

SUPREME COURT OF NOVA SCOTIA

Citation: *Uni Property Developers Ltd. v. 12740311 Canada Inc.*, 2025 NSSC 24

Date: 20250121

Docket: Hfx No. 528489

Registry: Halifax

In the Matter of *Builder's Lien Act*, R.S.N.S. 1989 c.277

Between:

Uni Property Developers Ltd.

Plaintiff

v.

12740311 Canada Inc.

Defendant

DECISION ON SUMMARY JUDGMENT

Judge: The Honourable Justice Scott C. Norton

Heard: By Correspondence, in Halifax, Nova Scotia

Decision: January 21, 2025

Counsel: Richard W. Norman, for the Plaintiff
Matthew Moir, for the Defendant

By the Court:

Overview

[1] This decision addresses the issue of whether summary judgment is available to the parties on a builders' lien claim.

[2] On May 16, 2024, the Plaintiff moved for an order granting summary judgment on its' builders' lien claim. The motion did not proceed because I permitted the Defendant to enter a defence. The Plaintiff asked the court to determine whether summary judgment was available considering conflicting decisions on that point. Due to a court administrative oversight it was not until December 2024 that I received confirmation that the parties wished this issue to be determined.

[3] The Plaintiff argued in favour of summary judgment while providing the court with the conflicting authority. The Defendant did not participate in the argument.

[4] For the reasons that follow, I conclude that summary judgment is available to parties on a claim under the *Builder's Lien Act*, RSNS 1989 c. 277 (the "Act").

Background

[5] The Plaintiff moved for summary judgment on a lien claim and for an order for the sale of the properties. The judge presiding adjourned the motion and requested briefing on the court's jurisdiction to deal with lien claims in a summary manner. The judge referred to an excerpt from *Bristow et al Construction, Builders' and Mechanics' Liens in Canada* (8th Ed., Carswell, 2020) which in turn relied on Justice Hood's decision in *Crane Canada Inc. v. Tribeca Mechanical Ltd.*, 2007 NSSC 160, for the proposition that summary judgment is not available in Nova Scotia with respect to lien claims; a trial must be held.

[6] Justice Hood did not refer to the decision of Justice Leblanc in *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2004 NSSC 180, in which the judge found that summary judgment is available on a lien claim.

[7] Both decisions were decided under the previous *Nova Scotia Civil Procedure Rules* (1972) and the predecessor *Mechanics' Lien Act* that was amended to become the *Builder's Lien Act* by SNS 2004, c. 14.

Analysis

[8] The *Builders' Lien Act* provides as follows:

Action to enforce lien

34 (1) The liens created by this Act may be enforced by an action to be brought and tried in the Supreme Court of Nova Scotia according to the ordinary procedure of that Court, except as varied by this Act.

(2) The jurisdiction of the Supreme Court of Nova Scotia under this Act includes a third party procedure where the amount claimed relates to the lien claim and arises out of the building contract or the work done or the materials supplied that is the subject of the lien claim.

...

Powers of judge, right of lien holder and proceeds of sale

35 (1) After the delivery of the statement of defence, where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action otherwise than at the ordinary sittings of the court, either party may apply to a judge who has power to try the action to fix a day for the trial thereof, and the judge shall make an appointment fixing the day and place of trial, and on the day appointed, or on such other day to which the trial is adjourned, shall proceed to try the action and all questions which arise therein, or which are necessary to be tried to fully dispose of the action, and to adjust the rights and liabilities of the persons appearing before him, or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all inquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of the action, and of all matters, questions and accounts arising in the action, or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action, or who have been served with the notice of trial, and shall embody all results in the judgment (Form I).

...

Notice of trial

36 The party who obtains an appointment fixing the day and place of trial, shall, at least eight clear days before the day fixed for the trial, serve a notice of trial, which may be in Form J in the Schedule to this Act, or to the like effect, upon the solicitors for the defendants who appear by solicitors, and upon all lien holders who have registered their liens as required by this Act, and upon all other persons having any registered charge or encumbrance or claim on the said lands who are not parties or, who being parties appear personally in the said action, and such service shall be personal unless otherwise directed by the court or judge who is to try the action, and the court or judge may, in lieu of personal service, direct in what manner the notice of trial shall be served.

Costs

41 ...

(3) In case the least expensive course is not taken by a plaintiff under this Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken.

[9] Sections 34(1) and 35(1) existed in the same form in the previous *Mechanics' Lien Act*.

[10] *Civil Procedure Rule 67* pertains to actions under the *Act*. This *Rule* did not exist in the 1972 rules. The focus of the *Rule* is to allow for alternative personal claims connected to a lien action, but the following is relevant to this motion:

67.01 Scope of Rule 67

(1) This Rule provides procedures, in addition to the procedures provided under the *Builders' Lien Act*, for an action started to enforce a builder's lien.

(2) This Rule also allows a person who starts an action for enforcement of a lien under the *Builders' Lien Act* to claim alternatively for a judgment obtainable under Rule 8 - Default Judgment.

(3) A builder may obtain a default judgment instead of remedies under the *Builders' Lien Act*, in accordance with this Rule.

