

**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 :)
)
ELECTRICON SERVICES INC.) M. Russell, *for the plaintiff*
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Plaintiff)
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- and -)
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)
2622059 ONTARIO LTD. and ADELAIDE) M. Marchioni, *for the defendant, 2622059*
AND ONTARIO HOLDING CORP.) *Ontario Ltd.*
)
)
Defendants)
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) **HEARD:** April 4-6, 12, June 6-7 and
) June 9, 2023 (by videoconference)

REASONS FOR JUDGMENT

Robinson A.J.

I. OVERVIEW

[1] This action involves a dispute between Electricon Services Inc. (“Electricon”) and 2622059 Ontario Ltd. (“Motorino”) regarding Electricon’s supply of electrical services and materials to the build-out of a restaurant known as “Motorino Citta” on Adelaide Street East in Toronto. The restaurant was the latest in a chain of Motorino restaurants, which included locations in Woodbridge and King City.

[2] Rob Ragno is the principal of Electricon. Enzo Commisso is the principal of Motorino. Mr. Commisso was introduced to Mr. Ragno by Anthony Presta, with whom Mr. Commisso had worked on the build-out of several prior restaurant locations. There is no dispute that Motorino

engaged Electricron to perform electrical work for the Motorino Citta restaurant. What is disputed is whether the parties entered into a legally enforceable contract for Electricron's work, the required scope of that work, and the price to be paid for it.

[3] Anthony Presta supervised and managed the construction of the Motorino Citta restaurant on behalf of Mr. Commisso. Although Mr. Ragno testified that he performed some labour work on site, Electricron's work was largely performed by a subcontractor, Matthew Hunter, through his company, Asgard Electric Inc. For the first several months of Electricron's work on the project, Motorino made regular payments to Electricron by post-dated cheques. Those payments continued until Mr. Commisso requested that the remaining uncashed cheques be returned so that he could replace them with new cheques. After receiving the cheques back from Mr. Ragno, new cheques were not provided. Electricron continued work, but Motorino ceased further payment.

[4] Electricron has preserved and perfected a lien for \$85,031.60 on account of the unpaid services and materials that it asserts were supplied to the build-out. That figure includes various changes and extras, which Electricron claims were directed by or on behalf of Motorino in the course of work. It is undisputed that only \$38,500 was paid to Electricron. Motorino argues that no further amounts are owing to Electricron by reason of Electricron's breach of contract and Motorino's set-off for incomplete and deficient work. Although Motorino also asserted a set-off for delay-related losses in the proceeding, no evidence was advanced on that at trial and it was not pursued.

[5] I find that Motorino did accept Electricron's estimate for the job, including the price, that Electricron has proven partial entitlement to its claimed changes and extras, and that Electricron completed its contractual scope of work. I further find that Motorino breached the contract by non-payment. Motorino has failed to prove alleged deficiencies and incomplete work, so I am not allowing any of its set-off claim. Based on these determinations, I find that Electricron is entitled to a lien in the amount of \$66,307.50, including HST, and judgment for the same amount against Motorino, plus pre-judgment interest.

II. ISSUES

[6] Six main issues must be decided at this trial, namely:

- (a) Was a contract formed between Electricron and Motorino and, if so, what are the contract terms? Specifically:
 - (i) Did the parties agree on a price for Electricron's supply of services and materials?
 - (ii) Did the parties agree on Electricron's required scope of work?
 - (iii) Did the parties agree on a completion date for the work?
- (b) Are any of the changes and extras claimed by Electricron recoverable?
- (c) Has Motorino proved that any of Electricron's work was deficient or incomplete?
- (d) Did Electricron complete its required scope of work?

- (e) If a contract exists, who breached it?
- (f) Is Electricon's lien timely?

III. ANALYSIS

a. Was a contract formed between the parties?

[7] Electricon relies on its estimate dated January 23, 2019, as forming the base contract for its work. Rob Ragno testified that Electricon's estimate was developed from mechanical and electrical drawings prepared by Tigris Engineering Inc. ("Tigris"), which were provided to Mr. Ragno by Enzo Commisso in an email on January 14, 2019. Electricon's position is that Motorino accepted its estimate. Motorino disputes that the price and scope of work as set out in the estimate were agreed.

[8] As a preliminary matter, there is conflicting evidence on whether or not Enzo Commisso signed Electricon's estimate at a meeting with Rob Ragno that took place shortly after the estimate was provided. Mr. Ragno testified that it was signed or initialled by Enzo Commisso, but that the signed version was lost. Mr. Commisso denies signing it. I need not address that conflict. There is sufficient other evidence before me on which to assess objective contract formation. As discussed below, I find that the parties objectively agreed to the terms as set out in Electricon's estimate dated January 23, 2019, which formed the base contract between the parties.

i. Relevant legal framework

[9] An enforceable agreement has five elements: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship. Although not cited by the parties, the Supreme Court of Canada has set out that a contract is formed where there is an offer by one party accepted by the other with the intention of creating a legal relationship, which is supported by consideration: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 35.

[10] Deciding whether or not a contract was formed is assessed on an objective basis, namely whether a reasonable person, apprised of all the circumstances, would believe that the parties had intended to contract and reached an agreement: *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328 at para. 47; *Nabizadeh v. Hamedani*, 2019 ONSC 4154 at para. 21.

[11] In deciding the objective intention of a party, words or conduct are properly considered. An intention to be bound can be established where an objective interpretation of the words or conduct of the parties would lead a reasonable person to conclude that the parties intended to be bound. In such cases, the requirement of a signature is a mere formality: *Kernwood Ltd. v. Renegade Capital Corp.*, [1997] OJ No 179 (CA) at para. 17.

[12] For a construction contract, the parties must be *ad idem* on all essential terms. Those include the exact scope of the work to be performed, the timeline for completion, and the price to be paid: *Kalagon Spar Ltd. v. Papegeorge*, 2020 ONSC 710 at para. 188. However, it is not fatal for an agreement to be silent on a completion date. In such a circumstance, the contractor is entitled

to a reasonable time to complete the work: *Goulimis Construction Ltd. v. Smith*, 2014 ONSC 1239 at para. 20 (cited in *Kalagon, supra*).

ii. Did the parties agree on a price?

[13] Mr. Ragno testified that he used Tigris' issued for permit drawings to develop Electricron's quote, including analyzing the requirements for power, lighting, and service distribution, counting the noted devices, and pricing the required electrical components. During his examination in chief, Mr. Ragno correlated electrical component counts between Tigris' drawings and Electricron's estimate and pointed out that the drawings included a $\frac{3}{16}$ -inch to 1-ft scale that he used in assessing the length of components and, accordingly, Electricron's pricing.

