CITATION: Alfa Mechanical Inc. v. Chang, 2023 ONSC 7167
COURT FILE NO.: CV-23-699103
DATE: 2023 12 19

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SUPERIOR COURT OF JUSTICE - ONTARIO

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

RE: ALFA MECHANICAL INC., *Plaintiff*

- and -

SEOKHWAN CHANG and SOONHYUN CHANG, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: A. Jazayeri, *for the plaintiff*

G. Govedaris, *for the defendants*

HEARD: October 24, 2023 (by videoconference)

REASONS FOR COSTS DECISION
(Settled Motion for Default Judgment)

[1] This costs decision arises from the plaintiff's motion for default judgment, which was brought on notice to the defendants. The plaintiff sought a declaration that it is entitled to a lien under the *Construction Act,* RSO 1990, c C.30 against the defendants' interest in their property in Toronto for $38,822.04, as well as personal judgment against the defendants for the same amount. At the return of the motion, the parties ultimately agreed to an order setting aside the defendants' noting in default and for the defendants to deliver a defence. They could not agree on costs.

[2] The plaintiff seeks its partial indemnity costs of $4,025, including HST, plus $357.90 in disbursements. That figure consists of costs thrown away from the noting in default and costs of the default judgment motion. The balance of costs claimed in the plaintiff's costs outline represent costs and disbursements that the plaintiff is not pursuing at this time given the outcome of the motion, but which it will ultimately be claiming as costs of the action. The defendants are willing to pay costs thrown away from the noting in default, but oppose costs of the motion.

[3] The defendants essentially advance three arguments for why there should be no costs of the motion: (i) the motion was improper since a lien cannot be validated by a motion for default judgment and personal judgment could have been obtained from the registrar; (ii) the motion was jurisdictionally and procedurally deficient; and (iii) the plaintiff effectively abandoned its motion when agreeing to resolve the motion by a consent order setting aside the noting in default.

[4] I feel compelled to comment on the defendants' procedural and jurisdictional arguments, although I ultimately need not decide them. For their own reasons, the parties agreed to settle the motion by setting aside the noting in default and the plaintiff withdrawing its request for default judgment. There was no argument and I have made no findings or determinations on the substantive merits of the motion, including whether it would have succeeded. I am unable to find that the motion was necessary or whether the plaintiff or the defendants is properly viewed as the successful party/parties.

[5] In these circumstances, I am not granting any costs of the motion, but am reserving the plaintiff's right to claim those costs as costs of the action. There will only be an order for the defendants to pay costs thrown away from the noting in default of $651, including HST.

ANALYSIS

[6] Section 86 of the *Construction Act* and rule 57.01 of the *Rules of Civil Procedure,* RRO 1990, Reg 194 (the "*Rules*") afford me with broad discretion to fashion a costs award that I deem fit and just in the circumstances of this case. Costs awards are intended to reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant: *Davies v. Clarington (Municipality),* 2009 ONCA 722 at para. 52. The overall objective is fixing an amount that is fair and reasonable in the particular proceeding, having regard to the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (CA) at paras. 26 and 38.

[7] The defendants do not dispute that the plaintiff is entitled to costs thrown away from the noting in default. Typically, full indemnity is the appropriate scale for costs thrown away. The defendants submit that costs thrown away should not exceed $500-$700 or $1,000 at the most. From my own review of the plaintiff's costs outline, the plaintiff appears to have incurred actual costs associated with the noting in default of $651, including HST. The balance of time claimed is for drafting the statement of claim and steps related to this motion. The costs incurred for the noting in default are within the range acknowledged by the defendants.

[8] I am mindful that the defendants offered to pay $1,000 in costs thrown away, which is greater than the full indemnity amount reflected in the plaintiff's costs outline. However, I must balance that with the fact that the defendants did not file any responding materials or provide a position on this motion until the morning of the hearing. For that reason, I am not reducing the amount of costs thrown away. The defendants have had the benefit of not having to argue against default judgment or bring a motion to set aside the noting in default. In such circumstances, it is neither fair nor just to deny the plaintiff its costs thrown away from the noting in default. I accordingly fix costs thrown away at $651, including HST.

