

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

CITATION: Northwoods v. Stewart et al – 2024 NBKB 040

BETWEEN:

**NORTHWOODS EXCAVATION LTD.**

Plaintiff/Respondent

- and -

**HEATHER ANNE LYNNE STEWART and  
ROBERTH VAUGHN STEWART,**

Defendants/Moving Party

- and -

**MICHAEL BISHOP doing business as M.V.B.  
CONTRACTING,**

Third Party

BEFORE: Justice William T. Grant

HEARING HELD: Saint John

DATE OF HEARING: February 23, 2024

DATE OF DECISION: February 27, 2024

**COUNSEL:**

Defendants/Moving Party: Michael J. Gooding

Plaintiff/Responding Party: Michael D. Heikkinen

Third Party: no appearance

[1] In the spring of 2022 the defendants, Heather and Robert Stewart entered into an oral contract with the third party, Michael Bishop doing business as M.V.B. Contracting, to perform certain work required in the construction of a new house on their lot on Purvis Brook Road in Kingston, New Brunswick. The work included land clearing, excavation work, site preparation work, septic system installation, excavation for house and garage footings, excavation of a well and completion of a driveway.

[2] They did not settle on a firm price, but the Stewarts told Mr. Bishop that they had other quotes in the range of \$40,000 - \$50,000 to which he replied that he would "treat you right" or "look after you".

[3] The Stewarts hired Ross Fowler of Fowler & Sons to build the remainder of the house and garage. Mr. Fowler told them that as long as he could start the footings for the house and garage no later than August of 2022, he could have the house ready for them to move in by Christmas. Their evidence is that Mr. Bishop agreed to Mr. Fowler's timeline.

[4] In July 2022 the Stewarts paid Mr. Bishop \$33,000.00 and he started his portion of the work in mid-July. The preparation work for the house footings was completed in August, 2022 but the preparation work for the garage footings was not done until mid-September, 2022.

[5] There were other delays particularly in the installation of the septic system as well as changes to the original plans, so the house was not move-in ready by

Christmas, 2022. Mr. Fowler said he was delayed until the septic system was installed and that did not occur until April, 2023.

[6] The Stewarts say that in December, 2022 Mr. Bishop told them he was going into business with “another guy” but he didn’t give them any written notice that the arrangement would affect the work on their house, and they say that they continued to deal directly with Mr. Bishop. They say the first they knew that the plaintiff, Northwoods Excavation Ltd., was involved with the work they contracted to Mr. Bishop was when they received an invoice from Northwoods dated April 26, 2023 for an additional \$58,276.30 (the “invoice”).

[7] Terry Wood who is the owner of Northwoods disputes this allegation and deposes that on or about November 7, 2022 he met with the defendant, Robert Stewart and Mr. Bishop at the Stewarts’ property where they had a conversation about Mr. Bishop’s personal problems and discussed the fact that Northwoods would be taking over the balance of Mr. Bishop’s work on the Stewarts’ property. He deposes that Mr. Stewart agreed to this arrangement and they shook hands though no written agreement was prepared.

[8] The Stewarts dispute the amount of the invoice which increases the total cost of their contract for the work to approximately \$91,000. They have refused to pay it saying they had no contract with Northwoods.

[9] On May 26, 2023 Northwoods filed a claim for lien in the Land Titles Office against the Stewarts’ property for the amount of the invoice.

[10] On or about June 12, 2023 the Stewarts received, by registered mail, a written Notice of Lien from Northwoods dated May 26, 2023 pursuant to s. 30 of the ***Construction Remedies Act***, SNB 2020 c. 29 (the “CRA” or “the Act”).

They also received a Notice to Owner from Northwoods dated May 25, 2023 pursuant to s. 54(1) of the CRA.

[11] On August 10, 2023 Northwoods started this action against the Stewarts who filed a Statement of Defence and Counterclaim against Northwoods on November 10, 2023. They also filed a Notice of Third Party Claim against Michael Bishop, doing business as M.V.B. Contracting, on November 10, 2023. On November 29, 2023 Northwoods filed a Defence to the Counterclaim. No Third Party Defence has been filed as of the hearing of this motion, undoubtedly because Mr. Bishop has filed an assignment in bankruptcy which stays this action against him under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3.

