CITATION: Allcon Concrete & Haulage Ltd. v. Klein-Rose Homes Inc. 2016 ONSC 1325
NEWMARKET COURT FILE NO.: CV-15-124012-00
DATE: 20160223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Allcon Concrete & Haulage Ltd.	)	
Lien Claimant/Plaintiff	)	Rocco A. Ruso and Colin Holland, for the Lien Claimant/Plaintiff
– and –	)	
Klein-Rose Homes Inc.	)	
Owner/Defendant	)	William Friedman and Patrick Bakos, for the Owner/Defendant
	)	**HEARD:** January 21, 2016

DECISION ON SECTION 47 MOTION

SUTHERLAND J.:

Introduction

[1] This is a motion brought by Klein-Rose Homes Inc. (the "Owner" or "Klein-Rose") for the following relief pursuant to s. 47 of the Construction Lien Act[1] ("*CLA*"):

(a) Discharge of the construction lien of the lien claimant, Allcon Concrete & Haulage Ltd. (the "Lien Claimant" or "Allcon") registered as Instrument Number YR2352004 against the lands and premises of the owner more particularly described in PINs, 03349-0659, 203349-0683, 03349-0685, 03349-0686, 03349-0688 203349-0700 and 03349-0702.

(b) In the alternative, an order that the registration of the claim for lien as registered as Instrument Number YR2352004 be vacated against the lands and premises owned by the Owner on such terms as the honourable court deems just.

[1] R.S.O. 1990, c. C. 30

(c) Costs of a motion on a full indemnity basis.

[2] Allcon, disputes the relief claimed on the motion brought by Klein-Rose on the basis that there are several issues requiring a trial and that the court cannot clearly find that the lien of Allcon should be discharged or the fix the amount of monies that should be paid into court to vacate the claim for lien and certificate of action for less than the amount of the lien plus 25% for costs.

Background

[3] Allcon registered a general claim for lien on September 4, 2015 as against the lands and premises owned by the Owner, as Instrument Number YR2352004 . The subject lands are forty-eight lots (individually and collectively the "Lots") in the subdivision developed in Kleinberg, Ontario.

[4] Allcon alleges in its claim for lien that it provided services and materials, to Berkley Homes (Kleinberg) Inc. ("Berkley") for the period October 14, 2014 to July 23, 2015. Allcon alleges that it provided materials and labour for excavation, earth works and haulage. Allcon alleges that the contract prize was $822,023.54 and that the amount outstanding for which the Lien Claimant liened is $605,629.67.

[5] Allcon entered into a verbal contract with Berkley in or about October 2014 for excavation, earth works and haulage services for the project adjacent to the intersection of Hwy 27 and Nashville Road in Vaughan, Ontario (the "Project"). This contract was on a time and material basis for services to be provided, as directed by Berkley

[6] Allcon became involved in doing work at the Project for Berkley when the original earth works contractor, Sterling Earthworks Inc. ("Sterling"), became bankrupt while performing its contract with Berkley. This subsequent abandonment of the Project by Sterling resulted in fill and other excavation materials throughout the premises being left, and Berkley retaining the services of Allcon to complete the work.

[7] The Lien Claimant deposes in an affidavit of its officer and director, Robert Strmota, that the work performed by the Lien Claimant for Berkley included:

(a) Providing and grading fill to develop a berm between Hwy 27 and Lots 1 to 15 and 42 to 44;

(b) Excavating fill to create a ditch at the toe of the slope of the berm at the property lines of Lots 1 to 15 and 14 to 24 which included excavation of material and creation of the ditch between the property lot lines of the said lots;

(c) Removing fill and other excavation materials from the northwest Lots 40 and 41, and distributing the removed fill southward along the western-most lots to the southern-most lots being Lots 16 to 18;

(d) Removing tree stumps, boulders and concrete abandoned by Sterling on Lots 31 and 32;

(e) Removing excess topsoil left by Sterling on Lots 33 to 37;

(f) Removing Armour Stone retaining wall materials abandoned by Sterling on the front of Lots 15 and 16;

(g) Repairing the silt fence that ran across the property lines of Lots 18 to 22.

