King Road Paving and Landscaping Inc. v. Plati

Ontario Judgments

Ontario Superior Court of Justice

R. Charney J.

Heard: November 24-27, 30, December 1-4,

7 and 10, 2015; December 16, 2016.

Judgment: February 13, 2017.

Court File Nos.: CV-14-118198-00 and CV-12-112441

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Between King Road Paving and Landscaping Inc., Louis Alaimo and King Road Paving Ltd., Plaintiffs, and Agostino Plati, Giuseppina Plati and Scotia Mortgage Corporation, Defendants And between Great Northern Insulation Services Ltd., Plaintiff, and King Road Paving and Landscaping Inc. also known as King Road Paving Ltd., Louis Alaimo, Agostino Plati, Giuseppina Plati and Scotia Mortgage Corporation, Defendants

(225 paras.)

Case Summary

Construction law — Contracts — Terms — Price — Variation — Extras — Breach — By owner — Failure to pay contract moneys — Action by plaintiff for damages allowed in part — Action by subcontractor and supplier to enforce lien claim allowed — Plaintiff orally contracted with defendants for renovation of barn — Plaintiff claimed it was owed $230,000 for contract and agreed-upon extras — Defendant denied scope of contract and claimed it paid plaintiff in full in cash — Payments were not fully documented — Plaintiff entitled to payment for proven extras and unpaid contractual amounts totaling $78,824 — Lien holders established basis for lien claim and holdback amounts.

Construction law — Liens — Lienable claims — By contractor or subcontractor — By material suppliers — Holdback — Enforcement of lien — Actions — Action by plaintiff for damages allowed in part — Action by subcontractor and supplier to enforce lien claim allowed — Plaintiff orally contracted with defendants for renovation of barn — Plaintiff claimed it was owed $230,000 for contract and agreed-upon extras — Defendant denied scope of contract and claimed it paid plaintiff in full in cash — Payments were not fully documented — Plaintiff entitled to payment for proven extras and unpaid contractual amounts totaling $78,824 — Lien holders established basis for lien claim and holdback amounts.

Action by the plaintiff, King Road Paving and Landscaping, against the defendants, Plati and his wife, for damages for breach of contract and breach of trust. Plati and Nesci hired the plaintiff to renovate an old barn. The first contract itemized $125,000 in renovations. Nesci was not on title to the property, as his interest was held in trust by the Platis. Nesci was the plaintiff's primary contact for the project. Upon commencement of the work, the plaintiffs alleged the defendants sought to expand the scope of work by adding a third floor loft to the barn. The contract price increased to $198,000. In addition, the plaintiffs alleged the defendants requested completion of several extras outside of the scope of their agreement. The plaintiffs claimed they supplied work and materials worth $340,000 and were paid $50,200. The plaintiffs sued, claiming damages totaling $295,000. The defendants alleged that no agreement was reached to expand upon the initial $125,000 contract. They denied agreement to any price increases or expansions to the scope of work. They alleged that the plaintiff was paid in full in cash. In addition to the primary claim by the plaintiff, a supplier, Great Northern Insulation, registered a construction lien for $51,415

and claimed against the plaintiff for additional unpaid amounts. Webdensco, a building supply centre, assigned its lien claim of $54,388 to the plaintiff.
HELD: Action allowed in part.

The plaintiff failed to establish the existence of a second contract or increase to the first contract for a third floor renovation. Without records, it was impossible to verify the plaintiff was paid in cash to the extent claimed by the defendants. Based on the payments made to the plaintiff's workers, and their continued work on the project, a total of $105,800 was paid to the plaintiff. Based on amounts paid, and the unpaid documented extras contemplated by the initial contract, the plaintiff was entitled to damages against the Platis totaling $78,824. None of the deficiencies claimed by the defendants were substantiated. Great Northern established its claim against the plaintiff for $105,803 and its lien claim against the Platis totaling $51,415. Webdensco established a basis for its lien claim in the amount of $54,388. The Platis were personally liable to the lien claimants for holdback amounts totaling $97,287.

Statutes, Regulations and Rules Cited:

Construction Lien Act, *R.S.O. 1990, c. C.30, s. 22*(1), s. 23(1), s. 24, s. 24(2), s. 33, s. 34, s. 54, s. 57(1), s. 57(2), s. 60(4), s. 62, s. 73, s. 78(1)

Courts of Justice Act, s. 128(1)

Excise Tax Act, *RSC 1985, c. E-15, s. 165*, s. 221(1), s. 277.1(1)

Interest Act, R.S.C., 1985, c. c.I-15, s. 3, s. 4

Counsel

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Domenic Saverino, for the Defendants, Agostino Plati and Giuseppina Plati.

Michael Odumodu, for the Plaintiff.

Rob Y. Moubarak, for the Defendants, King Road Paving and Landscaping Inc. also known as King Road Paving & Landscaping Inc. and Louis Alaimo.

REASONS FOR DECISION

R. CHARNEY J.

Introduction

1 The plaintiff King Road Paving and Landscaping Inc. (King Road) was hired in June 2012 by the defendant Agostino Plati (Plati) and his "partner" Giuseppe (Pino) Nesci (Nesci), as a contractor to complete extensive work on the renovation of an old barn located at 6090 18th Sideroad, Schomberg, Ontario (the property). One of the issues in dispute in this case is whether Plati and Nesci were partners or whether Nesci was simply acting as Plati's agent.

2 The plaintiffs claim that the purpose of the renovation was to retrofit the barn so that it could be used as "a legal marijuana grow operation". The defendants deny that this was ever the intended purpose of the renovations. The defendants claim that their original intention was to renovate the barn to build a country style music nightclub, and that it was the plaintiffs who proposed to lease the barn from the defendants after the renovation in order to operate

a marijuana grow-op. The defendants claim that the barn is currently empty (except for old furniture) and unused. The front of the barn is surrounded by a barbed-wire fence "to keep it separate from the rest of the property".

3 In June 2012 the parties entered into a contract to complete itemized renovations for $125,000. This first contract is not in dispute.

4 Upon the start of construction, the plaintiffs claim that the defendants sought to expand the scope of work by adding a third floor loft to be used as a "drying room", and the contract price increased to $198,000. After construction commenced, the plaintiffs allege that the defendants requested completion of several "extras" in addition to the scope of work outlined in the contract. The plaintiffs allege that these extras did not form part of the contract and constitute additional costs over and above the contract price of $198,000.

5 The plaintiffs claim that materials, supplies, labour and equipment totalling over $340,000 were provided by the plaintiffs.

6 The plaintiffs allege that the defendants have paid only $50,200 toward the costs of construction. The plaintiffs have brought this claim for $295,000 for breach of contract and breach of trust, plus interest at the rate of 36% per year. The plaintiffs did not register a lien under the *Construction Lien Act*, *R.S.O. 1990, c. C.30* (the Act).

7 The defendants take the position that the only contract agreed to was the first contract for $125,000. They did not agree to any subsequent contracts, price increases or expansions to the scope of work. The defendants deny that they sought to expand the contract by adding a third floor loft to the barn. Indeed, the defendants state that the barn is two stories tall with a third floor attic; no third floor loft or drying room was ever constructed. The defendants claim that the plaintiffs sought to increase the contract price from $125,000 to $198,000 because the plaintiffs' barn building expert had miscalculated the cost of the original project, but that the defendants did not agree to the increased price. The defendants allege that the entire $125,000 was paid to the plaintiffs, most of it in cash.

8 The case is confounded by the fact that there are no signed contracts relating to the work to be performed and much of the money that changed hands is alleged to have been paid in cash without any receipts.

9 Stuck in the middle are two suppliers that supplied goods and services to the project and remain unpaid. They registered construction liens against the property. These lien claims were tried together with the plaintiffs' claim against the defendants. The first supplier is Great Northern Insulation Services Ltd. (Great Northern), which contracted with King Road to supply spray foam insulation to the barn for $51,415.

10 The second supplier is Webdensco, a building supply centre, whose interest in the lien was assigned to King Road pursuant to s. 73 of the Act. King Road, seeks payment in the amount of $54,387.99 on behalf of Webdensco.

Facts

11 To understand the facts giving rise to this dispute we have to start with Nesci, who is not named as a defendant in this claim, but is a central figure in the history of the proceedings. Nesci and Plati purchased the property together in or around May 2012, but Nesci was not added as a registered owner of the property until December 23, 2013. The registered owners were Agostino Plati and his spouse Giuseppina Plati (the Platis), who are both named as defendants in this action. The plaintiffs have taken the position that Nesci and Plati were partners. There was no formal partnership agreement, although Plati referred to Nesci as his "partner" throughout his examination for discovery (Plati did not testify at the trial). The Platis held a 50% interest in the property in trust for Nesci pursuant to a trust agreement between Nesci and the Platis.

12 Although the Platis were the registered owners at the time of the construction project, Nesci was the person who dealt directly with King Road throughout the construction project. The defendants take the position that Nesci acted as Plati's agent and was not his partner. In his examination for discovery Plati stated: "Pino [Nesci] was in charge of it from the beginning to the end. I don't know anything else."

13 It is undisputed that Nesci and Plati intended to renovate the barn, although the intended purpose is in dispute. Nesci approached his friend Louis Alaimo (Alaimo), the owner of King Road and a plaintiff in this action, to undertake the renovation project.

14 As indicated above, Nesci testified that his dream was to build a country music style nightclub, although by August 2012 he knew that this was not practicable. Alaimo testified that the intention from the beginning was to grow medical marijuana. No licences to grow medical marijuana were ever obtained. At the end of the day the intended purpose of the barn does not really matter for the purposes of my analysis.

15 Alaimo knew a person named Steven DeGeer (DeGeer) who was a licenced carpenter with 32 years' experience in construction. DeGeer had worked as a labourer for King Road doing small scale landscaping jobs. Alaimo understood that DeGeer had experience constructing barns. Indeed, DeGeer testified at trial that he is an expert in barn construction and restoration "from the foundation to the roof". DeGeer testified that his expertise extended to framing, insulation and drywalling -- everything except electrical. Alaimo relied on DeGeer's expertise to itemize the work to be done, draft the contract and determine the price. Alaimo testified that he trusted DeGeer's judgment and totally relied upon him with respect to the work to be done and the price.

