

Case Name:

Butko v. Ratayeva

Between

Victor Butko, and

**Iryna Ratayeva, Varym Ratayev, the Toronto-Dominion
Bank, Alrae Investments
Inc., Vicotira Zemelman, Domenic Perschini,
Alex Greenspam, Julie De Santis
and 1249112 Ontario Inc.**

[2015] O.J. No. 2914

2015 ONSC 1102

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47 C.L.R. (4th) 344

255 A.C.W.S. (3d) 267

Court File No.: CV-14-511864

Ontario Superior Court of Justice

Master C. Albert

February 18, 2015.

(40 paras.)

Counsel:

A. Bouchelev for defendants Ratayev(a) (moving).

H. Swartz for plaintiff (responding).

ENDORSEMENT

1 MASTER C. ALBERT:-- Iryna Ratayeva, owner of 10 Elderwood Drive, Toronto, and her husband Vadym Ratayev ask the court to discharge the construction lien registered against their home on July 18, 2014 by Victor Butko, claiming \$115,000.00. They further ask the court to dismiss the action issued by Mr. Butko to enforce the lien claim.

2 The issues are:

- a) Whether Mr. Butko supplied services and materials to an improvement at 10 Elderwood Drive giving rise to a claim for lien and if so whether his lien claim was preserved and perfected in time;
- b) If the lien claim is discharged, whether the claim should proceed as a claim under section 63 of the *Construction Lien Act*, R.S.O. 1990, c.C.30 (the "Act") for a personal judgment and if so, which procedure should apply; and
- c) Whether a case management master exercising discretion as the court but not as the reference master has jurisdiction under section 47 of the Act to weigh evidence, evaluate credibility and draw reasonable inferences from the evidence in considering whether to dismiss an action and if so whether, on the facts of this case, discretion should be exercised in favour of the moving party.

I. Background

3 Mr. Butko registered a claim for lien as instrument AT3638625 on July 18, 2014 against PIN 21177-0178, 10 Elderwood Drive, for \$115,000.00 claiming in the "statements" portion of the claim for lien:

"Time within which services and materials were supplied from 2014/05/08 to 2014/06/16. Short description of services or materials that have been supplied: all materials and labour with respect to the construction of a home. Contract price or subcontract price

\$325,000.00. Amount claimed as owing in respect of services or materials that have been supplied \$115,000.00."

4 The evidence filed on the motion shows that Mr. Butko and Mr. Ratayev, a real estate agent,

have had business dealings that date back to 2010. Mr. Ratayev acted as agent for Mr. Butko's purchase of 220 Rosemary Road, Toronto and advised him regarding building permits and zoning approvals required to tear down the existing house and replace it with a newly constructed house. Mr. Ratayev was also named as a co- agent in the listing for sale of Mr. Butko's 220 Rosemary Road property.

5 When Mr. Butko's property sold in February 2014 for \$3.1 million, an amount \$400,000.00 less than the asking price, Mr. Butko did not realize any profit but Mr. Ratayev made a commission on the sale. It seems Mr. butko was not happy with this outcome.

6 During the period of Mr. Butko's tear down and rebuild Ms Ratayeva and her husband also carried out a tear down and rebuild of 10 Elderwood Drive. They had purchased the property in August 2010 and commenced the demolition and rebuild in October 2012, completing it in or about April 2014 and moving into the property in May 3, 2014.

7 The Ratayev(a)'s contend that Mr. Butko was not involved in any way with the 10 Elderwood Drive construction project and that he registered a construction lien in retaliation for the failure to achieve a profit on the sale of his 220 Rosemary Road property.

II. Analysis

a. The First Issue: Did Mr. Butko supply services and materials to the property?

