

CITATION: 2834277 Ontario Inc. v. Fraser, 2024 ONSC 3416
BARRIE COURT FILE NO.: CV-24-442
DATE: 20240613

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2834277 ONTARIO INC., CARRYING ON) Joseph R. Nimens, Self-Represented,
BUSINESS LOTB) Defendant to the Counterclaim
)
Plaintiff)
)
– and –) Tyler H. McLean, for the Defendants, Julia
) Fraser and James Lewis and the Plaintiffs by
JULIA FRASER and JAMES LEWIS) Counterclaim, James Lewis and Julia Fraser
)
Defendants)
)
AND BETWEEN:)
)
JAMES LEWIS and JULIA FRASER)
)
Plaintiffs by Counterclaim)
)
– and –)
)
2834277 ONTARIO INC., CARRYING ON)
BUSINESS LOTB and JOSEPH R.)
NIMENS)
)
Defendants to the Counterclaim)
)
) **HEARD:** June 11, 2024

2024 ONSC 3416 (CanLII)

REASONS FOR DECISION

CHARNEY J.:

Factual Background

[1] The Defendants, Julia Fraser and James Lewis, contracted with the Plaintiff, 2834277 Ontario Inc., to build a custom “floating home” or houseboat. The contract was signed on January 16 and 18, 2023. The Defendants agreed to pay \$490,809 including HST based on a payment schedule set out in the contract.

- [2] The Defendants paid the initial 30% down payment (\$147,322) in two payments in January and February 2023 in accordance with the terms of the contract.
- [3] The Defendants paid an additional 20% of the contract price (\$98,360) in March 2023.
- [4] The Defendants paid an additional 20% of the contract price (\$98,360) in April 2023.
- [5] At around that time a dispute arose between the parties regarding the progress of construction. The Defendants had paid 70% of the contract price (\$343,910) but were concerned that little progress was being made on the construction. They take the position that the houseboat was to be completed in June 2023.
- [6] The Defendants met with the Plaintiff in July 2023. He estimated that the houseboat would take an additional 9.6 weeks to complete, and that he required an additional \$379,000 to complete it. This was \$146,899 more than the original contract price.
- [7] The Defendants allege that the Plaintiff abandoned work on the houseboat, and they retained another individual to continue working on the construction of the houseboat and to correct work that the Plaintiff had done improperly. The combined costs of material and labour incurred by the Defendants to continue the construction was \$310,120.
- [8] No further work has been done on the houseboat since December 2023. The Defendants estimate that an additional \$200,000 will be required to complete and launch the houseboat.
- [9] On February 2, 2024, the Plaintiff wrote to the Defendants requesting more than \$250,000 plus \$125 an hour for labour to complete construction and launch the vessel. He also asserted that the Defendants were not to remove the houseboat or trespass onto the construction site.
- [10] The Defendants take the position that ownership of the houseboat has already passed to them. In particular, they note that on February 5, 2024 Transport Canada issued a Certificate of Registry with respect to the houseboat, listing the Defendants as the registered owners of the boat.
- [11] In February 2024, the Plaintiff changed the locks on the houseboat to exclude the Defendants. On February 27, 2024, the Plaintiff emailed the Defendants an unsigned Notice under the *Trespass to Property Act*, prohibiting the Defendants from attending the construction site where the vessel is located.
- [12] On February 20, 2024, the Plaintiff sued the Defendants for the unpaid portion of the contract price (\$108,262) plus \$57,084 for “occupancy and obstruction of the construction yard”, plus \$149,160 to launch of the houseboat.
- [13] The Defendants filed a Statement of Defence and Counterclaim on February 28, 2024, alleging that the Plaintiff abandoned the contract and did not complete the construction of the houseboat. They allege that it will cost the Defendants more than \$500,00 to complete

the construction of the houseboat as a result of the Plaintiff's deficiencies and failure to complete the work.

Motion

[14] The Defendants Julia Fraser and James Lewis have brought this motion pursuant to s. 104 of the *Courts of Justice Act* for an interlocutory order that they are entitled to possession of the houseboat and restraining the Plaintiff from interfering with their right to move the houseboat to a location of their desire.

[15] The motion was originally scheduled to be heard on April 18, 2024. The Plaintiff sought an adjournment until May 16, 2024 to retain counsel. Corkery J. granted the adjournment to June 11, 2024 (the first available motion date). The Court noted that the corporate Plaintiff had to be represented by counsel pursuant to Rule 15.01, unless a motion was brought under Rule 15.01(2). The Endorsement states:

The matter is adjourned to 11 June 2024...If counsel is not retained for that appearance, the plaintiff shall bring a motion to have a personal representative appointed for the corporation pursuant to Rule 15.01 before the next date.

