

CITATION: Zagros Homes Development v. Mbenkum, 2025 ONSC1803
COURT FILE NO.: CV-21-657617
DATE: March 20, 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)
)
)
) **DECISION:** February 18, 2025

2025 ONSC 1803 (CanLII)

Associate Justice Wiebe

COSTS AND INTEREST DECISION

[1] On February 18, 2025 I issued my reasons for judgment in this action. I ruled that the defendant, Cando 1 Construction Inc. (“Cando”) pay the plaintiff, Zagros Homes Development Inc. (“Zagros”), \$10,820 in breach of contract damages and that the Cando counterclaim was dismissed. I declared the Zagros claim for lien expired and thereby impliedly dismissed the Zagros action against Ernest Mbenkum and Alliance Lipenja (together “the Owners”). I also impliedly dismissed the Zagros claim against Saeed Salimpour, and the crossclaim by the Owners against Cando and Mr Salimpour for contribution and indemnity. I make those implied orders explicit herein.

[2] The parties filed costs outlines a few days after the argument. 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. In my reasons I directed the parties to make written submissions on costs and interest. They have now done so.

[3] The submissions were as follows:

- Zagros claims its partial indemnity costs, \$17,596.39, from Cando given Zagros' complete success in proving its claim against Cando and defeating the Cando counterclaim. Zagros also claims that Cando and Mr. Salimpour pay \$5,716.50 of the Owners' costs because of the refusal by Cando and Mr. Salimpour prior to trial to contribute to Zagros' costs when the Owners offered to go out without costs and contribute \$5,000 to Zagros' costs. Zagros also claims prejudgment interest on the \$10,820 judgment at 2.5% per annum running from December 1, 2020.
- The Owners claim their substantial indemnity costs (\$7,612.76) from Zagros and Cando in the following proportions: Zagros 80% or \$6,090.21; Cando 20% or \$1,522.55. The reason given by the Owners is that Zagros insisted on keeping the Owners in the action despite Zagros' failure to produce any probative evidence as to its last day of supply in support of the timeliness of its claim for lien. In short, Zagros knew or should have known it had no lien but did not release the Owners. This was conduct that merited the elevated scale of costs. The reason offered by the Owners for the 20% contribution of Cando is that Cando took the unreasonable position at trial that it was nothing but a construction manager not at risk, forcing the Owners to submit Mr. Mbenkum's affidavit to show that this was not the case and that Zagros contracted with Cando. The 20% represented the amount of time the Owners spent in preparing the Mbenkum affidavit and having Mr. Mbenkum cross-examined. In the alternative, the Owners claim their partial indemnity costs from the same parties in the same proportion.
- Cando and Mr. Salimpour claim that Zagros should pay the Owners' costs in an unspecified amount given the failure of the Zagros lien claim and get no costs from Cando and Mr. Salimpour due to "the divided result" as against those parties. These defendants also submitted that the action should have been brought in the Small Claims Court.

[4] Having considered these submissions I have decided to make the following costs award: Cando must pay Zagros \$17,596.39 in partial indemnity costs; Zagros and Cando must pay the Owners their substantial indemnity costs of \$7,612.76 with Zagros paying 50% or \$3,806.38 and Cando the other 50% or \$3,806.38. I so order. The following are my reasons:

- Zagros succeeded entirely in its claim against Cando and in defeating the Cando set-off and counterclaim. It should get its claimed \$17,596.39 in partial indemnity costs from Cando. The fact that Zagros did not succeed against Mr. Salimpour is, in my view, of no consequence. He was clearly the dominant force behind Cando and escaped personal liability in contract to Zagros by the narrowest of margins given his arrogant conduct in causing Cando to terminate the Zagros subcontract due to personal envy. This was not "a divided result."

- Concerning Mr. Turton’s Small Claims Court point, I do not accept it. Lien actions are only brought in the Superior Court. Under the new *Construction Act*, R.S.O. 1990, c. C.30, cases such as this one can be referred to a deputy judge or administrative judge of the Small Claims Court under section 58. However, in this case, the governing judgment of reference was obtained in another lien action that had claims well in excess of the Small Claims Court limits. The Zagros parties were joined by service of the notice of trial.
- The Owners deserve their costs on a substantial indemnity basis, \$7,612.76, from both Zagros and Cando. Zagros should have released the Owners long ago, given the absence of any probative Zagros evidence as to the last day of Zagros’ supply and the onus on Zagros to prove it last date of supply. I also agree that Cando must contribute to those costs as it forced the Owners to prepare and submit the Mbenkum affidavit with Cando’s unreasonable position that it was no more than a construction manager not at risk. But I find that Cando’s share must be greater than 20%. It must be 50%. Cando conduct concerning settlement on the eve of the trial, as described by Mr. Kostyniuk (which no one disputed), deserves to be sanctioned. That is what I order.
- The quanta of the Zagros and Owner’s costs outlines were not questioned. I also do not find the quanta objectionable given the work those two did.
- This is a result that Cando could reasonably have expected to pay in the event of a defeat. Cando’s costs outline is not a fair measure of the work Zagros and the Owners had to do to prove their respective cases, all on account of Cando’s conduct.
- Also, the result is not disproportionate. The amounts in issue were indeed modest. But the Owners had to respond effectively to issues that may affect their larger action against Cando and Mr. Salimpour. Zagros also could not allow the abuse it suffered at the hands of Cando and Mr. Salimpour to go unanswered.

[5] Concerning prejudgment interest, this action was commenced on February 21, 2021. The prejudgment interest rate specified by the *Courts of Justice Act*, R.S.O. c. C.43 (“CA”) section 128 is 0.5% for actions commenced in that period. CA section 130 (2)(a) gives the court a discretion to award higher prejudgment given changes in market interest rates. I agree with Mr. Kostyniuk that the 0.5% interest rate was an aberration of the pandemic and not reflective of market rates. Beginning in the third quarter of 2022 the specified prejudgment interest rates under section 128 started to climb. The rates consistently exceeded 2.5% per annum on and after the fourth quarter of 2022. No one objected to the Zagros request for 2.5% prejudgment interest. I, therefore, exercise my discretion and award Zagros the requested 2.5% prejudgment interest rate.

[6] As to the commencement date for the interest, Mr. Kostyniuk argued that this should be December 1, 2020. This date was also not contested. Given the uncertainty as to the last day of Zagros’ supply, I accept that date. Therefore, Zagros will have 2.5% prejudgment interest on the judgment in its favour for breach of contract damages from Cando in the amount of \$10,820 running from December 1, 2020. So ordered.

ASSOCIATE JUSTICE C. WIEBE

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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

COSTS DECISION

Associate Justice C. Wiebe

Released: March 20, 2025

