

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

NOV 07 2018

No. S-189965
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

IMH 415 & 435 MICHIGAN APARTMENTS LTD.,
IMH POOL XIV LP and IMH GP XIV LTD.

PLAINTIFFS

AND:

UNIQUE RESTORATION LTD., WYNSPEC MANAGEMENT INC.,
ZGEMI INC. and HARCONBRIDGE CONSTRUCTION LTD.

DEFENDANTS

AND:

STARLIGHT GROUP PROPERTY HOLDINGS INC.

DEFENDANT BY WAY OF COUNTERCLAIM

COUNTERCLAIM

Filed by: Unique Restoration Ltd. ("Unique")

To: IMH 415 & 435 Michigan Apartments Ltd., IMH Pool XIV LP, IMH GP XIV Ltd. and Starlight Group Property Holdings Inc.

And to: Their Solicitors

This action has been brought by the plaintiff(s) against the defendant(s) for the relief set out in the notice of civil claim filed in this action.

TAKE NOTICE that the defendant(s) Unique Restoration Ltd. claim(s) against you for the relief set out in Part 2 below.

IF YOU INTEND TO RESPOND to the claim made against you in this counterclaim, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST FILE a response to counterclaim in Form 4 in the above-named registry of this court within the time for response to counterclaim described below and SERVE a copy of the filed response to counterclaim on the address for service of the defendant(s) bringing this counterclaim.

YOU OR YOUR LAWYER may file the response to counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to counterclaim within the time for response to counterclaim described below.

Time for response to counterclaim

A response to counterclaim must be filed and served on the defendant(s) bringing this counterclaim,

- (a) if you were served with the counterclaim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the counterclaim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the counterclaim anywhere else, within 49 days after that service, or
- (d) if the time for response to counterclaim has been set by order of the court, within that time.

CLAIM OF THE DEFENDANT BRINGING THE COUNTERCLAIM

Part 1: STATEMENT OF FACTS

1. Unless otherwise defined herein, Unique adopts the defined terms used in the Notice of Civil Claim of the Plaintiffs dated September 12, 2018 (the “**Notice of Civil Claim**”). Unique adopts the defined terms without admitting to any of the allegations resulting there from.
2. Unique pleads, reiterates and relies on the admissions, facts, allegations and defined terms set out in its Response to Civil Claim filed in this proceeding.

The Parties

3. Unique carries on building maintenance and restoration services in the multi-unit residential, commercial and institutional sectors in Ontario and British Columbia.
4. Starlight is the asset and property manager with respect to the Michigan Properties, acting on behalf of the Michigan Owners.
5. Michigan Apartments is the registered owner of the Michigan Properties, which are legally described as follows:

City of Victoria Parcel Identifier: 030-409-519
Lot A of Lots 1817, 1818, 1819, 1820, 1821, 1822 and 1823 Victoria City Plan
EPP76927

The Building Envelope Contract

6. On or about May 19, 2016, Unique entered into the Building Envelope Contract with Starlight. Starlight entered into the Building Envelope Contract on its own and on behalf of the Michigan Owners.
7. Wynspec was appointed the “**Consultant**” under the terms of the Building Envelope Contract to provide administration of the Building Envelope Contract.
8. Unique says that the Building Envelope Contract contains, *inter alia*, the following express and implied terms:
 - (a) Unique would perform the exterior wall, windows replacement and balcony repairs (the “**Work**”) as detailed in the Building Envelope Contract:
 - (i) the Work included the following:
 - (ii) the interior abatement for windows and doors replacement at 415 Michigan;
 - (iii) interior abatement for window replacement at 435 Michigan; and
 - (iv) exterior abatement for exterior repair work and window replacement at 435 Michigan
 - (b) Unique would have total control of the Work and be solely responsible for the construction means and methods of completing the Work;
 - (c) Starlight and the Michigan Owners would provide Unique with access to the Michigan Properties to perform the Work;
 - (d) Starlight and the Michigan Owners would be responsible for protecting the Michigan Properties from any damage which occurred as a result of acts or omissions by Starlight, the Michigan Owners, Wynspec and other contractors, including the agents and employees of such parties;
 - (e) Starlight and the Michigan Owners would take all reasonable steps to determine whether the Michigan Properties contained any toxic or hazardous substances, including asbestos, and provide Unique with a written list of such substances and their location within the Michigan Properties;
 - (f) except for the Unique Abatement Work, Starlight and the Michigan Owners would take all necessary steps, in accordance with applicable legislation, to dispose of, store or otherwise render harmless toxic or hazardous substances which were present at the Michigan Properties prior to Unique commencing the Work;