[8] Klein-Rose became the registered owner of the service lots through the purchase of the subject lands by Rose Terra Investments Inc. from Berkley. An agreement of purchase and sale dated November 8, 2011 (the "Purchase Agreement"), sets out the terms of the purchase of the service lots from Berkley.

[9] Klein-Rose became the registered owner of the lots on August 15, 2014 pursuant to transfer deed registered as Instrument Number YR2172107.

[10] The Purchase Agreement for the purchase of the lots from by Berkley included terms whereby Berkley would continue to be responsible to perform further work affecting the lots.

[11] Paragraph 3.2 of the Purchase Agreement entitled "Vendor's Landscaping, Grading and Other Services", namely subparagraphs (a) and (e), read as follows:

> (a) Except as otherwise provided in this Agreement, to construct if and as required by the Municipality or Region under the Subdivision Agreement, **all berming, screening, retaining walls, landscaping and upscale entry feature** required to be installed pursuant to the provisions of the Subdivision Agreement affecting the lots/units or the Plan of Subdivision, and to complete and install all trees and other improvements required by the Subdivision Agreement to be constructed or located on the boulevards at the front, rear or flankage of the lots/units herein. **Other than boulevard** grading, topsoiling and sodding to be done by the **Purchaser**. Notwithstanding anything containing herein all grading, topsoiling and sodding of the buffer block including the boulevard to the curb line shall be the responsibility of the Vendor. Notwithstanding anything contained herein the Purchaser will be responsible for the planting costs as set out in **Schedule "G-Terms"**.
>
> ...
>
> (e) To **rough grade** the untreed portion of the lots/units to an average depth below approved finished grade levels by the Closing Date as set out in **Schedule "G-Terms"** annexed hereto.

[12] During the work performed by Allcon, it took instructions from the project engineer, EMC Group Limited ("EMC"). EMC acted as the multi-disciplined consultant and as the payment certifier for Berkley. EMC, along with Berkley, directed Allcon on what work to be performed, pursuant to Allcon's contract with Berkley

[13] Allcon issued thirty-five invoices to Berkley with respect to materials and services provided before these invoices went to Berkley and then to EMC as the payment certifier. Eleven of these thirty-five invoices were recommended for full payment by EMC. Five of the thirty-five invoices EMC certified and recommended partial payment. EMC refused to certify three invoices on the basis that the amount of stone delivered to the subject lands was in dispute. EMC refused or neglected to certify the remaining sixteen invoices.

[14] Berkley made payments for work done by Allcon in the amount of $286,743.26 from March to June 2015. Berkley has made no payments to Allcon after June 2015. The amount claimed as owing is $605,629.67. To date, $111,832.91 of the amount owing has been certified as complete yet these monies have not been paid.

[15] The Owner purchased the service lots from Berkley for the sum of $26,374,800. The purchase price does not distinguish between value of the land and costs to complete the work that may be required to satisfy the Region, Municipality or Klein-Rose.

[16] Berkley did not take part in this motion. No evidence has been provided on whether Berkley is or is not an active company and why it did not take part in this motion.

[17] The claim for lien by the Lien Claimant was vacated from title on two separate orders. On September 15, 2015, Sosna J. vacated the lien of Allcon from eleven of the Lots upon payment to court in the sum of $125,000 which represented $100,000 plus $25,000 as security for costs.

[18] On November 10, 2015, Glass J. ordered further vacation of the lien of the Lien Claimant upon paying into court $108,000 being comprised of $86,000 for the claim for lien together with costs in the amount of $21,600. The claim for lien was vacated from six Lots.

[19] Therefore, of the forty-one Lots liened, seventeen Lots have been vacated which indicates, that twenty-four Lots still have a claim for lien of the Lien Claimant registered against title.

