Court File No. CV-17-11760-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

-and-

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP.

Respondents

BRIEF OF AUTHORITIES
(Returnable on August 24th, 2017)

Date: August 23rd, 2017

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INDEX

2015 ONSC 389
Ontario Superior Court of Justice

Roni Excavating Ltd. v. Sedona Development Group (Lorne Park) Inc.

2015 CarswellOnt 826, 2015 ONSC 389, 249 A.C.W.S. (3d) 24, 43 C.L.R. (4th) 278

In the Matter of the Construction Lien Act, R.S.O. 1990, c. C. 30

Roni Excavating Limited, Plaintiff and Sedona Development Group (Lorne Park) Inc., Casaco Developments Inc. and Casimiro Holdings Inc., Defendants

Ricchetti J.

Heard: December 11, 12, 2014
Judgment: January 26, 2015
Docket: CV-12-3238-00

Counsel: R. Kennaley, for Plaintiff
C. Reed, for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Construction law

II Contracts
II.4 Payment of contractors and subcontractors
II.4.h Miscellaneous

Construction law

IV Construction and builders' liens
IV.3 Owner
IV.3.i Determining who is owner

Construction law

IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.i Entitlement to summary and default judgment
IV.10.i.v Miscellaneous

Construction law

IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.n Miscellaneous

Headnote

Construction law --- Construction and builders' liens — Owner — Determining who is owner

Defendants C acquired land for development — Project proceeded to point where pre-sales could be commenced — C agreed to sell land to defendant S — Agreement provided that S had positive obligations to complete development

and sell residential units — Agreement provided that C also had positive obligations including permitting financing on land — S continued with completion of project — Construction was substantially complete when S ran into financial difficulties — Construction liens were registered on title to land and litigation ensued — Money was paid into court — Issue was whether C were statutory owners as defined in Construction Lien Act — Parties agreed to bring motion for determination of issues by way of summary judgment — Motion granted — It was appropriate to grant summary judgment as it was determined that there was no genuine issue requiring trial for fair and just determination of issues — C had interest in land on which improvement took place — At minimum, improvement was made with C's knowledge and consent — C implicitly requested work done by lien claimants — C were "entrepreneur" in project based on clear and unambiguous terms of agreement and parties' actions taken in furtherance of agreement — C still had significant role in completion, construction and sale of project — C would benefit from improvement — Substance of agreement was not just mere financing of balance of purchase price — Substance of transaction was joint venture — There was implied request by C for provision of supplies and services for improvement on land — C were statutory owners — S was also statutory owner for improvement — Money in court were trust funds for contractors who contracted with defendants.

Construction law --- Contracts — Payment of contractors and subcontractors — Miscellaneous

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Construction law --- Construction and builders' liens — Practice on enforcement of lien — Entitlement to summary and default judgment — Miscellaneous

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Table of Authorities

Cases considered by *Ricchetti J.*:

Advanced Construction Techniques Ltd. v. OHL Construction Canada (2013), 2013 CarswellOnt 18456, 2013 ONSC 7505, 27 C.L.R. (4th) 213 (Ont. S.C.J.) — considered

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Bird Construction Co. v. Ownix Developments Ltd. (1984), 54 N.R. 109, (sub nom. *Phoenix Assurance Co. of Canada v. Bird Construction Ltd.*) 8 C.L.R. 242, 33 R.P.R. 221, [1984] 2 S.C.R. 199, 11 D.L.R. (4th) 1, 5 O.A.C. 109, 1984 CarswellOnt 592, 1984 CarswellOnt 805 (S.C.C.) — considered

Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn. (2006), 2006 CarswellOnt 5995, 55 C.L.R. (3d) 184 (Ont. Master) — referred to

Cipriani v. Hamilton (City) (1976), [1977] 1 S.C.R. 169, 1976 CarswellOnt 409, 1976 CarswellOnt 409F, 9 N.R. 83, (sub nom. *Hamilton (City) v. Cipriani*) 67 D.L.R. (3d) 1 (S.C.C.) — considered

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Exteriors By Design v. Traversy (2012), 18 C.L.R. (4th) 158, 2012 CarswellOnt 6727, 2012 ONSC 3164 (Ont. Master) — referred to

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Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc. (2009), 2009 CarswellOnt 1522, 2009 ONCA 256, 305 D.L.R. (4th) 577, 78 C.L.R. (3d) 1, 250 O.A.C. 232, 77 R.P.R. (4th) 159 (Ont. C.A.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — referred to

s. 1(1) "contractor" — considered

s. 1(1) "owner" — considered

s. 4 — referred to

s. 9 — considered

s. 67(1) — considered

s. 67(2) — considered

s. 67(3) — considered

s. 78(1) — considered

Mechanics' Lien Act, R.S.O. 1980, c. 261
s. 1(1)(f) "owner" — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20.04(2) — considered

R. 20.04(2)(b) — referred to

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

Words and phrases considered:

Entrepreneur

Two definitions of entrepreneur are as follows:

Merriam-Webster: "one who organizes, manages and assumes the risks of a business or enterprise"

Dictionary.com: "a person who organizes and manages any enterprise, especially a business, usually with considerable initiative and risk"

MOTION by parties for summary judgment.

***Ricchetti J.*:**

The Summary Judgment Motion

1 This is a summary judgment motion.

2 There are a number of agreements which need to be noted:

a) all lien claimants agreed to be bound by the decision on this motion;

b) all parties agreed leave should be granted under the *Construction Lien Act* for this motion to be heard;

c) all parties agreed that this matter can and should be heard by way of summary judgment motion on the affidavit evidence and cross examinations.

3 The primary issue is whether Casaco Developments Inc. and Casimiro Holdings Inc. ("Casaco/Casimiro") are statutory owners as defined in the *Construction Lien Act* for the improvement which forms the basis of the liens, namely the construction of the residential homes on the Lorne Park Project, as defined below:

a) If Casaco/Casimiro are statutory owners under the *Construction Lien Act*, s. 9 of the *Construction Lien Act* makes the proceeds of sale of the subject lands (presently in court) trust funds; or

b) If Casaco/Casimiro are not statutory owners under the *Construction Lien Act*, subject to holdback liability, Casaco/Casimiro would have priority to those funds in court for the unpaid purchase price.

4 The Lien Claimants are the trades who supplied materials or services to the construction of the Lorne Park Project as described below. The Lien Claimants submit that Casaco/Casimiro are statutory owners under the *Construction Lien Act*. As a result, the monies in court are trust funds for the "contractor", which they say are the Lien Claimants.

5 Casaco/Casimiro submit that they are not statutory owners under the *Construction Lien Act* as they made no "request" for the improvement being the construction of the residential homes in the Lorne Park Project. Casaco/Casimiro submit that the development work and the construction work are two different improvements for the Lorne Park Project. Casaco/Casimiro submit that the development improvement was complete by early 2009 and their sole interest, after 2010 during the construction, was to receive the balance of the purchase price under its agreement to sell the subject lands. Casaco/Casimiro submit that the entire benefit of the construction/sale of the residential homes was for Sedona. Casaco/Casimiro submit that, after 2010, Sedona was the sole equitable owner of all interest in the Lorne Park Project, except for the payment of the balance of the purchase price.

6 Casaco/Casimiro submit that, *if they are owners*, then Sedona is the contractor and the proceeds in court are trust funds for Sedona's benefit. Entitlement and priority to those trust funds would have to be subsequently determined.

7 Sedona has not defended these proceedings.

Background Facts

8 Claudio Posocco ("Posocco") is the principal of Sedona Development Group (Lorne Park) Inc. ("Sedona").

9 Jose Casimiro ("Casimiro") is the principal of Casaco/Casimiro.

10 Posocco and Casimiro have, in the past, cooperated in certain residential land projects.

11 In 2006, their first project, near Southdown and Lakeshore, Casimiro purchased the lands, Posocco and Casimiro developed the lands and they sold the lands prior to any residential construction. They divided the profits.

12 In 2006, their second project was the subject lands located at 1191 - 1203 Lorne Park Road ("Lands"). The Lands were purchased by Casimiro through Casaco/Casimiro. Posocco and Casimiro proceeded to develop these lands from 2006 until approximately 2009, eventually, into a nine townhome development (the "Lorne Park Project"). I will describe the Lorne Park Project in more detail below.

13 In 2008, Posocco and Casimiro purchased lands on Dixie Road, Mississauga. Through corporations, Posocco acquired title to the lands and Casimiro provided the financing by way of a mortgage. Posocco and Casimiro entered into a written joint venture agreement dated October 17, 2008. The joint venture proceeded to develop these lands. The subsequent construction of the residential homes would require both partners' agreement.

The Lorne Park Project

14 As set out above, the Lands were acquired in December 2006 by Casimiro through Casaco/Casimiro for approximately $1,225,000.

15 There is a disagreement between the Posocco evidence and the Casimiro evidence as to the initial intention for the Lands — to develop or develop and construct. For the reasons which will become evident, whatever the intention was, when the Lands were acquired in 2006, it is the roles of their respective companies after April 2010 that is relevant to and determinative of this motion.

16 From 2006 until approximately 2009, Casimiro funded the expenses (approximately $450,000) to develop the Lorne Park Project. This included costs for architects, planners, consultants and others for such things as legal expenses, architectural design, soil drilling and testing, geotechnical and environmental services, and planning reports.

17 By the end of 2008 or early 2009, the Lorne Park Project had proceeded to the point where pre-sales could be commenced.

18 Casimiro's evidence was that he didn't want to be involved in the construction phase of the Lorne Park Project and that by 2009 he was looking to sell the Lands to a builder while Posocco remained interested in proceeding with the construction of the residential homes.

19 Casimiro remained involved in the Lorne Park Project in 2009. Marketing and pre-sales of the nine residential townhomes was started by or through Sedona. Casimiro directly funded some of the marketing costs (approximately $100,000). After some point in time, Posocco started to fund the marketing costs. During this time, Posocco was also speaking with trades, construction financiers and making preliminary arrangements for construction of the residential units.

20 At least 4 and perhaps as many as 7 townhomes were pre-sold by the end of 2009.

21 During 2009, draft joint venture agreements were exchanged between Posocco and Casimiro but no agreement was concluded.

22 In April 2009, Casimiro advised Posocco he would sell to him the Lands for $2,350,000 ($1,000,000 on closing and $1,350,000 as a *2nd* mortgage at 12% with partial discharges available at $150,000 for each of the lots). No agreement materialized.

23 On December 3, 2009, Casimiro received an offer from a third party for the Lands for $2,500,000. The offer was not accepted by Casaco/Casimiro. It should be noted that this offer was entirely conditional on the purchaser being satisfied with the Lands and the development potential of the Lorne Park Project. In many ways, this offer was in essence an option by the purchaser. Casimiro submits that this offer is indicative of the fair market value of the Lands. I am not persuaded that Casaco/Casimiro have established that either the April 2009 offer to Posocco or the December 2009 offer is proof of the fair market value of the Lands at the time.