16 Sometime in early June 2012 Alaimo and DeGeer attended the property with Nesci to assess the site and discuss the project. Alaimo and DeGeer were both under the impression that Nesci was the owner of the property. They did not know that Plati had anything to do with the project. Nesci, Alaimo and DeGeer met for approximately 2.5 - 3 hours and DeGeer remained on site for another 90 minutes examining and taking measurements of the barn to determine what work had to be done. All the buildings were dilapidated. The barn was on a 20 degree lean and had to be straightened up. Outbuildings had to be taken away. DeGeer went home to do the pricing and write up a detailed contract.

17 DeGeer met with Nesci and Alaimo again approximately 3 days later. He had prepared a hand written quote with a building material estimate. The total came to $125,000. Nesci tried to negotiate a lower price, but DeGeer stated that the project could not be done for less.

18 DeGeer went home and drew up the contract on his computer. The date on the contract was June 20, 2012. The contract was for $125,000 (the first contract) and set out the work that was to be done. Nesci, Alaimo and DeGeer signed the contract in the third week of June. No copy of this contract (signed or otherwise) exists, although the parties agree that it was agreed to and probably signed and that work proceeded on the basis of that agreement.

19 DeGeer assembled a crew, and got to work. He started work in the third or fourth week of June.

20 DeGeer was King Road's foreman on the job and was responsible for ordering equipment and material and hiring and supervising the crew and keeping track of their hours. DeGeer attended the project site every day.

21 Nesci was also at the site every day to observe the progress.

22 Alaimo testified that he came to the job site almost every Friday to pay the workers. Alaimo testified that the workers were paid in cash because "it was more cost effective". Alaimo did not pay *Workers Safety and Insurance Act* premiums on their behalf. No deductions were made for income tax, Canada Pension Plan or Employment Insurance. Alaimo testified that those were the responsibility of the employees.

23 There is some dispute as to how frequently Plati attended the site, but in my view the better evidence is that he attended only "from time to time". As indicated above, Plati relied on Nesci for the day-to-day supervision of the renovations and for dealings with DeGeer.

24 Some time after work commenced DeGeer testified that Nesci asked him to add a third floor drying loft to the

contract. DeGeer recalculated the quote and advised Nesci that the price would go up to $198,000. Alaimo relied on DeGeer with respect to this change. DeGeer sent the new contract to Alaimo and Nesci. Alaimo believes that he signed the contract. The plaintiffs argued that this contract (the second contract) included the following addition that related to the third floor drying room: "Construct 12' loft using 2x6 studs, insulated vapour barrier and finished with 5/8 fire rated drywall". They argue that the "loft" is the reference to the third floor. The third floor and the price, according to DeGeer, were the only changes from the first contract. While a copy of the second contract exists (although the authenticity of the copy is disputed by the plaintiffs), the only signature on the second contract is Alaimo's.

25 DeGeer testified that he gave Nesci a copy of the second contract soon after the first one. While uncertain about the date he thought it would have been in late June/early July 2012.

26 Nesci testified that this second contract was given to him by DeGeer sometime around August or September 2012. Nesci testified that the only change to the first contract was the increased price, and after discussion with Plati, he did not sign the second contract. Nesci told DeGeer that Alaimo must complete the job for the price quoted in the first contract or Nesci would sue him.

27 According to DeGeer, the addition of the third floor drying room was the basis of the cost increase. The defendants dispute that they requested a third floor, and claim that this second contract is identical to the first contract save for the cost. The very existence of a third floor to the barn became a central issue in this case. I will return to the third floor later in these reasons.

28 Soon after the preparation of the second contract DeGeer testified that he went to the municipal Township offices to obtain a control burn permit. When he applied for the permit he discovered that Nesci was not the registered owner of the property, and it was registered in the name of Agostino Plati. He returned to the property and told Nesci that he knew that Nesci was not a registered owner. Nesci introduced DeGeer to Plati. Plati's English language skills were limited, so DeGeer was not able to communicate with him. Nesci advised DeGeer that Nesci was Plati's agent and was authorized to contract on his behalf.

29 DeGeer testified that he decided to prepare a new contract with Plati's name on it instead of Nesci's to reflect the fact that Plati was the registered owner. This was the third contract, and it was identical to the second contract except that the name Giuseppe Nesci was changed to Agostino Plati. DeGeer testified that he gave a copy of the contract to Alaimo and Plati and everyone agreed to it, although no one signed it. Alaimo testified that he signed the third contract and gave it to Nesci but never got the signed copy back.

30 In fact, the registered owners of the property were Agostino and Giuseppina Plati. DeGeer could not explain why he only added Agostino's name to the third contract if his intention was to have the contract reflect the names of the registered owners. I found DeGeer's testimony regarding the drafting and delivery of this third contract to be sketchy, inconsistent and unreliable.

31 DeGeer remained on the job site until approximately late October or early November 2012, when he was fired by Alaimo at Nesci's request. DeGeer testified that he was fired because the contract work was done and he kept asking Nesci for money to pay Alaimo's suppliers. Nesci testified that DeGeer was fired because he was frequently drunk on the job site. Nesci's testimony on this issue was confirmed by one of the workers (David May) who was called as a witness. The work was substantially completed at that point and the remaining crew was able to complete the work without DeGeer.

32 DeGeer testified that while he was on the job site Nesci requested extra work that was not in the contract. This included partial excavation and rebuilding of an existing pond, paving a ramp and parking area at the barn, replacing a roof and pouring a concrete slab on the second floor. One extra -- the excavation of unstable clay and soil under the barn -- was the result of unexpected circumstances. When these extras were requested DeGeer would speak to Alaimo and quote Nesci a price for the work, and only after Nesci approved it would DeGeer proceed with the work. None of these extras were reduced to writing or signed prior to commencing work.

33 Alaimo testified that he was paid only $50,200 for all the work that he performed. Nesci and Plati provided payments by way of cheques payable to King Road on July 11, 2012 ($4,000), July 12, 2012 ($25,000), August 6, 2012 ($15,000 -- cheque was returned NSF) and August 20, 2012 ($10,000). In addition, Nesci provided Alaimo with a bank draft in the amount of $11,200 on August 16, 2012.

34 While King Road takes the position that the last payment by Nesci was made on August 20, 2012, King Road continued to work on the project until some time in November 2012. King Road did not issue any invoices to Nesci or Plati for several months. On May 28, 2013 King Road delivered its first invoice for $147,800 ($198,000 less the $50,200 already paid). On that same day King Road delivered a second invoice itemizing the "extra work performed on site beyond original contract" and demanded an additional $126,198 for extras above the $147,800 claimed in the first invoice. The May 28, 2013 invoice was the first time that King Road had itemized and calculated the cost of the "extras". Alaimo did not register a lien within the time prescribed by the *Construction Lien Act*, but commenced this claim in March 2014.

35 The defendants take the position that payments were made by the defendants throughout the project. The contract itself contained no payment schedule or terms for progress payments. Nesci testified that he paid the plaintiffs $70,000 - $80,000 in cash in addition to the $50,200 in cheques and bank drafts that Alaimo acknowledges receiving. Nesci testified that the cash was used to pay the employees. Nesci's former common law spouse testified that she lent Nesci $57,700 in cash which he told her was to pay the employees. The cash came from an inheritance, money from her restaurant and additional money she collected as a seamstress making Elvis Presley jumpsuits. While she kept records of how much cash she lent to Nesci, she did not have direct knowledge of what Nesci did with the cash.

36 Alaimo acknowledges that Nesci paid cash on two occasions to pay two employees. Alaimo testified that he paid the workers approximately $55,600 in cash from his own funds over the course of the project, but denied that this cash came from Nesci.

The Contract

37 As indicated above, DeGeer testified that he prepared three contracts, all dated June 20, 2012. The first contract, between King Road and Nesci for $125,000 was prepared on June 20, 2012 and was signed by all parties on or about that date. No copy of this contract could be found, but the parties agree that it existed.

38 The second contract was for $198,000 and the plaintiffs argue it included additional work to be done on the third floor of the barn. There is a dispute about when this second contract was created. The June 20, 2012 date on the face of the second contract remained unchanged from the date on the first contract. This contract states that it is between King Road and Nesci, but was never signed by Nesci. The defendants produced a copy of this contract with Alaimo's signature, but the plaintiffs claim that this copy is a forgery because the font has been altered. The third contract was produced by the plaintiffs and is identical to the second contract but has Plati's name on it instead of Nesci's. The third contract was never signed.

39 The defendants agree that DeGeer prepared three contracts, but claim that they were all identical in terms of scope of work. The second and third contracts were for $198,000, and Nesci testified that the defendants refused to agree to the increased price.

40 DeGeer testified that the second and third contract included the addition of a third floor drying room. The plaintiffs argue that this addition is found in the following term: "Construct 12' loft using 2"x6" studs, insulated vapour barrier and finished with 5/8 fire rated drywall". The palintiffs argue that the "loft" is the third floor, and DeGeer testified that this addition was a reference to the third floor drying room. DeGeer testified that the addition of this third floor drying room is the reason that the price went up from $125,000 to $198,000. DeGeer testified that this third floor drying room was completed and he identified several photos of the finished drying room.

41 The contract refers to a lower level. It states: "Removal of concrete in lower level in building to be removed" and "A new concrete slab poured in the lower level with fibre mesh saw over 3/4" clear".

42 The contract also refers to a second floor. It states: "Removal and replace existing second floor replacing with 2"x12" joists covered in 3/4" fir plywood".

43 There is a statement that "2"x6" walls to be erected insulated vapour barrier and covered in 5/8" fire rated drywall". The contract does not indicate which level this applies to, but it is apparent that it must apply to the lower level because the lower level was insulated and covered in drywall, and there is no other reference in the contract to the insulation of the lower level.

44 There is no reference in the second or third contract to a "third floor". The defendants state that the "12' loft" referred to in the contract was in the original contract and refers to the floor above the lower level -- i.e. the second floor.

45 DeGeer also referred to the second floor as "the loft" in his testimony. For example, when shown the photo of the lower level at Exhibit 28, p. 343 he was asked where the stairs in the photo led. DeGeer answered: "the second floor loft". When asked "Is there a loft?" DeGeer answered "The second floor is the loft".

46 Nesci testified that the barn has only two levels and an attic. The lower level is approximately 12 feet high. The second level is 12 feet high. The attic is only the sloped roof portion above the second floor and peaks at about 6 feet. It has no vertical wall and was never finished.