Legal Principles

Section 47 of the CLA and Summary Judgment, Rule 20 of the Rules of Civil Procedure

[20] Section 47 of the *CLA* provides the court with wide discretion to determine whether a claim for lien should be discharged or the registration of the claim for lien or certificate of action or both, be vacated and to dismiss an action. Section 47(1) of the *CLA* reads:

General power to discharge lien

> 47. (1) Upon motion, the court may,
>
> (a) order the discharge of a lien;
>
> (b) order that the registration of,
>
> (i) a claim for lien, or
>
> (ii) a certificate of action,
>
> or both, be vacated;
>
> (c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or
>
> (d) dismiss an action,
>
> upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.

[21] Both the Lien Claimant and the Owner argue that the powers under s. 47 of the *CLA* are akin to summary judgment. The Owner argues that since this motion is akin to summary judgment the decision of the Supreme Court of Canada in *Hyrniak v. Mauldin*[2] and, with the Rule 20 of the *Rules of Civil Procedure*, the court has the ability to weigh evidence, evaluate the credibility of a deponent and draw reasonable inference from the evidence.

[22] Allcon submits that the court does not have that ability under s. 47 of the *CLA* to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence.

[23] I disagree with both submissions.

[24] A motion brought under s. 47 of the *CLA* may be "akin to a summary judgment motion" but is not a summary judgment motion. Section 47 deals with the discharge of a claim for lien, vacation of a claim for lien or certificate of action or both, and a dismissal of the action. The court's discretion is very wide. To utilize the summary judgment rules in the *Rules of Civil Procedure* to s. 47 of the *CLA* would, in my view, limit the wide discretion the court has with respect to discharging liens, vacating registrations and dismissal of actions. I agree with the statements of Master Sandler in *DCL Management Ltd. v. Zenith Fitness Inc.*[3]:

> [8] This argument of the lien claimant's counsel is simply wrong. Firstly, this motion is <u>not</u> a motion under Rule 20 but

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[2] 2014 SCC 7, [2014] 1 S.C.R. 87
[3] 2010 ONSC 5915 (Master) (CanLII), 97 CLR (3d) 159

> rather a motion under s. 47. The statutory test for exercising the court's power under s. 47 is "upon any proper ground". The authorities above-cited show that while a motion under s. 47 is "akin to a motion for summary judgment" and, like a motion under Rule 20, the moving party must show that there is "no genuine issue for trial" it is still not a motion under Rule 20. It is my opinion that the new limits on the exercise of the new powers under Rule 20 or, for that matter, the old limit under Rule 20.04 (4) where there is a question of law, which only a judge can decide, cannot limit the powers of the court (judge or master) given the court by the statutory provision of s. 47. S. 67 (1) expressly provides that the Rules of Civil Procedure shall apply unless inconsistent with any statutory provision. New Rule 20 cannot limit the broad power of the court given to it under s. 47 since the current wording of new Rule 20 is inconsistent with the broad general power given to the court under s. 47.
>
> [9] It must be remembered that s. 47 only allows the court to discharge a lien (and s. 45 only allows the court to declare a lien expired) so these are provisions that can only be used to attack a lien claim. These sections cannot be used by a lien claimant to seek summary judgment declaring a lien to be valid and to seek the enforcement of the lien. If a lien claimant wants to do this, then it must use Rule 20. And if such a motion is brought before a construction lien master, then all the provisions of the new Rule 20 would apply including the limits on the new powers which empower only a judge to weigh evidence, assess credibility and draw inferences. ...

[25] Accordingly, it is my opinion that the methodology to determine whether there is an "issue requiring a trial" as the Rule 20 dictates does not apply per se to a s. 47 *CLA* motion. A judge or master (having the matter referred to the master pursuant to a judgment for reference) need not utilize the summary judgment methodology in determining whether a lien should be discharged, registration vacated or action dismissed. The Judge or master need to carefully examine the evidence before it to determine "upon any proper ground" whether he or she should exercise the wide discretion provided in s. 47.