24 Finally, on April 19, 2010 Posocco and Casimiro, through their companies, entered into an Agreement of Purchase and Sale ("Agreement") for the Lands. It is the substance of this Agreement, the relationship between the parties created by this Agreement and their subsequent actions which are critical to and determinative of this summary judgment motion.

The Agreement

25 The relevant portions of the Agreement provide as follows:

> The Purchaser agrees to purchase from the Vendor, and the Vendor agrees to sell all and singular that certain parcel or tract of land and premises, situate, lying and being in the City of Mississauga being a parcel of land of approximately two (2) acres known municipally as 1195 - 1197 Lorne Park Road and 1203 Lorne Park Road (the "**Property**"), for the price and on the terms and conditions hereinafter set out:
>
> **Purchase Price**
>
> 1. The purchase price (the "**Purchase Price**") shall be the total of the following amounts:
>
> (a) Two Million Five Hundred Thousand ($2,500,000.00) Dollars; and
>
> (b) Interest at 12% per annum calculated monthly on One Million Five Hundred Thousand ($1,500,000.00) Dollars from the date that the Vendor receives One Million ($1,000,000.00) Dollars in partial payment of the Purchase Price in accordance with the terms of this agreement.
>
> **Purchaser's Obligations**

2. The Purchaser shall forthwith proceed with the development and subdivision of the Property into lots to permit the construction of five (5) bungalows and four (4) semi-detached residential units (the "**Residential Units**") and to sell and build such Residential Units and in this regard shall at its sole cost and expense:

(a) complete all re-zoning, site and development plan approvals and requirements and all other governmental requirements to permit the development of the property for the construction of the Residential Units;

(b) install and complete all services in accordance with the requirements of the municipality and other duly constituted authorities, being those services provided for in the all agreements entered into, or to be entered into between the Vendor and the Municipality, Region, or Public Utility (the "**Development Agreements**") which shall include but not be restricted to:

(i) storm and sanitary sewers to service each lot and to connect the same to municipal trunk sewers, and to provide lateral connections to the lot line in front of each building site;

(ii) water service to each lot and connected to the municipal service;

(iii) functioning gas service;

(iv) hydro service and as required by the Municipality, street signs and a lighting system along the road;

(v) paved roads in accordance with municipal requirements;

(vi) as required by the Municipality, gutters, curbs, public sidewalks and walkways;

(vii) all fencing, berming, landscaping and screening required to be installed pursuant to the provisions of the Development Agreements;

(viii) compliance with all requirements external to the lot line of the lots as may be required by the Development Agreements;

(ix) all those obligations and responsibilities normally assumed by a builder of similar dwellings to include without limitation:

(I) a replacement of topsoil, suppression of weeds, survey bars and water boxes and adjustment thereof;

(II) maintaining subdivision services, utility easements, other lots and access roadways, and access by utilities unimpeded, free of deposits of soil or mud, free of building materials, debris or other obstructions, including conformity with all municipal requirements with respect to preservation of trees, disposition of earth, protection of ravine slopes, planting of trees and landscaping;

(III) installation of or payment for all services and installations;

(IV) conformity with municipal by-laws and regulations and the provisions of the Development Agreements;

(V) trenching, back-filling, grading, sodding and planting;

(VI) preventing any occupancy of the land except in conformity with the Development Agreements and municipal requirements.

(c) the sale of the Residential Units and their construction in accordance with the sale requirements. The parties acknowledge that at the date herein seven (7) of the Residential Units have been sold.

Vendor's Obligations

3. The Vendor acknowledges that the development of the Property may require:

(a) The granting of rights of way and/or easements to utility providers for the construction and installation of utility services; and

(b) The execution of site plan/development agreements or agreements for the development and servicing of the Property;

and the Vendor agrees to without delay or cost provide such agreements, right of way and/or easements and conveyances as may be required to complete the development of the Property in accordance with the design of the Tenant.

4. The Vendor acknowledges that the Purchaser has received from the Laurentian Bank of Canada a letter of interest dated the 16 th day of March, 2010, a copy of which is attached hereto as Schedule "A" to provide financing for to the Purchaser for the purposes of completing the development of the Property and the construction of the Residential Units (the "**Laurentian Letter**").

5. The Vendor agrees that to provide the mortgage security referred to in the Laurentian Letter on the following terms:

. . . . .

6. The Vendor acknowledges that the sale of the Residential Units requires the Purchaser to provide mortgage security to secure a bond to The Guarantee Company of North America in the principal amount of One Hundred and Eighty ($180,000.00) Dollars and agrees to execute such mortgage security.

7. The Vendor shall not otherwise mortgage or encumber the Property.

Payment of Purchase Price

11. The Purchase Price shall be paid to the Vendor from proceeds of the sale of the Residential Units providing that the proceeds from sales, subject to maintaining an amount reasonably required for the completion of the development of the Property and the Residential Units which is not to exceed One Hundred Thousand ($100,000.00) Dollars shall be paid, applied and distributed as follows:

(a) Firstly, to the payment of all the Corporation's indebtedness which may be due and payable to third parties in accordance with the "Budget" attached as Schedule "B".

(b) Secondly, to the payment all indebtedness to the Laurentian Bank of Canada;

(c) Thirdly, payment to the Vendor of amount or amounts not to exceed One Million Five Hundred Thousand ($1,500,000.00) Dollars in partial payment of the Purchase Price;

(d) Fourthly payment to the Vendor of interest as provided for in paragraph 1(b) in payment of the Purchase Price.

Construction Liens

13. Without limiting the generality of the foregoing, and notwithstanding any notices which the Vendor may receive from the Purchaser's contractors or subcontractors, the Vendor shall not be liable, and no lien or other encumbrance shall attach to the Vendor's interest in the Property pursuant to the *Construction Lien Act* (Ontario) or any other Laws, in respect of materials supplied or work done by Purchaser or on behalf of the Purchaser and the Purchaser shall so notify or cause to be notified all its contractors and subcontractors.

14. The Purchaser shall promptly pay all of its contractors and suppliers and shall do any and all things necessary so as to minimize the possibility of a lien attaching to the Property and should any such lien be made or filed, the Purchaser shall discharge it within 5 days following the date of the registration of such lien, provided however that the Purchaser may contest the validity of any such lien and in so doing shall obtain an order of a court of competent jurisdiction discharging the lien from the title to the Property by payment into Court or by furnishing to the Vendor security satisfactory to the Vendor in nature and amount against all loss or damage

16. If and whenever an Event of Default occurs then:

(a) the Vendor has the immediate right of entry upon the Property;

(b) at the Vendor's option the Laurentian Letter and all further agreements resulting therefrom shall be automatically assigned to the Vendor;

(c) at the Vendor' option all contracts for the supply of labour and material shall automatically be assigned to the Vendor;

(d) at the Vendor's option all agreements for the purchase and sale of the Residential Units shall automatically be assigned to the Vendor; and

(e) the balance of the Purchase Price shall become due and payable.

26 The most significant terms of the Agreement, for the purpose of this motion, can be summarized as follows:

a) Casaco/Casimiro agreed to sell the Lands to Sedona for $2,500,000;

b) Sedona had a positive contractual obligation to proceed to complete the development and construction of the Lorne Park Project: "Sedona "**shall** forthwith proceed with the **development** and **subdivision** of the Property into lots... and **to sell and build** such Residential Units" at Sedona's expense (emphasis added);

c) Sedona had a positive contractual obligation to sell the "Residential Units and their construction in accordance with the sale requirements. The parties acknowledge that at the date herein seven (7) of the Residential Units have been sold";

d) Sedona had a positive contractual obligation to exercise "all those obligations and responsibilities normally assumed by a builder of similar dwellings";

e) Casaco/Casimiro had a positive contractual obligation to grant, at no cost, any easements, rights of way and agreements for the development and servicing of the Lands;

f) Casaco/Casimiro had a positive contractual obligation to permit financing on the Lands, for an existing financing Letter of Intent from the Laurentian Bank, "for the purposes of completing the development of the Property and the construction of the Residential Units". In essence this was construction financing and would become a first charge on the Lands. Casaco/Casimiro would not have personal liability for this construction financing but Laurentian Bank would have full recourse to Casaco/Casimiro's Lands as security in the event of default;

g) Casaco/Casimiro had a positive obligation to permit a further mortgage security on the Lands to The Guarantee Company of North America in the amount of $180,000. This appears to be the Tarion registration security by a builder for each new home to be sold at $20,000 per home;

h) $1,000,000 of the first advance from Laurentian Bank was to be paid to Casaco/Casimiro as part of the purchase price;

i) The balance of the purchase price was to be paid from the proceeds of sale of the residential units (after $100,000 to be reserved or set aside "for the completion of the development of the Property and the Residential Units") in the following order:

i. first, to pay Sedona's indebtedness to third parties in accordance with a "budget". Neither Casaco/Casimiro nor Sedona produced a copy of the "budget" but there was no dispute this was or would include contracts for the supply of materials and services which Sedona would enter into to complete the Lorne Park Project — the residential construction;

ii. secondly, to repay the construction financing to Laurentian Bank;

iii. thirdly, the balance of the purchase price principal; and

iv. fourthly, interest on the balance of the purchase price at 12%.

The order of payment meant that Casaco/Casimiro would only be paid after the costs to construct and the construction financing was paid from the proceeds of sale of the townhomes. In other words, the remaining $1,500,000 would only be paid to Casaco/Casimiro from any *net* profits, if any, upon completion of the Lorne Park Project;

j) Title would pass directly from Casaco/Casimiro to the third party home buyer.

k) Casaco/Casimiro were not to be responsible for construction liens. No one suggested that this provision was enforceable to deny the Lien Claimants rights under the *Construction Lien Act*. See s. 4 of the *Construction Lien Act*; and

l) In the event of default, Casaco/Casimiro had the right to take an assignment of the construction financing, the agreements of purchase and sale of the townhomes, and all contracts for the supply of labour and materials;

27 In June 2010 Laurentian Bank advised it would not finance the Lorne Park Project if the land was valued at $2,500,000. Posocco proposed to Casimiro a revised Agreement for $1,800,000 plus a $700,000 bonus — for a total of $2,500,000 - the same price as set out in the Agreement. Posocco submits that an amending agreement was signed to this effect. Casimiro submits that no such executed amending agreement exists and that the copy produced contains his forged signature. However, nothing turns on this as both the Agreement and the alleged amending agreement contain the same terms described above except for how the purchase price was to be allocated. For simplicity I will continue to refer to the "Agreement".