47 The plaintiffs and defendants provided dozens of photographs of the restoration and completion of the barn. Several times in his evidence DeGeer identified the third floor drying room. He testified several times that the lower level was 12 feet high, the second level was 12 feet high, and the third level had vertical walls 7 feet 8 inches high "wide open" to the gable where the triangular roof began. Above the third floor was the gable -- the triangular roof. DeGeer testified that the total height of the barn from the floor of the lower level to the gable (where the roof begins) was between 31and 32 feet. It is clear to me that DeGeer's evidence in this regard was mistaken and that he exaggerated the measurements to fit his recollection. It is also clear that the photos that he claims are of the third floor drying room (Ex. 28 pp. 357, 358 and 359) are photos of the second floor and the sloped roof. I found DeGeer's evidence to be contradictory and generally unreliable with regard to both measurements and the work that he performed.

48 There are several photos of the barn that are taken from the outside and from the inside with all of the floors removed. These photos can be somewhat misleading if one assumes that the bottom of the entry door to the barn will be just above the ceiling of the lower level and even with the floor of the second level. DeGeer testified that the lower level was twelve feet high, and that the ceiling of the lower level was even with the beam just above the cinder block. The photos show that the entry door sits just above the beam above the cinder block. If the barn was constructed so that the ceiling of the lower level was even with the beam above the cinder block then there could be a third floor.

49 But the photos taken after the floors were constructed clearly show that the bottom of the entry door (which sits above the beam above the cinder block) is about three feet lower than the ceiling of the lower level. The entry door enters onto a landing that is between the lower level and the second floor. In other words, upon entry one must walk down a flight of stairs to get to the lower level, but one must walk up a flight of six steps to get to the second level. The ceiling of the lower level (and the floor of the second level) is actually about three feet higher than the bottom of the entry door. You can see the lower portion of the entry door in the photos of the lower level (Ex. 28 pp. 354 and 362) and the upper portion of the entry door in the photos of the second level (Ex. 28 pp.349, 357)

50 The upper portion of the entry door is clearly visible in the photos that DeGeer identified as the third floor loft, indicating that it is really the second floor.

51 In addition, DeGeer's testimony regarding the height of each level was inconsistent with the photos. For example he testified that the strapping he installed was 3 feet apart and that each strap was 3 inches wide. DeGeer also testified that the entry door that he installed was a standard size door of 6 feet 8 inches in height with a rough opening of approximately 7 feet. The photos show that the door is three straps high (Ex. 28, pp. 382-385). DeGeer agreed that the door was not 9 feet high. If the door is 6 feet 8 inches high the straps can only be approximately 2 feet apart (plus three inches for each strap). When this observation was put to DeGeer he stated "It does look that way, doesn't it?" and he could offer no explanation for this discrepancy.

52 Another example of DeGeer's exaggeration of measurements relates to the concrete blocks used to block in the door on the lower level. When Alaimo reviewed the invoice from Kar-Los McMurry Masonry he explained that the 8 inch standard concrete blocks were purchased to block in the windows and doors on the lower level. The relevant photograph shows that a row of ten concrete blocks was used to block in the door, meaning the doorframe was just under seven feet. DeGeer claimed that the blocks were each 12 inches high, and that the doorframe was 10 feet high. There is no invoice for 12 inch concrete blocks.

53 The absence of a third floor was confirmed by David May, one of the workers at the barn. May stated that the barn had two floors -- the basement where the barn manger used to be, and the main floor above that. Above the main floor was an attic. May was shown a photo of the attic and confirmed that it was "the ceiling of the second floor" and was not used for anything. The photo shows an attic as described by Nesci -- an unfinished sloped roof portion above the second floor with the roof trusses visible. May had been upstairs in the attic, and he testified that the floor is plywood and the walls are the sloped roof. There were no vertical walls and no drywall, just the roof. May had no interest in the case and his evidence with respect to the barn was spontaneous and consistent. I accept his evidence on this point as credible.

54 The absence of a third floor is also confirmed by the evidence of Angelo Gabriele (Gabriele), the sales estimator for Great Northern, who was invited by DeGeer to examine the barn and give an estimate for insulation. Gabriele testified that on August 21, 2012 he attended the barn to give an estimate. He described the barn as a two story barn with an A-frame roof. DeGeer asked for an estimate for two options. The first was the price of insulating the lower level; the second was the price of insulating the sloped roofline. Gabriele's estimate provides a price of $13,500 plus tax (total $15,255) for the lower level (measurement 35 feet x 90 feet x 12 feet high). He also estimated a price of $16,500 plus tax (total $18,645) for the "slope roofline". DeGeer called Gabriele back two or three days later and stated that they would go with option one at that point and proceed only with the lower level. Gabriele rewrote the estimate for the lower level only. He added King Road as the customer rather than DeGeer, but left the August 21, 2012 date on it. The estimate reads "Lower 2x6 exterior walls...total area 35x90x12 feet high". The quoted price for just the lower level remained $15,255.00 including tax.

55 The work on the lower level was performed on September 10 and 12, 2012. As per the estimate, only the lower level was insulated.

56 Shortly thereafter DeGeer called Gabriele for another estimate, and Gabriele attended the site on September 25, 2012 and provided an estimate for insulating the second floor and the sloped roofline. Gabriele testified that the measurements of the second level were identical to the lower level. A single estimate was given for a total of $32,000 plus tax (total $36,160) for the second level and sloped roof. That work was done over a period of five days commencing October 1, 2012 and ending on October 10, 2012. Accordingly, the total cost of insulation was $51,415.

57 At no time did Great Northern provide an estimate for a third floor that was seven feet eight inches high. It is clear from Gabriele's testimony that the second floor ended at the sloped roof.

58 DeGeer testified that Great Northern provided an estimate of $15,000 for both the first floor and the second floor, and that the whole barn was done for $30,000. This is plainly inconsistent with the evidence of Great Northern

and the estimates and invoices filed, and is another example of DeGeer's confusion and inability to remember the facts accurately.

59 Accordingly, I conclude that there is no third floor in the barn, and the reference in the contract to the construction of a 12 foot loft with 2"x6" studs, insulated vapour barrier, finished with 5/8 fire rated drywall was a reference to the second floor. As such I reject DeGeer's evidence that the contract was amended to include the construction of a third floor drying room and that this was the reason that the price increased from $125,000 to $198,000. I accept Nesci's evidence that the first contract was identical to the second save for the increase in price, and that neither Nesci nor Plati agreed to the increased price. I accept that no third floor drying room was ever constructed and that, apart from the insulation, the attic remains unfinished.

60 That being said, there is nothing in the contract that refers to insulation of the sloped roof area, and clearly this work was done by Great Northern for a cost of $16,500 plus tax. I will return later in these reasons to whether this work can be considered an "extra".

61 Before leaving the issue of contracts I will comment on the plaintiffs' assertion that the second contract introduced by the defendants is a forged or altered document. The second contract is the one with Nesci's name on it and is signed by Alaimo. The plaintiffs agree that such a contract existed, but claim that this is not the one. They point to the fact that the name "Giuseppe Nesci" is in a different font then the rest of the contract, and that DeGeer, who drafted the contract, testified that he knew Nesci by the name "Pino Nesci" and was not aware that his first name was really Giuseppe. DeGeer also testified that he did not put page numbers on his contract, and this document was paginated. The plaintiffs do not dispute the authenticity of Alaimo's signature on the second page, or the authenticity of DeGeer's handwriting on the last page, but claim that the signatures are in the wrong place.

62 While the different font raises questions, the plaintiffs do not dispute that such a contract in Nesci's name existed. It strikes me as odd that the defendants would go to the trouble of forging or altering a document to create a different document that the plaintiffs readily admit existed in some other form. I am inclined to accept this as a true copy of the second contract, but I consider the authenticity of this document to be a red herring and irrelevant to my analysis. This is particularly true given the fact that I have accepted Nesci's evidence that the second and third contracts were identical to the first contract save for the price and that Nesci and Plati refused to agree to the increased price and refused to sign the later versions.

63 In conclusion, I find that the first contract dated June 20, 2012 for $125,000 was the only contract agreed to by the parties and that the scope of work reflected in the second and third versions of the contract was identical to the scope of work in the first contract.

64 This contract is referred to as a "lump sum contract" because the contractor agreed to carry out all the work set out in the contract for a fixed lump sum. The contract also provided a method for calculating the charges for work not included in the scope of work, stating (at the bottom of the last page): "All work not stated will be a charge of time and materials." There is nothing in the contract to indicate that such work will be charged an additional administrative fee or percentage above the cost of time and material.

65 Given these conclusions I do not have to consider whether the price increase in the second or third contract would be enforceable even if the defendants had agreed to the increase. Where parties agree to an increased price there must be new consideration because "past consideration is not good consideration". For example, in *Gilbert Steel Ltd. v. University Construction Ltd.* *(1976) 12 O.R. (2d) 19*; *67 D.L.R. (3d) 606* (Ont. C.A.), a steel supplier, having contracted to supply a contractor with steel at a specified price, in the course of a contract asked a higher price for the same steel. The contractor, who urgently needed the steel, agreed. The steel was supplied, but the contractor refused to pay the increased price. The steel supplier sued for the increased amount. His action failed on the ground that the supplier had given no consideration for the contractor's promise to pay an increased price for the steel.

66 I recognize that the holding in *Gilbert Steel* has been the subject of some controversy and commentary in the

ensuing years (see: *Richcraft Homes Ltd. v. Urbandale Corporation,* 2016 ONCA 622 (CanLII), at paras. 26 - 37 and 43), such that amendments or variations to contracts, unsupported by consideration, that are willingly accepted and not procured under economic duress, may be enforceable. As indicated, the plaintiffs' position in this case is that the contract price was amended to take into account the additional cost associated with the construction of a third floor drying room. As I have determined that there is no third floor drying room, I reject the plaintiffs' position, and I accept the defendants' position that the price increase proposed in the second and third contracts was never agreed to by the defendants.

Payment

67 The next issue is how much Nesci paid toward the project. Alaimo testified that he was paid only $50,200 by way of cheque or bank draft. Nesci testified that he paid $70,000 to $80,000 in cash above that amount.

68 Alaimo points out that there are no receipts or other records to confirm that the cash was paid. It is unlikely that such an amount would have been paid without some receipt or other record to confirm payment. On the other hand Alaimo claims to have paid over $50,000 in cash payment to the workers without any receipt or paper work to confirm that those payments were made.

