CITATION: Homes by Hendriks Inc. v. Honsberger 2025 ONSC 2237
COURT FILE NO.: CV-23-00061348-000
DATE: 20250410

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Homes by Hendriks Inc., Plaintiff

AND:

Marc Frederich Honsberger, Rachel Pauline Honsberger, Computershare Trust Company of Canada and CWF Group Mortgages Inc., Defendants

BEFORE: The Honourable Mr. Justice Robert B. Reid

COUNSEL: D. Schmuck, Counsel, for the Plaintiff

N. J. Kasozi, Counsel, for the Defendants Honsberger

HEARD: February 11, 2025

DECISION ON MOTION

Introduction:

[1] The defendants Marc Frederich Honsberger and Rachel Pauline Honsberger (the "Honsbergers") move for an order discharging the construction lien registered against their property municipally known as 3150 King Street, Vineland, Ontario, (the "property") pursuant to the provisions of ss. 35 and 47 of the *Construction Act,* R.S.O. 1990, c. C.30 (the "*Act* ").

[2] In the alternative, the Honsbergers seek an order reducing the plaintiff's construction lien.

[3] The action has been discontinued against the other defendants who did not appear or participate in the motion.

Background:

[4] The Honsbergers own the property.

[5] The plaintiff, Homes by Hendriks Inc. ("HBH") builds and renovates homes.

[6] The Honsbergers engaged HBH to perform improvements on the property. Initially, the plan was to repair the existing home and build a separate garage with an in-law suite. The home repair plan did not proceed. HBH was engaged to build the garage.

[7] An initial deposit of $10,000 was paid by the Honsbergers.

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[8] A preliminary construction agreement was signed in July 2021. In January 2022, the Honsbergers and HBH signed a contract for construction work, at a total projected cost of $1,110,604.21 plus HST. In addition to the initial deposit, the Honsbergers paid $111,960.42 plus HST and a further $627,110.97.

[9] Construction started in April 2022. Disputes arose. Depending on whose evidence is accepted, construction stopped in or around November or December 2022.

[10] A construction lien was registered by HBH on January 13, 2023 in the amount of $299,000.

[11] An examination of HBH occurred pursuant to s. 40 of the *Act* in September 2024.

[12] The matter is expected to be heard at trial during the sittings commencing May 12, 2025.

Issues for Decision on the Motion:

[13] The Honsbergers submit that the lien was registered out of time and should be discharged, or alternatively that the lien was in an exaggerated amount and should be reduced.

[14] HBH opposes the relief claimed, and in any event submits that the court has no legislative jurisdiction to reduce a lien in these circumstances.

[15] There is no question that many issues, including alleged deficiencies in construction, are proper subjects for the trial of the action and are distinct from the questions of whether the lien should be discharged or the lien amount changed.

[16] Therefore, the issues for decision on this motion are:

a. Should the lien be discharged?

b. Does the court have jurisdiction to reduce the lien?

c. If there is jurisdiction, should the lien be reduced, and if so, by what amount?

[17] A test similar to the summary judgment test in rule 20 motions under the *Rules of Civil Procedure*[1] applies to the defendants' motion in this case. The moving party must satisfy the court on a balance of probabilities that there is no genuine issue requiring a trial[2]. The responding lien claimant must lead its best evidence or risk losing. The analogy to the rule 20 procedure is not perfect however, because there may be claims that are legitimate claims in contract or tort that are not properly the subject of a lien. Therefore, as set out in *Structform* at para. 13, a critical question, even if the claim itself may be legitimate, is to determine what amount may legally attract the security afforded by a construction lien.

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[1] R.R.O. 1990, Reg.194

[2] *Ledcor Construction Limited v. Canalfa Liberty Village Homes Inc.*, 2008 CanLII 87009 (ON SC), at para. 28, and *Structform v. Ashcroft*, 2013 ONSC 4544 at paras. 12, 13.