28 The construction financing with Laurentian Bank was completed in December 2010. Casaco/Casimiro received $800,000 of the purchase price instead of the $1,000,000 set out in the Agreement. Despite the breach of the Agreement Casimiro took no steps to enforce his rights under the Agreement. Instead, he considered the balance of the purchase price owed to Casaco/Casimiro under the Agreement to be $1,700,000. The fact the result was an even greater balance to be paid from any net profits from the construction and sale of the townhomes, was not addressed by Casimiro.

29 Casimiro submits that the $2,500,000 purchase price under the Agreement was the fair market value of the Lands. However, during oral submissions Defence counsel was asked, if this was accurate, why would Casaco/Casimiro sell

the Lands for that price but subordinate being paid for the Lands until after the construction trades were paid and the construction financing was repaid? In other words, why risk payment of the purchase price on the success of the construction and sale of the Lorne Park Project? In my view, there was no reasonable answer to this question.

30 Similarly, Defence counsel was asked why Casaco/Casimiro didn't transfer the Lands and assume a Vendor Take Back mortgage, which could have been postponed to the construction financing. This proposal had been discussed as early as April 2009. The response was that this would avoid land transfer tax being paid twice since the individual lots and homes would be transferred directly from Casaco/Casimiro to the third party home buyers. The problem with this answer is that, even at a high 2% land transfer tax rate on the $2,500,000 price, this would only be approximately $50,000 and this cost is usually payable by the purchaser. This amount appears nominal compared with the risks to a vendor of subordinating and risking the payment of the substantial balance of the purchase price to the net profits of a hopefully successful construction project.

31 After the Agreement was executed, Sedona continued with the completion of the Lorne Park Project. Sedona dealt with the municipality. Sedona proceeded with the sale, the necessary steps to arrange for and the construction of the townhomes. Sedona was the only party who contracted with the suppliers and trades for the construction of the townhomes. Sedona was the only party who contracted with the third party home buyers of the townhomes.

32 The construction contracts between Sedona and, at least some of the Lien Claimants, contained a provision that the contractor's rights and remedies were limited to Sedona and no other third party. No one attempted to suggest that this provision was enforceable at law to deny the Lien Claimants their statutory lien rights and trust claims under the *Construction Lien Act.*

33 Sedona paid the trades for the construction of the Lorne Park Project. There is no doubt that many of the payments to the trades were made using the construction financing.

34 All the townhomes were sold by Sedona.

35 Construction was substantially completed when Sedona ran into financial difficulties.

36 Construction liens were registered on title to the Lands. Laurentian Bank's construction financing went into arrears. The third party home buyers were concerned about their deposits and their rights to purchase the townhomes.

37 Title to the Lands continued to remain in the name of Casaco/Casimiro.

38 Litigation ensued.

39 The various judicial proceedings relating to the Lorne Park Project were case managed. The agreements of purchase and sale to the third party home buyers were completed through vesting orders upon the buyers paying the balance owed under their agreements of purchase and sale into court.

40 All parties agreed that Laurentian Bank had priority to a portion of the monies in court. As a result, Laurentian Bank was repaid its construction financing.

41 After payment out to Laurentian Bank, there remain substantial monies in court. However, there are not sufficient monies to pay both Casaco/Casimiro and the Lien Claimants. There will be a considerable shortfall to whichever party does not have priority to the funds in court.

Analysis

Leave and Summary Judgment

42 The *Construction Lien Act* provides:

> 67. (1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.
>
> (2) Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute.
>
> (3) Except where inconsistent with this Act, and subject to subsection (2), the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act.

43 Summary judgment is available in Construction Lien actions. See *Exteriors By Design v. Traversy*, 2012 ONSC 3164 (Ont. Master) and *Kieswetter Demolition (1992) Inc. v. Traugott Building Contractors Inc.*, 2014 ONSC 1397 (Ont. S.C.J.).

44 I am satisfied that this is a proper case to grant leave to bring a summary judgment motion. Clearly, the determination of which of the two parties, Casaco/Casimiro or the Lien Claimants, has priority to the funds in court will expedite the resolution of the remaining issues in these proceedings.

45 Rule 20.04 of the Rules of Civil Procedure provides:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent
>
> 3. Drawing any reasonable inference from the evidence
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

46 In *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), the Supreme Court set out an approach to summary judgment motions where it is claimed there is "no genuine issue requiring a trial".

> [49] There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

47 In this case, the parties agreed to have the issues determined by way of summary judgment. See R. 20.04(2) (b). In any event, I am satisfied it is appropriate to grant summary judgment in this case as I have determined there is no genuine issue requiring a trial for a fair and just determination of the issues set out above.

48 While Casimiro takes issue with the credibility of Sedona, I am not persuaded that there are any credibility issues which require further evidence or *viva voce* evidence. As I stated above, the primary issue is whether Casaco/Casimiro are statutory owners under the *Construction Lien Act* and this can be determined based on the terms of the Agreement and the respective roles of the parties after the Agreement was executed.

49 In the same manner, it is not necessary to determine whether there was in 2006 through 2009 a joint venture agreement between Sedona and Casaco/Casimiro with respect to the construction of the townhomes or that such an intention existed in 2006.

What constitutes a Statutory Owner?

50 The *Construction Lien Act* 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;

51 This is referred to as a "statutory owner". There may or may not be more than one statutory owner for *Construction Lien Act* purposes..

52 There is a three part test for a party to be a statutory owner under the *Construction Lien Act*:

a) The party must have an interest in the premises;

b) The party must have requested the improvement in the premises; *and*

c) The improvement on the premises must have been made upon that party's credit *or* behalf *or* with that party's privity *or* consent *or* for that party's direct benefit.

53 As stated in *Advanced Construction Techniques Ltd. v. OHL Construction Canada*, 2013 ONSC 7505 (Ont. S.C.J.) at para. 151, [2013] O.J. No. 6013 (Ont. S.C.J.) whether or not a party is a statutory owner is dependent on the circumstances of each case.

54 The registered owner of property may or may not be a statutory owner under the *Construction Lien Act*. In *Bird Construction Co. v. Ownix Developments Ltd.*, [1984] 2 S.C.R. 199 (S.C.C.) [hereinafter *Phoenix Assurance*] at p. 213, 1984 Canlii 79 the Supreme Court commented on the definition of "owner" under Ontario's *Mechanics Lien Act* and stated:

> In applying these provisions of the Act, it must be remembered that "owner" under the statute is not necessarily the registered or legal owner of the fee. The security afforded by the Act is a claim against the interest of the person requesting the work and whose interest is to be thereby enhanced.

55 In *Bird Construction Co. v. Ownix Developments Ltd.* (1981), 33 O.R. (2d) 807, 125 D.L.R. (3d) 680 (Ont. C.A.) Wheatherson J.A. stated:

> Although the statutory definition of "owner" in s. 1(1)(d) of the Act "includes any person", etc., it is not, in my opinion, an extended, but rather a comprehensive definition of an owner against whose estate or interest a lien may

attach under s. 5 [now s. 6] of the Act. In *Sanderson Pearcy & Co. Ltd. v. Foster* (1923), 53 O.L.R. 519, Middleton J. said at p. 521:

> But this definition was only intended as a definition, and not as a means of fixing upon the owner some liability for a kind of lien not given by the statute. There are many cases in which several "own" land. The case of landlord and tenant is specially provided for, but joint ownership, tenancy in common, life-estates, etc., are not. The intention of the statute clearly is to prevent any one who has an estate or interest in lands upon which a lien may be claimed under secs. 6 and 8 [now ss. 5 and 7] from having liability imposed upon his estate unless there is on his part, first, a request, and, secondly, one or more of the alternative requirements mentioned.

How does the Court determine whether a party requested the Improvement?

56 In *Cipriani v. Hamilton (City)* (1976), [1977] 1 S.C.R. 169 (S.C.C.) at p. 173, (1976), 67 D.L.R. (3d) 1 (S.C.C.), Chief Justice Laskin held that "direct dealing" was *not* a necessary requirement in finding that a request is made.

57 In *Orr v. Robertson* (1915), 34 O.L.R. 147, 23 D.L.R. 17 (Ont. C.A.), the Court of Appeal held that work "can be found to have been performed at the request of a person" so as to make him an "owner" under the lien legislation even though the request was not made directly by that person but instead someone acting on the person's behalf.

58 In *Geocor Engineering Inc. v. Kingston 2000 Developments Ltd.* (2003), 30 C.L.R. (3d) 107, [2003] O.J. No. 5101 (Ont. S.C.J.) at paras. 16-18 and in *Advanced Construction Techniques Ltd. v. OHL Construction Canada*, 2013 ONSC 7505 (Ont. S.C.J.) at para 148, [2013] O.J. No. 6013 (Ont. S.C.J.), the court concluded that a request for the purposes of determining whether a party was a statutory owner under the *Construction Lien Act* could be implied or inferred from all the surrounding circumstances even if there was no direct dealing between the "owner" and the "lien holders".

59 In considering the "totality of the circumstances", one must consider the relationship between the parties. Where there is an agreement between the parties, it is the substance of the transaction and not the form of the agreement between the parties that must be considered. In *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, 305 D.L.R. (4th) 577 (Ont. C.A.), the Court of Appeal observed at paras. 67 - 68 that:

> The absence of direct dealings between the person said to be an owner under the Act and construction suppliers is only one factor to consider in examining the relationship between the parties. It is not determinative. Were it otherwise, a developer could easily escape its obligations to suppliers by the simple device of arranging for an associated or related company to directly engage suppliers for the provision of services or materials. This would defeat the intended protection provided to lien holders under the Act. For this reason, the courts have recognized that a 'request' for work to be done may be inferred from the totality of the circumstances, viewed in light of the substance of the relationship between the parties: *Phoenix*, [1984] 2 S.C.R. 199, at pp. 215-18; *Cipriani*, [1977] 1 S.C.R. 169, at p. 173; *Northern Electric*, at p. 769; *Roboak*, [1986] O.J. No. 2681, at pp. 203-04; *Muzzo*, at pp. 469-71; *Orr v. Robertson* (1915), 23 D.L.R. 17 (Ont. C.A.), at p. 18.
>
> Nor was the trial judge's reliance on *Muzzo* misplaced. In that case, the court was concerned with the meaning of 'owner' under s. 1(1)(d) of the *Mechanics' Lien Act*, R.S.O. 1970, c. 267, a predecessor statute to the current Act. The court considered *Phoenix*, *Northern Electric* and *Cipriani* and, consistent with these authorities, concluded that a request by a person to have work performed could be inferred from all the circumstances of the case. Thus, in *Muzzo*, a vendor of subdivision land was held to be an owner for the purpose of a lien claim where, following the sale transaction, the vendor remained the registered owner of the land and retained the rights to approve building plans and to repurchase the land on certain events.

