

CITATION: Con-Spec Constr. Inc. v. Marquee St. Clair West GP Corp., 2023 ONSC 7229
COURT FILE NO.: CV-21-664726
DATE: 2023 12 22

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: CON-SPEC CONSTRUCTION INC., *Plaintiff*

- and -

MARQUEE ST. CLAIR WEST GP CORP., GENERAL PARTNER FOR THE LIMITED PARTNERSHIP, MARQUEE ST. CLAIR WEST LP and PEAKHILL CAPITAL INC., *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: E. Quail, *for the defendant, Marquee St. Clair West GP Corp., general partner for the limited partnership, Marquee St. Clair West LP (moving party)*

W.A. Kyle, *for the plaintiff*

HEARD: December 14, 2023 (by videoconference)

**REASONS FOR DECISION
(Motion to Declare Lien Expired and Dismiss Action)**

[1] The defendant, Marquee St. Clair West GP Corp. (“Marquee”), seeks an order declaring the plaintiff’s lien expired, vacating the registrations of the claim for lien and certificate of action, and dismissing this action in its entirety. The sole dispute on this motion is whether the joined contract claim of the plaintiff, Con-Spec Construction Inc. (“Con-Spec”), is properly dismissed. Con-Spec concedes that its lien has expired and does not oppose any of the relief disposing of its lien and the action, albeit only insofar as enforcing the lien.

[2] I am granting the unopposed portion of the motion with respect to the lien and its enforcement, but am not granting the requested relief that I dismiss Con-Spec’s action in its entirety. Con-Spec’s claim in contract shall accordingly continue, but the action will now proceed as an ordinary action governed by the *Rules of Civil Procedure*, RRO 1990, Reg 194.

ANALYSIS

[3] Con-Spec does not dispute that its lien has expired or that Marquee is entitled to relief directly flowing from that expiry, namely a declaration of expiry, vacating the registrations of Con-

Spec's claim for lien and certificate of action, and dismissal of the action insofar as enforcement of the lien. That relief is expressly contemplated in s. 46 of the *Construction Act*, RSO 1990, c C.30. I thereby need only address Marquee's request that the action be dismissed in its entirety.

[4] Marquee does not argue that dismissal of Con-Spec's contract claim falls within s. 46 of the *Construction Act*. Rather, it argues that it is relief available under s. 47. That section provides the court with discretion, on motion, to discharge a lien on the basis that the claim for the lien is frivolous, vexatious or an abuse of process or on any other proper ground (s. 47(1)). The court is also authorized to make other orders on any proper ground, including an order dismissing an action (s. 47(1.1)). My decision on whether to dismiss Con-Spec's action in contract is discretionary.

[5] In support of dismissal of the entire action, including Con-Spec's contract claim, Marquee relies on the decision in *Lee v. Chiarella*, 2018 ONSC 7374. In that case, the defendants moved for the same relief that Marquee seeks on this motion. The circumstances are similar to this case. In *Lee*, the plaintiff had taken no steps to advance his lien action in three years. In particular, no steps had been taken beyond exchanging pleadings and the plaintiff bringing an unsuccessful motion to add defendants.

[6] Marquee specifically points to the analysis at para. 22-23 of the decision, in which Dennison J. held that case law supported that ss. 46(1) and s. 47(1)(d) of the former *Construction Lien Act*, when read together, provide the court with the discretion to either dismiss or permit a contract claim to continue without the lien claim. Dennison J. cites, among other cases, the Court of Appeals' decision in *Teepee Excavation & Grading Ltd. v. Niran Construction Ltd.*, 2000 CanLII 3447 (ON CA). In that case, at para. 25, the Court of Appeal confirmed the court's discretion under s. 47(1)(d) of the *Construction Lien Act* to dismiss an action in its entirety because a defendant will be prejudiced or because little has transpired in the action. The language of the current s. 47(1) and (1.1) of the *Construction Act* is substantively the same as s. 47(1) of the former *Construction Lien Act*.

[7] Both *Lee* and *Teepee* pre-date the Divisional Court's more recent decisions in *Maplequest (Vaughan) Developments. Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308 (Div Ct) and *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111 (Div Ct). Both decisions deal with the analysis on a s. 47 motion. However, in my view, none of the cases are inconsistent.

[8] In *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190 (leave to appeal ref'd 2021 ONSC 1250 (Div Ct)), at paras. 42-45, I reviewed the process for assessing a s. 47 discharge motion in light of the decisions in *Maplequest* and *R&V Construction*. I held that s. 47 has been recognized as being broadly drafted and may be used in a variety of manners. The processes applicable under s. 47 include a process similar to summary judgment under rule 20 of the *Rules of Civil Procedure*, but also include other manners that do not necessarily seek a summary disposition of a lien action on its merits.

[9] Although Con-Spec argues that Marquee's failure to tender any evidence on merits is a factor on this motion, I am not convinced that evidence on the merits was required. Marquee is not seeking summary disposition of the action on its merits. It is essentially seeking dismissal on the basis of unexplained delay in prosecuting the action. Lien actions are statutorily prescribed in

s. 50(3) of the *Construction Act* to be as far as possible of a summary character. In my view, depending on the facts of a case, undue delay in prosecuting a lien action may be a proper ground on which to seek dismissal of a lien action under s. 47.

