

CITATION: Brook Restoration Ltd. v. Greatwise Developments Ltd., 2023 ONSC 1996
COURT FILE NO.: CV-22-00090594-0000
DATE: 2023 Mar 28

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, R.S.O. 1990, c. C.30

BETWEEN:)	
)	
BROOK RESTORATION LTD.)	
)	M. Swartz and B. Kuchar, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
GREATWISE DEVELOPMENTS LTD.,)	A. Merskey and K. Kuczynski, for the
PLAYFAIR RESIDENCES LIMITED and)	Defendants/Moving Parties
KARY ON INC.)	
)	
Defendants/Moving Parties)	
)	
)	
)	HEARD: in writing

TRANMER, J.

ENDORSEMENT ON COSTS

[1] The Defendant moved for an Order discharging the lien, or alternatively, reducing the quantum of the lien claim, and therefore, the security posted.

[2] In my decision, 2023 ONSC 1118, I reduced the quantum of the lien claim from \$8,058,101.79 to \$6,551,681.65.

[3] In exercising my discretion on the issue of costs, I have considered the relevant factors and principles in the context of all of the circumstances of the motion.

Bona Fide efforts to Settle Costs

[4] In my decision, I ordered “If the parties are unable to agree on costs after bona fide efforts to do so, they may make written submissions... to be filed within 10 days.” (emphasis added).

[5] The parties have made written submissions on costs. The parties have not addressed whether any efforts were made to agree on costs. Given the written submissions filed, and their widely opposing positions, it is reasonable to assume that no efforts were made.

[6] This is a factor that weighs against a costs order, or weighs in favour of a reduced costs order, in my view.

Positions on Costs

[7] Greatwise claims it was successful on the Motion and seeks \$70,512.97 in substantial indemnity costs.

[8] Brook claims that it was successful and seeks \$98,656.37 as partial indemnity costs. Alternatively, Brook submits that there was divided success, and that there should be no Order for costs.

Section 86(1) of the Construction Act

[9] This section recognizes that costs are in the discretion of the Court. It does not mandate substantial indemnity costs in the circumstances of this Motion.

GTA Restoration Group Inc. v. Baillie, 2020 ONSC 6327

[10] I have considered the decision by Master Robinson.

[11] It provides helpful guidance.

[12] I have also considered the principles set out in *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 5125 and *Stucco Construction Inc. v. Nili-Ardakani*, 2021 ONSC 8541, cited by Brook.

[13] The overarching principles in considering costs are that costs are to be proportionate to the importance and complexity of the issues and to the amount involved in the proceeding and costs are to be in a fair and reasonable amount rather than an exact measure of the actual costs incurred. A costs award must take into account the reasonable expectations of the parties.

Success on the Motion

[14] In favour of Greatwise is my reduction of lien claim amount, my finding that it made a reasonable offer, albeit not a strict Rule 49 offer, and my finding that Brook did not acknowledge its \$250,000 error until the hearing which it reasonably should have done.

[15] In favour of Brook is my decision not to discharge the lien, the limited amount of the reduction of the lien quantum, and that I found the issues of the nature of the contract and abandonment to be triable issues.

[16] In my view, this is a case of divided success.

The Rule 57.01 Factors

[17] From the costs outlines filed, it is clear that each party could reasonably expect to pay the indemnity costs sought by the other party.

[18] The issues were not overly complex.

[19] The issues were of importance to both parties.

[20] I find that Brook's document dump of the ledger tended to lengthen the proceedings as did its failure to concede the significant error and obvious non lienable claims.

Hours Spent and Hourly Rates

[21] I find that the hours and hourly rates claimed as indemnity for costs by both parties are highly excessive.

[22] Although each party faced its own significant legal fees, thus having an expectation as to the magnitude of a costs claim by the other party, I find that the hours and rates claimed as costs for both sides are well beyond reasonable expectations for a Motion such as this, especially on the Brook side.

Boucher v. Public Accountants Council for the Province of Ontario (2004) 71 O.R. (3d) 291 (CA)

[23] The overall objective is to fix an amount that is fair and reasonable, having regard to the broad range of factors set out in Rule 57.01 and the expectations of the parties, for the unsuccessful party to pay rather than fix an amount based on the actual costs incurred by the successful party.

Decision

[24] On this Motion, I find that a fit, just and proportionate costs order is one of no Order as to costs. Each side shall bear its own costs.

Honourable Mr. Justice Gary W. Tranmer

Released: March 28, 2023

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