8 A lien claim is not an absolute right. It is an extraordinary remedy available to a person who supplies services and materials to improve a property¹ The Ratayev's contend that Mr. Butko did not supply services and materials to improve 10 Elderwood Drive and that his construction lien is a sham. They ask the court to discharge the lien claim. They rely on the evidence of Vadym Ratayev that Mr. Butko did not supply any renovation services or materials to 10 Elderwood Drive. They also rely on the evidence of the appraiser to the lender of funds for 1 Justice Power in *Lauch v Lauch*, 2011 ONSC 2998 (Canlll) citing and adopting Master Albert in *Federated Contractors Inc. v Ann-Maura Developments Inc.*, 2010 CarsweilOnt 37010 Elderwood Drive to the effect that as of April 2014 the new home was 99.1 percent completed. They filed in evidence the moving company invoice as corroborating evidence to show that they moved back into the property on May 3, 2014. That is four days prior to the beginning of the period in which Mr. Butko alleges that he began his supply of \$124,000.00 worth of services and materials.

9 Faced with this evidence Mr. Butko had the opportunity to lead evidence of the services and materials he supplied between May 8, 2014 and June 16, 2014. He filed an affidavit in which he makes bald assertions that he was "solicited to ... help with the renovations at 10 Elderwood Road ...I used my services, used my money and that of my wife's to loan Vadym money at his request and used my money to purchase materials."

10 Loaning money is not a lienable claim under the Act.

11 As for the purchase of materials, the only evidence in support filed by Mr. Butko is a series of receipts that total \$14,455.24 for the period that begins May 5, 2013 and ends July 3, 2013, a year prior to the alleged period of supply referred to in Mr. Butko's claim for lien. It also overlaps the period during which time Mr. Butko was building his own house at 220 Rosemary Road. Upon examining the receipts there is no indication that the materials were purchased for the construction of 10 Elderwood Drive.

12 Mr. Butko also tenders in evidence an invoice from himself dated January 14, 2014 for \$124,300.00 with the description: "Construction material loaned and labour up to date". It is addressed to Vadym Ratayev at 10 Elderwood Drive. It does not include any backup or documents explaining the materials and labour invoiced.

13 Given the opportunity on this motion to file supporting evidence to corroborate the supply of services and materials Mr. Butko failed to do so. On such a motion a contractor could file evidence in the nature of receipts for materials purchased, time sheets, a diary indicating days worked, a statement of hours worked and hourly rates charged, photographs of the work as it progressed and a description of the exact services and materials supplied. Mr. Butko did not file any such evidence.

14 He did file a document that he describes as a contract that he entered into with Vadym Ratayev on July 1, 2013 for construction of a home at IO Elderwood Drive. The contract provides for Vadym Ratayev to pay a deposit of \$500.00 on July 1, 2013 but there is no evidence that such a deposit was paid.

15 In my view the contract is also suspect due to the absence of any corroborating documents to show that it was implemented at all. If it was a valid contract it would have been implemented to some extent because the construction lien filed by Mr. Butko asserts that there was a contract for \$325,000.00 of which \$115,000.00 remains outstanding. If that is the case then one would expect to see some evidence of payment of the portion of the contract that Mr. Butko claims was paid. He provided no such evidence.

16 The Ratayev's deny entering into such a contract and filed in evidence the report of a handwriting expert, Atul K. Singla, who opines that the signature on the contract that purports to be that of Vadym Ratayev does not match the 14 other signatures of Vadym Ratayev used as samples. He concludes that the signature is forged. I accept Mr. Singla's qualifications as an expert. He has extensive experience as an expert in civil and criminal cases. While I do not need to rely on the report of Mr. Singla to find that the alleged contract asserted by Mr. Butko is of no probative value, it corroborates Vadym Ratayev's evidence that he never executed such a contract.

17 Mr. Butko filed an affidavit on February 11, 2015 that was out of time but that I grant leave to accept. He explains that the handwriting opinion is likely in error because Mr. Ratayev never returned the original contract signed, only a copy, so that if the signature was forged it was forged

by Mr. Ratayev. It makes no sense to suggest that Mr. Ratayev would forge his own signature on a document that he asserts is a fabrication. However it does suggest that perhaps Mr. Butko was unable to produce an original of the alleged contract because it does not exist.

