are a discretionary remedy intended to disgorge the defaulting party of the benefits received from their breach of contract. They may be awarded in cases where the non-defaulting party has suffered no loss, or where there is a loss, but it is less than the defaulting party's gain: *Cassano v. The Toronto-Dominion Bank,* 2007 ONCA 781 at para. 27.

[35] No case law was cited by the Owners supporting entitlement to both restitution damages and compensatory damages. Recovering under both theories of damages would, in my view, amount to double recovery.

[36] The Owners argue that they should be entitled to reimbursement of amounts paid because they incurred the cost of purchasing materials and Tenoes was paid to perform work using those materials, but the work was incomplete and largely deficient. The Owners argue that they received no value for Tenoes' work, as evidenced by the estimate obtained to complete framing work, which totalled $64,300, plus HST. I am unconvinced by these arguments.

[37] I find that compensatory damages, which I discuss below, is the correct measure of damages in this case. I reject the Owners' submission that I should allow reimbursement of all amounts paid in addition to compensating them for their proven damages arising from Tenoes' breach of contract. That said, I do find it appropriate to consider the estimated cost of completing framing work in my assessment of compensatory damages.

d. Was Tenoes work deficient and incomplete?

[38] The Owners claim damages of $73,966.63 for breach of contract. That figure is comprised of $35,757.73 in materials purchased by Raphael Pinto for Tenoes' work under the two agreements, $13,208.90 in additional materials purchased by Mr. Pinto to address deficiencies in Tenoes' work and to complete work that remained incomplete, and $25,000 for labour incurred to complete Tenoes' work in the basement.

[39] In addition to those heads of damages, I have considered the evidence tendered that rectification of deficiencies in Tenoes work was estimated by a non-party, Cardinal Carpentry, to be at least $64,300 plus HST. That evidence was put forward in support of the Owners' claim for restitution, but as I have found above it is more appropriately considered in assessing compensatory damages.

[40] Mr. Pinto's affidavit outlines that he supplied Tenoes with the materials for the framing and basement work, in support of which he appends the invoices for those materials to his affidavit. His affidavit testimony is that, as a result of Tenoes' errors, much of the work had to be demolished and materials repurchased. In support of that statement, invoices for the additional materials

purchased to complete the basement work are appended to Mr. Pinto's affidavit. Ms. Pinto has tendered the same invoices in her own affidavit.

[41] Mr. Pinto has also given evidence that, after Tenoes abandoned the job, he contacted an individual named Paul Martelli, who assisted him in rectifying the deficiencies in Tenoes' work in the basement. Mr. Pinto estimates their combined labour cost at "approximately $25,000".

[42] I find that the materials purchased for Tenoes' original work are not recoverable in damages. Neither of the Owners' affidavits states that Tenoes was responsible for supplying materials. To the contrary, the Owners conceded in closing submissions that they do not dispute they were responsible for supplying the materials for Tenoes' use. Purchasing materials for Tenoes' original scope of work was a cost that the Owners would always have incurred. They are not compensable damages flowing from Tenoes' breach of contract.

[43] Materials purchased to repair or remediate deficiencies in Tenoes' work are a different matter. The Owners have tendered various invoices for materials said to have been purchased to complete the basement work, since they say much of Tenoes' work had to be demolished and materials repurchased. I do not dispute that evidence, but it is general and unhelpful. There is no evidence connecting the material invoices to Tenoes' scope of work. Moreover, the total I have been provided ($13,208.90) does not appear to be the total of the invoices appended to the Owners' respective affidavits.

[44] In addition, several invoices included in the Owners' claim are for materials that do not seem to relate to anything in Tenoes' scope of work and have not been correlated to any specific deficiencies in the Scott Schedule. For example, there are multiple invoices for soaker tubs and toilets and an invoice for a shower kit and faucet, yet no evidence of the Owners having previously purchased such tubs, toilets, and faucets and, importantly, no explanation for how they are within Tenoes' scope of work, what was deficient, and why new materials were required. I was directed to nothing in the Scott Schedule dealing with them.

