CITATION: Invoice Payment Systems Corp. v. The Block Inc., 2025 ONSC 7156
DIVISIONAL COURT FILE NO.: 524/24
DATE: December 23, 2025

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

R. Lococo, S. Nakatsuru, M. Kurz JJ.

BETWEEN:	
INVOICE PAYMENT SYSTEM CORPORATION Appellant (Plaintiff)	*Spencer F. Toole*, Counsel for the Appellant (Plaintiff)
- and -	
THE BLOCK INC. Respondent (Defendant)	*Carol A. Dirks*, Counsel for the Respondent (Defendant)
	HEARD at Toronto: October 28, 2025

REASONS FOR DECISION

S. Nakatsuru J.

[1] The Block Inc. ("The Block") was constructing buildings in Waterloo, Ontario. It hired a contractor, Nikom Construction, to put up drywall in the buildings. Given their cash flow needs, as the work progressed, Nikom Construction assigned to Invoice Payment System Corp. ("IPSC"), a factoring company, the value of some of Nikom Construction's invoices to The Block. IPSC paid the value of those assigned invoices immediately to Nikom Construction while the invoices were processed by The Block.

[2] This system worked until some trouble arose regarding the performance of Nikom Construction's work at the site. The Block did not pay Nikom Construction for the invoices of June, July and August 2019. Nikom Construction abandoned the project in August 2019.

[3] Both Nikom Construction and IPSC registered liens under the *Construction Act*, R.S.O. 1990, c. C.30 against the development for a series of unpaid invoices. The liens were in the amount of $124,670.64 for Nikom Construction and $277,965.68 for IPSC.

[4] This appeal concerns the result of the trial before Gibson J. of the lien action with a counterclaim by The Block. Gibson J. found that The Block, the defendant in the underlying lien action, was entitled to a set-off for damages to compensate it for Nikom Construction's abandonment of the project**,** in an amount that was greater than the amount of the underlying lien claims. The judgment meant the plaintiffs, IPSC and Nikom Construction, were jointly and severally liable to pay the Block $325,824.41.

[5] IPSC appeals and seeks that the trial decision be set aside, arguing the trial judge made errors of law and palpable and overriding errors of fact. The Block submits that no such errors were committed and that the appeal should be dismissed. Nikom Construction did not participate in this appeal.

[6] For the reasons that follow, I allow the appeal on the ground that the trial judge erred in his treatment of set-off but would otherwise dismiss the appeal.

A. FACTUAL BACKGROUND

[7] The facts outlining the contours of this lawsuit can briefly be stated.

[8] The Block is a construction company that was the registered owner of 275 Larch Street in Waterloo, Ontario and was building five residential apartment buildings on the property. The Block contracted with Nikom Construction where the latter would provide drywall, labour, and material services for two of the buildings through two purchase orders signed on November 20, 2018. The total value of these two contracts was just over $1.27 million.

[9] Under this agreement, Nikom Construction was to send an invoice to The Block on the 25th of every month. Only Joel Pearce, the General Manager at Schembri Property Management (affiliated with The Block) or Gordon Schembri, the owner of The Block, could approve these invoices.

[10] On January 18, 2019, Nikom Construction entered into a factoring agreement with IPSC. Under this agreement, IPSC would advance to Nikom Construction 90 percent of the face value of some of the invoices Nikom Construction issued to The Block once The Block approved these invoices. In return, Nikom Construction assigned these invoices to IPSC. Nikom Construction entered this agreement because it was experiencing financial difficulties and needed to be able to collect payment invoices before The Block would pay them in the usual course of business.

[11] An issue at the trial concerned the approval process for Nikom Construction's invoices. Prior to June 2019, Joel Pearce approved all of Nikom Construction's invoices on behalf of the Block. Mr. Pearce was aware that Nikom Construction needed their invoices approved quickly and accommodated Milos Nikolic, Nikom Construction's principal, regarding this.

[12] On June 21, 2019, Mr. Nikolic met with Mr. Pearce to discuss concerns about the June invoice, as Mr. Pearce was going on vacation (the invoices were submitted on the 25th of each month). Three days later on June 24, Mr. Nikolic emailed Nathan Hallman, a senior project manager for The Block, with two invoices, to which Mr. Hallman replied, "I don't have the authority to issue payment". Mr. Nikolic also requested Mr. Hallman to send an email to IPSC about the same invoices.

