Citation: Whiteland Services Inc v Oscar Bidco Inc o/a Oldcastle Buildingenvelope, 2024 MBCA 109
Date: 20241219
Docket: AI23-30-09990

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice James G. Edmond
Mr. Justice David J. Kroft

B E T W E E N:

	)	***R. E. Olschewski*** *and*
	)	***A. Makam***
WHITELAND SERVICES INC.	)	*for the Appellant*
	)	
(Applicant) Appellant	)	***J. M. Wheeler*** *and*
	)	***E. F. P. Podaima***
- and -	)	*for the Respondent*
	)	
OSCAR BIDCO, INC. o/a OLDCASTLE BUILDINGENVELOPE	)	*Appeal heard and Decision pronounced:*
	)	***November 29, 2024***
(Respondent) Respondent	)	
	)	*Written reasons:*
	)	***December 19, 2024***

EDMOND JA (for the Court):

Introduction

[1] This is an appeal of a decision of an application judge in which she found that a builder's lien (the lien) registered against the applicant's property by the respondent was valid and ordered that the sum being held in trust as security for the lien be paid out to the respondent (the order).

[2] At the appeal hearing, we allowed the appeal, set aside the order of the application judge and dismissed the application to vacate the lien with reasons to follow. These are those reasons.

[3] The applicant sought an order under section 55(3) of *The Builders' Liens Act*, CCSM c B91 [the *Act*], or alternatively, an order vacating the lien upon payment of the amount of the lien into the applicant's counsel's trust account as security in place of the lien (the application). The application was initially heard by McKelvey J on March 22, 2023, and a consent order was pronounced, directing that, upon payment of $46,909.63 to be held in trust by the applicant's counsel (the funds), the lien will be vacated and the funds shall stand as security for the lien (the consent order) until further order of a court directing that it be paid out to the respondent. These funds have been deposited and continue to be held in trust.

[4] On June 30, 2023, relief sought pursuant to section 55(3) was heard on a contested basis. The application judge granted the order.

[5] The appeal was originally heard on April 29, 2024 (the first hearing). It was adjourned *sine die* as a result of two issues we raised. First, a preliminary question was raised as to whether the order was final or interlocutory and whether leave to appeal was required. Pursuant to section 25.2(1) of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*], leave is required to bring an appeal from an interlocutory order (there are exceptions that do not apply here). The applicant was directed to file a notice of motion seeking leave to appeal and the parties were given an opportunity to file memoranda of law addressing that issue.

[6] Second, the funds held pursuant to the consent order were directed to be paid out to the respondent and we questioned the legal basis for making that order.

[7] Further, we advised the parties that this Court recently heard an appeal dealing with an application made pursuant to section 55(3) of the *Act* and reasons for decision had not been released at the time of the first hearing (see *Sterling Parkway Residences Inc v Gypsum Drywall Interiors Ltd*, 2024 MBCA 46 [*Sterling Parkway*]). The parties were given an opportunity to review *Sterling Parkway* prior to proceeding with the appeal. As a result, the first appeal hearing was adjourned *sine die* and the parties were directed to file further material, including memoranda of law addressing the leave issue and supplementary facta addressing *Sterling Parkway*'s application to this appeal.

[8] The parties filed further material and the appeal hearing resumed on November 29, 2024. As to the preliminary issue of whether leave to appeal was required, the parties disagreed on whether the order was interlocutory or final. The applicant submitted that it was final. The respondent submitted that the finding that the lien was valid was interlocutory, and the direction on payment of the funds to the respondent was a final decision. However, at the appeal hearing, the respondent conceded that both decisions made by the application judge were final regarding the substantive rights of the parties and acknowledged that section 25.2(1) of the *CA Act* did not apply. We agreed.

Background

[9] In 2022, a construction project was underway on the applicant's property (the project). The respondent was a subcontractor that supplied

architectural glass panes to Accurate Dorwin (2020) Inc. (Accurate). Accurate performed work and services and supplied materials in relation to the project.

