CITATION: *Capital Excavating Corp v. Sandlot Capital Inc. et al*, 2025 ONSC 6424
COURT FILE NO.: CV-21-85997
DATE: 20251117

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Capital Excavating Corp., Plaintiff / Defendant to the Counterclaim

AND:

Sandlot Capital Inc. and Arjun Patil, Defendants / Plaintiffs by Counterclaim

BEFORE: The Honourable Justice A. Kaufman

COUNSEL: Michael R. Kestenberg, Counsel for the Plaintiff / Defendant by Counterclaim

Justin Villeneuve, Counsel for the Defendants / Plaintiffs by Counterclaim

HEARD: August 19, 2025

ENDORSEMENT

[1] The defendants seek an order for costs on a substantial indemnity basis in this discontinued construction lien action. They seek costs on a joint and several basis against the plaintiff corporation, Capital Excavating Group ("Capital"), its principal, Frank Merlo, and the plaintiff's counsel of record (not Mr. Kestenberg).

[2] Capital and Mr. Merlo did not appear on the motion. They instructed their counsel not to provide a telephone number or address for service and allegedly disabled their fax machine. The defendants served the plaintiff at the address listed on its invoices and on its corporate profile. The motion proceeded primarily on the issue of the plaintiff's counsel's personal liability for costs. The quantum of costs is not in dispute.

Background

[3] On June 1, 2020, the Capital and Sandlot Capital Inc. ("Sandlot") entered into a verbal agreement for excavation work at 575–577 Tweedsmuir Avenue in Ottawa (the "property"). The agreed contract price was $50,000.

[4] In September 2020, Sandlot identified several deficiencies in Capital's work and requested that they be remedied. Sandlot alleges that it incurred additional costs to address these deficiencies.

[5] On December 28, 2020, Capital submitted an invoice for $6,500, wherein it acknowledged that Sandlot had already paid $50,500 under the contract.

[6] Sandlot proposed to deduct $4,000 from the invoice to offset the cost of the alleged deficiencies and to pay Capital the remaining $2,500.

[7] In response, Capital issued a second invoice, also dated December 28, 2020, in the amount of $67,235 plus HST, claiming it was for "extras to the agreement."

[8] Mr. Merlo consulted with counsel in January 2021. He provided counsel both December 28 invoices and advised that there was no written contract between the parties.

[9] On January 22, 2021, the plaintiff preserved the lien by registering a claim for lien against the property. In its claim for lien, Capital claimed a contract price of $113,735 and an amount owing of $73,735 for services or materials supplied.

[10] On January 25, 2021, the defendant requested that the lien be removed, characterizing it as "fraudulent" and alleging that it was registered in retaliation for the defendant's decision to retain part of the holdback to address deficiencies.

[11] The plaintiff perfected the lien by commencing this construction lien action on March 10, 2021.

Mr. Merlo's discovery evidence

[12] At his examination for discovery on February 17, 2022, Mr. Merlo acknowledged that he did not request payment for any extras until the second invoice was submitted. He testified that there were "issues with the footings," which were "three feet [of] thickness," but confirmed that he had not sought additional compensation. He further admitted that he would not have issued the second invoice had the first invoice been paid in full.

[13] Mr. Merlo produced "tickets" from Aecon, a gravel distributor, listed in his affidavit of documents as purchase orders. To the defendants' counsel, these appeared to be unsigned quotes. Mr. Merlo undertook to provide proof of payment to Aecon, but the undertaking was never fulfilled.

Defendant's attempt to vacate the lien and the lien's expiration

[14] On February 24, 2023, the defendant served a motion to vacate the lien, alleging that the plaintiff knowingly participated in the preservation or perfection of a grossly exaggerated lien.

[15] At a case conference held on July 5, 2023, Associate Justice Fortier noted that the action did not appear to have been set down for trial. Counsel for the defendant inquired of plaintiff's counsel whether any steps had been taken in that regard. His correspondence received no response.

[16] On May 11, 2024, the plaintiff served a Notice of Discontinuance. The plaintiff's counsel advises that the plaintiff no longer wished to proceed with its action, as Mr. Merlo had retired and the business had closed.

[17] As pleadings had closed, leave of the Court was required to discontinue the action. On June 20, 2024, further to a motion by the defendants, the Court granted leave to discontinue the action with prejudice and permitted the defendants' counterclaim to proceed. The question of costs was adjourned. The lien and certificate of action were discharged.

Issues

[18] There are two issues to be determined on this motion. First, whether the defendants are entitled to costs of the discontinued action. Second, whether the plaintiff's counsel ought to be held personally liable for the defendants' costs pursuant to s. 86(1)(b) of the *Construction Act*.[1]

Analysis

Issue 1 - Costs of the discontinued action

[19] Pursuant to Rule 23.05 of the *Rules of Civil Procedure*,[2] a party may bring a motion for costs following the discontinuance of an action. Prior to its amendment in 2009, the rule presumptively entitled a defendant to costs unless the court ordered otherwise. The current formulation grants the court broader discretion. In exercising that discretion, the court applies the *bona fide* test: a defendant will generally be entitled to costs where the action was commenced without justification or in the absence of good faith.[3]

[20] For the reasons set out below, the Court finds that this action was without foundation and ought not to have been brought. The defendants are therefore entitled to their costs, which are fixed in the amount of $33,862.36.

