SUPREME COURT OF NOVA SCOTIA

Citation: Acadia Drywall Supplies Ltd. v. BBL.Con Design Build Solutions Ltd., 2013 NSSC 13

Date: 20130110
Docket: Hfx 375522
Registry: Halifax

Between:

Acadia Drywall Supplies Ltd.

Plaintiff

v.

BBL.Con Design Build Solutions Ltd, Harbourstone Enhanced Care Ltd. and Anglican Diocesan Centre Corporation

Defendants

Judge: The Honourable Justice Patrick J. Duncan

Heard: August 08, 2012, in Halifax, Nova Scotia

Counsel: James D. MacNeil, for the plaintiff

Colin D. Piercey, for the defendants

By the Court:

Introduction

[1] The defendants BBL.Con Design Build Solutions Ltd. (BBL.Con) and Harbourstone Enhanced Care Limited (Harbourstone) have jointly presented a motion seeking:

1. A declaration that the plaintiff, Acadia Drywall Supplies Ltd. (Acadia), is not entitled to a builder's lien upon the lands of the defendant Anglican Diocesan Centre Corporation (ADCC), and that the plaintiff's claim of lien against the property located at 5732 College Street , Halifax, Nova Scotia be vacated and discharged insofar as the same affects money paid into court as security for the Claim of Lien;

2. Directing that funds in the amount of $56,579.29 paid into court by the defendant Harbourstone be paid out of court forthwith, with interest;

3. An order for summary judgment on evidence.

Facts

[2] Anglican Diocesan Centre Corporation owns land at 5732 College St in Halifax. It entered into a lease of that land to Shannex RLC Ltd. for a period of 75 years to be calculated by certain terms in the lease.

[3] Shannex retained BBL.Con as a general contractor to build a seniors assisted living facility on the property.

[4] In 2011, BBL.Con sought information from the plaintiff Acadia Drywall in relation to supply of a product called Barritech VP, intended to be used as a liquid application vapor barrier in the building's construction. Communications about the product and its cost were exchanged between BBL.Con and Acadia's representatives.

[5] A Purchase Order was issued by BBL.Con to Acadia on August 29, 2011 for 32 barrels of Barritech VP and associated materials. The total order value was stated to be $50,770.02 with taxes included. The "Bill" information was to BBL.Con at a Chain Lake Dr. address in Halifax. The "Ship To:" information

specified was 5732 College St. in Halifax. These materials were considered by Acadia to be "special order" which the plaintiff alleges limited the right of the defendant to refuse delivery of all or part of the order.

[6] When the material arrived at Acadia's premises, the defendant requested that only 4 barrels be delivered to the work site, which occurred on September 13, 2011. BBL.Con intended to use these barrels to learn how to work with the product.

[7] BBL.Con representatives met with Richard Green, whose status appears to have been a technical representative employed with a third party company called Enercorp and who was to show them how to apply the product. The evidence suggests that he may have been acting in a representative capacity for Carlisle Coatings and Waterproofing Inc., the manufacturer of the product.

[8] A further 2 barrels were delivered on October 7, 2011.

[9] The Defendant decided that it would not take delivery of the balance of the product, claiming that it was not suitable for the purposes intended; that it was the

victim of misrepresentations about the product; and that, in any event, Mr. Green had released them from any obligation they might have to complete the purchase of the remaining 26 barrels.

[10] The plaintiff issued three different invoices totalling the amount owed for the original order. The invoices were addressed to Harbourstone. The evidence in the hearing is that Acadia did this on the instruction of Robin Lyttle who is Procurement Manager for BBL.Con. It appears that the invoices made their way to BBL.Con as they are stamped with a BBL.Con accounting stamp and BBL.Con paid for all materials delivered to the site. It refused to pay for those materials that continued to be held at Acadia's warehouse.

[11] The plaintiff filed its Claim of Lien on December 12, 2011. By consent order issued pursuant to section 29(4) of the **Builders' Lien Act** R.S.N.S. 1989, c. 277, as amended, (the **BLA**), the registration of the lien was vacated on January 6, 2012 upon Harbourstone's payment into court in the amount of $56,579.29.

[12] On January 27, 2012 the plaintiff filed a Statement of Claim naming the three defendants and pleading their liability on the basis of a breach of contract

and *quantum meruit*. A Defence and Counterclaim was filed by the defendants on May 31, 2012.