[45] In my view, it is not sufficient for an owner to make general statements about deficiencies in a contractor's scope of work, tender a Scott Schedule said to outline those deficiencies, tender invoices allegedly relating to the deficiencies, but fail to correlate them together. It is not for the court to pore over disorganized evidence and seek to connect dots that a party bearing the evidentiary onus ought to have done.

[46] I am accordingly unable to find that any of the claimed repurchased material invoices relate to materials needed to rectify deficiencies in Tenoes' work. The Owners have provided no correlation between the materials purchased, the alleged deficiencies in Tenoes' work, and the rectification work that is said to have been required or performed. They have failed to meet their evidentiary burden.

[47] I have a similar concern with the claim for estimated labour hours. The totality of the evidence on labour hours incurred by Raphael Pinto and Paul Martelli is a bald and self-serving statement by Mr. Pinto as follows:

> When Jose failed to complete the work in the Basement Agreement, I contacted Paul Martelli who assisted me in rectifying the deficiencies in Jose's work in the basement. The combined cost of my labour, and that of Paul Martelli is approximately $25,000.00.

[48] No explanation has been provided for how Mr. Pinto estimated the value of labour at $25,000. Mr. Martelli did not testify, although was included on the Owners' witness list. The Owners argue that the figure is an estimate provided by Mr. Pinto based on his calculations of the hours worked to complete the scope of work for items outlined earlier in his affidavit. Mr. Pinto's affidavit does not say that.

[49] The Owners further argue that Tenoes did not appear to cross-examine Mr. Pinto on his affidavit and nothing has been raised to suggest that the amount is incorrect. I am asked to accept the amount solely on the basis that nothing has been tendered to contradict it. For me to accept the Owners' argument would be tantamount to reversing the evidentiary onus of proof for their claim. The Owners bear the burden of proof on a balance of probabilities. As discussed earlier in these reasons, the fact that Tenoes has not directly challenged the Owners' evidence does not lighten their burden. Failing to cross-examine or tender contradictory evidence does not improve bald, self-serving, and unsubstantiated evidence.

[50] It was open to Mr. Pinto to provide evidence on how he calculated the labour amount, including the hours worked, rates used, and basis for using those rates. He did not do so. I have no doubt that Mr. Pinto and Mr. Martelli performed the work as stated by Mr. Pinto. However, I have an insufficient evidentiary basis on which to find, on a balance of probabilities, that $25,000 of work was performed by them. The Owners have failed to meet their evidentiary burden.

[51] There is, however, one piece of undisputed evidence that supports a compensatory damages claim. Mr. Pinto's affidavit outlines that, in September 2019, he obtained an estimate from Cardinal Carpentry to rectify outstanding deficiencies in Tenoes' work. That estimate is appended to Mr. Pinto's affidavit (as well as to Ms. Pinto's affidavit). It outlines a scope of work to be performed for a total of $63,400 plus HST. There is, of course, no evidence from Tenoes disputing that the scope of work quoted by Cardinal Carpentry is, as stated by Mr. Pinto, the same scope that Tenoes completed or was supposed to complete. The various work outlined in the quote does correlate to Tenoes' scope of work as discussed by Mr. Pinto elsewhere in his affidavit. I am satisfied that the estimate does, in fact, relate to the same scope of work that Tenoes was required to complete.

[52] I accordingly find that the Owners have demonstrated, on a balance of probabilities, a cost of completion and rectification for Tenoes' work in the amount of $64,300 plus HST, which are compensable by Tenoes. Deducting the unpaid balance of the two contracts, namely $1,500, Mr. Pinto (as the contracting party) is accordingly entitled to payment of $71,159.00, including HST, from Tenoes in damages for breach of contract.

e. Is Tenoes' lien improper and/or exaggerated?

[53] Any person who preserves a claim for lien in circumstances where they know or ought to know that the amount of the lien has been wilfully exaggerated or know that they do not have a

lien may be liable to any other person who suffers damages as a result: *Construction Act*, s. 35(1). Proving negligence is sufficient to establish a lien claimant's liability for damages arising from an exaggerated or invalid lien. There is no need to prove malice: *JDM Developments Inc. v. J. Stollar Construction Ltd.*, 2005 CanLII 41382 at para. 84.

