IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Savory 2588 Developments Ltd. v. HQM Contracting Ltd.,* 2024 BCSC 1733

Date: 20240918
Docket: 247666
Registry: Victoria

Between:

Savory 2588 Developments Ltd.
and Eagle Crest Canada Construction Ltd.

Petitioners

And:

HQM Contracting Ltd., 6 Mile Island Contracting Limited
and All In One Concrete Ltd.

Respondents

Before: The Honourable Justice A. Saunders

Reasons for Judgment

Counsel for the Petitioners:	L. LeBlanc, K.C.
Counsel for the Respondents:	J. Ough
Counsel for Cobrafer Construction Ltd.:	A. Lam
Place and Date of Hearing:	Victoria, B.C. August 13, 2024
Written Submissions Received:	August 15, 16, 21 and 22, 2024
Place and Date of Judgment:	Victoria, B.C. September 18, 2024

Introduction

[1] This is a petition under s. 23 of the *Builders Lien Act*, S.B.C.1997, c. 45 [*BLA*] to remove builders liens on a construction project filed by the respondents, subtrades to the project, upon payment into court of security in the amount of $182,229.39, inclusive of GST, which sum the petitioners submit is sufficient security in respect of the statutory 10% holdback amount they are required to maintain under *BLA* s. 4.

[2] The petitioners are the owner of the project, Savory 2588 Developments Ltd. (“Savory”) and Savory’s general contractor, Eagle Crest Construction Ltd. (“Eagle Crest”). Eagle Crest subcontracted structural and landscape concrete work (the “Contract”) to the subcontractor Cobrafer Construction Ltd. (“Cobrafer”). The respondents, the lien claimants, were subtrades contracted to Cobrafer.

[3] The petitioners claim the Contract was abandoned and not fully performed by Cobrafer. Cobrafer says it terminated the Contract for non-payment, and that its work under the Contract is substantially complete. Cobrafer submits that it also has a lien against the project (not in issue on this application), in respect of unpaid invoices in the amount of $777,642.92.

[4] The respondents’ filed lien claims against the project, which the petitioners now seek to have removed from title. The lien claims total $276,086.10. The respondents submit that they remain unpaid for work performed prior to Cobrafer’s termination of the Contract. The respondents assert in their filed response to petition that they intend to commence proceedings to enforce their rights to a release of any holdback funds paid into Court as security, once the amount of the security is determined.

Issue

[5] The petitioners seek to pay an amount of security, in substitution for the respondents’ liens, that is approximately $93,857 less than the respondents’ total lien claims. The petitioners rely on s. 23 of the *BLA*, the effect of which is that the

lien claims will be discharged upon payment of the lesser amount of (a) the total amount of the filed claims, or (b) the amount owed by the petitioners to Cobrafer under the Contract, provided that amount is at least equal to the statutory holdback.

[6] The holdback, under s. 4, is equal to 10% of the greater of either the value of the work or materials actually provided under the Contract, (*BLA* s. 4(1)(a)), or of the amount of any payment made on account of the Contract price (s. 4(1)(b)).

[7] An order fixing the amount of security the petitioners are entitled to post to discharge the petitioners from liability in respect of the liens, that is less than the face amount of the liens, therefore requires determination of:

a) the amount owed by the petitioners to Cobrafer under the Contract;

b) the value of the work or materials actually provided to the petitioners by Cobrafer under the Contract; and,

c) the amount of payments made by the petitioners to Cobrafer.

Each of these amounts appears to be in dispute.

Positions of the Parties

[8] Generally, the petitioners say that a just amount of security may be determined on the evidence.

[9] The respondents however say the evidence on this application, which was brought on short notice, is lacking, and the amount of the holdback must be determined at trial or summarily. The respondents cite s. 23(4) of the *BLA*, which provides:

> (4) An application under subsection (1) … may be brought by an application in proceedings that have been commenced to enforce a claim of lien, or by petition, and the court may
>
> > (a) hear and receive evidence, by affidavit or orally or otherwise, that it considers necessary in order to determine the proper amount to be paid into court,

> (b) direct the trial of an issue to determine the amount to be paid into court, and
>
> (c) refuse the application if it is of the opinion that the determination of the total amount that may be recovered by lien claimants should be made at the trial of the action.

[10] Cobrafer supports the respondents' position, and further says that in the alternative the amount of security should be fixed at $268,503.18.

Discussion

[11] The petitioners rely on two affidavits filed by Tye Reidie, who describes himself as an "authorized instructing person" for the petitioners. The majority of the evidence provided by Mr. Reidie is purported to be based on his personal knowledge, however his role with the petitioners is not stated and it is unclear to what extent the evidence he provides – for example, statements as to work orders approved – are matters he has direct knowledge of, as opposed to information he may have obtained from others. Mr. Reidie further relies on the purported results of a scope of work prepared by unnamed contractors (the "Scope of Work Table"), which puts the total value of the uncompleted, remaining work contracted to Cobrafer, and the cost of remedying deficiencies in Cobrafer's work, at $985,000.

