CITATION: Frontenac Mortgage Investment Corporation v. Hyde Park Residences Inc., 2015 ONSC 4457
COURT FILE NO.: 14-59998
DATE: 2015/07/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FRONTENAC MORTGAGE INVESTMENT CORPORATION, Applicant

AND

HYDE PARK RESIDENCES INC., Respondent

BEFORE: Beaudoin J.

COUNSEL: Heather L. Acton, counsel for the Moving Party, X-L-Air Energy Services Ltd.

Gordon Douglas, counsel for Deloitte Restructuring Inc., the Receiver and Manager of Hyde Park Residences Inc.

HEARD: June 19, 2015 (at Ottawa)

ENDORSEMENT

[1] X-L-Air Energy Services Ltd ("XLA") brings this motion seeking compensation for storage and handling costs incurred since February 20, 2014 with respect to the mechanical equipment related to the construction of a building on land owned by the Respondent, Hyde Park Residences Inc. ("Hyde Park").

The Facts

[2] The Respondent was the developer of the project known as Hyde Park Residences. XLA was the mechanical subcontractor. The project ran into financial difficulties and XLA registered two liens related to unpaid invoices and customized mechanical equipment that had been and was being fabricated for the project. Other liens were registered against the property. The project then stopped.

[3] In an effort to get the project back on track, an agreement was reached between the lien claimants and the developer in order to continue with work which was funded by the injection of additional capital. It was agreed among the lien claimants that if the settlement agreement fell apart, any mechanical equipment that was the subject matter of the second XLA lien which was

received by XLA but not delivered to the site would become the property of the developer and its creditors. The Receiver appears to accept that title passed on that date.

[4] The developer defaulted and Frontenac Mortgage Investment Corporation ("Frontenac") applied to the Court for an order appointing Deloitte Restructuring Inc. as Receiver in order to realize on the property for the benefit of all creditors. I granted that order on February 20, 2014. That appointing order permits the Receiver to, among other things, take possession of and control over the property and to receive, preserve and protect the property.

[5] By letter dated January 9, 2014, XLA's counsel had already advised the Receiver's counsel that it would be seeking compensation for storage and handling costs for the equipment that had been incurred by XLA up to that point in time.

[6] On May 27, 2014 the Receiver's counsel was advised that XLA would release the mechanical equipment to the Receiver upon storage fees or $2,500 per month (or $82.19 per day), calculated from the date of the receivership. The Receiver was further advised that XLA needed storage space for its own equipment, and that it would have to make alternate arrangements for storage if the Hyde Park equipment was not moved.

[7] The Receiver left the equipment in storage with XLA while it continuously offered of the assets of the developer for purchase. That remained the situation until such time as the Receiver accepted an offer to purchase the assets of the respondent which was approved by me on June 4, 2015.

[8] Having regard to the nature and size of the equipment, the storage costs have been significant and the evidence put forth by XLA is not disputed. XLA has received no compensation for the storage of this equipment since the Receiver was appointed.

[9] In his summary, XLA seeks to recover:

(a) storage costs for the equipment at a rate of $81.97 per day calculated from February 20, 2014;

(b) the cost to install a steel gate to ensure the equipment was secure in the amount of $2,599; and

(c) legal costs incurred with respect to this issue in the amount of $11,275.52.

[10] XLA relies on the provisions of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25. (the "*Act*"). In the alternative, it relies on the common law right of interpleader. The relevant sections of the *Act* are as follows:

[11] Section 1(1) defines a "storer" as follows:

> "storer" means a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be. ("entreposeur")

[12] Sections 4 (1) and 4 (3) provide:

> **Storer's lien**
>
> 4. (1) Subject to subsection (2), a storer has a lien against an article that the storer has stored or stored and repaired for an amount equal to,
> (a) the amount agreed upon for the storage or storage and repair of the article;
>
> (b) where no such amount has been agreed upon, the fair value of the storage or storage and repair, including all lawful claims for money advanced, interest on money advanced, insurance, transportation, labour, weighing, packing and other expenses incurred in relation to the storage or storage and repair of the article,
>
> and the storer may retain possession of the article until the amount is paid.
>
> ...
>
> **When lien arises**
>
> 4 (3) A storer's lien arises and takes effect when the storer receives possession of the article for storage ...