- (g) Unique would submit invoices (the “Invoices”) for payment to Starlight each month in accordance with the payment terms of the Building Envelope Contract;
- (h) Starlight and the Michigan Owners would pay Unique the amounts due under each Invoice within 60 days of the Invoice being submitted to Starlight;
- (i) Starlight and the Michigan Owners would not withhold the payment of any Invoice unless in accordance with the terms of the Building Envelope Contract;
- (j) where a sub-contractor retained by Unique filed a lien in accordance with the *Builders Lien Act*, SBC 1997, c. 45 (the “*Builders Lien Act*”), Starlight and the Michigan Owners would not be entitled to withhold payments from Unique where such a lien resulted from Starlight’s and the Michigan Owners’ failure to pay the Invoices when due; and
- (k) if Starlight and the Michigan Owners failed to pay any of the Invoices when due, Unique would be entitled to suspend the Work after providing 5 days written notice to Starlight.

Discovery of Asbestos and Stoppage of Work

- 9. Unique commenced performance of the Work on or around June 2016.
- 10. From on or around June 2016 to on or about September 19, 2017, Starlight was the prime contractor for the renovation of the Michigan Properties.
- 11. As the prime contractor Starlight was responsible for, *inter alia*, managing all aspects of the interior and exterior renovations of the Michigan Properties, including the safe abatement of hazardous materials such as asbestos fibers.
- 12. On or about December 14, 2016, WorkSafe BC conducted an inspection of the Michigan Properties following a third party complaint that drywall containing asbestos was not being properly stored on site. During the inspection, WorkSafe BC observed an employee of ZGEMI failing to use appropriate abatement procedures when performing interior renovation work that disturbed asbestos containing drywall.
- 13. On or about December 14, 2016, WorkSafe BC issued a stop work order with respect to 415 Michigan.
- 14. On or about January 12, 2017, Unique inspected reports of construction dust inside suites at 435 Michigan and determined, with the assistance of a third party contractor, that the construction dust did not contain asbestos fibers. At all times, Unique advised and updated Wynspec and the property managers at the Michigan Properties with respect to this incident and any other incidents of construction dust migration.
- 15. On or about January 16, 2017, Starlight voluntarily stopped all work at the Michigan Properties, including the Work to be performed by Unique.

16. At all material times, Unique performed the Work, including the Unique Abatement Work, in a good and workmanlike manner, including taking the necessary steps to abate material known to contain asbestos or other hazardous materials.
17. The migration of construction dust and debris containing asbestos fibers and other hazardous materials into the interior of the Michigan Properties was caused, aggravated or contributed to by the negligence of Starlight, the Michigan Owners, Wynspec, ZGEMI, Harconbridge or other parties unknown to Unique. Particulars of the alleged negligence include:
 - (a) hiring or engaging incompetent servants, agents or employees to work on the renovations to the Michigan Properties when they knew or ought to have known they lacked the requisite skills, qualifications or experience to do so;
 - (b) entrusting incompetent servants, agents or employees to work on the renovations to the Michigan Properties when they knew or ought to have known that they did not have the requisite knowledge and/or experience to do so;
 - (c) failing to adequately supervise incompetent servants, agents or employees when they knew or ought to have known that they required supervision;
 - (d) failing to adequately instruct or supervise their employees, agents or servants;
 - (e) failing to properly implement, operate or monitor the abatement of hazardous materials, including asbestos fibers;
 - (f) failing to take any steps to prevent the migration of dust, debris, asbestos fibers and other hazardous substances created by work outside the scope of the Unique Abatement Work into the interior of the Michigan Properties;
 - (g) failing to abate the accumulation of dust and debris containing asbestos fibers and other hazardous substances created by work outside the scope of the Unique Abatement Work in the interior of the Michigan Properties;
 - (h) failing to properly assess the risk of further migration of dust and debris containing asbestos fibers and other hazardous substances into suites in the Michigan Properties and take necessary steps to prevent the further migration of such dust and debris into 435 Michigan during work outside the scope of the Unique Abatement Work; and
 - (i) such further and other particulars as they become known to Unique.
18. On or about January 16, 2017, Starlight voluntarily stopped all work at the Michigan Properties, including the Work to be performed by Unique.
19. On or about August 14, 2017, Unique returned to the Michigan Properties to continue performance of the Work following the completion of the Remediation Work.