[9] With respect to costs of the motion, this case is similar to the circumstances of *Muskala v. Sitarski*, 2017 ONSC 2842. In that case, the parties agreed to a consent resolution of the motion, except for costs, and then asked the court to decide costs. Myers J. exercised his discretion not to award costs at all, stating that, in his view, costs generally should not be awarded when parties settle "except for costs".

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[10] Much of the rationale discussed and relied upon by Myers J. in *Muskala* equally applies here. The considerations for deciding costs under s. 86 of the *Construction Act* and rule 57.01 of the *Rules* generally flow from having determined rights on a motion. I have not done that. In my view, it is not appropriate for me to hypothetically consider what might have been the result of the motion in the absence of any argument from either party on the motion itself.

[11] The plaintiff submits that the parties' resolution stems from the low bar that the defendants would have to meet to set aside the noting in default. I do not agree that the threshold is "low" in a lien action, which has different requirements than those for setting aside a noting in default in an action governed by the *Rules.* Notably, as set out in s. 5(3) of O Reg 302/18 under the *Construction Act,* the court must be "satisfied that there is evidence to support a defence." There is no responding record. I thereby have no evidentiary basis to find that the defendants could or would meet the required threshold for an opposed motion to set aside the noting in default. During costs submissions, the plaintiff's position was that the defendants do not have any viable defences.

[12] In *Muskala*, Myers J. observed, at para. 9, "One never knows why people settle without invading the privileged relationship between lawyer and client." That is true here. I do not know what motivated the parties to settle the motion on the terms that they did. What I do know is that I lack a proper basis to find either that the plaintiff's motion was necessary and likely to succeed or that the defendants have a meritorious (or any) defence to the claim.

[13] The plaintiff complains of unfairness if it is denied costs since it is a small business and is pursuing a modest claim. I see no unfairness. For its own reasons – whether being practical, wanting to give the defendants a fair chance to defend, re-assessing its chances of success on the motion once it was opposed, or something else – the plaintiff agreed to resile from its motion knowing that the defendants were not agreeing to pay anything more than costs thrown away from the noting in default.

[14] In these circumstances, I am exercising my discretion not to award any costs of the motion. However, I am not prepared to foreclose the plaintiff claiming its costs as costs of the action. This is not a situation where the costs incurred in bringing this motion are sunk costs. For example, the supporting affidavit outlines the plaintiff's understanding of the relevant events and appends relevant supporting documents. The work associated with preparing that evidence is the same work that would need to be done for a trial. It ought thereby to benefit the plaintiff in future steps in this litigation. The plaintiff should therefore be entitled to claim the associated costs as costs of the action.

ADDITIONAL COMMENTARY

[15] The above is sufficient to resolve costs of the motion, so I need not decide the procedural and jurisdictional challenges raised by the defendants. They will remain to be decided in a future motion. However, as noted earlier, they are not without merit. In my view, they warrant brief discussion, which may help focus the issues on future motions.

[16] The defendants' challenges are threefold: (i) default judgment not available to validate a lien under the *Construction Act*; (ii) even if a lien may be validated by default judgment, an

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associate judge lacks jurisdiction to grant such default judgment; and (iii) if default judgment is available for validating a lien, then it could only be obtained on notice to the same persons entitled to notice of trial, which was not done by the plaintiff. To my knowledge, each of these are issues that have not been clearly addressed in existing case law.

[17] On the first argument, I question the defendants' position that that a lien cannot be validated by way default judgment. The defendants are correct that the provisions of the *Construction Act* generally tend to presume that validity of a lien will be decided at trial. They are also correct that there is no specific procedure prescribed for obtaining default judgment. However, the *Construction Act* is not silent on the availability of default judgment. To the contrary, "default judgment" is expressly contemplated in s. 5(5) of O Reg 302/18. The prior iteration of that section, which is found in s. 54(4) of the *Construction Lien Act* (the "*CLA*"), refers to "judgment" against a party noted in default. That statutory authority for default judgment is significant, since a breach of contract claim *may* be joined in a lien action (and typically that is done), but a party is not required to do so. If the legislature intended for default judgment to be available only on a joined contract claim, why does the legislation not say that?

