CITATION: HVAC Depot & Metal Mfg. Inc. v. Global HVAC & Automation Inc., 2024 ONSC 5752
COURT FILE NO.: NEWMARKET CV-23-577-00 & CV-23-899-0000
DATE: 20241017

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act,*

R.S.O. 1990, Chapter c.30

BETWEEN:	)	
HVAC DEPOT & METAL MFG. INC.	)	
Plaintiff	)	Adam Wainstock, for the Plaintiff
– and –	)	
GLOBAL HVAC & AUTOMATION INC., DEERFIELD 1 GP INC., DEERFIELD 2 GP INC., DEERFIELD 3 GP INC., THE CORPORATION OF THE TOWN OF NEWMARKET, THE REGIONAL MUNICIPALITY OF YORK, CANADA MORTGAGE AND HOUSING CORPRATION, WESTMOUNT GUARANTEE SERVICES INC., and ROYAL BANK OF CANADA	)	
Defendant	)	Kayla Kwinter, for the Defendants
	)	**HEARD:** October 7, 2024

AND BETWEEN:	)	
EMCO CORPORATION	)	
Plaintiff	)	Irwin Ozier, for the Plaintiff
– and –	)	
GLOBAL HVAC & AUTOMATION INC. (formerly GLOBAL PLUMPINB & HEATING INC.), DEERFIELD 1 GP INC., DEERFIELD 2 GP INC., DEERFIELD 3 GP INC.,	)	
Defendant	)	Kayla Kwinter, for the Defendants

REASONS ON MOTION

McCarthy J.:

The Motion

[1] The non-party contractor, KCL Group Limited ("KCL") moves for a declaration that the construction liens ("the liens") of the two Plaintiffs, HVAC Depot & Metal Mfg. Inc. ("HVAC Depot") and Emco Corporation ("Emco") (collectively referred to as the "lien claimants"), both expired prior to their respective registrations. The moving party seeks an accompanying order that the security it posted to stand to the credit of the liens be returned to it for cancellation.

[2] The liens were registered on premises located at 175 Deerfield Road in Newmarket ("the premises") for materials and services provided by the lien claimants under a sub-contract with KCL. KCL was the contractor retained for two phases of the three-stage construction project ("the project"), which saw the erection of three residential towers upon the premises.

Background (1): The Corporate Entities

[3] Some detail of the interconnection between various corporate entities and the history of the project before KCL became contractor is important for the court's consideration.

[4] The Rose Acquisition Corporation ("Rose ACQ") is a wholly owned subsidiary of the Rose Corporation ("Rose Corp.").

[5] On October 17, 2016, Rose ACQ entered into an Agreement of Purchase and Sale (the "APS") to purchase the premises from Bridon Baker Developments Inc.

[6] On February 1, 2018, Rose Corp. incorporated 175 Deerfield Inc. ("175 Inc.") for the purpose of taking title to the premises. 175 Inc. acquired title to the premises on February 15, 2018, and remained the registered owner of the premises until 2019 when it changed its name to The Davis Park Residences Inc. ("Davis Inc.").

[7] In October 2016, well prior to the acquisition of title to the premises by 175 Inc., Rose Corp. consulted with RAW Design Inc. ("RAW") for a proposal/quote for the project design. RAW furnished Rose Corp. with a preliminary proposal for the project on October 31, 2016, and was engaged to proceed.

[8] RAW invoiced Rose Corp. on December 31, 2016 for the program, planning and concept phase for half of the schematic design phase. RAW submitted an updated proposal to Rose Corp. in October 2017 for which it was paid.

[9] Rose Corp. began to solicit proposals for the construction of the project as early as 2017. On March 2, 2018, LCL Builds Limited ("LCL") submitted a construction management proposal for the first phase of the project. LCL submitted a proposed term sheet and a draft CCDC 5A on June 15, 2018. LCL sent a draft memo of understanding ("MOU") to Rose Corp. on September 11, 2018, which contemplated that the parties would execute a construction management contract by the end of November 2018. Negotiations continued resulting in a refreshed MOU in May 2019, which was eventually executed in July 2019.

[10] In January 2020, Rose Corp. and LCL agreed that KCL would be named as contractor. KCL contracted with Deerfield 1 GP Inc. to act as construction manager in respect of Phase 1 of the project and with Davis Inc. in respect of Phase 2 of the contract. In September 2020, the name of the owner of the Phase 2 contract was changed from Davis Inc. to Deerfield 2 GP Inc.

[11] Phase 1 work commenced on March 18, 2020 and achieved substantial performance on May 31, 2023. Phase 2 work commenced on November 11, 2020 and achieved substantial performance on February 29, 2024.

