

CITATION: 2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc, 2023 ONSC2301
COURT FILE NO.: CV-22-683480
DATE: April 14, 2023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc., CB Bridle Path Inc. and Kingsett Mortgage Corporation;

BEFORE: ASSOCIATE JUSTICE C. WIEBE

COUNSEL: Andrea Gorys for CB Bridle Path Inc. (“Bridle Path”);
Robert Hine for Jia Development Inc. (“Jia”);
Brendan Bowles for Folger, Rubinoff LLP (“FR”);

HEARD: April 5, 2023.

REASONS FOR DECISION

INTRODUCTION

[1] This is a construction lien action. The defendants, Bridle Path and Jia, the owners of the subject land, each brought a motion under *Construction Act*, R.S.O. 1990, c. C.30 (“CA”), section 47 for an order discharging the claim for lien of the plaintiff, 2708320 Ontario Ltd. cob Viceroy Homes (“Viceroy”) and vacating the related certificate of action from title.

[2] The motions were originally returnable before me on January 16, 2023. Bridle Path served its motion record on Viceroy on January 10, 2023. Jia served its notice of motion on January 5, 2023. The urgency was an impending sale of the property by the defendants.

[3] The lawyers for Viceroy, Fogler, Rubinoff LLP (“FR”), had on December 9, 2022 brought a motion for an order removing them as lawyers of record for Viceroy, which motion was originally returnable March 3, 2023. Because of the defendants motions, FR wanted this motion accelerated to January 16, 2023 to be heard first. This led to a case conference with me on January 11, 2023 at which time I scheduled the FR removal motion for January 16, 2023 and rescheduled the defendants motions to be heard on April 5, 2023. The purpose was to allow Viceroy to obtain a new lawyer to respond to these motions. I also scheduled a case conference to take place on March 6, 2023 to see whether Viceroy had retained counsel by that time.

[4] On January 16, 2023, Andrew Sun, the principal of Viceroy, was present at the removal motion with an interpreter provided by FR. Mr. Sun can only speak Mandarin Chinese. He did not oppose the removal order. I granted it. I also cautioned Mr. Sun about the critical need for Viceroy to obtain a new lawyer as quickly as possible to respond the defendants’ motions. He understood

this. I am satisfied from the evidence in these motions that FR complied with the service requirements of Rule 15.05 in a timely way.

[5] Jia served its motion record on Viceroy on February 21, 2023.

[6] At the March 6, 2023 case conference there was no lawyer for Viceroy. Mr. Sun was not present, despite having been made aware of this case conference at the removal motion on January 16, 2023. FR was present. Counsel for Bridle Path and Jia advised that Viceroy had neither appointed a new lawyer nor obtained an order granting it leave to be represented by a non-lawyer. They advised that their clients wanted to amend their notices of motion to seek a dismissal order on account of this representation issue. They also wanted to amend the notices of motion to seek production of the FR file concerning the preservation and perfection of the Viceroy lien. Their stated intention was to lay the possible foundation for an eventual motion against FR for costs under *CA* section 86. I set a schedule for these motions that allowed them to make these amendments.

[7] FR put LawPro on notice. LawPro wanted to amend the motion schedule concerning the section 86 issue. I convened a case conference on March 14, 2023. Brendan Bowles, counsel for LawPro, appeared and advised that he needed time to get instructions. I ordered that the section 86 issue, namely the claim for production from FR, be severed from the other issues in this motion, with the motion concerning the section 86 issue to be scheduled at a future date. Mr. Sun was present at this case conference, but without an interpreter. This made the conversation with him difficult. He indicated that he could not afford a lawyer. In the end, I was satisfied that Mr. Sun was aware of the urgent need for Viceroy to retain a lawyer and respond to these motions. Mr. Bowles offered to put Mr. Sun in touch with Mandarin speaking lawyers.

[8] On April 5, 2023, the day of the motions, counsel for Bridle Path and Jia were present as was Mr. Bowles. However, there was no one for Viceroy. Mr. Bowles advised that he had given Mr. Sun the names and addresses of three Mandarin speaking lawyers, that he had talked to one of those lawyers recently, and that this lawyer advised that Mr. Sun had not contacted him. I proceeded with the motions. Mr. Bowles made no submission other than that FR reserved the right to make submissions on the transition rules later, if necessary.