[16] At the hearing, the corporate Plaintiff was not represented by counsel, and no motion had been brought to have a personal representative appointed. Joseph Nimens was permitted to make submissions since he is named personally as a Defendant by Counterclaim and may act in person (Rule 15.01(1)).

[17] Section 104 of the *Courts of Justice Act* provides:

(1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

- (a) was unlawfully taken from the possession of the plaintiff; or
- (b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

[18] Rule 44.01(1) of the *Rules of Civil Procedure* states that:

An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

- (a) a description of the property sufficient to make it readily identifiable;
- (b) the value of the property;
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
- (e) the facts and circumstances giving rise to the unlawful taking or detention.

[19] In *Dent-X Canada v. Haccpone Co., Ltd. et al.*, 2022 ONSC 4713, Leibovich J. summarized the principles relating to these provisions:

The remedy is a discretionary one. To meet the test, Haccpone must demonstrate that there are substantial grounds to support that they are the legal owner or entitled to possession; there are substantial grounds for the claim that the property is being unlawfully detained, and that the balance of convenience favours the plaintiff. To demonstrate “substantial grounds”, the moving party must demonstrate a high degree of assurance that they will be successful at trial. That the party has a probability of success or is more likely to succeed is not enough. While the test is on substantial grounds, the degree of proof required is less than that of a summary judgment because a final disposition is not being made. The Court “should not embark upon a trial of the issues raised.” [Citations omitted.]

[20] In my view, the Defendants have met each of the factors set out in Rule 44.01(1):

- a. The houseboat is readily identifiable. Its precise location is known, and the Defendants have provided photographs.
- b. The value of the houseboat, which is not yet completed, is approximately \$300,000.
- c. The Defendants are the registered owners of the Vessel. It was custom built, the Defendants have paid 70% of the contract price (\$343,910) to the Plaintiff, and there is no dispute that construction of the houseboat was never completed. The present legal dispute relates not to ownership, but to which party breached the contract and the damages to be paid by the party in breach.

- d. The Plaintiff is unlawfully detaining the Vessel.
- e. The Defendants' affidavits have provided the facts and circumstances giving rise to the unlawful detention.

- [21] I note that the Plaintiff did not file any affidavits in response to the Defendants' motion, nor were the Defendants cross-examined on their affidavits in support of their motion.
- [22] I am also satisfied that the balance of convenience favours the Defendants having possession of their houseboat. Leaving the houseboat in its current incomplete condition may lead to the depreciation of its value. Moreover, the houseboat is occupying the Plaintiff's rented space in the construction yard, and the Plaintiff alleges that this has resulted in additional costs to him. It is in the Plaintiff's economic interest to have the Defendants' property removed from the rented construction space.
- [23] Section 104(2) of the *Courts of Justice Act* makes the Defendants "liable for any loss suffered by the person ultimately found to be entitled to possession of the property". In any event, the Defendants have both given an undertaking as to damages.
- [24] The Defendants have demonstrated that there are substantial grounds to support their position that they are the legal owners of the houseboat and are entitled to possession of the houseboat.
- [25] At the end of the day, this is a contract dispute between the parties. One of the parties will have to pay the other damages for breach of contract if the case is not otherwise settled.
- [26] In these circumstances, it would be unfair to permit the Plaintiff, who may in fact be the party liable for breach of contract, to hold the houseboat hostage while the litigation proceeds. This would amount to "execution before judgment".

Conclusion

- [27] The Defendants' motion is granted.
- [28] This Court Orders:
- a. That Julia Fraser and James Lewis shall have possession of the Vessel, as particularly described in Schedule "A" of the Notice of Motion.
 - b. That 2834277 Ontario Inc., Carrying on Business as LOTB and Joseph R. Nimens, and their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, are restrained from directly or indirectly by any means whatsoever, from interfering with Julia Fraser and/or James Lewis moving of the Vessel to a location of their desire, within the Province of Ontario.

[29] Costs for today are fixed at \$10,000, payable by 2834277 Ontario Inc. and Joseph Nimens jointly and severally to the Defendants Julia Fraser and James Lewis within 30 days.

Released: June 13, 2024

Justice R.E. Charney

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2834277 ONTARIO INC., CARRYING ON
BUSINESS LOTB

Plaintiff

– and –

JULIA FRASER and JAMES LEWIS

Defendants

AND BETWEEN:

JAMES LEWIS and JULIA FRASER

Plaintiffs by Counterclaim

– and –

2834277 ONTARIO INC., CARRYING ON
BUSINESS LOTB and JOSEPH R. NIMENS

Defendants to the Counterclaim

REASONS FOR DECISION

Justice R.E. Charney

Released: June 13, 2024