[14] Electricron's estimate totalled \$82,750.00, plus HST. Mr. Ragno testified that it was a combination of all materials required to complete the job based on Tigris' drawings, with labour hours estimated roughly between \$55-60 per hour. Mr. Ragno also testified that the labour rate included direct labour costs, plus additional costs such as WSIB, employment insurance, and additional "fringe" costs above what workers are themselves paid. He said that the labour rate was based on his experience as an electrical trade for sixteen years (at the time) and that it was used consistently in pricing the various aspects of the job.

[15] There was some evidence at trial that questioned whether Mr. Ragno did genuinely prepare Electricron's estimate himself or if he simply used an estimate provided to him by Matthew Hunter. However, I need not address that issue. Motorino was not a party to the subcontract between Electricron and Asgard Electric Inc. Regardless of the source, Motorino was presented with Electricron's estimate. That estimate was correlated through evidence to Tigris' drawings. The issue for trial is whether that estimate, and the price, was accepted.

[16] Motorino submits that there was no agreement as to price. Electricron points to Motorino's statement of defence as having admitted a fixed price contract. In my view, Motorino's position at trial is inconsistent with its pleading, which admits that the agreed contract price was Electricron's estimate, less \$10,000.

[17] Although not cited by either party, the Court of Appeal has expressly held that it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings: *Rodaro v. Royal Bank of Canada* (2002), 59 OR (3d) 74 (CA) at para. 60. In deciding whether Motorino has admitted a contract price, case law under rule 51.05 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "Rules") is relevant. Rule 51.05 sets out that an admission in a pleading may be withdrawn on consent or with leave of the court. For there to be an admission as contemplated rule 51.05, there must be an unambiguous, deliberate and intentional concession: *2424355 Ontario Ltd. v. Cui*, 2022 ONSC 244 at paras. 29 and 41.

[18] At para. 3 of the statement of defence, Motorino pleads that it did not agree to Electricron's price because it included a \$10,000 finder's fee, which Motorino was not prepared to pay. The defence goes on to plead that Electricron agreed to reduce its quoted price by \$10,000. At para. 4 of the statement of defence, Motorino then pleads that Electricron was to supply all services and materials in its estimate "for the fixed price estimate (less the reduction promised and sought)".

[19] Motorino submits that the language used is “nebulous” and that there is no clear pleading that the estimate was accepted, less \$10,000. I do not agree. I find no ambiguity in the pleading. In context of the surrounding paragraphs, the pleading is clear and unambiguous: Motorino has pleaded that it agreed to the estimate price, less \$10,000.

[20] Although Motorino argues that it clarified the position during examinations for discovery, I was directed to no case law supporting that a party’s own discovery evidence may be used by them on motion or at trial. To the contrary, the combination of subrules 39.04(1)-(2) and 31.11(1) in the *Rules* is that a party is precluded from using its own examination for discovery in evidence, whether on a motion or at trial, unless the other party consents. Motorino accordingly cannot rely on its own examination for discovery at this trial.

[21] Nevertheless, Motorino’s admission on its agreement to price is for an amount less than the price claimed by Electricron. I thereby must still address the evidence at trial with respect to whether the parties were, in fact, *ad idem* on price.

[22] Enzo Commisso testified that he did not agree to the price in Electricron’s estimate and, further, that he told Rob Ragno he would have to match the price of the prior contractor who did the electrical work at the Motorino restaurant in King City, namely \$58,000 plus HST. Mr. Commisso says he made clear to Mr. Ragno that Electricron would only get the job if it matched that price. Mr. Ragno is said to have agreed to review matters, but a new quote was never provided.

[23] Mr. Ragno’s testimony partially aligns with that of Mr. Commisso. Mr. Ragno acknowledged during his testimony that, during their initial meeting to review Electricron’s quote, Mr. Commisso was not happy with the price and wanted a lower one. Mr. Ragno maintained throughout his examination, though, that he never agreed to reduce it. He did, however, agree to revisit the price at the end of work and pass on savings if “everything went smoothly”. Mr. Ragno testified that Mr. Commisso agreed.

[24] On the price issue, I accept that there were discussions about reducing the price. However, I prefer the evidence of Rob Ragno to that of Enzo Commisso and find, on a balance of probabilities, that Mr. Ragno did not agree to reduce Electricron’s quoted price. I find that Motorino, by its conduct, accepted Electricron’s price. I say this for several reasons.

[25] First, there is no corroborating evidence supporting Mr. Commisso’s view that \$58,000 was a reasonable price for Electricron’s work or that Mr. Ragno agreed to it. A copy of the quote from the electrical contractor for the King City restaurant is in evidence. However, no evidence has been tendered on what comprised the base contract scope of work. No contractor invoices or proof of payment were tendered. There is also no evidence on what, if any, extras were performed over and above the base contract scope of work (which itself is unclear from the quotation). Mr. Commisso’s cross-examination testimony was that Mr. Ragno “committed to do the best he could” with price. In my view, such a commitment is consistent with Mr. Ragno’s testimony that he would see how the project went and potentially pass on any savings.

[26] Second, despite the emails and text messages being exchanged around the time, there is no contemporaneous written record corroborating Mr. Commisso's self-serving testimony that Mr. Ragno agreed to any reduction in price.

[27] Mr. Commisso acknowledged during his cross-examination that there was nothing in writing, but said that he and Mr. Ragno discussed it "a hundred times". However, Mr. Commisso's testimony also made clear that price was very important to him. He repeated during testimony that he paid only \$58,000 for the electrical work at the King City restaurant and felt it should cost him the same to do the Toronto restaurant. Nevertheless, despite suggestions that Mr. Ragno had agreed to "sharpen his pen" and provide a further estimate, there was no further estimate provided. Mr. Commisso made no written request by text or email to receive one.

[28] Motorino points to a text exchange in July 2019, well into Electricron's work, in which Mr. Commisso asked Mr. Ragno if he had re-adjusted the pricing "as we discussed". Mr. Ragno responds, "We're not done the job yet. I can't determine the cost". Mr. Commisso then replies, "It's all good we can do it after like I said I trust you." Motorino argues that this exchange supports its position that no price had been agreed. However, it is also equally consistent with Mr. Ragno's testimony that he was willing to revisit the agreed price at the conclusion of Electricron's work.

[29] I note that, although Mr. Commisso consistently testified that he expected to receive a revised quote, he did not initially testify that Mr. Ragno had agreed to provide a new quote or reduce the price. Rather, he said only that Mr. Ragno would review notes and "go through everything". Mr. Commisso also did not confirm in writing his position on a necessary reduction or a new estimate. It is, in my view, at odds with Mr. Commisso's position to have provided Mr. Ragno with post-dated cheques for weekly payments and allowed Electricron to commence work when he had still not received a new estimate or any clear agreement from Electricron to reduce its price. Mr. Commisso's testimony that Rob Ragno agreed that the weekly cheques were only until a new quote was received is entirely uncorroborated. It is also inconsistent with his other testimony that he told Rob Ragno that the only way he would get the job is if he matched the King City price (*i.e.*, \$58,000). That cannot reasonably have happened by the time Electricron commenced work if a revised quote was still outstanding.

