

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2271047 Ontario Ltd.)
) Jonathan Burshtein, for the Plaintiff
Plaintiff)
)
– and –)
)
Window City Industries Inc.)
) Kirkor A. Apel, for the Defendant
Defendant)
)
)
)
) **HEARD:** February 2, 2023

REASONS FOR DECISION

DE SA J.:

Overview

- [1] As part of the settlement of an action Window City Industries Inc. (“Window City”) had against 2271047 Ontario Ltd. which operates as Ecotech Windows & Doors (“Ecotech”) and Mark Ginzburg (“Ginzburg”), Ecotech entered into Minutes of Settlement with Window City.
- [2] As per the Minutes of Settlement, Window City agreed to “undertake best efforts” in the collection and enforcement of a default judgment Window City had against two defendants in the Settled Action, Richard Farbman and Lawrence Farbman. Pursuant to the Revised Minutes, Ecotech would share in the proceeds of the collection efforts.
- [3] According to Ecotech, Window City has failed to “undertake best efforts” and, as a result, breached the Minutes and its contractual duty of good faith by failing to conduct an examination in aid of execution.
- [4] Window City maintains that it has not failed in its obligations and continues to pursue enforcement.
- [5] Having reviewed the record before me, I am not satisfied that there is no genuine issue for trial. Accordingly, the motion for summary judgment is dismissed.

[6] The reasons for my decision are outlined below.

Summary of Facts

The Settlement

- [7] On November 5, 2010, Window City commenced a claim in the Ontario Superior Court of Justice under Court File No. CV-10-101634-00 (the “Settled Action”) against 2160983 Ontario Inc. (“Ontario Choice”), Richard Farbman (“Richard”), Lawrence Farbman (“Lawrence”) and Mark Ginzburg (“Ginzburg”).
- [8] In the Settled Action, Window City sought the sum of \$216,339.15 for amounts owing for windows and doors which Ontario Choice had ordered from Window City. Window City pleaded that the individual defendants were personally liable for their breach of the statutory trust provisions under s. 8 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.
- [9] On January 26, 2012, Window City obtained default judgment against Ontario Choice, Richard and Lawrence in the amount of \$267,229.22, bearing interest at the rate of 18% per annum, and costs of \$1,508.00, bearing interest of 3% per annum. Ginzburg continued to defend himself in the Settled Action.
- [10] The matter proceeded to trial as against Ginzburg. During the trial, Window City and Ginzburg agreed to a settlement. They entered into Minutes of Settlement dated May 31, 2016 (the “Minutes”) which were prepared at the courthouse and signed in the court parking lot. The following were the material terms of the Minutes:
- (b) Ginzburg would pay \$75,000 to Window City.
 - (c) Ginzburg was required to “*cooperate and assist in the efforts of Window City Industries Inc. to enforce the default judgment against Richard Farbman and Lawrence Farbman*”.
 - (d) Ginzburg was entitled to 1/3 of the proceeds of collection to a maximum of \$75,000, *after payment of legal fees, disbursements and HST, which were not to exceed 20% of the proceeds, to Window City’s lawyer.*
 - (e) Ginzburg was required to “*act in good faith to assist in the collection and enforcement of the default judgments*”.
 - (f) Window City was required to “*undertake best efforts in its collection efforts*”.
 - (g) Window City and its lawyer were entitled to “*cease collection efforts where there is no reasonable prospect of collection*” if “*all leads are exhausted and all reasonable steps have been taken*”.
 - (h) *The payment of \$75,000.00 by 2271047 Ontario Ltd. pursuant to paragraph one is in full consideration of the Release referred to in paragraph 2 and no claim*

may be made by 2271047 Ontario Ltd. or Mark Ginzburg, thereafter, on any basis whatsoever, other than for an accounting under paragraph 4.

[11] The mutual release signed by the parties also provided, amongst other things:

IT IS FURTHER AGREED AND UNDERSTOOD that in the event that any party should hereafter make any claims or demands or commence or threaten to commence any actions against another party for or by reason of any cause, matter, or thing specifically released herein, this document may be raised as an estoppel to any claim, demand or action commenced in regard to the aforesaid. In the event that any party commences any such proceedings, the party commencing the proceedings undertakes and agrees to indemnify the party against whom the proceedings are commenced, on a solicitor and client basis, in respect of any legal fees incurred in relation to any such claims.