[12] The petitioners say that when the uncompleted work and deficiencies in Cobrafer's work are accounted for, a holdback based on 10% of the amounts paid to Cobrafer to date is greater than 10% of the value of work or materials actually provided. The petitioners submit that the holdback should be calculated on that basis.

[13] The respondents and Cobrafer rely on an affidavit of a Ms. Do, a paralegal in the offices of Cobrafer's legal counsel, sworn largely on information and belief as to statements made by Cobrafer's CEO, Mr. Martinez.

[14] The petitioners acknowledge that Cobrafer has submitted invoices that remain unpaid, but – at least by implication – deny those amounts are owing. As I will describe, there is a live issue as to whether the petitioners are liable for invoices

submitted for work outside the scope of the original contract price: whether that work was carried out in accordance with the Contract's Change Order and Change Directive provisions.

[15] The petitioners do not provide a submission as to the amount currently owed; neither their evidence nor their submissions relate specific invoices paid as progress draws to particular work done. Rather, the petitioners, as I understand their argument, submit that when the value of the work left incomplete by Cobrafer on termination of the Contract is factored into the maximum Contract price, and the petitioners are given the benefit of a set-off for the cost of third parties remedying deficiencies – all of which is set out in the Scope of Work Table – any amount owing to Cobrafer is less than the statutory holdback calculated under s. 4.

a) First, the petitioners say – and it is common ground – that the original total maximum Contract price was $2,389,794.12. They further acknowledge there were Approved Change Orders totalling $51,988.13, effectively increasing the total maximum Contract price to $2,441,782.25 (the "Adjusted Contract Value"). That, it is submitted, represents the petitioners' maximum liability to the respondents, if all work had been performed.

b) Second, the petitioners point to the value, under the Contract's pricing, of the incomplete work as set out in the Scope of Work Table, which it submits amounts to $495,233.25. Deducting that amount from the Adjusted Contract Value means that the contract value of the work actually performed is $1,946.549.32; a 10% holdback of this amount would be $194,654.93.

c) Third, the petitioners further say that when the $489,766.75 cost to cure deficiencies, derived from the Scope of Work Table, is factored-in, the Contract value and 10% holdback are further reduced to $1,456,782.57 and $145,678.25, respectively. I understand the petitioners to say, in other

words, that this is the calculation of 10% of the value of the work or materials actually provided under the Contract under s. 4(1)(a)).

d) Finally, the petitioners submit that this "10% of the value of the work and materials" as properly calculated, is less than the "10% of the sums paid under the Contract", under s. 4(1)(b). The petitioners say that as of termination of the Contract, the total amount of progress draws paid amounted to $1,822,293.90. A 10% holdback of that amount would be $182,229.39.

[16] (The respondents' evidence is that a lesser total amount of progress draws has been paid to date; however, given that the s. 4(1)(b) calculation uses the greater of the "value" and "sums paid" figures, using the petitioners' higher figure works to the respondents' advantage.)

[17] As it is the greater of those two sums which is to stand as the holdback, the petitioners submit it is this amount of $182,229.39 that should be paid into Court, allowing the liens to be removed from title.

[18] To the extent there are uncertainties around the precise calculations, the petitioners rely on *M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd*., 2005 BCSC 1375, where Mr. Justice Johnston said,

> [59] In considering the amount to be paid or posted in return for cancellation of a claim of lien, I should not attempt to make findings that could cause difficulty for the judge who will hear the trial of these issues, but should instead attempt, with the evidence available, to fix a sum that fairly represents my view, based on the evidence tendered on this application, of an amount that will do justice between the parties under s. 24.

The petitioners submit that, given the evidence of extensive deficiencies and remaining work to be done, the amount suggested will do justice.

[19] As noted, Cobrafer contends that it is owed more than $777,000, under a series of unpaid invoices. The Do Affidavit states, on information and belief, that the

Contract is substantially complete, and sets out the following as the value of the work and materials actually provided under the Contract:

i. $2,275,994.70 plus GST for the original Contract scope;

ii. $49,512.50 plus GST in approved additions;

iii. $231,665.94 in "requested additional scope required by the Petitioners".

[20] The second Reidie Affidavit states that "no work orders have been approved" other than the $49,512.50 acknowledged by the petitioners, and that the "sums sought to be paid by Cobrafer…under change orders have not been approved and are disputed". The petitioners say that this direct evidence of Mr. Reidie is to be preferred to the affidavit on information and belief of Ms. Do. The petitioners further submit that the Do Affidavit sets out no exhibits evidencing the written agreement of the parties to modify the scope of work of the Contract price. Cobrafer, in reply, submits that the gap in the evidence is due to the last-minute filing of response to the short leave application, and that given the opportunity, it will be able to tender evidence of being directed by Eagle Crest to add additional contract feet of concrete.

[21] I find the petitioners' submission problematic in several respects.