Breaches by Starlight and the Michigan Owners

20. From June 2016 to June 2018, Unique submitted Invoices to Starlight for payment on a monthly basis in accordance with the terms of the Building Envelope Contract. During this period of time, Starlight and the Michigan Owners frequently failed to perform their obligation under the Building Envelope Contract to pay such Invoices when due.
21. On or about May 8, 2018, Wynspec issued certificates of substantial completion with respect to the Work.
22. On or about May 30, 2018, Starlight notified Unique that it would be withholding payment of all Invoices on the basis that Unique had failed to provide certain information to Starlight in accordance with section 41 of the Builders Lien Act.
23. On or about June 5, 2018, Unique provided to Starlight the information requested in accordance with section 41 of the Builders Lien Act and requested Starlight and the Michigan Owners perform their obligations under the Building Envelope Contract to pay the amounts due under the Invoices when due.
24. In breach of their obligations under the Building Envelope Contract, Starlight and the Michigan Owners have refused or neglected to pay the amounts due under the following Invoices:

Invoice No.	Invoice Date	Amount Due	Date Due
7756	02/28/2018	\$214,774.59	05/09/2018
7778	03/30/2018	\$337,159.27	06/08/2018
7809	04/30/2018	\$350,323.41	07/09/2018
7820	05/30/2018	\$24,914.09	08/08/2018
7821	05/09/2018	\$656,688.42	06/09/2018
7810	04/30/2018	\$601,530.79	07/03/2018

(collectively, the “Outstanding Invoices”)

25. Starlight and the Michigan Owners have refused or neglected to pay the amounts due under the Outstanding Invoices despite Unique’s demand that they do so.
26. The amount of \$2,185,390.57 plus interest accruing at the rate of 24.00% per annum, remains due and owing to Unique under the Building Envelope Contract.

27. On or about June 7, 2018, Unique by its agent made a claim of lien pursuant to the Builders Lien Act alleging that the sum of \$2,221,090.57 is or will become due and owing on May 8, 2018, by causing the said claim of lien to be filed against the Michigan Properties at the Victoria Land Title Office under registration number CA6851343 (the “**Building Envelope Lien**”).
28. The amount secured by the Building Envelope Lien is \$2,185,390.57, plus interest accruing at the rate of 24.00% per annum, pursuant to the Outstanding Invoices.
29. In specific response to paragraphs 57 and 58 (Part 1) of the Notice of Civil Claim, Unique denies that it had any obligation under the Building Envelope Contract to cause the any liens filed by its subcontractors to be removed and released from title to the Michigan Properties because such liens resulted from Starlight’s and the Michigan Owners’ failure to pay the Invoices when due.
30. Upon notifying Starlight and the Michigan Owners of their failure to perform their obligations under the Building Envelope Contract, Unique was entitled to suspend its performance of the Work pursuant to the terms of the Building Envelope Contract.
31. On or about June 15, 2018, Unique suspended its performance of the Work in accordance with the terms of the Building Envelope Contract. Unique maintained materials for completion of performance of the Work at the Michigan Properties until on or about July 7, 2018.
32. On or about August 28, 2018, Wynspec purported to deliver the Default Notice to Unique.
33. On or about August 29, 2018, Unique requested Wynspec provide details of Unique’s alleged default by failing to “complete the contracted scope of work” under the Building Envelope Contract. Wynspec has neglected or refused to provide such details despite Unique’s request.
34. On or about August 31, 2018, Unique provided written notice to Wynspec and Starlight that it disputed the validity of the Dispute Notice on the basis that it had been entitled to suspend performance of the Work when it did so on or about June 15, 2018.
35. On or about September 4, 2018, Unique made a good faith effort to cure the alleged default by attending the Michigan Properties to resume performance of the Work, however, Starlight and the Michigan Owners refused to provide Unique with access to the Michigan Properties.
36. By refusing to provide access to Unique to the Michigan Properties to perform the Work, Starlight and Michigan Owners breached their obligations under the Building Envelope Contract or, alternatively, breached their duty to perform their obligations under the Building Envelope Contract honestly and in good faith.
37. On or about September 6, 2018, Starlight provided written notice (the “**Termination Notice**”) to Unique purporting to terminate the Building Envelope Contract.

