

**CITATION:** Zagros Homes Development v. Mbenkum, 2025 ONSC 1054  
**COURT FILE NO.:** CV-21-657617  
**DATE:** February 18, 2025

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
IN THE MATTER OF the *Construction Act*, R.S.O. 1990, c.C.30

**B E T W E E N :** )  
)  
)  
ZAGROS HOMES DEVELOPMENT INC. ) Robert N. Kostyniuk for the plaintiff  
)  
Plaintiff )  
)  
-and- ) F. Scott Turton for Cando 1 Construction  
) Inc. and Saeed Salimpour  
)  
ERNEST MBENKUM, ALLIANCE ) Tushar Subharwal for Ernest Mbenkum and  
LIPENJA, CANDO 1 CONSTRUCTION ) Alliance Lipenza  
INC. and SAEED SALIMPOUR )  
)  
Defendants )  
)  
)  
) **HEARD:** December 3, 2024

2025 ONSC 1054 (CanLII)

Associate Justice Wiebe

**REASONS FOR JUDGMENT**

[1] This action concerns a claim for lien in the amount of \$10,735 registered by Zagros Homes Development Inc. (“Zagros”) on a residential lot owned by Ernest Mbenkum and his wife Alliance Lipenja (together “the Owners”). The claim for lien is for alleged unpaid framing work.

[2] The defendant, Cando 1 Construction Inc. (“Cando”), was either the construction manager or the general contractor for a home construction project on the subject property. Cando’s principal is Saeed Salimpour. Zagros alleges it was the framing subcontractor.

[3] Cando denies the Zagros claim stating that there was no subcontract and, in any event, if there was, it was breached by Zagros when Zagros sub-subcontracted its entire scope to Med

Carpentry Inc. (“Med”), thereby justifying Cando’s decision to hire Med to complete the framing. Cando claims repayment of the \$5,000 it paid Zagros as damages. The Owners dispute the timeliness of the claim for lien and assert that, if the Zagros lien is valid, their liability is limited to the basic holdback.

[4] For the purpose of the eventual report, I order that this action is now the reference action.

### ***Background***

[5] The following facts were derived from the evidence and were not disputed. In 2018 the Owners decided to demolish the existing house on the property and replace it with a more modern house. In the fall of that year, 2018, through a friend, they were introduced to Mr. Salimpour. They decided to retain Cando or Mr. Salimpour as, the Owners allege, the general contractor.

[6] Mr. Salimpour presented the Owners with a CCDC-2 2008 Stipulated Fixed Price Contract wherein Cando is described as the “contractor.” The date on this document is December 21, 2018. Pursuant to this contract, Cando was to do the construction for a fixed price of \$791,000. The Owners signed this document. Mr. Salimpour signed the document on behalf of Cando. It is an issue in a separate action as between the Owners and Mr. Salimpour and Cando as to whether the Owners contracted with Mr. Salimpour as well as with Cando.

[7] The demolition and construction proceeded with Cando coordinating same. It dealt with subcontractors to get the work done. Cando and Mr. Salimpour assert that they were no more than a construction manager not at risk.

[8] Cando and Mr. Salimpour rendered no invoices. The Owners paid Cando and Mr. Salimpour in cash whenever Mr. Salimpour instructed the Owners to do so. From December 21, 2018 to September 8, 2022, the Owners paid cash totaling \$1,647,607.56 in numerous installments. For each payment, Mr. Salimpour signed a receipt entitled, “Cash Receipt for Contractor Services.”

[9] In October, 2020 Cando and Mr. Salimpour were looking for a framer. Zagros was on another project. Khashayar Mohammadzadeh, the principal of Zagros, was put in contact with Mr. Salimpour. Mr. Salimpour asked for a quote and provided Mr. Mohammadzadeh with the plans.

[10] In October, 2020 Mr. Mohammadzadeh provided a quote in the name of Zagros. The document was in the form of a contract. It was wrongly dated October 10, 2020. Mr. Mohammadzadeh emailed it to Mr. Salimpour on October 22, 2020. The document states that it was being submitted to the “owner.” Mr. Mohammadzadeh states in his affidavit that this was a standard term in his quotation document, and that the quote was submitted in fact to Mr. Salimpour.