60 In *Muzzo Brothers Ltd. v. Cadillac Fairview Corp.* (1981), 34 O.R. (2d) 461 (Ont. H.C.), Justice West had the following to say:

> These cases support two general principles; that the substance, and not merely the form, of the relationship between the parties must be considered and that a request to have work performed may be inferred from a consideration of all the circumstances even in the absence of direct dealings between the parties.

61 The Defence submits that the authorities suggest that for a registered owner to be a statutory owner, the court should find the owner to be an "entrepreneur". The authorities relied on by the Defence do not define what constitutes an entrepreneur. I should add that "entrepreneur" is not a requirement of the *Construction Lien Act*'s definition of "owner".

62 Two definitions of entrepreneur are as follows:

> • Merriam-Webster: "one who organizes, manages and assumes the risks of a business or enterprise."
>
> • Dictionary.com: "a person who organizes and manages any enterprise, especially a business, usually with considerable initiative and risk."

63 In *Ken Gordon supra*, the Supreme Court used the following analysis to determine whether the party in that case was an "entrepreneur":

> It is clear that OHC, as a Crown corporation, can qualify as an owner under the Act (s. 1(1)(*d*)). OHC has an interest or estate in these lands. By its arrangements and relationship with E, OHC has a very extensive interest, in the broader sense of the word, but over and above all these considerations is the similarity of the relationship between OHC and E to those relationships examined by this Court in *Northern Electric Co. v. Manufacturers Life Insurance Co.*, [1977] 2 S.C.R. 762, *Hamilton (City of) v. Cipriani*, [1977] 1 S.C.R. 169, and *Phoenix*, *supra.* In each case the entrepreneur of the project, though with varying final positions or interests, was found to be an owner under the Act. OHC, on these authorities, clearly falls within the statutory definition of an owner, and in this, I am in respectful agreement with all the others below.

64 Obviously, a party who organizes, manages a project and assumes a risk of the project is an entrepreneur. An entrepreneur's role will vary from project to project. The degree of organization, management and risk will also vary from project to project. An entrepreneur need not carry out all three roles and could still be an entrepreneur.

65 Whether a party might or might not be an "entrepreneur" is not definitive as to whether the court should imply a request for the improvement. I am not persuaded there is any "magic" to the word "entrepreneur". If a party is an entrepreneur, namely the party has a role and interest in the project, depending on the role and interest of that party, the court could and should consider that as a factor in determining whether the party implicitly requested the improvement.

66 All the circumstances relating to the party, including the party's interest in the lands, the role of the party before, during and after the improvement, the party's interest in the financial aspects of the improvement, must all be considered as factors in the court's determination.

67 Once all the relevant circumstances are considered, the court must proceed to determine whether, in those circumstances, it is reasonable for the court to imply a request by that party for the supply or services provided to the improvement.

The Position of the Parties on Statutory Owner

68 It is common ground that Casaco/Casimiro have an interest in the Lands on which the improvement took place. It is also common ground that the improvement was made with, at a minimum, the Casaco/Casimiro's knowledge and consent.

69 The issue which separates the parties is whether there was a "request" by Casaco/Casimiro for the improvement in the Lands.

70 The Lien Claimants submit that they have established that Casaco/Casimiro made a "request":

a) There was only one improvement - the Lorne Park Project - commencing from 2006. The Lien Claimants submit Casaco/Casimiro contracted and paid for expenses relating to the development and the subsequent construction phase of the Lorne Park Project; or

b) The work done by the Lien Claimants, even if restricted to the improvement being the construction of the townhomes, while directly at the request of Sedona, was also implicitly at the request of Casaco/Casimiro.

71 Casaco/Casimiro submit that there was no request by them for the supply of materials or services to the improvement for which the Lien Claimants liens arose:

a) There were two separate improvements. Casaco/Casimiro were only involved in the *development improvement* and not the *construction improvement* of the Lorne Park Project; and

b) The *construction improvement* was done solely at the request of Sedona.

72 The Lien Claimants rely heavily on *Bird Construction Co. v. Ownix Developments Ltd.*, [1984] 2 S.C.R. 199 (S.C.C.) as having direct application to the present case. In *Phoenix Assurance*, in order to establish a head office building in Toronto, Phoenix entered into an arrangement with Ownix. Ownix lacked adequate financing to develop the property that would become the head office for Phoenix. Phoenix assisted with the financing. The actual construction was undertaken under a contract between Ownix and the General Contractor, Bird. The Court held that Phoenix made a request for work from the contractor Bird despite "in a strict factual sense" Ownix entered into the construction contract with Bird. The Supreme Court stated:

I do not think that the interposition of Ownix and the separation of the guarantor and the mortgagor roles, as compared to Northern Electric where the four roles were played by only two parties, is a difference with legal consequences under the Act. Consequently, I conclude, as did the Divisional Court and the Court of Appeal below, that Phoenix did make "the request" that the work for which the lien claim (other than third party space tenants' improvements) was made be done by Bird. The request was made in a strict factual sense by Ownix who, of course, entered into the construction contract with Bird in the performance of its role under the development contract between Ownix and Phoenix. That agreement stipulated that:

> The building shall be constructed by the Developer at its expense in accordance with detailed drawings, elevations and specifications (including materials to be used) which must first be approved by Phoenix Canada and such approval shall not be unreasonably withheld or delayed.

While the construction contract was signed before the development contract, the latter had long negotiation roots as the parties to the project organized finances, plans, specifications, permits and all the paraphernalia of modern urban building projects. The sequence of the execution of these contracts is unimportant to the determination of the position of the parties under The Mechanics' Lien Act, supra.

In *Hamilton (City of) v. Cipriani*, [1977] 1 S.C.R. 169, the City, with the provincial agency, The Ontario Water Resources Commission, as its banker, entered into an agreement to cause a works to be built on city land. The Commission was found to have become the general contractor, though actual construction was carried out under a construction contract entered into by the City and not the Commission. Laskin C.J., speaking for a unanimous Court, stated at p. 173:

> Schroeder J.A. in the Ontario Court of Appeal, looking to the substance of the transactions between the City, the Commission and McDougall, construed the interrelationship as one where the Commission became the general contractor for the City and, as such, proceeded to carry out its contract through another general contractor. In my opinion, this is a proper analysis, recognizing the fact that the Commission was being the

> City's banker. The City was and remained the "owner" within s. 1(d) so as to make its land lienable under s. 5, and it is idle formalism to contend that the work was not done at its request.

Ownix was in much the same position as the Commission, and Phoenix, like the City, was the legal owner throughout.

73 Casaco/Casimiro heavily rely on *JDM Developments Inc. v. J. Stollar Construction Ltd.*, [2005] O.J. No. 4817 (Ont. S.C.J.) as being on "all fours" with the present case. J. Stollar Construction Limited (JSCL) was the owner of a number of lots in a subdivision it was developing. It was alleged that the owner of JSCL, prior to his death, had agreed to allow JDM Developments Inc. (JDM) to build on two lots and from the sale of the proceeds, pay to JSCL the sum of $60,000 for each lot. JDM started to build on the two lots. A dispute arose when JSCL refused to advance mortgage funds for the buyers. JDM liened the two lots. JDM admitted that it was its own decision as to whether to build on a lot, the type of home, the price and all other terms of the sale. The Court found at para 53 that JDM did not have a valid claim for lien and that his claim was in reality a claim for the sale of the building lots. The Court at para 61 found that JSCL was not a statutory owner. The court went on to make the following findings of fact and determinations at paras 63-64, 67 and 69:

> It is clear on the evidence that the improvements were not done upon JSCL's request, or upon any of the required elements within the statutory definition of "owner". In my view, there neither an express request or a request by implication on the part of JSCL derived from the circumstances in order to give rise to lien rights against JSCL's interests sought to be charged. The evidence clearly establishes that JDM, on its own version of the alleged oral agreement, had complete control over how the houses were built, designed, constructed or sold. There was no privity or consent between JDM and JSCL in this regard. The houses were not constructed upon JSCL's credit and certainly not on JSCL's behalf.
>
> In order to have a valid and enforceable lien, a lien claimant must show that the person sought to be charged as "owner" requested directly or impliedly, the work, service or material to be supplied, so as to enhance his estate or interest in the property. This requirement has not been met as JDM in this case intends to solely retain the benefit of the improvement. See: Constructions Builders' and Mechanics' Liens in Canada, Macklem and Bristow, Vol. 1, p. 2-4.
>
> I agree with JSCL's submission that JDM seeks to lien its own improvement. ...
>
> I further find that the quantification of JDM's liens have nothing to do with the price or cost of improvements to Lots 167 and 175...

Application to this case

Were there two improvements?

74 It is not necessary to decide whether there were two improvements as submitted by Casaco/Casimiro or one improvement as submitted by the Lien Claimants.

75 As set out below, I am satisfied that Casaco/Casimiro are statutory owners even if the construction phase of the Lorne Park Project was treated as a separate improvement from the development prior to the early part of 2009.

What is the substance of the transaction between Casaco/Casimiro and Sedona?

76 The Defence submits that Casaco/Casimiro' sole interest was to be paid for the balance of the purchase price being the fair market value of the Lands at the time. I cannot agree with the Defence that the substance of the transaction was that Sedona was building the homes solely for its own account.