67.02 Other Rules apply

(1) These Rules, except a Rule that is inconsistent with a provision of the *Builders' Lien Act*, apply to an action started by filing a statement of claim under the *Builders' Lien Act*.

(2) In a proceeding to enforce a builder's lien, the statement of claim is the originating document referred to in Rule 82.14(2), of Rule 82 - Administration of Civil Proceedings.

[Emphasis added]

[11] The purpose of lien legislation is relevant. Bristow discusses this in his text at §1:3:

Importantly, most lien legislation specifically provides that liens shall be enforced at the least expense and that the procedure shall be as far as possible of a summary character having regard to the amount and nature of the liens in question...Many of the Acts further provide that, where the least expensive course is not taken by a party, the costs allowed to that party are not to exceed what would have been incurred had the least expensive course not been taken.

[12] The *Act* does not contain an express statement that liens shall be enforced with a summary procedure but does contain the restriction on costs in s. 41(3).

[13] Justice Leblanc in *Boehner* conducted a comprehensive review of summary proceeding under lien legislation in several jurisdictions. The issue of whether summary judgment was available was squarely before the court. After referring to ss. 34(1) and 35(1) and various judicial authorities from other provinces, Justice Leblanc summarized his reasoning:

[25] In any event, I cannot see how these words can be taken to exclude summary judgment. Specifically in the case of the *Nova Scotia Mechanics' Lien Act*, the trial procedure clearly has effect after the matter has been set down for trial. It is not clear why, as the defendant suggests, this should prevent a plaintiff from seeking a resolution other than by trial. There is no evidence in the *Act* that such pre-trial procedures as interrogatories are foreclosed by the trial procedures set out therein. Why, then, should summary judgment be taken to be excluded? In this regard, the words of Huband J.A. in *Gateway Construction* are helpful: "It would be open to the parties, where appropriate, to avail themselves of such pre-trial procedures as examinations for discovery, interrogatories, and discovery of documents."

[26] It should be noted as well that each of the lien Acts I have discussed incorporates the regular rules of court unless varied by the *Act*. In the *Nova Scotia Act* s. 34(1) addresses this point. Summary judgment is provided for in our **Civil Procedure Rules**. Moreover, Rule 1.03 provides that "the object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding." It is worth pointing out that these procedures are available to defendants and plaintiffs equally. Hence, in a lien case, where the plaintiff had no basis for a claim, it would be open to a defendant to seek summary judgment; and that defendant would be equally entitled to the "just, speedy and inexpensive" determination of the proceeding. As Esson J.A. put it in *Jordan Electric*, the rule permitting summary judgment "is part of the practice and procedure of the court" which is "not varied by this Act in any way which precludes the granting of the relief..."

[27] A further objection – one which received great weight in *Blue Heron Enterprises* and *Diotte* – arises from the "class action" nature of a lien claim. This may indeed serve as an obstacle to summary judgment where there appear to be additional potential lien claimants. But this problem can be overcome in the manner suggested by Esson J.A. in *Jordan Electric*:

It will, of course, be important, having in mind the complexities that beset actions of this kind, to be sure that all interested parties are given notice of an application for summary judgment and that the granting of the order does not prejudice the interest of anyone.

[28] The defendant's argument implies, on one hand, that all procedures not set out in the *Act* are therefore forbidden, and, on the other hand, that once a plaintiff

commences an action under the *Act*, it can only be resolved by trial. Neither conclusion can be reconciled with Rule 1.03, nor with the statement in the *Act* itself that the regular **Civil Procedure Rules** apply unless varied. The plaintiff takes the position that nothing in the *Mechanics' Lien Act* precludes summary judgment and accordingly the **Civil Procedure Rules** – including Rule 13 – apply in these circumstances. Counsel for the plaintiff makes the point that, in addition to the silence of the *Act*, what little Nova Scotia caselaw does exist contradicts the defendant's position. I agree. There is no convincing reason to conclude that summary judgment is excluded by the fact that the *Mechanics' Lien Act* provides for a trial procedure. As Esson J.A. said in *Jordan Electric*, to argue otherwise places insufficient emphasis on the clear statement that the **Civil Procedure Rules** apply unless they are varied by the *Act*.

[14] I would adopt and apply this reasoning to the *Act*. I would add that this approach is consistent with the direction provided by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7:

[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity.

...

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must

permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[15] Regarding *Crane*, with respect, Justice Hood was not referred to *Boehner* and did not conduct the thorough examination of the issues that Leblanc J. undertook. *Boehner* was relied on by Duncan J. (as he then was) in *Acadia Drywall Supplies Ltd. v. BBL Con Design Build Solutions Ltd.*, 2013 NSSC 13, wherein he declared the lien to be invalid and granted summary judgment to two defendants but refused summary judgment to a third defendant.

[16] Considering the changes to the legislation, *Rules* and the direction of the Supreme Court of Canada, the court should, in appropriate cases, permit and promote summary judgment for the just, speedy, and cost-effective resolution of a lien claim.

[17] There are no costs awarded.

Norton, J.