[54] The Owners assert that Tenoes' lien was not timely and was preserved and perfected for an exaggerated amount. Their s. 35 damages claim is focused on mortgage-related interest, fees, and disbursement costs. In particular, they claim damages of $194,956.82 argued to arise from Tenoes' allegedly improper and exaggerated lien, comprised of the following:

(a) $34,500 in fees and disbursements from securing a third mortgage used to vacate Tenoes' lien;

(b) $137,638.02 in interest, fees and disbursements charged by the first mortgagees when discharging their mortgage, including three months of additional interest charged by the mortgagees; and

(c) $22,818.80 in interest, fees and disbursements charged by the second mortgagee when discharging the construction loan mortgage, including three months of additional interest charged by the mortgagee.

[55] I accept the Owners' submissions on timeliness and exaggeration and find that Tenoes' lien was not timely and, in any event, was preserved for an amount well in excess of any amounts actually owing to Tenoes. I find that Mr. Oliveira knew or ought to have known that Tenoes' lien rights had expired and that he was preserving and perfecting a lien for an exaggerated amount. Tenoes is accordingly liable for any damages that the Owners have suffered as a result of the invalid lien.

[56] With respect to timeliness, I have already found that Mr. Oliveira ceased work and abandoned the contracts on February 14, 2019. The lien of a contractor expires sixty days after the date the contract was completed, abandoned, or terminated: *Construction Act*, s. 31(2)(b). Tenoes' claim for lien was not registered until April 30, 2019. That is more than 60 days after the date of abandonment. Tenoes' lien had thereby expired by the time it was preserved. I draw an adverse inference from Mr. Oliveira's failure to attend trial and tender any evidence on timeliness. I find that he knew or ought to have known that Tenoes' lien had expired at the time the claim for lien was registered.

[57] With respect to exaggeration, the Owners' undisputed evidence is that the total contract price for the two contracts was $61,500. Tenoes' lien was preserved and perfected on the basis of a contract price of $160,400. Since Tenoes did not appear or tender any evidence in support of its position on the contracts, that figure is unsupported by any evidence before me. Accounting for the $60,000 already paid to Tenoes, the value of unpaid services and materials for which Tenoes was entitled to lien cannot have exceeded $1,500. The lien is accordingly exaggerated.

[58] I am also satisfied that the extent of exaggeration is wilful. Evidence at trial supports and I have found that the total price for Tenoes' contract work was $61,500. Mr. Oliveira failed to attend trial and has not substantiated the lien amount. Absent any evidence supporting a potentially

reasonable basis to lien for $100,400, I draw a further adverse inference from Mr. Oliveira's failure to attend trial and tender any evidence to substantiate the lien amount that he knew or ought to have known that the lien amount was exaggerated.

[59] With respect to damages, I accept and find that the Owners' have suffered damages for the fees and disbursement costs associated with the loan obtained to vacate the lien. I am not satisfied, though, that the Owners' other claims for mortgage interest, fees, and disbursement costs were incurred as a result of the lien.

[60] The Owners obtained mortgage financing from Sub-Prime Mortgage Corporation to vacate Tenoes' lien. The total mortgage advance was $160,000, from which $125,500 was paid into court to vacate Tenoes' lien. Both of the Owners' affidavits state that they did not receive any funds from the mortgage. I accept and find that the mortgage was required to secure funds necessary to vacate Tenoes' lien and that costs associated with it are properly claimable as s. 35 damages.

[61] The $34,500 claim figure is calculated from amounts that are outlined in an acknowledgment of receipts and disbursements and mortgage advance ledger statement. The Owners claim the full advance of $160,000, less the $125,500 paid into court, which I previously ordered be returned to the Owners when discharging Tenoes' lien. No other amounts were pursued in respect of the mortgage loan.

[62] In my view, two items included in the $34,500 amount are not recoverable from Tenoes. First, mortgage funds were used to pay $3,737.89 in outstanding property taxes. That is not a cost arising from the lien. It is a separate liability of the Owners that has not been connected to the lien by any evidence at trial. Second, $4,060.08 of the loan advance was paid to the Owners' lawyers in trust. No explanation has been provided for why the Owners are not entitled to receive those excess mortgage funds or what happened to them. In any event, they are not a cost arising from the lien. They are excess funds that ought to be paid to the Owners, if not already paid out to them.