[30] Considering the nature of text messages that Mr. Commisso sent over the course of the project, I find that failing to send any written request to Mr. Ragno for a new estimate or seeking confirmation on price at the outset of Electricron's work to be objectively at odds with Mr. Commisso's overall pattern of communication.

[31] Finally, Mr. Commisso admitted that he lied to Mr. Ragno in order to get uncashed cheques returned to him under the guise of cashflow issues and needing to change the post-dated payment structure and replace the cheques. However, he confirmed during his cross-examination that he did not want the cheques cashed because Electricron was falling behind on its work. He testified that he was "saying anything to get the cheques back".

[32] Specifically, in late April 2019, Mr. Commisso asked Mr. Ragno not to cash the last monthly cheques moving forward and, when the next cheque was cashed, texted Mr. Ragno about it. Mr. Ragno offered to e-transfer the funds back, to which Mr. Commisso agreed, explaining that

he had “over 70k in rents coming out tonight”. Mr. Ragno arranged for the e-transfer of funds back (which was done in two installments).

[33] On June 1, 2019, Mr. Commisso then texted Mr. Ragno, stating, “Hey brother. I need to change your 3500\$ cheque's to 2000\$ cheque's until mortgage money comes in. It's just to [sic] much between all 3 locations at one time”. Mr. Ragno agreed and the uncashed cheques were returned to Mr. Commisso.

[34] None of that was true. Mr. Commisso agreed during his cross-examination that although he had told Mr. Ragno that Motorino was having cash problems, it was not. The motivation for asking for the cheques was Mr. Commisso’s view that Electricron was “falling behind drastically” and because Mr. Ragno had still not produced a finalized quote. It was put to Mr. Commisso that he said none of that to Mr. Ragno. Mr. Commisso did not point to any instance where he had done so, other than purportedly following up on the revised quote during telephone calls.

[35] Mr. Commisso acknowledged during his testimony that he had no intention of giving new cheques to Electricron. Nevertheless, the record supports that he continued to make ongoing promises to deliver replacement cheques, with excuses for why it was not done. Electricron continued to perform, but no further payments were made to it during the balance of its work.

[36] In my view, Mr. Commisso’s conduct was contrary to the general duty of honesty in contractual performance, which requires that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract: *Bhasin v. Hrynew*, 2014 SCC 71 at para. 73. Mr. Commisso’s capacity and willingness to knowingly mislead Mr. Ragno when it suited him to do so seriously impacts his credibility, particularly on the price issue. Coupled with the other concerns outlined above, I find Mr. Commisso’s testimony to be less credible and reliable than that of Mr. Ragno.

[37] For the above reasons, I prefer the evidence of Mr. Ragno and find that Mr. Commisso did agree to Electricron’s price, albeit subject to potentially revisiting the price at the end of the project. It is always open to contracting parties to renegotiate a contract price later in a project. Construction projects in particular include multiple variables that often lead to price changes, such as material price variations, de-scoping work, or good faith dealings between contracting parties to deal with potential variables in the project that did or did not come to fruition.

[38] I accept and find that, on a balance of probabilities, Mr. Ragno was prepared to discuss a potential price reduction once actual costs were known and if there were costs savings to Electricron that could be passed on. In my view, though, that does not change the fact that the base contract price was agreed prior to Electricron commencing work. I do not accept Motorino’s position that agreeing to potentially revisit price at a later date means that there was no agreement on price at the outset.

[39] Motorino argues, as set out in its pleading, that it should at least be entitled to a \$10,000 reduction for the “finder’s fee” that Electricron was to pay to Anthony Presta. Mr. Presta testified that Rob Ragno had offered to pay him \$10,000 if Electricron got the job. Mr. Ragno squarely denied it in his own testimony. Mr. Presta further testified that he told Mr. Ragno that he did not

want the payment and, after telling Mr. Commisso about it, Mr. Commisso wanted the amount reduced from Electricron's price.

[40] The evidence on the purported \$10,000 "finder's fee" is limited to Mr. Presta's testimony that it was offered, Mr. Ragno's testimony denying it, and Mr. Commisso's hearsay testimony about what Mr. Presta told him. Timing of the alleged finder's fee proposal was not clearly addressed at trial. Based on Mr. Presta's testimony, though, it appears to predate Electricron's estimate. That timing is material. If I accept Mr. Presta's evidence that Mr. Ragno offered a finder's fee, then Mr. Presta says he rejected it. There is no cogent evidence before me supporting that that Electricron's estimate was generated prior to Mr. Presta declining the purported finder's fee, or that the estimate was grossed up to include the finder's fee. The position appears to be entirely based on Mr. Commisso's subjective view that the finder's fee was built into the total price quoted by Electricron.

[41] Objectively, I find no basis on which to support that a finder's fee was included in Electricron's estimate or that there was any agreement to reduce Electricron's price by \$10,000 (or any other amount). I accordingly find that Electricron's estimate did not include any "finder's fee" of \$10,000 and, accordingly, that the price is not properly reduced to account for it.

iii. Did the parties agree on the scope of the work?

[42] Rob Ragno testified that Enzo Commisso provided him with a copy of the building permit, architectural drawings, and Tigris' mechanical and electrical drawings for Motorino Citta. As noted earlier in these reasons, Mr. Ragno testified that the scope of work outlined in Electricron's estimate was based on Tigris' drawings.

[43] Electricron's estimate also identifies various exclusions. Mr. Ragno testified that the listed exclusions were items like fire alarm, data/communication low voltage wiring, and appliances, ovens, and related connections from the junction box. The estimate further notes that fixtures and lighting supplied by Electricron are limited to "Pot Lights, Multiples, Trouffers and Track Lighting", which Mr. Ragno testified were general lighting that could be obtained anywhere. All other lighting is noted in the estimate as being supplied by Motorino, although installation of that owner-supplied lighting was included in Electricron's quote. Mr. Ragno testified that decorative lighting that was site-specific to the design of the space could not be priced without specific instructions on what to order or where to order it from, so it was excluded.

[44] Motorino concedes that the electrical scope of work for the restaurant includes the electrical design as set out in Tigris' drawings. However, Enzo Commisso's evidence is that the scope of work included additional elements from the Motorino restaurant in King City that may not have been reflected in Tigris' drawings. Ms. Commisso testified that those elements would have been noted or discussed during a purported walkthrough by Rob Ragno at the King City restaurant.