[10] I am not convinced that Con-Spec's delay in advancing this lien action is sufficient to support denying Con-Spec the right to pursue its contract claim. I say this for three main reasons.

[11] First, the only evidence tendered in support of dismissal is the fact that Con-Spec failed to comply with the s. 37 requirement that either this action be set down for trial or an order for trial be made within two years of commencing it. The affidavit also points out that Con-Spec's counsel did not respond to an emailed letter advising that this motion would be brought. That is the totality of evidence tendered. The balance of the affidavit deals only with the timing of pleadings. That evidence may be sufficient for relief under s. 46 (which Con-Spec does not oppose), but in my view more is required to establish "a proper ground" for dismissal of an action in its entirety, including non-lien claims properly joined in the action.

[12] Second, there is nothing in the record supporting that Marquee has taken any steps to move the action forward itself. Although Con-Spec has the primary burden of advancing its action, Marquee has advanced a counterclaim for \$73,538.20. The supporting affidavit on the motion provides no evidence of any communications or other efforts by Marquee seeking to move the action and its counterclaim toward trial. There is, in fact, no evidence on what, if anything, transpired between August 2021, when the last pleading was served, and August 2023, when Marquee gave notice that this motion would be brought.

[13] Marquee takes the position that it is content to have its counterclaim dismissed. However, Marquee conceded during submissions that it has only taken that position recently. Notably, it is not the position taken in Marquee's materials. The supporting affidavit expressly states, "If the relief sought is granted, Marquee will elect to proceed with the Counterclaim." This being the only evidence before me, I find that Marquee intended to pursue its counterclaim regardless of whether Con-Spec pursued its lien and contract claims throughout the period of August 2021 until after this motion had been brought.

[14] In these circumstances, absent any evidence from Marquee on its own efforts to move the action forward, I find that Marquee was either complicit in the delay or at least complacent about it. That is a factor militating against dismissal, since the delay is not fairly viewed as being laid solely at the feet of Con-Spec.

[15] Third, there is no evidence of any prejudice to Marquee from the contract claim continuing. The only prejudice cited by Marquee was additional time and expense. That is "prejudice" inherent in litigation. There is no evidence that witnesses or records are unavailable or cannot be found or supporting any other form of prejudice. In my view, there is no strong presumption of prejudice to Marquee in this case. Conversely, the prejudice to the plaintiff is significant: Con-Spec will lose all right to pursue its claim, even in contract.

[16] For these reasons, I find no proper ground on which to dismiss Con-Spec's contract claim at this stage. It shall accordingly be permitted to proceed. Since Con-Spec's lien has expired and

the lien remedy is no longer available, both sides agreed that the action is properly continued under the *Rules of Civil Procedure*. I am thereby making that order.

COSTS

[17] In the event it was successful on this motion, Marquee sought costs of both the action and motion of \$5,000. No costs outline was prepared or submitted, contrary to subrule 57.01(6) of the *Rules of Civil Procedure*. Marquee's lawyer submitted that a costs outline was not prepared since other courts have been willing to deal with costs more informally. I cannot comment on what other judges and associate judges may do in the particular circumstances of particular cases. However, failing to come to court with a costs outline, as required by the *Rules of Civil Procedure*, is to my mind a risky proposition.

[18] I was not prepared to defer costs submissions to permit Marquee's counsel to prepare a costs outline, so costs submissions proceeded in the absence of one.

[19] Marquee seeks \$2,800 for costs of the motion. That costs claim ought to have been supported by a costs outline. It is not clear how it was incurred. The motion record consists of a brief procedural affidavit outlining the pleadings, the expiry of two years, a single letter sent by Marquee's lawyers, and the fact of no response. There was no factum and only two cases were provided. Motion argument was brief.

[20] Although Con-Spec has been successful on the only opposed portion of the motion, it does not seek any costs. It rightly concedes that some costs should be payable to Marquee since the balance of the relief declaring the lien expired with corollary orders is being granted. Marquee did attempt to deal with this motion on consent, but received no response. This motion was thereafter brought. I agree that, in these circumstances, Marquee is entitled to costs. Con-Spec submits that a costs award dealing only with the motion should not exceed \$1,500.

[21] Con-Spec's concession on costs is reasonable. I accept that Marquee must reasonably have incurred \$1,500 on a partial indemnity basis to bring and argue this motion. However, I am not prepared to take judicial notice that Marquee's total costs were higher than Con-Spec's concession without the benefit of a costs outline setting out rates, tasks, and hours spent. There has also been divided success. I fix costs of the motion in the amount of \$1,250, including HST.

DISPOSITION

[22] For the above reasons, an order shall issue declaring Con-Spec's lien expired, vacating the registrations of Con-Spec's claim for lien and certificate of action, dismissing Con-Spec's action insofar as enforcing the lien, continuing the contract claim as an ordinary action governed by the *Rules of Civil Procedure*, and requiring Con-Spec to pay costs of the motion to Marquee in the amount of \$1,250, including HST, within thirty (30) days. Order accordingly.

DATE: December 22, 2023