[11] The quote was for the specified framing work to be done by Zagros at a fixed price, \$49,000 plus HST for a total price of \$55,670, with the price to be paid at specified milestones. 20% of the price was to be paid upon completion of the first floor wall framing. 20% of the price was to be paid by the completion of the second floor walls. Mr. Salimpour responded by email the same day, October 22, 2020 stating that the quotation “generally looks good.” He asked for a 15% discount. He did not get it. Mr. Mohammadzadeh says that Mr. Salimpour then accepted the quote verbally and that the quote formed the contract. Mr. Salimpour denies accepting the quote.

[12] Zagros, being already engaged on another project, decided to subcontract its scope to Med, a qualified subcontractor Zagros worked with previously. Med's principal is Riccardo Agraso. Mr. Agraso agreed to do the work. An oral subcontract was agreed upon.

[13] After a delay, Med started its work on November 1, 2020. Mr. Agraso gave Zagros a Med "invoice" dated November 2, 2020 in the amount of \$10,000 plus HST (ie. \$11,300). The document described this amount as an "advance." At this time Zagros paid Med \$10,000 as Med wanted to get paid for its work.

[14] On November 14, 2020 Cando paid Zagros \$5,000 in cash. In cross-examination, Mr. Salimpour described this payment as a requirement of Zagros for "holding a spot" for its work.

[15] Mr. Mohammadzadeh states in his affidavit that by November 19, 2020 Med had completed the first floor and had "started" the second floor. He also says that thereafter Med continued on the project "for the better part of a month."

[16] Mr. Mohammadzadeh in his affidavit gave hearsay evidence he said same from Mr. Agraso, namely that, "in early December, 2020," Mr. Salimpour made a contract with Med to have Med complete the framing work. In his affidavit, Mr. Salimpour states that he did this when he discovered that Zagros was doing none of the framing work. There was no further evidence as to when Med's work for Zagros ended and when this new Med contract work started.

[17] Mr. Mohammadzadeh in his affidavit gave hearsay evidence that Mr. Agraso told him that Med was to be paid \$30,000 plus HST by Cando, that Med completed the second floor framing, the ceiling, the roof trusses and the roofing, and that Mr. Salimpour only paid Med \$12,000. Mr. Agraso was not called to confirm this evidence.

[18] On January 22, 2021 Zagros registered a claim for lien in the amount of \$10,735. The stated last date of supply on the claim for lien is November 24, 2020. Mr. Mohammadzadeh states in his affidavit that he "terminated" the subcontract and that about \$18,000 worth of the Zagros scope was done at that time. He states that, on the advice of counsel, he "low-balled" the value of the work done at "\$14,000" in the hope of getting paid.  $(\$14,000 \times 1.13) - \$5,000 = \$10,820$  which is just over the amount of the claim for lien.

[19] On February 24, 2021 Zagros purported to perfect its lien by commencing this action. On May 21, 2021 Cando and Mr. Salimpour delivered a statement of defence and counterclaim. They admitted in paragraph 3 that "Cando was the general contractor retained by [the Owners] to construct the new house." The counterclaim was for the return of the \$5,000 paid to Zagros.

[20] Another lien claimant on this project obtained a judgment of reference from Justice Vermette on August 3, 2021. The first trial management conference was conducted by me on March 14, 2022. The parties to the within action were served with the notice of trial and attended. The Owners delivered their statement of defence and crossclaim on May 16, 2022.

[21] I conducted further trial management conferences on June 3, 2022, July 10, 2023 and November 6, 2023. The other lien claim was resolved. At the trial management conference on November 6, 2023 I made orders for necessary interlocutory steps in this action. At the trial management conference on March 25, 2025 I scheduled a one-day summary, virtual trial in this action to take place on August 15, 2024.

[22] On August 15, 2024, the day of the trial, Mr. Kostyniuk’s computer failed. As a result, I adjourned the trial to December 3, 2024 and gave directions for the serving and uploading of the affidavit of Mr. Agraso, who appeared on the Zagros witness list.