Motions to Discharge Lien and Release Money Paid into Court

[13] The defendants' first motions seek a declaration that the lien be discharged and the monies paid into court released to Harbourstone.

Section 29(4) BLA Remedy

[14] The defendants submit that section 29(4) of the **BLA** gives the court jurisdiction to determine that a valid lien does not exist. That section reads:

> (4) Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

[15] In *Builders' Lien Act and 3025369 NSL* 2005 NSSC 133 Coughlan J. held that this section is a mechanism that may be used to determine that no lien exists. see, paras. 6-8. In reaching this conclusion he followed a decision of *O'Hearn J.C.C. in McLanders Contractors Ltd. v. Eastern Flying Services Ltd.* (1982) 55

NSR(2d) 449 at 450. The test is described as analogous to Summary Judgment. There is a "heavy burden" on the applicant to show that it is "clearly the case" that the claim can safely be disposed of on this basis.

Position of the Defendants

[16] The common argument of the three defendants is that a lien may only attach to the leasehold interest in the property and only for the value of the materials delivered to the site. As the entire cost of those materials delivered to the site has been paid, there is no right of lien remaining for the plaintiff.

[17] They submit that the contractual dispute over payment for the balance of the materials which were not delivered is a matter for trial between BBL.Con and Acadia.

[18] There are further defence arguments alleging:

1. that the Claim of Lien was filed outside the statutorily prescribed period;

2. that ADCC is not an "owner" within the meaning of section 2(d) of the **BLA**, nor has it given statutorily mandated consent to attach a lien to its estate in fee simple as set out in section 8(2) of the **BLA**;

3. that Harbourstone is not an "owner" within the meaning of section 2(d) of the **BLA** and further that it has no interest or estate in the land or building at 5732 College St.

Position of the Plaintiff

[19] The plaintiff submits that Acadia is within that class of supplier intended to be protected by the **Builders Lien Act**. It submits that the facts of this case are unique in that "materials" had "commenced to be furnished" to the site, and that the balance of the materials were held by them at the request of BBL.Con, otherwise the entire order would have been placed on the College Street site.

[20] Acadia says that it should be provided security for the value of the entire unpaid amount of BBL.Con's original Purchase Order, not just for that amount delivered to the site.

[21] As the materials are special order and unable to be sold or returned then the lien attaches for the value of the entirety of the original amount ordered, notwithstanding the fact that the largest part of the order never left Acadia's premises.

ADCC

[22] Initially it must be said that the parties agree that the lien cannot attach to the “ADCC' estate in fee simple. I agree.

[23] The **Builders Lien Act** provides that:

> 8 (1) The lien shall attach upon the estate or interest of the owner in the property mentioned in Section 6.

[24] An "owner" is stipulated in section 2(d) to mean:

> 2 (d) "owner" extends to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
>
> (i) upon whose credit,

> (ii) on whose behalf,
>
> (iii) with whose privity and consent, or
>
> (iv) for whose direct benefit,
>
> work, or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;

[25] ADCC holds title in fee simple to the subject land. However, to be an "owner" within the meaning of s. 2(d) requires more. In this case there is no evidence that ADCC requested that materials be placed or furnished on the property. It was not done on its credit, on its behalf; nor for its direct benefit; and it was not done with its consent. As a result there is no evidence upon which it can be argued that ADCC is an owner of the land. There is however, a mechanism that the plaintiff could rely upon, notwithstanding these facts. The lien can attach to ADCC's interest in the land if ADCC consents to that, in accordance with the provisions of s. 8(2) of the **BLA**, which reads:

> 8 (2) Where the estate or interest upon which the lien attaches is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of lien at the time of the registering thereof, verified by affidavit.

There is no evidence that ADCC has provided this consent.

[26] In the circumstances, I conclude that the lien as against the fee simple estate interest of ADCC is not valid.

Harbourstone

[27] The uncontested evidence is that Harbourstone is a single purpose entity operating a nursing home in Sydney, Nova Scotia. It has not been involved in any way with the construction, operation or ownership of the project. It is not an owner or lessee of the property; it has not retained contractors or subcontractors in relation to any construction on the subject property. It has not ordered or requested the supply of materials to the site. It is not an "owner" within the meaning of the **BLA**.

[28] The only documentary reference that I can find to this entity is found in Exhibits D and E to Mr. Dixon's affidavit. These are Invoices generated by Acadia showing "SOLD TO Harbourstone Enhanced Care". It has been suggested that Mr. Lyttle requested that the invoice be issued to this entity. The evidence also suggests that this was a pre-existing account for "Shannex Health Care".