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[18] Relevant provisions of the *Act* include the following:

> 31 (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. R.S.O. 1990, c. C.30, s. 31 (1); 2017, c. 24, s. 67.
>
> (2) Subject to subsection (4), the lien of a contractor,
>
> (a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the 60-day period next following the occurrence of the earlier of,
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> (i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and
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> (ii) the date the contract is completed, abandoned or terminated; and
>
> (b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the 60-day period next following the occurrence of the earlier of,
>
> (i) the date the contract is completed, and
>
> (ii) the date the contract is abandoned or terminated. R.S.O. 1990, c. C.30, s. 31 (2); 2017, c. 24, s. 26 (1-5), 66.
>
> 35 (1) In addition to any other ground on which the person may be liable, any person who preserves a claim for lien or who gives written notice of a lien in the following circumstances is liable to any person who suffers damages as a result:
>
> 1. The person knows or ought to know that the amount of the lien has been wilfully exaggerated.
>
> 2. The person knows or ought to know that he or she does not have a lien. 2017, c. 24, s. 30 (2).
>
> (2) In the circumstances described in paragraph 1 of subsection (1), the court may, on motion, order that the lien amount be reduced by the exaggerated portion, as determined in accordance with section 17, if it finds that the person has acted in good faith. 2017, c. 24, s. 30 (2).

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> 44 (5) Where an amount has been paid into court or security has been posted with the court under this section, the court, upon notice to such persons as it may require, may order where it is appropriate to do so,
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> (a) the reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; or
>
> (b) the reduction of the amount of security posted with the court, and the delivery up of the security posted with the court for cancellation or substitution, as the case may be.
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> 47 (1) The court may, on motion, order the discharge of a lien,
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> (a) on the basis that the claim for the lien is frivolous, vexatious or an abuse of process; or
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> (b) on any other proper ground. 2017, c. 24, s. 37 (1).
>
> (1.1) The court may, on motion, make any of the following orders, on any proper ground:
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> 1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
>
> 2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
>
> 3. An order dismissing an action. 2017, c. 24, s. 37 (1); 2018, c. 17, Sched. 8, s. 15 (1).
>
> (1.2) An order under subsection (1) or (1.1) may include any terms or conditions that the court considers appropriate in the circumstances. 2017, c. 24, s. 37 (1).

Should the lien be discharged?

[19] The Honsbergers submit that the claim for lien was filed outside the 60 days prescribed by s. 31 of the *Act* on the basis that HBH abandoned the project following its last full day of work which was before November 10, 2022. While the Honsbergers admit that HBH attended to rectify some deficiencies in December 2022, they state that such work was minimal and that caselaw supports the proposition that rectification is not a proper basis for extending the date by which a lien must be registered.[3]

[3] *Applewood Glass & Mirror Inc. v. Baun Construction Inc.*, 2009 CanLII 63590 (ON SC) at paras. 10 – 12.

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[20] HBH denies that the lien was registered out of time. In the examination under s. 40 of the *Act*, its representative deposed to work having been done in December, 2022: for example, framing that took place between December 20 and 21, and utility servicing work was provided by subcontractor Bosma Excavating between December 12 and 14. HBH also refers to the rental of a ladder from United Rentals for use at the property in December.

[21] The Honsbergers allege that HBH relied on unsupported hearsay evidence at the examination of its representative. They submit that HBH was in the best position to identify when its work had been done and should have provided proper documentation or direct evidence of any such work. They state that the Bosma Excavating work was in the nature of rectification, and note that there is no direct evidence of the delivery of the United Rentals ladder to the property.

[22] Clearly, there are evidentiary conflicts as to the critical question of when lienable work was last performed by HBH on the property. Although some of those conflicts could have been resolved by direct evidence from the individuals who performed the work, I am not prepared to conclude that the lien should be discharged based on the quality of evidence provided. The date of last work is a genuine issue that requires a trial, and on that basis, there will be no order discharging the lien.

Does the court have jurisdiction to reduce the lien?