Issue 2 - Costs against a solicitor under ss. 86(1) of the *Construction Act*

[21] Subsection 86(1) of the *Construction Act* provides that costs may be awarded against,

> (b) a person who represented a party to the action, application or motion, where the person:
>
> (i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for lien is without foundation or is for a grossly excessive amount, or that the lien has expired, or
>
> (ii) prejudiced or delayed the conduct of the action.

[1] RSO 1990, c C.30.
[2] RRO 1990, Reg 194.
[3] *Garrick v Halton Police Board*, 2025 ONSC 5593, at para 74.

[22] This provision reflects the dual responsibilities of a solicitor in a lien proceeding. The first is the duty owed to the client. Under the Law Society of Ontario's Rules of Professional Conduct, a lawyer must "raise fearlessly every issue, advance every argument, and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law".[4]

[23] The second duty is owed to the public and to the administration of justice. Subsection 86(1) recognizes that the unilateral registration of a lien is an extraordinary remedy. It encumbers legal title and restricts property owners' ability to deal freely with their land. Such remedies, in an ordinary civil proceeding, would require prior judicial authorization. Master Sandler cited with approval the following passage from D. Gladholt, The Conduct of a Lien Action, Thomson Carswell, 2004:

> "The power to unilaterally register a lien (effectively a mortgage, as it contains inherent rights to sell property to satisfy a debt) affecting the legal title of a person with whom your client may have no privity of contract is an extraordinary power, yet it is the fundamental statutory right of every lien claimant and every lien claimant's solicitor. It has been observed that this power includes the power to secure a claim for principal, and a prejudgment claim in costs of the lien litigation, much like an interlocutory order for security for costs. In all non-lien civil proceedings, the plaintiff would require the prior intervention of a judicial officer to obtain such remedies. Rather than require a "show cause" hearing before the exercise of this powerful statutory remedy, the Attorney General's Advisory Committee chose instead to enhance the gatekeeper role of the lien claimant's solicitor. The idea was to interpose the lien claimant's solicitor as a gatekeeper to the statute, with personal responsibility to all persons who might suffer damage as a result, and to the court itself, to keep non-existent or grossly inflated liens and stalling tactics out of the system. These reforms are most evident in ss. 35 and 86 …".[5]

[24] The solicitor's duty to the administration of justice recognizes that the extraordinary power of unilateral registration of a lien carries corresponding responsibilities. Master Albert has described this responsibility as a "gatekeeping function".[6]

[25] What does the gatekeeping function require? The threshold is not high. Liability under s. 86(1) does not attach to a solicitor who takes on a weak case or is merely negligent. Such

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[4] Law Society of Ontario, Rules of Professional Conduct, Chapter 5, commentary to s. 5.1-1.
[5] *Pineau v. Kretschmar Inc.*, 2004 CanLII 5925, (ONSC), at para 57.
[6] *Brian T. Fletcher Construction Co. Ltd. v. 1707583 Ontario Inc.*, 2009 CanLII 81402, (ONSC), at para. 36.

a standard would risk creating a chilling effect and discourage lawyers from representing lien claimants. [7] Rather, the gatekeeping function merely requires that lawyers not knowingly preserve or perfect liens that are clearly without foundation.

[26] With respect to the knowledge requirement, I adopt Associate Justice Wiebe's interpretation in *Viceroy* that actual knowledge may be imputed through the doctrines of wilful blindness or recklessness. [8] A lawyer cannot self-immunize against liability by deliberately refusing to acquire actual knowledge. Counsel for lien claimants must review and consider both the quantum and the lienability of provable services before registration.[9] Where time constraints require registration before a full investigation, such an investigation must follow promptly thereafter. [10]

[27] I now turn to whether the plaintiff's counsel fulfilled the gatekeeping function required of him under s. 86 of the *Construction Act*.

[28] The plaintiff's counsel provided an affidavit stating that he met Mr. Merlo in January 2021 and was given two invoices—one for $56,500 and another for $67,235. Mr. Merlo explained that the second invoice reflected additional work due to unforeseen conditions, including deeper excavation, 35 truckloads of engineered material, and compaction. He attributed $14,000 to material and $45,400 to labour. Mr. Merlo also advised that there was no written contract.

[29] The plaintiff's counsel states that he was instructed to file a lien and believed the claim was valid. He understood that extras had been incurred due to unforeseen conditions, that no written documentation supported those extras, and that the plaintiff had a reasonable claim.