[45] Despite Motorino's evidence at trial on what it argues comprised the base contract scope of work, Electricron argues that its scope of work was not put in issue by Motorino in its statement of defence. It argues that the statement of defence is unambiguous that Motorino accepted the scope of work as set out in the estimate. I agree.

[46] Although para. 3 of the statement of defence denies that Motorino accepted the quote from Electricron, it challenges only price on the basis that the parties agreed to reduce it. At para. 4 of the statement of defence, Motorino specifically pleads that “for the fixed price estimate (less the reduction promised and sought) the Plaintiff was to provide all of the materials and services set out in the estimate” (emphasis added). There is no reference to any other scope of work.

[47] That admission is, in my view, sufficient to reject Motorino’s position that I should consider the purported walkthrough by Rob Ragno at the Motorino restaurant in King City. However, I would have rejected that argument in any event.

[48] Mr. Commisso testified that, during an early meeting, he told Mr. Ragno that he wanted the same look and feel as the King City restaurant for the subject location in Toronto. Mr. Ragno agrees that it was discussed. Motorino thereby argues that the electrical layout at the King City location is also relevant.

[49] Mr. Commisso testified to a walkthrough having occurred in which Mr. Ragno reviewed the King City location. Mr. Ragno acknowledged attending the location, but he denies that there was ever a “walkthrough” or that he was ever directed to do one. He testified that the Toronto job was priced based only on Tigris’ drawings, with no reference to the King City location.

[50] I prefer Mr. Ragno’s evidence on this issue. Neither Mr. Commisso nor Mr. Presta, who were Motorino’s only witnesses at trial, were present during the purported walkthrough. Mr. Commisso testified that he knows that Rob Ragno viewed the restaurant because he spoke to the restaurant manager about welcoming Mr. Ragno and walking him through everything. The manager was not called as a witness. Mr. Commisso’s testimony on the walkthrough was not corroborated through other means. I have accordingly been provided with no evidence that cogently contradicts or calls into question Mr. Ragno’s testimony. Self-serving hearsay evidence from Mr. Commisso is insufficient to do so. I give it no weight.

[51] Also, Mr. Ragno’s unchallenged testimony is that he never received any electrical drawings for the King City location. Motorino has not explained how, objectively, it would be reasonable to expect Electricron to depart from approved mechanical and electrical drawings for the Motorino Citta restaurant, on its own initiative, in order to incorporate electrical design elements from a different location, all without engineer review and approval.

[52] I have no doubt that Mr. Commisso intended Electricron’s scope to include all electrical work necessary to achieve the same look and feel as the King City restaurant. However, since contract formation is assessed on an objective standard, Mr. Commisso’s subjective understanding of the scope of work is immaterial.

[53] With respect to the scope as set out in the estimate, Tigris’ drawings are not specifically referenced. Instead, the estimate sets out a specific electrical scope of work items under five areas in the restaurant: the three public washrooms, the kitchen and staff washrooms, and the dining area. Electricron submits that these areas correspond to Tigris’ drawings. Mr. Ragno correlated the estimate to Tigris’ drawings during his testimony. As already above, Motorino does not dispute

that Electricron's scope of work included the electrical scope outlined in Tigris' drawings, so I accept Mr. Ragno's evidence on this point.

[54] I accordingly find that, objectively, the estimate was made with reference to Tigris' issued for permit mechanical and electrical drawings, but not with reference to or including anything else, including elements from the King City location. I find that Electricron's scope of work as set out in the estimate should be read only in conjunction with and by reference to Tigris' drawings.

iv. Did the parties agree on a completion date?

[55] As already noted, failing to agree to a completion date is not fatal in deciding whether a valid contract was formed. Nevertheless, I find that the parties did agree to a completion date for Electricron's work, namely by the end of Motorino's rent-free period.

[56] Mr. Ragno testified that Mr. Commisso agreed to have Electricron commence work once he had the keys to the premises, which was to be on February 1, 2019, and that he understood that Motorino had four months of rent free time from that point to fit out the restaurant before lease payments would start. Mr. Ragno testified that there was no firm date discussed for Electricron to complete the electrical work, but acknowledged that Mr. Commisso did want all work completed during the rent free period. Mr. Commisso's testimony is consistent with that expectation. Objectively, I find that, on a balance of probabilities, the parties understood and agreed that Electricron's work was to be completed by that time.

b. Are any of the claimed changes and extras recoverable?

[57] Electricron's estimate was based on Tigris' issued for permit drawings. During examination in chief, Rob Ragno confirmed that there were no changes in Tigris' issued for construction drawings impacting the original estimate. Lighting locations and power layout remained the same and certain fixtures that had been "TBD" in the issued for permit drawings were now specified as being supplied by the owner. The light fixture inclusions (and associated counts) and exclusions in Electricron's estimate remained the same.

[58] Electricron claims changes and extras outlined in three invoices: a general invoice for various changes and extras (\$19,395), an invoice for air conditioning unit hookups (\$7,000), and an invoice for the supply and installation of GFCI receptacles (\$175). All of the changes and extras identified in the three invoices are argued to have been directed or approved by Motorino.

[59] Motorino's position is that, with only a few exceptions, the claimed extras form part of Electricron's existing scope of work and, even if they did not, Motorino did not provide written instructions to proceed with any changes or extras and did not approve them. Motorino also asserts that the amounts charged by Electricron for extras were never agreed.

[60] Electricron has the onus of proving its claim for changes and extras. I find that Electricron has failed to prove that claim, with three exceptions.

i. Relevant legal framework for extras

[61] Motorino cites my decision in *Reid v. Xiao*, 2021 ONSC 7468 at para. 41 for the law relevant to extras. That decision relies on my summary of the law in the prior case of *Osmi Homes v. Kumar*, 2020 ONSC 2712 at paras. 93-94. The key principles applicable to assessing extras, as I summarized in those cases, are as follows:

- (a) For fixed price contracts, in the absence of a contractual provision addressing how extras are to be dealt with, an express or implied agreement is required covering the supply of and payment for work beyond the scope of the contract.
- (b) A contractor who performs work or supplies materials not called for by the contract, and who does so without instructions or consent of the owner (either express or implied), is not entitled to charge for that extra work.
- (c) What amounts to instructions from the owner will depend on the circumstances relating to each item of work, but an owner may be found to impliedly assent or acquiesce to the extra by conduct such as knowingly permitting the contractor to perform work without giving definite instructions.
- (d) There are three primary considerations in assessing extras, namely (i) whether the base contract scope of work changed so fundamentally that the contract price no longer applies to the services and materials actually supplied, (ii) whether there was an express or implied agreement for supply of services and materials claimed as extras, and (iii) in the absence of agreement on a price for the extras, whether the value of extras has been proven on a *quantum meruit* basis.