[23] At the conclusion of the motion hearing, and for the first time, counsel for HBH raised the issue of the court's jurisdiction to reduce the lien, arguing that the provisions of s. 44(5) of the *Act* restrict the court's jurisdiction to reduce the amount of a lien to cases where payment has been made into court to vacate the lien.

[24] I am satisfied that the court does have jurisdiction to consider a reduction in the lien amount based on the broad remedial power contained in s. 35 of the *Act*, as distinguished from the specific authority to reduce in the amount of money paid into court under s.44(5). A recent example of the court reducing the lien amount can be found in *RJ Concrete v. Eco Depot LTD.*[4]

Should the lien be reduced, and if so, by what amount?

[25] As with the claim that the lien was registered out of time and should be vacated, the test for reduction of the amount of the lien is similar to the test for a summary judgment. Is there a genuine issue requiring a trial pursuant to s. 35(1) of the *Act* as to whether the amounts claimed to support the lien are wilfully exaggerated? Put another way, is there a reasonable prospect that the plaintiff can prove the lien in the amount claimed?[5] The lien

[4] 2022 ONSC 1759
[5] *Structform, supra*.

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claimant must present its best evidence and bears the onus of proof because it is invariably in the best position to provide that evidence[6].

[26] Pursuant to s. 14(1) of the *Act*, "A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials."

[27] A contractor cannot register a claim for lien for materials if they are not delivered to the project site.[7]

[28] It was admitted in the evidence of HBH given at the s. 40 examination that HBH billed the Honsbergers for materials ordered from Regional Doors & Hardware Ltd. ($28,147.38 plus $3,659.15 HST) and Brycon Wood Door ($5,966 plus $775.58 HST). Those materials were never delivered to the property. As well, HBH charged for siding pursuant to a bill from T-Daniil's Contracting Ltd. ($17,890 plus $2,325.70 HST). The siding work was not performed, nor was the material delivered to the property.

[29] Therefore the lien claim was wilfully exaggerated by the cost of goods not delivered and the lien is reduced by $58,763.80.

[30] The Honsbergers paid an initial deposit of $10,000 to HBH. No credit was given for that amount against bills rendered, and therefore the Honsbergers seek a reduction in the lien amount by $10,000. The position of HBH was that the deposit had been reallocated to the house renovation contract that did not proceed, and therefore should not be used to reduce the amount of the lien. That dispute represents a genuine issue for trial and should not reduce the amount of the lien in the meantime.

[31] Part of the lien amount relates to project management fees which were contractually agreed to be a 20 percent "builder mark-up" on services and expenses otherwise incurred, as per the Project Management Agreement dated July 8, 2021. The management fees on the six invoices dated between September 12, 2022, and January 18, 2023, including a reduction of 50 percent on the September 12, 2022 invoice) were $76,422.72 plus HST of $9,934.95.

[32] In the s. 40 examination, HBH confirmed that the management fee of 20 percent is office overhead. For example, it includes the office staff calling suppliers and trades, scheduling work, and dealing with deficiencies. In the cross-examination on Darren Hendricks' responding affidavit for this motion filed on behalf of HBH, the management fee was stated to include work at the office including selecting trades, reviewing labour requirements, calling suppliers to secure quotes, preparing progress bills, and generally including overhead and administration.

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[6] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc.*, 2023 ONSC 2301 at para. 27.
[7] See for example *Viceroy Homes* at para. 30 (h), and *Heyday Homes Ltd. v. Gunraj*, 2004 CanLII 34324 (ON SC) at para. 284

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[33] In *Selectra Inc. v. The Corporation of the Town of Penetanguishene*[8], this court held that:

> General overhead expenses cannot be considered a supply of materials or services upon or in respect of an improvement as those services were "not so directly related to the construction of the improvement" to fall within the contractual chain on construction projects that are given a financial preference and a security interest by the Act. As such, general overhead expenses are not lienable (see *Rudco Insulation Ltd. v. Toronto Sanitary Inc*., 1998 CanLII 5529 (ON CA), [1998] O.J. No. 4105 ONCA).