[26] I do find, however, that from the *Hyrniak*[4] decision, the Supreme Court of Canada has set out a brave new world when it comes to civil actions, which includes construction lien actions. There has been a cultural shift with respect to civil actions. As Karakatsanis J. stated:

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[4] supra, footnote 2

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[27] I find these words of Karakatsanis J. extremely compelling in construction lien actions. The *CLA* does mandate in s. 67(1) that "the procedure in a construction lien action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question." A "fair and just adjudication" that allows the Judge or Master to make the necessary findings of fact and apply those findings of facts to the law.

[28] It is therefore my opinion that under s. 47 of the *CLA*, the court has a wide discretion and in that discretion the court is able to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence the court deems appropriate in determining "upon any proper ground" whether a claim for lien should be discharged, a claim for lien or certificate of action vacated or an action dismissed. Under s. 47, the court is not limited or obligated to utilize the methodology of reasoning mandated for summary judgment motions.

Should the Claim for Lien of the Lien Claimant be Discharged?

[29] The Owner submits that the claim for lien should be discharged because:

(a) Allcon did not supply lienable services or materials to the lands owned by the Owner, being the lands in which Allcon registered its claim for lien.

(b) If the court determines that Allcon did supply services and materials to the lands owned by the Owner, the services provided to those lands have been paid in full and thus, there are no monies outstanding and no right to register a claim for lien.

(c) That if the court finds Allcon's claim for lien should not be discharged then the Owner's liability to Allcon is simply construction statutory holdback pursuant to s. 22 of the *CLA* and given that the total contract amount between Berkley and

Allcon is $822,023.54 the maximum amount of the lien that can be registered by Allcon against the lands owned by the Owner is $82,202.35.

Did Allcon Supply Services and/or Materials on the Lands Owned by Klein-Rose in order to have a lien upon those lands?

[30] Section 14(1) of the *CLA* deals with the creation of the lien. Section 14(1) states:

> **Creation of lien**
>
> 14(1) 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.

[31] Section 1(1) of the *CLA* defines "improvement" , "contract" and "contractor" as follows:

> "improvements" means, in respect of any land,
>
> (a) any alteration, addition or repair to the land,
>
> (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
>
> (c) the complete or partial demolition or removal of any building, structure or works on the land; ("améliorations")
>
> "contract" means the contact between the owner and the contractor, and includes any amendment to that contract.
>
> "contractor" means a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement.

[32] The *CLA* defines "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; ("propriétaire")

[33] The *CLA* defines "premises" and "supply of services" as follows:

"premises" includes,

(a) the improvement,

(b) all materials supplied to the improvement, and

(c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made; ("local")

"Supply of services" means any work done or service performed upon or in respect of an improvement and includes,

(a) The rental of equipment with an operator, and

(b) Where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specifications that in itself enhances the value of the owner's interest in the land, and a corresponding expression has a corresponding meaning.

[34] In reviewing the *CLA*'s definitions of "contractor" and "subcontractor", it is clear that Klein-Rose is neither. There is no direct contract between Klein-Rose and Allcon. This is agreed upon and admitted by both parties. Therefore, in order for Allcon to have the ability to have a lien against the lands owned by Klein-Rose, Klein-Rose must be an owner under the *CLA* and Berkley a contractor.

[35] It is trite to say that the *CLA* is remedial legislation. It is also trite to say that, in order for Allcon to have the remedial benefits of the provisions of the *CLA* Allcon must be a lien claimant. The law is clear that a determination of whether or not Allcon is a lien claimant is to be strictly construed. Once it is determined that Allcon is a lien claimant, then the remedial provisions of the *CLA* are liberally construed.[5]

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[5] *George Wimpey Canada Ltd. v. Peelton Hills Ltd. et al*, 1982 CarswellOnt. 166 (ONCA); 35 OR (2d) 787; 132 DLR (3d) 732

Is Allcon a Lien Claimant Upon the Lands Owned by Klein-Rose?