[62] These are the principles that I have applied in assessing Electricron’s claim for extras.

ii. Agency – Approval of extras by Anthony Presta

[63] Electricron argues that the majority of its claimed changes and extras were directed by Anthony Presta, who is argued to be an agent of Motorino and, accordingly, authorized to direct and approve changes. I find that he was not an agent of Motorino.

[64] Neither side put forward any relevant law on agency. I have discussed it in my prior decision in *Bellsam Contracting Limited v. Torgerson*, 2023 ONSC 468, at paras. 64-66. The key principles are as follows:

- (a) The onus of proving agency lies with the party dealing with the agent. That party must prove either actual or apparent authority.
- (b) Actual authority arises from an express or implied agreement between the agent and principal. It is demonstrated through a “manifestation of consent” by the principal to the agent that the agent may act for or represent the principal.
- (c) Apparent authority is concerned with the appearance of authority to third parties. It requires the principal to make some representation, including through omission,

that a reasonable person could rely upon in concluding that the agent has authority to act. A representation by the alleged agent alone is insufficient.

[65] I am satisfied that Mr. Presta had no actual authority. Mr. Commisso testified clearly that Mr. Presta did not have any authority to direct or accept extras. He described Mr. Presta as the construction supervisor on site, but described himself as “the money guy”. Mr. Commisso was clear in his testimony that only he had authority to approve extras. He testified that he told Rob Ragno “all along” that he would deal with anything involving money.

[66] Anthony Presta’s testimony is to the same effect. He testified that that he had nothing to do with pricing. He was just on site. He also testified clearly that Mr. Commisso had final authority on all construction and financial decisions. Mr. Presta clearly stated that he had no approval authority for changes and extras.

[67] I also find that Mr. Presta had no apparent authority. The only evidence of a “representation” by Enzo Commisso about Anthony Presta’s role are instances where Mr. Commisso told Rob Ragno to speak to Mr. Presta about on-site matters. These do not assist Electricon. There was no evidence that Mr. Ragno was specifically directed to deal with Mr. Presta on approval of extras. Mr. Presta was a site supervisor. I do not agree that a reasonable person would rely on the circumstances under which Mr. Ragno was directed to speak with Mr. Presta about on-site construction matters to conclude that it also meant Mr. Presta had authority to direct and approve extras.

[68] Matthew Hunter did testify to various changes and extras that were directed by Anthony Presta, but also testified that, after Mr. Hunter’s first month on site, he was dealing directly with Mr. Presta at Rob Ragno’s direction. Mr. Hunter did not testify to any cogent basis for believing that Mr. Presta had authority to approve extras, and certainly no representation by Mr. Commisso about it.

[69] I accordingly find that Anthony Presta had no actual or apparent authority to approve compensable changes and extras.

iii. General changes/extras (invoice no. 19095)

[70] The general invoice for changes and extras was generated by Electricon following a site walkthrough by Matthew Hunter, during which he reviewed the as-built electrical work against Tigris’ drawings to identify changes and extras. Prices for those changes are reflected in the invoice, with credits for the price of values for the original scope.

[71] Both Rob Ragno and Matthew Hunter testified on the changes and extras. Enzo Commisso generally deferred to Anthony Presta on questions about changes in the work. Mr. Presta was examined on them to a degree. Frankly, the evidence on changes and extras is far less detailed than I would have liked.

[72] Mr. Ragno’s testimony on extras was not particularly helpful. He spoke generally about extras and, later in his testimony, discussed in some greater detail the extras and credits identified

on Electricron's extras invoice. However, despite testifying that the majority of instructions for changes were given to him, with only some given directly to Matthew Hunter, Mr. Ragno's evidence focused on the changes themselves, not the circumstances under which Electricron was said to have been directed to make them.

[73] I accept Mr. Ragno's evidence that, for example, Electricron installed 2x4 troffers instead of the specified 2x2 troffers and converted a staff washroom into an office that required more power and more receptacles. However, Mr. Ragno did not testify in any detail about how and when the changes were directed and what was discussed when they were directed. Rather, he testified only generally that most changes were directed on site by Anthony Presta "on the fly", purportedly leaving no opportunity to provide any pricing beforehand.

[74] Later in his examination in chief, Mr. Ragno testified that larger changes were directed by Mr. Commisso himself on-site, such as the change from 2x2 troffers to 2x4 troffers, or were discussed with Enzo Commisso. Mr. Ragno testified that that Mr. Commisso typically repeated what Mr. Ragno characterized as a common line: "be fair with me". It was Mr. Ragno's understanding that the list of changes and prices would be reviewed at the end of the job.

[75] Matthew Hunter's testimony focused more on how the extras were confirmed and priced near the end of Electricron's work. He did testify that smaller changes, such as USB plugs and an additional bench, were not discussed with Anthony Presta. Mr. Presta is said to have directed that the work get done and price was not the question.

[76] Mr. Presta was not asked during his examination-in-chief about his knowledge of or involvement in the specific extras claimed by Electricron. During his cross-examination, Mr. Presta acknowledged that some specific changes were directed by Mr. Commisso during the course of construction. However, his evidence was too general to be helpful. Specific items that Mr. Presta identified were not connected to items on Electricron's extras invoice.

[77] For example, Mr. Presta acknowledged during his cross-examination that heat lamp wiring had to be redone by Electricron following a change by Motorino. Mr. Presta believed the rewiring was required due to framing being incorrectly done, although Mr. Presta could not recall if he discussed the need to redo the work with either Mr. Ragno or Mr. Hunter. Mr. Presta was examined on the point with respect to a specific text exchange between Mr. Ragno and Mr. Commisso, which included a photograph of the specific area. Mr. Ragno was also examined on the photograph and work performed. His evidence is consistent with Mr. Presta's evidence. I accept and find that Electricron was required and directed to rewire the area due to changes in another trade's work. The problem is that, if it is a claimed extra, the rewiring was not correlated in evidence to any specific item or items of extra work claimed in Electricron's extras invoices.

[78] Mr. Presta was directly examined on Electricron's extras invoice. However, he was unable to confirm whether many items listed in the invoice resulted from directed changes. Mr. Presta did accept that certain listed items would not have been performed at Electricron's own initiative, such as upgrading dishwasher power, but he did not recall giving directions on the items or any discussions about them. Accordingly, Mr. Presta could not confirm that the work was directed or completed.

[79] Given the foregoing, coupled with my finding that Anthony Presta was not an agent of Motorino with authority to approve extras, I find that Electricron has generally failed to demonstrate that there was any agreement, express or implied, for the claimed changes or extras. There are a few exceptions.

