

CITATION: Backyard XP Inc. v. Cesario-Valela, 2024 ONSC130
COURT FILE NO.: CV-23-697863
DATE: January 6, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Backyard XP Inc. v. Mirella Cesario-Valela, Vito Valela and Canadian Imperial Bank of Commerce;

BEFORE: ASSOCIATE JUSTICE C. WIEBE

COUNSEL: Cameron D. Neil for Mirella Cesario-Valela and Vito Valela;
Luigi Iantosca for Backyard XP Inc.

HEARD: October 31, 2024.

REASONS FOR DECISION

[1] This is a construction lien action that has been referred to me for trial. The defendants, Mirella Cesario-Valela and Vito Valela (together “the Owners”) brought this motion seeking an order requiring the plaintiff, Backyard XP Inc. (“Backyard”), to post partial indemnity costs of \$76,670.35 as security for the Owners’ costs should the Owners obtain a costs award in the end. Backyard argued that there should be no order for security for costs.

[2] Having read and heard the submissions of the parties, I have decided that Backyard should post security for costs. The following are my reasons.

[3] The rule governing such motions is Rule 56.01(1). The Owners rely on Rule 56.01(1)(d) which specifies that the court may make an order for security for costs “as is just” where it appears that the plaintiff is a corporation and “there is good reason to believe” that the plaintiff has insufficient assets in Ontario to pay the defendant’s costs.

[4] As this is a lien action governed by the *Construction Act*, R.S.O. 1990, c. C.30 (“CA”) and *Ont. Reg. 302/18* under that act, there is also the question of leave for such a motion under *Ont. Reg. 302/18*, section 13, namely the section that specifies that interlocutory steps not provided for by the CA must have the consent of the court, which consent is to be provided on proof that the steps are necessary and would expedite the resolution of the issues in dispute.

[5] I have held that the test for leave for such a motion under *Ont. Reg. 302/18* section 13 is similar to the threshold test the moving party must meet on the underlying motion for security for costs concerning Rule 56.01(1)(d); see *Yuanda Canada Enterprises Ltd. v Pier 27 Toronto Inc.*, 2017 ONSC 1892 (CanLII) at paragraph 14. That threshold test is that the defendant must prove that there is “good reason to believe” that the plaintiff corporation has insufficient assets to pay costs. The reason I drew this parallel is that where there is “good reason to believe” the lien claimant

cannot pay the defendant's costs, there is a necessity to establish procedural fairness, as the lien claimant has the security of the land for its lien.

[6] Mr. Neil argued that I have already granted leave for the motion by scheduling it in my first trial management directions dated August 6, 2024. I disagree. I did not determine the threshold question at that time. The threshold question must be determined in the context of the motion itself.

[7] Much of this motion revolved around the question of whether the Owners had met their onus of proof on the threshold test. I find that they have for the following reasons:

- The evidence shows that Backyard was incorporated in March, 2021, namely only 3.5 years ago and just a few months before this project. It is affiliated with another company named Garrison Creek Construction Inc. (“Garrison Creek”). Backyard has only two employees, the company directors who are also the directors for Garrison Creek. Backyard has no shop or warehouse. It runs its “office” out of a shared workspace. Its registered head office is vacant. It has no real estate in the Greater Toronto Area where it works. It has not filed returns. It has no PPSA registrations indicating that it does not lease vehicles and equipment.
- What is most telling though is the evidence that Backyard is nothing but a front for Garrison Creek, obviously the company of substance. While it was Backyard that contracted with the Owners for the project work in this case, it was Garrison Creek that insured the project, registered the project under its name with the Ministry of Labour, and identified the project to the Electrical Safety Authority as being run by Garrison Creek. The evidence contains many invoices and orders from third party suppliers and subcontractors concerning the project naming Garrison Creek, not Backyard, as the party that was supplied. Project related emails and paperwork contain the Garrison Creek name, not Backyard. Garrison Creek has the same office and directors as Backyard. It is as if the project was run by and for the benefit of Garrison Creek and its directors, but all behind the carefully created liability shield of a contract with the Owners in the name of its recently created affiliate, Backyard.
- Backyard presented evidence showing that it carries on business. It argued that this undermined the defendant's threshold position. There was evidence of two Backyard contracts since the project in question: a landscaping contract in the summer of 2023 in Bradford for \$17,500; and a landscaping contract in Hamilton in the amount of up to \$403,356 on which at the time of argument there was \$128,850.35 owing to Backyard on a September 26, 2024 invoice. Backyard also presented evidence of a bank account in its name containing \$10,687.40. Neither the bank nor the date of the bank statement were identified. I do not accept this argument. First, there was no evidence as to the profits that were gained on the Bradford contract and the profits that are expected on the Hamilton contract. Second, I repeat that the evidence on this motion indicates that Backyard acted as a front for Garrison Creek and subcontracted all its scope to others. It is not unreasonable to infer that this business model continued with these subsequent contracts meaning that any profit would quickly be siphoned off by Garrison Creek.
- In *Yuanda, supra*, paragraph 15, I adopted the threshold test identified by the Court of Appeal in *City Commercial Realty (Canada) Ltd. v. Bakich*, [2005] O. J. No. 6443 (OCA). This test required that the moving party show “indicia of insolvency” or “instability.” I note that the

definition included proof that the plaintiff corporation is a “shell company.” In my view, the evidence in this motion showed that Backyard was just that, a shell company. It appeared to be nothing more than a liability front for the operation of the company of substance, Garrison Creek.

[8] With the Owners having satisfied the threshold test, the onus switches to Backyard to show it has sufficient assets to pay costs. Was that onus satisfied? Backyard presented no further evidence concerning its assets. For the reasons stated above, I therefore do not find that Backyard has satisfied this onus.