[63] The remaining amounts for the lender's fee, broker's fee, title insurance, legal fees, and disbursements are all costs incurred in obtaining the mortgage to vacate the lien. I find that those amounts, which total $26,202.03, are properly recoverable from Tenoes as s. 35 damages.

[64] The balance of the Owners' s. 35 damages claim relates to discharge of the two mortgages that remained secured against title when Tenoes registered the claim for lien: a first-ranking mortgage in favour of Carlos Ferreira and Alice Ferreira for $990,000 and a second-ranking construction financing mortgage in favour of Doralice Ferreira for $563,000.

[65] Mr. Pinto's evidence is that the construction loan was structured to be advanced in three installments: $235,000 on January 15, 2019, $148,000 on or before March 15, 2019, and the balance of $180,000 on or before May 15, 2019. By the time that Tenoes' lien had been registered, the first two tranches of construction loan financing had been advanced. The Owners' common evidence is that, on May 14, 2019, the Owners received an email confirming that the final advance could not be made until Tenoes' lien was discharged.

[66] Subsequently, on June 13, 2019, the Owners received a letter from the lawyers for the mortgagees. That letter advised that the mortgages would not be extended past the maturity date on July 15, 2019, and requested a discharge on maturity.

[67] The Owners ultimately secured a $2.6 million mortgage from Vault Capital Inc. to pay out the first and second mortgages and finance the remaining construction work. Both Owners state that it was the only mortgage they could obtain in the circumstances and that they were not in a position to negotiate its terms, which they both state are onerous. In total, $1,491,069.12 was paid from that loan financing to discharge the mortgage held by Carlos Ferreira and Alice Ferreira and the mortgage held by Doralice Ferreira.

[68] The Owners argue that the loans were called because of Tenoes' lien. My difficulty with that position is that it is unsubstantiated on the evidence before me. The letter from the mortgagees' lawyers makes no reference to the lien and there is nothing before me supporting that the Owners reasonably expected that the loans would be renewed or the term of each mortgage extended prior to Tenoes' lien being preserved.

[69] In response to questions on these issues during closing submissions, the Owners initially sought leave to re-open their case and give further testimony. I raised concerns with the request. This was a summary trial. A timetable was fixed for the Owners to serve their affidavits of evidence-in-chief. It was up the Owners to decide what evidence they required to prove their various damages claims. Their witness list included each of Carlos Ferreira and Doralice Ferreira, but they were not ultimately called as witnesses. The Owners tendered the evidence that they did at trial, then closed their case. My questions in closing submissions were about how the Owners' evidentiary onuses at trial had been met by the evidence as tendered.

[70] I did, however, afford the Owners an opportunity to adjourn to allow them to prepare legal arguments on reopening a case during closing submissions, supported by a factum or at least relevant case law. My concern was ensuring a fair process. Albeit not appearing, Tenoes was unrepresented. Before entertaining new evidence in response to questions in closing submissions that telegraphed my own concerns with trial evidence (not something typically done by the court during the evidentiary phase of trial), I felt it necessary to have submissions on how doing so was fair and just in the circumstances of this case. After a brief recess, the Owners withdrew their request to reopen the case and elected to proceed with closing submissions.

[71] There is an insufficient evidentiary basis to find, on a balance of probabilities, that the Owners reasonably expected that the mortgage terms would be extended beyond maturity, that the loans were called because of the lien, or that the ultimate new mortgage obtained to payout the existing mortgages was less favourable because of the presence of Tenoes' lien.