Position of Klein-Rose

[36] It is the position of Klein-Rose that Allcon is not a lien claimant in that the claim for lien of Allcon is improperly preserved and perfected against the lands owned by Klein-Rose in that Allcon did not supply services or materials to an improvement on the land owned by Klein-Rose.

[37] It is the position of Klein-Rose that:

(a) The contract for the supply of services and materials was with Berkley and not Klein-Rose;

(b) Allcon's work was on lands which was adjacent to the lands owned by Klein-Rose. These lands were owned by the Corporation of the City of Vaughan, Region of York, and Roberta Jean Kesten. These lands are the lands known as the "block lands" where Allcon provided services and materials to perform excavation and to perform certain ditch and berm work. In any work that was performed by Allcon on the lands owned by Klein-Rose, being excavation and removal of soil and debris were contained in invoices numbers 1373 and 1380, which have been paid in full.

(c) The amount liened by Allcon is exaggerated

[38] Accordingly, it is the position of Klein-Rose that no lien was created by Allcon upon the lands in which Klein-Rose is the registered owner.

Position of the Lien Claimant, Allcon

[39] Allcon takes the position that it is a lien claimant and it supplied materials and services not only upon Lots owned by Klein-Rose but on the block lands which resulted in an improvement and benefit to the lands owned by Klein-Rose. Specifically, Allcon states that it performed services and provided materials to Berkley by:

(a) Providing and grading fill to develop the berm on the block lands being lands between Hwy 27 and Lots 1 to 15 and 42 to 44.

(b) Excavating fill to create a ditch at the toe of a slope of the berm at the lot lines of Lots 1 to 15 and 42 to 44.

(c) Removing fill and other excavation materials from Lots 16, 18, 40 and 41.

(d) Removing tree stumps, boulders and concrete on Lots 31 and 32.

(e) Removing excess topsoil left on Lots 33 to 37.

(f) Removing Armour Stone retaining wall building materials on the front of Lots 15 and 16.

(g) Repair silt fence across the property lines of Lots 18 to 22.

[40] Allcon also states that the work it performed was not only directly on the Lots owned by Klein-Rose but also on the block lands for Berkley pursuant to its contract with Berkley. Allcon submits that the services and materials provided to Berkley created an improvement to the lands owned by Klein-Rose. Furthermore, without the work performed by Allcon for Berkley, Klein-Rose could not perform its work of building homes on the Lots.

[41] Allcon also submits that pursuant to the provisions of the Purchase Agreement, Berkley was responsible to continue to do work not only around and up to the lands owned by Klein-Rose but also on the lands owned by Klein-Rose, including removal of soil and debris, to allow for rough grading.

[42] Allcon also submits that Klein-Rose knew that further work was to be done specifically on its lands and around its lands for the improvement of the lands of Klein-Rose. Klein-Rose consented and agreed, pursuant to the terms of the Purchase Agreement, that Berkley and its subcontractors can enter the lands owned by Klein-Rose to complete its contract obligations for which Berkley, as vendor, was responsible to perform.

Analysis

[43] The question for the court to determine is whether or not Allcon provided an "improvement" to the lands owned by Klein-Rose. If the court finds that an improvement has been made or a determination on the basis of the evidence provided on this motion a determination cannot be made, then the court cannot grant the relief requested by Klein-Rose.

[44] Further, if the court determines that there was an "improvement" to the lands owned by Klein-Rose, then Klein-Rose is an owner pursuant to s. 1(1) of the *CLA*. Under s. 1(1) the definition of "owner" includes any person having an interest in the premises on whose "behalf" or "privity or consent" or "for whose direct benefit" an improvement is made to the lands.