77 I conclude that Casaco/Casimiro implicitly "requested" the work done by the Lien Claimants. Casaco/Casimiro was an "entrepreneur" in the Lorne Park Project based on the clear and unambiguous terms of the Agreement and the actions

by the parties taken in furtherance of that Agreement. There are a number of reasons for coming to this conclusion (in no particular order):

a) The transaction set out in the Agreement is not a simple sale of property as suggested by the Defence. Mr. Casimiro was a sophisticated investor. He had lawyers representing him. Lawyers were involved in the preparation of the Agreement. Even by his own evidence, Casimiro clearly knew the difference between development and construction. Casimiro chose to execute the Agreement and was bound by its terms. It is clear from the terms of the Agreement that Casimiro *required* Sedona to construct the residential homes and *needed* the construction to take place and the Lorne Park Project to be successful for Casaco/Casimiro to be paid the balance of his purchase price. As a result, Casimiro clearly had a significant interest in the construction and sale of the residential homes on the Lands;

b) As a sale of property for $2,500,000, if that was the fair market value of the Lands as submitted by the Defence, the Agreement makes little sense. Clearly, if the Lands were worth less than $2,500,000 then Casaco/Casimiro would have had "skin in the game" and the balance of the terms in the Agreement would make much more sense in that Casimiro would be sharing in the profits of a successful completion of the Lorne Park Project. However, it is not necessary to decide whether the Lands were worth $2,500,000 in 2010. Assuming the Lands were worth $2,500,000 in 2010, structuring the transaction to *require* Sedona to build the townhomes, subordinate Casaco/Casimiro's payment of the balance of the purchase price until *after* payment of all the suppliers and trades contracted by Sedona and repayment of the construction financing, puts the balance of the purchase price entirely at risk and contingent on a successful construction and sale of the townhomes by Sedona - the Lorne Park Project. This is entirely inconsistent with Casmiro's evidence that he did not want to be involved or *take the risk of the construction* of the townhomes. By structuring the transaction as he did: he required the construction, assisted in the construction by agreeing to and permitting the use of his Lands for this purpose and assumed the risk of the successful construction and sale of the townhomes in order to be paid the substantial balance of the purchase price;

c) Casaco/Casimiro could easily have taken a VTB (Vendor take back) mortgage. Casimiro stated that he was surprised when he returned from his trip that the Lands remained in the name of his companies. He knew what a VTB was from the first offer he made to Posocco in April 2009. He did nothing to fix the manner in which the Agreement was structured and allowed the Lands to remain in the name of Casaco/Casimiro. Casimiro suggested that his lawyer provided him advice that the delayed closing was the "same practical effect as an immediate sale". No affidavit was submitted by Casimiro's lawyer. It is hard to imagine that any lawyer could have advised the Agreement had the same practical effect as an immediate sale and transfer of title to the Lands, when it is clear that the balance of the Casaco/Casimiro's purchase price is subordinated to all lien claimants and construction financing and dependent on net profits for payout. Casaco/Casimiro had no security for the balance of the purchase price. Casaco/Casimiro would only get paid if and to the extent there were net proceeds of sale of the newly constructed homes. Even if the Defence is correct that Casimiro received bad legal advice, this doesn't alter the clear terms and conditions Casimiro agreed to in writing and the subsequent role he played in the construction of the residential lands through the respective obligations carried out by the "vendor" under the Agreement;

d) Unlike a typical agreement for the sale of property, the Agreement required the purchaser to construct homes on the property. The Agreement uses the words "shall". Sedona had no choice but to proceed to construct the residential homes or be in breach of the Agreement. In many ways, this is similar to the facts in *Hamilton*, where the court found that, in essence, the City used the Commission to act essentially as its general contractor for the improvement;

e) Despite the outstanding balance of the purchase price, the Agreement permits the Lands to be encumbered for financing, granting of easements, rights of way and so forth. Clearly, Casimiro agreed to and accepted this role in the construction and sale of the Lorne Park Project and proceeded on this basis for a number of years. Casimiro agreed he would transfer title directly to the third party home buyers. While Casimiro's role is a very different role than Sedona's role in the completion and construction of the Lorne Park Project, it is still a significant role in the completion, construction and sale of the Lorne Park Project;

e. The payment of the balance of the purchase price clearly demonstrates the role and interest of Casimiro in the construction and sale of the Lorne Park Project. Casaco/Casimiro specifically agreed to be paid the balance of the purchase price from the "proceeds of sale of Residential Units" but only AFTER:

i. Deduction of $100,000 as "reasonably required for the completion of the development";

ii. Payment of Sedona's suppliers and trades; and

iii. Payment of the construction financing to Laurentian Bank;

If the Lien Claimants are successful in this motion (i.e. Casaco/Casimiro are statutory owners) then the priority of payment from the funds in court is exactly in the same order as Casaco/Casimiro had agreed to pursuant to the terms in the Agreement. On the other hand, if Casaco/Casimiro are successful in this motion (i.e. Casaco/Casimiro are not statutory owners) Casaco/Casimiro would be paid in priority to Sedona's third party obligations (i.e. the suppliers and trades), entirely contrary to the order of payments set out in the Agreement;

f. Casaco/Casimiro had a significant role in financing the construction and sale of the Lorne Park Project. Casaco/Casimiro actively financed the construction by postponing payment of the balance of the purchase price and allowing the construction finance to be a first charge on their Lands. Casaco/Casimiro actively participated in the construction by permitting various agreements, rights of way, easements etc. to encumber the Lands. Casaco/Casimiro delegated to Sedona the detailed requirements regarding the construction and sale of the townhomes as set out in paragraph 2 of the Agreement. Casaco/Casimiro would be the transferor of the land (with the newly constructed home) directly to the third party home buyer. Casaco/Casimiro and Sedona were jointly dependent on a successful construction project to be paid — they both had "skin in the game";

g. To use the language in *Phoenix*, *Northern Electric Co. v. Manufacturers Life Insurance Co.* [1976 CarswellNS 32 (S.C.C.)] *and Hamilton* and repeated in *Ken Gordon Excavating Ltd. v. Edstan Construction Ltd.*, [1984] 2 S.C.R. 280 (S.C.C.), at 289, Casaco/Casimiro were "entrepreneurs" in the Lorne Park Project. To use the language of Casaco/Casimiro in their factum — "If the owners plan to benefit from the improvements being constructed... they are owners for the purposes of the *Construction Lien Act*." Without any question, Casaco/Casimiro would benefit from the improvement — the payment of the balance of the purchase price from the net profits of the Lorne Park Project. The Defence submits that the purchase price did not include a premium or sharing of the profits of the Lorne Park Project. Even if that was so, Casaco/Casimiro had a $1,700,000 interest or benefit in the improvements to be constructed. I fail to see how Casaco/Casimiro would not benefit from the construction and sale of the residential homes;

h. Despite the submissions of the Defence, the substance of the Agreement was not just the mere financing of the balance of the purchase price. The provisions in the Agreement which permit Casaco/Casimiro to take over the construction contracts, the construction financing and the third party purchase agreements would not normally, by themselves, attract an implied request for the supply or services to the improvement. Project lenders who lend money for construction typically have such provisions but are not statutory owners. Such provisions are simply security interests of the lender until and if/when the lender chooses to exercise its remedies to step into the shoes of the borrower. In this case, an ability to take over all aspects of the construction, financing and sales, when coupled with the provisions directing Sedona to build and sell the townhomes, along with consents and agreements by Casaco/Casimiro to assist Sedona with the construction and sale of the townhomes, creates a significant involvement of Casaco/Casimiro in the improvement;

i. Casimiro had the ability to structure the transaction in any manner he chose. In April 2010, Casimiro chose to do it in the manner described above whereby Casaco/Casimiro actively participated in the Lorne Park Project and had an interest in the Lorne Park Project being financially successful; and

j. By analogy, Casaco/Casimiro's unpaid balance is akin to an unregistered mortgage for the unpaid purchase price. S. 78(1) of the *Construction Lien Act* provides that liens arising from an improvement have *priority over all* conveyances, *mortgages or other agreements*, affecting the owner's interest in the premises. It is important to note that this section refers to all "mortgages" and "other agreements". The balance of the section in the *Construction Lien Act* goes on to give "registered mortgages" priority over liens in certain circumstances and limited to certain amounts. To accede to the Defence submissions would create a new priority in favour of an owner for unpaid purchase price which is even better than some registered mortgages.

78 I conclude that the substance of the transaction between Casaco/Casimiro and Sedona was a joint venture, with respective roles and interests, for the successful construction and sale of the Lorne Park Project. Casaco/Casimiro was an entrepreneur in the Lorne Park Project.

Was there an implied request by Casaco/Casimiro?

79 I find that, in this case, there was an implied request by Casaco/Casimiro for the provision of supplies and services for the improvement on the Lands. Given the role of Casaco/Casimiro in the Lorne Park Project set out above, which I will not repeat, it is reasonable to imply a request for the improvement made to the Lands and I do so imply such a request.

80 In fact, had it been necessary, in my view, an express request for the improvement might have arisen from the fact that Casaco/Casimiro specifically required Sedona to proceed with the construction and sale of the townhomes and provided Sedona with the financial and other critical support relating to the construction which was to occur on the Lands.

81 The Defence submits that the Lien Claimants have a lien solely against Sedona's interest in the Lorne Park Project. This makes little sense as, Sedona's only interest under the Agreement, where title remained with Casaco/Casimiro, was to net profits if any from the Lorne Park Project. This would be a "hollow" interest for the Lien Claimants to attach to despite that it was their materials and services who added to the value of the Lands.

Conclusion on Casaco/Casimiro as a Statutory Owner

82 As a result of finding that Casaco/Casimiro made a request for the supply of materials and services to the improvement, being the construction of the residential homes, Casaco/Casimiro are statutory owners under the *Construction Lien Act.*

Is Sedona a statutory owner under the Construction Lien Act?

83 Casaco/Casimiro submitted that Sedona was the owner on the basis it had an equitable interest created by the Agreement, despite the fact the Agreement had not closed. See para 38 of the Defence factum: "As owner in equity, Lorne Park Sedona has an interest in the Lorne Park lands."

84 I agree. By virtue of the Agreement, Sedona had an equitable interest in the Lorne Park Project lands through the Agreement whether or not you characterize the Agreement as a joint venture agreement.

85 Having determined that Sedona has an equitable interest, there is no issue that the supply of materials and services to the improvement was done at the request of and with the consent, knowledge and benefit of Sedona.

86 There is nothing in the *Construction Lien Act* prohibiting there from having more than one statutory owner for an improvement. See *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.* (2006), 55 C.L.R. (3d) 184 (Ont. Master).

87 As a result, I find that Sedona is also a statutory owner for this improvement. Sedona as a statutory owner has its interest in the Lands also subject to any construction liens.

Do Casaco/Casimiro owe a trust to the construction trades?

88 If Casaco/Casimiro are statutory owners, the Defence submits the monies in court are trust funds for the benefit of the contractor.

89 I do not accept the Defence's alternative submission, that, if Casaco/Casimiro is a statutory owner, Sedona was the "contractor".

90 Contractor is defined in the Construction Lien Act as follows:

> "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; ("entrepreneur")

91 The Defence submits that, since no one contracted directly with Casaco/Casimiro, Sedona must be the contractor and the monies are trust monies for Sedona.

92 I have determined that BOTH Casaco/Casimiro and Sedona were statutory owners for this improvement. Therefore, their respective interests in the Lands are subject to the statutory trust in favour of those contracting with either or both of them.

93 In this case, all the suppliers and trades had contracted with Sedona. The monies in court are in trust for the Lien Claimants.

94 I make no finding whether Sedona was or was not the agent of Casaco/Casimiro in these circumstances. This issue was not fully addressed by counsel in submissions.

Conclusion

95 I find that:

a) Casaco/Casimiro are statutory owners with respect to the residential construction improvement on the Lorne Park Project;

b) Sedona is also a statutory owner of the residential construction improvement on the Lorne Park Project; and

c) the monies in court are trust funds for the "contractors" who contracted with either Casaco/Casimiro and/or Sedona.