[13] The Block paid all invoices up to May 2019 (less the 10 percent statutory holdback), but did not pay the invoices for June, July, and August 2019, as The Block claimed the invoices were deficient.

[14] On August 21, 2019, Nikom Construction walked off the site and abandoned the project.

[15] On October 3, 2019, Nikom Construction assigned its lien rights to IPSC pursuant to an Assignment of Lien Agreement.

[16] On October 4, 2019, Nikom Construction and IPSC registered claims for liens against The Block of $124,670.64 and $277,965.48 respectively. These liens were perfected when Nikom Construction and IPSC issued a statement of claim for the values of their liens.

[17] The Block issued a statement of defence in which it claimed set-off as a defence against the claims of both Nikom Construction and IPSC. The Block also counterclaimed against Nikom Construction for $1,500,000. The Block did not issue a counterclaim against IPSC.

B. THE TRIAL DECISION

[18] The matter went to a nine-day trial in September 2023. IPSC did not call evidence at trial. The trial judge dismissed both lien claims and allowed The Block's counterclaim in part.

[19] In dismissing the lien claims, the trial judge found that Nikom Construction had not met its burden to establish the value of the services and materials it supplied to The Block. Nikom Construction did not produce any invoices for materials or labour, and only produced timesheets until June 7, 2019. Nikom Construction also did not produce any field reports for materials or services completed after June 7, 2019, rather relying on handwritten notes from a Nikom Construction worker who did not testify at trial. Nikom Construction also did not put forward an independent valuation of the services and materials it supplied before it abandoned the project. The trial judge found this was insufficient for Nikom Construction to meet its burden as a lien claimant.

[20] The trial judge further found that Nikom Construction repudiated its contract with The Block by abandoning the project. He found that Nikom Construction refused to or was unable to perform its contractual obligations and demonstrated no intention to be bound by its contract with The Block after it abandoned the project.

Approval of Nikom Construction's invoices and the indoor management rule

[21] At trial, Nikom Construction relied on emails sent by Mr. Hallman as proof of the value of Nikom Construction's invoices. The trial judge found that Mr. Hallman did not have authority to approve invoices on behalf of The Block and that Mr. Hallman expressly advised Mr. Nikolic of this on June 25, 2019, when Mr. Hallman stated in an email "I don't have the authority to issue payment." This resulted in Mr. Nikolic's actual knowledge that Mr. Hallman did not have the authority to approve invoices on behalf of The Block.

[22] The trial judge then found that Mr. Nikolic deliberately orchestrated having Mr. Hallman email IPSC, despite knowing that Mr. Hallman did not have the authority to approve invoices, because Mr. Nikolic and Nikom Construction wanted to receive funds immediately from IPSC. This happened multiple times.

[23] Both Nikom Construction and IPSC argued at trial that they could rely on the indoor management rule under s. 19 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, for Mr. Hallman's ostensible authority to approve invoices on behalf of the Block. The trial judge found that Nikom Construction could not rely on the indoor management rule because Mr. Nikolic had actual knowledge that Mr. Hallman did not have the authority to bind The Block.

[24] The trial judge also found that IPSC could not rely on the indoor management rule because IPSC ought to have made appropriate inquiries as to Mr. Hallman's authority. It found that IPSC was alerted to Mr. Hallman's lack of ostensible authority when, after IPSC sent a document to Mr. Hallman for his signature, Mr. Nikolic replied "[a]lso is Nathan [Hallman] supposed to sign this". IPSC then failed to make any inquiries as to Mr. Hallman's authority. Because of this, the trial judge found IPSC assumed the risk that Mr. Hallman could not approve invoices on behalf of The Block.

Set-off and counterclaim

[25] The Block claimed set-off as a defence to both lien claims and counterclaimed against Nikom Construction for the costs associated with Nikom Construction's repudiation of the contract.

[26] The trial judge found that The Block was entitled to rely on set-off under s. 17(3) of the *Construction Act* and equitable set-off as a defence to both lien claims. He found that the fact Nikom Construction assigned its invoices to IPSC should not prevent The Block from being able to set-off its damages against any amount owing to IPSC. To this effect, the trial judge stated at para. 112 that "it would be unjust for The Block to have to pay to IPSC in full for the amount of Nikom's invoices, while not being able to set-off against those amounts for any incomplete work, deficiencies or damages caused by Nikom."

[27] The trial judge then found that The Block mitigated its damages by re-tendering to complete the work Nikom Construction left unfinished and to correct deficiencies in the work. The Block's costs to remedy Nikom Construction's repudiation exceeded the value of the original contracts with Nikom Construction such that that there was $325,824.41 still owing to The Block.

