CITATION: Bank-Strox Renovation Inc. v. Lugano View Limited, 2024 ONSC1901
COURT FILE NO.: CV-17-573823
DATE: April 2, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bank-Strox Renovation Inc. v. Lugano View Limited;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Dylan Dilks for Lugano View Limited;
Nicole Abergil for Bank-Strox Renovation Inc.

HEARD: March 25, 2024.

ENDORSEMENT

[1] Lugano View Limited ("Lugano") seeks an order lifting a consent stay order and an order under old *Construction Act,* R.S.O. 1990, c. C.30 ("*CA*") section 47 discharging the subject claim for lien and dismissing this action, all on account of delay.

Background

[2] The following facts are not in dispute. Lugano, the owner, retained Bank-Strox Renovation Inc. (Bank-Strox) as general contractor on a balcony renovation project. Lugano terminated the contract on January 2, 2017. On March 13, 2017 Bank-Strox registered a claim for lien in the amount of $279,309.38. Lugano paid an amount to Bank-Strox.

[3] Bank-Strox commenced this lien action on April 21, 2017 claiming a lien of $238,095.96. This action was not defended as by November, 2017 the parties agreed to arbitrate the issues with Stephen Morrison. Other than the agreement to arbitrate, no other terms of the arbitration were agreed upon.

[4] On September 6, 2017, a subcontractor to Bank-Strox, Royalguard Industries Incorporated ("Royalguard"), registered a claim for lien. On October 6, 2017, Royalguard commenced its own lien action naming Bank-Strox and Lugano as defendants. In its pleading, Lugano alleged that Bank-Strox had abandoned the contract, delayed, caused deficiencies and not paid trades. The Royalguard claim was resolved in February, 2018 with a payment by Lugano to Royalguard that decreased the Bank-Strox claim accordingly. In the end, the Bank-Strox claim for lien was reduced to $215,621.27.

[5] The arbitration did not take place. There were several email exchanges with Mr. Morrison from November, 2017 to February, 2019. During this time, the parties also discussed settlement. On February 11, 2019 Bank-Strox delivered a Statement of Position concerning the arbitration. There

was no responding statement from Lugano. On February 13, 2019, Mr. Morrison circulated a retainer agreement for the arbitration. It was not executed by either side.

[6] Due to the looming end of the two-year period under *CA* section 37, the parties obtained a consent order from Master Robinson (as he then was) on April 1, 2019 deeming the order an order for trial for the purpose of section 37. The order also stayed this action to facilitate the arbitration and authorized the parties to move for further directions from the court and to lift the stay.

[7] Bank-Strox then hired a new lawyer, Roy Wise. It began working on an arbitration brief and an affidavit of documents. In December, 2019 Mr. Wise suggested to Michael Swartz, counsel for Lugano, through emails that a less expensive arbitrator be chosen or that the matter be returned to the court. Mr. Swartz rejected both suggestions reaffirming Lugano's desire to arbitrate with Mr. Morrison. There was then no activity in 2020 and 2021.

[8] In February, 2022, Bank-Strox hired its present lawyers. However, again, nothing happened. On May 30, 2023 Mr. Swartz sent a letter advising that Lugano had decided to bring this motion. He enclosed a notice of motion for a date to be determined. Again, nothing happened. On September 20, 2024 Mr. Dilks emailed threatening that Lugano would schedule the motion if Bank-Strox did not advise by September 29, 2022 that it intended to move forward with the arbitration. That deadline passed without a response. On October 27, 2023 Ms. Abergil emailed advising that the principal of Bank-Strox had been ill and unable to give instructions in 2022. She advised that Bank-Strox would resist the motion. Lugano scheduled this motion in November, 2023.

Delay

[9] It is undisputed that the old *CA* applies. There was some discussion as to whether leave under *CA* section 67(2) is necessary. This is the subsection that requires consent of the court for interlocutory steps not provided for in the *CA*. In my view, no such leave is required. Concerning the stay motion, the consent stay order expressly authorized a motion to lift the stay. The remainder of the motion is brought under *CA* section 47 which does not require leave.

