

Cite as: Bathurst Plumbing & Heating (1967) Ltd. v. Pro Air Systems (1972) Inc.,
1976 NSCO 11

N O V A S C O T I A
C O U N T Y O F H A L I F A X

To wit:

C.H. 07877

I N T H E C O U N T Y C O U R T
O F D I S T R I C T N U M B E R O N E

BETWEEN:

BATHURST PLUMBING & HEATING
(1967) LTD.,

Plaintiff

- and -

PRO AIR SYSTEMS (1972) INC.
and PENHORN MALL LIMITED,

Defendants

Willard Strug, Esq., and Bruce Outhouse, Esq., for the plaintiff.
F. B. Wickwire, Esq., for the defendant, Pro Air Systems (1972)
Inc.

1976, March 10, O Hearn, J.C.C.:— This is a second decision in this Mechanics' Lien action consequent upon reasons I delivered on July 11, 1975 and upon memoranda of the parties based on those reasons, which reached me on September 4 of last year and February 14 of this year. The essential part of this judgment is the allowance and disallowance of items of account. I have tabulated the results in a statement which is appended to these reasons. In general, I have in allowing or disallowing an item accepted the reasoning of the proponent or the opponent respectively. Two matters call for more particular comment.

The first is the plaintiff's claim for overtime. These accounts are dated in 1973 but were submitted many months after that. As business practice it was outrageous and one has an instinctive sympathy with the defendant's plea that the plaintiff should be estopped by his earlier statements of account or barred by his laches. The parties, however, agreed to treat about these matters in the Spring of 1974 in order to come to some sort of settlement, and it seems to me that the possibility of a settlement was sufficient consideration to justify holding them to it.

I am not prepared to accept the plaintiff's revised statement of overtime, as submitted in the memorandum, because while it is probably a more accurate overall summary of the overtime that was incurred, to my mind it leaves quite unsettled what items have already been paid and what not. The defendant has established, to my satisfaction, that some items of overtime claimed have been paid and, accordingly, I have deducted the three items specified in column B, on page 14, of the defendant's memorandum from the amounts claimed on Invoices 41152, 41155 and 41156, while allowing the remaining items of overtime claimed in Invoices 18714 and 18715. These allowances include overtime for Mr. Caissie, which seems on the whole to be a proper charge in accord with the agreement between the parties, and there are also items with respect to Canada Pension Plan and Vacation Pay arising out of the overtime that I think are properly charged. I cannot seem to find a basis for allowing 15546 however.

The other point that requires discussion is that the defendant's contention that Invoices 15391, 15390, 15385, 15372 and 15393 should be included in the work covered by 15539, which is the general invoice respecting what has been called the 'Sobey's extra'. While this is arguable, I think the preponderance of evidence is to the contrary, and I have allowed these items.

Two points of law remain to be determined. The first is whether a mechanics' lien exists in this case. In my opinion, the plaintiff did not file its lien in time. The work purported to be done to preserve the lien was, I think, done but it was clearly a colorable attempt to preserve the lien by work which although part of the main contract, nevertheless, was done furtively and covertly in the full knowledge that the plaintiff would not have been permitted on the premises for that purpose had Mr. Colton's mission been known to the defendants. The plaintiff's claim is preserved, however, by

s.45 of the *Mechanics' Lien Act*.

This raises the second point, the contention of the defendant that in such a case the plaintiff is entitled to recover no costs. This is based on an interpretation of s.40 of the Act, relating to costs, and presumably on Orkin *Law of Costs*, 1968, Canada Law Book, page 274. This may be the practice in Ontario but conditions in Nova Scotia would make this an inequitable provision, except in the case contemplated in the plaintiff's memorandum, i.e., the plaintiff cannot recover costs in such case from the owner, or the lien fund where it does not establish a lien and has no privity of contract with the owner. A mechanics' lien action is a normal and usual way of litigating building contracts in this jurisdiction and it is likely enough that most such litigation is prosecuted in the county courts in that class of proceedings. There seems to be no general reason, therefore, for the defendant to complain of the forum—a point made about counterclaims in some of the Ontario jurisprudence—or to feel agrieved by the type of proceeding employed to bring the matter to court. The failure to prove a lien in this case, I think, entitles the owner to recover its costs from the plaintiff but the plaintiff is entitled to recover its costs from the defendant within the limits, enacted by *Mechanics' Lien Act*, s.40, together with the balance of account to which it is entitled, \$10,438.63.

P. L. J. - de -

Judge of the County Court of
District Number One

STATEMENT

Contract of 1973, August 13	\$ 64,000.00
Contract of 1973, November 8	30,000.00
'Undisputed extras'	13,058.88
'Reduced extras'	2,755.49
'Disputed extras':-	<u>\$109,814.37</u>

<u>Invoice date & number</u>		<u>Claim</u>		<u>Allowed</u>	
1973, Nov. 29	18714	*	231.18		231.18
" " "	18715	*	1,830.00		1,830.00
" Dec. 7	41152	*	882.70		151.20
" " 13	41155	*	1,376.83		246.10
" " 14	18717		193.98		193.98
" " 20	41156	*	375.28		41.47
" " 28	41157		346.21		346.21
1974, March 28	15375		40.00	a	40.00
" " "	15377		263.30	a	263.30
" " "	15378		75.00	a	75.00
" " "	15379		55.00	a	55.00
" " "	15380		458.00		458.00
" " "	15381		97.00		—
" " "	15382		175.00		—
" " "	15393 ^s		475.00	a	300.00
" " 29	15372 ^s		1,004.84		1,004.84
" " "	15384 ^s		413.04		—
" " "	15385 ^s		207.92	a	207.92
" " "	15386		157.00	a	157.00
" " "	15387		294.00	a	294.00
" " "	15388		34.00	a	34.00
" " "	15389		253.20	a	253.20
" " "	15390 ^s		307.80		307.80
" " "	15391 ^s		278.12		278.12
" June 4	15533		24.51		24.51
" " "	15534		129.00		129.00
" " 5	15539 ^s		8,048.70		5,000.00
" " "	15541		742.20		—
" " 6	15546	*	249.33		—
					<u>11,921.83</u>
					\$121,736.20

^a Agreed items

^s 'Sobey extra' alleged

* Overtime

Deficiencies & back charges

Claimed

Allowed

Those admittedly legitimate at cost to Defendant	2,764.91	\$ 2,764.91
Exhaust fans	485.72	320.57
Repairing leaks	237.85	237.85
" "	634.00	<u>634.00</u>
		3,957.33
		<u>107,340.24</u>
		<u>111,297.57</u> \$111,297.57

Total

Amount paid by Defendant

Balance due Plaintiff

\$ 10,438.63