CITATION: Lumberjacks Tree Service v. 407 East Construction General Partnership, 2024 ONSC 1744
OSHAWA COURT FILE NOS.: CV-13-86368 and CV-14-87460
DATE: 20240325

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, C-30

OSHAWA COURT FILE NO.: CV-13-86368-00

BETWEEN:	)	
	)	
LUMBERJACKS TREE SERVICE	)	Robert Harason, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
407 EAST CONSTRUCTION GENERAL PARTNERSHIP, SNC-LAVALIN CONSTRUCTION (ONTARIO) INC., FERROVIAL-AGROMAN CANADA INC., JUSTIN DEMERCHANT, ROBERT HEMS also known as ROB HEMS, GABRIELMEDEL, SNC-LAVALIN GROUP INC., SNC-LAVALIN INC., FERROVIAL, S.A., FERROVIAL CORPORACION, S.A., FERROVIAL-AGROMAN, S.A., CINTRA CONCESIONES DE INFRAESTRUCTURAS DE TRANSPORTE, S.A., 407 EAST DEVELOPMENT GROUP GENERAL PARTNERSHIP, SLI 407 EAST DEVELOPMENT GROUP INC., CINTRA 407 EAST DEVELOPMENT GROUP INC., OM&R 407 EAST DEVELOPMENT GROUP GENERAL PARTNERSHIP, PROTRANS 407 EAST DEVELOPMENT GROUP INC., CINTRA OM&R 407 EAST DEVELOPMENT GROUP INC., HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, HER MAJESTY THE QUEEN	)	

IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF INFRASTRUCTURE, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION, THE CORPORATION THE CITY OF PICKERING, THE CORPORATION OF THE CITY OF OSHAWA, THE CORPORATION OF THE TOWN OF WHITBY and THE REGIONAL MUNICIPALITY OF DURHAM Defendants	)	Dan Boan and David Major for the Defendants, 407 East Construction General Partnership, SNC-Lavalin Construction (Ontario) Inc. and Ferrovial-Argoman Canada Inc. (These defendants)

AND:

ONTARIO

SUPERIOR COURT OF JUSTICE

OSHAWA COURT FILE NO.: CV-14-87460

BETWEEN: LUMBERJACKS TREE SERVICE Plaintiff **– and –** 407 EAST CONSTRUCTION GENERAL PARTNERSHIP, SNC-LAVALIN CONSTRUCTION (ONTARIO) INC., FERROVIAL-AGROMAN CANADA INC., JUSTIN DEMERCHANT, ROBERT HEMS also known as ROB HEMS, GABRIEL MEDEL, 407 EAST DEVELOPMENT GROUP GENERAL PARTNERSHIP, SLI 407 EAST DEVELOPMENT GROUP INC., CINTRA 407 EAST DEVELOPMENT GROUP	)	Robert Harason, for the Plaintiff

INC., HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF INFRASTRUCTURE, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION Defendants	)	Dan Boan and David Major for the Defendants, 407 East Construction General Partnership, SNC - Construction (Ontario) Inc. and Ferrovial-Argoman Canada Inc. (These defendants) **Heard: March 20 and 21, 2024**

ENDORSEMENT RE: MOTION TO STRIKE AFFIDAVTS OF JUSTIN DeMERCHANT DATED MARCH 22, 2023.

SUTHERLAND J.:

Introduction

[1] Th plaintiff brings an oral motion during the trial to strike portions of the Affidavit of Justin DeMerchant dated March 22, 2023, (DeMerchant Affidavit) along with exhibits attached to that affidavit.

[2] The plaintiff seeks to strike paragraphs 212 to 326, 407, 327, 331, 335, 336-339 and 339-349. Plus, documents relating to the counterclaim of These defendants and the diary Notes of Mr. DeMerchant dated February 20, 2013 and May 28, 2013.[1]

[3] The plaintiff provided an objection summary of the paragraphs in issue which is found at Exhibit "L" and the motion concerns items 3-9 on that list.

[4] For the reasons that follow, a portion of the DeMerchant Affidavit are struck, the photographs are not admitted and the remainder of the motion is dismissed.

Trial Affidavits and Procedure

[1] These notes are found at B-1-7067 and B-1-9959 on Caselines.