[23] On December 3, 2024 the trial took place virtually. Zagros called only Mr. Mohammadzadeh who submitted two affidavits. Mr. Agraso did not appear. Cando and Mr. Salimpour called only Mr. Salimpour who submitted two affidavits. The Owners called only Mr. Mbenkum who submitted one affidavit.

### ***Issues***

[24] Based on the evidence and submissions, I find that the following are the issues to be determined:

- a) Did Zagros have a subcontract and, if so, with whom?
- b) If it did, did Zagros breach the subcontract by subcontracting with Med?
- c) What are the damages?
- d) What was Zagros’ last day of supply?

### ***Witnesses***

[25] Before I analyze the issues, I will comment on the credibility of the witnesses.

[26] Generally, I found Messrs. Mohammadzadeh and Mbenkum credible. Their affidavits contained important detail and corroboration. For instance, Mr. Mohammadzadeh went into the quoting process and contract negotiation and attached the quotation document. Mr. Mbenkum was careful to attach the signed prime contract document and all of the receipts Mr. Salimpour signed for the Owners’ cash payments.

[27] Mr. Mohammadzadeh was also frank. He conceded and explained inconsistencies in his evidence such as the wrong date on the quotation document and the reference in this document to the “owner.” In cross-examination, he conceded not having a site diary or Med time sheets to time the exact end of Med’s supply under Zagros. He conceded that Zagros had no workers on site. Also, the fact that Mr. Mohammadzadeh paid Med \$10,000 when Zagros only received \$5,000 from Cando showed that he was a man of integrity and trustworthiness.

[28] Mr. Salimpour, on the other hand, was not credible. His affidavits lacked detail and corroboration. There was only one exhibit. His evidence contained glaring contradictions that he did not explain. In cross-examination, he insisted on portraying himself and his company as nothing more than a construction manager not at risk, with the Owners contracting directly with trades, including Med. That contradicted the fixed price general contract Cando signed with the Owners as indicated in the Mbenkum affidavit, a document that described Cando as the “contractor” with responsibility for the project. It contradicted paragraph 3 of the Cando/Salimpour statement of defence and crossclaim which admits that Cando “was the general contractor.” It contradicted the receipts Mr. Salimpour gave the Owners in return for the cash payments to Cando and Mr. Salimpour, each of which described the cash as being for “contractor services.”

[29] There was also a glaring contradiction in Mr. Salimpour's evidence about Cando's \$5,000 payment to Zagros. In his first affidavit, he described that payment as a mistaken payment to Zagros for work done, mistaken because, unbeknownst to Mr. Salimpour allegedly, it was Med doing the work. In cross-examination, he changed his evidence and described the payment as being due to Zagros' insistence on a payment to "hold a spot" for an eventual contract, suggesting that the framing had not started when the payment was made. In the end, Mr. Salimpour came across as a person lacking integrity and capable of saying anything to suit his interests.

[30] Therefore, whenever the evidence of Messrs. Mohammadzadeh and Mbenkum, on the one hand, and Mr. Salimpour, in the other, conflicted, I preferred to evidence of the former. The evidence of Messrs. Mohammadzadeh and Mbenkum did not conflict.

### *Analysis*

#### **a) *Did Zagros have a contract and, if so, with whom?***

[31] Zagros asserts it had an oral subcontract with Cando in accordance with the terms of the quotation Zagros emailed on October 22, 2020. Cando and Mr. Salmipour deny accepting that document and deny that there was a subcontract with Zagros.

[32] In *Continental Homes Inc. v. 2646576 Ontario Inc.*, 2024 ONSC 6219 (CanLII) at paragraphs 47 and 48 I summarized the law concerning contract formation with construction contracts:

[47] What makes an enforceable contract? As stated by Associate Justice Robinson in *Bellsam Contracting Limited v. Torgerson*, 2023 ONSC 468 (CanLII) para. 35, an enforceable contract has five elements: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship. Determining whether a contract is formed is done through an objective assessment, namely a determination of how each party's conduct would appear to a reasonable person in the position of the other party; see *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 (CanLII), [2021] 1 SCR 868 para. 35. It does not matter whether a party does or does not subjectively intend to contract. It matters whether that party's conduct is such that a reasonable person in the position of the other party would conclude that the party intended to be bound by the contract; see *Ethiopian Orthodox*, *supra*, at paras. 37 – 38. The court must consider the factual matrix between the parties; see *Bellsom Contracting*, *supra*, at para. 36.

