

CITATION: NDF Financial Inc. v. Tomas, 2025 ONSC 4427
COURT FILE NO.: CV-19-617526
DATE: 2025 07 25

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act, RSO 1990, c C.30, as amended*

RE: NDF FINANCIAL INC., *Plaintiff*

- and -

LIDIJA TOMAS also known as LIDIJA MOHAN, EVEREST FINANCE CORPORATION and THERIAULT HOLDINGS INC., *Defendants*

AND RE: LIDIJA TOMAS also known as LIDIJA MOHAN, *Plaintiff by counterclaim*

- and -

NDF FINANCIAL INC. and NICHOLAS FIORINI, *Defendants by counterclaim*

BEFORE: Associate Justice Todd Robinson

APPEARING: M. Shifman, *for the defendant, Theriault Holdings Inc.*

L. Tomas, *in person*

HEARD: April 30, 2025 (by videoconference)

**REASONS FOR DECISION
(Motion to Dismiss Lien Action and Payout Lien Security)**

[1] Theriault Holdings Inc. (“Theriault”) moves to dismiss this lien action by NDF Financial Inc. (“NDF”) and for payment out of the security previously paid into court by Theriault to vacate NDF’s lien. Although not specifically listed in the notice of motion, an adjunct to that relief is an order discharging NDF’s lien, since it is the subject of this lien action and attaches to the lien security sought to be returned.

[2] NDF did not appear at the hearing and has not otherwise opposed the motion despite being served with the motion materials (with service validated per my separate endorsement issued at the hearing). Lidija Tomas consents to discharging NDF’s lien and dismissing NDF’s action, but intends to continue her counterclaim against NDF and Nicholas Fiorini. Theriault takes no position on whether the counterclaim should continue and withdrew relief seeking dismissal of the

counterclaim. Since NDF did not appear and does not oppose the motion, the only disputed issue is whether the lien security should be paid out to Theriault, or whether it should remain in court while Ms. Tomas' dispute with Theriault over the power of sale proceedings for the subject property plays out.

[3] Having considered the parties' arguments, I am satisfied that payout of the lien security is a separate issue from Ms. Tomas' dispute with Theriault. There is no crossclaim between those co-defendants, so the alleged improvidence of the power of sale process and proper accounting of the sale proceeds is not an issue in this action. Regardless of the source of funds, Theriault posted the security to vacate NDF's lien. That lien is now being discharged and the action to enforce the lien is being dismissed. The lien security is properly returned to the party who posted it. I am unconvinced that the separate dispute between Ms. Tomas and Theriault properly influences or bears on that outcome. Accordingly, in addition to discharging NDF's lien, I am directing that the funds be paid out to Theriault.

ANALYSIS

[4] This lien action and the reference before me has a long and procedurally troubled history. The action was commenced in 2019, with a judgment of reference and order for trial obtained in late 2019. The reference before me was constituted in early 2020, after which there were a series of hearings for trial directions and multiple motions until late 2021. The reference thereafter fell into abeyance for over three years.

[5] The lien and this action concern work performed by NDF at a property in Toronto that was formerly owned by Lidija Tomas. The property was sold by the second charge mortgagee, Theriault, under power of sale in August 2020. At the time, Ms. Tomas disputed the sale process and Theriault's accounting from the sale and brought a motion before me seeking a preservation order over a portion of the sale proceeds. Prior to the first return of the motion, a consent order was agreed whereby the first charge mortgagee, Everest Finance Corporation, was paid in full on its secured mortgage debt from the proceeds of sale and the agreed amount of \$14,015.73 was posted into court to vacate NDF's lien. That sum represented the basic holdback amount required to be retained under s. 22(1) of the former *Construction Lien Act*, RSO 1990, c C.30 (the "CLA"), the provisions of which remain applicable in this lien action by operation of s. 87.3 of the current *Construction Act*. Distribution of the balance of the proceeds of sale remained disputed by Ms. Tomas. After hearing argument for the requested preservation order, I dismissed the motion: *NDF Financial Inc. v. Tomas*, 2020 ONSC 5594.

[6] Ms. Tomas separately commenced a non-lien action against Theriault and its principal, Martin Theriault, among others, arising from the power of sale. I have limited information on that proceeding. I was advised at this motion hearing that the action has been dismissed by Penman J., with costs awarded against Ms. Tomas. Ms. Tomas advised that she intended to appeal that decision.

[7] Theriault moves under subrules 24.01(2) and 60.12(b) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "Rules"), citing NDF's non-compliance with my prior interlocutory orders in this reference and delay in prosecuting this action. Theriault has not moved under any

provision of the *CLA*. However, except where inconsistent with the *CLA*, the *Rules* apply in lien actions: *CLA*, s. 67(3).

[8] NDF does not oppose the dismissal of its lien action, so I need not engage in a detailed analysis of the grounds for doing so. Unquestionably, NDF remains in ongoing breach of multiple interlocutory orders that I made several years ago. I agree with Theriault's factum submission that NDF's conduct (or lack thereof) is inconsistent with a serious intention of complying with those orders or pursuing its claim to trial. NDF has completely disengaged from the litigation. That supports the dismissal relief sought.

[9] I do wish to comment on Theriault's reliance on subrule 24.01(2) of the *Rules* as a basis for dismissing NDF's action. In my view, relief under that subrule is not available in a lien action. Subrule 24.01(2) mandates that an action shall be dismissed for delay where either of the circumstances in paragraphs 1 and 2 of subrule 48.14(1) apply to the action, namely that the action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action or the action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off. Since this action has not been placed on or struck off a trial list, the second criteria does not apply.