[5] Before I embark on my reasons, I wish to deal with Trial affidavits. Trial affidavits are fundamentally different than affidavits used on motions and applications. Trial affidavits, as is the case here, are used as replacement to oral testimony given in direct examination. Thus, the laws of evidence must be strictly complied with, such as the law of hearsay.[2] Trial affidavits should be drafted with the purpose that the affidavits are testimony given at a trial. Further, with Trial affidavits the witness/deponent of the affidavit is entitled to give oral evidence before the affidavit is presented to be offered as an exhibit at the trial. It is therefore my view that when there is an objection to the contents of a Trail affidavit, those objections should be brought when the witness, the deponent of the affidavit, has given their evidence under direct examination on any deletions, corrections or additions to the affidavit and before the affidavit is considered to be made an exhibit at the trial for the truth of the contents as testimony at the trial. I say this for two main reasons. First, the witness may not be tendered as a witness at the trial. So, until the witness is tendered the affidavit is not relevant. Second, the witness may alter, correct, or elaborate on the contents of the affidavit before the affidavit is offered as an exhibit at the trial. This evidence before the affidavit is offered as an exhibit may be relevant for the Court to consider when deciding any objections to the contents and any exhibits attached to the affidavit.

[6] As in this trial, pretrial management Orders were given that permitted counsel presenting the witness at trial to make any corrections, or elaborations before the affidavit of the witness was offered as an exhibit at the trial, before the commencement of cross examination. This opportunity was limited to 15 minutes of testimony. The plaintiff decided to have its motion determined before the witness/deponent, Mr. DeMerchant was presented. As will be seen in these reasons, given the substance of the plaintiff's objections concerning business records, which are not the same substance of These defendants' objections to the affidavit of Amanda MacDonald, the plaintiff's objections became problematic.

[7] This Court has made these general observations to illustrate concerns of the use of Trial affidavits as direct examination testimony and a necessary process concerning objections to the content and any exhibits attached to Trial affidavits.

Position of the Parties

[8] The plaintiff has four main grounds that it objects to the paragraphs and documents. These are that these paragraphs and documents are:

(a) Hearsay.

(b) not admissible as business records or pursuant to the principled exception to the hearsay rule.

(c) are opinion and legal conclusion.

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[2] *Schindler Elevator Corporation v. Walsh Construction Company of Canada* 2020 ONSC 433 at paras. 5 and 6.

(d) are prior consistent statements and is oath helping.

(e) violate Rules 31.07(c) of the *Rules of Civil Procedure*[3] (the Rules) and cannot be admitted with leave pursuant to Rule 53.08.

[9] These defendants do not agree that all the paragraphs objected to are hearsay and further contend that the documents objected to can be admitted as business records pursuant to section 35 of the *Ontario Evidence Act*[4], or under the common law as business records, or under the principled exception to the hearsay rule. These defendants argue that the diary notes of Mr. DeMerchant are not prior consistent statements and are not oath helping. These defendants do not agree that some of the undertakings were not answered in 60 days. On refusals and under advertisements, These defendants contend that undertakings were answered as ordered by this Court by December 27, 2022.[5] On any answers not provided within the 60 days period, These defendants argue that leave should be granted given that they were provided before or on December 27, 2022, at least 14 months before trial and the plaintiff conducted further examinations on the answers given on January 3, 2023. The plaintiff has suffered no prejudice.

[10] I intend to deal with each mode of objection separately.

Business Records

[11] Section 35 of thew *Evidence Act* reads:

> **Business records**
>
> **Definitions**
>
> **35** (1) In this section,
>
> "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; ("entreprise")
>
> "record" includes any information that is recorded or stored by means of any device. ("document") R.S.O. 1990, c. E.23, s. 35 (1).
>
> **Where business records admissible**
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record

[3] RRO 1990, Reg. 94.
[4] RSO 1990 c. E.23.
[5] See the Endorsements dated November 2, 2022 and November 29, 2022.

at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. R.S.O. 1990, c. E.23, s. 35 (2).

Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. R.S.O. 1990, c. E.23, s. 35 (3).

Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility. R.S.O. 1990, c. E.23, s. 35 (4).

Previous rules as to admissibility and privileged documents not affected

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. R.S.O. 1990, c. E.23, s. 35 (5).

[12] There is no dispute that Notice was given to the plaintiff by These defendants from Notices of Intention dated March 20, 2023 and February 5, 2024.