[9] Having heard the submissions of counsel for Bridle Path and Jia, I decided orally to grant the motions in their entirety with written reasons to follow. These are my reasons.

BACKGROUND

[10] Bridle Path filed two affidavits sworn by its CEO, Serge Moyal, an affidavit sworn by Jonathan Farber, the president of Joshani Construction Ltd. (“Joshani”), the company hired by the defendants to provide winterization services concerning the subject property, and the transcript of the section 40 cross-examination of Mr. Sun conducted on August 25, 2022. Jia filed an affidavit sworn by its principal, Denis Pei. I derived the following background facts from these materials.

[11] The land is located at 2425 Bayview Avenue, Toronto. Prior to 2016 a previous owner, Alexandria Town Homes, obtained zoning, variance, site plan approvals and demolition and construction permits for the construction of townhomes and underground parking on the property.

A later owner, Urbancorp (Bridlepath) Inc., had the demolition, excavation and foundation work done. Urbancorp became insolvent in 2016, and the project stopped. Through the insolvency proceedings, Bridle Path acquired the land. Photographs were taken of the site at that time.

[12] In July, 2017 and 2018 Bridle Path transferred half of the ownership to Jia. The project continued to remain dormant. The owners hired Joshani to provide winterization protection. Further photographs were taken in August, 2018.

[13] The owners set up a small modular sales office at the site, and did some minor cleaning and testing in addition to the winterization work. The project itself remained dormant.

[14] In early 2022 Bridle Path contemplated selling its half ownership share. On February 28, 2022 it entered into a conditional sale agreement with one Biao Liu (“Bill”) whereby Bill was given 30 days to satisfy himself as to the feasibility of the project and obtain financing.

[15] Bill introduced Mr. Pei to Mr. Sun. On March 9, 2022 the three signed a Letter of Intent (“LOI”) whereby Bill and Jia agreed to hire Viceroy to construct the project should the sale be completed. The LOI stated that a construction contract would be signed after Bill acquired his share of the land. The LOI also stated that any construction Viceroy did prior to the closing of the sale could not exceed \$500,000.

[16] Mr. Sun corresponded with Mr. Pei by WeChat. On March 11 and 12, 2022 Mr. Sun asked whether he could start cleaning. Mr. Pei responded that they were waiting for an engineering report about the foundation given the long delay in the project. Mr. Pei then became ill with Covid-19. He expected that Viceroy would do minor cleaning without affecting the winterization protection.

[17] On March 11, 2022 Viceroy rendered an invoice to Jia in the amount of \$13,560 for “excavator” work. This invoice was paid on March 14, 2022.

[18] On March 31, 2022 Bill advised that he could not close the sale. Mr. Sun then corresponded with Mr. Pei seeking to be the contractor for the project despite the failure of the sale. Mr. Sun also proposed becoming co-owner of the property. He reiterated these ideas in WeChat correspondence to Mr. Pei on April 6, 2022.

[19] On April 26, 2022 Mr. Sun phoned Mr. Pei asking as to the status of his proposed joint venture. Mr. Pei responded that he had not considered it. This upset Mr. Sun.

[20] Later on April 26, 2022 Mr. Sun sent Mr. Pei ten Viceroy invoices dated between March 15 and April 5, 2022 for amounts that totaled \$3.74 million on account of work allegedly done by Viceroy on the property. Mr. Pei responded rejecting these invoices. Mr. Sun then threatened to lien the property and notify the City of Toronto and the owners’ lender of the claim for lien.

[21] The next day, on April 27, 2022, Viceroy registered a claim for lien in the amount of \$3,740,300. The claim for lien alleged that Viceroy did the following work: “demolition of existing buildings, excavation, removal of debris, repair and completion of foundation, framing materials.” It alleged that the work was done between March 1, 2022 and April 8, 2022, namely in 39 days.

[22] On June 30, 2022, Viceroy commenced an action and registered a certificate of action purporting to perfect its lien. The defendants named were Jia, Bridle Path and the mortgagee, Kingsett Mortgage Corporation (“Kingsett”). The claim included claims concerning the lien and claims for an accounting of contract funds. The claim against Kingsett was about priority. No defence has been served to date.

