

CITATION: Par-Tek v. Dunwin Ltd. v., 2020 ONSC 7197
COURT FILE NO.: CV-19-4426
MOTION HEARD: 20201109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Par-Tek Design Build Ltd., Plaintiff, Defendant by Counterclaim

AND:

Dunwin Limited and Dr. Jennifer Thompson and Glen Erin Animal Hospital,
Defendants, Plaintiffs by Counterclaim

BEFORE: MILLER J.

COUNSEL: M. Harris, for Par-Tek Design Build Ltd.

P. Holdsworth, for Dr. Jennifer Thompson and Glen Erin Animal Hospital

A. Wine, for Dunwin Limited

HEARD: November 9, 2020

ENDORSEMENT

- [1] This is a motion brought by the Defendants and Plaintiffs by Counterclaim, Dr. Jennifer Thompson and Glen Erin Animal Hospital (collectively, “Glen Erin”) for an Order discharging the Lien of Par-Tek Design Build Ltd., Plaintiff and Defendant by Counterclaim (“Par-Tek”) on 2111 Dunwin Drive, Mississauga (the “Property”); and for an Order directing the Accountant of the Superior Court to pay out of Court the Security posted to vacate the lien.
- [2] Glen Erin also seeks leave to bring a motion for summary judgment, dismissing the Action as against its landlord, the Defendant, Dunwin Limited (“Dunwin” or “Landlord”).
- [3] The Plaintiff, Par-Tek Design Build Ltd., takes the position that the motion is premature, and that it should be dismissed. They submit that the moving parties do not have standing to seek the relief sought as no Statement of Defence has been filed by the Defendant Dunwin; and further that there is, in any event, a genuine issue requiring a trial as to whether the lien was properly brought against the landlord Dunwin.
- [4] The hearing occurred by videoconference. Counsel for Dunwin attended the hearing but did not participate.

Background

- [5] Glen Erin Animal Hospital is the registered business name of Dr. J. Thompson Veterinary Professional Corporation, owned and operated by the personal defendant, Jennifer Thompson (“Dr. Thompson”).
- [6] Dunwin and Glen Erin entered into an Agreement to Lease the Property in January 2019 (“Lease”).
- [7] In May 2019, Dr. Thompson requested that Par-Tek prepare a contract for the construction of a new veterinary clinic for Glen Erin, in accordance with prepared architectural plans.
- [8] On June 4, 2019, Par-Tek’s principal, Andrew Parker, met with Dunwin’s property manager, Stan Bordokine, and provided him with copies of the architectural plans for the veterinary clinic to be built at the Property. In an email the same day, Mr. Parker asked Mr. Bordokine to approve the architectural drawings.
- [9] By letter dated June 5, 2019, and pursuant to the terms of the Lease, Dunwin consented to Glen Erin’s requested renovations, in accordance with the architectural drawings provided by Par-Tek.
- [10] On June 6, 2019, Glen Erin and Par-Tek entered into a “Project Management Contract” for the construction of the improvement at the Property (“Contract”).
- [11] Work was done on the Property by Par-Tek until they were dismissed by Glen Erin September 25, 2019.
- [12] On September 26, 2019, Mr. Parker emailed Mr. Bordokine, informing him of the termination of the Contract and, for the first time, providing him with a copy of the Contract.
- [13] On October 1, 2019, Par-Tek registered the Lien against Dunwin’s freehold interest in the Property for the full amount of its claim for damages against the tenant, Glen Erin.
- [14] Par-Tek Design Build Ltd (“Par-Tek”) claims damages in respect of its work performed at the request of and for Dr. Thompson and Glen Erin, the tenant of the subject Property.
- [15] In addition to its claim against Glen Erin, Par-Tek registered the Lien against the Landlord’s freehold interest in the Property and in this action seeks a declaration that it is entitled to the Lien in the full amount of the damages claimed, and a corresponding Order for the Landlord’s Property to be sold to recover damages claimed against the tenant, Glen Erin.
- [16] Glen Erin submits that the Contract was exclusively between Glen Erin and Par-Tek and did not involve Dunwin, except that under the terms of its lease, Glen Erin required the consent of Dunwin to commence the work.

- [17] Par-Tek disputes that its relationship was exclusively with Glen Erin, and not with Dunwin. Par-Tek submits that the work was done at the request of and with the consent of Dunwin.

Standing

- [18] The Lien is not registered against Glen Erin's leasehold interest in the Property. The Lien is registered against "the interest of every person identified as an "owner" of the premises described in said PIN to this lien". The only "owner" described in the PIN to the Lien is the Landlord, Dunwin.

- [19] Glen Erin vacated the Lien by depositing Security into court for the principal amount of the Lien plus 25% for costs, as required by 44(1) of the *Construction Act*. Glen Erin is currently incurring interest payments on the Security. Glen Erin was required to vacate the Lien as a term of its lease with Dunwin.

