

CITATION: DNR Restoration Inc. v. Trac Developments Inc., 2023 ONSC1849
COURT FILE NO.: CV-22-692195
DATE: March 20, 2023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DNR Restoration Inc. v. Trac Developments Inc.;

BEFORE: ASSOCIATE JUSTICE C. WIEBE

COUNSEL: Jamie Spotswood and Allison Presse for Trac Developments Inc.;
Vito Scalisi for DNR Restoration Inc.;

HEARD: March 2, 2023.

REASONS FOR DECISION

[1] The moving party, Trac Developments Inc. (“Trac”), moves for an order declaring the lien of DNR Restoration Inc. (“DNR”) expired on account of a failure to preserve in time and returning the posted security, or, in the alternative, reducing the security posted for the DNR claim for lien.

[2] The DNR claim for lien was registered on September 27, 2022 in the amount of \$2,501,259.86. DNR has conceded a reduction in the lien amount to \$860,656. Trac has not specified the amount by which the DNR claim for lien should be further reduced to.

BACKGROUND

[3] The following facts are evident from the motion material and are not in dispute.

[4] The project in issue was the construction of a residential condominium at 248-260 High Park Avenue, Toronto. The condominium is comprised of 9 units within a converted heritage church building and 51 units within a connected four-storey new building with two levels of underground parking.

[5] On March 23, 2018, the owner, Trac, contracted with Wilkinson Construction Services Inc. (“Wilkinson”) whereby Wilkinson was to act as a pure construction manager, namely a construction manager not at risk, for Trac for the subject project.

[6] On November 1, 2019, Trac contracted with DNR whereby DNR was to supply and install formwork and rebar caps for the fixed price of \$3,646,000 plus HST. This contract will be called “the Contract.” The Contract specified additional unit rates for the placing of concrete, reinforcing steel and reinforcing steel accessories.

[7] Work was to have commenced in April, 2020. There was a delay. DNR mobilized in mid-October, 2020. There was further delay due to unexpected underground water. The tower crane could not be installed until May, 2021. On November 6, 2020 the church façade collapsed. There were other delays.

[8] On January 10, 2022 DNR submitted a delay claim concerning the church façade collapse. On March 2, 2022 Trac replaced Wilkinson with Clark Construction Management Inc. (“Clark”). Wilkinson registered a construction lien.

[9] Payment issues arose. On June 3, 2022 DNR’s lawyer delivered a formal notice of default letter pursuant to GC 7.2.3 of the Contract advising that Trac was in default for failing to pay the DNR delay claim and the March draw. The letter gave Trac five days to correct the default, failing which DNR would either suspend the work or terminate the Contract.

[10] Clark issued a new schedule on June 3, 2022. The parties met on June 8, 2022. Trac paid the March draw. There was a discussion about revised pricing for the May, June and future draws on account of the delays on the project and DNR’s increased costs. DNR did not render monthly draw applications for May, 2022 and thereafter.

[11] DNR continued to work during this time.

[12] On July 11, 2022 Danny Verissimo, president of DNR, sent an email advising of two options to finish the work, one being with DNR at specified new pricing to account for increased costs of delay, and the other being with another forming contractor.

[13] The parties explored the second option. On July 22, 2022 Mr. Verissimo introduced Topcrete Forming Inc. to the owner. On August 2, 2022 Topcrete submitted a quotation for the completion work. Trac and Topcrete negotiated a contract in August, 2022.

[14] On July 25, 2022 DNR delivered a formal notice of work suspension, effective August 1, 2022, due to the failure to reach an agreement on new pricing.

[15] On July 28, 2022 Trac delivered a formal notice of default pursuant to GC 7.1.2 due to DNR’s alleged lack of resources on site. The letter gave a five day cure period, and threatened that Trac would cure the default itself at DNR’s expense if DNR did not comply.

[16] In August, 2022 DNR submitted Progress Draw 19 for June standby charges.

[17] On August 3, 2022 Mr. Verissimo emailed Clark advising that DNR had indeed suspended its services effective August 1, 2022 until an agreement was reached.

