

SUPREME COURT OF NOVA SCOTIA

Citation: *McCarthy's Roofing Ltd. v. PCL Constructors Canada Inc.*, 2014 NSSC 449

Date: 20141209

Docket: Truro, No. 426466

Registry: Truro

Between:

McCarthy's Roofing Limited

Plaintiff/Respondent

v.

PCL Constructors Canada Inc.

Defendant/Applicant

The Town of Truro
and the Municipality of the County of Colchester

Defendants

DECISION

Judge: The Honourable Justice E. Van den Eynden

Heard: November 4, 2014, in Truro, Nova Scotia

Oral Decision: December 9, 2014

Written Release: January 9, 2015

Counsel: John Kulik, Q.C./Daniel Watt, for the Plaintiff/Respondent
Sara Scott, for the Defendant/Applicant, PCL Constructors
Canada Inc.

By the Court:

Introduction:

[1] The Defendant, PCL Constructors Canada Inc. ("PCL") brings this motion seeking a determination that the lien filed by the Plaintiff, McCarthy's Roofing Limited ("McCarthy's") is invalid. The lien was discharged through the posting of a security bond by PCL. PCL requests the monies paid into court and held as security in lieu of the property, be paid out of court with interest.

[2] PCL was the general contractor for the construction of the Truro Civic Center. McCarthy's was the roofing subcontractor. The project encountered several challenges and delays, which impacted McCarthy's work timeline.

[3] The original contract price and holdback was paid in full to McCarthy's. Prior to receiving payment McCarthy's put PCL on notice it was seeking a claim arising from schedule delays and winter conditions. At the time of payment there was no communication between the parties as to whether or how the payment of the full contract price or holdback impacted McCarthy's claim.

[4] The two other defendants; the town of Truro and the Municipality of the County of Colchester did not participate in the motion or take any position, as this application primarily involved issues between PCL and McCarthy's.

Issues:

[5] The central issue for determination is whether the lien filed by McCarthy's is valid. In answering this question the following sub issues must also be answered:

- (a) Is the claim a lienable claim under the **Builders Lien Act**?
- (b) Is the claim defeated by PCL's payment of the original contract amount?
- (c) If McCarthy's failed to sufficiently substantiate its claim as requested by PCL does this defeat the claim?
- (d) Was McCarthy's lien registered on time?

Overview of the Evidence:

[6] The evidence was submitted by affidavit. There was no cross-examination on the affidavits. To a fairly large extent the facts are uncontroverted. I now turn to summarize the facts.

[7] The subcontract between the general contractor PCL and McCarthy's is dated April 19, 2011. Pursuant to that contract, McCarthy's agreed to supply and install roofing and related services and material at the Truro Civic Centre.

[8] It was expected McCarthy's would commence work in August 2011 and complete by November 2011; before complicating winter conditions set in. The original contract price was \$959,000.00 +HST.

[9] It was expected the entire project would be substantially completed by October, 2012. That did not occur. According to McCarthy's; work was completed on February 4, 2014. PCL states February 14, 2014.

[10] Although PCL asserts any delay is the fault of McCarthy's, I find that at least initially, at no fault of its own, McCarthy's was unable to commence work on the site as originally planned or to continue in an uninterrupted fashion until completed. For the most part McCarthy's work was carried out in a sporadic fashion because of these delays, which were beyond its control.

[11] McCarthy's had to leave the site on several occasions because the areas which required roofing were not ready for McCarthy's to carry out services pursuant to the subcontract with PCL.

[12] On March 6, 2012 McCarthy's put PCL on notice, in writing, of its claim for extra cost caused by the delays. At that point in time McCarthy's estimated it provided an additional 23 days of labour. The cessation of work and onset of winter conditions required roofing materials that had been transported to the site to be transported and warehoused offsite due to winter conditions and related work site complications. The total labour and related costs at that time were \$99,728.00 + HST. Costs claimed for storage and transportation of materials were \$35,352.00 + HST.

[13] Subsequent to putting PLC on notice of the claim for extra cost in March 2012, McCarthy's continued to provide services. Under letter dated February 21, 2013, McCarthy's put PCL on notice that the claim had been further crystallized. The claim amount had increased and McCarthy's finally issued an invoice to PCL in May, 2014. The invoice was for \$224,084.40.

[14] On February 28, 2013, McCarthy's submitted a request for the final installment payment of the original contract less the holdback. This amount was paid by PCL to McCarthy's in April, 2013. At this point in the project PCL was aware of McCarthy's claim and secondly, that McCarthy's had not yet completed its work. In particular, concrete pavers for the roof had not yet been delivered to the site from the supplier or installed.

[15] On January 31, 2014 McCarthy's requested payment of the holdback. The hold back of \$110,962.16 was paid by PCL on February 25, 2014.

[16] The application for payment of the holdback (Exhibit J to the affidavit of Mr. Gian) and the supporting continuation sheet prepared by McCarthy's makes no reference to the claim for delay and storage. McCarthy's list the contract amount as \$964,888.00 with no balance noted for the work to be completed, the material stored and the balanced required to finish. That said, as noted, prior to disbursing the holdback PCL had correspondence articulating a claim dating back to March, 2012 and then again on February 21, 2013.