[12] In this motion the Stewarts request an Order that:

**(a) the Claim for Lien by the Plaintiff, Northwoods Excavation Ltd, against property identified as Property Identifier (PID) 00436287 is invalid;**

**(b) The action to enforce the said Claim for Lien be dismissed and the Certificate of Pending Litigation be discharged and removed from registration against said property;**

**(c) ...**

**(d) costs be awarded to the Defendants pursuant to Rule 59 of the New Brunswick Rules of Court and/or s. 100 of the Construction Remedies Act, SNB 2020, c. 29; and**

**(e) such other and further relief the Court upon hearing the Motion deems fit and just.**

[13] In support of the Motion the Stewarts rely primarily on s. 54(4) and s. 54(8) of the CRA. In essence they submit that Northwoods is not entitled to a lien because it did not give them a Notice to Owner as required by s. 54(4) of the Act within 45 days after the first day services or materials were supplied.

[14] They further submit that even if Northwoods took an assignment of their contract with Mr. Bishop, because they were never served with a Notice to Owner by Mr. Bishop, any entitlement to a claim for lien arising from that contract would have expired 45 days after the first services or materials were supplied in mid-July 2022, i.e. sometime in early September, 2022. In support of this submission, they rely on s. 54(8) of the Act which provides that where a contractor fails to give a Notice to Owner within the 45 days as required by s. 54(4) of the Act the contractor is not entitled to register a lien against the property for the work.

### **LAW**

[15] In the case of *Horsman v. Brun* 2001 NBQB 124 Rideout J. refused an application to dismiss a lien for not having been filed on time. That case dealt with the issue of when there was substantial completion of the contract by the lien claimant, an issue that Justice Rideout found went to the root of the contractor's entitlement to a lien.

[16] In the unreported case of *Margaret Evelyn Young-Lockhart v David Duncan Young* (BC-246-2021) Justice Ivan Robichaud discussed the test for vacating a Certificate of Pending Litigation (formerly known as a *lis pendens*) when he stated at paragraphs 26 and 27:

**26. In *MacLean Sports v. Fredericton*, Justice Garnett summarized the law with respect to the Court's discretion to revoke a Certificate of Pending litigation at paragraphs 16 to 20:**

[16] The test for whether a court should rescind a Certificate of Pending Litigation has been formulated over many years.

[17] In *Sheppard v. Kennedy* (1884) 10 P.R. 242 the principle was stated as follows:

*A lis pendens* should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the Court before the plaintiff's right to have his case tried is interfered with.

[18] In *Brock v. Crawford*, (1908) 11 O.W.R. 143 at 147 the Court stated that:

... a certificate will be vacated only by the defendant proving that under no possible circumstances can the facts set out in the pleadings give any right in respect of the land in question.

[19] In *Inwood v. Ivey*, 1939 CanLII 331 (ONSC), [1939] D.L.R. 101 at paragraph 9 the Justice said:

To enable me to make the order asked for, I must hold that by no circumstances can the claim of the plaintiff as endorsed on the writ, and as it may be developed in the pleadings not yet delivered, give the plaintiff any right in the lands. It will not be sufficient that the plaintiff may fail. There must either be a certainty that he will fail, or it must clearly appear that even if successful in his action he cannot get an interest in the land. In my opinion, the situation is not so clear as to justify me in making the order asked.

[20] In *Century 21 v. Tri-Town Realty*, (1989) 99 N.B.R. (2d) 369, 1989 CanLII 8294 (NBQB), Justice Higgins stated that the Certificate will not be vacated "unless the

**plaintiff, if successful, cannot succeed in obtaining an interest in the land in question.”**

**27. In that decision, the Plaintiff was claiming an equitable interest in land based on a resulting and/or constructive trust. The Court said it was not convinced a Court of Equity would not order the Defendant to return the land to the Plaintiff and refused to vacate the Certificate of Pending Litigation.**

### **ANALYSIS AND DECISION**

[17] The legal relationship between Northwoods and the Stewarts is critical to the determination of the issue in this motion, i.e. whether the Claim for Lien filed by Northwoods is valid or invalid. There are at least three possible findings concerning that relationship:

- a) they could have been in a direct contractual relationship in which case Northwoods would have been obligated to send the Stewarts a Notice to Owner under s. 54 of the CRA;
- b) there could have been an assignment by Mr. Bishop to Northwoods of his contractual rights and obligations under his contract with the Stewarts in which case Northwoods would be in the same position in respect to any rights to a lien that Mr. Bishop would be in; or
- c) Northwoods could be found to have been a sub-contractor to Mr. Bishop in which case it would have its own right to a lien independent of Mr. Bishop.