[45] Klein-Rose relies heavily upon the Ontario Court of Appeal decision of *George Wimpey*[6]. *George Wimpey* is a decision under the old *Mechanics' Lien Act*, R.S.O. 1980, c. 261. It flows from a decision form the Divisional Court which flowed from a decision from the High Court of Justice after a trial. Briefly, the facts of *George Wimpey* are that the lien claimant entered into a contract with a subdivision developer to construct various roads and sidewalks and install underground services. At the time the plaintiff performed work on the road allowances, the land was owned by the developer. These lands became a

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[6] Supra, footnote 6

public street and highway owned by the City of Brampton by the time the work actually commenced. Five months after the contract between the plaintiff and the developer, the developer sold the property and took a mortgage back to secure the purchase price. Thorson J.A., at page 9 of the decision, stated:

> In all of these cases, however, the work done was work which was directed to, or done to advance, the work project that was being carried out on the very work site which was sought to be charged with the lien. We have not been directed to any case in which the words have been applied so as to authorize a lien on property other that that on which the work project itself was being carried out, on the ground that the other property in fact benefitted from the work and should therefor carry the burden of the lien.

[46] The Ontario Divisional Court in the decision of *Benny Haulage Ltd. v. Carosi Construction Ltd.*[7], followed the Court of Appeal decision in *Wimpey* in allowing the appeal of the judgment of Perras J. in discharging the claim for lien of the plaintiff and cancelling the letter of credit in the amount of $99,000. The Divisional Court disagreed with the finding of Perras J. that the work performed by the plaintiff "off-site" did not physically contribute in a direct and essential way to the construction and improvement on site was therefore not a supply of services in respect of an improvement as defined in s. 1(1) of the *CLA*.

[47] In the decision of *Con-Drain Co. (1983) Ltd. v. 846539 Ontario Ltd.*[8], Cameron J. dealt with a motion to dismiss the plaintiff's action on the ground that there was no general issue for trial. The action of the plaintiff was that of breach of trust pursuant to the *CLA*. The action dealt with the advancement of funds by the bank to the developer. In this case, the plaintiff argued that the services provided on the municipal road allowance constituted an "improvement" to the lots in the subdivision which increased the selling prices of the lots and the proceeds received from the bank. In the Con-Drain case, there was no evidence that the plaintiffs provided any work to the lands in question or were permitted or acknowledged to do any work on behalf of the developer.

[48] Cameron J. stated at para. 70:

> Firstly, while having some sympathy for the plaintiff's claims, I do not see how the plaintiff's work on the road allowances falls within the definition of an "improvement" of the lots under s.1(1) of the *CLA*. The definition is exhaustive. It requires an alteration to "to the land or a construction or installation on "the land". The most the plaintiff can say is that the work enhanced the value of the lots.

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[7] [1998] O.J. No. 6563

[8] (1997), 35 C.L.R. (2d) 230 (Ont. Gen. Div.), aff'd. [1998] O.J. No. 5041 (Ont. C.A.)

See also *George Wimpey Kennedy Ltd. v. Peelton Hills*, (1982) 35 O.R. 787 (C.A.) decided under the *Mechanics' Lien Act*.

[49] The Ontario Court of Appeal in the decision of *Rudco Insulation Ltd. v. Toronto Sanitary Inc.*[9], also reviewed the Ontario Court of Appeal decision in *George Wimpey*. The Court in *Rudco* summarized the holding in *George Wimpey* as follows:

> … The court held that a contractor who performed work on a public street could not assert a lien claim against adjoining land benefited by the work. The work was not done "in respect of" the adjoining land. Thorson J.A. examined the history of the legislation and noted that the words "in respect of" were introduced into the legislation solely for the purpose of remedying the historical problem that a lien could only be obtained if work had been done upon the work site itself.

[50] In the circumstances of this case, Allcon had a contract with Berkley to perform work on a time and material basis which included work on the Lots owned by Klein-Rose and on the block lands adjacent to Klein-Rose Lots. Allcon did perform work on the Klein-Rose Lots. Therefore, the work for which Allcon was contracted by Berkley to perform was not limited to the block lands. The scope of the project for which Allcon was retained to perform services for Berkley included the Klein-Rose Lots and the block lands.