[18] On August 9, 2022 Trac’s lawyer sent DNR’s lawyer a letter rejecting any agreement. He alleged that, “as DNR has ceased providing services of value to Trac, it terminated its contract.” The lawyer then alleged that “Trac has accepted DNR’s termination.” The lawyer went on to demand that DNR remove its equipment by August 10, 2022.

[19] On August 15, 2022 Mr. Verissimo sent an email to Clark advising that DNR was still under contract. He referred to stripping of formwork in the underground.

[20] On August 17, 2022 Brett Latham of Clark texted DNR advising that Clark “got a note from TRAC. Our guys are going to walk your guys off the site. The contract is terminated.”

[21] On September 27, 2022 DNR registered a claim for lien in the amount of \$2,501,259.86. Trac obtained a vacating order from me on October 17, 2022 by posting a \$2,751,259.86 lien bond.

[22] Trac asked for a case conference to schedule this motion. I held one on November 22, 2022, and scheduled this motion. The motion record was delivered on or about December 16, 2022. There have been cross-examinations on filed affidavits.

[23] In the meantime, DNR purported to perfect the lien by commencing this action on December 23, 2022.

ISSUES

[24] Based on the motion material and the submissions of counsel, I believe that the following are the issues to be determined on this motion:

- a) Does the new *Construction Act*, R.S.O. 1990, c. C.30 (“CA”) apply?
- b) Was the DNR claim for lien registered out of time?
- c) Should there be a reduction in the posted security, and, if so, by what amount?

ANALYSIS

a) Does the new CA apply?

[25] Whether the old CA, namely the one that existed prior to June 30, 2018, or the new CA applies to this case turns on the transition rules in CA section 87.3(1). Since there was no evidence of the procurement process for this project, it is CA section 87.3(1)(a) that is relevant. Section 87.3(1)(a) specifies that the old CA continues to apply if, “a contract for the improvement was entered into before July 1, 2018.”

[26] There is no dispute that the Wilkinson contract was entered into prior to July 1, 2018. There was no evidence of other contracts concerning the project predating July 1, 2018. Therefore, the Wilkinson contract was the focus of the argument.

[27] I bear in mind that statutory words are to be read in their entire context and in their grammatical and ordinary sense in harmony with the legislative scheme, the object of the legislation, and legislative intent; see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paragraph 26.

[28] Mr. Scalisi argued that the Wilkinson contract was not “a contract for the improvement” under section 87.3(1)(a) as it concerned the provision of services only. I do not accept this argument. “Contract” is defined in CA section 1 to be the contract between an owner and a “contractor.” “Contractor” is defined in section 1 of the CA to be the one who contracts with the owner for the supply of “services or materials” (emphasis added). The CA does not confine the concept of “contract” to the provision of “services and materials.”

[29] Furthermore, it is well established now that pure construction managers such as Wilkinson, who provide only services, have lien rights along with all the other parties who provide services and materials to the improvement; see *B.I.L.D.O.N. Construction (801) Inc. v. Project 801 Inc.*, 2011 4169 at paragraph 25, and *Marino v. Bay-Walsh Ltd.*, [2002] O.J. No. 2211 at paragraph 111. If construction managers with contracts with the owner, such as Wilkinson, have lien rights, they surely are “contractors” with “contracts” for the purpose of section 87.3(1)(a).

[30] Mr. Scalisi also argued that the concept of improvement in section 87.3(1)(a) is tied to and limited by the concept of “a contract.” As a result, he argued, the transition rule applies uniformly to each “contract,” and all work that falls within the scope of each contract, but not uniformly as between contracts even though these contracts concern the same project. Therefore, so the argument went, only Wilkinson and its subcontractors would be governed by the old *CA*, but not the other contractors, such as DNR, whose contracts were entered into after July 1, 2018.

[31] Mr. Scalisi relied upon the decision of Associate Justice Robinson in *Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.*, 2021 ONSC 3396 (CanLII). This was a case where a subcontract was entered into after July 1, 2018 and the contract under which it was created predated July 1, 2018. The sub-subcontractor argued that the transition rule of section 87.3(1)(a) did not apply to subcontracts, and that subcontracts dated after July 1, 2018 were governed by the new *CA* regardless of the date of the contract. This despite the clear wording of section 87.3(2). Associate Justice Robinson rejected this argument. At paragraph 30, His Honour commented on the relationship between subcontracts, contracts and the improvement. This is the paragraph that Mr. Scalisi appears to be relying upon::

Subcontract work is a portion of the overall work to be performed pursuant to a contract for the improvement. It is inherently connected to, if not dependent on, that contract. It logically follows that the same legislative scheme governing the rights, obligations and remedies under the contract should also govern subcontracts for performance of the same scope of work required by that contract.