[80] Mr. Presta acknowledged the change claimed by Electricron from 2x2 LED troffer to 2x4 LED troffer, which is a change that he believed he directed Electricron to complete. He further confirmed that moving a walk-in freezer from the upstairs area (as it was on the Tigris drawings) to a downstairs area was something Mr. Commisso told him to get moved, and for which he directed Electricron to move the wiring. Otherwise, Mr. Presta was unable to confirm that any of the items claimed by Electricron as extras were, in fact, changes or extras to its scope of work.

[81] I am satisfied that Mr. Commisso was aware of the light fixtures being changed and that he directed that the walk-in freezer be moved to the downstairs area. The record accordingly supports either an express or implied agreement for these changes to proceed. Electricron has otherwise failed to prove that Motorino authorized or was even aware of the balance of changes and extras outlined in invoice no. 19095. That finding is, in my view, dispositive of the claim for those items.

[82] Motorino also argues, regardless of any agreement to perform the work, that there were no discussions about or agreement on price for any of the claimed extras. I agree that there is no clear and cogent evidence that the price for any of the claimed extras in invoice no. 19095 was discussed, let alone agreed.

[83] After rendering Electricron's change invoice, a meeting occurred between Mr. Ragno, Mr. Commisso and "John" (an individual who did not testify at trial because he passed away prior to it). Mr. Ragno testified that, at that meeting, Mr. Commisso was irate and challenged the price of the extras. Mr. Ragno's view was that Mr. Commisso only wanted a better price for the changes, but did not dispute that the extra work had been done.

[84] Absent agreement to price, Electricron bears the onus of proving the value of claimed extras on a *quantum meruit* basis. During cross-examination, Matthew Hunter confirmed that he maintained records of all workers and their worked hours, as well as supplier invoices, but did not provide them to Mr. Ragno. The fact that supporting labour timesheets and material costs are available, but were not produced in the litigation is problematic for Electricron. Without them, there is no objective evidence by which to assess the amounts charged as extras for new materials and the reasonableness of credits given for substituted materials. Electricron produced the documents a few days before trial and moved at the outset of trial for leave to tender them, which Motorino opposed. I denied leave and dismissed Electricron's motion for reasons given orally at the time, with costs of the motion reserved in any event of the trial.

[85] Actual costs do not appear to have been the basis for calculating the charged amount of the extras. Mr. Hunter testified that the final extras invoice was determined by him performing a walkthrough with the drawings, marking off everything done on the project and noting whether there should be an additional charge or a credit given. He testified that he would then have spoken

with Rob Ragno with his notes to discuss them and come up with a “fair market price” for each item. However, his notes on the copy of the drawing were not kept.

[86] Neither Mr. Ragno nor Mr. Hunter gave any evidence on how they determined the “fair market price” for each extras item, except that Mr. Hunter testified on the labour rate used. He said nothing about using actual material costs. Without clearer evidence on the factors considered when deciding the price, I cannot fairly assess the amounts charged and credits given. The labour rate is no different. Mr. Hunter used a labour rate of \$65 per hour, but that rate was not, in my view, established to be a standard market labour rate for electrical work.

[87] Electricon points to *Nijar v. Feldman*, 2020 ONSC 552 at para. 100, that *quantum meruit* is an equitable remedy that must be “flexible” and adapted to the requirements of fairness in the circumstances of each case. I am also mindful of the Court of Appeal’s observation that a trial judge is obliged “to do his or her best” to assess damages on available evidence even where quantification is difficult: *TMS Lighting Ltd. v KJS Transport Inc.*, 2014 ONCA 1, at para 61. In my view, it would be unjust to deny Electricon any recovery on the claimed extras for the light fixture changes and additional wiring work required for the relocated walk-in freezer, which I have found were agreed by Motorino.

[88] Electricon claims \$5,000 for the upgraded 2x4 LED light fixtures, representing a claimed cost of \$250 for 20 lights. Electricon has then credited 2x2 LED light fixtures and LED pot lights. The net is a claimed extra of \$1,400. There is no question that the lights were changed with Motorino’s agreement. I accept Mr. Hunter’s evidence on the count as compared to Tigris’ drawings, but there is no corroborating evidence for the fixture prices used by Mr. Hunter. I accordingly allow only \$1,000, plus HST, as the net extra for the light substitution.

[89] Electricon claims \$750 for the cost of relocating the power for the walk-in cooler by approx. 70 feet from where it was located on Tigris’ original drawings. I accept that the electrical supply was moved 70 feet, since Mr. Hunter’s testimony on how he conducted his walkthrough supports that he would have taken an accurate measurement. In the absence of cogent evidence on the quantum, though, I cannot allow it in full, but it was a directed change that would clearly have involved extra work, so I also cannot deny it. “Doing my best”, I allow \$500, plus HST, as the extra for the walk-in freezer relocation.

[90] The balance of changes and extras on invoice no. 19095 have not been made out and I dismiss Electricon’s claim to be paid for them. In my view, there is no inequity in doing so. Electricon acted on the direction of Mr. Presta on a misplaced assumption that he had authority to approve extra work. As discussed above, there is no cogent evidence before me of any instruction from or representation by Mr. Commisso that extras could be directed and approved by Mr. Presta. Mr. Ragno did not ask Mr. Commisso for approval of changes nor did he discuss a price before proceeding. Electricon thereby assumed the risk of non-payment for extras by not obtaining approval from Motorino prior to performing the work. Whether or not Mr. Presta was giving directions “on the fly” does not assist Electricon without a finding of agency, which I have not made. The juristic reason for denying an extras claim by a contractor in such circumstances is unfairness to the owner from having to pay for services or materials that it did not authorize and were unknown to it prior to the supply.

[91] Given my disposition above, I need not address whether claimed extras were or were not duplicative of Electricron's base contract scope of work.

iv. Air conditioning hookups (invoice no. 19088)

[92] There is no dispute that Electricron installed hookups for certain air conditioning units that were to have been supplied by the landlord, but were not so done in a timely manner and needed to be installed before commissioning. Trial evidence supports that Motorino did ask Electricron to install the air conditioning units and was aware that the work was being performed. Price, though, is disputed.

[93] Mr. Ragno's evidence is that the parties agreed to \$7,000, plus HST, as invoiced by Electricron. Mr. Commisso testified that he told Mr. Ragno that if he would do the work for \$4,000, then he would approve it. He testified that he never approved \$7,000, that he only agreed to pay \$4,000, and that the price was not raised again until Electricron invoiced the work in August 2019.

[94] The evidence at trial supports that Mr. Ragno identified the air condition work to Mr. Commisso as "a \$7000 extra" for which he sought approval. That is set out clearly in an email dated July 31, 2019. There is no written record of acceptance. Mr. Ragno says he never agreed to do the work for only \$4,000. He testified that amount would have been well below his own actual cost for the work, which he estimated to be \$4,800, excluding labour.