[10] On August 10, 2022, the respondent agreed to supply glass panes to Accurate for $125,600. The plans for the project required 379 glass panes. Accurate initially issued purchase orders to the respondent for 379 glass panes. Between November 2, 2022 and December 9, 2022, the respondent shipped 379 glass panes for the project to Accurate pursuant to fourteen purchase orders. On November 16, 2022, Accurate issued another purchase order to the respondent for a single glass pane. Sometime in January 2023, the last glass pane was delivered to Accurate's business location, rather than to the applicant's property, although there was disagreement as to whether it was delivered in early January or late January.

[11] On February 23, 2023, the respondent registered the lien claiming the amount of $46,909.63. On February 28, 2023, the applicant paid the entire holdback amount of $43,131.38 to Accurate based on a statutory declaration signed by Accurate, and without checking for registered liens. Accurate subsequently pursued protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

[12] No certificate of substantial performance was produced in evidence before the application judge.

[13] The applicant's position before the application judge was that the 379 glass panes were supplied and installed in December 2022, and there was no evidence that the last glass pane was for the project. The applicant submitted, therefore, that the lien for the value of the 379 glass panes was registered too late and should be vacated from the title of the property.

[14] The application judge found that there was an ongoing request by Accurate to the respondent to provide glass panes for the project, including the last glass pane delivered in January 2023. Further, she found that even if the last glass pane was not required for the project, it was ordered for the project by Accurate. Accordingly, the application judge pronounced "that the lien filed by [the respondent] was filed within the proper time limits and the money held in trust will be paid out to [the respondent]." She also then held that the lien is valid and directed that the funds "be turned over to the respondent".

[15] The order was stayed for thirty days pending appeal and the parties agreed to continue to hold the funds in trust pending the outcome of this appeal.

Standard of Review

[16] There is no dispute on the applicable standard of review respecting an order made under section 55(3) of the *Act*. The order is a discretionary decision that is entitled to significant deference, and appellate intervention is not justified absent a misdirection in law, a palpable and overriding error of fact or a clearly wrong decision occasioning "a truly unjust result" (*Sterling Parkway* at para 36; see also *Sagkeeng v Government of Manitoba*, 2021 MBCA 88 at para 29, quoting *Perth Services Ltd v Quinton*, 2009 MBCA 81 at para 28; *Elsom v Elsom*, [1989] 1 SCR 1367 at 1374-75, 1989 CanLII 100 (SCC)).

[17] The issues of statutory interpretation, including the test to be applied on a section 55(3) application, are questions of law, subject to review on a standard of correctness (see *Sterling Parkway* at para 37).

Analysis and Decision

[18] The test to be applied to vacate a lien under section 55(3) of the *Act* was articulated in *Sterling Parkway* as follows: "an order vacating a lien under s 55(3) of the *Act* on other grounds ([that is,] without posting security) should be granted only in the clearest of cases where there are no material facts in dispute and it is patently demonstrable that no builders' lien exists" (at para 59).

[19] The application judge erred in law in failing to apply the correct legal test. In fairness to the application judge, she did not have the benefit of *Sterling Parkway* at the time she gave the order. Had she identified and applied the correct test, she would have simply dismissed the application.

[20] The applicant submits that the application judge erred in finding that the lien was registered in time, as the last glass pane supplied was never used to improve the project and, therefore, could not be used to extend the time for registering the lien. Further, it contends that the last glass pane was supplied pursuant to a second contract and that the application judge erred in finding that it was delivered on January 24, 2023, and not on January 5, 2023. Alternatively, the applicant submits that, having found that the agreed price for the 379 glass panes was $125,600, and that the amount paid was $98,846.03, the amount owing to the respondent was $26,753.97, not the amount ordered by the application judge to be paid to the respondent.

[21] The respondent submits that there is no basis for appellate intervention respecting the order declaring the lien valid. The application judge's factual finding that the last glass pane was delivered on January 24, 2023, and other findings of fact are entitled to deference. Further,

the respondent submits that the application judge did not err in finding that the funds were left unpaid to the respondent, as there was only one contract, and that it is supported by the purchase orders and invoices rendered.