[18] In her affidavit at paragraphs 27 - 29 Heather Stewart deposes:

**27. At no time did my husband or I have any notice or knowledge that Mr. Bishop had assigned the Contract Work to Northwoods Excavation Ltd. (“Northwoods”). At some point in or around the month of December, 2022, Mr.**

**Bishop had said something in passing to me to the effect that he was getting into business with another guy, but Mr. Bishop never notified my husband or I, nor did we have any knowledge, that Mr. Bishop was assigning the Contract Work that we hired him to complete.**

**28. My husband and I had no knowledge that Mr. Bishop's comments in passing about getting into business with another guy concerned the Contract Work. We always saw Mr. Bishop's equipment and workers on site and my husband and I always dealt directly with Mr. Bishop even after the Contract Work was allegedly assigned.**

**29. The first time that my husband and I learned that Northwoods was involved in the Contract Work was when I received an invoice dated April 26, 2023 by email from Jessie Moore, Office Manager of Northwoods. ...**

[19] At paragraphs 8 and 9 of his affidavit in support of this motion. Robert Stewart repeats the allegations in paragraphs 28 and 29 of Heather Stewart's affidavit.

[20] In paragraph 6 of his affidavit opposing the motion Terry Wood of Northwoods says those allegations are not true. He further states that in late summer of 2022 Mr. Bishop told him he was having personal struggles. He continues at paragraphs 10 – 13:

**10. Mr. Bishop advised me and I verily believe it to be true that he told the Defendants that he was having these personal struggles in or about the summer of 2022.**

**11. Mr. Bishop asked me if Northwoods had the capacity to take over and complete the remaining work at the Property, as he did not feel that he would be capable of doing so given the trying personal circumstances he was facing. I agreed that Northwoods would complete the project.**

**12. I met with Mr. Bishop and Robert Stewart at the Property on or about November 7, 2022. I was picking up**

**one of Northwoods' excavators to move it to a different site. At that point in time, Northwoods' equipment and some labourers had been on site at various points over the preceding five (5) to six (6) weeks.**

**13. Mr. Stewart was on site that afternoon checking on the progress of the work. He expressed to Mr. Bishop and me that he was tired because he had been working night shifts. The three (3) of us (me, Mr. Bishop, and Mr. Stewart) had an in-depth conversation about Mr. Bishop's recent personal issues and that Northwoods would be taking over the rest of the contract work from MVP (sic). Mr. Stewart agreed to this and we shook hands, although no written agreement was ever prepared. ...**

[21] Neither party asserts that they entered into a contract but according to Northwoods they took an assignment of the contract from Mr. Bishop. The Stewarts' evidence, on the other hand, tends to support a finding that Northwoods was a sub-contractor to Mr. Bishop.

[22] As noted earlier, it makes a difference which legal relationship there was because as an assignee of the contract between Mr. Bishop and the Stewarts Northwoods would have no more rights to a lien on the property than did Mr. Bishop who clearly did not serve the Stewarts with a Notice to Owner.

[23] If, on the other hand, Northwoods was a sub-contractor then its entitlement to a lien is protected from Mr. Bishop's failure to serve a Notice to Owner by s. 54(9) of the CRA which states:

**54(9) The entitlement of any subcontractor or other person to register a claim for lien with respect to an improvement is not affected by any deficiency in a notice to owner or by the failure of a contractor to give a notice to owner with respect to that improvement.**

[24] I find that the issue of whether Northwoods was a contractor, an assignee, or a sub-contractor goes to the root of the issue that is before the

Court in this motion, i.e., whether or not, in all the circumstances of this case, the Claim for Lien filed by Northwoods against the Stewarts' property for the work it did was invalid.

[25] I further find that the answer to the question of what legal relationship existed between Northwoods and the Stewarts is not clear from the evidence in the Record on Motion. Applying the test used by Justice Rideout in *Horsman v. Brun, supra.*, and that set out by Justice Robichaud in the *Young* case, *supra.*, I find that it is possible that after a trial a judge could find that Northwoods was a sub-contractor to Mr. Bishop and that it was not required to serve a Notice to Owner nor, by virtue of section 54(9) of the CRA would it be affected by the fact that no Notice to Owner was served by Mr. Bishop under s. 54(4) of the Act and that its lien would be found to be valid.

[26] I therefore find that it is not clear from the record on this motion that the lien filed by Northwoods in this case will ultimately be found to be invalid.

[27] As a result this Motion is dismissed with costs of \$1,500.00 all-inclusive.

---

**William T. Grant**  
**Judge of the Court of King's Bench**  
**of New Brunswick**