[51] Klein-Rose agreed to and contracted with Berkley that the services and materials to be provided by Allcon were to also be on the lots owned by Klein-Rose. The Purchase Agreement made it clear that Klein-Rose knew, agreed and consented to the obligation put forth upon Berkley to comply with the terms of the subdivision agreement, the Region or the Municipality, which included having the lots ready for rough grading and rough grading of the lots in which Klein-Rose was the registered owner and the retaining walls, screening, ditch, berm and silt fence.

[52] It seems to me that the work performed by the Lien Claimant falls within the statement of Thorson J.A. in *George Wimpey* that "the work done was work which was directed to or done to advance, the work project that was being carried out on the F very work site which was sought to be charged with the lien."

[53] Accordingly, on the evidence provided to me on this motion, I disagree with the submissions of Klein-Rose that the work performed by Allcon could not be an improvement to the lands in which Klein-Rose was the registered owner.

[54] Klein-Rose also makes the submission that if the court finds that if there was an improvement to the Lots that the work performed by the Lien Claimant on the lots is limited to two invoices, being invoices 1373 and 1380. Given that those invoices have been paid, Klein-Rose submits that there is no money owing.

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[9] [1998] O.J. No. 4105

[55] I disagree with this submission of Klein-Rose.

[56] In looking at the services performed by the Lien Claimant, one must look at the contract of the Lien Claimant. The contract of the Lien Claimant was for time and material on the lands instructed by Berkley or its agent, EMC. There was no specific written contract. The time and material of the contract with Berkley is set out in the invoices supplied by the Lien Claimant which includes work done specifically on the Lots of Klein-Rose and on the block lands. There was no challenge to the ability or not of Allcon to have registered a general lien pursuant to section 20 of the *CLA*. Given the lien of Allcon is a general lien, it is not for this court on a motion under s. 47 of the *CLA* to individually look at every invoice and pick which invoices have been paid and not paid on which lots, pursuant to the terms of the contract with Berkley. The court is to look at the contract in its totality and not specifically pick invoices for specific work on specific lots unless the terms of the contract between Berkley and Allcon mandate such.

[57] Thus, on the material provided to this Court on this motion, I cannot find that Klein-Rose is not an owner pursuant to the *CLA*.[10]

[58] Accordingly, it is only in the cases, as Justice McEwen stated in *Kamali Design Home Inc. v. Bondarenko*, that are "patently demonstrable"[11] that the court should exercise its discretion under s. 47 of the *CLA* to discharge a lien claimant's claim for lien and vacate any certificate of action or dismiss any action. I do not find, in the circumstances of this case, that this is a case where I should exercise my discretion and discharge the claim for lien of Allcon and vacate its certificate of action. Consequently, this portion of the relief claimed by Klein-Rose in its notice of motion, I decline to give.

Vacation of Allcon's Claim for Lien

[59] Klein-Rose is requesting an order fixing the amount for which Klein-Rose required to vacate the claim for lien of Allcon. Klein-Rose's position is that as an owner, it is only responsible to the statutory holdback of 10% of the value of the services and materials provided by Allcon.

[60] Section 44(2) of the *CLA* states:

> ***On payment in of reasonable amount***
>
> (2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

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[10] Also see : *Roni Excavating Ltd v. Sedona Development Group (LornePark) Inc.* 2015 ONSC 389 (Ont. S.C.) and *Di Mario v. Schuster* 1994 Carswell Ont 938 (Ont. Gen.Div)

[11] *Supra*, para. 24

[61] It is the position of Klein-Rose that in the circumstances of this case, it is reasonable that Klein-Rose should only have to pay 10% of the invoiced amount of Allcon, namely, $82,023.54.