[28] From these findings, the trial judge allowed the counterclaim in part. This resulted in the order that the plaintiffs pay the amount of $325,824.41 to The Block.

C. THE ISSUES ON APPEAL

[29] The various grounds of appeal raised can be organized and distilled into essentially two issues:

- Did the trial judge err in his findings about Mr. Hallman's lack of authority to approve payments?

- Did the trial judge err in finding IPSC liable for damages to The Block?

D. JURISDICTION AND THE STANDARD OF REVIEW

[30] Section 71(1) of the *Construction Act* provides the Divisional Court with jurisdiction to hear an appeal of any judgment in a construction lien proceeding, including counterclaims and cross-claims, where there is no order directing the proceeding continue as an ordinary action: *TRS Components Ltd. v. Devlan Construction Ltd*., 2015 ONCA 294, 125 O.R. (3d) 161, at para. 26; *MGW-Homes Design Inc. v. Pasqualino*, 2024 ONCA 422.

[31] The standard of review on this statutory appeal is set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Errors of law are reviewed on a correctness standard. For errors of fact, there must be a palpable and overriding error. Errors of mixed fact and law also require a palpable and overriding error unless there is an extricable error of law or principle, which is then reviewed on a correctness standard.

E. ANALYSIS

Issue 1: Did the trial judge err in his findings about Mr. Hallman's lack of authority to approve payments?

[32] The appellant makes two submissions on this point.

[33] First, the appellant submits the trial judge made a palpable and overriding error when using Mr. Hallman's emailed statement to Nikom Construction that Mr. Hallman did not "have the authority to issue payment" to conclude that Mr. Hallman did not have the authority to approve invoices. They argue that the trial judge improperly conflated "approve" and "issue" in the email from Mr. Hallman. They argue a reasonable person would have understood Mr. Hallman to mean he could not distribute payment, not that he could not approve an invoice.

[34] Second, the appellants submit that it amounted to speculation for the trial judge to rely on Mr. Nikolic's email to IPSC asking if Mr. Hallman was supposed to sign a notice of assignment to conclude IPSC ought to have known Mr. Hallman did not have authority to approve invoices and that IPSC should have made inquiries about Mr. Hallman's authority.

[35] I am not persuaded by these submissions.

[36] The trial judge's findings about Mr. Hallman's email, Mr. Nikolic's knowledge, and IPSC being alerted to Mr. Hallman's lack of authority are all factual findings that are owed deference.

[37] The trial judge made a factual finding about Mr. Hallman's email where he tells Mr. Nikolic he does not have the authority to "issue" payment. The interpretation of the email and the meaning of the wording used in it was uniquely within his domain as a trier of fact. To interpret that email as Mr. Hallman saying he had no power to approve payment was entirely a reasonable interpretation. The argument raised by the appellant was one made before the trial judge and rejected by him. No palpable and overriding error has been shown in that regard.

[38] Moreover, based on the whole of the evidence, the trial judge found that Mr. Hallman was not able to approve invoices, and that Mr. Nikolic was aware of this. The latter determination was based upon findings of credibility and is owed significant deference.

[39] Regarding the second submission, the trial judge's decision that the indoor management rule did not apply was based on evidence showing IPSC had genuine reason to doubt Mr. Hallman's authority. This determination that IPSC was alerted to Mr. Hallman's limited role was a reasonable inference available to the trial judge because there was a sudden change in the point of contact without any reason, Nikom Construction's submissions were incomplete, and all previous communications had been with Mr. Pearce as the source of approval. Further, IPSC did not adduce any evidence at trial that it relied on Mr. Hallman's emails to advance payments to Nikom Construction.

[40] Given that no palpable and overriding error has been demonstrated, this ground of appeal is dismissed.

Issue 2: Did the trial judge err in finding IPSC liable for damages to The Block?

[41] The appellant addresses this ground of appeal in two separate but inter-related ways. First it submits that the trial judge erred in awarding damages against IPSC when The Block only counterclaimed against Nikom Construction. Second, it submits that the trial judge erred in setting off more than the value of IPSC's lien and awarding compensation to The Block for the entire extent of the damages caused by Nikom Construction.

[42] The first submission can be readily dealt with. It is undisputed that The Block only counterclaimed in damages against Nikom Construction. However, The Block did plead set-off against both Nikom Construction and IPSC. When the trial judge's reasons are read fairly and holistically, he did not grant an alleged counterclaim for damages against IPSC. Rather, the trial judge made the order that he did under the rubric of a set-off.