Significantly, the Purchase Orders issued by the defendant BBL.Con, found as Exhibits A and C to Mr. Dixon's affidavit, refer only to BBL.Con, with the delivery location as 'Parkland at the Gardens; 5732 College St. Halifax, NS B3H 1X3". The apparent error in naming Harbourstone cannot be attributed to the defendant Harbourstone. Even if Mr. Lyttle requested the invoice to be sent in this manner, there is no evidence that he had authority to bind Harbourstone.

[29] Counsel for the plaintiff says that Shannex RLC, the lessee of the land from ADCC, is a related company to Harbourstone with a common director, Joseph Shannon. Acadia says, therefore, that this error in failing to name Shannex RLC, but instead Harbourstone, may be cured by permitting an amendment to the claim of lien. I have been referred to sections 19 and 21 of the **Builders' Lien Act** to find jurisdiction to make such an amendment. (I note that both companies also list Jason Shannon as an officer.)

[30] There has been no motion filed by Acadia seeking such an amendment. Further, I am not prepared to entertain such a motion in the absence of proper Notice to Shannex.

[31] Shannex, as a distinct corporate person, is entitled to know the claim against it, and to defend that claim; and to defend against an attempt to join it into the claim. It may be that as a result of Joseph Shannon, being a director of both Harbourstone and Shannex, there is an argument to be made that there would be no prejudice to Shannex in permitting such an amendment. However, in a world where it is common for business people to hold multiple positions as officers and/or directors of various corporations, it is a dangerous proposition to say that one corporation can be taken to have notice of a potential lien claim against it because one of its directors is also a director of another company, against whom a lien is incorrectly filed.

[32] There is no evidence to support a lien as against Harbourstone and so I conclude that the lien against Harbourstone is not valid. As Harbourstone deposited the funds held as security for the lien they are entitled to the return of those funds with interest.

[33] In reaching this conclusion, I do so without prejudice to any attempt by the plaintiff to seek to join Shannex as an owner subject to the lien, or as a defendant to the plaintiff's claim.

[34] The defendant submits that it paid for the materials delivered to the College Street site and that a lien cannot exist for the cost of materials not delivered to the site.

[35] Section 6 of the **BLA** sets out the right of lien for the provision of materials to be used in construction of a building:

> 6 (1) Unless he signs an express agreement to the contrary and in that case subject to Section 4, any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making, constructing, erecting, fitting, altering, improving, or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them, for any owner, contractor, or subcontractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees and appurtenances, and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.
>
> (Emphasis added)

[36] The question posed in this case is whether a lien can exist for the price of the 26 barrels which BBL.Con refused delivery of, and which never arrived on the College Street site. The answer to the question depends upon the meaning attached to the words "place or furnished" in the above section. If the plaintiff succeeds then it says that it has a valid lien. In view of my decision to direct the monies paid into court by Harbourstone released, BBL.Con would presumably then be called upon to pay funds into court.

[37] The plaintiff concedes that the available case law on the supply of materials for a lien claim holds that the material must actually reach the property sought to be charged. It submits, however, that the meaning of "furnished" in section 6 of the **BLA** of Nova Scotia has never been judicially interpreted in Nova Scotia. The plaintiff urges that the traditional approach used in other jurisdictions should not apply in the application of the Nova Scotia provision.

[38] The cases with which the plaintiff takes issue include *Ludlam-Ainslie Lumber Co. v. Fallis* (1908) 19 O.L.R. 419, where Clute J. states at pp. 423-424:

> 19 … The question raised on this appeal is whether a sub-contractor is entitled to recover for the value of material sold to the contractor, but which was not

> actually placed in the building or upon the land upon which the building was being erected. The **Mechanics' Lien Act**, R.S.O. 1897, ch. 153, sec. 4, provides that "any person who ... places or furnishes any materials to be used in ... constructing ... any ... building ... for any owner, contractor or subcontractor, shall, by virtue thereof, have a lien for the price of such ... materials upon the ... building ... and the lands ... upon or in respect of which ... such materials are placed or furnished to be used ..."
>
> 20 Section 22 provides that the claim for lien by a contractor or sub-contractor may be registered before or during the performance of the contract or within thirty days after the completion thereof. Sub-section 2: "A claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed."
>
> 21 Is the sub-contractor entitled to his lien as soon as he delivers the material to the contractor, no matter whether it be placed upon the land or incorporated in the building or not? I cannot think that this is the true construction of the Act, the meaning of which I take to be that <u>where the owner of the land receives the benefit of the labour or material a lien attaches, not to the material furnished, but to the land, because the owner is benefited thereby, and, it may be, that such lien attaches if the material is furnished upon the land to which the lien may attach, even although not incorporated in the building, if the same is under the control of the owner</u>. This, I think, is apparent, having regard to the various sections of the Act.
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> (Emphasis added)