[23] Bridle Path and Jia initiated a section 40 cross-examination of Mr. Sun that began on August 25, 2022. In the course of the cross-examination, Mr. Sun admitted that Viceroy did not supply \$2.2 million worth of work described in the ten invoices delivered on April 26, 2022. The cross-examination was not completed that day. It resumed on January 4, 2023, but Mr. Sun refused to answer questions.

SECTION 47 MOTION

[24] Bridle Path and Jia alleged that the Viceroy claim for lien was frivolous, vexatious and an abuse of process. That is now a stated ground under the new *CA* section 47(1) (a) for ordering a discharge of a lien. The other stated ground in section 47(1)(b) is “any other proper ground.” The old section 47 specified that a lien could be discharged “upon any proper ground.”

[25] There was some discussion about which version of the *CA* applied to this motion. Based on the evidence provided, I was satisfied that the old *CA* applied. All the discussion concerning the project was about resuming the project that laid dormant since 2016. There might have to be some changes, but the excavation and foundation work were largely done back in 2016. The original permits remained. The procurement for this project, and indeed the contracts that led to that work, all predated July 1, 2018.

[26] But the distinction between the old section 47 and the new one as to the grounds for bringing a section 47 motion is largely a distinction without a difference. In the 1993 decision in *Franco Property Development Ltd. v. Heritage Glen North Ltd.*, 1993 CarswellOnt 2572 at paragraph 36, Justice Day found that a huge and dubious claim for lien registered by a contractor controlled by the same party that controlled the owner for the apparent purpose of gaining priority over lender security, was frivolous, vexatious and an abuse of process under Rule 21.01(3)(d). The judge also found that for the same reasons, the claim for lien could be discharged and the action dismissed under the old *CA* section 47. This indicates that the old *CA* section 47 embraced motions to discharge claims for lien that are frivolous, vexatious and an abuse of process.

[27] The process to be followed in a section 47 motion has now been clarified. The moving party must prove that there is no triable issue as to the basis on which the lien is sought to be discharged; see *Maplequest (Vaughan) Developments. Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308 (CanLII) at paragraph 25. Both parties must “put their best foot forward” in the evidence to assist the court in making this determination, and the court is entitled to make this assumption; see *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190 (CanLII) at paragraph 56. The lien claimant has this onus because it is invariably in the best position to provide the evidence; see *GTA*, *op. cit.*, paragraph 55.

[28] What constitutes frivolousness, vexatiousness and an abuse of process? The caselaw provides some guidance in this regard. “Frivolous” is used to describe an action that is so highly unlikely to succeed that it is apparently devoid of practical merit; “vexatious” includes actions that

obviously cannot succeed and that are brought for an improper purpose; “abuse of process” is a flexible doctrine that gives the court the inherent power to prevent the misuse of its process; see *XPL Construction Solutions Inc. v. North Bay Capital Investments Ltd.*, 2023 ONSC 238 (CanLII) at paragraphs 34 to 39.

[29] Bridle Path and Jia sought to have the Viceroy claim for lien discharged on the basis that the quantum claimed was frivolous, vexatious and an abuse of process. They asserted that there was no evidence that Viceroy did any of the work alleged in its claim for lien.

[30] Having reviewed the evidence on these motions, I concluded that Jia and Bridge Path had established that there was no triable issue in this regard and discharged the claim for lien and vacated the certificate of action accordingly. Here are my reasons:

- a) The Viceroy claim for lien claimed that Viceroy did \$3,740,300 worth of work from March 1, 2022 to April 8, 2022, a period of only 39 days. The work was described as follows: “demolition of existing buildings, excavation, removal of debris, repair and completion of foundation, framing materials.” It is truly hard to believe that all of this work could have been done in such a short period of time.
- b) The photographs in the motion records and the evidence of Messrs. Moyal, Farber and Pei all confirm that no work done was done on the site at this time other than some cleanup.
- c) Furthermore, the evidence showed that the demolition of the existing buildings had been done by the earlier owners years ago, as had the excavation and completion of the foundation. This work description in its claim for lien appears to be an entire fabrication by Viceroy.
- d) In his section 40 cross-examination, Mr. Sun admitted that the work described in Viceroy invoice dated April 1, 2022 (V22040109) in the amount of \$1,265,000, namely “foundation for 10 houses, driveway into garage, material and labour for roofs of 4 houses,” was not done.
- e) In cross-examination, Mr. Sun also admitted that the work described in Viceroy invoice dated March 28, 2022 (V22032807) in the amount of \$949,200, namely “framing for no. 18, 19 + 20 in production and installing,” was not done.
- f) Of the eight other Viceroy invoices that were delivered on April 26, 2022, six described work that clearly was not done, namely foundation reinforcement, building guardrails and stairs, excavation and transportation, building a structural wall, relocating a showroom and renovation, and the installation of a smart security system. None of this work was shown in the photographs that were taken of the project site and that appeared in the motion material. Mr. Farber also confirmed in his affidavit that none of this work was done.
- g) Two of the ten dubious Viceroy invoices delivered on April 26, 2022 concerned cleanup work. They are both dated March 15, 2022. The invoices describe the alleged work of