69 Alaimo alleges that the last payment was made by Nesci on August 20, 2012, yet no invoices were sent by King Road until May 28, 2013. Alaimo testified that his creditors were breathing down his neck for payment. Why would Alaimo wait nine months to issue an invoice if he had not been paid nearly $274,000?

70 Added to this, Nesci points to a letter dated November 13, 2013 that Alaimo wrote to a lawyer named Bob Boccia to help Nesci obtain a loan. The letter states:

> The contract price for the project at 6090 18th SDR in Shomberg Ontario is $295,000 Canadian Dollars. The work was completed on October 23, 2012 and all funds on this project has (sic) been received and the only money outstanding is Elmvale Home Building Center in the amount of $54,389.96...

71 The letter is signed by Alaimo. Alaimo acknowledges that he wrote this letter, but states that he did so at the request of Nesci. He testified that he has no idea who Bob Boccia is, and that Nesci asked him to write this letter as a favour so that Nesci could obtain financing. He needed proof that all trades were paid to obtain the loan. Nesci promised him that once he got the financing he would pay Alaimo what was owed. Alaimo states that he provided the letter because he was desperate for payment and hoped that Nesci would get the financing and pay him what was owed.

72 Without the benefit of records and receipts it is impossible to verify Nesci's claim to have paid Alaimo $70-80,000 in cash. On the other hand, Alaimo acknowledges that his employees were paid $55,600 in cash. He was evasive regarding the source of this cash, which I find especially troubling given his claim to be unable to pay his suppliers and subcontractors during that same period of time. I find that Nesci was likely the source of that cash. These cash payments would also explain why King Road continued to work on the project until November 2012, and did not send an invoice to Nesci or Plati until nine months after the last cheque payment in August 2012. King Road continued working after that date because they continued to receive cash payments used to pay the workers. I find that Nesci was continuing to make cash payments to cover workers' salaries until November 2012.

73 Accordingly, I find that Nesci/Plati had a contract with King Road for the amount of $125,000, and that a total of $105,800 ($50,200 by cheque or bank draft plus $55,600 cash) was paid by Nesci/Plati with respect to that contract.

HST

74 Another dispute between the parties is whether the contract price included HST. The contract itself is silent with respect to HST. Alaimo testified that when HST is not referred to in the contract then HST is not included in the price.

75 However, Alaimo sent Plati two invoices on May 28, 2013. The first invoice was for the original contract and stated it was for "$198,000.00 HST included". The second invoice, which was for the extra work performed on the site, listed the various charges beyond the original contract and claim costs "+HST".

76 The plaintiffs state that there was an error in the first invoice and it should have stated "+HST" rather than "including HST". I accept the plaintiffs' evidence on this point. I heard no evidence that HST was ever specifically discussed during the contract negotiation. It is most likely that Nesci assumed that because most payments would be made in cash he would avoid having to pay HST.

77 In my view when a contract for goods and services is silent with respect to HST there is an inference that the price does not include HST, and that HST will be added to the quoted price.

78 The HST regime is established under s. 277.1(1) of the *Excise Tax Act*, *RSC 1985, c. E-15*, pursuant to which the tax is imposed on the recipient (purchaser) of the goods or services, who is the payor of the tax (s. 165). The supplier of the goods or service is the designated tax collector who remits the tax to the government (s. 221(1)). The case law supports the position that where, through oversight or other error, the supplier omits or incorrectly states the HST on the contract the recipient of the goods or services remains responsible for the full amount of the tax. To conclude otherwise would make the tax collector personally liable for the payment of the tax with no right of recourse against the tax payor. In this regard I adopt the analysis of Dorgan J. in *Leong v. Princess Investments ltd*., *1999 CanLII 6391* (BC SC) and the several cases cited therein. See also *Prospect Builders Ltd. v. Fraser* *1996 CarswellOnt 160*; *[1996] O.J. No. 119*, (Ont. Gen. Div.), at paras. 14 - 16. While these cases related to the payment of the Goods and Services Tax there is nothing in the relevant legislation that would lead to a different result with respect to the Harmonized Sales Tax.

Interest Rate

79 The contract did not include any payment terms or any interest rate for late payments. The first invoice in relation to the original contract does not include any claim for interest. The second invoice in relation to the extras claims payment within 30 days and late payment charges of 3% per month thereafter.

80 The plaintiffs acknowledge that the written contract did not provide payment terms or interest for late payment, but claim that 3% per month is "reasonable in the circumstances as it is comparable to the rates charged by suppliers, which was 2% per month on average." Alaimo testified that he told Nesci that he was going to charge him 3% interest around November 2012 and that Nesci "was fine with that". No such oral agreement was alleged in the Amended Amended Statement of Claim.

81 The defendant argues that at no time was an interest rate of 3% per month agreed to. In fact, no payment terms or interest rate were ever agreed to by the parties and the court should not be filling in blanks where the parties have not included any such terms in their agreement.

82 Interest rates cannot be imposed unilaterally by including a claim for interest in an invoice; see *Gilbert Steel*, supra, where the Court of Appeal states: "I attach no significance to the notation '1% per month interest on overdue accounts' on the invoices received by the defendant at the increased prices on the basis that interest cannot be imposed unilaterally in this manner."

83 In addition the interest rate claimed by the plaintiffs violates sections 3 and 4 of the *Interest Act*, R.S.C., 1985, c. c.I-15. Section 3 provides:

> Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.

84 Section 4 provides:

> [W]henever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

85 The contract includes no reference to an interest rate. Even if the second invoice reflected the terms of a contract it purports to impose interest at the rate of 3% per month but does not indicate an annual rate as required by s. 4 of the *Interest Act*.

86 I reject the contention that Nesci agreed orally to pay interest at the rate of 3% per month. In the first place, I find Alaimo's statements in this regard to be not credible, especially when no such agreement was pleaded in any of the iterations of the Statement of Claim. Second, there is no evidence that any such agreement, if there actually was one, fully disclosed the annual cost of borrowing as required by the *Interest Act*. Alaimo's evidence in this regard struck me as a belated effort to fill a gap in his claim.

87 Finally, it makes no sense that Alaimo and Nesci discussed and agreed to 3% interest per month in November 2012, but Alaimo did not send out any invoices until May 28, 2013. If there was such an agreement Alaimo (who claims that he was desperate for payment) would have sent out his invoices (which he claims he prepared as each extra was completed) immediately.

88 The plaintiffs are, however, entitled to prejudgment interest in accordance with s. 128(1) of the *Courts of Justice Act*.

Extras

89 As the construction commenced, the plaintiffs allege that the defendants requested completion of several "extras" in addition to the scope of work outlined in the contract. King Road has made a claim for an additional $111,680 for extra work done on the project that was beyond the original contract price. DeGeer testified that when these extras were requested DeGeer would speak to Alaimo and quote Nesci a price for the work, and only after Nesci's approval would DeGeer proceed with the work. DeGeer and Alaimo acknowledge that none of these extras were reduced to writing or signed prior to their undertaking. They were all agreed to on a "handshake". Alaimo stated that he relied on DeGeer to obtain Nesci's agreement.

90 Alaimo claimed that he prepared individual invoices for each extra immediately after work on the extra was completed, but acknowledged that after each "extra" was completed he did not send an invoice to the defendants to ask for payment. When asked why not, Alaimo paused for a long time and answered: "there was no need to". Given Alaimo's evidence that he was desperate to be paid by the defendants I do not believe his evidence that he prepared any invoices as the work progressed or was completed. I find that these "invoices" (Ex 32, tabs 19 to 27), which are all undated, were all prepared on or around May 28, 2013 for the purpose of drafting the invoice of that date.

91 The defendants allege that they did not agree to any extras. All of the work performed was within the scope of work outlined in the original contract. Some of the extras claimed by the plaintiffs were not done. There were no oral agreements regarding the price of any extras.

92 Since Nesci was on site every day, I find that he was aware of all work done on the project and all such work had his express or implied authorization. I also find that at all times Nesci was acting as an agent for the defendants Agostino Plati and Giuseppina Plati, the registered owners of the property. The primary issue is whether the work claimed as "extras" really qualifies as extras, or whether it was within the scope of work to be performed under the contract of June 20, 2012. In the absence of any written agreements relating to extras, the only way to determine whether something is an extra is by reference to the original contract. A secondary issue is whether the work claimed was actually performed, and, if so, the cost of such work.

93 I do not believe DeGeer's testimony that he discussed each proposed extra with Nesci and agreed to a price in advance. Like much of his testimony, this is fabricated in order to cover up his own errors, miscalculations, and failure to keep proper records of work performed.

94 While Nesci was aware of all work being done on site, he often assumed (or perhaps hoped) that any extras would be covered by the price set out in the contract. That, however, is not what the contract provides.

95 As indicated above, the contract provides that "All work not stated will be a charge of time and materials." Accordingly, where I find that work done was in fact an extra, price will be calculated on the basis of "time and material" where appropriate invoices or other evidence are provided to support the claim.

96 In *2016637 Ontario Inc. o/a Balkan Construction v. Catan Canada Inc. et al*, 2013 ONSC 4727 (CanLII) Broad J. reviewed the legal principles governing "extras" in a lump sum contract. He stated (at paras. 10,11 and 13):

> It is well-established that in a lump sum contract, the contractor is entitled to the whole of the price, but to no more, irrespective of whether the work actually carried out is more or less than anticipated. However, extras to the contract must be paid for in addition to the contract price, and the parties may agree to make a deduction for work omitted (see C.E.D. Building Contracts I.1.(d) para. 12).
>
> A contractor is obliged to perform only such work as is included in its contract, and accordingly, a contract may provide the owner with the right to order extra work and may specify some method of payment for such work, e.g. on a cost-plus basis. ...
>
> When a contractor performs work or supplies materials not called for by the contract without instructions, express or implied, from the owner, or the consent of the owner, it is not entitled to charge for this additional work or materials as an "extra". However, when the contractor performs work or supplies materials not called for by the contract on the instructions, express or implied, of the owner, it is entitled to charge for additional work or materials as an "extra". What amounts to instructions from the owner depends on the circumstances relating to each item. If the owner, without giving definite instructions, knows that the contractor is doing extra work or supplying extra materials, and stands by and approves of what is being done and encourages the contractor to do it, that will amount to an implied instruction to the contractor, and the owner is liable (see *Chittick v. Taylor* (1954) 12 W.W.R. (N.S.) 653 (Alta S.C.) at paras. 8-10).