[12] Revised Minutes of Settlement (the “Revised Minutes”) were signed in June 2016 together with a mutual release. The following amendments were made in the Revised Minutes: (a) a recital was added stating “Window City Industries Inc. threatened to bring a motion to add 2271047 Ontario Inc. as a party to the proceedings”. In addition, the following terms were included:

- i. the \$75,000 sum was to be paid by Ecotech;¹ and
- ii. Ginzburg was entitled to direct to whom his share of the proceeds of any amounts collected could be distributed. Ginzburg would assign this share to Ecotech.

Efforts to Collect

[13] In the months following the settlement, Mr. Burshtein (Ginzburg’s counsel) provided information regarding possible assets available to Richard and Lawrence. The source of the information was not provided nor was Window City able to verify it.

[14] Mr. Burshtein pressed for an update on the status of any efforts made by Window City to enforce the judgment as against Richard and Lawrence. Given the perceived inaction on the part of Window City, at some point Mr. Ginzburg even asked for the return of the \$75,000 he paid to settle the action.

[15] On August 11, 2017, Jeff Sadr, Window City’s CEO, advised Mr. Burshtein that, (a) Window City had conducted real estate searches; and (b) Mr. Apel called Lawrence

¹ Ecotech is a company registered in Mr. Ginzburg’s mother’s name.

Farbman by telephone and Lawrence agreed to be served with a notice of examination. In that letter, Mr. Sadr explained:

At the present time, we do not see any reasonable prospect of collection. We can always re-examine the prospects of collection. The agreement does not allow your client to simply decide to demand \$75,000.00. Nor is there a deadline for Window City to enforce the judgment.

On a totally without prejudice basis, we are also agreeable to discussing with you terms for providing you with authorization to enforce the judgments, at your own expense, on the same terms as the Minutes of Settlement. If we can agree on the terms of this, we can execute another agreement. Assigning the judgments to you for collection would be in full a remedy for any claim your client might have.

In the alternative, some change in circumstances in the future might result in the judgments being enforceable. We look forward to hearing back from you and hopefully there is new information your client can provide.

- [16] Mr. Ginzburg did not accept Mr. Sadr's proposal to pursue enforcement of the judgments himself.
- [17] After various letters back and forth regarding information Mr. Burshtein had received, and suggested steps to be taken, on July 4, 2018, Mr. Burshtein again asked Mr. Apel for an update regarding the steps taken to enforce the judgment.
- [18] On July 5, 2018, Mr. Sadr wrote to advise that Mr. Apel was no longer appointed to the file. He further advised that they had been unable to locate any assets or verified sources of income for Richard Farbman, and that Lawrence Farbman had filed for bankruptcy. Lawrence Farbman also had no assets or verified sources of income. Accordingly, Mr. Sadr advised that Window City was going to cease collection efforts until additional assets/income information became available.

Ecotech Commences an Action for Damages

- [19] In April 2019, Ecotech commenced this action seeking damages in the amount of \$75,000 for breach of the agreement. Ecotech takes the position that Window City breached the Revised Minutes as it failed to undertake best efforts in the collection efforts. It also ceased collection efforts before "all leads were exhausted and all reasonable steps have been taken". According to Ecotech, Window City was required to:
 - a. Bring a motion to set aside the stay in bankruptcy against Lawrence Farbman;
 - b. Conduct an examination in aid of execution against Lawrence Farbman; and

c. Conduct an examination in aid of execution against Richard Farbman.

[20] Ecotech further takes the position that Window City's obligations under the Minutes were independent of Ginzburg's obligation to act in good faith to assist in the collection and enforcement of the default judgments".