38. On or about September 7, 2018, Unique provided written notice to Starlight that it disputed the validity of the Termination Notice on the basis that the Termination Notice purported to rely on the fact Unique suspended performance of the Work and failed to cure the alleged default in the Default Notice.
39. Starlight and the Michigan Owners breached their obligations to Unique under the Building Envelope Contract by, *inter alia*, the following:
 - (a) failing to provide Unique with access to the Michigan Properties to perform the Work;
 - (b) failing to take all reasonable steps to determine whether the Michigan Properties contained any toxic or hazardous substances, including asbestos, and provide Unique with a written list of such substances and their location within the Michigan Properties;
 - (c) except for the Unique Abatement Work, failing to take all necessary steps, in accordance with applicable legislation, to dispose of, store or otherwise render harmless toxic or hazardous substances which were present at the Michigan Properties prior to Unique commencing the Work;
 - (d) failing to pay Unique the amounts due under the Outstanding Invoices; and
 - (e) such further and other particulars as they become known to Unique.
40. As a result of the breaches of the Building Envelope Contract by Starlight and the Michigan Owners and the negligence of Starlight and the Michigan Owners, Unique has suffered loss, damage and expense, including:
 - (a) amounts due under the Outstanding Invoices, plus interest;
 - (b) costs incurred as a result of the presence of asbestos fibers in the interior spaces of the Michigan Properties causing Starlight to voluntarily stop all work at the Michigan Properties, including the Work to be performed by Unique;
 - (c) loss of opportunity to complete performance of the Work;
 - (d) loss of income from completing performance of the Work in accordance with the Building Envelope Contract; and
 - (e) such further and other damages to be proven at trial.

The Prime Contractor Agreement

41. On or about September 19, 2017, Unique entered into a prime contractor agreement (the "**Prime Contractor Agreement**") whereby Starlight retained Unique as the "prime contractor and constructor" for the renovation of the Michigan Properties. Starlight entered

into the Prime Contractor Agreement on its own behalf and on behalf of the Michigan Owners.

42. The Prime Contractor Agreement contains, inter alia, the following express and implied terms:

- (a) Unique would be responsible for managing all aspects of the interior and exterior renovations of the Michigan Properties from September 19, 2017 until the final completion of such work;
- (b) Starlight and the Michigan Owners would pay Unique a monthly fee in the amount of \$19,850.00, plus applicable taxes (the “**Monthly Fee**”);
- (c) Starlight and the Michigan Owners would pay Unique the Monthly Fee within 60 days of the date of each monthly invoice submitted by Unique; and
- (d) Unique or Starlight/the Michigan Owners could terminate the Prime Contractor Agreement by providing the other with 30 days written notice.

43. In accordance with the terms of the Prime Contractor Agreement, Unique managed all aspects of the interior and exterior renovations of the Michigan Properties starting on September 19, 2017.

44. From September 2017 to June 2018, Unique submitted monthly invoices to Starlight and the Michigan Owners in accordance with the Prime Contractor Agreement.

45. In breach of their obligations under the Prime Contractor Agreement, Starlight and the Michigan Owners have refused or neglected to pay the amounts due under the following Invoices:

Invoice No.	Invoice Date	Amount Due	Date Due
7780	03/30/2018	\$20,144.25	05/29/2018
7805	04/30/2018	\$20,144.25	06/29/2018
7832	05/31/2018	\$20,144.25	07/30/2018
7888	06/30/2018	\$10,072.13	29/08/2018

(collectively, the “**Outstanding Prime Contractor Invoices**”)

46. The amount of \$70,504.88, plus interest accruing at the rate of 24.00% per annum, remains due and owing to Unique under the Prime Contractor Agreement.