97 The definition of "extra work" is that set out in *Ron's Trending and Hauling Ltd. v. City of Estevan*, (1985) 11 C.L.R. 148; 1985 CanLII 2394 (SK QB) at paras. 8 and 9:

> Extra work, entitling the contractor to additional payment, must be work which is substantially different from, and wholly outside the scope of the work contemplated by the contract: Goldsmith, *Canadian Building Contracts* (3rd ed., 1983), p. 83. Although there appears to be no generally accepted definition of "extra work", it has been suggested that in a lump sum contract it may be defined as work not expressly or impliedly included in the work for which the lump sum is payable. If work is included in the original contract sum, the contractor cannot recover extra payment for it, although he may not have anticipated that the additional work would be necessary: Keating, *Building Contracts* (3rd ed., 1969), p. 63.
>
> Keating has also suggested (at p. 62) that, in order to recover payment for work as an "extra", the contractor must prove: (1) that the "extra" work was not included in the work for which the lump sum is payable; (2) that there was a promise, expressed or implied, to pay for the work; (3) that any agent who authorized the work was authorized to do so; and (4) that any condition precedent to payment has been fulfilled.

98 See also *Titan Electrical v. Johnson Controls*, 2015 ONSC 7300 at para. 13 and at para. 30 citing Goldsmith on *Canadian Building Contracts*, 4th edition, Carswell, 1988 at pp. 4-2:

> Under a lump sum contract the contractor agrees to carry out all the work involved in the construction of the work for a fixed lump sum. In this respect he takes a calculated risk that the actual amount, and the cost to him, of the work to be carried out may be more than he anticipated; but irrespective of the actual amount of work involved, he must perform the whole of the work, in return for which he is entitled to receive the whole

> of the price agreed upon, but no more. Often such contracts provide for a contingency allowance, i.e., a sum which the contractor is required to add to the estimated cost to cover any unforeseen contingencies that may arise.
>
> In the absence of any changes or extras, the contractor is not entitled to any additional payment over and above the lump sum price, even if it transpire that the amount of work which actually has to be carried out is substantially more than anticipated. On the other hand, if the construction can be properly completed with the carrying out of less work than anticipated, the contractor is nevertheless entitled to the whole of the contract price.

Invoiced Extras

(i) Extra Digging In Basement

99 The plaintiffs claim an additional $25,000 because they had to excavate 3 feet deep to remove unstable soil and replace it with 2.5 feet of gravel and 6 inches of concrete instead of 4 inches as stipulated in the original contract.

100 The defendant states that the excavation was part of the contract as the contract included the following terms: "All excavating and final grading"; "Removal of concrete in lower level in building to be renovated" and "A new 4" concrete slab poured in the lower level with fibre mesh saw over 3/4" clear". The defendant argues that "All excavating and final grading" means that the entire excavation, expected or not, is included in the contract price. The contract did not state what depth of excavation was expected.

101 The defendant relies on *Metric Excavating Ltd. v. 619908 Ontario Ltd.*, *(1991) 45 C.L.R. 314*, in which the plaintiff, relying on his own experience and inspection of the site, provided a fixed price for excavation and haulage. The Court rejected its claim for increased payment stating (at para. 6):

> The plaintiff had fixed its price on its estimate of the amount of excavation required. If, because of soil conditions, a deeper excavation was required to give the required base, it is the loss of the plaintiff in the absence of any clause to protect itself.

102 In my view the original contract did provide for the excavation of the lower level that was required to pour a 4 inch concrete slab as set out in the contract. It makes no sense that a contract that provides for "All excavation" and the laying of a 4 inch concrete slab did not anticipate that excavation would be required before the concrete slab was poured. In the absence of express terms the contractor takes the risk if a deeper excavation than anticipated is required.

103 In addition, there is a real question whether this "extra" work was ever performed. Gregory Fera was the cement finisher hired to lay the cement on the basement after the grade was laid. He testified that the ground under the barn was in bad shape and was excavated to a depth of about 12 inches and replaced with stone. He stated that the contract was for 4 inches of cement to be poured on the floor, but in some places they poured 5 inches of cement because the grading was not done properly. Fera had many years' experience as a cement finisher. He was not challenged with regard to these estimates. As I will discuss below when dealing with the second floor, Fera's memory of approximate measurements was remarkably accurate when compared to the records. I prefer Fera's evidence regarding measurement estimates to DeGeer's. Accordingly, I find that, in any event, the ground under the barn was excavated to a depth of approximately one foot, and covered with a 4 to 5 inch concrete slab.

(ii) Supplied and Placed Top Soil in Existing Garden

104 The plaintiffs claim $1,100 for triple mix to spread in the greenhouse to plant vegetables. The plaintiffs rely on an invoice from Hermann's Contracting dated July 23, 2012 for $601.50 for Garden Blend soil. The invoice does not identify where the Garden Blend Soil was delivered.

105 The defendants deny requesting any top soil or triple mix be placed in the greenhouse, and deny that any was delivered. They note that the invoice supporting the claim indicates that the product was received by a person named "Raj Ray". DeGeer could not identify who that was. No one at the job site was named Raj Ray.

106 King Road's invoice to Plati dated May 28, 2013 does not break down the labour and equipment cost as required by the terms of the contract.

107 Given the fact that the Hermann's invoice does not indicate where the Garden Blend soil was delivered and that the person who signed for the delivery was unknown to DeGeer and never at the job site, I find that this garden soil was never delivered to the property. For the reasons given above I am not prepared to accept DeGeer's testimony on this point given these unexplained discrepancies, and I reject this charge.

(iii) Build Small Building to House Electrical Panels

108 The plaintiffs claim $3,800 to build a small building to house the electrical system that was required to bring electricity from the road to the barn.

109 The plaintiffs claim that they excavated the area, placed gravel and a concrete slab floor, and erected walls and a roof to complete the building. The claim is supported by a single invoice from James Dick Concrete dated August 16, 2012 for "Footings". There is no indication on this invoice what the footings were for, and the invoice does not appear to include a price. The plaintiffs have provided no breakdown with respect to time and material.

110 The defendants agree that a shed was built to store the personal items of the workers, but deny that it was ever used to store an electrical system. They note that while there are dozens of photos of the work done on site, there are no photos showing this small building.

111 In addition, the electrical work for the barn, including a vault (concrete pad for the transformer) and trenching, grounding and metering and obtaining the relevant permit, was performed by Minnings Electrical Service Ltd. on or around October 22, 2012. DeGeer was not involved in the electrical work. It is unclear to me how the James Dick invoice from August 16, 2012 relates to the electrical work done in October.

112 In the absence of any legible invoice or any break down of time and material, there is simply insufficient evidence to support the amount claimed for this building, whatever it was used for.

(iv) Excavate and rebuild Existing Pond

113 I heard a lot about the pond.

114 The plaintiffs allege that the defendants asked DeGeer to make the existing pond larger and deeper to create a large pond to be the focal point of the property. DeGeer testified that he told Nesci that he would have to cap the pond's water source and hire a larger and more expensive excavator, and that the price for this extra work would be $50,000 plus HST. DeGeer testified that Plati and Nesci agreed to this and told him that "money was no object" and "the sky is the limit".

115 Nesci testified that he did not agree to pay $50,000 to excavate the pond, and that he only asked that the muck in the pond be cleaned out.

116 I agree that there is nothing in the original contract about excavating the pond and that any work in relation to the pond is properly considered an extra. The phrase "All excavating and grading" would include all excavating and grading of the barn and the land immediately adjacent to the barn that was required to make the barn serviceable. There is no reference in the contract to the pond or the cleaning of the pond.

117 The plaintiffs acknowledge that they did not complete the work on the pond and have claimed $22,480 for labour and equipment. This is based on renting an excavator for 2 weeks in August, and excavating and redesigning the existing small pond by making it larger and deeper. The claim is supported by an invoice from Toromont Cat for $10,321 for the rental of the excavator for two weeks.

118 There is no dispute that some work was done on the pond. The issue is what work was actually done.

119 Once again I rely on the evidence of David May, who was hired by DeGeer to operate the excavator that worked on the pond. May testified that he used the excavator to clean out and shape the pond and move some lumber that was on the site. He said that the excavator sat around without being used for part of the time. He was on the site for about 80 hours, but the work on the pond took about 35 to 40 hours. He was emphatic that it did not take him two weeks to clean out the pond. He was paid cash for his work by DeGeer and Nesci, although he could not recall how much he was paid.

120 I accept May's evidence and conclude that the work done on the pond was not as extensive as that claimed by DeGeer. When shown a photo of the pond after all the work had been completed DeGeer identified it as a photo of the pond before work had begun.

121 The contract included "All trucking and machinery", although I interpret this as all trucking and machinery for work that was within the scope of work in the contract. Trucking and machinery for extras would not be included in that term.

122 Based on this evidence I am prepared to allow one-half the invoiced cost of the excavator for cleaning out the pond ($5,160.50). There is no breakdown of costs with respect to labour, and I am not prepared to include any additional amount for labour since no records were kept and the evidence is insufficient to permit a fair calculation.

(v) Replace Roof on Adjacent Building

123 The plaintiffs claim $9,600 for replacing the roof on a building adjacent to the barn. They supplied and placed corrugated steel sheeting on this building. No invoices are attached to support this claim.

124 Nesci testified that DeGeer offered to replace the steel roof of the second building with sheet metal that had been left over from the repair of the barn roof. Nesci testified that the sheet metal could not be returned to the supplier for a refund, so DeGeer offered to replace the other, smaller roof on the adjacent building free of charge. At no time did Nesci agree to pay $9,600 for this.

125 While I am satisfied that this work qualifies as an extra, there is no breakdown of time and material with respect to this work. I have no evidence as to how much the material used to replace the roof on the adjacent building cost or how many hours the work took. Given this complete lack of evidence I am unable to arrive at any price for the time and material related to this work.

(vi) Create a Parking Area at the Main Building

126 The plaintiffs claim $13,800 for the creation of a parking area. King Road argues that the parking area was created at Nesci's request and that Nesci agreed to pay $20,000 for the parking area. Alaimo testified that on reviewing the invoices he determined that the actual cost was only $13,800 and reduced the price despite approval for the higher amount.