[21] In any event, Ecotech maintains that Mr. Ginzburg has met his obligations by:

- a. Providing contact information for Lawrence Farbman and Richard Farbman;
- b. Providing details of a custom home at 715 Oriole Parkway, Toronto, which was built by Richard Farbman, but held in his spouse's name (now his former spouse);
- c. Advising Window City that Richard Farbman had received \$200,000 from his spouse as part of a separation;
- d. Providing details of Richard Farbman's current source of income (as a full-time independent contractor for Euroseal Window Industries Ltd. – his father's company); and
- e. Promptly responding to inquires made by Window City to the best of his abilities.

[22] Ecotech alleges that Window City breached its contractual duty of honesty and good faith by acting in an arbitrary and capricious manner by:

- a. Providing Ecotech with spurious reasons as to why it was not proceeding with its collection efforts; and
- b. Misrepresenting to Ginzburg and/or Ecotech the steps that it would and did take in its collection efforts.

[23] Ecotech also seeks punitive aggravated and exemplary damages on the basis that Window City's conduct was malicious, oppressive and high-handed.

Analysis

Test: Motion for Summary Judgment

Is there a Genuine Issue Requiring a Trial?

General Principles

[24] Pursuant to Rule 20.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court *shall* grant summary judgment if it is satisfied there is no genuine issue *requiring* a trial. Animating the interpretation of 20.04(1) is Rule 1.04 which requires that the rule be liberally construed to secure the just, most expeditious and least expensive determination of a proceeding *on its merits* having regard to the complexity of the issues and the amounts involved.

[25] A trial is not required if the judge on the motion can, 1) achieve a *fair and just* adjudication; 2) make the necessary findings of fact; 3) apply the law to those facts; and 4) be satisfied that the motion is a proportionate, more expeditious and less expensive means to achieve a *just* result rather than going to trial.

[26] As the Supreme Court explained in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87, at para. 50:

These principals are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principals so as to resolve the dispute. [Emphasis added.]

[27] This Court is entitled to assume that the record contains all of the evidence that the parties will rely on if there is a trial: *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200 (CanLII), at para. 27.

Application to the Facts of the Case

[28] Ecotech is of the view that this action can be resolved entirely based on the documentary record as the ultimate question is whether Window City's collection efforts, which were detailed in the correspondence between the parties, constituted "best efforts".

[29] In the context of the Minutes, Ecotech submits that best efforts required at a minimum that Window City conduct an examination in aid of execution.

[30] According to the plaintiff, it was also a breach of Window City's duty of good faith and honest performance to determine there was no reasonable prospect of collection without conducting examinations in aid of execution and attempting to set aside the stay in bankruptcy against Lawrence Farbman.

[31] In response, Window City maintains that there are genuine issues for trial, which include:

- 1) *What are the best efforts necessary for the defendant to undertake in the collection of the default judgment?*
- 2) *If best efforts are found to have been not exercised, what damages, if any, result from the lack of best efforts?*
- 3) *Is specific performance an adequate remedy for the plaintiff and what is the specific performance?*

- 4) *Did the plaintiff's principal, Mark Ginzburg, breach the agreement by failing to assist the defendants?*
- 5) *What is the amount of time the defendant has to enforce and collect the default judgment (ie. what is the deadline for the defendant to collect)?*
- 6) *What is the effect of the term that the defendant can cease collection efforts and how does this term interrelate with "best efforts"?*
- 7) *What is the interpretation of the term of the agreement limiting the plaintiff to only actions for an accounting and payment of collected funds?*
- 8) *Can constant monitoring for real estate assets be considered "best efforts"?*
- 9) *Should the defendant be penalized by the complete lack of assets of the judgment debtors?*
- 10) *The equitable considerations for the defendant to have suffered damages in excess of \$267,000.00, at the hands of Mark Ginzburg and his business partners, the Farbman brothers, and now being faced with an action to return the \$75,000.00 paid after a 5-day fraud trial.*
- 11) *In dealing with all of the above issues, credibility will be an issue requiring a trial.*

[32] In *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, Ewaschuk J. described the meaning of "best efforts" as requiring "first class, as opposed to second-class efforts" and requiring "the requisite party to leave no reasonable stone unturned to discharge its duty". Justice Ewaschuk qualified the duty as "not requiring the party to sacrifice itself totally to the economic interests of the party to whom the duty is owed, although the interests of the other party must predominate.": *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, [1990] O.J. No. 564 (ON H.C.J.), at para. 44.