[10] With respect to dismissal relief based on the first criteria, I find it to be inconsistent with ss. 37, 46, and 47 of the *CLA*. NDF did not pass a trial record, which would seem to trigger subrule 48.14(1) of the *Rules*. However, passing a trial record is not a prerequisite to a lien action being tried under the scheme of the *CLA* and local practice in Toronto Region with respect to lien references. The "set down" requirement in lien action is found in s. 37(1) of the *CLA*, which requires that an action in which the lien may be enforced be set down for trial or an order is made for the trial of such an action prior to the second anniversary on which a lien was perfected. If neither is done, then the lien expires and lien action may be dismissed by motion under s. 46. Dismissal relief may also be separately sought "upon any proper ground" under s. 47.

[11] In this case, NDF complied with s. 37(1) of the *CLA*. A judgment of reference under s. 58 of the *CLA* was obtained in November 2019 and, thereafter, an order for trial was obtained in December 2019. That led to a series of hearings for trial directions before me through which I sought to advance the parties and this action to trial readiness. In my view, it is inconsistent with the scheme of the *CLA* to grant mandatory dismissal relief for non-compliance with paragraph 1 of subrule 48.14(1) of the *Rules* (*i.e.*, failing to deliver a trial record) in circumstances where there has been proper compliance with the requirements of s. 37(1) of the *CLA*.

[12] In any event, as already noted, NDF does not oppose dismissal and the relief is supported by NDF's ongoing breach of court orders. Since the action in which NDF's lien is to be enforced is being dismissed, it follows that the lien should be discharged. The sole remaining issue is what should be done with the lien security in court, which was posted by Theriault from the proceeds of sale of the property. Theriault seeks its return. Ms. Tomas argues that it should remain in court for the time being.

[13] The core of Ms. Tomas' argument is that the way Theriault dealt with the property after it exercised rights under its mortgage amounted to a conflict of interest. She argues that, had the

property been sold as-is, rather than Theriault seeking to finish the project, there would have been a profit with funds flowing to Ms. Tomas. Various fees incurred by Theriault are argued to have been improperly charged to Ms. Tomas. Ms. Tomas challenges the accounting of the proceeds of sale, taking the position that she ought to have received some money after paying out proper mortgage indebtedness to Theriault.

[14] Candidly, Ms. Tomas has put forward good arguments that, if substantiated in evidence, would support her challenges both to Theriault's conduct and to its accounting of the proceeds of sale. However, that does not change the result of this motion.

[15] NDF's action is being dismissed and the lien discharged. The money in court is security for that discharged lien. Theriault is the party that posted the funds into court. There is no crossclaim by Ms. Tomas against Theriault and, accordingly, the disputed issues between Ms. Tomas and Theriault are not issues in this lien action. Ms. Tomas' separate non-lien action against Theriault arising from the power of sale has been dismissed, albeit that the dismissal order may be under appeal.

[16] In deciding the dispute, I must consider operation of the *CLA*. Notably, both ss. 45(3) and 46(4) presume that, upon a lien being declared expired, any lien security paid into court "be returned to the person who paid the amount into court." Although NDF's lien is being discharged, as opposed to being declared expired, I have been directed to no legal authority supporting that lien security should remain in court upon discharge of a lien in circumstances such as this case. Ms. Tomas is essentially requesting that I make a preservation order over the holdback funds pending a further accounting by Theriault or court order. However, I dismissed Ms. Tomas' prior request for a preservation order for reasons given in September 2020: *NDF Financial Inc. v. Tomas*, 2020 ONSC 5594. There is no evidence before me of any material change in circumstances between the parties regarding their dispute.

[17] I understand Ms. Tomas' frustration and why she has taken this position on the motion. However, I find no legal basis to deny Theriault the return of the lien security that it posted for NDF's discharged lien.

[18] For the foregoing reasons, I am directing that the holdback security in court be paid out to Theriault. That order is without prejudice to any rights and remedies that Ms. Tomas may have with respect to a proper accounting or otherwise as between her and Theriault.

DISPOSITION

[19] I accordingly order as follows:

- (a) NDF's lien, preserved by registering a claim for lien on February 1, 2019 as instrument no. AT5068664 in the Land Titles Division of the Land Registry Office of Toronto, is hereby discharged.
- (b) This action is hereby dismissed, without prejudice to Ms. Tomas' counterclaim continuing.

- (c) The Accountant of the Superior Court of Justice is hereby directed to pay out to Theriault the security previously posted pursuant to the order of Master Robinson (as then titled) dated September 23, 2020, in the amount of \$14,015,73, plus all accrued interest.
- (d) The order in subparagraph (c) above shall be without prejudice to any rights and remedies that Lidija Tomas may have with respect to a proper accounting or otherwise as between her and Theriault.
- (e) This order is effective without further formality.

[20] A draft order may be submitted in Word format via my Assistant Trial Coordinator (ATC) for my review and signature. I am dispensing with the requirement for approval as to form and content by any other party, but all parties should nevertheless be copied when submitting the draft order.

COSTS

[21] In my endorsement dated April 30, 2025, I directed that submissions as to costs of the action would proceed in writing. A timetable was fixed and I specifically directed that all costs submissions be submitted by email to my ATC, together with proof of service. I have received only Ms. Tomas' responding costs submissions. Theriault's primary written submissions and reply submissions (if any) do not appear to have been submitted to my ATC as ordered. I am unable to address costs of the action and motion without Theriault's submissions.

[22] Theriault shall accordingly submit (or resubmit) to my ATC copies of any previously-served written submissions, with proof of service, within the next two (2) weeks, failing which Theriault will be deemed to have withdrawn its claim for costs.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: July 30, 2025