[62] Both Klein-Rose and Allcon agreed that the court has discretion under s. 44(2) of the *CLA* to determine an amount that the court determines reasonable. Section 44(5) provides the court with the authority to reduce the amount of monies that have been paid into court pursuant to section 44(1) or (2) of the *CLA*. Although Klein-Rose did not rely on section 44 of the CLA in its notice of motion, Allcon made no objection to the relief claimed by Klein-Rose to the reduction of amount paid into court or the court fixing the reasonable amount required to vacate the claim for lien of Allcon.

[63] It is Allcon's position that in the circumstances of this case, there is no reason for the court to exercise its discretion different than what s. 44(1) of the *CLA* mandates. Section 44(1) mandates that the full amount of the claim for lien plus 25% for costs for a total of $50,000 for costs be required to be posted in order to vacate a claim for lien of a lien claimant and any certificate of action.

[64] As mentioned previously, the developer Berkley was not a part of this motion. The standing of Berkley with respect to its financial viability has not been provided to the court.

[65] The concerns the court has with respect to the submissions of Klein-Rose are several.

[66] First, the holdback obligation of Klein-Rose is with its contract with Berkley. In that contract, the value of the services and materials to be provided was not specified. The court can only assume that that value is included within the purchase price.

[67] Further, if the submission of Klein-Rose is adopted, any owner can bring a motion to the court to vacate a lien claimant's claim for lien and any certificate of action by arguing that as an owner they are only responsible for the statutory holdback of the contractor, even if the contractor may be financially viable. To accede to this submission of Klein-Rose, in the court's opinion, would undermine the provisions and purposes of the *CLA*. The security for which the *CLA* provides a lien claimant would be minimized, in all circumstances, to the owner vacating the claim for lien of the lien claimant and any certificate of action by posting simply 10% of the value of the contracted services and materials between the contractor and the subcontractor.

[68] Klein-Rose also submits that the claim for lien of Allcon is exaggerated. This submission of Klein-Rose is based on the court making a finding that the extent of the claim for lien are the two invoices, 1373 and 1380, or that the liability of the claim for lien is limited to the statutory holdback. I do not accept either submission.

[69] The services and materials supplied by Allcon are based on the contract between Berkley and Allcon and not only on the two invoices that have been paid pursuant to that contract. The specifics of the work and price for the work required by the contract between Allcon and Berkley have not been provided in the evidence on this motion. Further, the value of

the work that Berkley was obligated to complete for Klein-Rose has not been provided in the evidence.

[70] It is still the obligation of the court under s. 44(2) of the *CLA* to determine an amount that is "reasonable in the circumstances to satisfy the lien". I have not been provided any compelling evidence and I am not convinced that I should exercise my discretion by fixing an amount that is different than the amount mandated by section 44(1) of the *CLA*. I agree with the statement of Gates J. in *1109140 Ontario Limited v. Sunningdale Gold Club Ltd.*[12], at para. 11:

> In reaching this decision I am persuaded by the decision of Gauthier J. of the Ontario Superior Court of Justice in the Graham Mining Case and that to obtain an order under s.44 (2) of the Construction Lien Act the amount to be paid into court in satisfaction of the claim must be reasonable in the circumstances and is therefore not limited to the amount of the statutory holdback. Further, as provided by s.14 (1) of the Act, the person who supplies services or materials has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

[71] Therefore, I do not find that it is reasonable in the circumstances to fix an amount different than what is set out in section 44(1) of the *CLA* and thus, I decline to exercise my discretion under section 44(2) of the *CLA*.

Disposition

[72] For reasons given above, the motion brought by Klein-Rose is dismissed.

Costs

[73] If the parties cannot agree on costs, Allcon to serve and file its submission of costs within fourteen days from the date of this decision, and Klein-Rose will have fourteen days thereafter to serve and file its submissions. The submissions are to be no more than three pages, double-spaced, exclusive of any bill of costs, case law, and offers to settle. Submissions are to be filed with the court. If no submissions for costs are received, an order will be made granting no costs.

Justice P.W. Sutherland

Released: February 23, 2016

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[12] 2004 CarswellOnt. 375 (OSCJ)