[72] As already noted, a reason for calling the first mortgage was not given in the lawyers' letter and there is no evidence on what, if anything, the Owners were told by or on behalf of the mortgagees about why the loan was being called. For the second mortgage, the fact that the Owners were told that the final construction loan draw could not be advanced until the lien was discharged is not evidence that the loan was called because of the lien. Making the final advance

could have jeopardized the lender, since Tenoes' lien would have priority over that loan advance by operation of s. 78(4) of the *Construction Act.*

[73] In a similar vein, I do not doubt the Owners' evidence that the presence of Tenoes' lien made it more difficult to find new financing to pay the existing mortgage debts and obtain financing to complete the construction. Both of the Owners state in their affidavits that they "contacted numerous mortgage brokers" and that it was "extremely difficult" to find a mortgage provider given the lien. However, there is no specific evidence on their efforts to obtain financing or the difficulties that they encountered because of the lien. The Owners submit that the efforts to find new lenders were verbal discussions, but that is not stated anywhere in the affidavit evidence. Particulars of what lenders were contacted, what terms were offered or discussed, and similar pertinent details were not provided. Without such evidence, I cannot find, on a balance of probabilities, that the "onerous terms" of the refinancing were necessary by reason of Tenoes' lien.

[74] For these reasons, I find that the Owners have not met their evidentiary onus of demonstrating that discharge of the first and second mortgages was required by reason of the lien or that Vault Capital Inc. was the only lender from which the Owners could reasonably obtain loan financing and on terms that they could not negotiate. Accordingly, I find that costs associated with those discharges and the subsequent mortgage are not recoverable as s. 35 damages.

[75] Although not necessary given my finding above, the majority of amounts claimed as damages would not have been recoverable in any event. For both existing mortgages, the majority of the Owners' claim is for interest accrued under the mortgages. For the first mortgage, that includes interest accrued prior to Tenoes commencing work. All such interest would have been payable by the Owners in any event of the lien.

[76] The Owners also claim charges for "three month's bonus", which they characterize as a charge for early discharge of the mortgages. Apart from the evidence suggesting that the mortgages had matured, the "three month's bonus" charges in the mortgage discharge statements refer to s. 17 of the *Mortgages Act*, RSO 1990, c M.40. That section deals with circumstances where a default has been made in the payment of principal money secured by a mortgage, not early discharge.

[77] No convincing argument has been made for why the three-month interest charges arose from preservation of Tenoes' lien. I note also that the extract tendered from the construction loan commitment for the second mortgage includes a term stating that the mortgage may only be closed on three months bonus. It accordingly appears that the three-month charge under at least that mortgage was payable by the Owners in any event.

[78] I accordingly find that the Owners are entitled to s. 35 damages for the lender's fee, broker's fee, title insurance, legal fees, and disbursements incurred in respect of the third mortgage to vacate Tenoes lien. I otherwise dismiss the balance of their s. 35 damages claim.

IV. CONCLUSION

[79] For the foregoing reasons, Raphael Pinto shall have judgment against Tenoes for breach of contract in the amount of $71,159.00, including HST. The Owners shall have judgment against Tenoes for s. 35 damages in the amount of $26,202.03. Both judgment amounts shall bear pre-judgment interest pursuant to the *Courts of Justice Act*, RSO 1990, c C.43.

V. COSTS, INTEREST & REPORT

[80] This trial decision has been significantly delayed due to personal circumstances and through no fault of the Owners. I regret that delay and any impact it has had on the Owners.

[81] The Owners' bill of costs was served on Tenoes. The Owners intended to rely on an offer to settle, so I deferred costs submissions until I had rendered this decision to avoid being aware of the offer when deciding the case. Given my findings above and the fact that certain claims allowed were advanced by set-off in the Owners' original statement of defence and others by way of set-off and counterclaim in their subsequent amended pleading, I would also like the Owners' submissions on calculating pre-judgment interest.

[82] The Owners may make brief written submissions as to costs, as well as the date(s) from which pre-judgment interest should run, calculation of interest, and a *per diem* rate that may be applied to the date of a report. Submissions shall not exceed five pages and may be submitted by email to my Assistant Trial Coordinator within thirty (30) days, or such additional time as may be requested and approved.

ASSOCIATE JUSTICE TODD ROBINSON

Released: September 16, 2024

CITATION: Tenoes Construction v. Pinto, 2024 ONSC 5119
COURT FILE NO.: CV-19-620873
DATE: 2024 09 16

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N :

TENOES CONSTRUCTION

Plaintiff /
Defendant by counterclaim

- and -

RAFAEL PINTO and ANDREIA OLIVEIRA PINTO

Defendants /
Plaintiffs by counterclaim

REASONS FOR JUDGMENT

Associate Justice Todd Robinson

Released: September 16, 2024