[13] It is not disputed that the purpose of this section is "to make admissible records which, because they were made pursuant to a regular business duty, are presumed to be reliable."[6] The section "is to afford a more workable rule of evidence in the proof of routine business records, s. 36 [now s. 35] is cast in very broad terms so as to encompass practically every type of writing utilized in connection with any business."[7] Once a record falls within the broad meaning of s. 35 and the criteria set out therein, the record should be admitted. The Court has no discretion.[8]

[14] *Setak* further indicates that:

> Reverting then to the wording of s. 36 [now 35], once it is clear that the writings or records were made in the course of a business in the sense that

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[6] *Setak Computer Services Corp. v. Burroughs Business Machines Ltd*., [1977] 15 O.R. No. (2d) 570, [1977] CarswellOnt 626, (ON HCJ) as quoted in *K.K. v. M.M*. 2021 ONSC 3975 (SCJ) at para. 32. Also see *EllisDon Corp. v. Ontario Sheet Metal Workers' and Roofers Conference*, 2013 ONSC 5808 (Div.Ct) at para. 35.
[7] *Setak*, note 6.
[8] *Setak*, note 6.

> they related to the operation of a business as defined, as opposed to some purely private or personal activity, then the party intending to introduce in evidence the writings or records must satisfy two further criteria as preconditions to admissibility, namely, (1) that the writing or record was made in the usual and ordinary course of a particular business, and (2) that it was in the usual and ordinary course of business to make such a writing or record at the time of or within a reasonable time after the act, transaction, occurrence, or event to be established by the introduction of the writing or record.
>
> It is clear from the wording of s. 36 [now 35] that it is not necessary that the maker of the writings or records be called 1977 CanLII 1184 (ON SC) to personally identify the documents, although in this case Mr. Dinniwell and Mr. Croil were the authors of the minutes sought to be introduced. In our Courts, the usual procedure in proving business records is to call a person with personal knowledge of the business of the party producing the records and who also has personal knowledge of the circumstances surrounding the preparation of such records. Thus, the evidence of Mr. McDermott is sufficient to identify for this purpose the minutes of the meetings which I have already described.

[15] In *R. v. Felderhof* [9], Hryn J. reviewed the law on section 35 and concluded at para. 26 that the criteria of section 35 are through various requirements:

1. Record made on some regular basis, routinely, systematically,
2. of an act, transaction, occurrence or event,
3. and not of opinion, diagnosis, impression, history, summary or recommendation
4. made in the usual and ordinary course of business
5. if it was in the usual and ordinary course of such business to make such record,
6. pursuant to a business duty
7. at the time of such act or within a reasonable time
8. and where the record contains hearsay, both the maker and informant must be acting in the usual and ordinary course of business.

[9] 2005 ONCJ 406 (CanLII).

[16] These requirements of Hryn J., have been adopted and accepted in *Rizzuto v. Hamilton Wentworth Catholic District School Board*.[10]

[17] The plaintiff argues that the DeMerchant Affidavit does not indicate the system used to make the routine records or that the records contested are those made in the usual ordinary course of business. The DeMerchant Affidavit, the plaintiff contends is silent. Hence, there is no evidentiary basis for this Court to determine that the criteria for section 35 have been satisfied. The plaintiff also contends that the documents are reviews, summaries and updates that are not records made in the ordinary course of business that meet the criteria of section 35.

[18] These defendants argue that the plaintiff is mistaken, if the Court reviews the DeMerchant Affidavit, the documents in dispute and the business of These defendants, it is clear that the documents are made in the ordinary course of business. These defendants assert that they are not personal documents of Mr. DeMerchant or any other person and are routinely and systemically prepared since they are from documents used in These defendants' business of construction and were made solely for business purposes. In addition, These defendants point out that Mr. DeMerchant has not yet taken the stand and as such he has not made any elaborations, additions or corrections to his affidavit which he is permitted to do in the fifteen minutes allotted for his direct examination.

[19] From my review of the DeMerchant Affidavit, it appears that:

(a) Mr. DeMerchant is an experienced person in construction and has been a long-term employee with SNC Lavalin and its affiliates.

(b) Is well accustomed with the systems and procedures of SNC Lavalin.

(c) The 407 East project Phase 1 was just another construction project of many that he has been involved and was involved with Phase 2 of the 407 construction.

(d) He is experienced in general contract administration and procurement which includes responsibility of working with and documenting subcontractors and their work.