[32] I disagree with Mr. Scalisi’s argument. Throughout the *CA*, including in section 87.3, the concept of improvement is not tied to and limited by the concept of “contract.” Indeed, it is the contrary – an improvement can be broader in scope than a contract. In section 1, “improvement” is defined in broad terms to be the entirety of a project. An improvement is defined to include any “alteration, addition or capital repair to the land,” or “any construction, erection or installation on the land,” or “the complete or partial demolition or removal of any building, structure or works on the land.” Section 87.3 does not change that definition.

[33] The concept of “contract” in section 1 can be narrower in scope. It is defined in relation to the concept of “contractor,” which is defined as the person who contracts with the owner “to supply services or materials to an improvement.” As such, a “contract” can encompass the entire improvement or, such as in this case, a part of it. Where a contract is narrower than the scope of the improvement, and there are other contracts for the improvement, the only logical interpretation to be given to section 87.3(1)(a) is that the first contract will determine which version of the *CA* will apply to all contracts for the improvement. This is, of course, subject to any evidence of procurement if all the contracts are dated after July 1, 2018.

[34] I believe that in *Crosslinx* Associate Justice Robinson adopted this view of the transition rule in section 87.3(1)(a), and that Mr. Scalisi misread his decision. His Honour made an important observation in paragraph 22. He said that the second transition rule in section 87.3 (1)(b), namely “the procurement process for the improvement,” makes no reference to “contracts” and “subcontracts.” He stated that that this rule would be rendered superfluous if the dates of each contract were found to govern the transition issue. A statute such as the *CA* should be interpreted as an integrated whole and not as creating superfluous subsections such as this.

[35] His Honour also observed that if both statutes were allowed to govern contracts on one project, there would be confusion. He pointed to several examples: different holdback release dates; uncertainty as to whether written notice is required to withhold payment on account; uncertainty as to whether section 39 demands can be made of landlords; uncertainty as to how the landlord’s interest can be affected by liens; and uncertainty as to the retention and accounting obligations of trustees. A statute is to be read as a whole, with all parts making sense and contributing to the overall purpose of the statute. It should not be read as creating confusion unless that result simply cannot be avoided.

[36] What His Honour stated in paragraph 30 pertained only to the facts of the case before him, namely a dispute between a subcontractor and a contractor as to which of their respective contracts determined the transition issue for the subcontract. These comments cannot be taken as an overarching interpretation of the transition rule in section 87.3(1)(a) itself.

[37] Associate Justice Robinson made one general conclusion in paragraph 4: “I have determined that the intended effect of the language used in s. 87.3 is that the same legislative scheme for rights, obligations, and remedies provided in the *Construction Act* applies consistently to all persons involved in the same improvement.” I agree with this comment. Such an interpretation gives meaning to each of the transition rules, including section 87.3(1)(b), and avoids the confusion of having two statutory regimes govern the same project.

[38] As this conclusion pertains to the improvement in issue in this case where there are many “contracts,” not just one as in *Crosslinx*, it means that if the earliest “contract” predates July 1, 2018, such as the Wilkinson contract, all contracts on the improvement fall under the old *CA* regardless of the dates of those contracts. That is what I find.

[39] As a result, I find that the DNR Contract is governed by the old *CA*.

b) Was the DNR claim for lien registered out of time?

[40] Trac moves for an order declaring the DNR expired on account of a failure to preserve the lien in time. It is undisputed that DNR was a “contractor.” As the old *CA* applies, DNR, therefore, had to preserve its lien on or before 45 days from the date of “completion or abandonment” since there was no certificate of substantial performance published. It is undisputed that the Contract was not completed. The issue was abandonment. Since DNR registered its claim for lien on September 27, 2022, the court must, therefore, find that DNR abandoned the contract on or before August 13, 2022 to find that it’s lien has expired due to a failure to preserve in time.