[33] In *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, Justice Dorgan of the British Columbia Supreme Court summarized the principles extracted from the case law on the meaning of best efforts as follows:

1. "Best efforts" imposes a higher obligation than a "reasonable effort".
2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
3. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.

4. The meaning of “best efforts” is, however, not boundless. *It must be approached in the light of the particular contract, the parties to it and the contract’s overall purpose as reflected in its language.*
5. While “best efforts” of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of “inevitable failure” is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made “best efforts” rests on the defendant.
7. Evidence that the defendant, had it acted diligently, could have satisfied the “best efforts” test, is relevant evidence that the defendant did not use its best efforts.

[Emphasis added.]

Atmospheric Diving Systems Inc. v. International Hard Suits Inc., 1994 CanLII 16658 (BC SC), at para. 71.

- [34] As the jurisprudence makes clear, the meaning of “best efforts” must be *approached in light of the particular contract, the parties to it and the contract’s overall purpose as reflected in its language.*
- [35] Any remedy granted in this case should also consider the context of the relationship between the parties and the nature of the settlement at issue.
- [36] This is not a case where Mr. Ginzburg has been denied \$75,000 he was owed. This was a case where it was contemplated that Mr. Ginzburg would receive a proportionate share of the monies collected from the other defendants, Richard and Lawrence.
- [37] Ginzburg was required to “act in good faith to assist in the collection and enforcement of the default judgments”.
- [38] Pursuant to the Minutes, Ginzburg was also only entitled to start receiving proceeds (1/3 of all proceeds up to a total of \$75,000) after payment of all legal fees, disbursements, and HST to Window City’s lawyer.
- [39] The costs of collection (legal fees, etc.) are also properly considered in assessing the nature of Window City’s efforts. Obviously, it could not be that Window City would be expected to spend thousands of dollars in legal fees to obtain hundreds for Ginzburg.
- [40] In this case, Window City had conducted searches, and was aware that Richard and Lawrence had no assets to satisfy the outstanding judgment. In my view, it was a reasonable course of action for Window City to wait until sufficient assets were in their possession to continue pursuing collection.

- [41] On the record before me, it is unlikely that conducting an examination in aid of execution would have provided any meaningful information beyond what Window City already had in its possession.
- [42] It is also unclear from the record whether Ginzburg complied with his “good faith” obligation to assist in the enforcement. The record suggests that Ginzburg may have had an ongoing relationship with Lawrence and Richard. In my view, Ginzburg’s “good faith” efforts would be relevant to an assessment of whether any relief should be granted.
- [43] While Ginzburg in his affidavit suggests he got nothing out of the settlement, this ignores the fact that Ginzburg settled the matter with Window City with a view to avoiding payment of the full \$267,000. Window City, in resolving the matter, also gave up the opportunity to obtain judgment in full as against Ginzburg.
- [44] Even if I were satisfied that Window City had not complied with its obligations under the agreement (which I am not), the appropriate remedy, in my view, would be to order Window City to continue in its collection efforts with increased diligence.
- [45] The action itself also seems to ignore that the Minutes and Release provide that *no claim may be made by 2271047 Ontario Ltd. or Mark Ginzburg, thereafter, on any basis whatsoever, other than for an accounting under paragraph 4.*
- [46] In my view, whether the plaintiff is entitled to pursue the action at all given the wording of the Release is a live issue.
- [47] Accordingly, the motion for summary judgment is dismissed.
- [48] I will receive costs submissions of 3 pages or less from Window City within 3 weeks of the release of this decision. The plaintiff has 2 weeks thereafter to respond.

Justice C.F. de Sa

Released: July 5, 2023

CITATION: 2271047 Ontario Ltd. v. Window City Industries Inc., 2023 ONSC 4012

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2271047 Ontario Ltd.

Plaintiff

– and –

Window City Industries Inc.

Defendant

REASONS FOR DECISION

Justice C.F. de Sa

Released: July 5, 2023