(e) He was very much involved with the subcontract of the plaintiff.

(f) He was acting as a senior employee of SNC Lavalin and as such had a business duty.

[20] The documents attached in the DeMerchant Affidavit from paragraphs 212-326 pertain to support for the costs incurred by These defendants to allegedly complete the work of the plaintiff and to remedy any deficiency work. These documents entail invoices, emails,

[10] 2023 ONSC 2101 at paras. 15 and 22.

acknowledgement of payment less construction lien holdback from the various subcontractors, work authorizations and photographs.

Analysis

[21] The problematic issue of Mr. DeMerchant not yet testifying becomes an issue. There is no explicit statement in the DeMerchant Affidavit that that sets out the procurement procedure and payment procedure of invoices by SNC. This deficiency may have been cured by the testimony of Mr. DeMerchant, but the plaintiff decided to have this motion heard before Mr. DeMerchant's testimony, even though numerous times this Court cautioned the plaintiff that Mr. DeMerchant has not yet taken the witness box.

[22] Nonetheless, from my review of the documents, it is clear to me that most of the documents attached to the paragraphs 212-326, are documents one would normally see in a construction business such as in the business of road work and project construction. That is, requests for work, authorization from work, change orders, invoices, descriptions of the work performed by the subcontractor, approval of work performed by the contractor work/time sheets and payment of the work by the contractor. In this case, obtaining acknowledgement of payment signed by the subcontractor is a document one would find in the ordinary business of construction work when subtractors and material suppliers are used.

[23] It appears to me that the documents in dispute are documents that one would expect to regularly find on a construction project and that the documents are not personal documents but are business documents.

[24] Moreover, the dates of the documents and signatures of approval are all made contemporary with the time of the work described therein. This leads the Court to conclude that the documents are contemporaneous to the dates the work described was performed and the documents are used on a regular and routine basis by These defendants and the subcontractors given the standard form of the documents attached to the DeMerchant Affidavit.

[25] Accordingly, I conclude that the documents disputed that are work contracts, invoices, timesheets, work authorizations, change orders, extra work requests, payment applications, work sheets, work rates, minutes of meetings and acknowledgement of payment(s) fall within the criteria and requirements of section 35 and that the documents are admissible as business records.[11] I am satisfied that the documents meet the factors to be admissible under section 35 and meet the circumstantial guarantees of reliability.

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[11] Other cases have qualified similar records as business records under section 35. *Ontario (Ministry of Finance) v. 1375923 Ontario Inc.*, 2019 ONCJ 547 found invoices, contracts, contract conditions, workorders, price records, labour reports, event sale summary reports, accounting records to be admissible. *Enbridge Pipelines Inc. v. Williams,* 2017 ONSC 1642 found daily inspection reports to be admissible under section 35.

[26] However, I do not accept that the numerous photographs are business records that are routinely used in the business of construction. Those documents are not admissible under section 35, in the circumstances of this case.[12]

[27] Given that I have determined that the documents stated fall within the criteria in section 35, I need not deal with the common law business records exception to the hearsay rule nor the principled exception to the hearsay rule.

Diary Notes

[28] The plaintiff contends that the two dated days of diary notes taken by Mr. DeMerchant are prior consistent statements that are not admissible.

[29] The diary notes are notes taken by Mr. DeMerchant in the ordinary course of the business, that is, recording what took place at meetings with the plaintiff and others that he was present.

[30] The plaintiff directs the Court to *Schluessel v. Margiotta*[13] for the proposition that notes taken are prior consistent statements and are hearsay and therefore inadmissible. In reviewing the decision the document in question, typed notes, were not produced in Mr. Margiotta's "original affidavit of records" but were disclosed after questioning occurred. The transcriber of the notes was not produced. Consequently, the Court had concerns on the reliability of the notes given that they were produced late, and that the transcriber of the typing was not produced to verify the notes typed were accurate.

[31] The Court in *Taylor v. Zents*[14], at paragraph 122 stated:

> The Supreme Court of Canada in *R. v. Marquard* [1993] 4 S.C.R. 223 has stated the more modern principle that, where the sole purpose of evidence is to bolster the complainant's credibility, the evidence will be excluded on the basis that it contravenes the rule against oath-helping. On the other hand, such evidence may be admitted where it relates to matters in issue other than credibility.

