CITATION: Haven Property Services Corp. v. 2465855 Ontario Ltd., 2024 ONSC 7295
COURT FILE NO.: CV-18-597614
DATE: 2024 12 31

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SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: HAVEN PROPERTY SERVICES CORP., *Plaintiff*

- and -

2465855 ONTARIO LTD. and BANK OF CHINA (CANADA), *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: D. Wang, *for the plaintiff's former lawyers, Capo Sgro LLP*

S. Gordon, *for the plaintiff*

HEARD: December 5, 2024 (by videoconference)

REASONS FOR DECISION
(Motion for Charging Order)

[1] The plaintiff's former lawyers, Capo Sgro LLP, seek an order lifting the stay of these proceedings to obtain a charging order for its unpaid accounts for legal fees and disbursements over certain proceeds of a settlement reached between Haven Property Services Corp. ("Haven") and 2465885 Ontario Ltd. (the "Owner"). Haven opposes. The Owner takes no position.

[2] I am dismissing the motion. Although I am satisfied that Capo Sgro LLP's efforts were sufficiently instrumental in achieving the ultimate settlement, I am not satisfied that the record before me supports that Haven is unable or unwilling to pay its lawyers' fees. To the contrary, evidence on this motion supports that Haven appears to be financially capable and willing to pay Capo Sgro LLP's fees as found owing in the pending assessment under the *Solicitors Act,* RSO 1990, c. S.15.

ANALYSIS

[3] This motion arises out of Capo Sgro LLP's representation of Haven in pursuit of payment for unpaid services supplied by Haven to the Owner for managing the redevelopment of the Westin Prince Hotel in Toronto. Haven retained the services of Capo Sgro LLP to pursue payment. On behalf of Haven, Capo Sgro LLP preserved and perfected a lien against the premises, exchanged pleadings, passed a trial record, and obtained a judgment of reference of this lien action to an

associate judge under s. 58 of the *Construction Act,* RSO 1990, c C.30. This action was subsequently stayed by order of my colleague pending arbitration between the parties. Arbitration was expressly contemplated by the parties' contract.

[4] After this action was stayed, an arbitration proceeded. That arbitration was bifurcated into two stages. The first stage was to determine whether Haven was entitled to claim fees pursuant to the parties' agreement. The second stage of arbitration was to determine the percentage of overall work completed by Haven. Haven was successful at the first stage of the arbitration. The parties ultimately settled during the second stage prior to the arbitration hearing. Per the parties' minutes of settlement, the settlement amount was to be paid in four equal installments. At the time of drafting the minutes of settlement, Haven would not agree to include a direction that the settlement funds be paid to Capo Sgro LLP. Prior to this motion being heard, three of the four installments had already been paid by the Owner to Haven. The fourth and final payment was due on December 15, 2024, and is being held in trust pending disposition of this motion.

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[5] Capo Sgro LLP's legal fees for representing Haven from March 2018 to July 2024 (when the arbitration settled) totalled $231,171.92. It is undisputed that Haven paid to Capo Sgro LLP or Capo Sgro LLP has received a total of $182,686.42. Capo Sgro LLP seeks a charging order over the settlement funds for $48,485.50, representing the unpaid balance of its accounts. Haven has commenced an assessment of Capo Sgro LLP's accounts under the *Solicitors Act*.

Relevant legal framework

[6] Where a lawyer has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the lawyer may seek a charge on property recovered or preserved in that proceeding through the lawyer's instrumentality for fees, costs, charges and disbursements incurred in that proceeding: *Solicitors Act*, s. 34(1). The court may also order that the solicitor's bill for services be assessed and that payment be made out of the charged property: *Solicitors Act,* s. 34(3).

[7] A charging order is a discretionary remedy. There is no right to one. To obtain a charging order, the onus is on the lawyer seeking it to demonstrate three criteria: (i) the fund or property must be in existence at the time the charging order is granted; (ii) the property must have been "recovered or preserved" through the instrumentality of the lawyer; and (iii) there must be some evidence that the client cannot or will not pay the lawyer's fees. In deciding whether to exercise the discretion to grant a charge, the court must balance the circumstances and equities of each case and client: *Weenen v. Biadi, supra* at paras. 14-15.

[8] This motion is also brought in an action commenced under the former *Construction Lien Act* (the "*CLA*"), which continues to apply by operation of s. 87.3 of the current *Construction Act*. Interlocutory steps, other than those provided for in the *CLA,* first require the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute: *CLA,* s. 67(2). That leave requirement was not addressed by either party in their facta, so I asked for submissions on it.

Is leave required and should it be granted?