[41] Trac argued that DNR had abandoned its Contract work as of August 1, 2022. It also argued that Trac terminated the Contract in early August, 2022. DNR argued that DNR did not abandon the Contract and that Trac indeed terminated the Contract, but did so no sooner than the Clark email of August 17, 2022.

[42] It was not clear under which section of the old *CA* this motion is brought. Such a motion could be brought under section 45 without notice or under section 47 with notice. As the motion was on notice, I will presume that section 47 governs.

[43] With motions under section 47 the moving party must prove there is no triable issue, including no genuine issue of credibility, as to the bases 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. The “enhanced powers” available to a judge under Rule 20.04(2.1) to determine on a motion for summary judgment whether there is really a genuine issue requiring a trial (ie. weighing evidence, evaluating credibility and drawing reasonable inferences), are not available to a judge hearing a motion under *CA* section 47; see *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111 (CanLII) at paragraph 61. The basis on which Trac seeks to have the DNR claim for lien discharged is timeliness.

[44] Abandonment occurs “when there is a cessation of work and either an intention not to complete the contract or a refusal to complete the contract”; see *Gem in Niagara Homes Inc. v. Dewling et al.*, 2018 ONSC 3500 (CanLII) at paragraph 27. As a result, abandonment occurs when an owner terminates a contract; see *Gem in Niagara Homes, op. cit.*, paragraph 28. These are all questions of fact.

[45] Having reviewed the evidence on this motion, I have determined that Trac has failed to meet its onus of proving that there is no triable issue concerning the timeliness of the DNR claim for lien. These are my reasons:

- The evidence shows that on July 25, 2022 DNR served Trac with a formal notice of “suspension” of the work due to the failure by the parties to agree to give DNR new pricing for the work in light of the delays on the project. Whether DNR was entitled to do this under the Contract is an open question. However, it is clear to me that the notion of “suspension” of work is not the same as an intention not to complete the Contract work.
- DNR followed this notice up with an email to Trac on August 3, 2022 stating that the work was indeed “suspended” effective August 1, 2022 until an agreement was reached. I reiterate that work “suspension” is not the same as an intention not to complete.
- There were Clark Daily Logs reporting on site conditions from August 1, 2022 to August 16, 2022. They clearly showed the presence of a DNR crew on site during this time. However, there was hardly any activity reported. What was reported was activity consistent with demobilization. The one exception was August 17, 2022 when Clark noted that DNR was preparing scaffolding for slab work. Mr. Spotswood urged me to conclude that this was definitive evidence of abandonment, and that the August 17, 2022 work was “bootstrapping,” namely work done solely at DNR’s initiative to extend its lien period. I find that this evidence was just as consistent with the concept of work “suspension,” namely that DNR had suspended work effective August 1, 2022 to pressure Trac into an agreement.

Furthermore, the work on August 17, 2022 could hardly be bootstrapping because DNR was well within its lien period even under Trac’s theory of the case. Bootstrapping usually occurs after the lien period has clearly expired.

- Mr. Spotswood challenged the credibility of DNR’s position. He showed that in cross-examination Mr. Verissimo conceded that he knew in early August, 2022 that there was no and would be no agreement with Trac, that Topcrete was taking over, that DNR would not be working any longer on site, and that, while DNR intended on working on transitional work and the church foundation pour in August, it never actually did this work. This may all be the case, but this just convinces me that there is a genuine issue requiring a trial as to whether DNR had suspended its work as it said. After all, as late as August 15, 2022 Mr. Verissimo sent an email to Clark stating that DNR remained under contract and was doing work.
- Mr. Spotswood argued that Trac terminated the Contract prior to August 13, 2022. There was indeed a formal notice of default from Trac on July 28, 2022. The notice was on account of alleged lack of DNR resources on site. It gave a five day cure period. Importantly, the notice did not threaten a Contract termination. It threatened that Trac would cure the default at DNR’s expense.
- There was no evidence that Trac actually took any steps prior to August 17, 2022 pursuant to that notice of default, namely by taking over the work on site.
- There was Mr. Spotswood’s own letter to DNR dated August 9, 2022 wherein he confirmed that there was and would be no agreement. In this letter Mr. Spotswood alleges that it was DNR that had terminated the Contract by not doing meaningful work, and that Trac “accepted” that termination. This is not a letter of contract termination. It is in effect a reversion to the issue of DNR’s alleged abandonment that I have already discussed.
- Interestingly, in his August 9, 2022 letter Mr. Spotswood demanded that DNR remove its equipment by August 10, 2022. There was no evidence that this equipment removal actually happened before August 17, 2022.
- The clearest evidence that Trac terminated the Contract was the Clark email of August 17, 2022. The email was a clear statement of that intention: “Our guys are going to walk your guys off the site. The contract is terminated.” Importantly, the email does not refer to any earlier abandonment by DNR or earlier contract termination by Trac. The email does not appear to have been sent out of frustration over DNR’s ongoing presence on site. The email states that Clark “got a note from TRAC.” This suggests that Trac made the decision to terminate that day. Indeed, Brett Latham of Clark in cross-examination admitted he was not told by Trac at any time prior to this date about a Contract termination.