[39] In *Milton Pressed Brick Co. v. Whalley* (1918) 42 O.L.R. 369, per Hodgins J.A., at pp. 377-378:

> The **Mechanics and Wage-Earners Lien Act**, R.S.O. 1914, ch. 140, gives extensive protection to material-men who supply materials "to be used," but the lien so declared is upon the land and erection which it is intended to benefit. In the case of materials supplied, it is given upon the land "upon which such materials are placed or furnished to be used".

The extent of this protection is discussed in *Larkin v. Larkin*, 32 O.R. 80; *Ludlam-Ainslie Lumber Co. v. Fallis*, 19 O.L.R. 419; and *Kalbfleisch v. Hurley*, 34 O.L.R. 268, 25 D.L.R. 469.

But here a lien is also claimed by the appellants on their own goods. These had been sold to the contractors, who have since failed. They were delivered on the street in front of the building and land in question, but never actually reached the latter.

Mr. Proudfoot asked for whatever lien his clients were entitled to. But no case has yet decided that a lien under the **Mechanics and Wage-Earners Lien Act**, either on the land or on the material, itself, exists by mere appropriation of goods to a contract, or on delivery to the owner or contractor, unless they are placed upon or reach the lands to be affected. The difficulties in the way of any other method of establishing a lien are many. If a contractor for half a dozen different houses buys steel or concrete by wholesale and stores it in his yard, it is in one sense delivered to be used in certain buildings. A car of lumber for a particular building may be bought in Buffalo f.o.b. there. It is intended to use it in a building and on certain land. Yet it would be impossible to give the wholesaler or the lumber merchant a lien upon the land merely because there was in his mind and that of the contractor an intention to devote the material in whole or in part to the erection of a building or buildings upon certain specified land. The difficulty of any other construction of the Act than the one now stated was pointed out by Clute J., in the *Ludlam* case (*ante*). With regard to the lien upon the materials themselves, the statute is explicit in creating it only when they have reached the land to which it is intended to attach them and from which they cannot be removed (sec. 162) to the prejudice of any lien.

The general lien under sec. 6, and the special one in the nature of a vendor's lien upon the material itself, depends upon the same condition, i.e., the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must be on it, so that either in fact or in contemplation of law the value of the land itself is enhanced by its presence.

(Emphasis added)

[40] Counsel for the plaintiff has presented an interesting construct to support his client's position. It starts with the uncontroversial notion that the policy behind the **Act** is to "protect those who supply labour and material for the improvement of realty owned by another. " see, *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.* [1929] O.J. 23, at para.8. This is accomplished by providing security for those who provide that material.

[41] The argument continues that the **BLA** does not contain an explicit requirement that the material be physically delivered on site for a valid claim to exist and urges a broad interpretation that favors the supplier of the material. The interpretation sought is that it is sufficient on the facts of this case to say that the product was "furnished" or "commenced to be furnished" and so enough to support the lien for the amount of the entire order. The facts that counsel suggest are important to this conclusion are:

- that it was a "special order" with a limited shelf life, which was known to the defendant;

- that all materials were described in a single order of 32 barrels and all were to be delivered to the site;

- that the only reason the materials were not delivered to the site as the agreement called for, was that the defendant asked the plaintiff to hold the balance at their facilities until the defendant was ready to use it;

- that the contract did not permit a return once ordered;

- a portion of the order was used on the property.

[42] In summary, the plaintiff says part delivery of the order is sufficient to attract a lien for the entire price, whether the whole of the order is delivered to the land or not.

[43] With respect, I do not agree with the plaintiff. It is easy to see why the plaintiff takes the position it does. If the evidence ultimately bears out its version of events, then it will be shown that Acadia got caught holding a very expensive order of materials that it could not return and without compensation from the defendant. It has no security in the form of a lien because it acted as the corporate "good guy" in agreeing not to deliver the product as it normally would have.