[18] There are two other relevant provisions to be considered. First, s. 50(3) of the *Construction Act* (formerly s. 67(1) of the *CLA*) sets out that lien actions are to be as far as possible of a summary character. Requiring a trial to prove a lien in all cases, including where the defendant has been noted in default, would seem contrary of that statutory requirement. Second, s. 50(2) of the *Construction Act* (formerly s. 67(3) of the *CLA*) sets out that the rules of court apply except to the extent of any inconsistency with the *Construction Act* and its regulations. While there is no procedure outlined in the *Construction Act*, there are established procedures for default judgment set out in the *Rules*. Although I need not decide the issue, I am unconvinced that it is inconsistent with the *Construction Act* to permit default judgment that includes validating a lien.

[19] The second argument is that, if validating a lien by default judgment is available, then an associate judge would lack jurisdiction to do it. I have previously discussed the differing jurisdictions of a judge and an associate judge for motions for judgment in two cases: *Pylon Paving (1996) Inc. v. Beaucon Building Services Inc.,* 2022 ONSC 3282 and *Strada Aggregates Inc. v. YSL Residences Inc.,* 2020 ONSC 7034.

[20] For the purposes of the defendants' argument, comments that I made in *Strada Aggregates* are relevant. In the course of my discussion about an associate judges' jurisdiction to grant default judgment in a lien action, I made a throwaway comment that "only a judge or s. 58 referee has authority to declare a lien valid under the *Construction Act*." The defendants submit that approach is correct. However, based on the submissions made at this hearing, I am now unsure.

[21] *Strada Aggregates* was an *ex parte* motion brought in writing for monetary judgment against the defendants. Relief was not sought declaring the lien valid and there were no submissions made on an associate judge's jurisdiction to do so. I accordingly did not have the benefit of any argument on the language of s. 5 of O Reg 302/18 or the prior language in s. 54(4) of the *CLA*. As discussed above, both confirm that judgment may be given against a defendant (or third party) who is in default. Neither expressly confers that jurisdiction exclusively to a judge. I acknowledge that the submissions made at this hearing were in the context of deciding costs, but

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I nevertheless now question the correctness of my unequivocal statement in *Strada Aggregates* that only a judge or s. 58 referee (including a reference associate judge) may validate a lien.

[22] In my view, an associate judge's jurisdiction to validate a lien by way of a motion for default judgment (or, frankly, summary judgment) remains an open question. It will need to be addressed in a future case on a proper record, likely with submissions on the issue of jurisdiction.

[23] The third argument is that, if validating a lien is available by default judgment, then it could only properly be obtained on notice to all persons who would be entitled to notice of trial under the *Construction Act* and its regulations. The defendants have made a compelling argument for such a requirement. In cases where a lien action proceeds to trial, s. 9(4) of O Reg 302/18 under the *Construction Act* (formerly s. 60(4) of the *CLA*) requires that notice of trial be served on various persons when the court fixes a date for trial. Notably, where the lien continues to attach to the subject premises (as in this case) that list includes the owner, any person with a registered interest in the premises, execution creditors of the owner, and other lien claimants.

[24] The notice requirement makes sense. All of the persons entitled to notice of trial are affected by a trial in a lien action. The result of a lien being validated is that the lien claimant may be entitled to force a sale of the property and also becomes entitled to the benefit of various statutory priorities over the rights of others as outlined in Part XI of the *Construction Act*. The owner, those with registered interests in the premises, execution creditors, and other lien claimants are all thereby affected and may well wish to oppose the lien claimant's claim as a result.

[25] The defendants argue that the same concerns arise in the context of a default judgment motion seeking to validate a lien. They point to subrule 37.07(1) of the *Rules,* which presumptively requires all motions to be brought on notice to "any party or other person who will be affected by the order sought." I am inclined to agree with the defendants that a properly constituted default judgment motion must be on notice to the same parties entitled to notice of trial, all of whom are entitled to challenge the validity of a lien. However, that will remain to be decided in another motion.

DISPOSITION ON COSTS

[26] For the above reasons, I order as follows:

(a) The defendants shall pay to the plaintiff costs thrown away from the noting in default fixed in the amount of $651, including HST.

(b) The balance of the plaintiff's costs as claimed in its costs outline for this motion shall be claimable as costs of the action.

(c) This order is effective without further formality.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: December 19, 2023

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