127 The work includes the excavation of the area and the supply of 2 3/4 inches of gravel for grading. The plaintiffs have provided various order/delivery sheets from James Dick Aggregates dated from August 16, 2012 to November 12, 2012 to support this claim. The sheets dated August 16, 2012 do indicate that the product was to be shipped to the property in Schomberg, but there is no indication that material shipped on that date was used for grading the parking area. The order/delivery sheets for the other dates indicate that the material purchased was to be picked up or delivered to King Road in Alliston, Ontario. There is evidence that at least some of the material delivered to Alliston was forwarded to the property in Schomberg, but there is no evidence that any of this material was used for grading the parking area. There is no delineation that would enable the court to determine which deliveries relate to the creation of the parking area.

128 The plaintiffs have also provided a letter from James Dick Construction dated December 13, 2012 enclosing a copy of King Road's account and stating that $13,724.64 remains outstanding from August. I assume this statement is the basis for the plaintiffs' final calculation of $13,800. Alaimo provided no explanation as to how he came to the $13,800 figure other than that it was based on the invoices enclosed with that letter.

129 Of the invoices enclosed with the December 13, 2012 letter, three specifically state that they relate to the Schomberg property: the invoice dated August 28, 2012 for $5,710 plus HST, the invoice dated October 12, 2012 for $484.62 plus HST, and the invoice dated October 26, 2012 for $3,660 plus HST. It is clear from the ticket numbers that at least some of the invoices relate to the order/delivery sheets that the plaintiffs claim correspond to the grading of the lower level of the barn and were claimed by them with respect to that first extra.

130 The defendants argue that the excavation and grading of the parking area adjacent to the barn is included in the scope of the work agreed to in the contract under the term "All excavating and final grading."

131 In my view the term "All excavating and final grading" is broad enough to include the grading of the parking area adjacent to the barn, since this was necessary to make the barn serviceable. This conclusion is reinforced by the opening sentence of the contract, which states that the contract is for "the said work to be done on the property known as Lot 25, Concession 9 King Township..." The contract is not limited to the work to be done on the barn. Accordingly, I conclude that the creation of the parking area outside the barn is not an extra.

132 If I am wrong with respect to that conclusion, the evidence provides no basis for me to determine the cost of the time and materials associated with the excavation and grading of the parking area. Many of the invoices provide no basis for determining which deliveries were used at the property rather than King Road projects at other properties, or which deliveries related to the parking area rather than other aspects of the project such as the gravel used in grading the basement floor, which also came from James Dick Construction. I am not prepared to accept DeGeer's word or memory on any of these details, and DeGeer kept no records relating to the work done on the parking area as opposed to other aspects of the project.

(vii) Poured Concrete Slab on the Second Floor

133 The plaintiffs claim $18,000 for pouring a concrete slab over the second floor. The contract states that the flooring on the second floor was to be 3/4 inch fir plywood. Accordingly the concrete slab over the second floor is an extra. There is no dispute that a 2 inch concrete floor was poured over the plywood.

134 DeGeer testified that Plati requested that the second floor have concrete instead of plywood and that Nesci agreed to a price of $18,000.

135 Nesci testified that he did not ask for a concrete floor and that it was Alaimo and DeGeer who wanted to install the floor because they planned to lease the barn and use it to grow medical marijuana. Nesci testified that he told them that if they wanted to install a concrete floor they could go ahead, but that he was not going to pay for it.

136 Given the fact that there was no existing lease agreement I cannot believe that Alaimo took it upon himself to install the concrete floor at his own expense. I find that Nesci consented to the installation of the concrete floor, and that the concrete floor is an extra. Alaimo testified that the $18,000 price is not based on the actual cost of labour, material and equipment, but is based on the alleged agreement between DeGeer and Nesci. I do not, however, accept that Nesci agreed in advance to a price of $18,000. Accordingly, the price of the concrete floor must be calculated on the basis of time and material as per the contract.

137 The plaintiffs have provided very little evidence to permit me determine the cost of time and materials associated with the concrete slab on the second floor, but by putting together some of the testimony I will try to determine the value. There are no records relating to labour costs, and Gregory Fera, who installed the concrete on

the second floor, testified that he and his son were never paid for their work although two other workers were paid an unspecified amount.

138 Alaimo testified that he based his estimate on the second floor being 90 feet by 50 feet, or approximately 4,000 square feet. This evidence is inconsistent with the detailed calculations provided by Great Northern, which state that the floor is 90 feet by 35 feet, or 3,150 feet. Great Northern's evidence in this regard is consistent with that of Gregory Fera, who installed the concrete on both floors and testified that each floor was approximately 3,500 square feet.

139 Fera testified that he used about 15 cubic meters of cement to put down the 2 inch floor, and that cement cost $200 a cubic meter. His size estimate is consistent with Alaimo's invoice, which states that approximately 13 cubic meters of cement was pumped on site to the second floor. This is consistent with the invoice of Orangeville Concrete Pumping that states that 12.5 cubic meters of cement was pumped. This means that the total cost for cement would be approximately $2,600. Alaimo has also provided an invoice for the mesh that is put under the cement, and the total cost for mesh, nails and delivery was $1,437 including HST. Thus the cost for material appears to be around $4,000.

140 Alaimo testified that the total cost of installing the concrete floor (including material) was approximately $3.00 per square foot. Even accepting Alaimo's cost estimate (and assuming the accuracy of Great Northern's measurements), the maximum total cost for installation would be $9,450. As with most of his evidence, it appears that Alaimo has exaggerated the cost per square foot.

141 Given this information I am prepared to allow $6,000 for this extra, plus HST.

(viii) Excavate and Pave Ramp to Building

142 The plaintiffs claim $9,800 for the excavation, grading and paving of a ramp to the barn door. They claim to have supplied and placed 6 to 8 inches of gravel and 40 tons of hot asphalt on October 22, 2012. The plaintiffs argue that this work was outside the scope of work in the original contract.

143 There is no dispute that the ramp was completed, but the defendants take the position that it fell within the term "All excavating and final grading" in the contract.

144 In my view the term "All excavating and final grading" is broad enough to include the excavation and grading of the ramp to the front door of the garage. Some sort of ramp to the second level appears to have existed before the construction began. The front door is several feet above grade and I agree that the phrase "final grading" included access to the front door by a ramp when the barn was complete.

145 That being said, grading does not include paving with asphalt, and I accept that the paving was an extra. The invoices provided by the defendants indicate that Coco Paving Inc. provided 40 tons of asphalt on October 22, 2012 for the price of $2,629.44 (plus HST), and I allow this additional amount as an extra.

146 There are no records relating to labour costs.

(ix) Supply Extra Fill

147 The plaintiffs claim $3,900 for trucking in 15 loads of fill to backfill the wall of the barn to support and strengthen walls and protect the walls from frost heaving. Alaimo testified that Nesci agreed to pay $3,900 for this fill, and that the fill was clay provided from King Road's own yard at a cost of $300 per load. Alaimo said the price should have been $4,500, but he gave the defendants a discount. There are no delivery records to support this claim, although a King Road employee did testify that he delivered clean fill for "berming up" the barn.

148 The defendants take the position that backfilling around the perimeter of the barn falls under the general clause of the contract that provides for "final grading".

149 I accept the defendants' position on this issue.

Extras Not Invoiced

150 In addition to the extras invoiced in the May 28, 2013 invoice, the plaintiffs are seeking payment for extras that were never invoiced. These include extra electrical, fuel costs, and the third floor insulation.

(i) Extra Electrical

151 The plaintiffs claim $9,146.72 for "extra electrical". They have provided an invoice from Minnings Electrical Services Ltd. to King Road Paving dated October 22, 2012 for $19,146.72 ($16,944 plus HST). Minnings completed the electrical work for the barn, including a vault (concrete pad for the transformer) and trenching, grounding and metering. He also obtained the permit. The plaintiffs argue that under the original contract only $10,000 was allotted for electrical work and that any electrical work above the $10,000 allotted is an extra.

152 King Road did not include this charge as an extra in its invoice of May 28, 2013. Indeed, King Road never sent out an invoice with respect to this charge. Alaimo testified that he never sent the defendants an invoice for this charge because he forgot, and only remembered about it a couple of weeks before he testified in December 2015.

153 Peter Minnings testified at the hearing and confirmed that he discussed the proposed electrical work with DeGeer and Nesci, and that Nesci approved the price. Nesci denies this. Peter Minning also sent a copy of the invoice to King Road's lawyer on December 6, 2013, advising that he made several attempts to collect from King Road, but had not received any payment. There is no dispute that Minnings did the work claimed in the invoice.

154 While the original contract did not include any reference to electrical work, the copy of the contract introduced by the defendant includes a hand written note signed by DeGeer on the last page that states: "Note: $10,000 was allotted in the price of Hydro from Pole to Barn". While DeGeer testified that this is not where he signed the contract, he acknowledged that he did write such a note and agreed that this was his signature

155 The position of the defendants is that any costs above the $10,000 should be borne by the plaintiffs. The parties agreed that electrical would be completed for a lump sum of $10,000, and any additional cost would be the responsibility of the plaintiffs.

156 I accept the plaintiffs' interpretation of the contract. If the intent of the contract were to have the full cost of the electrical work included in the lump sum of $125,000, the contract would have simply included "all electrical work". The fact that a specific amount was quoted indicates that any work above the allotted amount was considered to be an "extra".

157 Therefore, I find that $9,146.72 (inclusive of HST) will be allowed as an extra for electrical work.

(ii) Milligan Fuels

158 The plaintiffs claim that approximately $17,000 to $20,000 worth of fuel was used during the construction on the property to fuel the machinery and equipment. DeGeer testified that he calculated the contract based on approximately $10,000 for fuel, and that Nesci gave an oral agreement that he would pay any amount above that limit. Accordingly, the plaintiffs claim $7,000 to $10,000 in additional fuel.

159 The defendants argue that the contract expressly provides for "All trucking and machinery", and that fuel to operate the trucks and machinery is impliedly included in this term. They deny that Nesci made any oral agreement with DeGeer to pay for fuel above $10,000.

160 King Road did not include a charge for fuel as an extra in its invoice of May 28, 2013.

161 I reject DeGeer's evidence that Nesci made an oral agreement to pay for any fuel above $10,000. I find that the term of the contract "All trucking and machinery" impliedly includes the fuel for the trucking and machinery, and this does not, therefore, constitute an extra.

(iii) Third Floor Insulation

162 As indicated above, the contract provided for the construction of an "insulated vapour barrier" in the lower level and the second floor loft. There is nothing in the contract that refers to insulation of the sloped roof area, and there is no dispute that this work was done by Great Northern for a cost of $16,500 plus HST.