[12] Like 175 Inc., Deerfield 2 GP Inc. and Deerfield 3 GP Inc. are single purpose entities incorporated for the purposes of the project only.

[13] No portion of the premises on which Phases 1, 2 or 3 were built were ever owned by Rose Corp. or Rose ACQ. Rose Corp. never acquired title to the premises. None of Davis Inc., 175 Inc., Deerfield 2 GP Inc., or Deerfield GP Inc., entered into any contract related to the improvement of the premises prior to July 1, 2018.

Background (2) – Global HVAC and The Lien Claimants

[14] On June 11, 2020, KCL retained Global HVAC & Automation Inc. ("Global") as its mechanical subcontractor on the project.

[15] The lien claimants each supplied materials to Global for use at the project.

[16] Emco began to deliver pipe, valve sewers, and watermain materials to the project in September 2020. Emco's last delivery to the project was on December 2, 2022, by which time it had supplied $351,842.51 worth of materials. Emco remains unpaid.

[17] Beginning in August 2022, HVAC Depot began supplying sheet metal and HVAC product to the project through Global. Its last delivery to the project was on November 4, 2022, by which time it had an account owing to it of $32,990.35.

[18] HVAC Depot registered a lien against title to the premises on December 30, 2022. Emco registered its lien against title to the premises on January 27, 2023. Both liens were therefore registered on the 56th day after the respective dates of last supply.

The Issue

[19] The issue before me is whether the liens in question were properly preserved. If they were not, they will have expired, and the security posted by KCL for the discharge of the liens must be returned to it.

[20] The determination of this issue turns squarely on whether the lien rights of the lien claimants are governed by the provisions of the "old" *Construction Lien Act*, R.S.O. 1990, c. C.30 ("CLA") or the new *Construction Act*, R.S.O. 1990, c. C. 30 ("CA" or the "Act").

[21] Under the old CLA, a construction lien of a subcontractor is deemed to expire at the conclusion of the 45-day period following the date of last supply, unless preserved prior to that time. Under the new CA, a construction lien of a subcontractor is deemed to expire at the conclusion of the 60-day period following the date of last supply, unless preserved prior to that time.

[22] The lien claimants registered their respective claims for lien against title to the property on the 56th day following their last supply to the project. It follows that if the old CLA applies, they are out of time and their respective liens have expired. On the other hand, if the new CA applies, they have properly preserved their respective liens, having registered their claims for lien within the 60-day period.

Transition Provisions

[23] The transition provisions under s. 87.3(1) of the CA provide, in part, as follows:

> This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,
>
> a) a contract for the improvement was entered into before July 1, 2018; [or]
> b) a procurement process for the improvement was commenced before July 1, 2018 **by the owner of the premises**. [emphasis added]

Definitions

[24] The definitions of the following key words and terms are found in s.1 of both the old CLA and the new CA:

> "contract" means the contract between the owner and the contractor, and includes any amendment to that contract;
>
> "improvement" means, in respect of any land,
>
> (a) any alteration, addition or capital repair to the land,
> (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
> (c) the complete or partial demolition or removal of any building, structure or works on the land;
>
> "interest in the premises" means an estate or interest of any nature, and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any lands or premises;
>
> "owner" means any person, including the Crown, having an interest in a premises at whose request and,
>
> (a) upon whose credit, or
> (b) on whose behalf, or
> (c) with whose privity or consent, or
> (d) for whose direct benefit,
>
> an improvement is made to the premises but does not include a home buyer;
>
> "premises" includes,
>
> (a) the improvement,
> (b) all materials supplied to the improvement, and
> (c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;

[25] Section 1(4) also describes the commencement of a procurement process, which is commenced on the earliest of the making of,

> (a) a request for qualifications;
> (b) a request for quotation;
> (c) a request for proposals; or
> (d) a call for tenders.

Analysis

[26] The court first needs to determine whether in fact Rose Corp. or Rose ACQ were ever owners as defined in the Act. If they were not, then neither could enter into a contract or enter into a procurement process for the purposes of the transition provisions of the Act.

[27] I am principally guided by the Ontario Court of Appeal's decision in *Ravenda Homes Ltd. v. 1372708*, 2017 ONCA 834, where the court, in considering what constitutes an owner for the purposes of the CLA, drew this important distinction:

> [T]he definition of owner under s. 1(1) of the CLA requires that an owner have "an interest in a premises" to which the improvement is made, not just an interest in the improvement. An interest in personalty or an interest in an improvement by itself, without an attached interest in land, cannot constitute a lienable interest: at para. 29.

[28] In my view, this is the exact situation we face in the case at bar.

[29] While Rose Corp. certainly maintained an interest in the project and in the improvement through its contractual dealings, at no time before July 1, 2018 can it be said that it had any interest in the premises. It also cannot be said that Rose ACQ had such an interest even though it entered into an APS for the purchase of the premises.

