

CITATION: DMD Building Systems Corp. v. 2665408 Ontario Inc. et al., 2024 ONSC 5425
BARRIE FILE NO.: CV-22-1438-00
DATE: 20241001

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *Construction Act*, R.S.O. 1990, c. C.30

BETWEEN:)
)
DMD Building Systems Corporation) Eddy J. Battiston, for the Plaintiff
)
) Plaintiff)
)
– and –)
)
2665408 Ontario Inc., Tango Design-Build)
Inc. and Blue Moon Financial Corporation)
)
) Defendants)
) **Heard: September 20, 2024 – In Writing**

2024 ONSC 5425 (CanLII)

DECISION ON MOTIONS FOR DEFAULT JUDGMENT

SUTHERLAND J.:

Introduction

- [1] The plaintiff is one of four construction liens registered against the premises and lands owned by the defendant, 2665408 (the “Owner”). The four lien claimants all had a contract with the general contractor, the defendant, Tango Design-Build Inc. (the “GC”).
- [2] The Owner and the GC have been noted in default in the construction lien proceedings commenced by the three lien claimants. The lien claimants seek judgment against the GC based on contract and the fixing of holdback and judgment against the Owner for holdback owed.
- [3] The four lien claimants are:
 - (a) The Plaintiff (DMD);
 - (b) CV-22-974 – Leen Steels Ltd. v. 2665408 Ontario Inc. et al. (“Leen Steels”);

(c) CV-22-1578 – Dosh Electric Ltd. v. 2665408 Ontario Inc. et al. (“Dosh”); and

(d) CV-23-3660 – J.V.H. Masonry Ltd. v. Tango Design-Build Inc. et al., a Newmarket action (“JVH”).

- [4] A pretrial was conducted on June 21, 2024. At that pretrial, I agreed to hear the motions for default judgment in writing.
- [5] After receiving the default judgment motion material from the four lien claimants, it became apparent that I did not receive evidence on the issue of holdback and the Owner’s liability. A further pretrial was conducted on July 26, 2024, where an Order was made permitting all parties until August 16, 2024, to provide the Court with their respective evidence on the issue of owner liability.
- [6] All the lien claimants indicated that they are not challenging the timeliness of each other’s claim for lien.
- [7] I have received the further material and below is my decision on each lien claimants’ request for judgment.

Pertinent Legal Principles

Default Judgment

- [8] Rules 19.05 and 19.06 of the *Rules of Civil Procedure*¹ (the “Rules”) reads as follows:

19.05 (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed. R.R.O. 1990, Reg. 194, r. 19.05 (1).

(2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages. R.R.O. 1990, Reg. 194, r. 19.05 (2); O. Reg. 131/04, s. 11.

(3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented. R.R.O. 1990, Reg. 194, r. 19.05 (3).

(4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial. R.R.O. 1990, Reg. 194, r. 19.05 (4).

Facts Must Entitle Plaintiff to Judgment

¹ RRO 1990, Reg. 194.

19.06 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. R.R.O. 1990, Reg. 194, r. 19.06.

[9] Section 5 of O. Reg. 302/18 reads:

Noting in default

5. (1) If a person against whom a claim is made in a statement of claim, counterclaim, crossclaim or third party claim defaults in the delivery of a defence to that claim, the person against whom the claim is made may be noted in default.

(2) If a defendant or third party has been noted in default under subsection (1), the defendant or third party may not contest the claim of the person who named the defendant or third party as a defendant or third party, or file a statement of defence, except with leave of the court.

(3) A court may grant leave under subsection (2) only if the court is satisfied that there is evidence to support a defence.

(4) If the court grants leave under subsection (2), the court may,

(a) make any order as to costs that it considers appropriate; and

(b) give directions as to the conduct of the action.

(5) The following rules apply with respect to a defendant or third party who has been noted in default under subsection (1), if leave is not granted under subsection (2):

1. The defendant or third party is deemed to admit all allegations of fact made in the statement of claim, counterclaim, crossclaim or third party claim, as the case may be.

