

CITATION: Continental Homes Inc. v. 2646576 Ontario Inc., 2024 ONSC7301
COURT FILE NO.: CV-19-632358
DATE: December 31, 2024

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act*, R.S.O. 1990, c.C.30

B E T W E E N :

CONTINENTAL HOMES INC.

Plaintiff

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)
)
) Eni Hanxhari for the plaintiff,
) Tel.: 416-238-5100,
) Email: eni@bozailaw.com;
)

-and-

2646576 ONTARIO INC. and
8682470 CANADA INC. o/a CHANG XIN
CONSTRUCTION

Defendants

)
)
)
) Stefan Juzkiw for the defendants;
) Tel.: 905-290-5055,
) Email: stefan@juzkiw.com;
)
)

) **DECISION:** November 8, 2024

Associate Justice Wiebe

COSTS AND INTEREST DECISION

[1] On November 8, 2024, I issued my Reasons for Decision on the trial in this case. I ruled that the plaintiff has a lien and breach of contract damages in the amount of \$23,279.50. I dismissed the remainder of the plaintiff's claims and the entirety of the defendants' set-off and counterclaim.

[2] As ordered, the defendants served and filed a costs outline on May 28, 2024. It showed totals of \$49,149.45 in partial indemnity costs and \$77,957.43 in substantial indemnity costs. The plaintiff did not serve and file a costs outline until November 1, 2024, over five months late. I took written submissions on whether to accept this very late filing and included in my Reasons my decision to accept the late filing and the reasons for doing so. I specified that I would consider this

event again when awarding costs. The plaintiff's costs outline showed \$56,668.36 in substantial indemnity costs and \$37,778.91 in partial indemnity costs.

[3] The plaintiff seeks full indemnity costs of \$64,856.61 or substantial indemnity costs of \$56,668.36. The defendants submit that there should be no order as to costs or an order that the plaintiff be paid only between \$9,000 and \$15,000.

[4] Both lawyers are wrong about my jurisdiction to award costs. This is a lien action, and, therefore, my jurisdiction to award costs stems from *Construction Act*, R.S.O. 1990, c. C30 ("CA"), section 86. The only limit on the court's broad discretion to award costs under CA section 86, is CA section 86(2), namely the subsection that specifies that the recipient of costs should not receive more than what that party would have incurred from taking the least expensive course of action. Neither side addressed section 86(2). The *Rules of Civil Procedure* provide guidance as to how the court can exercise its broad discretion under CA section 86 in awarding costs.

[5] In my Reasons for Judgment I set a schedule for closing written submissions on costs. I ordered that the initial written submissions be limited to three pages. Mr. Juzkiw's written submission was double that number, namely six pages. There was no explanation for this blatant violation of my order. I also note that Mr. Juzkiw inappropriately reargued issues that I addressed in my Reasons for Judgment, such as the \$6,000 owed to the plaintiff from a previous project and the wrongful repudiation of the contract by Chang. This will all be taken in consideration in my costs ruling.

Result

[6] The plaintiff succeeded in getting a judgment declaring it has a lien in the amount of \$23,279.50 and ordering payment of contract damages for the same amount. It also succeeded in defeating the entirety of the defendants' set-off and counterclaim of \$63,516.77.

[7] However, the \$23,279.50 is but a fraction of what Continental claimed, namely a lien of \$35,000 and contract damages of \$130,000. In short, the plaintiff succeeded in getting a judgment for only 14% of what it claimed in addition to defeating the defendants' set-off and counterclaim. This limited success must be recognized in the costs award.

Offers to settle

[8] The plaintiff showed that it made five written offers to settle starting on April 21, 2023. They all involved payment to the plaintiff of \$40,000 or less. The first one, the one dated April 21, 2023, was for payment of \$35,000 (all-inclusive), and was made just over 12 months before trial. It specified that the offer was to be accepted in 15 days failing which costs would be added. The other four were made on May 1, 2024, the day before trial, and went from a high of an offer for payment to the plaintiff of 40,000 to payments to the plaintiff of \$30,000, \$25,000 and finally \$20,000, all of which were all-inclusive.

[9] The requirements of Rule 49.10 do not bind this court given the broad discretion of CA section 86. Nevertheless, the court is always interested in promoting settlement, which is one of the primary purposes in awarding costs. These offers were all all-inclusive offers, namely they included principle, interest and costs.

[10] Given the poor state of the trial evidence, particularly the defendants' evidence, the defendants should have accepted any of the last three offers that were made on May 1, 2024. The plaintiff obtained a result that exceeded these offers, particularly the last one, the one for \$20,000 all-inclusive. This will be considered in awarding costs.

Conduct

[11] The plaintiff argues that there should be an award of substantial indemnity costs against the defendants given their conduct. Ms. Hanxhari pointed out that the defendants called an expert witness that was not capable of giving evidence. She pointed out that, although the defendants listed Mr. Abdukhalilov as one of their witnesses and served and uploaded his affidavit, they never called him as a witness. She made general accusations of inappropriate conduct on the part of the defendants and their lawyer without giving examples.