- cleaning pipes, removing site covering, cleaning with water guns, pruning trees and fixing a gate. The defendants admit that cleaning work was done. However, as indicated by Mr. Pei in his affidavit, Viceroy rendered an invoice for cleanup work on March 12, 2022, three days earlier, and was paid for that invoice on March 14, 2022. Had Viceroy actually done the work described in its two March 15, 2022 invoices for cleanup, it is an open question as to why it did not include that work in its earlier cleanup invoice that was paid. Without an answer to that question and given the other admissions of non-supply by Mr. Sun, the court is left to draw the conclusion that the work was not actually done.
- h) Mr. Sun admitted in his section 40 cross-examination that the Viceroy claim for lien included materials that were not delivered to the site. It is well established that a contractor cannot register a claim for lien for materials that are not supplied to a project site; see *1508270 Ontario Limited v. Laudervest Development Limited*, 2007 CanLII 79364 (ONSC) at paragraph 16.
 - i) Mr. Sun in his section 40 cross-examination admitted that the Viceroy claim for lien was based on budgeting estimates, not on the value of services and materials supplied to the property. This evidence is consistent with the amounts included in the ten dubious Viceroy invoices that were delivered on April 26, 2022 and that form the basis of the Viceroy claim for lien. All of these invoices are in round numbers.
 - j) In his section 40 cross-examination on August 25, 2022, Mr. Sun gave 40 undertakings to substantiate the Viceroy claim for lien. The key undertakings were the provision of all the backup for the Viceroy invoices, such as timesheets, site logs, photographs of the work, videos of the work, and any other proof the work was done. The undertakings included the provision of the list of subcontractors that were involved in the work, and the records of the material that were supplied. All of these undertakings remain unanswered after more than seven and a half months and despite these motions. I draw the adverse inference from this failure to comply with these undertaking, particularly in the face of these motions, that Viceroy's answers would not support the Viceroy claim for lien.
 - k) There was also the fact that Mr. Sun refused to complete his section 40 cross-examination. I was advised that Mr. Sun appeared with an FR lawyer at the scheduled resumption date of January 4, 2023, but refused to answer questions.
 - l) The circumstances in which the Viceroy claim for lien was registered indicated that the Viceroy claim for lien was done for an improper purpose, namely either to force Jia and Bridle Path to agree with Mr. Sun's joint venture proposal or as a reprisal for not doing so. Mr. Sun had the ten dubious Viceroy invoices rendered on April 26, 2022. This was the same date on which Mr. Sun was told by Mr. Pei that neither Jia nor Bridle Path had considered Mr. Sun's proposal. This upset Mr. Sun. He told Mr. Pei on April 26, 2022 that Viceroy would be registering a claim for lien, and threatened to inform the City of Toronto and the defendants' lender about the claim for lien. The Viceroy claim for lien was registered the next day on April 27, 2022.

- m) I drew the adverse inference from Viceroy's failure to appear on these motions that it had no evidence to respond in a meaningful way to these motions.

[31] I, therefore, concluded that there was no triable issue here, that the Viceroy claim for lien was indeed frivolous, vexatious and an abuse of process, and that it should be discharged and vacated, and the related certificate of action vacated. That is what I ordered.

REMOVAL ORDER NONCOMPLIANCE

[32] Jia and Bridle Path also moved under Rule 15.04(6) and (7) for an order dismissing the Viceroy action on the basis of its failure to appoint a lawyer or obtain an order granting it leave to be represented by a non-lawyer in contravention of my removal order of January 16, 2023. The obligation under these rules creates a positive obligation on the corporation to comply with the removal order and these rules, and provides that a plaintiff corporation's action can be dismissed if the removal order and these rules are not complied with; see *Knockhandu Inv. v. Daniel MacDonald Inv. et al.*, 2007 CanLII 45715 (ONSC) at paragraph 12.