[10] Concerning the delay issue, there is no issue as to a delay in the lien action as the parties suspended that action in November, 2017 when they agreed to arbitrate and then later obtained a consent stay of that action to facilitate the arbitration. Understandably, nothing has happened in the lien action as a result. The question concerns the delay in the arbitration. Does it justify lifting the stay and dismissing the action for delay?

[11] Having considered the evidence and the submissions of the parties, I have decided to dismiss the motion. Here are my reasons.

[12] The cornerstone of any analysis of motions for dismissal for delay is the principle that the plaintiff bears the primary responsibility for the progress of an action and suffers the consequences of a dilatory regard for the pace of the litigation; see *M. Fuda Contracting Inc. v. 1291609 Ontario Ltd.*, 2018 ONSC 4663 (CanLII) at paragraph 31 and *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386 (CanLII) at paragraph 48. That principle makes sense for civil actions where the plaintiff is the one who commences the action and forces the defendant to incur the expense and inconvenience of a response.

[13] In my view, this principle does not apply to an arbitration like the one in this case, where both parties together agree to arbitrate the case after the commencement of a civil action to perfect a lien. In these circumstances, the rules of contract interpretation apply and require that both parties fulfil their contract obligations to each other in good faith and take the steps necessary to arbitrate the case. That means that the responsibility at minimum rests on both parties to progress the arbitration and that both parties suffer the consequences of failing to do so.

[14] But I go a step further. In a case, like this one, where the defendant fails even to plead, either in the lien action or in the arbitration, the defendant bears a greater responsibility to move the arbitration forward. The defendant is the sole party that is aware of all of the issues that will drive the case and has not disclosed this knowledge and information on the record. The agreement to arbitrate and the eventual consent stay order act as a shield protecting the defendant from the adverse consequences of not pleading, namely against being noted in default and all the consequences in a lien action that flow from that. That means, in my view, that the defendant bears the greater responsibility to move the arbitration forward to allow for pleadings and the other necessary interlocutory steps.

[15] I take inspiration from the decision of Associate Justice Robinson in *Nova Concrete Inc. v. 2035211 Ontario Inc.*, 2022 ONSC 2391 (CanLII). In this case, the plaintiff lien claimant had the defendant owner, a corporation, noted in default for failing to plead. Four years after the service of the statement of claim and the default and after an amalgamation, the owner brought a motion to declare the lien expired and to dismiss the action for delay. The delay motion proceeded under *CA* section 47. His Honour denied that motion. He stated in paragraph 40 that while delay may be a "proper ground" for a motion under section 47, the determination of that issue should be "contextual, not static." He described in paragraph 42 that the defendant's failure to plead was a failure "of the most basic obligation in litigation." He found in paragraph 43 that the owner's failure to plead for four years without an explanation rendered delay an improper ground for a dismissal order in that case.

[16] Lugano is not disqualified from bringing a motion for a dismissal order under section 47 in this case on account of its failure to plead. This is due to the arbitration agreement in late 2017 before pleadings closed in the lien action. However, I find that Lugano's lack of pleading foisted on it the greater responsibility to move the arbitration forward and to explain the delay.

[17] I note incidentally that the Lugano pleading in the Royalguard action suggests that Lugano probably has in mind a huge set-off and counterclaim against Bank-Strox concerning deficiency correction costs, and contract abandonment and delay damages. Once pleaded, the Lugano pleading could therefore effectively make it the *de facto* "plaintiff" with the largest claim, thereby putting an onus on it to explain the delay even under the traditional analysis of motions in civil actions for dismissal for delay.