[22] As to the notion that I am to fix a sum that will "do justice" between the parties, based on the evidence, I note that *M3 Steel* was decided under s. 24 of the *BLA*, which concerns applications to cancel liens on the posting of "sufficient security" (s. 24(1)), where the Court is given wide discretion to consider "all the relevant circumstances" and order the cancellation of a lien on the posting of security found to be "satisfactory". That section of the *BLA* stands in distinct contrast to s. 23, which is concerned specifically with lien claimants who have not directly contracted with the owner or payor. It requires that the total amount of the claims filed, the amount owing, and the required holdback, be judicially determined, and provides mechanisms under s. 23(4) for the reception of evidence to allow such determinations to be made.

[23] On this point, the petitioners further cite *Chandler v. Champion Enterprises (Canada) Ltd*., 2013 BCSC 1518 for the proposition that the Court may be satisfied with evidence of the value of work that is "less than precise". That, however, was a trial decision.

[24] I find it is not possible on the evidence before me to make a judicial determination of the factors that go into setting the amount required to be paid into Court. I outline the following concerns. My comments are brief, as nothing I say should embarrass or constrain any judge who will hear this matter going forward:

a) On the issue of the petitioners authorizing additional work or changes in the Contract price, whether by way of Change Orders, or – as the respondents point out is permitted by the Contract – Change Directives, I cannot fairly determine the issue on the basis of the affidavits. There is a conflict in the evidence. The petitioners point to Cobrafer's Notice of Termination of July 24, 2024, where Cobrafer's CEO Mr. Martinez refers to change orders and extra work orders that were "not accepted", but it is far from clear that this is a reference to all the work done under the disputed invoices. Weighing the relative strength of the Reidie and Do Affidavits on this issue is not appropriate on an application of this nature, and the respondents, and Cobrafer, ought to be given the opportunity to provide complete evidence on this point.

b) Furthermore, there is something to be said for the point that the strength of the first Reidie Affidavit shifted the burden to the respondents, and Cobrafer, to provide positive proof of written agreements. However, I note that the second Reidie Affidavit, only produced at the hearing, attached a copy of a March 22, 2024 email to Mr. Reidie from Mr. Martinez, in which Mr. Martinez acknowledges he missed substantial components of the work in costing his bid and seeks some accommodation to avoid a "monumental hit". The petitioners present this as evidence that Cobrafer substantially underbid on the Contract, the implication being that Cobrafer

bears responsibility for its apparent inability to pay its subtrades. One of the two "missed scopes" referred to in the email appears to have been the parking levels P2-P1, with an associated value of up to nearly half a million dollars. The copy of the email produced appears to have either the reply, or a forwarding comment, redacted. I would have expected an irregularity of this magnitude to have been the subject of at least some further correspondence or communications that would be relevant to this issue, but nothing further was disclosed by the petitioners and Mr. Reidie provides no evidence as to how that matter was resolved. It certainly seems possible from this disclosure that there will yet be pertinent evidence on the issue of the final scope of the Contract.

c) In respect of calculating the value of the purported outstanding work, the Scope of Work Table is not admissible evidence. Mr. Reidie does not say that he presents it on information and belief, and it could not be accepted as such, because contrary to Rule 22-2(13) of the *Supreme Court Civil Rules* [*SCCR*] the affidavit does not disclose the source of the information set out in the Scope of Work Table; it is described only as the result of a review by "contractors". Further, the Scope of Work Table was only disclosed the day of the hearing; with respect to both the incomplete work and the deficiencies alleged, the respondents and Cobrafer are entitled at least to further particulars, and perhaps discovery, of the supporting evidence.

d) It is not apparent to me how the claimed deficiencies have any bearing on the holdback amount. As was the case in one authority cited by the petitioners, *Pinnacle Living (Capstan Village) Lands Inc. v. Tarrier Group Inc*., 2023 BCSC 1315, deficiency set-offs may impact calculation of the amount owing by the petitioners to Cobrafer, under s. 23(b). The petitioners however cite no authority for the proposition that the cost of making good deficiencies is relevant to determining either the value of work or materials actually provided, or the amounts of payments made,

under s. 4. The petitioners' submission appears to conflate those two sections.

[25] Lastly, I note the petitioners cite *Lee & Sons Grocers Ltd. (Re)* (1998), 45 C.L.R. (2nd) 162, 1998 CanLII 2637 (BCSC), as an example of the Court making a s. 23 order on the basis of the petitioner owner's affidavit only, over the respondent's objection that determination of the holdback amount should not be made at that stage. Master Powers (as he then was) did note, however, that the respondent was not asking for an opportunity to file contradictory evidence; and further, it is apparent from Master Powers' description of the parties' positions that the respondent was not seeking to invoke s. 23(4), but rather was opposed to any security being posted in a lesser amount than the lien claims. That is not this case.

[26] The petition is adjourned. The petitioners are at liberty to apply for the order sought by way of converting the petition into a civil claim, with the petition to stand as the notice of civil claim, and proceeding with determination of the holdback amount by way of summary trial pursuant to *SCCR* Rule 9-7. I am not seized.

"A. Saunders, J."