[48] What are the essential terms of an enforceable construction contract? It is well established law that an enforceable construction contract requires that there be a meeting of the minds between the parties on three elements: the scope of the work; the price; and the schedule. There must be a certain agreement on these elements; see *The Gatti Group Corp. v. Zuccarini*, 2020 ONSC 2830 (CanLII) at paragraph 71.

[33] There was no dispute that the October 22, 2020 Zagros document and the conduct of the parties on October 22, 2020 met the requirements of an offer, consideration, mutual intention to create a legal relationship and certainty of essential terms for a construction contract. The issue is whether Cando and Mr. Salimpour accepted the document as the contract.

[34] Having reviewed the evidence and submissions, I conclude that Mr. Salimpour did accept the document as the contract. First, Mr. Mohammadzadeh stated in cross-examination that, after the

negotiation over Mr. Salimpour's requested discount, Mr. Salimpour verbally accepted the document as the contract on October 22, 2020. Mr. Salimpour asserted he did not accept it. As stated earlier, I found Mr. Mohammadzadeh generally more credible than Mr. Salimpour.

[35] Second, Mr. Salimpour's conduct at this time, looked at objectively, indicated that he indeed accepted the document. In his email of October 22, 2020 Mr. Salimpour stated expressly that he found the document acceptable except for the price. As for the price, there was no evidence that the two men negotiated further after Mr. Salimpour failed in his attempt to get the lower price of \$47,500. If Mr. Salimpour rejected the quotation after the failed negotiation on price, he would have dismissed Zagros at this point and sought a different framer. Instead, he invited Zagros to start working, which it did through Med on October 28, 2020.

[36] As I found in *Continental Homes* at paragraph 50, acceptance can be implied from the circumstances and the conduct of the offeree. I referred to a case, *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.*, 1964 CanLII 88 (SCC), [1964] SCR 614, where the Supreme Court found an enforceable contract when the offeree simply started using the tug boats without formally authorizing the written contract that had been offered. That is comparable to this case where Mr. Salimpour instructed Zagros to start working rather than dismiss it for an unacceptable price.

[37] Mr. Turton made several arguments which I do not accept. He referred me to the *Business Names Act*, RSO 1990, c B.17 section 2(6), the subsection that requires corporations to use their registered names on contracts. Zagros did not use its full, registered name on the quotation document. That may be the case, but I was shown no authority for the proposition that such a failure rendered the document unenforceable as a contract. Mr. Turton also argued that Cando and Mr. Salimpour could not accept the document because it referred to the offeree as "the owner." Mr. Mohammadzadeh stated that this was a standard term of his quotation document that he mistakenly did not change. The evidence shows that Mr. Salimpour was not misled by this mistake as he embarked immediately (within minutes) on negotiating with Mr. Mohammadzadeh the subcontract. Mr. Turton also pointed out that Zagros rendered no invoices to Cando. That may be the case; but it is of no consequence, in my view, as the project appeared to be largely run on a cash basis with no invoices. Indeed, Cando appeared to render no invoices to the Owners and was paid twice the amount of the contract price.

[38] The next issue to be determined is the party that contracted with Zagros. I reject Zagros' argument that it contracted with Mr. Salimpour personally. Mr. Salimpour is indeed the principal of Cando. However, there was no evidence of a personal undertaking or commitment by Mr. Salimpour to Zagros to perform the obligations of the contract document. There was in fact positive evidence that Cando was the contracting party. The receipt for the \$5,000 that was paid to Zagros was signed by Mr. Mohammadzadeh as having been received from Cando, not Mr. Salimpour. Furthermore, the general contract on its face specified that it was Cando that was the general contractor responsible for the project delivery, not Mr. Salimpour. Logically, therefore, it would be Cando that would contract with subcontractors such as Zagros to get the work done, not Mr. Salimpour.