[44] However, to open up the interpretation of section 6 to accommodate the unique facts of this case would, in my opinion, run contrary to the common law, to the plain language of the section and to the underlying principle that a lien intends to provide security for the value that the supply of material has added to the land or leasehold interest subject to the lien. In this case, the material which arguably enhanced the value of the leasehold is limited to the 6 barrels actually applied. Those have been paid for.

[45] Accepting the plaintiff's argument would mean that an "owner", within the meaning of the **BLA** could, theoretically, be left open to any number of liens for any amount of material not paid for and not used to enhance the value of the land. This has the potential to create great injustice to the "owner". The plaintiff has a remedy, which is to pursue the action for breach of contract and *quantum meruit* as pleaded. There is no basis upon which to require security in the form of a lien for materials that I conclude were not "placed" or "furnished" to the land.

[46] I am satisfied that the defendant BBL.Con has met the heavy burden upon it to demonstrate that a declaration of invalidity is clearly deserved. The lien as it

relates to agreement for the provision of the Barriteck VP pursuant to the agreement between Acadia and BBL.Con is not valid.

Motion for Summary Judgment

[47] The defendants have also presented a motion to dismiss the plaintiff's claim summarily in accordance with **Rule 13.04**:

> **Summary judgment on evidence**
>
> **13.04 (1)** A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> **(2)** The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> **(3)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> **(4)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> **(5)** A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

> **(6)** The motion may be made after pleadings close.

[48] The availability of this remedy in litigation that involves a lien claim has been held to exist by LeBlanc J. in *Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd. et al* 2004 NSSC 180.

[49] The role of the motions judge in applying this Rule has been the subject of appellate comment on various occasions since the Rule was enacted. I take the current state of the law to be that enunciated in *Globex Foreign Exchange Corp. v. Launt* 2011 NSCA 67, by Farrar J.A. for the majority:

> 13 The prerequisites for summary judgment to dismiss an action are -- first, that the applying defendant shows that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success *(Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27).
>
> 14 Accordingly, the first question the Chambers judge had to ask herself was whether she was satisfied that there were no matters of fact or of mixed law and fact requiring trial. Only if she were persuaded that this initial threshold had been met, would she then go on to ask the second question, that is, whether Globex demonstrated that it had a real chance of success in advancing its argument that an agency relationship existed between Launt and Numberco *(Frothingham v. Perez*, 2011 NSCA 59, para. 38-40).
>
> 15 In conducting the requisite analysis the clear directions of this Court on a number of occasions bear repeating. It is not the function of the Chambers judge on a motion for summary judgment to determine matters of fact or mixed law and fact which are in dispute (*Oceanus Marine Inc. v. Saunders*, [1996] N.S.J. No.

301 (Lexis) (C.A.), para. 20, *The Bank of Nova Scotia v. A. MacKenzie's Auto Mart Inc*., 2010 NSCA 81 at para. 21, *Young v. Meery*, 2009 NSCA 47).

16 The Court's role is limited to assessing the threshold of whether a genuine issue exists for trial. The evaluation of credibility, the weighing of evidence and the drawing of factual inferences (except in limited circumstances) are functions reserved for the trial judge.

17 With respect, the Chambers judge erred in approaching her task as if she were to determine on the evidence before her whether an agency relationship existed between Launt and Numberco, rather than determining whether there was a material fact in issue requiring a trial. I will come back to the Chambers judge's error after discussing the law of agency.

[50] To the same effect the court stated in *Gilbert v. Giffin* 2010 NSCA 95:

14 The prerequisites for summary judgment to dismiss an action are -- first that the applying defendant shows that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27).

[51] And in *Bank of Nova Scotia v. A. MacKenzie's Auto Mart Inc*. 2010 NSCA 81 Farrar J.A. says:

21 AMCI Export Corp., supra, makes clear that which is well-known; it is not the function of the Chambers judge on an application for summary judgment to determine matters of fact or mixed law and fact which are in dispute. Matters of controversy are to be left for resolution at trial (para. 16 and para. 17).

ADCC

[52] I have reviewed the Claim, the Defence and the Counterclaim, the affidavit evidence and the evidence adduced in the hearing of these motions. The facts as this claim relates to the ADCC are undisputed. The only involvement of ADCC in this matter was as the holder of title in fee simple of the land upon which the materials were supplied.

[53] I find that there is no genuine issue of fact requiring a trial relating to the claim against ADCC.