[22] The respondent agreed that it was an error for the application judge to order payment of the funds to the respondent. Although we will briefly address that direction, the primary issue in this appeal was whether the lien should be vacated on any grounds pursuant to section 55(3) of the *Act*.

[23] While both parties agree in their supplementary facta that "material facts are not in dispute", there were clearly many contested issues before us that were key to the application judge's decision, including:

a. whether the last glass pane was delivered on January 5 or January 24, 2023;

b. whether the last glass pane was for remedial work, as opposed to part of the supply subcontract;

c. whether there was one or two subcontracts;

d. if the last glass pane was not used to improve the project, whether it can form part of a lienable interest; and

e. if payment out was appropriate, whether the respondent was entitled to the funds that the application judge directed be paid out to the respondent or some lesser amount.

[24] Applying the correct test used in *Sterling Parkway*, this was not one of the clearest of cases where there were no material facts in dispute, and it is

patently demonstrable that no builders' lien exists. Had the application judge applied the correct test, she would not have found that the lien was valid and directed the funds to be paid out to the respondent pursuant to the consent order. Once it was determined that there were material facts in dispute and it was not patently demonstrable that no builders' lien existed, it was not open to the application judge to vacate the lien, and the only disposition was to dismiss the application.

[25] While it was not fully argued in this case (and we are not ruling on that point), it is questionable whether an application judge has jurisdiction under section 55(3) to make a final determination as to whether a lien is valid. The purpose of section 55(3) is only to vacate a lien if the *Sterling Parkway* test is met. In this case, assuming the respondent will now issue a statement of claim to enforce its lien, we leave it to a trial judge, who will have a complete evidentiary record, for the determination of whether the lien is valid or not.

[26] The application judge also directed that the funds be paid out to the respondent pursuant to the consent order. Although the consent order states that the funds were posted pursuant to section 55(3), it is clear that the consent order was granted pursuant to section 55(2). Section 55(2) permits vacating a lien upon posting security or payment into court.

[27] Sections 55(2) and 55(3) provide for two different routes to vacate a builders' lien. If a lien is vacated under section 55(2), an application may be made pursuant to section 56(3) for payment out of the security posted. In this case, no such application was filed by the respondent.

[28] The application judge had no jurisdiction or authority to order the release of the funds, as that cannot be ordered pursuant to section 55(3). A separate application pursuant to section 56(3) and a notice to every person affected are required, which would include any other lienholders.

[29] In this case, since there were material facts in dispute, the application should have been dismissed and the respondent should have been required to advance an action to prove and enforce its lien pursuant to the *Act*. As pointed out in *Sterling Parkway*, the process to enforce a lien is distinct from an application under section 55 of the *Act* (see para 49).

[30] Similar to what occurred in *Sterling Parkway*, the application judge in this case purported to make final determinations regarding the validity of the lien and directed the release of the funds to the respondent. The caution in *Sterling Parkway* at para 69 is apt:

> [T]the application judge's role on a s 55(3) application is limited to applying the proper test and determining whether the applicant is entitled to have a lien vacated at that stage. In a proper case, like *Aurora Quarrying*, such an application may be allowed. Judges dismissing this type of application are strongly discouraged from making statements about either law or facts that are or may be in dispute at trial. This is especially so where another judge will hear the legal issues and contested facts at the trial (see *Hyczkewycz v Hupe*, 2016 MBCA 23 at para 5).

Conclusion

[31] In the result, we allowed the appeal, set aside the order of the application judge and dismissed the application to vacate the lien. Although the parties requested costs, we determined that this was not an appropriate case for costs to be awarded on the appeal in the circumstances, including the

timing of the release of *Sterling Parkway*. Since the respondent was successful on the application, albeit for different reasons, we see no reason to disturb the application judge's order of costs in the Court below, being that costs be in the cause.

Edmond JA

Beard JA

Kroft JA