[95] Mr. Ragno testified that he spoke with Mr. Commisso by telephone and received a go-ahead. Mr. Commisso is said to have advised Mr. Ragno that the cost would be back charged to the landlord/developer in any event. Mr. Commisso denies it.

[96] Even taking into account my earlier credibility findings, I am not convinced that, on a balance of probabilities, Mr. Commisso did verbally accept \$7,000. I find it odd that Mr. Ragno did not provide anything in writing to Mr. Commisso (or to Matthew Hunter) about the alleged verbal approval, particularly given that Mr. Ragno felt a written approval was needed when sending the email to Mr. Commisso in the first place.

[97] I am satisfied and find that, on a balance of probabilities, there was no agreement as to price for the air conditioning unit hookups. It accordingly falls to Electricron to prove the value of the work on a *quantum meruit* basis. I find it has not done so.

[98] No evidence was tendered at trial on how the \$7,000 figure was determined. As noted above, Mr. Ragno estimated his actual costs to be \$4,800, excluding labour, but the basis for that estimate was not explained. Matthew Hunter performed the work. He confirmed during cross-examination that he had purchased the equipment and materials necessary to complete the installation work. He further confirmed that he would have received supplier invoices setting out the cost. Those documents were not produced in the litigation and leave to tender them at trial was denied.

[99] I am accordingly unable to find that the cost of the work exceeded the \$4,000 amount that Mr. Commisso testified he was willing to pay, or that Electricron's actual cost of the work exceeded that amount, as alleged. I accordingly allow \$4,000, plus HST, for the air condition hookups.

v. GFCI receptacles (invoice no. 19094)

[100] Enzo Commisso testified that he was unaware of the GFCI receptacle extra work prior to being invoiced by Electricron. It was never quoted, sent to him, or approved. I accept that extra GFCI receptacles were directed by the Electrical Safety Authority ("ESA") during its inspection on August 20, 2019. However, whether or not Electricron was directed to do the work by a governing authority does not absolve it from complying with the common law requirements for obtaining approval from the owner. If Electricron expected Motorino to pay for them, then the decision on whether or not to install additional GFCI receptacles in compliance with direction from the ESA ultimately rested with Motorino, not Electricron. Since this extra was not performed with prior knowledge or approval of Motorino, I am dismissing Electricron's claim for it.

c. Has Motorino proved that any of Electricron's work was deficient or incomplete?

[101] Motorino's set-off claim is for amounts paid to various trades to rectify alleged deficiencies and to complete Electricron's outstanding work. In particular, Motorino has tendered invoices from Rhinotek Entrance Solutions, Steadfast Safety Services, Ridgeline Electric Inc., and Connect Cabling, who are alleged to have performed work that Motorino argues was the responsibility of Electricron.

[102] I find that the evidence tendered by Motorino does not support any finding that the alleged deficiencies existed or that work alleged as incomplete was, in fact, incomplete when Electricron left the site. Moreover, Motorino has not proved that that the claimed rectification and completion work was completed by the trades or is within Electricron's contractual scope of work.

[103] Objective evidence of alleged deficiencies is required at trial, commonly involving evidence such as photographs of the deficiencies and the trades who completed rectification work being called as witnesses: *Wo-Built Inc. v. Sangster*, 2011 ONSC 3121 at para. 81.

[104] No cogent evidence was tendered at trial to support Motorino's set-off claims. Trade invoices were tendered, but without any clear evidence explaining the work performed or connecting it to Electricron's contractual scope of work. During their testimony, neither Rob Ragno nor Matthew Hunter provided any clear concession that work outlined in the various trade invoices was within Electricron's scope. Representatives from the trades performing the work were not called at trial. Only Enzo Commisso and Anthony Presta testified on the alleged deficiencies and incomplete items. Authenticity of the trade invoices was challenged by Electricron, but those invoices were not authenticated in evidence at trial.

[105] Mr. Commisso confirmed during his examination in chief that he was not familiar with the deficiencies, since Anthony Presta dealt with them. During his cross-examination, Mr. Commisso further acknowledged that he was not dealing with the construction. In light of that evidence, I have given no weight to Mr. Commisso's views on deficiencies in Electricron's work, particularly

since he insisted that the claimed trade invoices were part of Electricon's scope of work while at the same time, in several instances, acknowledging that he did not know what specific work was captured by the descriptions of work outlined in the trade invoices. Mr. Commisso also testified that the 4trade invoices were paid, but there is no corroborating evidence of payment.

[106] Despite Mr. Commisso deferring to Anthony Presta on deficiencies, Mr. Presta's examination on them was quite limited and did not tie the work in the trade invoices to Electricon's scope of work. Notably, Mr. Presta was not asked for his own recollections and independent knowledge on what work was deficient or incomplete. Instead, he was shown each of the trade invoices for completion and rectification work and asked questions arising from them, effectively being led through his examination using the trade invoices as guideposts.

[107] Moreover, Mr. Presta confirmed that, for certain incomplete or deficient items, the reason he believed they were within Electricon's scope of work is because he was told that by Mr. Commisso. For other work he said he believed it was in Electricon's scope of work because it was something present at the King City location. He was not, though, taken to Electricon's estimate or Tigris' drawings to correlate Electricon's scope of work to the trade invoices. Hearsay from Mr. Commisso and Mr. Presta's subjective belief is insufficient evidence on which to find that the work completed by other trades was, in fact, within Electricon's scope.

[108] Motorino has failed to meet its evidentiary onus and I accordingly dismiss its set-off claim on that basis. I thereby need not address Electricon's arguments that it was given neither notice of deficiencies nor a reasonable opportunity to remedy them.

d. Did Electricon complete its required scope of work?

[109] The testimony of both Rob Ragno and Matthew Hunter supports that all of Electricon's work was completed. Enzo Commisso deferred to Anthony Presta on what work was performed, but Mr. Presta's testimony did not dispute the testimony of Mr. Ragno and Mr. Hunter, except in a fairly general way. Given my finding that Motorino has not made out the alleged incomplete work and deficiencies, I am satisfied that Electricon has met its onus of demonstrating that it completed its contractual scope of work.

[110] I accordingly find that Electricon has proven an adjusted total contract price of \$92,750, plus HST. That pre-tax figure is comprised of the base contract amount of \$87,250, plus \$5,500 in extras that I have found to be recoverable.

e. Who breached the parties' contract?

[111] In the course of litigation, Motorino had maintained that Electricon's work was delayed. Certainly, Electricon's work was not completed within the anticipated four-month period that I have found was understood and agreed by the parties. Based on the evidence at trial, there is certainly a triable issue on whether Electricon or Motorino is responsible for delay and, if so, to what extent. Nevertheless, Motorino's delay allegations were not pursued at trial, nor was delay argued to be a breach of contract in closing submissions. I accordingly need not address that.