[9] Capo Sgro LLP submits that there has already been finality in the underlying litigation by virtue of the settlement, subject only to the final settlement payment. I have understood that submission to be, essentially, that because the parties themselves have resolved all issues in the litigation, this is not genuinely an "interlocutory" motion. I disagree.

[10] Haven and the Owner have indeed settled their dispute. Per the case history available to me, the action was previously discontinued against Bank of China (Canada). However, settling all issues is not the same as a final disposition of this proceeding. There has been no final order, and one is not contemplated in the parties' minutes of settlement until after the final payment has been made. In my view, this motion by Capo Sgro LLP thereby remains an interlocutory motion in this proceeding.

[11] I am nevertheless satisfied that the motion will be demonstrated to be "necessary" if Capo Sgro LLP makes out the requirements for a charging order. If it does so, then I will have been satisfied that Capo Sgro LLP was instrumental in securing the settlement and that it is unlikely to be paid without the charging order. That would support necessity for the motion.

Has Capo Sgro LLP made out the requirements for a charging order?

[12] It is not clear that s. 34 of the *Solicitors Act* applies to fees and disbursements incurred in an arbitration proceeding. However, Haven concedes that the settlement funds are a fund over which a charging order may be made. The dispute on this motion is on the other two elements. Haven's position is that Capo Sgro LLP was not instrumental in achieving the settlement and that it is able and willing to pay any fees that are found owing after the pending fee assessment has been completed.

[13] For a lawyer to have been "instrumental", they must have played a "substantial and integral" part in the recovery or preservation of the subject property. Playing "some part" in the recovery or perseveration is insufficient: *Dervin v. Suarez*, 2021 ONSC 1339 at para. 6. Haven submits that its lawyers played essentially no role in negotiating the ultimate settlement.

[14] I reject Haven's argument that Capo Sgro LLP was not instrumental in reaching the settlement. There is evidence before me that Haven engaged in direct negotiations with the Owner's counsel without the assistance of Capo Sgro LLP. However, there is no cogent evidence before me on the extent of those negotiations, nor is there evidence supporting a finding that the negotiations, and the willingness of the Owner to settle, was entirely severable from the previous actions taken by Capo Sgro LLP on Haven's behalf, including the case put forward to that point.

[15] Haven has sought to downplay the nature of success at the first stage of the arbitration and the work performed during the second stage leading up to the scheduled arbitration hearing. However, there is insufficient evidence before me to find, as Haven submits, that the result at the first stage was fairly certain and that Capo Sgro LLP's work during the second stage did not play a substantial and integral role in priming the Owner for settlement. Importantly, the settlement was negotiated on the eve of the first day of the arbitration hearing. Although there is less evidence

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than I would have liked on the nature and scope of work performed by Capo Sgro LLP, I am sufficiently satisfied that the record supports, on a balance of probabilities, that its work was substantial and instrumental in achieving the settlement, regardless of whether Capo Sgro LLP was directly involved in the ultimate settlement negotiations.

[16] Nevertheless, Capo Sgro LLP must also satisfy me that there is some evidence that Haven cannot or will not pay the lawyer's fees. I am not satisfied that is the case here.

[17] Capo Sgro LLP argues that Haven is unable to pay or that I should at least infer that its ability to pay has diminished. Capo Sgro LLP points specifically to the fact that fees were predominantly paid by Haven's principal, Paolo Abate, with personal credit cards and not by the corporation. I reject the argument. I find no proper inference of Haven's inability to pay solely from the fact that Haven's principal made direct payments to Capo Sgro LLP on Haven's behalf. Also, if nothing else, the total settlement paid by the Owner to Haven to date, including the final payment retained in trust, greatly exceeds the charge sought. There is no evidence before me supporting that the funds already paid or to be paid have been or will be disbursed beyond the reach of Haven's creditors, including Capo Sgro LLP.

[18] Capo Sgro LLP argues that there is also "some evidence" that Haven is unwilling to pay its fees. In support of that position, it points specifically to the following:

(a) there has been an unpaid balance owing by Haven since Capo Sgro LLP rendered its April 2024 invoice;

(b) since June 2024, Paolo Abate made several representations that he would make some payments and speak about fees, but paid only $15,000 toward outstanding fees prior to the settlement being executed;

(c) Mr. Abate refused to sign minutes of settlement including a direction to pay the settlement funds to Capo Sgro LLP, which followed questions by Mr. Abate about the direction and him being advised by Capo Sgro LLP that its fees would be paid from the first settlement payment with a final account to be rendered and paid from the second payment; and

(d) without prior notice or discussion, Haven obtained an order for assessment of Capo Sgro LLP's accounts.

[19] I agree with Haven that this case has parallels to the decision in *Sparovec v. Smith*, 2022 ONSC 7401, in which Kimmel J. held, at para. 16, that the indirect and inferential evidence tendered on inability and unwillingness of the client to pay in that case was insufficient to meet the third prong of the test.