Costs

96 Unless the parties can settle the issue of costs or *both* parties can agree on making written submissions on costs, either party may arrange for an attendance before me to make oral submissions on costs.

Motion granted.

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2015 ONSC 6576
Ontario Superior Court of Justice (Divisional Court)

Roni Excavating Ltd. v. Sedona Development Group (Lorne Park) Inc.

2015 CarswellOnt 16117, 2015 ONSC 6576, 259 A.C.W.S. (3d) 220, 55 C.L.R. (4th) 63

Roni Excavating Limited, Plaintiff (Respondent) and Sedona Development Group (Lorne Park) Inc, Defendant and Casaco Developments Inc. and Casmiro Holdings Inc, Defendants (Appellants)

Molloy, Hambly, Hackland JJ.

Heard: October 22, 2015
Judgment: October 23, 2015
Docket: Brampton DC-0013-00

Proceedings: affirming *Roni Excavating Ltd. v. Sedona Development Group (Lorne Park) Inc.* (2015), 43 C.L.R. (4th) 278, 2015 CarswellOnt 826, 2015 ONSC 389, Ricchetti J. (Ont. S.C.J.)

Counsel: C. Reed, for Appellants
R. Kennaley, for Respondent, Roni Excavating Limited

Subject: Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications
Construction law

IV Construction and builders' liens
IV.3 Owner
IV.3.i Determining who is owner

Headnote
Construction law --- Construction and builders' liens — Owner — Determining who is owner

Defendants C acquired land for development and agreed to sell land to defendant S — Agreement provided that S had positive obligations to complete development and sell residential units and C also had positive obligations including permitting financing on land — S continued with completion of project, and construction was substantially complete when S ran into financial difficulties — Construction liens were registered on title to land and litigation ensued — On motion for summary judgment, motion judge held that defendants C were owners as defined in Construction Lien Act and that they owed trust obligations to construction trades — C appealed — Appeal dismissed — Motion judge did not err in finding that both C defendants and S were owners and that trust obligation should be imposed on all owners — Motion judge correctly identified legal test be applied in determining whether definition of owner had been met, provided careful reasons that reviewed relevant facts, and applied law to reasonable factual conclusions and inferences drawn — Motion judge made no error in concluding that C were owners within meaning of Act — Motion judge conducted appropriate analysis and identified and applied correct legal principles in determining whether C could be said to have directly or implicitly requested improvements to real property — Privity of contract was not always required in order to impose trust obligations — C's interpretation would defeat purpose of Act, which was to ensure contractors and workers who supplied services and materials to property were paid in priority to owners for whom work was done.

Table of Authorities

Cases considered:

Andrea Schmidt Construction Ltd. v. Glatt (1980), 28 O.R. (2d) 672, 112 D.L.R. (3d) 371, 1980 CarswellOnt 1365 (Ont. C.A.) — referred to

Arthur Andersen Inc. v. Toronto Dominion Bank (1994), 13 C.L.R. (2d) 185, (sub nom. *Andersen (Arthur) Inc. v. Toronto Dominion Bank*) 71 O.A.C. 1, 17 O.R. (3d) 363, 14 B.L.R. (2d) 1, 1994 CarswellOnt 233, 14 B.L.R. (2d) 1 at 49 (Ont. C.A.) — referred to

Di Mario v. Schuster (1994), 13 C.L.R. (2d) 140, 1994 CarswellOnt 938 (Ont. Gen. Div.) — followed

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
s. 1(1) "owner" — referred to

s. 7 — considered

s. 8 — considered

s. 9 — considered

APPEAL by defendants from judgment reported at *Roni Excavating Ltd. v. Sedona Development Group (Lorne Park) Inc.* (2015), 2015 ONSC 389, 2015 CarswellOnt 826, 43 C.L.R. (4th) 278 (Ont. S.C.J.), finding defendants were owners as defined by *Construction Lien Act*, and owed trust obligations to construction trades.

***Per curiam*:**

1 This is an appeal from a decision of Ricchetti J. dated January 26, 2015, granting partial judgment on a summary judgment motion in a construction lien proceeding. The motion judge held that the Appellants were "owners" as defined by the *Construction Lien Act*, R.S.O. 1990, c. C.30, and that they owed trust obligations to construction trades. The Appellants appeal both findings.

2 The motion judge correctly identified the legal test to be applied in determining whether the definition of "owner" under the *Act* had been met. Further, he provided careful reasons reviewing the relevant facts and applied the law to the reasonable factual conclusions and inferences which he drew. His ultimate conclusion that the appellants met the statutory requirements to be an "owner" within the meaning of the *Act* is a question of mixed fact and law and is entitled to deference. We see no error and hence no basis for interfering with the motion judge's conclusion in that regard, whether as a question of fact, or a question of law, or a question of mixed fact and law.

3 In particular, we find that the motion judge identified and applied the correct legal principles in determining whether the appellants could be said to have directly or implicitly requested the improvements to the real property. The fact that the appellants did not want to be involved in the actual construction is not determinative. This is an issue that is fact-driven and which requires a contextual approach, taking into account all of the surrounding circumstances. We are satisfied that the motion judge conducted that analysis appropriately. His findings of fact are entitled to deference.

4 On the second issue, the Appellants argued that even if they were statutory owners within the meaning of the *Act*, any proceeds of sale received by them are held in trust *only* for claimants who contracted directly with or were

employed by them. Since they had no privity of contract with the Appellants, they submit that they do not have any trust obligations to them.

5 Before the motion judge, the Appellants had argued that the other defendant, Sedona Development Group (Lorne Park) Inc. ("Sedona") was the owner of the project. The motion judge agreed that Sedona had an equitable interest in the lands and also met the other requirements of "owner" under the *Act.* That finding is not challenged in this appeal. However, the motion judge rejected the argument that if the Appellants were owners, then Sedona must be the contractor, rather than an owner. Rather, the motion judge found that there can be more than one owner and that Sedona was an owner, along with the two Appellants. Because all of the trades had contracted directly with Sedona, the motion judge held that the funds paid into court from the sale of the property were impressed with a trust in favour of the lien claimants.

6 The Appellant's argument with respect to privity of contract may be relevant to the obligations under ss. 7 and 8 of the *Act* with respect to the flow of funds down the construction ladder or pyramid. However, we do not agree that the same principles apply to the trust provisions in s. 9 of the *Act.* Sections 7 and 8 do not relate to proceeds of sale.

7 With respect to the trust claims, it would be inconsistent with the purpose of the legislation to accede to the privity of contract argument advanced by the Appellants. For the scheme of the legislation to work, there will always be a contractor, there will always be a payor who holds the trust funds, and there will always be a beneficiary to whom the trust funds are owed. The Court of Appeal has confirmed that privity of contract is not always required in order to impose a trust obligation: *Andrea Schmidt Construction Ltd. v. Glatt* (1980), 112 D.L.R. (3d) 371 (Ont. C.A.); *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.).

8 The interpretation urged by the Appellants would defeat the purpose of the legislation, which is to ensure that contractors and workers who supply services and materials to real property are paid in priority to the owners of the property for whom the work was done. It is not consistent with that purpose to have the owners recoup the increased value of the land through the sale to the detriment of those claimants who created that increased value through their work and materials.

9 We agree with the conclusion of the motion judge that Sedona and both Appellants were all owners who had an interest in the property. Notwithstanding the lack of direct privity between the Appellants and the claimants, the motion judge imposed trust obligation on all three owners. In our view that is consistent with the purpose of the legislation, the approach taken in a similar situation by Granger J. in *Di Mario v. Schuster* (1994), 13 C.L.R. (2d) 140 (Ont. Gen. Div.), and with the Court of Appeal decisions we have mentioned above.

10 Accordingly, this appeal is dismissed.

11 On consent, costs are fixed at $22,000.00 payable forthwith.

Appeal dismissed.

2006 CarswellOnt 5392
Ontario Superior Court of Justice (Divisional Court)

1276761 Ontario Ltd. v. 2748355 Canada Inc.

2006 CarswellOnt 5392, [2006] O.J. No. 4740, 48 R.P.R. (4th) 201, 55 C.L.R. (3d) 54

1276761 Ontario Ltd., carrying on business as GRM Contracting (Plaintiff / Appellant) and 2748355 Canada Inc. and Camco Developments Inc., Camille's Restaurant Systems Inc., Michael Statham and Ashbran Enterprises Ltd. (Defendants / Respondents)

Durno, Wilson, Aston JJ.

Heard: March 8, 2006
Judgment: May 26, 2006
Docket: DC-05-076716-00

Proceedings: affirming *1276761 Ontario Ltd. v. 2748355 Canada Inc.* (2005), 44 C.L.R. (3d) 284, 2005 CarswellOnt 3018 (Ont. S.C.J.)

Counsel: Laszlo Pandy for Appellant
Michele Hecke for Respondent, 2748355 Canada Inc.
No one for other defendants

Subject: Contracts; Corporate and Commercial; Property; Insolvency

Related Abridgment Classifications

Construction law

IV Construction and builders' liens
IV.3 Owner
IV.3.f Leasehold situations

Construction law

IV Construction and builders' liens
IV.4 Property or interest subject to lien
IV.4.i Leasehold interest
IV.4.i.ii Requirement of notice to landlord

Construction law

IV Construction and builders' liens
IV.11 Loss or discharge of lien
IV.11.i Compliance with requirements

Headnote

Construction law --- Construction and builders' liens — Loss or discharge of lien — Miscellaneous issues

Subtenant retained plaintiff as contractor to build new restaurant at landlord's premises — Changes by subtenant increased initial contract price three-fold — Landlord approved plans and drawings for construction of restaurant, but was not party to plaintiff's contract with subtenant — Plaintiff filed lien on property regarding improvements

and when subtenant defaulted, plaintiff attempted to enforce lien against landlord — Landlord's motion for order dismissing lien claim was granted on basis that notice which plaintiff sent landlord about liability insurance policy, stating that it would be constructing restaurant on premises, was deficient under s. 19(1) of Construction Lien Act — Appeal by plaintiff dismissed — Test is whether landlord has notice of contractor's intention to hold landlord responsible in case of default by tenant — Statutory notice requirement may not be fulfilled by "notice events" alone without document providing notice in writing — Notice in any particular case must be "sufficiently distinct and memorable" to allow landlord to know when 15-day period within which it may deny liability commences — Notice must be in writing, and words "improvement to be made" require notice to be given before work is undertaken — Document being relied upon as "notice" should not be buried or overshadowed in document delivered for some other purpose — "Notice events" which supplemented plaintiff's memo to landlord, taken singularly or cumulatively, were insufficient by themselves to satisfy notice requirement under s. 19(1) — Motions judge correctly concluded that memo did not clearly signal potential liability by landlord and did not constitute adequate notice under s. 19(1).