2. Despite anything to the contrary in this Regulation, the defendant or third party is not entitled to notice of the trial of the action or of any step in the action, or to participate in the trial of the action or in any step in the action.

3. Default judgment may be given against the defendant or third party.

[10] There is nothing in Rule 19 that conflicts with section 5 of the Regulation.² Thus, on a motion for default judgment, the Court has jurisdiction to grant judgment based on the deemed admissions based on the allegations in the Statement of Claim. However, deemed admissions on their own may not necessarily provide the Court with the necessary evidentiary basis to grant the relief requested by the plaintiff. The Court has a legal obligation to only grant judgment where the deemed admissions and/or admissible evidence provide the necessary facts that permits the Court to grant the relief sought by the plaintiff.³

Construction Act

[11] The *Construction Act*⁴ (the “Act”) is remedial legislation that provides a means of security for persons that provide labour and materials for the improvement to land. The *Act* provides this unique remedial security by way of a mechanism for providers of labour and materials, lien claimants, to register on the title of land a claim for lien to secure the amount owed for such labour and materials.

[12] Sections 31 and 34 of the *Act* set out the mechanism to do so. A claim for lien is preserved when that claim for lien is registered on the title of the property, as defined by the *Act*, within 90 days from the last day of work for lien claimants that do not have a direct contract with the owner of the property.

[13] Further, this claim for lien must be perfected, per section 36 of the *Act*, within 90 days for the last day the lien claimant provided labour and/or material for the improvement of the property based on the contract between the lien claimant and the person to which the lien claimant provided the labour and/or materials.

[14] If the claim for lien is not preserved or perfected, as strictly required by the *Act*, the claim for lien is not valid and as such does not provide the security of the land for the amounts owing, or any holdback obligations, as the *Act* provides.

[15] With these principles in mind, I will assess whether default judgment should be granted as requested by the four lien claimants.

DMD Building Systems

[16] DMD presented evidence through the affidavit of Devris Karaaslan sworn July 2, 2024. From the Statement of Claim and the affidavit filed, I make the following factual findings:

² Section 87.2 of the *Act* is not offended for there is no conflict.

³ Rule 19.06 and see *Nikore v. Jarman Investment Management Inc.* (2009), 97 O. R. 132, 2009 CanLII 46655 (SCJ).

⁴ RSO 1990, c. C. 30.

- DMD entered into a contract with the GC dated September 29, 2021, in the amount of 2.2 million dollars which was increased to 2.486 million dollars with extras. Schedule D, article 3, indicates that interest accrues on outstanding balances at the rate of 1.5% per month.
- The GC provided monies for payment. One such payment, a cheque number 0052, was returned NSF.
- The last draw was on August 12, 2022.
- Invoices were provided along with time sheets. The last invoice is dated July 21, 2022, and timesheets show that last day of work was on July 21, 2022.
- The amount outstanding as of August 12, 2022 was \$1,644,570.60.
- A claim for lien was preserved in the amount of \$1,644,570.60 on September 9, 2022, being Instrument No. SC1928930 and was perfected on November 10, 2022 as Instrument Number SC1944096.
- The Statement of Claim was issued on November 10, 2022.
- The GC was served with the Statement of Claim on January 20, 2023, and the Owner was served on January 23, 2023.
- The GC and Owner have not filed a Statement for Defence to the action.

[17] Based on the above, I make the following findings.

- The GC and Owner were served with the Statement of Claim and have not filed a Statement of Defence and as such are noted in default.
- DMD is owed the sum of \$1,644,570.60 from the GC and DMD is granted Judgment in that amount.
- DMD has a preserved and perfected claim for lien per the *Act* and has a valid claim for lien.
- DMD is entitled to interest at the rate of 1.5% per month commencing from the date of the preserved claim for lien, being September 9, 2022.
- DMD requests costs on a partial indemnity basis. I find that a fair and reasonable amount that the GC should pay in costs to DMD is \$20,000.