[39] On the other hand, I also reject the point made by Cando and Mr. Salimpour that Zagros contracted with the Owners. As just stated, the general contract specified that Cando was the general contractor with responsibility for the project delivery. This included the hiring of subcontractors to assist in the work. There was no reason, therefore, for the Owners to contract with Zagros. Also,

there was no evidence that Messrs. Mohammadzadeh and Mbenkum met or talked at any time, much less contracted with each other.

[40] For these reasons, I find that Zagros entered into a subcontract with Cando in accordance with the terms and conditions of the October 22, 2020 Zagros document. I will call it “the Subcontract.”

**b) *Did Zagros breach the Subcontract by subcontracting with Med?***

[41] There is nothing in the Subcontract that prohibited Zagros from subcontracting its scope to another subcontractor as long as the terms and conditions of the Subcontract were met. There was also no evidence that such a restriction should be implied. Indeed, if anything, it should be the other way. I take judicial notice that the right to subcontract is a common term of construction contracts and a common practice. It facilitates efficient allocation of resources. Furthermore, Mr. Salimpour confirmed in cross-examination that Med was a good framer that completed Zagros’ scope well. Therefore, I find that Zagros did not breach the Subcontract by subcontracting as it did with Med.

[42] It follows from this that it was Cando that breached, indeed fundamentally breached and repudiated, the Subcontract when it terminated the Subcontract and contracted directly with Med. Mr. Salimpour said he “was not interested in” having such a complete sub-subcontracting of the framing scope to Med at a lower cost, with Zagro collecting the difference in the Subcontract price. I find this explanation essentially an admission by Mr. Salimpour of his envy at Zagros’ business acumen. His personal envy did not justify his conduct in terminating the Subcontract.

[43] In the leading case of *Heyday Homes Ltd. v. Gunraj*, 2004 CanLII 34324 (ON SC) at para. 342, Master Sandler articulated the now well-known principle that contract repudiation exists where a party evinces an intention no longer to be bound by the terms of the contract, and that the innocent party may accept the repudiation and terminate the contract. That is what happened here. Cando subcontracted with another party for no other reason than to get the work done at a lower price. There could be no clearer expression of a contract breach showing an intention not to be bound by the terms of the Subcontract. Zagros accepted the repudiation and terminated the Subcontract and registered its claim for lien.

**c) *What are the damages?***

[44] In *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171 (CanLII) at paragraph 49, Justice Perell aptly summarized the law of construction contract damages. In paragraph 49 he stated that, upon a contract repudiation by the “owner,” or in our case the “contractor,” the contractor has no claim in damages and the subcontractor is entitled to abandon the work and to a lien for the unpaid value of the work performed and materials supplied plus damages for breach of contract.

[45] I will apply this principle here. Having repudiated the Subcontract, Cando is not entitled to damages. I, therefore, dismiss its set-off and counterclaim.

[46] For its part, Zagros claims breach of contract damages for the unpaid price of the work it performed through Med. That value is tied of course to the terms of the Subcontract. The onus rests on Zagros to prove its damages.

[47] The Subcontract price was specified to be paid at milestones. 20% of the Subcontract price of \$55,670, or \$11,134, was to be paid upon completion of first floor wall framing. There was circumstantial evidence that this was done. On November 2, 2020 Med rendered an “invoice” for an “advance” of \$11,300, namely the equivalent of the amount due for the first floor wall framing. Mr. Mohammadzadeh at discovery said he attended at the site although he had no notes or records of such attendances. He paid Med \$10,000 on or about November 2, 2020. This was done, according to Mr. Mohammadzadeh, because Mr. Agraso was pressing to be paid for work Med had done. Coming from Mr. Mohammadzadeh, this evidence was credible. This all indicates that the first floor wall framing work was done at this time or shortly thereafter. I, therefore, find that Med completed the first floor wall framing creating a payment entitlement of \$11,134.

[48] Zagros claims that it completed, through Med, work amounting in total to \$15,820 (ie.  $\$14,000 \times 1.13 = \$15,820$ ). This leaves \$4,686 (ie.  $\$15,820 - 11,134 = \$4,686$ ) of the claim to be proven. This is 42%, or less than half, of the Subcontract price that was to be paid upon completion of the second floor wall framing, \$11,134.