[12] I do not accept this argument. Substantial indemnity costs are meant to sanction egregious, malicious and counter-productive conduct, not hard-fought but misguided litigation; see *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722 (CanLII) at paragraph 45. I place the conduct of which Ms. Hanxhari complains in the second category, namely misguided litigation. After all, the exclusion of the two defendant witnesses simplified the trial and made it shorter.

[13] Indeed, I go a step further. The conduct of the plaintiff needs to be considered as well. It was the plaintiff that was grossly delinquent in failing to replace its initial lawyers in accordance with the removal order. This delayed the trial by five months. It was also the plaintiff who insisted on taking its claim for breach of contract damages in the amount of \$130,000 to trial without any evidence at all. It was also the plaintiff who provided only sketchy evidence in support of its lien amount and left me grappling with Mr. Nessori's evidence in this regard. It was the plaintiff that was grossly delinquent in complying with my schedule for serving, filing and uploading costs outlines. This plaintiff's conduct has in fact made me significantly reduce the plaintiff entitlement to substantial indemnity costs for the trial despite the plaintiff's reasonable offers to settle.

Quantum

[14] Mr. Juzkiw made several criticisms of the quantum of the Continental claim: overstated correspondence costs, exaggerated time for drafting motion material, unnecessary research charges, inflated trial attendance time, unnecessary administrative costs, filing fees and mediation costs not incurred. The approach I am taking to the costs is more general in scope and does not involve such a granular review of the Continental claim. My award will result in an award that accounts for any inappropriate charges that may have been made.

Reasonable expectation of the unsuccessful party

[15] There is no doubt that the Continental claim for costs is within the range of what the defendants should reasonably expect to pay in costs in the event of a loss like this. Their own costs outline contains amounts for partial and substantial indemnity costs that well exceed those in the plaintiff's costs outline.

Costs ruling

[16] In awarding costs, the court must fix an amount that is fair and reasonable for the unsuccessful party to pay, and not base the award solely on the successful party's costs; see *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA) at paragraph 26.

[17] I have decided that the defendants must jointly and severally pay the plaintiff **\$20,000** in partial indemnity costs. This is just over half of what the plaintiff claims in partial indemnity costs. It reflects the limited level of success of the plaintiff, the offers to settle it made, the costs outlines and the conduct of both parties, all as described above.

Prejudgment interest

[18] There is then the question of what prejudgment interest Chang should pay on the breach of contract damages judgment. In her written submission Ms. Hanxhari claimed prejudgment interest at the rate of 4.8% per annum calculated on the amount the plaintiff claims for costs starting at December 6, 2019, the date this action commenced. This is clearly incorrect as there was no entitlement to costs prior to this award. I will take the plaintiff as submitting that it should get prejudgment interest on the breach of contract damages judgment of \$23,279.50 at the rate of 4.8% running from December 6, 2019, the date the action commenced.

[19] The 4.8% per annum rate is also clearly wrong. It is the specified rate for prejudgment interest for actions commenced in the fourth quarter of 2024. The correct prejudgment interest rate is 2% per annum, which is the specified prejudgment interest rate for the fourth quarter of 2019, namely the quarter with the date December 6, 2019.

[20] The claimed commencement date for the running of the prejudgment interest would also appear to be wrong as section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“*CJA*”) specifies that prejudgment interest is to run from the date the cause of action arose. Certain dates suggest themselves here: there is May 28, 2019, the date the deposit was due; there is July 31, 2019, the date the Continental subcontract was terminated; there is September 10, 2029, the date the claim for lien was registered. There was no discussion about the correct date for the commencement of prejudgment interest. Therefore, I have decided to order that it run from the later date claimed by the plaintiff, December 6, 2019, the date the action was commenced.

[21] The prejudgment interest per diem amount is calculated as follows: $(\$23,279.50 \times 0.02) / 365 = \$1.27/\text{day}$. There are 1,850 days from December 6, 2019 to the date of this ruling. That means that as of today there is \$2,349.50 of prejudgment interest accrued. But prejudgment interest is calculated to the date my report is confirmed. That date is also the date from which post-judgment interest is calculated.

Draft report

[22] I enclose a draft report for consideration of the parties. As indicated in the draft report, I intend to sign it at 12 noon on January 10, 2025. Please provide any comments you may have by email to my Assistant Trial Coordinator prior to that time. I also enclose a memorandum giving guidance on the process of report confirmation.

ASSOCIATE JUSTICE C. WIEBE

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B E T W E E N :

Continental Homes Inc.

Plaintiff

- and -

2646576 Ontario Inc. and
8682470 Canada Inc. o/a Chang Xin Construction

Defendants

COSTS AND INTEREST DECISION

Associate Justice C. Wiebe

Released: December 31, 2024