163 The plaintiffs have not claimed this cost as an extra because their position is that the cost of insulating the third floor was covered by the $73,000 price increase set out in the second (and third) contract. I have previously found that the price increase in the second and third contracts were never agreed to by the defendants and these contracts did not, in any event, include anything about a third floor. Nonetheless, I find that Nesci knew that the sloped roof area was being insulated by Great Northern and either gave express or implied consent to this extra.

164 The defendants argue that they did not know that spray foam insulation was to be used, and that spray foam is more expensive than regular insulation and that the additional cost was not approved. I have no evidence of what this additional cost might be.

165 Given that the insulation work was done over a period of five days commencing October 1, 2012 and ending on October 10, 2012, and given that Nesci was on site supervising every day, I reject the defendants' contention that they did not know that spray foam insulation was being used. The contract does not specify the type of insulation to be used. I find that whichever type of insulation was used it was included in the price of the lower level and second floor loft as per the original contract, but was an extra with regard to the sloped roof area.

166 Accordingly, I find that the insulation of the sloped roof area for $16,500 plus HST will be allowed as an extra.

Summary of Contracts

167 Based on the foregoing analysis, I conclude that the parties agreed to the following contracts and extras:

(i) Original Contract: $125,000 plus HST

(ii) Excavate and Rebuild Existing Pond: $5,160.50 plus HST

(iii) Pour Concrete Slab on Second Floor: $6,000 plus HST

(iv) Pave Ramp to Building: $2,629.44 plus HST

(v) Extra Electrical: $9,146.27 (inclusive of HST)

(vi) Third Floor Insulation: $16,500 plus HST

168 Total Contractual Claims (including HST): $184,624

169 Amount Paid: $105,800

170 Amount outstanding: $78,824

171 As a final observation with respect to this aspect of the claim, I note that each party in this proceeding has bitterly complained about the inadequacies in the opposite parties' pleadings, and argued that these pleadings did not provide fair notice of the case that had to be met or the defences raised. Without parsing the various pleadings filed in this case I can confirm that both the plaintiffs and the defendants in the main action bear some responsibility for these inadequacies. Each party has asked that an adverse inference be drawn against the other party for its failure to take a specific position or make specific allegations in its Statement of Claim or Statement of Defence.

Where adverse inferences have been drawn I have indicated as such in these reasons, and neither party has been prejudiced by the inadequacies in the respective pleadings.

Deficiencies

172 The defendants claim for deficiencies for work not completed as well as damages as a result of work not completed. I have been provided with no expert evidence to substantiate this allegation.

173 The contract provided for "plumbing and drainage". Nesci claimed that this included a washroom, which existed on site but was removed by DeGeer during the renovations. Nesci claims that the plumbing and drainage was not completed. The defendants claim $15,000 for this deficiency although they have produced no invoices to support this claim. In any event, I am not prepared to accept that the general term "plumbing and drainage" includes the construction of a washroom facility.

174 The defendants claim that a fire escape was removed by the plaintiffs and never replaced. There is nothing about the fire escape in the contract with regard to either removal or replacement. I conclude that the contract did not include the cost of installing a new fire escape, and, in any event, I have no evidence regarding what it would cost to replace the fire escape.

175 The contract provides for the "installation of steel doors", although no specific number is provided. The defendants claim that this work was not completed. We do know that at least one steel door (the entry door) was installed. No invoices or other evidence was provided to quantify the cost of the installation of any other steel doors.

176 The contract provides for "installation of security system, infrared cameras, motion detectors, door key pad", and this work was never done. The defendants claim $8,000 for this deficiency. No invoices or other evidence was provided that would enable the court to estimate the actual value of the completion of this work.

177 Accordingly, while the failure of the plaintiffs to install the security system and at least one additional steel door do qualify as deficiencies, in the absence of any evidence regarding the cost of correction or completion I am unable to quantify the value of this claim, and the claim for deficiencies is therefore dismissed.

The Lien and Contract Claims

(i) Great Northern

178 The plaintiff Great Northern advances both a contract claim for payment and a claim for lien pursuant to the *Construction Lien Act* (the Act).

179 As set out above, Great Northern was retained by King Road to supply insulation to the barn located on the property for a total cost of $51,415.00 (inclusive of HST). Great Northern dealt with DeGeer on behalf of King Road while on site. There is no dispute that Great Northern installed spray foam insulation in accordance with the terms of that contract, and remains unpaid for the work done.

180 With respect to the contractual claim, Great Northern claims payment from the defendants King Road and Louis Alaimo, who signed a personal guarantee. The total claim is for $51,415.00, plus interest of 26.8 % per year.

181 The insulation was completed over two stages, the lower level completed on September 12, 2012 and the second floor and sloped roof completed on October 10, 2012.

182 Before work on the second stage could be performed payment arrangements had to be made because the initial work had not been paid for and King Road required credit to proceed. A credit application was provided and completed by Alaimo on behalf of King Road.

183 The credit agreement contained terms providing credit terms of 30 days for payment, with interest on outstanding amounts at the rate of 2% per month or 26.8% per year and a personal guarantee by Alaimo of King Road's indebtedness to Great Northern. There is no dispute that Alaimo signed this personal guarantee on September 28, 2012.

184 Great Northern invoiced King Road for the lower floor in the amount of $15,255 on September 30, 2012. By the terms of the credit agreement it was due on October 30, 2012. Great Northern invoiced King Road for the second floor and sloped roof in the amount of $36,160 on October 15, 2012. By the terms of the credit agreement it was due on November 14, 2012.

185 King Road and Alaimo acknowledge that King Road obtained the services of Great Northern on behalf of the property owners, and that Alaimo signed the personal guarantee. Their only dispute with respect to the Great Northern claim is whether Alaimo should be personally liable for the full outstanding amount. Alaimo takes the position that since he signed the credit agreement on September 28, 2012 he cannot be held personally liable for the debts incurred prior to that date. If his position is correct, he would be personally liable for the second invoice ($36,160) but not the first invoice ($15,255) because the work with respect to the first invoice was completed on September 12, 2012, and was payable upon completion even though the invoice was not delivered until September 30, 2012.

186 I do not accept this argument. I agree with Great Northern that upon applying for credit from Great Northern, Alaimo was providing his personal guarantee for "the due payment of all of [King Road's] indebtedness to Great Northern". All means all. It means the indebtedness that existed when he signed the agreement as well as future indebtedness that might be incurred. There is nothing in the agreement to limit the guarantee to future indebtedness. Further, at the time that he executed the guarantee, Alaimo knew that Great Northern had performed work for which it remained unpaid. It is entirely artificial to suggest that the personal guarantee can be compartmentalized in the manner suggested by Alaimo.

187 Great Northern also seeks a declaration that it is entitled to a lien on the property in the amount of $51,415 and that the property owners, Agostino Plati, Giuseppina Plati and Giuseppe Nesci pay that amount plus costs, failing which their interest in the property be sold and the proceeds applied to the credit of this action.

188 Great Northern registered a lien on November 13, 2012 (within the 45 day period required under sections 33 and 34 of the *Construction Lien Act*), and the following day gave both King Road and the Platis notice that the lien had been registered. The lien was perfected by the commencement of this proceeding and registration of a Certificate of Action on title on December 14, 2012 (within the 90 day period required under s. 36 of the *Act*). The only owners named in the lien are Agostino Plati and Giuseppina Plati.

189 Although King Road and Alaimo initially took the position in their Scott Schedule that Great Northern's work was deficient, they abandoned that position at trial and no evidence of deficiencies was led.

190 There was no dispute that at the time the work on the barn was performed the Platis were the registered owners of the property and held a 50% interest in the property in trust for Nesci pursuant to a trust agreement between Nesci and the Platis. Nesci's interest in the barn was formally registered on title after the liens were registered.

191 The primary dispute between the parties relates to the amount of the lien claim.

192 Great Northern argues that the *Construction Lien Act* imposes two payment obligations on statutory owners for holdback. The basic holdback and the "notice" or "additional" holdback.

193 The basic holdback is set out in s. 22 (1) of the Act which provides:

> 22. (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

194 Since the total contract price for all work done including extras is $184,624, the basic holdback is $18,462.

195 The notice holdback is set out in s. 24 of the Act. It provides:

> 24. (1) A payer may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the price of the services or materials that have been supplied under that contract or subcontract unless, prior to making payment, the payer has received written notice of a lien. *R.S.O. 1990, c. C.30, s. 24* (1).
>
> (2) Where a payer has received written notice of a lien and has retained, in addition to the holdbacks required by this Part, an amount sufficient to satisfy the lien, the payer may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price of the services and materials that have been supplied under that contract or subcontract, less the amount retained.

196 Pursuant to s. 23(1) of the Act "an owner is personally liable for holdbacks that the owner is required to retain under this Part to those lien claimants who have valid liens against the owner's interest in the premises". Accordingly, the Platis are personally liable for any holdbacks they were required to retain.

197 At the time the Platis received notice of the Great Northern lien (November 14, 2012) I have found that $78,824 was still to be paid by the Platis to King Road. This amount has never been paid. Pursuant to s. 24(2) of the Act the lien holders can look to this additional unpaid amount as further security for their liens. In *Basic Drywall Inc. v. 1539304 Ontario Inc*., *2012 ONSC 6391* (CanLII) the Divisional Court explained (at paras. 22 - 23):

> The fact which distinguishes this case from all prior precedents cited to us is that the owner's holdback obligation in this case is not necessarily limited to the basic 10 per cent basic holdback. It owed much more than that to the contractor and never made payment to the contractor. Under s. 24 of the Act, lien claimants can look to this additional unpaid amount as further security for their liens by giving written notice to the owner.
>
> Once an owner has notice of the claim for lien, the lien claimant has security against the owner's interest in the land to the full extent of the amount the owner, as payer, owes to the general contractor. See, for example, *Urbacon Buildings Group Corp. v. Guelph (City)*, *[2009] O.J. No. 5531*, *91 C.L.R. (3d) 145* (S.C.J.), at para. 26.

198 Pursuant to s. 24(2) the payor may make payment of 90 per cent of the contract less the amount retained, which means that the holdback is calculated as 10 per cent of the price of the contract plus the amount retained. In this case that equals $97,287.

199 Accordingly, Great Northern has security against the Platis' interest in the land to the extent of its lien to a maximum of $97,287, to be divided pro rata with other registered lien claimants.