[49] Mr. Mohammadzadeh stated in his affidavit that Med started the second floor framing by November 19, 2020. He also stated that Zagros “continued on the project for the better part of a month” thereafter. As stated earlier, I found Mr. Mohammadzadeh generally credible. Also, Mr. Salimpour did not dispute these statements. This is sufficient circumstantial evidence that Zagros through Med did at least \$4,686 worth of work on the second floor wall framing.

[50] As a result, I find that Zagros has met its onus of establishing that it did \$15,820 worth of work and that Cando should pay Zagros \$10,820 (ie.  $\$15,820 - \$5,000$ ) in breach of contract damages.

**d) What was Zagros’ last day of supply?**

[51] Whether Zagros has a lien for \$10,735 as claimed turns on the issue of timeliness. It is undisputed that the new *Construction Act*, R.S.O. 1990, c. C.30 (“CA”) applies. Section 31 of the new CA specifies that, where there is no certification of substantial performance and no certification of the subcontract and contract termination has not happened, as in this case, the subcontractor must preserve its claim at the conclusion of 60 days following the last date of supply.

[52] Zagros registered its claim for lien on January 22, 2021. 60 days prior to this registration date is November 23, 2020. Therefore, Zagros must prove it supplied on or after November 23, 2020 to have its claim for lien found to be timely. Did it do so?

[53] In his affidavit, Mr. Mohammadzadeh stated that the Cando subcontract with Med was made “in early December, 2020,” but he admitted this information came entirely from Mr. Agraso, thereby rendering this evidence hearsay. Despite Mr. Mohammadzadeh’s otherwise general credibility, this critical hearsay evidence was simply not reliable given Mr. Mohammadzadeh’s clear interest in establishing such a late last day of supply to prove the Zagros lien.

[54] In argument, Mr. Kostyniuk candidly admitted that there was no evidence establishing that Zagros’ last day of supply fell on or after November 23, 2020. There was no site diary and no time sheets from Med proving this point. There was no evidence from Mr. Agraso.

[55] The onus rests on the lien claimant to prove the essential elements of its claim for lien. I find that Zagros has failed to do so in relation to the timeliness of its claim for lien. I declare, therefore, that Zagros lien is expired and should be vacated.

### ***Conclusion***

[56] In conclusion, for the reasons stated, I rule that Cando must pay Zagros \$10,820 in breach of contract damages, and I declare that the Zagros lien has expired and must be vacated.

[57] I allowed the parties a few days after the argument to serve and file their costs outlines. The Zagros cost outline shows \$17,596.39 in partial indemnity costs, \$25,904.62 in substantial indemnity costs and \$33,321.04 in full indemnity costs. The costs outline of Cando and Mr. Salimpour shows partial indemnity costs of \$12,707.18. The costs outline of the Owners shows \$5,871.15 in partial indemnity costs, \$7,612.76 in substantial indemnity costs and \$9,354.37 in actual costs.

[58] I encourage the parties to confer and come to an agreement on costs. If they cannot agree, written submissions on costs must be served, filed and uploaded in accordance with the following schedule:

- Those claiming costs must serve, file and upload written submissions on costs of no more than two (2) pages on or before February 25, 2025;
- Any responding written submissions on costs must be no more than two (2) pages and must be served, filed and uploaded on or before March 4, 2025;
- Any reply written submissions on costs must be no more than one (1) page and must be served, filed and uploaded on or before March 7, 2025

[59] These submissions must address the issue of prejudgment interest as well.

**Released:** February 18, 2025

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**ASSOCIATE JUSTICE C. WIEBE**

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**DATE:** February 18, 2025

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

In the matter of the *Construction Act, R.S.O. 1990, c. C.30*

**B E T W E E N :**

Zagros Homes Development Inc.

Plaintiff

- and -

Ernest Mbenkum, Alliance Lipenja, Cando 1  
Construction Inc. and Saeed Salimpour

Defendants

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**REASONS FOR JUDGMENT**

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Associate Justice C. Wiebe

**Released:** February 18, 2025