[13] Section 6 of the *Act* also specifies that a possessory lien has priority over the interest of all other persons in the article. The act has been considered remedial legislation that is designed to protect those who repair or store an article.[1]

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[1] *Fountain Tire Corporation v. Grant Thornton Ltd.*, 2007 CanLII 23162 (ON SC)

[14] In this case, there is no written agreement between the developer and XLA that governs the storage of the mechanical equipment in issue. The equipment was initially received by XLA in or about May, 2012 from the companies that fabricated the equipment. XLA did not receive the equipment from the developer. Nevertheless, on or about May 23, 2013, title to the mechanical equipment passed from XLA to the developer pursuant to an agreement entered into between the lien claimants.

[15] In my view, the definition of "storer" is broad and XLA fits within that broad definition.

[16] In a decision cited by the Receiver namely, *National Bank of Canada v. CJC Bottling Ltd.,* [2006] O.J. No. 1714 (SCJ), the court had to decide whether the goods were stored "on the understanding that the person will be paid for the storage" in order to determine if the claimant in that case was a "storer".

[17] Here, it is helpful to look at the reports filed by the Receiver and Manager. In the first report dated April 7, 2014, under the heading **Hyde Park assets being held by third parties,** the Receiver acknowledges that XLA is seeking storage costs. The Receiver further acknowledges that the value of the equipment is several hundred thousand dollars. His remarks conclude: "this matter is still being pursued".

[18] The second report of the Receiver dated January 26, 2015, continues to describe mechanical equipment stored by XLA as asset of Hyde Park being held by a third-party. The report discloses that there were discussions about releasing the mechanical equipment to the Receiver upon payment of storage fees in the amount of $82.19 per day calculated from the date of the receivership and XLA's offer to move the equipment back to the Hyde Park site for approximately $20,000. The Receiver indicates that it wants to wait until bids were received before deciding to commit funds to retrieve the equipment. The Receiver was aware that XLA was claiming additional storage costs and advised XLA that it would have to wait until the purchaser of the property decided whether or not it would need equipment.

[19] The third report dated May 28, 2015, continues to describe the mechanical equipment as an Hyde Park asset being held by a third party. The report discusses XLA's attempts to realize on the equipment to recover its storage charges. At para 46, the report states:

> ... The Receiver also requested X-L-Air to provide a summary of the amounts being claimed for storage and handling of the equipment, and if deemed fair, then the Receiver would consent to X-L-Air retaining some or all of the proceeds from its sale to be applied to the storage and handling costs.

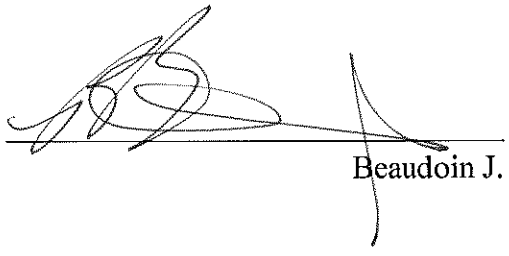
[20] John Saunders, who authored those reports claims in his affidavit filed in response to the motion that he only learned on July 17, 2014 that the equipment in issue was never delivered to the Hyde Park construction site. He explains that his mistaken belief that Hyde Park had accepted the equipment on an earlier date was the basis for his conclusion that the Receiver should compensate XLA for its storage of the equipment.

[21] This may be so, but he was aware of that mistake when he filed his two reports after July 17, 2014, including the report dated May 28, 2015 where he acknowledges XLA's entitlement to fair compensation for the storage and handling of the equipment.

[22] On the facts before me, I find that there was an understanding that XLA would be paid for its reasonable storage costs. Section 4(1)(b) provides that where no such amount has been agreed upon, a "storer" has a lien for the "fair value of the storage". In this case the only evidence of fair value is that which has been provided by XLA; namely that the cost of the storage of this equipment is $82.19 per day. I conclude that XLA can properly claim that amount from the date of the appointment of the receivership until such time as the equipment is removed from its storage facilities. In the alternative, I would allow XLA the right to claim these storage costs by way of Interpleader.

Costs

[23] I decline to order the Receiver to compensate XLA for the cost of installing a gate nor will I allow XLA to claim its legal costs under this section of the *Act*. XLA must seek any compensation for legal costs in the context of bringing this motion. XLA is to make its written submissions within 20 days of the release of this decision and the Receiver will respond within 20 days thereafter.



Beaudoin J.

Released: July 9, 2015

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