[46] I, therefore, reiterate that Trac has failed to meet its onus of proving that there is no triable issue that the DNR lien has expired. There are indeed genuine issues concerning the lien timeliness that require a trial.

c) **Should there be a reduction in the posted security, and, if so, by what amount?**

[47] Under old *CA* section 44(5) the court may reduce the amount posted for a claim for lien. Because such a reduction amounts in effect to a reduction of the lien itself, the onus of proof on the moving party is a high one. The moving party must prove that there is no genuine issue for trial concerning the amount of the claimed reduction; see *Ledcor Construction Limited v. Canalfa Liberty Village Homes Inc.*, 2008 CanLII 87009 (ONSC) at paragraph 35.

[48] The reduced DNR claim for lien is composed of the following:

Description of DNR claim	Amount
Work orders: W/O 07082022 W/O 285918 W/O 285917 Total work orders:	\$7,288.60 \$5,835.00 \$1,155.00 \$14,278.60
May, June, July and August work on site: unbilled (less 8 payments made by Trac to the union and to trades)	\$371,631.27
Rebar accessories installed: unbilled	\$50,912.50
Holdback (less 3 payments made to trades)	\$324,820.11
Total lien amount (without HST)	\$761,642.48
Total lien amount (with HST)	\$860,656.00

[49] Trac does not dispute the holdback amount. It disputes the three work orders, the May to August work amount and the rebar accessories.

[50] The three work orders concerned extra work. W/O 07082022 concerned overtime for concrete placement that was approved by David Parker, a site supervisor for Clark. The other two work orders were for earlier labour concerning a flood due to a water pump failure and the preparation of a mud slab for the elevator shaft. They were signed off as extras by George Leopold of Wilkinson. Mr. Spotswood argued that Trac never approved these extras as required by the Contract, and that I should deny these claims as a result. I will not do so. It was undisputed that the stated work was done. The fact that the construction managers for the owner, the owner's representative on side, approved this work as an extra charge at minimum creates triable issues as to whether these were legitimate extras and whether Trac's rejection of them was proper.

[51] Concerning the rebar accessories, Mr. Verissimo stated in his affidavit that Mr. Leopold of Wilkinson got DNR to agree to bill these at the end of the project, and that these do not appear on invoicing as a result. In his affidavit, he presented evidence from the DNR Rebar Accessory Tracker that DNR installed 407.3 tons of rebar. The charge of \$50,912.50 was this 407.3 tons multiplied by

the rate of \$125 per ton for the accessories. In his factum Mr. Spotswood complained that DNR did not present evidence from Mr. Leopold. He also quibbled about the DNR proof of the supply of the accessories. The onus rests on Trac in this motion to prove that there is no triable issue concerning this item. The evidence indicates that it is at least a triable issue that the accessories were provided and have not been paid for.

[52] Most of the argument concerned the DNR claim for the May to August, 2022 work. Mr. Verissimo prepared a summary of the work done in this period. It is undisputed that DNR indeed did Contract work during this time. It did not bill for this work as it expected to reach an agreement with Trac as to new pricing to be applied to this work and future work. Mr. Verissimo admitted in cross-examination that the charge for this work in the claim for lien was based on the new pricing DNR wanted in this agreement. Mr. Verissimo also admitted that no such agreement was ever reached. Mr. Spotswood did not want me to strike this entire claim, but just reduce it to the amount based on the old pricing in the Contract. He did not have a proposed figure, but submitted that that I should order the reduction and have the parties work out the accounting.