[17] Notwithstanding McCarthy's had signalled its clear intent to pursue additional claims the parties did not discuss the outstanding claim at the time of payment of the 90% or the 10% hold back. There was no communication one way or the other respecting whether the monies paid by PCL were related to, or satisfied, the additional claim.

[18] Returning to the delay issue. The original delay was not within McCarthy's control. The site was not ready when expected and there was some interruption in work. This appeared to have a cascading effect on McCarthy's ability to get back to the site to complete its work. Due to the protracted timeline of the Civic Centre,

it conflicted with other obligations of McCarthy's. PCL did some chasing to get McCarthy's back as quickly as possible; however, the fact that delays on the front end would or could bump into other work undertaken by McCarthy's seems foreseeable. Ultimately, the work was completed in February, 2014.

[19] PCL requested particulars of McCarthy's claim both post receipt of the March, 2012 communication and the February, 2013 communication. Details sought included time cards and invoices. None of the information requested was provided. This understandably was frustrating to PCL and hampered its ability to assess the claim in any meaningful way.

[20] McCarthy's registered its lien against the property on March 25, 2014. PCL posted a lien bond for \$260,000.00 on April 29, 2014. On May 4, 2014 this Court granted a consent order vacating the lien.

[21] The amount claimed by McCarthy's is disputed by PCL; both with respect to entitlement to damages and the amount of damages.

Position of the parties:

[22] PCL's position has shifted somewhat. Shortly following the filing of the lien PCL took the position that the lien is invalid as it purports to claim for

amounts in excess of the amounts owed by the owner to PCL. (See tab N in affidavit of Paul Garnier.). This position was also argued in PCL's brief; however was abandoned during oral submissions.

[23] The remaining arguments advanced by PCL in its brief are summarized as follows:

1. The purpose behind lien legislation is to protect parties providing services or materials by allowing the registration of security as against real property when payment has not been received.
2. The connection between the work or material supplied to the property must be established for a lien to attach to the property. It is a fundamental principle that work and materials be unpaid in order for a lien to attach.
3. PCL asserts McCarthy's seek a priority for payment which it is not entitled.
4. PCL argues McCarthy is seeking to have a lien attach for work for which it has already been paid in full prior to filing a lien. Although McCarthy's work in relation to the pavers continued into February 2014, PCL asserts McCarthy's had received full payment as of April

4, 2013 and the holdback paid on February 25, 2014. In short, the work performed was part of the original contract for which McCarthy's have been paid in full. PCL argues that any delay respecting the installation of the pavers was caused by McCarthy's.

5. McCarthy's is suggesting that its work for the pavers which it has been fully paid for, would allow its claim for a lien for delay and storage. PCL argues this is not a permissible use. Such a claim is simple not lienable. McCarthy's is seeking to hide behind the broad protections of the Act.
6. The lien is not an equitable remedy. As a statutorily created preference, the lien claimant is entitled only to the benefit for which the statute provides.
7. PCL argues that McCarthy's is out of time for filing a lien.
8. During oral arguments, PCL asserted McCarthy's failure to substantiate the claim from March, 2012 until current is a critical factor. PCL was trying to get detailed backup information so it could assess the claim. Why should McCarthy's get the benefit by their failure to substantiate the claim and prohibit PCL from responding; while on the other hand tie up PCL's money? The **Builders Lien Act**

should not be expanded to cover claims which cannot be substantiated.

9. PCL requests the lien be declared invalid and the security held with the court released. PCL asserts it has discharged the heavy onus or burden placed upon it.
10. McCarthy's is free to pursue its claim for delay and storage against PCL; however, it simply cannot do so under the **Builders Lien Act**.

Position of McCarthy's:

[24] Turning first to the lack of substantiation issue – McCarthy's argue it has been somewhat blindsided and prejudiced as this was not raised in the Motion, supporting affidavit and brief; rather raised in a response affidavit. It was not identified as an issue in the case it had to meet; had it been - McCarthy's would have had an opportunity to respond. PCL is attempting to split the case – the merits and proof of the claim itself are for trial – not for a summary motion and, in any event, are not relevant to the validity of the lien itself; other than to identify the nature and some particulars of the claim to assess whether it falls within the legal framework of the **Builders Lien Act**.

[25] I note that PCL pointed out that under CPR 23 McCarthy's could have asked the court for permission to respond and file additional affidavits. That was not pursued. As well, PCL noted the issue of substantiation was also raised in case authorities referenced by the Respondent to which PCL was replying.

[26] McCarthy's asserts the lien should not be declared invalid. McCarthy's asserts no clear grounds have been established by the Applicant which would support such a remedy. McCarthy's further assert:

1. The claims advanced by McCarthy's are lienable claims. Additional expenses incurred because of project delays such as additional labour costs, equipment rental and related costs of having to remain on a job site longer than anticipated are regularly found to be lienable claims;
2. McCarthy's should not be deprived of its lien security because PCL does not accept liability. Nor does payout of the full contract price defeat the lien claim. In order to defeat the claim McCarthy's must be paid in full for the actual work done. It was not;
3. The lien was registered within the 60 day time limit post completion; and
4. Finally, McCarthy's submit the application should be dismissed and bond remain in place.