[34] That conclusion was endorsed in the more recent decision of this court in *Chesney et al. v. Malamis*[9].

[35] The court in *Selectra* at para. 23 observed that costs incurred offsite such as administrative overhead and onsite office overhead costs are not lienable, and went on to list examples including:

> (f) Supplying construction management services including *inter alia* reviewing tenders, selection of trades, supervision of site superintendents and coordination of trades;
>
> (j) Communications with suppliers to solicit quotes and coordination of the responses;
>
> (l) Preparation of progress billing statements [citation omitted].

Those examples coincide with work represented by the management fee of 20 percent in this case.

[36] Based on the evidence of HBH to which I have referred, and the caselaw on the point, I am satisfied that there is no genuine issue requiring a trial on the question of whether the 20 percent management fee was lienable. It was not. The lien claim was wilfully exaggerated by that amount.

[37] Therefore, the lien claim is reduced by a further $76,422.72 plus HST of $9,934.95.

[38] The Honsbergers request a reduction in the lien amount by $4,731.74 plus $615.01 HST relating to the logged hours of Greg Jonah. Mr. Jonah was an operations manager for HBH who functioned as project manager.

[39] Mr. Jonah was described by HBH as manager of all its construction projects, and the site supervisors reported to him. He typically did not do hands-on construction work and

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[8] 2016 ONSC 2293 at para 24
[9] 2023 ONSC 1742 at para. 36

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worked half of the time in the HBH office. Hours billed as part of the lien were specifically logged to the Honsberger project.

[40] In *Marino v. Bay-Walsh Ltd.*,[10] , Zelinski J. observed:

> Project managers whose responsibilities, whether onsite or off contributed "in a direct and essential way to the construction of the improvement" are persons who have supplied services "to the improvement" whether or not the services are supervisory, managerial, physical or manual.

[41] Those comments were supported in *Selectra* where cases with similar results were canvassed.

[42] I accept that in this case, there should be no reduction of the lien by the logged hours of Greg Jonah, since as project manager, his activities when logged to the Honsberger project can reasonably be considered as a supply of services.

[43] The Honsbergers submit that the lien should be reduced by the amount of $2,580 plus $335.40 HST which relates to services provided by Bosma Excavating on the basis that the work was remedial, repairing damage done to the property for which HBH was responsible and for which there was to be no charge. HBH disputes that characterization of the work by Bosma, stating that it was new work incurred for utility services including extending a trench and supplying lateral piping.

[44] Given that conflict of evidence, it represents a genuine issue requiring a trial, and there will be no reduction in the lien amount relating to the Bosma services.

Conclusion:

[45] For the foregoing reasons:

a. The request that the lien be vacated is dismissed, and

b. The amount of the lien is reduced by $145,121.47.

[46] This decision is without prejudice to the Honsbergers seeking a further reduction in the value of the lien at trial.

Costs:

[47] The award of costs, including the scale of costs, is a matter for further submissions, if required, following the receipt of this motion decision.

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[10] [2002] O.J. No. 2211 ONSC at para. 111

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[48] The parties are encouraged to resolve the issue of costs of the motion between themselves. If they are unable to do so, they may submit their Bills of Costs and make written submissions, consisting of not more than three pages in length according to the following timetable:

- The Honsbergers are to serve their Bill of Costs and submissions by April 25, 2025.
- HBH is to serve its Bill of Costs and submissions by May 9, 2025.
- The Honsbergers are to serve their reply submissions, if any, by May 16, 2025.
- All submissions are to be filed with the court with a copy to St.Catharines.SCJJA@ontario.ca and uploaded to Case Center by May 20, 2025.

[49] If no submissions are received by the court by May 20, 2025, or any agreed extension, the matter of costs will be deemed to have been settled.

Reid J.

Date: April 10, 2025

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