

SUPERIOR COURT OF JUSTICE

BETWEEN :

TRIFIELD CONSTRUCTION MANAGEMENT INC.

Plaintiff (Responding Party)

- V -

111 BATHURST INC., HARHAY CONSTRUCTION MANAGEMENT LTD., AND RBC

Defendants (Moving Parties)

COUNSEL: Moving (Def) J. Sacks
Responding (Pl.) V. Ibe

TRANSCRIPTION OF THE ENDORSEMENT OF MASTER C. ALBERT

dated October 28, 2015 (unreported)

The defendants 111 Bathurst (“111”) and Harhay Construction (“Harhay”) ask the court for partial summary judgment dismissing the claim against Harhay and discharging the claim for lien registered May 30, 2014 as instrument AT3596086. The first issue is whether there is a genuine issue requiring a trial to determine whether Trifield has a cause of action against Harhay that has a chance of success or whether the claim against Harhay should be dismissed summarily.

Trifield’s claim against Harhay is grounded in contract. The only written contract is one between Trifield and 111. The evidence of Trifield’s witnesses S. Goodman and A. Goodman is that the contract was with 111. Former employee Mr. Philosophie’s evidence is that the contract was between Trifield and 111. For Trifield to prove its claim against Harhay has a chance of success it must provide some evidence of a basis for Harhay having an obligation to pay Trifield for services and materials supplied. The totality of the evidence is that there is no contractual basis imposing such an obligation on Harhay or that Harhay has an ownership interest in the property. There is evidence that Harhay paid Trifield’s invoices, or some of them, but that fact was not explored by Trifield on cross-examination.

The purpose of Rule 20, and the rationale underlying the rule as expressed in the *Hryniak v Mauldin* case 2014 SCC 7, is that where there is no genuine issue requiring a trial after the parties have been given an opportunity to put their best evidence forward, the issue should be determined by summary judgment.

In this case I find that there is no genuine issue requiring a trial on the issue of whether Harhay had an obligation to pay Trifield for services and materials supplied. There was no contractual obligation. There is no evidence that Harhay has an ownership interest in the property. As such, the claim of unjust enrichment by improving the property cannot succeed as against Harhay.

For these reasons, the claim against Harhay is dismissed.

The second issue is whether the construction lien is fatally flawed by naming Harhay, rather than 111, as the person to whom services and materials were supplied. In my view it is not. The position of 111 and Harhay is that Harhay was 111's construction manager and at all times the contract was between 111 and Trifield. The services and materials would have been supplied to Harhay as 111's construction manager. There is no error. If there is, it is minor and the curative provision in section 6 of the *Construction Lien Act* allows it to be cured by reading in "111" together with "Harhay"

The analysis and rationale explained in *Govan Brown v Equinox* 2014ONSC 3924 at paragraphs 35 through 40 applies. 111 has not been misled. No one is prejudiced. The purpose of registering a lien is met, namely 111 is on notice that the services and materials Trifield supplied to improve 111's property at 111 Bathurst Street have not been paid for and Trifield claims a lien against the owner 111's interest in the property or a charge against security posted if the lien claim has been vacated.

For these reasons the defendants' motion to discharge the claim for lien is dismissed.

COSTS

MOTION

Success was divided on the issues but defendants argue the bulk of the costs incurred was in respect of the motion to dismiss the action as against Harhay.

Taking into account factors that include compensation, reasonable expectation as gleaned from costs outline filed, results achieved, I find that on the motion each party should bear their own costs.

ACTION

On the dismissal of the action as against Harhay I find that Harhay is entitled to costs of the action fixed at \$500.00 payable by Trifield to Harhay.

Master C. Albert