

CITATION: Dal Bianco v. Deem Management et al.
COURT FILE NO.: CV-18-598657-00CL

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Donald Dal Bianco, Applicant

AND:

Deem Management Services Limited and The Uptown Inc., Respondents

BEFORE: C. Gilmore, J.

COUNSEL: R. Brendan Bissell, Counsel for the Receiver Crowe Soberman Inc.

Hans Rizarri [not counsel], representative of Crowe Soberman Inc.

David Ullmann, Counsel for the Applicant Donald Dal Bianco

Bradley Phillips, Counsel for the Respondents Deem Management Services Limited and The Uptown Inc.

Eric Gionet and Ben Salsberg, Counsel for Maxion Management Services Inc.

Harold Rosenberg, Counsel for Deep Foundations Contractors Inc.

Jeffrey Armel, Counsel for EXP Services Inc.

Edward D'Agostino, Counsel for Kieswetter Excavating Inc.

Sean Dewart, Counsel for John C. Wolf, Christopher Kropka, Jeffrey M. Warren, Steven P. Jeffrey and Blaney McMurtry LLP in Court File No. CV-20-00637618-0000

HEARD: November 18, 2021

ENDORSEMENT ON MOTION

Introduction

[1] This the Receiver's motion for approval of its Fourth Report, authorization and approval to pay the Receiver and its lawyers' accounts, reference of construction issues arising in the receivership to an Associate Judge, and advice and directions on the Receiver's participation and role in such a reference.

[2] In issue is whether the Maxion lien and ownership claims should be dealt with separately from the sub-trade liens.

Background

[3] In the summer of 2018, following a sales process, the Receiver sold the main asset under its administration. Distributions from the sale were made to first-ranking secured creditors including two mortgages. A balance of \$5.4M remains. This is insufficient to satisfy all creditors' claims and the sub-trade liens.

[4] There are outstanding issues in relation to the disputes in relation to the remaining sale proceeds including whether Maxion is an owner and therefore disentitled to a lien, and whether the third mortgage is a reviewable transaction.

[5] In February 2021, approximately three years after the within Application was commenced Maxion commenced a new claim seeking damages of \$50,000,000 from, amongst others, Deem Management and Dal Bianco. Maxion claims it has an ownership interest in the Uptown development. Maxion seeks to have both its lien claim and its ownership interest determined at a reference by an Associate Judge.

[6] While the parties agree in principle to a reference in order to resolve the outstanding issues, the parties and the sub-trades disagree on whether the Maxion claims (re liens and ownership) should be included in the reference.

[7] The Receiver suggests four possible options:

- a. shelving all proceedings in respect of the distribution issues pending the determination of the Action, such that any remaining distribution issue be thereafter determined in this receivership, possibly including a Construction Act reference.
- b. excluding any and all claims by the general contractor from the Construction Act reference.
- c. not making any reference under the Construction Act, meaning that the office of the Receiver and/or the receivership proceeding (including the Superior Court under the BIA, for example) remain the only forum for the discussion and determination of all outstanding issues, including Construction Act issues, in respect of the distribution of the Balance.
- d. the reference of all issues between the parties, including those in the Action and those touching on entitlement of the Balance, to an Associate Judge under the Construction Act.

[8] The Receiver's position on this motion is that the fourth option is the most practical and economical. If that option is chosen, the Receiver seeks direction from the Court as to whether or if its participation would be required on the reference.

The Positions of the Parties

The Sub-Trades

[9] There is no issue as to the validity of the liens of the sub-trades. The view of the sub-trades is that an Associate Judge has the authority to determine Maxion's status, including a determination of whether it is an Owner. It does not make sense to refer the liens of the sub-trades to an Associate Judge if the Maxion's claims are not included.

Deem Management (Respondent)

[10] Deem takes the position that the issue of ownership should be determined by a judge of this Court given the credibility issues at stake. Further, Deem intends to counterclaim against Maxion for losses sustained by virtue of the actions of Maxion. As such, it would not be appropriate for an Associate Judge to hear those matters.

[11] Once the Maxion/Deem issues have been determined, the balance should be referred to an Associate Judge.

Maxion

[12] Maxion submits that all issues of the parties including Maxion's new Action should be referred to a single Associate Judge. This will be the most cost efficient and reasonable way to proceed and ensures there will be no inconsistent decisions.

[13] Maxion submits that the Receiver need not take part in the reference.

Donald Dal Bianco (Applicant)

[14] The Applicant opposes referring this matter to an Associate Judge until the determination of whether Maxion is an owner or lien claimant is determined.

[15] It is not correct that the Applicant previously agreed to a reference. The Applicant agreed to a reference of the sub-trade liens only. The decision of Maxion to serve a new Action in February 2021 has derailed the scheduling of this matter.

Analysis and Ruling

[16] It is this Court's view that the risk of inconsistent findings and the issue of cost efficiency dictate that all issues related to the sub-trades and the issue of owner vs. lien claimant (re Maxion) be referred to an Associate Judge. To be clear, this includes the issues in the new Maxion Action. There is no reason why an Associate Judge could not deal with all issues both in terms of jurisdiction and timing.

[17] The matter must move forward now that the Court of Appeal has issued its decision in relation to the priority of the Deem Management mortgage.

[18] Given all of the above, I make the following Orders:

[19] The claims for lien against the Proceeds of Sale held by the Receiver shall be referred to an Associate Judge in Toronto as follows:

- a) Maxion Management Services Inc. dated March 29, 2018 in the amount of \$4,522,597;
- b) Maxion Management Services Inc. dated July 13, 2018 in the amount of \$560,283.48;
- c) Deep Foundations Contractors Inc. dated March 14, 2018 in the amount of \$918,432;
- d) Kieswetter Excavating Inc. dated March 7, 2018 in the amount of \$1,827,409;
- e) Onespace Limited dated March 19, 2018 in the amount of \$68,580; and
- f) EXP Services Inc. dated April 12, 2018 in the amount of \$336,654
- g) Deem Management Services Ltd. as owner and Donald Dal Bianco as mortgagee shall also be parties to the reference.
- h) Maxion's Action against the third mortgagee and some of its lawyers shall form part of the reference although the parties may agree to stay the action as it relates to the lawyers if so advised.
- i) The Receiver need not participate in the reference unless as directed by the Associate Judge.

[20] The Administrative Order attached hereto shall issue.

Costs

- [21] Dal Bianco sought \$9,500 in partial indemnity costs and Deem Management sought \$3,400 in partial indemnity costs.
- [22] The solution recommended by the Receiver was the most practical and should have been agreed upon at the outset. The sub-trades and Maxion shall have their costs of this motion payable by the Applicant and the Respondent (jointly and severally) in an amount proportionate to what the Applicant and Respondent would have expected to receive if successful.
- [23] Therefore, the Applicant and the Respondent shall pay the all-inclusive sum of \$10,000 to Maxion and the sub-trades by way of costs for this motion. Maxion and the sub-trades shall determine the apportionment of those costs as between themselves.



C. Johnson, Jr.

Judge

Date: February 13, 2022