Leen Steels

[18] Leen Steels presented evidence through the affidavit of Kulwinder Singh Bagyal sworn July 4 and August 16, 2024. From the Statement of Claim and the affidavits filed, I make the following factual findings:

- Leen Steels entered into a contract with the GC dated June 15, 2021, in the amount of \$255,000 plus HST. There is no interest provision in the contract.
- Invoices were sent. The last invoices sent was on January 25, 2022 which included invoice for work performed and financing charges. The invoice dated May 13, 2022 were for financing charges only. The last invoice for worked performed only was on November 25, 2021. No timesheets or work logs were provided to show the last day of work. Some of the invoices indicated that interest accrued on the outstanding balance at the rate of 2% per month.
- The amount outstanding is \$296,434.60.
- A claim for lien was preserved in the amount of \$296,434.60 on May 16, 2022, being Instrument No. SC1896553 and was perfected on July 10, 2022, as Instrument Number SC1921238. The Statement of Claim was issued on July 10, 2022. The claim for lien indicates that the last day of work is March 17, 2022.
- The GC was served with the Statement of Claim on August 26, 2022, and the Owner was served on August 29, 2022.
- The GC and Owner have not filed a Statement for Defence to the action and were noted in default on February 2, 2023.

[19] Based on the above, I make the following findings.

- Leen Steels is owed the sum of \$296,434.60 from the GC and Leen Steels is granted Judgment in that amount.
- The last day of work at the latest is January 25, 2022. There is no other credible evidence to indicate otherwise, except for the date inserted in the registered claim for lien, which had no documentary support.
- Leen Steeles has not preserved nor perfected its claim for lien per the *Act* and does not have a valid claim for lien.
- Leen Steele is entitled to interest at the rate of 2.0% per month commencing from the date of the issuance of the Statement of Claim, being July 10, 2022.

- Leen Steels has provided a Bill of Costs. I find that a fair and reasonable amount that the GC shall pay in costs on a partial indemnity basis is \$10,000.

JVH

[20] JVH presented evidence through the affidavits of Andy Lauritsen sworn July 3, 2024, and August 14, 2024. From the Statement of Claim and the affidavits filed, I make the following factual findings:

- JVH entered into a contract with the GC dated July 22, 2021 in the amount of \$231,000 plus HST. The contract did not have a term concerning interest being charged on outstanding amounts.
- Invoices were provided. No timesheets or work logs were provided. From the invoices provided, the last day of work was on May 21, 2022, being invoice dated May 25, 2022, no. 6224. There is an invoice E6494 which charges for work stoppage from May 21, 2022. This invoice is dated May 29, 2023. There is no explanation of the work stoppage or if any actual work was performed on the lands after May 21, 2022.
- The amount invoiced is \$320,718.30 with an amount outstanding of \$173,547.31.
- A claim for lien was preserved in the amount of \$173,547.31 on July 11, 2023 being Instrument Number SC1992944, with a last day of work stated in the claim for lien of July 6, 2023. The claim for lien was perfected on August 2, 2023, as Instrument Number SC2003513.
- The Statement of Claim was issued on August 1, 2023.
- The GC was served with the Statement of Claim on August 30, 2023, and the Owner was also served on August 30, 2023.
- The GC and Owner have not filed a Statement for Defence to the action and were noted in default on January 29, 2024.
- The action was discontinued against the mortgagee on March 11, 2024.

[21] Based on the above, I make the following findings.

- JVH is owed the sum of \$173,547.32 from the GC and JVH is granted Judgment in that amount.
- JVH has not preserved nor perfected its claim for lien per the *Act* and does not have a valid claim for lien. The documentary evidence provided shows that the last day of work was in May 2022.

- JVH is entitled to prejudgment interest pursuant to the *Courts of Justice Act* from the date of the issuance of the Statement of Claim.
- JVH is entitled to costs, and I fix those costs in the amount of \$10,000 payable by the GC.