[43] This then brings me to the discussion of whether the trial judge erred in doing so.

[44] The appellant submits that Nikom Construction only assigned IPSC the benefits of the contract. They argue that assignment of a contractual benefit does not make an assignee liable in contract absent an express agreement providing for liability and that s. 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which allows for set-off claims to exceed the underlying claims, does not apply to assignees of contractual rights. Moreover, in the alternative, they argue that the principles underlying equitable set-off or statutory set-off under the *Construction Act* result in The Block's set-off claims against IPSC being limited to the amount IPSC received from Nikom Construction.

[45] The respondent argues they are entitled to statutory set-off under s. 17(3) of the *Construction Act* and equitable set-off. They argue the statutory set-off is broader than equitable set off and that it would be patently unfair to deny The Block the benefit of the statutory set-off, despite no direct contract between The Block and IPSC, as IPSC claimed the benefit of the statute as a lienholder. The respondent submits that equitable set-off also applies because the claims arise from the same series of transactions and failure to allow set-off would be unjust. They state that holding otherwise would run contrary to the purpose of the *Construction Act* and allow contractors to circumvent liability by assigning invoices mid-project.

[46] To begin the analysis, legal set-off does not apply. Although the trial judge made a reference to it, his decision, for good reason, does not rely upon it. Section 111(3) of the *Courts of Justice Act*, which expressly authorizes awards to the defendant when the set-off is greater than the original claim,

does not apply in the case at bar because there is no mutuality of debts: *Holt v. Telford*, [1987] 2 S.C.R. 193; *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (C.A.), at paras. 23-24.

[47] Although the reasons are brief and it is not explicit, the trial judge appears to have applied both equitable set-off and set-off as found within s. 17(3) of the *Construction Act.*

[48] The appellant does not contest the application of set-off by the trial judge. The core complaint is that the trial judge erred by awarding more than what was claimed by IPSC, in effect making IPSC liable for damages committed by Nikom Construction in the absence of any counterclaim against it by The Block.

[49] Equitable set-off arises when there are cross obligations which are so closely connected or related that it would be inequitable to permit one party to enforce its obligation without permitting a set-off to the other: *Canada Trustco Mortgage Co. v. Sugarman* (1999), 179 D.L.R. (4th) 548 (Ont. C.A.). Put simply, "it would be unjust to permit one party to enforce payment without taking into account the commitment flowing the other way": *Architectural Millwork v. Provincial Store*, 2015 ONSC 4913, 51 C.L.R. (4th) 25, at para. 60, aff'd 2016 ONCA 320, 51 C.L.R. (4th) 42.

[50] The leading case on equitable set-off is *Holt v. Telford*, which sets out the five principles that underlie equitable set-off at p. 212. See also *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, 497 D.L.R. (4th) 1, at para. 92.

[51] As previously noted, the application of those principles is not seriously in dispute here. In other words, the trial judge did not err in setting off what The Block owed to IPSC as a lienholder.

[52] Section 17(3) of the *Construction Act* also deals with set-off in determining the value of a lien. It states:

> (3) Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person the payer is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages related to the improvement or, if the contractor or subcontractor, as the case may be, becomes insolvent, all outstanding debts, claims or damages whether or not related to the improvement.

[53] The rights of set-off recognized by s. 17(3) of the *Construction Act* are wide-ranging and broad: McGuinness, *Construction Lien Remedies in Ontario*, 2nd ed. (Toronto: Carswell, 1997), at pp. 218-219; *C & A Steel (1983) Ltd. v. Tesc Contracting Co. Ltd.* (1998), 39 O.R. (3d) 155 (Gen. Div.).

[54] Although equitable set-off and s. 17(3) set-off operate differently, they overlap more than they diverge as s. 17(3) set-off is of an equitable nature: McGuinness, at pp. 218-19.

[55] In my opinion, although the issue was left undecided in *13736 Canada Ltd. v. Cozy Corner Bedding Inc.*, 2020 ONCA 235, 150 O.R. (3d) 83, at para. 54, I find that a set-off in these circumstances whether under equity or s. 17(3) of the *Construction Act* cannot be greater than the lien. This arises from the nature of set-off and the wording of s. 17(3).

