

SUPREME COURT OF NOVA SCOTIA

Citation: *Blackhawk Construction Limited v. Martin*, 2020 NSSC 388

Date: 20201215

Docket: Hfx. No. 463831

Registry: Halifax

Between:

Blackhawk Construction Limited

Plaintiff/Defendant by Counterclaim

v.

Gregory Neil Martin and Marjorie Marie Martin

Defendants/Plaintiffs by Counterclaim

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: December 15, 2020 in Halifax, Nova Scotia in Chambers

Oral Decision: December 15, 2020

Written Decision: January 29, 2021

Counsel: Plaintiff by William Dooks self-represented
Dennis James, Q.C. for the Defendants

Wright, J. (orally)

[1] This is a motion by the defendants/plaintiffs by counterclaim for an order vacating the registration of a builders' lien filed against their residential property by the plaintiff Blackhawk Construction Limited ("Blackhawk") in 2017.

[2] By way of background, in 2016 the parties entered into a new home construction contract for a single family dwelling to be built on a waterside property in West Petpeswick. That contract was later amended in August of 2016 expanding the scope of the work with an adjusted contract price of \$415,338.

[3] Construction began that year and by January of 2017, the defendants had paid \$270,000 to Blackhawk in progress payments. After further payments were made and credits given, approximately \$108,000 of the contract price remained unpaid as of February, 2017.

[4] Along the way, the defendants became concerned about the quality of workmanship and hired a forensic structural engineer to determine the extent of the deficiencies. A report was obtained in March of 2017 outlining all of the deficiencies but with a soured relationship having developed between the parties, Blackhawk did not carry them out. Rather, Blackhawk ultimately left the project, filed a builders' lien shortly thereafter, and never returned to the site.

[5] In May of 2017, Blackhawk commenced this proceeding by filing a Statement of Claim, in response to which the defendants filed their defence pleadings with a counterclaim for deficiencies. That was followed by an exchange of documents between the parties in 2018 and discovery examinations that were

held in early 2019. In mid 2019 a Date Assignment Conference was held setting trial dates beginning January 18, 2021 (a mere three weeks away).

[6] After the defendants became aware that Blackhawk was selling off some of its construction equipment in 2020, they filed a motion for security for costs in July of that year. That motion was heard by Justice Ann Smith on September 14th who subsequently released a written decision on October 2nd in favour of the defendants. That in turn was followed by the issuance of an order on November 5th, the terms of which required Blackhawk to:

1. Provide security for costs in the amount of \$30,000;
2. Pay that amount into court on or before November 16, 2020; and
3. Pay costs of the motion in the amount of \$1,500 by November 27, 2020.

[7] That order was not complied with by the payment deadlines or at any time since with Blackhawk now saying that it is insolvent.

[8] The Civil Procedure Rules at play in this motion are Rules 45.04(1) and 45.04(3). Subparagraph 1 provides that an order for security for costs stays the proceeding until the security is given or the claim is dismissed. Subparagraph 3 provides that a party who obtains an order for security for costs may make a motion for dismissal of the claim if the party ordered to provide security fails to do so as ordered. Were such a dismissal to happen, obviously the lien security would fall with it and be vacated.

[9] The defendants have chosen not to apply for dismissal of the Blackhawk claim at this time in order to keep their options open for pursuing their counterclaim against Blackhawk if it ever emerges from insolvency in the future.

Rather, the defendants have chosen instead to take the intermediate step of making this motion under s.29(4) of the *Builders' Lien Act* to vacate the registration of the lien to enable them to obtain financing for the cost to repair the deficiencies.

Section 29(4) reads as follows:

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.

[10] The position of the defendants is this. As matters presently stand, the defendants will be stymied indefinitely in being able to complete the necessary repairs to their house where the proceeding has now been stayed by virtue of the security for costs order until the security is given or the claim is dismissed. With Blackhawk's current insolvency, there is no prospect for payment of security for costs to be made any time soon, if ever, nor is it economically feasible for the defendants to now press the litigation of their counterclaim, with little prospect for recovery of any judgment they may obtain.

[11] The only timely way out of this quandary for the defendants, and to still preserve their counterclaim, is to apply for an order vacating the registration of the lien as a consequence of Blackhawk's failure to comply with the order to pay security for costs. Hence, this motion.

[12] The essential question for the court to decide then is whether, having regard to s.29(4) of the *Builders' Lien Act*, the failure of Blackhawk to comply with the order for security for costs, and the resulting disadvantaged position the defendants now found themselves in, should be considered a "proper ground" for the immediate vacating of the registration of the lien.

[13] I have not been referred to any case precedent where this question has been judicially considered. I have only been referred to the decision of this court in **Ocean v. Economical Mutual Insurance Company**, 2012 NSSC 144 which considered Civil Procedure Rule 45.04(3). That case involved a completely different factual context, however, and did not involve the interpretation or application of the *Builders' Lien Act*. Rather, it was a case where an order of dismissal was sought and granted under Civil Procedure Rule 45.04(3). I do not find that case to be of much assistance here. The court must therefore balance the respective interests of the parties to this motion in deciding upon the appropriate remedy.

[14] There is no question but that the defendants now find themselves in a disadvantaged position with the litigation now in limbo. The lien prevents them from obtaining financing for the cost of repairs to the house and will do so indefinitely under the status quo, with the proceeding now stayed unless the lien is vacated. Under the present scenario, Blackhawk is in a position to tie up the property indefinitely, and continue to hold the upper hand by maintaining its lien interest all the while, notwithstanding its failure to comply with the order of the court for payment of security for costs.

[15] Failure to comply with a court order carries consequences. Those consequences should not preserve the advantaged position of the party in default of the order, to the prejudice of the position of the successful party on the motion.

[16] In my view, this balancing of interests favours the defendants and constitutes a proper ground for vacating the registration of the lien within the parameters of s.29(4) of the *Builders' Lien Act*. I therefore find the vacating of the lien to be the

appropriate and just remedy to be imposed in the circumstances of this case. An order will issue accordingly which will serve to lift the encumbrance of the builders' lien on the title to the defendants' property, so that they can obtain financing for the cost of repairs.

[17] I decline to award costs of this motion to the defendants which will serve as an expression of the court's disapproval of the smear campaign which has been conducted by the defendant Marjorie Martin against Blackhawk and its principal, William Dooks, on her facebook platform and a website she has established. Mr. Dooks speaks of the detrimental effect this has had on Blackhawk and on him personally in the community. I take the view that private litigants should conduct their cases within the process of the courts and not on social media platforms. The request for costs of this motion is denied accordingly.

J.