[9] Did Backyard present evidence that an order for security for costs would be unjust? It did not. The motion was brought early enough in the reference and the action not to prejudice Backyard by having it incur substantial costs before having to post security for costs. There was also no evidence that Backyard would be rendered incapable of presenting its case if it was ordered to post a reasonable amount for the defendant’s costs, namely there was no evidence that it was impecunious. That only makes sense given the position of Garrison Creek behind Backyard. There was also no evidence that Backyard’s claim has a good chance of success. There was evidence about the defendants’ conduct, but this was not relevant to the issue in this motion.

[10] I am, therefore, driven to the conclusion that Backyard should be required to post security for costs. That is what I order.

[11] Concerning the quantum to be posted, there was no issue concerning the reasonableness of the defendants’ claim for partial indemnity security for costs in the amount of \$76,670.35. The defendants’ bill of costs shows that \$13,869.22 of this amount plus disbursements has already been incurred and that the defendants estimate they will incur \$59,590 plus disbursement in the future. Neither the past cost nor future costs appear unreasonable. The Owners estimate two further trial management conferences and a five-day trial, all of which makes sense for a case with claims of the magnitude as the ones in this case.

[12] There are two issues that bear on the quantum to be ordered. First, there is the existence of the counterclaim. The Backyard claim for lien is in the amount of \$106,739.97 and it makes no separate claim for damages. The Owners, on the other hand, claim damages of \$500,000 for overpayment and deficiency correction costs. This claim is five times what Backyard claims.

[13] There is a well-respected principle that a plaintiff should not be required to post security for the defendants’ costs of advancing their own claim against the plaintiff and that indeed, if the defendant’s counterclaim amounts to the driver of the action, there should be no security for costs; see *Proxema Ltd., v Birock Investments Inc.*, et al, 2016 ONSC 5686 (CanLII) at paragraph 34.

[14] Because the parties failed to address this issue in their initial submissions, I recalled counsel to do so on January 6, 2025. I have considered their submissions.

[15] Mr. Iantosca made the point that I should take into account the fact that the Owners commenced a civil action in 2023 against Backyard, Garrison Creek and two companies related to Garrison Creek, Cracked Pencil Design Inc. and Construction Solutions Ltd., for the same claims they assert in their counterclaim in the lien action. This civil action is being referred to me on

consent. Mr. Iantosca argued that the Owners, therefore, did not need security for costs as they will have recourse for costs recovery from the company of substance, Garrison Creek, through the civil action. I do not accept that argument. This point pertains only to the Owners' costs of the counterclaim, not their costs of defending the lien action, which is the subject matter of this motion.

[16] There was insufficient evidence as to what the respective claims in this case involve for me to deny security for costs on account of the counterclaim. But I will significantly discount the amount of security on account of the counterclaim.

[17] As for the amount of the discount, what is a reasonable measure? There was no breakdown in the Owners' bill of costs as between claim and counterclaim. Therefore, I must apply some other measure of "rough justice"; see *Yong Tai Construction v Unimac Group Ltd.*, 2015 ONSC 4866 (CanLII) at paragraph 17. One measure of this apportionment is in the pleadings. The Owners' counterclaim is five times the size of the Backyard claim. Applying 20% to the \$76,670 claimed by the Owners produces the amount of \$15,334. Mr. Iantosca argued for an even lower amount using the same logic.

[18] However, this is not, in my view, a fair reflection of the cost the Owners will incur in defending the lien claim. Had there been no counterclaim, the Owners would still have had to plead and there would probably have been some production, a Scott Schedule, some level of discovery and a trial. I am also mindful that the Owners' pleaded claim may be well beyond their actual claim, a phenomenon that not uncommon.

[19] In my view, a better measure is what the *CA* requires be posted as security for costs to vacate the Backyard claim for lien. This is the statutorily mandated security for Backyard's cost for advancing its own lien claim. The Owners' costs for defending that same lien claim *per se* should not be that dissimilar. If anything, it should be a little less. 25% of \$106,739.97 is \$26,684.99.

[20] As a result, I have decided to order that Backyard post partial indemnity costs of **\$25,000** as security for the Owners' costs.

[21] The second issue to be determined is the staggering of this obligation. It is now customary to stagger the obligation to post the security for costs to facilitate the continuation of the action. I make the following staggering order:

- Backyard must post the first tranche of security for costs in the amount of \$12,500 on or before March 30, 2025; and
- Backyard must post the second tranche of security for costs in the amount of \$12,500 on or before 30 days following the trial management conference in which I schedule the trial hearing.

[22] Concerning the costs of this motion, the parties agreed that the successful party should get its partial indemnity costs. Both parties filed costs outlines. Backyard's costs outline shows partial indemnity costs of \$7,455.55. The Owners' costs outline shows partial indemnity costs of \$7,838.

[23] As this does not appear to be a motion where offers to settle were exchanged, I believe I have enough to make a fair and reasonable costs award for this motion. The Owners' succeeded to obtaining an order for security for costs and should get costs as a result. But their success was a fraction of what they claimed. The costs award should reflect the proportion of this success. As a result, I find that Backyard should pay the Owners **\$2,500** in costs in thirty days from today.

[24] Should either party object to this award, they have up to 12 noon on Monday, January 13, 2025 to serve and file written costs submissions of no more than two pages. Should that not happen, my costs award will be confirmed.

[25] Should there be such a written costs submission, my award will be set aside. The other party then has up to 12 noon on Friday, January 17, 2024 to serve and file written responding costs submissions of no more than two pages. The objecting party then has up to 12 noon on January 21, 2024 to serve and file written reply costs submissions of no more than one page. Parties are warned that I could then go in any direction with my final award.

DATE: January 6, 2025

ASSOCIATE JUSTICE C. WIEBE