[56] Equitable set-off is a defence, not a counterclaim, that is available when the defendant has a claim of set-off closely connected to the plaintiff's claim: *P.I.A. Investments Inc. v. Deerhurst Limited Partnership* (2000), 20 C.B.R. (4th) 116 (Ont. C.A.), at para. 32. The authors in R. Meacher, D. Heydon, and M. Leeming, in *Equity: Doctrines and Remedies*, 4th ed. (Sydney: Butterworths, 2002) summarize the concept of set-off and how it compares to a counterclaim at p. 1074 in the following manner;

> A set-off is said to exist when a defendant, in answer to a plaintiff's claim, is able to plead successfully that a countervailing claim which he has against the plaintiff absolves him, wholly or partially, from liability to the plaintiff. It is to be distinguished from a counter-claim, in that a counter-claim is never a defence to a plaintiff's claim but an entirely independent action brought by a defendant against a plaintiff although in the same proceedings. A counter-claim must be used offensively; it cannot be used defensively. But a set-off, like an estoppel, and in the same limited sense, is a shield, not a sword. [Footnotes omitted.]

[57] For this reason, equitable set-off, as a substantive defence rather than a counterclaim, is not precluded by a limitation period, even if that is a bar to a counterclaim: C*anada Trustco Mortgage Co. v. Pierce* (2005), 254 D.L.R. (4th) 79 (Ont. C.A.), at paras. 43-46, leave to appeal refused, [2005] S.C.C.A. No. 337; *World Financial Solutions Inc. v. 2573138 Ontario Ltd.*, 2025 ONSC 3111, at para. 59.

[58] Relevant to the issue before me, in *Cozy Corner Bedding Inc*., at para. 37, Zarnett J.A. described equitable set-off thusly:

> Although equitable set-off is a defence, it is one that arises from the defendant having a "cross-claim" that is closely connected to the plaintiff's claim. It is a way of raising, as a defence, a plaintiff's liability to take into account a loss it occasioned to the defendant in reduction of the plaintiff's claim. It is often referred to as a "claim for equitable set-off". [Citations omitted.] [Emphasis added.]

[59] Authorities have rejected the use of equitable set-off as a sword rather than a shield when it is raised. In *Toronto Kosher v. Windward Drive Holdings*, 2011 ONSC 4398, at para. 61, in an application dealing with the assignment of a commercial lease, Belobaba J. described this argument as "a strikingly novel proposition" that "ask[ed] the court to transform equitable set-off from a shield into a sword and in doing so to ignore the numerous breaches of due process and fair hearing that would follow if the assignee was not only bound by the equities but was exposed to liability on the entire amount of a judgment even after the lease ended and set-off was no longer available".

[60] Similarly, in *Tri-Lag Corp. v. York Region District School Board*, 2017 ONSC 1523, 3 L.C.R. (2d) 298, at para. 31, the court followed *Toronto Kosher* and agreed that this argument amounted to "ignor[ing] the well-established case law and allow[ing] [the defendants] to use set-off as a 'sword' rather than as a 'shield' … The use of set-off in this way would be to bestow a damages windfall in circumstances that would be unfair and inequitable."

[61] Lastly, the result is no different if the set-off provision found in s. 17(3) is considered. While the ambit of the subsection is broad, it is not unconstrained. Subsection 17(3) explicitly limits its operation to "determining the amount of the lien." The value of a lien is limited by the section that creates it to the price of the services and materials that have been supplied by the lien claimant: McGuiness, at pp. 212-213. Under s. 17(3), the value of the lien that is set-off by a balance of outstanding debts, claims, or damages owing that is greater than the lien, can only reduce the lien to nil in the absence of a counterclaim and cannot result in an award against the lienholder: *Sundance Development Corp. v. Islington Chauncey Residences Corp.*, 2023 ONSC 5239, at para. 220.

[62] Accordingly, the trial judge erred in making an award against IPSC and I would grant this ground of appeal.

F. DISPOSITION

[63] For these reasons, the appeal is allowed in part. The order awarding $325,824.41 and pre-judgment interest against IPSC is quashed. The other parts of the order remain in effect.

[64] At the appeal hearing, counsel advised that the parties had agreed on the amount of costs to be payable to the successful party but did not expressly address the outcome if success is divided. The parties are encouraged to come to an agreement but if they do not, the appellant will have ten days from the date of this decision to make costs submissions no greater than two pages in length. The respondent will have seven days to respond with submissions of a similar length.

S. Nakatsuru J.

I agree:

R. Lococo J.

I agree:

M. Kurz J.

Released: December 23, 2025

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