- [20] Dunwin has not filed a statement of defence. To date Par-Tek has not required Dunwin to file a statement of defence.

- [21] Rule 20.01(3) of the *Rules of Civil Procedure* requires a defendant to deliver a statement of defence before it may move for summary judgment:

A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

- [22] The parties agree that s.47 of the *Construction Act*, which authorizes a court to discharge a lien or vacate the registration of a claim for a lien on any proper ground, is similar in nature to a partial summary judgment motion.

- [23] Par-Tek takes the position that Glen Erin does not have standing to seek discharge the lien or vacate the registration of a claim for the lien against Dunwin, or to have the claim against Dunwin dismissed when Dunwin has not filed a statement of defence.

- [24] Glen Erin submits that as they have filed a statement of defence they have standing to seek dismissal of the part of the claim against Dunwin.

- [25] Neither party provided any authority for their respective positions.

- [26] In a similar case, *Concord Carriers Ltd. v. Alnet Holdings Ltd.* (2005), 46 C.L.R. (3d) 313. Tulloch J. (as he then was) held at paragraph 12 that one defendant had standing to bring a motion for summary judgment on behalf of another defendant.

- [27] I am satisfied that Glen Erin does have standing to bring the motion pursuant to s. 47 of the *Construction Act* and Rule 20 on behalf of Dunwin.

- [28] I further note that Chapnik J., in *Aylmer Meat Packers Inc. v. Ontario*, 2011 ONSC 4470 at paragraph 23, held that a claim against a co-defendant should not be dismissed where

the remaining defendant could then throw blame on the absent defendant to the prejudice of the plaintiff.

- [29] This concern is not present in this case as a reason to preclude Glen Erin from moving for summary judgment. Certainly, the reasoning of Chapnik J would preclude Glen Erin from casting blame on Dunwin in defending the claim against it and in prosecuting its counterclaim. The pleadings in Glen Erin's Statement of Defence and Counterclaim do not do this.

Genuine Issue Requiring a Trial

- [30] Glen Erin takes the position that the Lien is improper as Par-Tek failed to comply with the requirements of the *Construction Act*, RSO 1990 c. C.30, both at the time that it commenced work on the alleged improvement to the Property, and again when it registered the Lien against the interest of the Landlord. Glen Erin submits that Par-Tek was never entitled to register the Lien against the Landlord's interest in the Property, as the Landlord does not fall into the category of "owner" in the legislation. It therefore has no right to recover its alleged damages against Glen Erin through a sale of the Landlord's Property.
- [31] Glen Erin submits that Par-Tek does not plead any facts to support its bald allegation that Dunwin is a statutory "owner" within the meaning of the *Construction Act*.
- [32] Section 1(1) of the *Construction Act* defines the term "owner" as follows:
- "owner" means any person, including the Crown, having an interest in a premises at whose request and,
- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,
- an improvement is made to the premises but does not include a home buyer;"
- [33] Glen Erin disputes that Dunwin is a statutory "owner" on the bases that: (a) the Contract between Glen Erin and Par-Tek does not mention Dunwin, the Landlord or the Lease; and (b) that at no time did Dunwin "request" Par-Tek to make any improvements.
- [34] Par-Tek asserts that Dunwin is indeed an "owner" as defined in Section 1(1) of the *Construction Act*. Par-Tek's position is that not only was the work approved by Dunwin, but Dunwin made specific requests for work to be done. Dunwin is therefore an "owner" pursuant to the *Construction Act*, and both the lien and the action are properly brought against Dunwin as well as Glen Erin.
- [35] There is no dispute that Par-Tek's work on the premises constitutes "improvement" within the meaning in the definition of "owner". There is also no dispute that the

Landlord, Dunwin, consented to the improvement through its representative Stan Bordokine.