[30] Neither Rose Corp. nor Rose ACQ ever held a legal or lienable interest in the land as of June 29, 2018.

[31] Even if Rose ACQ obtained some interest by virtue of being the contracting party to the APS, no legal or lienable interest can be established by an APS. It is only the conveyance of title that would create that interest. Moreover, Rose ACQ never entered into any contracts with agents, contractors, construction managers, etc. prior to July 1, 2018 so as to engage the transition provisions in the Act and maintain the shorter lien preservation time requirements in the old CLA.

[32] While an "interest in premises" requires only "an estate or interest of any nature", neither entity crossed even that low threshold. Neither of them acquired an estate of any nature. I am not persuaded that ownership of shares by one corporate entity creates an interest in premises owned by another corporate entity. The Ontario Court of Appeal made this tenant of corporate law clear in *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2006), 61 O.R. (3d) 786 (C.A.), stating that:

> [A] shareholder of a corporation -- even a controlling shareholder or the sole shareholder -- does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See Salomon v. Salomon & Co. Ltd., [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation: at para 12.

[33] I agree with the respondent that Rose Corp.'s ownership of shares in the closely held subsidiary corporations, Rose ACQ or Davis, could neither afford nor entitle it to an interest in the subsidiaries' assets. This principal has been properly explained in the decision of *Galsan Holdings Inc. v. Davalnat Holdings Inc.*, 2018 ONSC 3600, at paras. 31 and 34, wherein Justice Nishikawa stated:

> It is trite law that the assets of a corporation are owned by the corporation not the corporation's shareholders.
>
> …
> The corporate entities that hold title to the properties, Seabrook and 132, are distinct legal persons under the law. As a shareholder of Seabrook and 132, Galsan has no possessory rights to the Four Valley Property or the Romina Property. Mr. Gallo and Mr. Calvano have chosen to organize their businesses and property holdings through corporate entities. While two individuals are the principals behind the various corporations, the corporate structure cannot be disregarded.

[34] I find that neither Rose Corp. nor Rose ACQ had anything more than an interest in the shares of any of its subsidiaries or closely held corporations; It had no rights or interest in their assets. They were legally distinct and separate corporate entities.

[35] I agree with the respondent that a finding that Rose Corp. or Rose ACQ were owners for the purpose of the Act would have unintended consequences: they would be exposed to the trust provisions under Part II of the Act. This would run counter to the entire purpose of having single purpose entities take ownership of the premises in these circumstances. Just as Rose Corp. or Rose ACQ has no legal liability for holding funds in trust or for the debts of Deerfield Inc. or Davis Inc., it cannot claim a benefit by holding itself out as an owner for the purpose of gaining an advantage under the transition provisions of the old CLA.

[36] I note as well that s. 32 of the CLA and the CA requires the owner to be named in the certification of substantial performance of a construction contract and for the owner to confirm the date when the contract was substantially performed. The fact is that neither Rose Corp. or Rose ACQ were named as owners or confirmed dates of completion in the certificates for Phase 1 or Phase 2. This is not only non-compliant with the Act but serves as proof that neither Rose Corp. or Rose ACQ considered themselves to be owners of the premises in May 2023 or February 2024.

[37] Because neither Rose Corp. nor Rose ACQ were owners at any time prior to July 1, 2018, any agreements, contracts or dealings they engaged in or entered into in respect of the project could not have been "contracts" for the purpose of the transition provisions. And since these entities were not owners, they could hardly have commenced a procurement process before July 2018, which would have served to maintain the lien preservation timelines in the old CLA.

[38] Finally, I am mindful that the Act is remedial legislation, which merits a liberal interpretation. It should be considered and interpreted in light of the overall purpose legislation: to confer protection upon legitimate lien claimants. These claimants are often

small operators, who might otherwise be out of pocket if liens are not available to attach to the lands when they provide an improvement through their labour and supply of material. This was reiterated in *H.I.R.A. Limited v. Middlesex Standard Condominium*, 2018 ONSC 1526, wherein Justice Grace stated:

> The law is clear that the *CLA* is to be given a strict interpretation when determining whether a claimant is entitled to assert a lien. However, if the threshold is met, the statute is to be liberally construed when analyzing the rights conferred on those entitled to its protection: *Clarkson Co. v. Ace Lumber Ltd.*, 1963 CanLII 4 (SCC), [1963] S.C.R. 110 at para. 11. : at para. 53.

Disposition

[39] For the foregoing reasons, the motion of the non-party contractor is dismissed. If the parties are unable to agree upon the scale of quantum of costs, they shall take out an appointment to appear before me in person at Newmarket through the trial coordinator.

McCarthy J.

Released: October 17, 2024