Dosh

[22] Dosh presented evidence through the affidavit of Eduard Doshi sworn July 3, 2024. From the Statement of Claim and the affidavit filed, I make the following factual findings:

- Dosh entered into a contract with the GC dated July 2021 in the amount of \$144,748.48.
- Invoices were provided. The last invoice is dated July 12, 2022, being invoice 36-2022. There are two subsequent invoices for temporary service maintenance fees in the amount of \$575 plus HST dated August 7, 2022 (43-2022) and September 7, 2022 (53-2022).
- The GC paid \$45,200 leaving an outstanding balance of \$99,548.48. There was no term in the contract or on the invoices that imposed a rate of interest accruing on outstanding amounts.
- A claim for lien was preserved in the amount of \$99,548 on September 23, 2022, being Instrument No. SC1932441. The last day of work indicated in the claim for lien is August 2, 2022. A certificate of action was registered on title on December 9, 2022, as Instrument Number SC1950725.
- The Statement of Claim was issued on December 8, 2022.
- Mr. Doshi deposed that the last day of work was on August 2, 2022 where Dosh provided temporary service and completed work as set out in paragraph 43 of his July 3, 2024 affidavit.
- The GC was served with the Statement of Claim on February 23, 2023, and the Owner was served on February 9, 2023.
- The GC and Owner have not filed a Statement for Defence to the action and were noted in default on March 21, 2023.
- The action was discontinued against the mortgagee on March 26, 2023.

[23] Based on the above, I make the following findings.

- Dosh is owed the sum of \$ \$99,548.480 from the GC and Dosh is granted Judgment in that amount.

- Dosh has preserved its claim for lien per the *Act* but did not perfect its claim for lien within time. Dosh does not have a sheltering claim for lien per section 36 (4) of the *Act* due to the fact that the only valid claim for lien of DMD was not perfected until November 9, 2022. This date is after the time required for Dosh to have perfected its claim for lien.
- Dosh is entitled to prejudgement interest from the date of the issuance of the Statement of Claim per the *Courts of Justice Act*.
- Dosh is entitled to costs in the amount of \$10,000 to be paid by the GC.

Holdback

- [24] Section 22 of the *Act* mandates that the owner must holdback 10% of “the price of the services and material as they are actually supplied under the contract or subcontract.”
- [25] From the evidence provided, the price of services provided by the four lien claimants is \$2,977,653.97. Ten percent of that amount is \$297,765.40.
- [26] The Owner was sent section 39 demand letters from two of the lien claimants. Section 39 demand letters were sent by JVH on July 31, 2024, and Leen Steels on July 31, 2024. No response was received from the Owner.
- [27] There is no evidence that the Owner has paid the holdback.
- [28] Consequently, I find that the Owner is responsible for the holdback in the amount of \$297,765.40. DMD is the only valid claim for lien and as such is entitled to Judgment against the Owner for the holdback.

Conclusion

- [29] I therefore grant Judgment as follows:
- (a) In favour of DMD as outlined above against the GC along with a Judgment against the Owner in the amount of the holdback of \$297,765.40. DMD to provide a draft Judgment for my review and signature including a calculation for prejudgement interest against the GC at the rate of 1.5% per month, as stated above. All other necessary provisions containing the sale of the Property to be provided. Costs, as fixed, to be paid by both the GC and Owner.
 - (b) In favour of Leen Steels as set out above along with a calculation of prejudgement interest as outlined above. Costs to be paid by the GC. The claim for lien and certificate of action to be discharged and vacated, as is applicable. Draft Judgment to be provided to me for my review and signature.

- (c) In favour of JVH as set out above along with a with a calculation of prejudgement interest as outlined above. Costs to be paid by the GC. The claim for lien and certificate of action to be discharged and vacated, as is applicable. Draft Judgment to be provided to me for my review and signature.
- (d) In favour of Dosh as set out above along with a with a calculation of prejudgement interest as outlined above. Costs to be paid by the GC. The claim for lien and certificate of action to be discharged and vacated, as is applicable. Draft Judgment to be provided to me for my review and signature.
- (e) Staff to place a copy of this endorsement in all of the claim for liens court files, as described above.

Justice P. W. Sutherland

Released: October 1, 2024.

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1990, c. C.30

BETWEEN:

DMD Building Systems Corporation

Plaintiff

– and –

2665408 Ontario Inc., Tango Design-Build Inc., and Blue
Moon Financial Corporation

Defendants

**DECISION ON MOTIONS FOR DEFAULT
JUDGMENT**

Justice P.W. Sutherland

Released: October 1, 2024