- [36] What remains in dispute is whether Dunwin made any “request” of Par-Tek for improvements, such that it fits the definition of “owner” in the *Construction Act* context.
- [37] The parties filed evidence by way of affidavit in support of their respective positions. That evidence is summarized below.
- [38] In his affidavit sworn August 24, 2020 Stan Bordokine indicates that he was occasionally copied on emails from, and between Mr. Parker and Glen Erin regarding issues arising during the course of construction. He indicates that he was “required” to intervene at one point when Par-Tek’s trades people caused a flood in the neighbouring unit to the Property. He indicates that all of my communications relating to this matter went directly through Dr. Thompson in her capacity as principal of the tenant, Glen Erin. He indicates that Par-Tek’s work at the Property was performed at the sole request of the tenant, Glen Erin, and Dunwin’s role was limited to approving the Blueprints.
- [39] Mr. Bordokine was cross-examined October 13, 2020. He testified that he never had any correspondence directly with Mr. Parker and he never asked Dr. Thompson or Mr. Parker to do any work on the building. He testified that in addition to the occasion when he met Mr. Parker to receive the Blueprints, Mr. Parker was present on a couple of occasions when he visited the Property. He testified that he did not speak to Mr. Parker about modifications to the Blueprints nor about “the environments that were necessary to the Property”.
- [40] Andrew Parker’s affidavit of September 27, 2020 indicates that in addition to approving all changes to the premises -the renovations and structural improvements -at times, Dunwin asked Par-Tek to complete the scope of the work on their behalf. This included but was not limited to mold remediation, and other matters.
- [41] Mr. Parker indicates that Dunwin approached Par-Tek for mold treatment and other work. He indicates that Dunwin made numerous other requests to Par-Tek to complete other improvements to the building including but not limited to the base building sprinklers, roof drains, other base building issues bring the building up to code.
- [42] Mr. Parker indicates that Dunwin asked Par-Tek several times to complete the mold remediation and asked for quotes, via telephone calls directly from Stan Bordokine. In addition, Par-Tek was in direct communication with Dunwin throughout the project regarding base building issues such as recommended trades for “fire alarm, roofing, etc, replacement of existing hollow metal steel doors, mold remediation, upgrading the ABS roof drain pipes, wall penetrations for new HV AC, floor penetrations for new plumbing, Xray scanning required before concrete cutting, base building electrical, sprinklers, etc.”
- [43] This contradiction in the evidence goes to the heart of whether Dunwin made a “request” that work be done by Par-Tek and is therefore crucial to the determination of the issues before the Court.

Analysis

- [44] The law governing summary judgment motions is set out at Rule 20 of the *Rules of Civil Procedure* and as articulated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7.
- [45] As indicated at paragraph 28 of that decision :
- ... 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.
- [46] As indicated in *Hryniak*, the proper approach on a motion for summary judgment is to first determine if there is a genuine issue requiring a trial based only on the evidence without using the powers set out in Rule 20. There will be no genuine issue requiring a trial if the summary judgment process provides the evidence required to fairly and justly adjudicate the dispute in a timely, affordable, and proportionate procedure.
- [47] If there appears to be a genuine issue requiring a trial, the need for a trial might still be avoided by using the powers under Rule 20 (2.1) of weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence. Further, a judge may, pursuant to Rule 20 (2.2), for the purposes of exercising any of those powers, order that oral evidence be presented by one or more of the parties.
- [48] The use of those powers are discretionary. Here my evaluation of the incompatible evidence of Mr. Parker and Mr. Bordokine on the pivotal issue leads me to conclude that that issue can only be resolved by way of a trial. The testimony of those two witnesses cannot stand alone but requires a full airing of the evidence at trial, and oral evidence from these two witnesses alone would not assist in a just determination of the issue.
- [49] I conclude that there is a genuine issue requiring a trial that cannot be resolved by use of the powers available pursuant to Rule 20 (2.1) and (2.2). The motion for relief under s.47 of the *Construction Act* and for summary judgment is dismissed.

Section 19(1) of the *Construction Act*

- [50] Section 19(1) of the *Construction Act* limits a lien claimant's right to lien the freehold interest of a landlord to 10% of the amount of any payment or contribution towards the improvement, "if payment for all or part of the improvement is accounted for under the terms of the lease or any renewal of it, or under any agreement to which the landlord is a party that is connected to the lease".
- [51] Glen Erin raised the issue of s. 19(1) and submits that no payment for all or part of the improvement is accounted for under the terms of the Lease or any renewal of it, or under any agreement to which the Landlord is a party that is connected to the Lease.
- [52] Par-Tek does not plead in the Statement of Claim, nor in its Reply that payment for all or part of the improvement is accounted for under the terms of the Lease, or under any agreement to which Dunwin is a party.

[53] Nor did Par-Tek advance, in the hearing before me, the position that Glen Erin and Dunwin had any arrangement under the terms of their Lease or otherwise between them regarding accounting for the costs of the improvements.

[54] In the circumstances there is no reason for me to make any determination of the non-existent claim against Dunwin pursuant to s. 19(1) of the *Construction Act* .

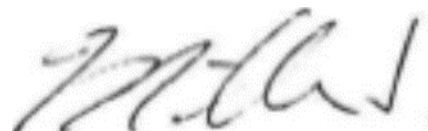
Conclusion

[55] For the reasons given above, the motion for relief under s.47 of the *Construction Act* and for summary judgment is dismissed.

[56] The trial of the issue raised here is, in my view, inextricably intermingled with the issues of the trial as a whole, as proof of the Plaintiff's claim, including what work was done at whose request, is integral to the claim and to the defence put forward by Glen Erin. As a judge who does not habitually sit in Milton, I decline to seize myself of the trial both because the trial will be, in scope, significantly beyond what was before me on this motion and, I would not want to hinder the trial being heard expeditiously due to any difficulty in accommodating my sitting schedule.

Costs

[57] Having determined that there is a genuine issue requiring trial, I order costs of this motion payable in the cause.



MILLER J

Date: November 23, 2020