[33] In this case, considerable effort was made to give Viceroy the opportunity to comply with the removal order I granted on January 16, 2023. I allowed the FR removal motion, originally returnable March 3, 2023, to be accelerated to be heard instead of these motions on January 16, 2023, and I rescheduled these motions to April 5, 2023. This despite the statements of counsel for Jia and Bridle Path that the Viceroy claim for lien was jeopardizing a pending sale of the property that was scheduled to close at the end of January, 2023. This was all done to allow Viceroy the time it needed to retain a lawyer or obtain an order granting it leave to be represented by a non-lawyer primarily to respond to these motions. On January 16, 2023 at the removal motion Mr. Sun was present with an interpreter provided by FR. He did not oppose the removal. I explained to Mr. Sun the dire need for Viceroy to get a new lawyer or a non-lawyer representative as soon as possible to respond to these motions. He understood that.

[34] Viceroy was served with the removal order in a timely way. However, it did not hire a new lawyer and did not get an order granting it leave to be represented by a non-lawyer. Mr. Sun did not even appear at the case conference I had scheduled for March 6, 2023, a case conference that was scheduled to determine whether Viceroy would retain a lawyer.

[35] Mr. Sun did appear (but without an interpreter) at the sudden case conference I scheduled on March 14, 2023 at the request of LawPro. Mr. Sun was able to communicate that he could not afford a lawyer. This was an uncorroborated statement. It did not accord with the fact that Viceroy had retained a lawyer a year ago to register the Viceroy claim for lien and start an action, and continued to retain one for the section 40 cross-examination in August, 2022. Also, Mr. Sun did not mention his alleged financial straits on January 16, 2023 at the removal motion when he had an interpreter and I informed him of these motions and the dire need for Viceroy to hire a new lawyer. Given the other evidence on these motions of Mr. Sun's lack of credibility, I do not accept his assertion of impecuniousness.

[36] The events of these motions have convinced me that Viceroy has abandoned this action. Mr. Bowles confirmed that he gave Mr. Sun the names of three Mandarin speaking lawyers shortly after the March 14, 2023 case conference. Mr. Bowles stated on April 5, 2023 that one of those three later

confirmed to him that that lawyer was never contacted by Mr. Sun. Then, of course, there was the absence of Viceroy on the return date of the motions, April 5, 2023, despite all the notice Mr. Sun received of these motions.

[37] I, therefore, order that this action be dismissed on account of Viceroy’s failure to hire a lawyer or get an order granting it leave to be represented by a non-lawyer.

CONCLUSION

[38] For these reasons, on April 5, 2023 I orally ordered that the Viceroy claim for lien be discharged and vacated, that its certificate of action be vacated and that this action be dismissed. I also scheduled a case conference for May 11, 2023 to schedule the section 86 portion of the motion that concerns FR. On April 11, 2023 I signed the order document incorporating my oral order.

[39] Concerning the costs of this action and this motion as against Viceroy, Jia filed a costs outline that showed \$39,072.80 in actual costs, \$31,010.25 in substantial indemnity costs, and \$26,448.44 in partial indemnity costs. It appeared that this costs outline concerned both the costs of the action and the motion, although that was not clear. Bridle Path did not file a costs outline.

[40] There would appear to be no doubt that Jia and Bridle Path are entitled to their costs of this action and motion as against Viceroy. I want final written submissions to help me determine the quantum of this costs award. I also believe that FR should have an opportunity to address the costs issue, as it may be affected by that ruling.

[41] Jia and Bridle Path must on or before April 26, 2023 serve Mr. Sun (on behalf of Viceroy), Mr. Bowles and each other with written submissions as to the costs of the action (including this motion). These written submissions cannot be longer than five pages. Bridle Path must include in addition to its written costs submissions a costs outline for the costs of the action. Viceroy and FR may on or before May 8, 2023 deliver responding written submissions, which written submissions cannot be longer than five pages. In that event, Jia and Bridle Path will have the right on or before May 11, 2023 to deliver reply written submissions of no more than one page.

DATE: April 14, 2023

ASSOCIATE JUSTICE C. WIEBE