[20] The foregoing points, taken together, are not cogent or convincing evidence that Haven is unwilling to pay Capo Sgro LLP's fees. Rather, they support a finding that Haven has not paid the balance of the fees, which is undisputed. Capo Sgro LLP would seek to have me infer that declining to include a direction in the minutes of settlement and ongoing non-payment is properly viewed as an unwillingness to pay. In my view, that inference is unsupported on the record before me and, in any event, the Court of Appeal has expressly held that a finding that a client owes

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money to a law firm for unpaid accounts does not, in and of itself, justify a charging order or lien: *Weenen v. Biadi, supra* at para. 26. Non-payment of fees alone is insufficient to satisfy the third element of the test.

[21] I do not accept that the record supports an unwillingness to pay. There is no dispute that Haven's fees were being paid throughout the course of the retainer until after the April 2024 account was rendered. Haven rightly points out that its last $15,000 payment followed an email from Capo Sgro LLP requesting "a substantial reduction, if not complete payment, of the current outstanding account" from April 2024. I agree with Haven that the payment supports a willingness to pay. It reflects prompt partial payment following Capo Sgro LLP's request for payment on its unpaid account, which was made one week before the arbitration hearing was scheduled to commence. Capo Sgro LLP has also retained the deposits refunded by the arbitrator. Those funds would otherwise have been payable to Haven, and there is no evidence that Haven has disputed Capo Sgro LLP retaining them. Accordingly, in my view, they are properly viewed as a further "payment" by Haven against the unpaid accounts.

[22] I also give no effect to Capo Sgro LLP's argument that commencing an assessment of its fees without prior notice supports unwillingness to pay. Haven commenced the assessment of Capo Sgro LLP's nine accounts totalling $231,171.92 prior to this motion being brought. I reject the submission that commencing the assessment is an indicium of Haven's unwillingness to pay. A client is afforded the statutory right under the *Solicitors Act* to challenge its lawyer's fees and have them assessed. The fact that a client contests the amount owing to its lawyers, including by way of assessment, is not evidence of a client's inability or unwillingness to pay: *Weenen v. Biadi, supra* at para. 25.

[23] In my view, the record demonstrates an ongoing willingness and ability by Haven to pay Capo Sgro LLP's fees throughout the course of the retainer. Further payments have only now become subject to having the fees assessed.

[24] The Court of Appeal has expressly observed that s. 34 of the *Solicitors Act* is intended to codify the court's inherent jurisdiction in equity to declare a lien on the proceeds of a judgment where there appears to be good reason to believe that the solicitor would otherwise be deprived of his or her costs: *Weenen v. Biadi, supra* at para. 16. I am not convinced that there is good reason to believe that Capo Sgro LLP will be deprived of its fees if a charging order over the settlement funds is not granted.

[25] Capo Sgro LLP has not met its onus of establishing entitlement to a charging order. I am accordingly denying leave for this motion under the *CLA* and dismissing it.

COSTS

[26] Haven has been successful in opposing this motion and is entitled to its costs. The costs outlines submitted by both Capo Sgro LLP and Haven are similar. Haven seeks its partial indemnity costs of $4,400, including HST and disbursements. Capo Sgro LLP submits that its own partial indemnity costs claim of $3,500 is reasonable.

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[27] In my view, the slightly higher costs of Haven are understandable given the research required and factum prepared, which I found quite helpful. Nevertheless, the reasonable expectations of the parties are always a factor and I have considered the time expended by Capo Sgro LLP as well as the relative importance of the motion to both lawyer and client. Having considered the factors outlined in subrule 57.01(1) of the *Rules of Civil Procedure,* RRO 1990, Reg 194, I fix Haven's partial indemnity costs of this motion in the amount of $3,850, including HST and disbursements.

[28] In its factum, Haven argues that costs awarded to a client should not be set off as against any potential legal fees owing that are subject to a pending assessment because the fee amount owing, if any, has not yet been properly determined: *Weenen v. Biadi,* 2018 ONCA 393 at para. 8. Since Haven is assessing Capo Sgro LLP's fees, an assessment date has not yet been scheduled, and the results of that assessment are uncertain, I agree that such an order is appropriate in this case.

DISPOSITION

[29] For the foregoing reasons, Capo Sgro LLP's motion is dismissed with costs of the motion payable to Haven in the amount of $3,850.00, including HST and disbursements, payable within thirty (30) days. Unless Haven otherwise agrees, the costs shall be payable irrespective of the outcome of the assessment and may not be set-off against Capo Sgro LLP's outstanding billed and unpaid fees.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: December 31, 2024

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