47. On or about May 15, 2018, Unique provided written notice to Starlight that it had elected to terminate the Prime Contractor Agreement effective
48. On or about June 7, 2018, Unique by its agent made a claim of lien pursuant to the Builders Lien Act alleging that the sum of \$80,577.00 is or will become due and owing on May 8, 2018, by causing the said claim of lien to be filed against the Michigan Properties at the Victoria Land Title Office under registration number CA6851342 (the “**Prime Contractor Lien**”).
49. The amount secured by the Prime Contractor Lien is \$70,504.88, plus interest accruing at the rate of 24.00% per annum, pursuant to the Outstanding Prime Contractor Invoices.
50. Unique has complied with the provisions of the *Builders Lien Act* and is entitled to builders liens on the Michigan Properties.

Part 2: RELIEF SOUGHT

1. A declaration that Unique is entitled to a lien pursuant to the *Builders Lien Act* in the amount of \$2,185,390.57, plus interest accruing at the rate of 24.00% per annum, as against the Michigan Properties and against any further security posted or funds paid into Court in substitution for the Michigan Properties.
2. A declaration that Unique is entitled to a lien pursuant to the *Builders Lien Act* in the amount of \$70,504.88, plus interest accruing at the rate of 24.00% per annum, as against the Michigan Properties and against any further security posted or funds paid into Court in substitution for the Michigan Properties.
3. A Certificate of Pending Litigation.
4. A declaration that Starlight and the Michigan Owners are in breach of their obligations under the Building Envelope Contract and the Prime Contractor Agreement.
5. General and special damages for breach of the Building Envelope Contract and the Prime Contractor Agreement.
6. A declaration that Unique is entitled to an indemnity from Starlight and the Michigan Owners in accordance with the Building Envelope Contract with respect to:
 - (a) any amounts paid by or on behalf of Unique as a result of the failure of Starlight and the Michigan Owners to fulfill their obligations pursuant to the terms and conditions of the Building Envelope Contract;
 - (b) any amounts paid by or on behalf of Unique as a result of the negligent acts or omissions of Starlight and the Michigan Owners or anyone for whom Starlight and the Michigan Owners are liable; and
 - (c) all legal costs and expenses incurred by Unique as a result of the failure of Starlight and the Michigan Owners to fulfill their obligations pursuant to the terms and

conditions of the Building Envelope Contract and/or the negligent acts or omissions of Starlight and the Michigan Owners or anyone for whom Starlight and the Michigan Owners are liable.

7. Judgment in favour of Unique for all amounts due to it from Starlight and the Michigan Owners as set out herein.
8. Interest in accordance with the Building Envelope Contract, the Prime Contractor Agreement, the Outstanding Invoices and the Outstanding Prime Contractor Invoices.
9. Costs on a solicitor and own client basis in accordance with the Building Envelope Contract and the Prime Contractor Agreement or, alternatively, costs in accordance with the *Supreme Court Civil Rules*.
10. Such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

1. Starlight and the Michigan Owners have breached their obligations to Unique under the Building Envelope Contract and the Prime Contractor Agreement.
2. Unique has suffered loss, damage and expense as a result of the breaches of the Building Envelope Contract and the Prime Contractor Agreement by Starlight and the Michigan Owners.
3. Unique pleads and relies on the terms of the Building Envelope Contract and the Prime Contractor Agreement.
4. Unique is entitled to a lien for the amounts due under the Building Envelope Contract and the Prime Contractor Agreement pursuant to the *Builders Lien Act*.

Defendant's address for service:

McMillan LLP
Suite 1500 – 1055 West Georgia Street
P.O. Box 11117
Vancouver, BC V6E 4N7
Attention: Daniel Shouldice

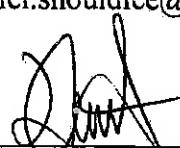
Fax number address for service (if any):

n/a

E-mail address for service (if any):

daniel.shouldice@mcmillan.ca

Date: November 7, 2018


Signature of lawyer for the Defendant,
Unique Restoration Ltd.

Daniel Shouldice

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.