18 Mr. Butko's evidence goes on to list a number of instances where he or his wife advanced money to Mr. Butko. Money is not a service or materials that is lienable. If Mr. Burko has a claim for moneys lent and not repaid then his recourse is a civil collection claim.

19 Mr. Butko also relies on evidence that he had a helper, Sergey, who carried out work at I 0 Elderwood Drive prior to its tear down and rebuild. He refers to a letter from Sergey at tab "N" but no such letter was attached to his affidavit. Nor did he file an affidavit from Sergey to corroborate this evidence. Even if he did, the work performed prior to the tear down in 2012 would not fall within the period of supply for which the lien claim was registered.

20 Mr. Butko, as respondent on this motion, must put forward his best evidence. If this is his best evidence then there is no chance that his claim for lien can succeed. He has provided no evidence of supplying services and materials from May 8, 2014 to June 16, 2014 as asserted in his claim for lien. I find that Mr. Butka's bald assertions, unsupported by any evidence of probative value, fail to persuade me that his claim for lien has any chance of success.

21 On that basis the claim for lien registered by Mr. Butko as instrument AT3638625 on July 18, 2014 against PIN 21177-0178 must be discharged and the certificates of action registered as instruments AT36850 14 and AT3686469 must be vacated.

b. The Second Issue: Should the action continue pursuant to section 63 of the Act?

22 The Act provides that a claim for lien can continue as a claim for a personal judgment in circumstances where the lien claim is not proven. This provision is useful when a lien claim is preserved or perfected out of time but there is a chance of success on the claim as a personal judgment.

23 I have reviewed the statement of claim carefully. It pleads only the recovery claimed in the claim for lien. If the claim for lien would have succeeded on its merits, or would have had a chance to succeed on its merits, but the lien claim was out of time, then recovery under section 63 would have ben appropriate. In that event I would have directed that the action proceed as an ordinary action unless the plaintiff waived the excess above \$100,000.00 in which event the action should proceed as a simplified rules action.

24 However, given my ruling on the third issue, the discussion regarding section 63 of the Act is academic.

c. The Third Issue: A Master's jurisdiction under s.47 of the Act

25 The moving parties contend that as a master exercising discretion under section 47 of the Act I have the power to weigh evidence, evaluate credibility and draw reasonable inferences from the evidence on a motion to dismiss an action brought under the Act. The responding party's position is that those powers rest exclusively with a judge pursuant to summary judgment rule 20.04(2.1) or, alternatively, by a master presiding over a reference in which case the master has all the powers of the court including those of a judge.

26 Section 47 (1) (d) of the Act provides:

47. (1) Upon motion, the court may,

(d) dismiss an action

upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.

27 "Court" is defined in the Act as the Superior Court of Justice. Section 67 of the Act provides that except where inconsistent with the Act the rules of court apply. Rule I defines "court" to include a case management master.

28 It is well established that a motion brought under section 47 of the Act is akin to a summary judgment motion. The test that has been applied and that continues to apply is the test that applies to summary judgment motions brought in civil actions under rule 20.04. Prior to the rule amendment the test was whether there is a genuine issue for trial. Since the rule amendment the test is whether there is a genuine issue that requires a trial. The responding party is required to put his best foot forward and lead his best evidence in an effort to keep the lien claim (and in this case the action) alive. In effect the summary judgment test under rule 24.04 applies to motions brought pursuant to section 47 of the Act.