Construction law --- Construction and builders' liens — Owner — Leasehold situations

Subtenant retained plaintiff as contractor to build new restaurant at landlord's premises — Changes by subtenant increased initial contract price three-fold — Landlord approved plans and drawings for construction of restaurant, but was not party to plaintiff's contract with subtenant — Plaintiff filed lien on property regarding improvements and when subtenant defaulted, plaintiff attempted to enforce lien against landlord — Landlord's motion for order dismissing lien claim was granted on basis that notice which plaintiff sent landlord about liability insurance policy, stating that it would be constructing restaurant on premises, was deficient under s. 19(1) of Construction Lien Act — Appeal by plaintiff dismissed — Test is whether landlord has notice of contractor's intention to hold landlord responsible in case of default by tenant — Statutory notice requirement may not be fulfilled by "notice events" alone without document providing notice in writing — Notice in any particular case must be "sufficiently distinct and memorable" to allow landlord to know when 15-day period within which it may deny liability commences — Notice must be in writing, and words "improvement to be made" require notice to be given before work is undertaken — Document being relied upon as "notice" should not be buried or overshadowed in document delivered for some other purpose — "Notice events" which supplemented plaintiff's memo to landlord, taken singularly or cumulatively, were insufficient by themselves to satisfy notice requirement under s. 19(1) — Motions judge correctly concluded that memo did not clearly signal potential liability by landlord and did not constitute adequate notice under s. 19(1).

Construction law --- Construction and builders' liens — Property or interest subject to lien — Leasehold interest — Requirement of notice to landlord

Subtenant retained plaintiff as contractor to build new restaurant at landlord's premises — Changes by subtenant increased initial contract price three-fold — Landlord approved plans and drawings for construction of restaurant, but was not party to plaintiff's contract with subtenant — Plaintiff filed lien on property regarding improvements and when subtenant defaulted, plaintiff attempted to enforce lien against landlord — Landlord's motion for order dismissing lien claim was granted on basis that notice which plaintiff sent landlord about liability insurance policy, stating that it would be constructing restaurant on premises, was deficient under s. 19(1) of Construction Lien Act — Appeal by plaintiff dismissed — Test is whether landlord has notice of contractor's intention to hold landlord responsible in case of default by tenant — Statutory notice requirement may not be fulfilled by "notice events" alone without document providing notice in writing — Notice in any particular case must be "sufficiently distinct and memorable" to allow landlord to know when 15-day period within which it may deny liability commences — Notice must be in writing, and words "improvement to be made" require notice to be given before work is undertaken — Document being relied upon as "notice" should not be buried or overshadowed in document delivered for some other purpose — "Notice events" which supplemented plaintiff's memo to landlord, taken singularly or cumulatively, were insufficient by themselves to satisfy notice requirement under s. 19(1) — Motions judge correctly concluded that memo did not clearly signal potential liability by landlord and did not constitute adequate notice under s. 19(1).

Table of Authorities

Cases considered by *Aston J.*:

Dearlove v. 451019 Ontario Ltd. (2002), 2002 CarswellOnt 3743, 22 C.L.R. (3d) 315 (Ont. S.C.J.) — considered

Equity Waste Management of Canada Corp. v. Halton Hills (Town) (1997), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Pinehurst Woodworking Co. v. Rocco (1986), 38 R.P.R. 116, 13 O.A.C. 121, 1986 CarswellOnt 669 (Ont. Div. Ct.) — followed

Royal Tile Flooring Ltd. v. Rannoch Developments Ltd. (1998), 1998 CarswellOnt 5996 (Ont. Gen. Div.) — considered

Sloot Construction-Design Ltd. v. North Maple Mall Ltd. (1999), 1999 CarswellOnt 4174, 50 C.L.R. (2d) 145 (Ont. S.C.J.) — considered

Southern Plumbing Ltd. v. Quality Craft Interiors Ltd. (1994), 17 C.L.R. (2d) 195, 1994 CarswellOnt 951 (Ont. Master) — considered

Venneri Engineering Ltd. v. Zonenward Leasex Management Inc. (1994), 16 C.L.R. (2d) 141, 1994 CarswellOnt 943 (Ont. Master) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — referred to

s. 1(1) "owner" — referred to

s. 19 — considered

s. 19(1) — considered

Regulations considered:

Construction Lien Act, R.S.O. 1990, c. C.30
General, R.R.O. 1990, Reg. 175

s. 2(2) — considered

Form 2 — considered

APPEAL from judgment reported at *1276761 Ontario Ltd. v. 2748355 Canada Inc.* (2005), 44 C.L.R. (3d) 284, 2005 CarswellOnt 3018 (Ont. S.C.J.), discharging plaintiff's claim for lien and vacating registration of claim for lien and certificate of action.

***Aston J.*:**

1 The plaintiff ("GRM Contracting") appeals the order of July 6, 2005, wherein Bryant J. discharged the plaintiff's claim for lien and vacated the registration of the claim for lien and certificate of action. The sole issue in this appeal is whether a written notice given by GRM Contracting (the "contractor"), to the respondent, 2748355 Canada Inc. (the "landlord") complies with the requirements of s. 19(1) of the *Construction Lien Act*, R.S.O. 1990 c. C.30. If it does, the landlord's interest in the premises is subject to the appellant's lien.

2 For the reasons that follow, we agree with the appellant that the test applied by the motion judge was too onerous. However, his conclusion was correct.

Factual Background

3 In December 1999, the subtenant Statham retained GRM Contracting as a contractor to build a new restaurant at the landlord's premises. The initial contract price was $189,000. As a result of changes required by the subtenant over the course of the contract, the contract price increased to approximately $580,000. By January 20, 2000, the landlord was aware of at least some of this additional work. In February 2000, in various meetings and communications, the landlord was informed about specific drawings for the work being done and the contractor was in turn provided with the landlord's Tenant Manual of Design Criteria and general information. On or about February 22, 2000, the landlord approved the plans and drawings for the construction of the restaurant. The landlord was not a party to the appellant's contract with the subtenant and did not request that work. The motions judge found the landlord was not an "owner" as defined by s. 1(1) of the *Construction Lien Act*. That finding is not being appealed, only the finding on the adequacy of notice under s. 19(1) of the *Act*.

4 On or about March 3, 2000, prior to commencing work on its contract with the subtenant, the appellant delivered to the landlord a memo which included the following statement:

> Re; Camilles project 60 Interchange way unit 7a
>
> GRM Contracting Ltd. will be working on your premises doing the leasehold improvements and Buildout of the Camille's bar & grill. I Trust you have received a copy of my liability insurance As requested.

5 The reference to liability insurance was tied in to other separate work the contractor was doing for the landlord, not the work that is the subject of the lien. At no time did the appellant give the landlord a copy of its contract with the subtenant for the construction of the restaurant, nor did it ever advise the landlord that if it were unable to recover payment from the subtenant, it would look to the landlord for payment. No such demand was made upon the landlord until the Statement of Claim was issued months later, in November 2000. GRM Contracting had registered its lien on August 22, 2000.

The Statutory Provision

6 Section 19(1) of the *Construction Lien Act* reads as follows:

> Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.

7 Ontario Regulation 175 under the *Construction Lien Act*, s. 2(2), provides "a notice to a landlord under ss. 19(1) of the *Act* may be in Form 2." Form 2 is attached as Schedule "A" to these reasons.

The Reasons of the Motions Court Judge

8 The learned motion judge found that:

> a) A contractor's statutory right of recovery under s. 19 is distinct from a contractual or common law right and is conditional upon proper notice under the statute. Furthermore, the contractor has the onus of proving that proper written notice has been given to the landlord (at para. 19).
>
> b) The contractor may satisfy the notice requirement without using Form 2 (at para. 24).
>
> c) The memo of March 3, 2000, did not constitute adequate notice under s. 19 of the *Construction Lien Act*. The express reasons for this conclusion are that GRM Contracting did not provide, or offer, a copy of the contract. The landlord did not know its potential monetary exposure. The memorandum provided was given in the context of some other need and part of a communication for some other purpose. At least some of the costs for the improvements were for additional improvements subsequent to the March 3, 2000, memorandum. The motions judge regarded as "critical" that the landlord be warned of its potential liability to the contractor, relying particularly on the *Pinehurst Woodworking Co.* and *Venneri Engineering Ltd.*, infra (paras. 28-33).
>
> d) Subsequent notice to the landlord, after Statham defaulted under the contract, did not comply with s. 19(1) because that notice was given after the improvements had already been made (at para. 31).

9 Although the motions judge refers to "a reasonable landlord", it is clear, in context, that the motions judge did actually, and properly, address whether this particular landlord knew or ought to have known of its potential liability in the specific factual context of the case.

The Test on Appeal

10 The proceedings before the motions judge took place based on an Agreed Statement of Facts. The motions judge was not required to make findings of fact on any contested evidence. The only issue in the case at bar is whether the notice requirements in s. 19(1) were met. This is a question of mixed fact and law, since it involves applying a legal standard to a set of facts. The standard of review is not as stringent as the standard of correctness: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at paras. 28 and 36. See also *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.) at pages 13-15.

The Jurisprudence

11 In *Pinehurst Woodworking Co. v. Rocco*, [1986] O.J. No. 41 (Ont. Div. Ct.), the issue was whether delivery of plans and specifications showing work to be done by Pinehurst and its subcontractors on leased premises constituted sufficient notice to make the fee simple subject to the lien. There was no mention of the contract price and no intention at the time to give notice under the predecessor to the present s. 19(1). The Divisional Court, at page 20, held that the provision in the *Construction Lien Act* requiring the contractor to give notice in writing (by personal service according to the *Act* as it then read):

> ... envisages something more arresting in the sense of attention-getting than the delivery of plans required to be delivered for other reasons. The notice must be sufficiently distinct and memorable to allow the landlord to know when the 15 day period, within which he may deny liability, commences.
>
> [emphasis added]

12 The court found that the required notice had not been given, pointing to certain facts. Pinehurst had no intention of triggering the operation of the subsection. In fact, the plans were delivered to the landlord for a separately identified reason. The alleged notice did not give the landlord information as to the contract price.

13 We adopt the test outlined in *Pinehurst Woodworking Co.* as reasonable. It ensures that the landlord has notice of the contractor's intention to hold the landlord responsible in case of default by the tenant, without imposing overly technical or onerous requirements.

14 The *Pinehurst Woodworking Co.* decision has been often referred to in subsequent cases but with certain inconsistency. One line of authority suggests that the written notice under s. 19(1) of the *Construction Lien Act* must be fairly closely akin to the prescribed Form 2. However, other jurisprudence suggests that mere "indicators of notice" or "notice events" may suffice.