[32] Justice Casullo in *Taylor v. Zents* did not find that the testimony of lay witnesses to be oath-helping. She determined that in no way was their testimony for a "nefarious purpose to be corroboration of Mr. Taylor's evidence."

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[12] I do note that the plaintiff objected to all the documents but neither counsel made any specific reference or submission to the photographs.
[13] 2018 ABQB 615 (CanLII)
[14] 2024 ONSC 166

[33] *R. v. Wentworth*[15] states that the law is that prior consistent statements may not be used as confirmatory evidence unless the statements are relevant and probative by inferences and not through repetition indicates accuracy.

[34] In this situation, if the Court understands the plaintiff's submissions correctly, the diary notes are hearsay statements that are used to oath help Mr. DeMerchant's proposed testimony of what took place at the meetings as set out in his diary notes.

[35] I fail to see how the notes taken by Mr. DeMerchant on what took place at a meeting that he was present are prior consistent statements. The notes do not appear to be taken to challenge the credibility of the plaintiff's witnesses nor help the credibility of Mr. DeMerchant's anticipated testimony. The diary notes are not oath helping. The notes were notes taken by Mr. DeMerchant at or around the time of the meeting. I have no concern on the authenticity or reliability of the notes.

[36] For these reasons, I do not agree with the plaintiff that prohibition against prior consistent statements to affect credibility applies.

Rule 31.07 and 53.08

[37] The plaintiff submits that answers to undertakings and refusals did not comply with Rule 31.07 and as such the documents at issue on this motion, are not admissible.

[38] Rule 31.07 sets out the consequences for a party or person who undertakes to answer a question but fails to answer the question in 60 days of the response to provide the information. The failure to do so is that the party may not introduce at the trial the information not provided except with leave of the Court.

[39] Rule 53.08 indicates that Court may grant leave to admit the information excluded by Rule 31.07 if the Court is satisfied that there is a reasonable explanation for the failure and the granting of leave would not cause prejudice to the opposing party that could not be compensated for by costs or an adjournment. There is no issue for undue delay in the conduct of the trial given that the trial has commenced.

[40] First, I agree with These defendants that the documents and information provided that answered refusals and under advisements have not breached Rule 31.07. These defendants did not agree that they were obligated to answer the refusals or under advisements until the Court Order, which was made on consent. The Order was that the refusals and under advisements would be answered by December 27, 2022, and they were.

[41] The question then becomes if any undertakings were not answered within the 60-day period, are those answers and information are inadmissible.

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[15] 2023 ONSC 1165 at paras. 65-67

[42] The Court is in a bit of a quandary in that no evidence has been provided to indicate what specifically are the answers or information not provided within the 60-day period from undertakings given. These defendants did upload onto Caselines (document 138) a chart of answers provided to the plaintiff on December 27, 2022 and the email serving same. From review of the chart, the vast majority of the answers are for refusals and under advisements. There are answers to undertakings, but they appear to be corrections or updated answers to previous answers based on the underlining and the email from counsel that enclosed the chart. Thus, I cannot determine on the information before me what undertakings, if any, did not comply with the Rule, that is were not answered within 60 days of the agreement to provide the answer.

[43] Moreover, the Court is at a loss on the plaintiff's position given that the plaintiff conducted further examinations as requested by it and Ordered by the Court. This was all conducted more than a year before the trial. The plaintiff also served and filed reply affidavits based on the affidavits served and filed by These defendants which contained some of the very documents and answers that the plaintiff is now objecting.

[44] Also, the method of trial in these proceedings that direct examination was by affidavits, the purpose and effect of the Rule is not the same. The plaintiff is provided with the testimony of all witnesses of These defendants long before trial and in the case of this trial, replied in affidavit form.

[45] Consequently, the Court sees no prejudice whatsoever suffered by the plaintiff if any of the undertakings were not answered within the 60-day period, which, as previously stated, the Court has no evidence of.

[46] The Court is not persuaded by this objection of the plaintiff.

Hearsay, Opinion and Legal Conclusion

[47] The plaintiff objects to the paragraphs stated earlier on the basis of hearsay, opinion and legal conclusion.