200 The Platis argue that since their contract with King Road was for $125,000 they were obliged to hold back only 10 percent of the contract price and therefore, as owners, are liable to the lien holders for only $12,500. Their position is based on the premise that the total contract price was only $125,000 and that they paid that entire amount prior to November 14, 2012. As indicated above, I have rejected both of these factual assertions, and therefore I must reject the Platis' position on this issue.

ii) The Webdensco Lien

201 The second lien holder is Webdensco. Webdensco is a building supply company that provided various

supplies to King Road in relation to the renovation of the barn. Webdensco invoiced King Road $65,986 for the supply of materials and supplies to the property. $54,387.99 remains outstanding.

202 Although King Road and Alaimo initially took the position in their Scott Schedule that Webdensco's work was deficient, they abandoned that position at trial and no evidence of deficiencies was led.

203 The evidence demonstrates that the last day of supply to the property was October 9, 2012 and Webdensco registered its lien on October 31, 2012. The Certificate of Action was registered on November 22, 2012. Accordingly the time limits set out in ss. 33, 34 and 36 of the Act were all met. The only owners named in the lien are Agostino Plati and Giuseppina Plati.

204 I do not know when the Platis received notice of Webdensco's claim, but it would not have been later than April 2014 when the Statement of Claim was served, and the $78,824 remained unpaid on that date. "There is no time limit in the Act for giving written notice of a lien to an owner, so any notice before actual payment would suffice to create security against the full unpaid amount vis-a-vis the owner" (*Basic Drywall* at para. 24). Accordingly, s. 24(2) also applies with respect to Webdensco's lien, and Webdensco has security against the Platis' interest in the land to the extent of its lien to a maximum of $97,287. The holdback amount is to be shared pro rata between the two lien claimants.

205 The Platis argument with respect to Webdensco is the same as that with respect to Great Northern: their contract with King Road was for $125,000, they paid that entire amount, and they were obliged to hold back only 10 percent of the contract price and therefore, as owners, are liable to the lien holders for only $12,500. This argument is rejected for the same reason that it was rejected with respect to Great Northern's lien claim.

Is the Court Order Enforceable Against Nesci Personally?

206 Nesci is not a defendant in this action. He was not named as an owner in any of the liens that were registered. Indeed, he is not even mentioned in the Statement of Claim or any of the amended versions of the Statement of Claim. On December 7, 2015, the second last day of the trial and after Nesci had finished his testimony on behalf of the defendants, counsel for the King Road plaintiffs brought a motion without notice for an order "that any Judgment or Order awarded at trial of this action against Agostino Plati and Giuseppina Plati in favour of the plaintiffs also be enforceable as against Giuseppe Nesci". They did not bring a motion to amend the Statement of Claim to add Nesci as a defendant.

207 Counsel for the Platis objected to the motion being brought without notice and indicated that he was not prepared to argue the motion that day. The plaintiffs were aware of Nesci's interest in the property at least since Plati's examination for discovery in October 2014, and never sought to add him as a defendant.

208 The plaintiffs' motion was adjourned and as events unfolded was never argued.

209 The plaintiffs, in their factum, have taken the position that Nesci was an owner of the property within the meaning of s. 23 of the *Construction Lien Act* in addition to being a partner with Plati when the liens were registered. They argue that Nesci should therefore be subject to the Court's order even though he was never added as a defendant to this claim. They argue that Nesci was served with a notice of trial pursuant to s. 60(4) of the Act and is therefore a party to the action by virtue of s. 57(1) of the Act which provides:

> 57. (1) The person serving the notice of trial and all persons served with notice of trial are parties to the action.

210 They also rely on s. 57(2) of the Act which provides that "the court may at any time add or join any person as a party to the action", subject to limitations set out in s. 54 of the Act.

211 It is unclear whether Nesci was properly served with a notice of trial. The plaintiffs served Nesci by sending the

notice to Mr. Saverino, the lawyer for the Platis, but Mr. Saverino advised the plaintiffs that he had not been retained by Nesci and would not accept service on his behalf. That being said, Nesci acknowledged that he knew about the action from Plati, and Nesci appeared as a witness at the trial.

212 Even assuming that Nesci was a "party" within the meaning of s. 57(1) of the Act, there is a distinction between being named as a defendant in the Statement of Claim and being a "statutory party" by virtue of s. 57(1) of the Act. (See: *Atlas Construction Inc. v. The Brownstones Ltd,* *(1996) 27 OR (3d) 711*; *[1996] O.J. No 616* (Gen. Div.) in which D.S. Ferguson J. refers to the parties who are added pursuant to s. 57(1) even though not named in the pleadings as "statutory parties".)

213 Statutory parties have the right to participate in the trial even though they are not named as plaintiffs or defendants and have not filed pleadings. For example, s. 60(4) of the *Construction Lien Act* requires that all registered lien claimants be served with the notice of trial, and pursuant to s. 57(1) they become parties to the action. "Thus every lien action acquires aspects of a class action and is an action in which every other lien in relation to the same improvement may be tried." (*North Key v. Miwell*, *2013 ONSC 4433* (CanLII) at para. 16). This is different than an ordinary civil action because the process established by the Act is a statutory remedy that permits the determination of all lien claims against the property at the same time. In *Deslaurier v. Le Groupe Brigil*, *2012 ONSC 3350* (CanLII) Master Calum MacLeod summarized the scheme of the Act as follows (at paras. 10, 16 and 17):

> The *Construction Lien Act* creates a statutory procedure whereby contractors and suppliers in the construction industry can obtain security for unpaid debts if they take certain defined steps. The Act is remedial legislation but it creates a statutory remedy that did not exist at common law... Moreover the Act and its procedures are written to accommodate small and simple liens on one hand and complex overlapping liens registered by parties at different levels in the construction pyramid on the other...
>
> ...In an ordinary civil action, only the rights of the named parties will be adjudicated but that is not the case in a lien action for a number of reasons. In fact every action commenced to enforce a lien is an action in which all of the other liens may be enforced because by operation of the Act all lien claimants will become parties to the action at the time of trial. This is consistent with the sheltering rules, which provide that only one action need be commenced to perfect all of the liens (providing it is commenced in time) and is evident from the following provisions of the Act.
>
> a) S. 60 of the Act requires that when the date is set for trial of a lien action, the plaintiff must serve a notice of trial on any other person having a preserved or perfected lien;
>
> b) S. 57 (1) of the Act provides that all parties served with the notice of trial are parties to the action;
>
> c) S. 51 of the Act requires the court to try the action and all questions "that arise therein or are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it or on whom notice of trial has been served" and to give all necessary relief to all "parties to the action".
>
> One of the principle reasons that the Act requires all lien claimants to be before the court and bound by the result at the trial of any of the liens has to do with ultimate disposition of the land affected by the liens or of the security paid into court. Under provisions such as ss. 44, 65, 80 and 84 the funds paid into court or the proceeds of sale of the land to which the liens attach are pooled and shared pro-rata by the lien claimants as their interests may appear and subject to the priority rules. Consequently unless the funds exceed the total of all of the liens those funds cannot be distributed until all subsisting lien claims have been adjudicated.

214 The fact that all lien claimants are bound by the result of the trial does not mean that statutory parties not named as defendants can be made personally liable for breach of trust. One of the primary purposes of pleadings is to identify the parties against whom the action is brought and relief is claimed. I was not provided with any authority that suggests that the court may make an order against a statutory party not named as a defendant in the action. To the contrary, the Ontario Divisional Court has recently affirmed that the "total failure" to name a person as an owner

in the Statement of Claim "is not a mere irregularity" and will be fatal to the lien claim against that person (*Dolvin Mechanical Contractors Ltd. v Edge on Triangle Park Inc*., *2017 ONSC 783* at paras. 16 and 18) (CanLII)

215 This issue relates only to the lien claims by Great Northern and Webdensco. King Road does not have a lien claim against the property, its claim against the Platis is based on breach of contract and is therefore subject to the ordinary Rules of Civil Procedure. Nesci was never a party to the contract claim made by King Road, and therefore no order can be made against him with respect to that contract claim.

216 Since Nesci is not a defendant in the action and the plaintiffs' motion was never argued, it is both inappropriate and unnecessary for the court to consider whether Nesci and Plati were partners.

217 I have found that the lien holders have security against the Platis' interest in the land to the extent of their lien to a maximum of $97,287, and that the holdback amount is to be shared pro rata between the two lien claimants.

218 Section 78(1) of the Act provides that "Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises." Since Nesci was made a registered owner of the property after the liens were registered, the lien holders have priority over Nesci's interest in the property regardless of whether he has a personal obligation to pay.

Conclusion

219 Judgment is granted in favour of the plaintiffs King Road and Louis Alaimo against the defendants Agostino Plati and Giuseppina Plati in the amount of $78,824 plus prejudgment interest in accordance with s. 128 (1) of the *Courts of Justice Act*.

220 Judgment is granted in favour of the plaintiff Great Northern Insulation Services Ltd. against the defendants King Road and Louis Alaimo in the amount of $105,803.

221 This Court declares that Great Northern Insulation Services Ltd is entitled to a lien under the *Construction Lien Act*, upon the interest of the owners Agostino Plati and Giuseppina Plati, in the property known as PT Lot 26 Con 9 King PT, 65R1115 T/W R153731; Township of King, address 6090 Eighteenth Sideroad, Schomberg for the amount of $51,415.00.

222 This Court declares that Webdensco is entitled to a lien under the *Construction Lien Act*, upon the interest of the owners Agostino Plati and Giuseppina Plati, in the property known as PT Lot 26 Con 9 King PT, 65R1115 T/W R153731; Township of King, address 6090 Eighteenth Sideroad, Schomberg for the amount of $54,387.99.

223 This Court orders that the personal liability of the owners Agostino Plati and Giuseppina Plati to the lien holders in respect of the holdbacks the owners were required to retain is $97,287, and writs of execution may be issued forthwith for the amounts set out in paras. 221 and 222 above.

224 The parties are directed to prepare a draft order for my approval in accordance with the findings of this court and Form 19 (Judgment at Trial Under s. 62 of the Act where Lien Attaches to Premises) under the *Construction Lien Act*.

225 If the parties are unable to agree on costs they may file written submissions of no more than 3 pages plus cost outlines and any offers to settle in accordance with the following schedule:

(a) Submissions of Great Northern -- 20 days after the release of this decision

(b) Submissions of King Road/Alaimo -- 10 days after Great Northern

(c) Submissions of Platis -- 10 days after King Road/ Alaimo

R. CHARNEY J.

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