Overview of the law:

Purpose/burden

[27] The **Act** provides important security. It should not be taken away except in the clearest of grounds.

[28] The burden is on the Applicant PCL. It is a heavy burden. The Applicant must demonstrate the remedy it seeks is clearly deserved.

[29] It is somewhat analogous to an application for summary judgement. It should be clear on the evidence there is no genuine contestable issue requiring a trial.

[30] There is case law which clearly supports the view that additional expenses incurred as a result of a delayed project timeline can form the basis of a valid lien. The lien claimant must show the lien falls within the parameters of the **Act** as defined by section 6(1). Additional expenses as claimed by McCarthy's must fall within the defined scope.

[31] Section 24(1) sets out the timeline for filing a lien claim. In this case, within 60 days after completion of the contract. Case law has further defined this to be when the "last work" on the project was done.

[32] As authority for the foregoing summary of legal principles I refer to:

W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd., 2006 NSCA 120;

W. Eric Whebby Ltd v. Garden Crest Developments Ltd., 2003 NSCA 59;

Krupp Canada Inc. v. JV Driver Projects Inc., 2014 ABQB 259;
Structform International Ltd. v. Ashcroft Homes Construction Inc., 2013
4544;
Stucor Construction Ltd. v. Brock University, [2001] O.J. No. 4060 (S.C.);
Clarkson Co Ltd. et al. v. Ace Lumber Ltd et al., 1963 S.C.R. 111;
Builders' Lien Act, R.S., c. 277, s. 6, 11, 13(5), 24 and 29.

Decision and Reasons for Decision:

[33] Turning to my decision on the specific issues before me:

(a) Is the claim a lienable claim under the Builders Lien Act?

[34] Based on the evidence before me, I am satisfied the claims fall within the scope contemplated by the **Builders Lien Act**. Looking at the nature of the claim components, at least on its face, it appears to fall within those contemplated by the **ACT**. (Re: extra labour and related costs, equipment rentals).

[35] Apart from the argument of having received all monies due under the contract and the failure to provide particulars so the claim could be assessed on its merits; there really is no or little evidence which would support a finding that the claims fall outside the scope of what is protected under the **Act**.

[36] In this case, the lienholder was unable to commence its work at the scheduled time and the schedule was interrupted at times. Given the protracted

schedule and winter conditions to contend with on a roofing project, it is understandable that McCarthy's might encounter difficulties getting back to the site at the precise time the general contractor wanted. It is also foreseeable they might incur extra expenses for the services and/or materials to be provided to the project.

(b) Is the claim defeated by PCL's payment of the original contract amount?

[37] For the purpose of this narrow motion I find in the negative. At the time the contract price and hold back was paid out, PCL had knowledge in writing of the claim. No supporting documentation was provided notwithstanding the outstanding requests; however, the items claimed were at least, on their face, relevant and appear directly tied to the project. The claim was not withdrawn and remained unpaid at the time the holdback was released. If there was an opportune time for PCL to clarify this issue and attempt to tie the full contract payment and release of hold back to the claim – one would expect that to happen prior to release of the holdback. For the purposes of this motion, nothing turns on this point; rather, I just point out one would expect the issue to at least have been raised.

[38] Section 13(5) and (6) of the **Builders Lien Act** operates to discharge the lien to the extent of payments made. The claim advanced by McCarthy's is over and

above the contract amount. So the claim advanced is not extinguished under these provisions.

(c) If McCarthy's failed to sufficiently substantiate its claim as requested by PCL does this defeat the claim?

[39] Detail is lacking; specifics were requested and not provided. That said, it is not inconceivable (in fact quite possible) in these circumstances, given the extent of delays beyond the subcontractors control, that additional costs were incurred. I find that proof and entitlement of quantum are matters for trial. The lack of substantiation is not sufficient to defeat the claim. In other factual circumstances, it might be enough. The cases Ms. Scott referred to are, in my view, distinguishable. For example the *Tamma* case (**Tamma Construction Co. v. Brault** [1995] O.J. No. 2426). In this case the claims were merely guesswork or speculation. We have more here. We have the subcontractor who carried out the work or over saw it, provide the particulars of the claim; albeit with having yet to produce the supporting documents.

(d) Was McCarthy's lien registered on time?

[40] I find no violation of the time requirements set out in the **Builders Lien Act**. McCarthy's had work to complete (which was not immaterial) and the lien was registered within the 60 day limit following the completion of work.

[41] In short, PCL has not met its burden. The requisite clearest of grounds are not present. The application is dismissed.

[42] My findings, however, relate to this narrow application. The parties are free to argue the claim on its merits at trial.

Costs:

[43] Counsel provided oral submissions on costs in the range of \$750.00 to \$1,000.00. Costs are awarded in the amount of \$1,000.00 which PCL shall pay to McCarthy's forthwith.

Justice E. Van den Eynden