[48] Briefly with opinion evidence, non experts may not give opinion evidence. To give opinion evidence the witness must comply with the requirements to do so under Rules or qualify as a participant expert. These defendants have made it clear that Mr. DeMerchant is not being offered as an expert. There is a practical fact that "the line between fact and opinion is not always clear."[16] Not all factual statements setting out personal observations with a conclusion is opinion evidence. The witness is in a much better position as personally being present to make observations to assist the Court.[17] In doing so, the witness is not necessarily providing opinion evidence but rather, I would say, a conclusionary statement based on their personal observations.

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[16] *Hollowcore v. Visocchi* 2014 ONSC 6802 (CanLII), at para. 184.
[17] Ibid. at paras. 185-186.

[49] The Court will deal with each group of the paragraphs.

212-326

[50] The plaintiff argues that paragraphs 213, 214, 221, 222, 223, 224, 225, 226, 228, and 237 are objectionable for they are hearsay. Paragraphs 214, and 237 are opinion. Paragraph 227 requires an expert for which Mr. DeMerchant is not offered as an expert.

[51] As a general statement, I find that when Mr. DeMerchant uses "407 ECGP", he is referring to his employer. It is not that his employer is providing hearsay evidence to him. It is that when he is using "407 ECGP" he is referring to actions or procedures conducted by or for his employer rather than action or procedures conducted by him.

[52] Such as paragraph 213 second sentence, the employer is being referred to for it is the employer that uses the rates generally, not him, but that the rates listed were not provided for anything done with the plaintiff. I do not find this is hearsay.

[53] 214: I do not find is hearsay that is inadmissible. It is used as a narrative on when his involvement commenced concerning replacement contractors. Mr. Dean is scheduled to be a witness at this trial. I also do not find that there is an opinion being offered. It is a statement of Mr. Dean that triggered Mr. DeMerchant's involvement is finding replacement contractors.

[54] 220: I do not find that there is hearsay. It just says a fact that Mr. Serre attended and walked around the site with Mr. Dean.

[55] 221: The paragraph quotes a phrase used in the email attached as an exhibit. The exhibit has been admitted as a business record concerning cost for completion or deficiencies.

[56] 222: I do not find any hearsay. The quote attached has been admitted as a business record.

[57] 223: I do not find hearsay. The quote has been admitted as a business record.

[58] 224: I do not find any hearsay. The quote has been admitted as a business record. The chart just reproduces what was set out in the quote.

[59] 225: I do not find any hearsay. It is a statement of what his employer determined and the fact that 407 East retained 12 subcontractors.

[60] 226: I do not find any hearsay. The quote and email have been admitted as a business record.

[61] 227: The plaintiff argues that this paragraph and chart should be struck because an expert report is required. I do not accept this argument. The chart is a list summary of the amount. These defendants contend they are costs incurred due to the conduct of the plaintiff. This is not opinion evidence. It is a statement from their personal involvement. An expert

opinion is not required to list the amounts indicating what These defendants allege are costs incurred.

[62] 228: The plaintiff contends the paragraph is hearsay in that Mr. DeMerchant does not have personal knowledge. I do not find that it is hearsay and am dubious on the basis of the statement of the plaintiff that it is not personal knowledge. The plaintiff can challenge Mr. DeMerchant's knowledge in cross examination. I do not accept that this paragraph be struck.

[63] 237: I do not find any hearsay. The invoices have been admitted as a business record. The chart is a list of the invoices provided.

327

[64] The plaintiff argues that his paragraph should be struck for it offers a legal conclusion. I disagree. The paragraph is a statement of Mr. DeMerchant. I do not read it as a legal conclusion or an attempt to fetter the Court's decision on the terms of the Contract of the plaintiff.

331

[65] The plaintiff argues that the first sentence is opinion, and the second sentence is hearsay. I agree with the plaintiff that the first sentence speculates a conclusion of the plaintiff. This sentenced is struck. The second sentence, I do not find is hearsay.

336-339

[66] The plaintiff argues that the paragraphs should be struck for the claims of These defendants have not been pleaded. Specifically, the plaintiff argues that the only pleading in which these claims can be made by These defendants is their Amended Amended Fresh as Amended Statement of Defence and Counterclaim and not their Reply to the Defence to Counterclaim of the 407 East Defendants.

[67] It is from these pleadings that These defendants have plead that the plaintiff is not entitled to interest and that These defendants are seeking damages for having to bond an improper claim for lien registered by the plaintiff and for an excessive amount liened - registered and non-registered - of the plaintiff.