29 The issue is whether the restrictions on the powers available to a judge under rule 20.04(2.1) are available to the court (i.e. a master) exercising jurisdiction under section 47 of the Act. In my view they do. The Act does not incorporate rule 20.04 by reference. Rather the case law developed to provide that the test that is used to decide motions under rule 20.04 is the same test that should be applied on motions under rule 47 of the Act. Had the legislature sought to limit the discretion of the court under section 47 such that the powers used to exercise discretion are restricted to motions under section 47 of the Act heard by a judge but not by a master, then the Act would have so stated. Section 67 is clear: where the Act and the rules conflict, the Act prevails. I conclude that the powers available to the court to determine a motion under section 47 of the Act are not limited in their application to motions heard by a judge. A master may exercise the same powers on a motion under section 47 of the Act whether or not the master is presiding over a reference or a motion in an action that has not been referred.

30 Since the body of law in that regard developed the rule was amended in furtherance of the recent trend towards judicial efficiency, proportionality and the alternative and more expeditious resolution of disputes where appropriate. Rule 20.04 now reads:

20.04(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 the claim or defence ...

(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 trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

31 Cases decided since implementation of the amendments to rule 20.04 have reinforced the legislature's intention to allow for an expedited resolution of disputes where appropriate. In *Combined Air Mechanical Services Inc. v Flesch*² the Court of Appeal considered the powers in rule 24.01(2.1) in explaining the full appreciation test on a summary judgment motion as follows:

"50 ... In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of trial?"

51. "We think this full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interests of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating 2 (2011) 108 O.R. (3d) 1 at paragraphs 50 and 51 from a number of witnesses and found

in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process."

32 In the present case there is a relatively simple issue: did Mr. Butko supply services and materials to improve 10 Elderwood Drive from May 8, 2014 to June 16, 2014 for which he was not paid? The evidence, while contradictory, is not voluminous. Affidavits were filed by the main parties: Mr. Butko for the plaintiff and Mr. Radayev for the defendant. The defendant also filed a short affidavit from a real estate appraiser and a report from a handwriting expert. In my view a summary judgment motion is an adequate substitute for the trial process.

33 The Supreme Court of Canada opined on the revised summary judgment test in *Hryniak v Mauldin*³, noting that the rules changed the test for summary judgment from whether the case presents a genuine issue for trial to whether there is a genuine issue that requires a trial. The court found that:

"43 ...The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure ...

"44. The new powers in rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

"45 ...the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication."

34 I have already discussed the evidence filed on this motion. The preponderance of evidence supports a finding that Mr. Butko did not supply services and materials to improve I 0 Elderwood Drive between May 8, 2014 and June 16, 20 I4. There is not a shred of evidence filed in response by Mr. Butko that persuades me that there is a genuine issue that requires a trial.

35 The moving parties are entitled to their order dismissing the action, discharging the lien claim of Mr. Butko and vacating the certificate of action.

III. Conclusion

36 THIS COURT ORDERS that the construction lien registered on July 18, 2014 as instrument AT3638625 against PIN 21177-0178 LT (10 Elderwood Drive) is hereby discharged.

37 THIS COURT ORDERRS that the certificate of action registered on September 10,2014 as instrument AT36850 14 and the certificate of action registered on September II, 20 I4 as instrument AT3686469 are hereby vacated.

38 THIS COURT ORDERS that this action be and the same is hereby dismissed.

39 THIS COURT ORDERS that the parties attend before me on March 11, 2015 at 10:00am to make submissions on costs unless, prior to that date, the parties have agreed on costs.

40 The moving party defendants may take out the order discharging the lien claim and vacating the certificate of action forthwith as a separate order from the order dismissing the action and the order for costs.

MASTER C. ALBERT

1 Justice Power in *Louch v Louch*, 2011 ONSC 2998 (CanLII) citing and adopting Master Albert *Federated Contractors Inc. v Ann-Maura Developments Inc.*, 2010 CarswellOnt 370.

2 (2011) 108 O.R. (3d) 1 at paragraphs 50 and 51

3 2014 SCC 7, [2014] 1 S.C.R. 87 paragraphs 43-45