[53] I am not prepared to do this. DNR's entitlement to this claimed compensation may arise from the existing Contract, regardless of the failed negotiation over new Contract pricing. The evidence indicates that the new rates claimed by DNR were meant to compensate DNR for the costs it was incurring due to the significant delay in the project, and that DNR was blaming Trac for this delay. This was evident from the letter Mr. Verissimo wrote to Trac on July 11, 2022 wherein he described the price structure proposed by DNR was reflective of "current market rates" for labour and material. Under GC 6.5.1, in the event of a delay caused by the owner or person for whom the owner was responsible, DNR was entitled to a reasonable time extension and to be reimbursed for the reasonable costs incurred by DNR as a result of the delay. The new pricing sought by DNR may just have been such a reasonable reimbursement of the DNR's costs due to the alleged Trac delay.

[54] There is a requirement that the trade contractor give written notice of the delay within ten days of the commencement of the delay. But the fact that the parties were engaged in a protracted negotiation over the new pricing suggests that Trac was made aware of this claim in a timely way and was prepared to entertain it. As a result, in my view, the quantum of what DNR should be paid for the period from May to August, 2022 is another triable issue.

[55] In its factum, Trac also alleges that DNR under-accounted for the payments Trac made to DNR's union and three subcontractors. What Trac alleges it actually paid to the union and the trades boiled down to uncorroborated assertions by Mike Giamou, Trac's principal, in his affidavit. At best, these assertions created no more than further triable issues. Given the evidence, I find that the issue of the Trac payments also requires a trial.

[56] Therefore, I have decided not to reduce the posted security further than to \$860,656 plus the required security for costs.

[57] I should add that the Trac notice of motion refers to an additional claim for section 35 damages; but there was no evidence from Trac in this regard. As a result, I make no finding concerning section 35 damages.

CONCLUSION

[58] In conclusion, I have decided to do no more than reduce the posted security to \$860,656 + \$50,000 = \$910,656. The \$50,000 is the upper limit for security for costs under the old *CA*. The remainder of the motion is dismissed.

[59] Concerning costs, Trac filed a costs outline that shows \$104,996.36 in partial indemnity costs, \$156,476.16 in substantial indemnity costs, and \$175,084.47 in actual costs. DNR filed a costs outline that shows \$21,457.47 in partial indemnity costs.

[60] Given the result and to expedite the conclusion of this motion, I have decided to award costs in a two stage process. First, I will make an award of costs. I believe I have enough information and evidence to make such a ruling. DNR would usually be awarded costs, as it succeeded on the issues that threatened the remainder of its claim for lien. With the exception of the transition rule point, DNR also succeeded on the issues that were argued. However, I am not prepared to award DNR costs, as it is obvious that DNR registered a grossly inflated claim for lien, namely a claim for lien that was three times what it should have been. DNR has now conceded this fact. Trac was, therefore, justified in bringing this motion. On the other hand, in my view, had Trac focused on getting the security reduced to \$910,656, it would undoubtedly have been awarded costs. It did not do that. Instead, it pursued issues that were triable issues, and did so without success. Hence, I have decided to make an award of no costs. That is my costs award.

[61] The second stage is this. Should either side or both sides want to challenge this costs award, the challenging side must serve, file and upload to *Caselines* written costs submissions of no more than five (5) pages on or before 12 noon on March 27, 2023. Should that happen, my costs award will be set aside. Any side wanting to respond to the challenger's submissions must serve, file and upload to *Caselines* written costs submissions of no more than five (5) pages on or before April 3, 2023. Any reply written submissions of no more than one (1) page must be served, filed and uploaded to *Caselines* on or before April 5, 2023. I will then issue a new costs award.

[62] Parties must bear in mind that, should my costs award be challenged, my eventual costs award may go in either direction or in no direction at all. I will also take into consideration the costs of the written costs submissions.

DATE: March 20, 2023

ASSOCIATE JUSTICE C. WIEBE