[68] The plaintiff did not bring a motion to strike any of the pleadings of the These defendants. Further, the plaintiff has not provided any legal support for its contention that the only pleading that can be used by These defendants is the Amended Amended Fresh as Amended Statement of Defence and Counterclaim.

[69] I do not accept the argument of the plaintiff.

[70] These defendants have plead in their Amended Amended Fresh as Amended Statement of Defence and Counterclaim sections 35 and 86 of the *Construction Act* and have plead that

the plaintiff is not entitled to interest based on "special circumstances." In addition, These defendants elaborated on some of the "special circumstances" in their Reply to the Defence to Counterclaim. It are the pleadings as a whole, in my view, the Court should take into consideration and not just one pleading, the Amended Amended Fresh as Amended Statement of Defence and Counterclaim.

[71] The allegations in both pleadings were not challenged by the plaintiff by way of a motion to strike. There is no evidence provided that a demand for particulars on these two pleadings was served and not responded to by These defendants. The challenge of the pleading at this stage I find is late and further, the pleadings do indicate issues concerning the plaintiff's claim for interest and These defendants claim damages for an excessive lien amount and the registration of the lien on title. These are live issues in this proceeding.

[72] I am not persuaded that these paragraphs be struck.

339-349

[73] The paragraphs deal with the plaintiff's claim for interest. The paragraphs put forth evidence that is relevant on the plaintiff's claim for interest in the full amount being claimed in the two proceedings. The interest claims and opposition to those claims is unique and not a usual dispute on interest.

[74] I find that the paragraphs are relevant to the issue of interest. Whether it is recoverable based on the terms of the Contract with the plaintiff and the conduct of the plaintiff, as alleged, is yet to be determined. But the paragraphs are relevant and admissible to that issue.

[75] The Court indicated to the parties that the issue of costs and interest will be determined after a decision is rendered. Having said this, I agree that the paragraphs are relevant to the plaintiff's claim for interest and am not persuaded that these paragraphs should be struck for not being relevant and not having any factual foundation in the pleadings for the allegations.

Disposition

[76] I make the following Order:

(a) The first sentence of paragraph 331 is struck and except for the photographs found at pages 258-262, 883-895, 898-899, 993-997, 1009, 1011-1017, 1169-1170, 1353, 1354, 1782 of the DeMerchant Affidavit the other documents are admissible under section 35 of the *Evidence Act* and the remainder of the plaintiff's motion is dismissed.

(b) Costs are reserved to the end of the trial.

Justice P.W. Sutherland

Released: March 25, 2024

CITATION: Lumberjacks Tree Service v. 407 East Construction General Partnership, 2024 ONSC 1744
OSHAWA COURT FILE NOS.: CV-13-86368 and CV-14-87460-00

LUMBERJACKS TREE SERVICE

Plaintiff

– and –

407 EAST CONSTRUCTION GENERAL PARTNERSHIP, SNC-LAVALIN CONSTRUCTION (ONTARIO) INC., FERROVIAL-AGROMAN CANADA INC., JUSTIN DEMERCHANT, ROBERT HEMS also known as ROB HEMS, GABRIEL MEDEL, SNC-LAVALIN GROUP INC., SNC-LAVALIN INC., FERROVIAL, S.A., FERROVIAL CORPORACION, S.A., FERROVIAL-AGROMAN, S.A., CINTRA CONCESIONES DE INFRAESTRUCTURAS DE TRANSPORTE, S.A., 407 EAST DEVELOPMENT GROUP GENERAL PARTNERSHIP, SLI 407 EAST DEVELOPMENT GROUP INC., CINTRA 407 EAST DEVELOPMENT GROUP INC., OM&R 407 EAST

DEVELOPMENT GROUP GENERAL PARTNERSHIP, PROTRANS 407 EAST DEVELOPMENT GROUP INC., CINTRA OM&R 407 EAST DEVELOPMENT GROUP INC., HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF INFRASTRUCTURE, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION, THE CORPORATION THE CITY OF PICKERING, THE CORPORATION OF THE CITY OF OSHAWA, THE CORPORATION OF THE TOWN OF WHITBY and THE REGIONAL MUNICIPALITY OF DURHAM

Defendants

ENDORSEMENT RE: MOTION TO STRIKE AFFIDAVTS OF JUSTIN DeMERCHANT DATED MARCH 22, 2023.

Justice P. W. Sutherland

Released: March 25, 2024