[54] Further, I find that there is no evidentiary basis upon which to conclude that Acadia's claim has a real chance of success as against ADCC. There is no evidence upon which to find that there is a basis in law which could support a claim that ADCC be held liable to Acadia Drywall with respect to the order and provision of the Barritech VP materials.

[55] The plaintiff's claim against ADCC is dismissed.

Harbourstone

[56] The facts relating to the claim against Harbourstone are not complex. Harbourstone is a corporate entity that has no relationship with the plaintiff in relation to this project. It was incorrectly identified by the plaintiff in its invoices, notwithstanding BBL.Con's Purchase Order which clearly identified that it was the entity to be billed at its address in Halifax; and that the product was to be delivered to the College Street address.

[57] The only question of fact is why did this invoicing error occur? Is it evidence that could cause liability to fall on Harbourstone?

[58] The evidence on this motion is that a representative of BBL.Con requested that Acadia issue the invoice in this way. Acadia knew this to be a Shannex project and that Harbourstone was a Shannex company that it previously did business with, so the plaintiff used the same billing information. This evidence has not been challenged.

[59] I conclude that there is no material dispute of fact that requires a trial.

[60] Does the plaintiff's claim have a real chance of success against Harbourstone? On the evidence presented I conclude that it does not.

[61] But for the invoicing error, there is no evidence of a contractual or other legal relationship in existence as between the plaintiff and Harbourstone, upon which the latter could be held liable for the order and provision of the Barritech VP materials. Harbourstone had no interest in the College Street project and received no benefit from the materials or services alleged to be provided by Acadia to the project.

[62] Accepting that Mr. Lyttle did request the invoice to go to Harbourstone, I conclude that there is no evidence that he had the actual or implied authority to bind Harbourstone. He was an employee of BBL.Con, not Shannex, and not Harbourstone. His involvement cannot assist the plaintiff's claim.

[63] The claim of the plaintiff as against Harbourstone is dismissed.

BBL.Con

[64] BBL.Con's situation is considerably different.

[65] There are genuine issues of fact and of mixed fact and law that require a trial. Some of them are listed as follows and in no particular order:

1. Whether Mr. Green represented to the defendant that the defendant was released from any contractual liability it might have for the cost of the 26 undelivered barrels.

2. If it is found that Mr. Green did make such representations, then it must be determined whether he had the authority to bind Acadia Drywall, thus eliminating its claim as against the defendant.

3. There must be a determination of when the contract was formed, and what it was for. Was the contract for the purchase of 32 barrels plus associated materials, which were non-returnable as alleged by the plaintiff; or separate orders of 4 barrels, 2 barrels and 26 barrels, with the defendant to be liable for payment only on those delivered? i.e., 6 barrels and associated materials.

4. If the plaintiff was liable to its supplier for the cost of all 32 barrels, then what are the plaintiff's losses, and does the defendant bear responsibility in whole or in part to the plaintiff for these losses alleged to arise from the defendant's refusal to take delivery and to pay for the materials?

5. Whether, as the defendant submits, it was unaware of the limitations of the product until after the delivery and application of 6 barrels, or as the plaintiff alleges, the limitations complained of were all identified in writing to the defendant in advance of the order being placed. In this regard, see the Affidavit of Dave McIntosh of Acadia, at Exhibits A, B, C and D, each of which identify materials to which the product could be applied, and the "Limitations" which include minimum temperatures for application and the inability to apply under certain rain conditions. These may be seen as contradicting the defendant's position that it was not aware of these limitations prior to receipt of the 4 barrels.

6. Disputes between the parties as to the conditions upon which the order of the materials was made and as to the decision to deliver to the property in installments must be resolved.

[66] I conclude that the defendant BBL.Con has not met the burden of demonstrating the absence of genuine issues of fact or mixed fact and law

requiring trial. Having failed on the first part of the test the defendant's argument fails.

[67] The motion of BBL.Con for summary judgment on evidence is dismissed.

Conclusion

[68] I declare the lien to be invalid and the money paid into court by Harbourstone is directed to be paid to Harbourstone, with interest.

[69] I grant summary judgment on evidence and dismiss the plaintiff's claim against ADCC and Harbourstone. The motion for summary judgment seeking to dismiss the plaintiff's claim against BBL.Con is dismissed.

Costs

[70] I will hear from the parties as to costs, if they are otherwise unable to agree.

[71] Order accordingly.