[30] The Court concludes that Capital's lien was clearly without foundation. Section 14 of the *Construction Act* creates the lien as follows:

> 14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

[31] "Price" is defined to mean the contract or subcontract price agreed upon between the parties, or, where no specific price has been agreed, the actual value of the services or materials supplied.[11] The "actual value" in this definition permits reliance on the equitable doctrine of *quantum meruit*, but only where the claim is grounded in a promise—express or implied—to pay for the value of the work.[12]

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[7] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, at para 49 ("*Viceroy*").
[8] *Viceroy*, at para. 53.
[9] *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 6327, at para 12.
[10] *Brian T. Fletcher Construction Co. Ltd. v. 1707583 Ontario Inc*., 2009 CanLII 81402, (ONSC), at para 19.
[11] *Construction Act*, s. 1(1) definition "price".
[12] *2002759 Ontario Ltd et al. v. Koropeski et al*., 2021 ONSC 7873, at paras 73-74.

[32] In my view, the plaintiff's counsel failed in his gatekeeping function. He was presented with two invoices dated the same day. The first reflected the agreed contract amount and disclosed that $50,500 had already been paid, leaving a balance of $6,500. The plaintiff's counsel states that Mr. Merlo explained the second invoice related to extras due to unforeseen conditions.

[33] Faced with an invoice showing a $6,500 balance and a second invoice for $67,235 dated the same day, the plaintiff's counsel ought to have made inquiries. On what basis was Sandlot required to pay for extras? Was Sandlot advised of the unforeseen conditions? When did Capital indicate that additional charges would apply? Did Sandlot know the extra work was being performed? Did it agree to pay for any extra work? The plaintiff's counsel's failure to make those inquiries amounts to wilful blindness.

[34] Had such basic inquiries been made, it would have been apparent that the lien was without foundation. Mr. Merlo admitted on discovery that there was no agreement to pay for extras and that he "did not ask for any extra" relating to the footings when he allegedly performed the work. He testified that he performed the alleged additional work for free. He further admitted that he decided to register the lien only after Sandlot claimed an offset for deficiencies, stating that he was being made out to be a "bad man", and that he liened for amounts he "did not charge" previously. The second invoice was the first time he requested payment for those alleged extras.

[35] If Mr. Merlo gave these answers on discovery, there is no reason to believe he would not have given the same answers to the plaintiff's counsel had he been asked. These answers would have made it clear that there was never a contract for $113,735 as stated in the lien.

[36] The plaintiff's counsel states that Mr. Merlo advised him that the extras consisted of $14,000 in engineered material and $45,000 in labour. While lawyers may sometimes need to register a lien without perfect information, there is no evidence that the plaintiff's counsel sought any supporting documentation. One would expect invoices, proof of payment, timesheets or diaries. It is difficult to accept that payments of this magnitude to suppliers and labourers would not generate any documentation at all. Mr. Merlo undertook to provide proof of payment at his examination for discovery on February 17, 2022, but that undertaking remained unanswered over two years later when the action was discontinued.

[37] The conduct of the plaintiff's counsel stands in marked contrast to that of counsel in *Viceroy*. In that case, although the lien ultimately proved to be without foundation, counsel took active steps to verify its legitimacy. They sought and repeatedly requested supporting documentation both before and after perfecting the lien. When the client failed to produce the promised documents and it became apparent during cross-examination that portions of the lien were indefensible, counsel advised the client to voluntarily discharge the lien. When counsel did not obtain these instructions, they withdrew from the record. The plaintiff's counsel, by contrast, made no inquiries into the basis of the claimed extras, accepted two invoices dated the same day without scrutiny, and proceeded to register a lien for an amount nearly double the agreed contract price. His failure to investigate in the face

of obvious red flags and lack of support distinguishes this case from *Viceroy* and supports a finding of wilful blindness.

Conclusion

[38] Costs against a solicitor under s. 86 of the *Construction Act* are to be granted in rare cases. The provision is not intended to penalize zealous advocacy or honest errors in judgment. Rather, it applies where a lien claim is pursued without foundation and in the face of clear warning signs that ought to prompt reasonable inquiries into the core merit of the claim.

[39] The *Construction Act* entrusts lien claimants and their counsel with a powerful remedy that can significantly affect property rights. That power must be exercised with care and with a view of upholding the integrity of the lien system. In this case, the plaintiff's counsel participated in registering and perfecting a lien without making basic inquiries that would have revealed the absence of any agreement or entitlement to the claimed extras. His failure to do so amounts to wilful blindness and breaches the gatekeeping duty. Accordingly, he is jointly and severally liable for the defendants' costs of the discontinued action.

Disposition

[40] For the foregoing reasons, the Court orders as follows:

1. The defendants are awarded their costs of the discontinued action on a substantial indemnity basis, fixed in the amount of $33,862.36.

2. The costs award is made jointly and severally against the plaintiff, Capital Excavating Group, its principal, Frank Merlo, and its counsel of record, pursuant to s. 86(1)(b)(i) of the *Construction Act*.

A. Kaufman J.

Date: November 17, 2025