[18] Has Lugano explained its delay? No, it has not. The evidence shows that Lugano did virtually nothing to advance the arbitration once the arbitration agreement was in place in late 2017. It consented to the stay order. It followed up with counsel for the plaintiff as to the status of the arbitration in May, 2023 and September, 2023. It then brought this motion. It did not bring a motion under the *Arbitration Act*, 1991, SO 1991, c 17 ("*AA*"), section 10. While the arbitration agreement in this case may be no more than an oral one, that makes it no less a binding arbitration

agreement; see *AA* section 5(3). *AA* section 10 is the section which specifies that, where there is an arbitration agreement with no process to appoint an arbitrator or where there is an arbitration agreement with such a process that has not be activated, either party to an arbitration agreement can move before the court to get the court to appoint the arbitrator. Neither party disputed that section 10 would apply to this case. Once the arbitrator is appointed, the arbitrator has the power under the *AA* to force the parties to plead and to deal with a delay in the arbitration; see *AA* section 27. Indeed, in the stay order itself, Master Robinson (as he then was) invited the parties to apply to the court for directions. Neither party took these steps, and neither party explained why that was not done.

[19] I note as well that, while there was evidence that Bank-Strox delivered a pleading in the arbitration and started preparing an affidavit of documents, Lugano did neither and had no explanation for not doing so other than to say that there was no arbitration agreement in place in this regard. This made an application under *AA* section 10 all the more imperative, and that did not happen. Lugano's profound inaction is, in my view, fatal to this motion.

[20] Lugano argued that it has been prejudiced by the Bank-Strox delay. There is authority for the proposition that the mere existence of the claim for lien is prejudicial to the owner; see *Southwestern Sales Corporation Limited v. Spurr Bros. Ltd.*, 2016 ONCA 590 (CanLII) at paragraph 16. However, there was no evidence of actual prejudice on account of this delay, such as the interruption of a refinancing or a sale. In that event, Lugano no doubt would have been able to move under *CA* section 44 to vacate the claim for lien with security. It has not done so to date. In any event, if there was actual prejudice, Lugano is, for the reasons already discussed, in part if not primarily to blame for it.

[21] I note as well that there is no evidence that a fair trial hearing in this case cannot not take place despite the delay. There was no evidence of a loss of key witnesses or key documents. While memories may have faded, this case appears to be typical construction case where the documents will guide the process.

[22] I have to comment on the position of Bank-Strox. While I am dismissing the Lugano motion, I am also not impressed with the conduct of Bank-Strox. It discussed settlement with Lugano up to the time of the stay order. Then, with new counsel, it appears to have gotten "cold feet" about the arbitration with Mr. Morrison due to the expense. Lugano nevertheless insisted on staying with Mr. Morrison. Bank-Strox then did nothing and did nothing for over two years. In the motion material, Bank-Strox's principal, Martin Bankov, in his affidavit tried to explain this delay on the Covid-19 pandemic and its adverse effects on Bank-Strox's business. There was no corroboration for this bald statement. The pandemic might explain a delay of a few months, but not one of over two years.

[23] Then there was the hiring of Bank-Strox's present counsel in February, 2022; but then there was again no activity by Bank-Strox for 1.5 years. Mr. Bankov tried to explain this delay on his medical condition; but there was no medical corroboration for that position. This was indeed a poor response to this motion. While I will not change my decision due to this poor response, it will have an affect on my costs decision.

Conclusion

[24] For these reasons, I dismiss the motion in its entirety.

[25] As for costs, both sides filed costs outlines. Lugano filed a costs outline that shows $24,887.47 in partial indemnity costs, $37,294.19 in substantial indemnity costs and $41,429.77 in actual costs. Bank-Strox filed a costs outline that shows $8,681.45 in partial indemnity costs, $12,298.73 in substantial indemnity costs and $14,469.09 in actual costs.

[26] I believe I have enough to make an order as to costs of this motion. It is highly unlikely that meaningful offers were served given the issues.

[27] I am not prepared to award either party costs in this motion. Lugano was not successful and, therefore, should not be awarded costs. Bank-Strox's response to this motion was poor as described above, and, therefore, does not deserve costs. Therefore, I award no costs of this motion. Both parties must absorb their own costs.

DATE: April 2, 2024

ASSOCIATE JUSTICE C. WIEBE