15 In *Venneri Engineering Ltd. v. Zonenward Leasex Management Inc.*, [1994] O.J. No. 1649 (Ont. Master), the plaintiff Venneri sought to hold the landlord Pianosi liable, relying on s. 19(1) of the *Construction Lien Act*. The prescribed form was not used and the issue was the adequacy of the "written notice" given. The plaintiff had faxed and mailed a letter to Pianosi, which read, in part,

> This letter is to notify you that we have been retained by your tenant Leasex ... This work will involve considerable renovation to the existing mechanical and electrical systems and we would appreciate receiving your acknowledgement by returning a signed copy of this letter as soon as possible.

16 Pianosi signed and returned a copy of the letter, adding certain conditions. Master Sandler found as a fact that Pianosi never would have signed the acknowledgement on the letter if he thought there was any risk of liability. He found that if there had been some sort of warning in the letter to the effect that the plaintiff was trying to hold the landlord liable, Pianosi would have made it clear to the plaintiff that the landlord assumed no responsibility for payment.

17 In considering the decision in *Pinehurst Woodworking Co.*, Master Sandler noted that under the predecessor to what is now s. 19(1) of the *Construction Lien Act*, there was no form of notice prescribed by Regulation. The essential facts were otherwise quite similar in the two cases. Master Sandler found that the wording of the letter from Venneri was not sufficiently "arresting" or "attention getting" or "sufficiently distinct and memorable" to allow the landlord to know that he was "being looked to to be financially responsible" for any money owing by his tenant to the contractor.

18 Master Sandler went on to comment:

> At a minimum, the "notice" must contain the basic elements of Form 2, being the name of the landlord and a reference to his capacity as landlord, the details of the contract, a description of the improvement to be made, a sufficient description of the premises, a reference to the contractor and the tenant by name and by capacity, and words sufficient to make it clear that the contractor is looking to the landlord's interest in the land, in addition to the tenant and his interest in the leasehold, to be responsible for payment of the improvement to be made, and additional words sufficient to make it clear that the landlord must give written notice back to the contractor within a certain time, if it wishes to disclaim responsibility for the improvement to be made, and additional words sufficient for the landlord to know when the 15 day period, within which he may disclaim liability, commences. Of course the safest procedure is for the contractor to use Form 2, in which case there can be no question of the adequacy of the notice. Failing that, each case must be looked to on its facts as I am doing in the present case.

19 We agree with the submissions of the appellant, GRM Contracting, that these comments in *Venneri Engineering Ltd.* go too far in their articulation of the onus upon a contractor and that they are incorrect. The obligations suggested exceed the obligations imposed by the provisions of 19(1) of the *Construction Lien Act*.

20 Master Clark considered the notice issue in *Southern Plumbing Ltd. v. Quality Craft Interiors Ltd.*, [1994] O.J. No. 2109 (Gen. Div.). The contractor in that case gave no express written notice to the landlord but relied upon "notice events." The court did not reject the concept that notice events, taken singly or cumulatively, might amount to adequate notice under s. 19(1) of the *Act* but found on the facts of that particular case that the notice events fell short of what was required.

21 In *Sloot Construction-Design Ltd. v. North Maple Mall Ltd.*, [1999] O.J. No. 4927 (Ont. S.C.J.), Heeney J. rejected the concept that "notice events" could satisfy the notice requirement of s. 19(1) of the *Construction Lien Act*. At para. 15 he states:

> The apparent object of s. 19(1) is to provide a mechanism whereby a person contemplating doing work on leased premises can hold the landlord liable for the price of the work. Notice is given to the landlord about the contract. The landlord then has 15 days to disclaim any responsibility for payment. If the landlord does not disclaim, the lien against the tenant will attach to the landlord's interest in the property. If the landlord does disclaim responsibility, then presumably the supplier will have to make a decision whether to proceed with the job anyway, trusting that he will be paid by the tenant and knowing that he has no lien rights against the interest of the landlord in the premises.

22 Other cases apparently hold the contractor to a much less stringent standard.

23 The highwater mark in a less stringent standard is outlined in *Royal Tile Flooring Ltd. v. Rannoch Developments Ltd.* [1998 CarswellOnt 5996 (Ont. Gen. Div.)], 15 May 1998, Guelph 10295/96. The court defined the issue as "whether or not any notice or notice events exist which would constitute sufficient notice under s. 19(1)." The lease between the landlord and its tenant specifically referred to particular improvements the tenant was to make to the property, reserving to the landlord its approval, and at least general knowledge of the improvements to be made.

24 There was no letter sent from the contractor to the landlord. The trial judge found that the lease itself in the context of other events and communications, constituted sufficient acts of notice under s. 19(1). While the lease was seen as a "significant distinction from the facts in *Venneri Engineering Ltd.*," Walters J. also specifically chose "not to import the additional requirements Master Sandler saw fit to impose in the *Venneri Engineering Ltd.* decision," that is to say the need for the notice to be "arresting" or "attention-getting" or "sufficiently distinct and memorable" to allow the landlord to know that he, or at least his land, was being looked to for indemnification.

25 In *Dearlove v. 451019 Ontario Ltd.*, [2002] O.J. No. 4217 (Ont. S.C.J.), the landlord sought to strike the claim for a lien which was founded in part upon s. 19(1) of the *Construction Lien Act*. Caswell J. held that the use of Form 2 is not mandatory and that a contractor is only required by s. 19 of the *Construction Lien Act* to identify the contractor and the tenant and describe the improvement. Using that low threshold, she concluded that there was at least a triable issue to be placed before the trial judge.

26 We conclude in law that the appropriate test was correctly outlined in *Pinehurst Woodworking Co.* The additional requirements enunciated by Master Sandler in *Venneri Engineering Ltd.* are too onerous and exceed the requirements of the statute. Further, we conclude that the interpretation in the case law that the notice requirement contemplated in the statute may be fulfilled by "notice events" alone, without a document providing notice in writing, does not conform with the statute. Notice events may only supplement the notice provided.

Analysis

27 In this case the appellant's memo to the landlord of March 3, 2000, previously referred to, is supplemented by "notice events" that include:

> a) details of the work required to be completed being set out in Schedule H of the lease;
>
> b) meetings between the appellant and the landlord in February of 2000;

c) the contents of the landlord's own Tenant Manual being provided to the tenant for the work to be done;

d) the review and approval by the landlord of the plans and drawings for the work;

e) the awareness of the landlord of additional work; and

f) the landlord's own independent awareness of the construction costs.

28 The appellant does not rely on these notice events as sufficient for the purposes of s. 19(1) in and of themselves, but submits that they are nevertheless relevant in measuring the adequacy or sufficiency of the March 3rd memo.

29 Who should bear the risk if the contractor chooses not to use the available Form 2? What is missing from the March 3rd memo that would have been included in a properly completed Form 2? The memo does not specify the date of the contract between the contractor and the subtenant, nor does it attach a copy of the contract or offer it up for inspection. There is no address for service for the contractor and the boldly printed "warning" of potential liability on the bottom of Form 2 is missing. The appellant submits that none of this missing information is germane on the facts and circumstances of this case because there is no demonstrable prejudice to the landlord. Even without a copy of the contract or advice as to its particulars, the landlord knew generally of the work to be done from the terms of the lease and knew specific information about plans and specifications that it approved before March 3, 2000. The landlord knew the approximate cost of the improvement. The landlord was in regular contact with the contractor and had no need of an address for service. Furthermore, the landlord was a sophisticated and experienced party, presumptively aware of s. 19(1) and not requiring a "warning".

30 The appellant submits that a fundamental purpose of the *Construction Lien Act* is to protect unsophisticated contractors or subcontractors and to ensure that landlords do not reap the benefits of the improvements to the property as a windfall.

31 The respondent submits that even sophisticated and experienced landlords should not be ambushed by a document that does not prompt a landlord to consider its option of disclaiming liability.

32 In our view, the very use of the word "notice" in the statutory provision is significant. We agree with Sutherland J. on behalf of the court in *Pinehurst Woodworking Co.* that the notice in any particular case envisages something "arresting in the sense of attention-getting" and that it must be "sufficiently distinct and memorable to allow the landlord to know when the 15 day period, within which he may deny liability, commences."

33 It is also significant that the notice must be in writing and that the words "the improvement to be made" requires the notice to be given before the work is undertaken.

34 Because of the 15 day period within which the landlord can disclaim responsibility, it is important that there be a "trigger point," that is to say an identifiable document which starts the clock running. It should be clear, and the document being relied upon as "notice" should not be buried or overshadowed in a document delivered for some other purpose. Landlords, particularly those who may have many tenants, are entitled to a fair warning if the rights and interests of parties are to be properly and equitably balanced under the *Construction Lien Act*.

35 A defective or incomplete Form 2 could constitute notice under s. 19(1) if it otherwise clearly signals a potential liability. However, we conclude that "notice events" taken singularly or cumulatively are not sufficient by themselves to satisfy the notice requirement to a landlord under s. 19(1) of the *Construction Lien Act*. These events may supplement the written notice a contractor is relying upon if the events took place before the delivery of that document, but it is a question of fact in each case as to whether the "written notice" is adequate in the sense of signalling potential liability.

36 In our view the motions judge correctly concluded that the memo of March 3, 2000, even in the context of the other facts and circumstances, did not clearly signal a potential liability on the part of the landlord and did not constitute adequate notice under s. 19(1) of the *Construction Lien Act*.

37 This appeal is, therefore, dismissed.

38 We asked counsel for their submission as to what the reasonable costs would be payable by the losing party. The respondent suggested $16,000.00 and the appellant suggested $7500.00 inclusive of G.S.T. and disbursements. In our view the suggestion of the appellant is reasonable, relative to cost awards in other cases. Costs therefore fixed in the amount of $7500.00 payable by the appellant to the respondent.

Schedule "A"

Form 2 - Notice to Landlord Under Subsection 19(1) of the Act

Construction Lien Act

TO: , the landlord of
(address of premises)

FROM:

a contractor, who has entered into a contract with your tenant,
to supply services or materials to make the following improvement to the above named premises:
(describe improvement to be made)

This contract was entered into on *(date)*

(Use A, B or C as appropriate)

(A) A copy of the contract is enclosed.

(B) The contract is oral and the following are the details of the contract:

(C) You may inspect a copy of this contract at *(place)* between the hours of , and every *(days of week)*.

Date:

(contractor or agent)
(address for service of contractor)

WARNING: Subsection 19(1) of the *Construction Lien Act* provides as follows:

19. (1) Where owner's interest leasehold — Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.

Appeal dismissed.

End of Document

Court File No. CV-17-11760-00CL

KEN TULLOCH CONSTRUCTION LTD.	- and -	**1684567 ONTARIO INC., et al.**
Plaintiff		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

In the Matter of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended

Proceedings commenced at Belleville, Ontario

BRIEF OF AUTHORITIES

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