[112] Given my findings above that Motorino has failed to prove the alleged deficiencies and incomplete work, I find no conduct that amounts to a breach of contract by Electricron.

[113] I have found that Enzo Commisso misled Rob Ragno in obtaining a return of the post-dated cheques under the guise of replacing them. Further cheques were never provided and Motorino failed to make any further payments to Electricron. Even ignoring the disputed changes and extras, the base contract price was not paid in full, despite the work being completed. I accordingly find that Motorino breached the parties' contract by non-payment.

f. Is Electricron's lien timely?

[114] Timeliness of Electricron's lien is challenged by Motorino. Specifically, Motorino argues that the lien was not preserved in time under the *Construction Act*, RSO 1990, c C.30.

[115] Electricron is a "contractor" under the *Construction Act*. There was no certification or declaration of substantial performance of Electricron's contract, so Electricron's lien expired 60 days after the date the contract was completed, abandoned, or terminated: *Construction Act*, s. 31(2)(b). Electricron's claim for lien was registered on October 18, 2019. Neither abandonment nor termination were argued (and neither is supported by the evidence at trial). The question is whether the contract was completed on or after August 19, 2019. If not, then the lien was preserved out of time.

[116] Electricron's claim for lien asserts a last supply on September 6, 2019. Motorino submits that there is no evidence of contract work being performed after it rendered its first invoices on August 17, 2019. Assuming all work had been completed by that time (hence Electricron was invoicing), Motorino submits that Electricron's lien had already expired when it was preserved.

[117] A contract is deemed to be completed when the price of completion, correction of a known defect, or last supply is not more than the lesser of 1% of the contract price and \$5,000: *CLA*, s. 2(3). Given my findings on extras, the total contract price was \$92,750, plus HST, meaning that the price of completion, correction of a known defect, or last supply by Electricron occurring on or after August 19, 2019 must be at least \$927.50, else Electricron's lien was preserved after it had expired.

[118] On August 14, 2019, a modest list of outstanding work was sent by text from Rob Ragno to Enzo Commisso. It identified outstanding work to be exit signs, two master switches, installing a grinder plug, installing a refrigerator plug, installing electrical receptacles in the converted office, and installing pizza bar lights and heat lamps. No evidence on the value of that work was tendered.

[119] On August 17, 2019, Mr. Ragno texted Mr. Commisso, stating, "We will be contract complete as of Tuesday," referring to August 20, 2019. Evidence supports that the ESA subsequently conducted its final inspection of Electricron's work on August 20, 2019. On the same date, Rob Ragno sent an email to Enzo Commisso, copied to Anthony Presta and Matthew Hunter, confirming that the ESA inspection had passed, but also identifying a list of certain outstanding items impacting completion of electrical work.

[120] A final walkthrough occurred on August 22, 2019. Rob Ragno, Enzo Commisso, Anthony Presta, and Matthew Hunter were all in attendance. Following the walkthrough, Mr. Hunter sent Mr. Presta a list of outstanding work by text message. Separately, Mr. Commisso texted a list of thirteen items of outstanding work to Mr. Ragno, which Mr. Commisso confirmed during his cross-examination outlined work remaining to be completed by Electricron. Mr. Hunter testified that the two lists were largely the same.

[121] There is some evidence that Electricron continued work after the ESA inspection up until September 5, 2019, but little evidence on whether it was deficiency remediation work (which was ongoing) or incomplete contract work (such as plug installation work on September 5, 2019). Mr. Hunter testified that, after the site walkthrough on August 22, 2019, he and his workers were on site completing the punch list items that he had texted to Anthony Presta. That work was said to have proceeded between August 23 and 26, 2019. Mr. Hunter testified that Electricron's work was ultimately finished on September 4 or 5, 2019. Mr. Presta similarly testified that Electricron was not off-site until the end of August or beginning of September.

[122] I find that work was still ongoing after Electricron's invoice on August 17, 2019 and, more pertinently, after August 19, 2019. Notably, Mr. Hunter's evidence, which I accept, supports ongoing work on the list of items that he texted to Anthony Presta until at least August 26, 2019.

[123] I would have preferred clearer and more direct evidence on the nature and value of work being completed after that date. Nevertheless, on the totality of the evidence, and having regard to the cost details in Electricron's invoices, I am satisfied that the price of completion or correction of known defects performed after August 19, 2019 was at least \$927.50. I accordingly find that Electricron's lien is timely.

IV. CONCLUSION

[124] For the reasons set out above, I find that Electricron has proven and is entitled to a lien in the amount of \$66,307.50, including HST, being the total price for services and materials of \$92,750, plus HST, less the payments of \$38,500. Electricron shall all have judgment against Motorino for breach of contract in the same amount, plus pre-judgment interest.

V. COSTS, INTEREST & REPORT

[125] My trial decision has been significantly delayed as a result of personal circumstances and through no fault of the parties. I regret that delay and any impact it may have had on the parties.

[126] Counsel for Motorino has recently provided information to the court that Motorino made an assignment (or was ordered) into bankruptcy on July 16, 2024. Electricron's action is stayed by that bankruptcy by operation of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3. This trial was completed prior to the bankruptcy, so I have still released my decision. Subject to hearing submissions, determining costs is a new step that would appear to be captured by the stay of proceedings.

[127] Electricon's lien attaches to and is enforceable against the lien security in court upon issuance and confirmation of my report. I would typically deal with costs and any disputes over the calculation of pre-judgment interest before issuing a report on this reference.

[128] The parties previously exchanged bills of costs. At the conclusion of trial, only Electricon uploaded its bill of costs to CaseLines (now Case Center) as directed. As a result, I do not have a copy of Motorino's bill of costs.

[129] I encourage Electricon to coordinate with Motorino's trustee in bankruptcy on any necessary lift-stay order and/or an order to continue, whether and how costs of the action should be addressed, whether there is any dispute on calculation of pre-judgment interest, and whether and when a report from this reference may issue. A hearing may be arranged through my Assistant Trial Coordinator for required directions or, once the bankruptcy hurdle is addressed, to make any necessary submissions on costs, calculation of pre-judgment interest, and to address the form of report.

ASSOCIATE JUSTICE TODD ROBINSON

Released: September 13, 2024

CITATION: Electricon Services Inc. v. 2622059 Ontario Ltd., 2023 ONSC 5072
COURT FILE NO.: CV-19-631271
DATE: 2024 09 13

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 :

ELECTRICON SERVICES INC.

Plaintiff

- and -

2622059 ONTARIO LTD. and
ADELAIDE AND ONTARIO HOLDING CORP.

Defendants

REASONS FOR JUDGMENT

Associate Justice Todd Robinson

Released: September 13, 2024