In the Alberta Court of Justice

Citation: ProPainting Solutions Inc. v Datta, 2023 ABCJ 101

Date: 20230428
Docket: P2290102294
Registry: Calgary

Between:

ProPainting Solutions Inc.

Plaintiff

- and -

Subrata Datta and Aditi Datta

Defendants

Reasons for Decision of the Honourable Justice G.P. Shannon

Background and Facts

[1] A summary dismissal application (the "Application") was brought by the Defendants (the "Applicants") in the within action on April 14, 2023.

[2] It was continued on April 26, 2023 complete with a 90 minute *viva voce* hearing with respect to hearing from 3 witnesses: Mr. Subrata Datta ("Datta"); the Plaintiff's corporate representative, Mr. Stefan Crisan ("Crisan"), and Mr. Tahir Rafiq of Urban Signature Homes ("Rafiq"), the replacement general Contractor, each providing oral testimony under cross-examination.

[3] The sole and exclusive purpose of *viva voce* hearing was to ensure that the parties put their "best foot forward" and for the Court to ascertain additional key oral evidence, if any, and to also test the reliability and credibility of the witnesses, regarding the originally filed affidavits for the Application.

[4] Given that both parties filed affidavits for the within Application, the Court understood that no party took the position that the record before the Court was insufficient for final disposition in relation thereto. However, the Court used its discretion to permit a brief 90 minute *viva voce* hearing on April 26, 2023, as necessary for the Court to make its final determinations based on the Application.

[5] The two issues on the Application were:

1) whether there existed an "oral contract" for payment by the Defendants of the additional painting work and also payment for the original unpaid painting work; and

2) in the alternative, if the doctrine of "unjust enrichment" existed based upon the facts and circumstances.

[6] The parties were of the view that the Court could interpret the alleged "oral contract", if any and also determine if the doctrine of "unjust enrichment" was applicable to the facts at bar, and conclude the action, whether in favour of the Plaintiff or the Defendants, summarily.

[7] The Plaintiff alleges a certain telephone call and/or a face to face meeting occurred in the middle of December of 2021, wherein the Plaintiff attempts to form the basis of its claim of an oral contract for more than just the additional painting work of $9,528.22 (the "Additional Work") and alleges that said oral contract combined the Additional Work and also the unpaid Original Work of $48,366.57 (the "Original Work"). The Defendant denies he agreed to pay for the Original Work.

[8] The general contractor and home builder, Wolf Custom Homes Ltd. ("Wolf") did not pay the Plaintiff, a subcontractor, for the Plaintiff's Original Work, as on or about November 10, 2021, Wolf filed an assignment in bankruptcy, with Grant Thornton Limited, the duly appointed, Trustee of Wolf's estate (the "Trustee").

[9] Datta swore and filed an affidavit in support of Application, dated November 15, 2022.

[10] Crisan, swore and filed an affidavit in reply thereto opposing the Application, some five months later on April 11, 2023.

[11] Datta's affidavit disclosed the home building project between the Defendants and Wolf on or about August 30, 2020, to build a custom home at 6 Damkar Drive Rocky View County, Alberta (commonly known as the "Watermark at Bearspaw development" or the "Lands") for the agreed price of $1,079,269.68, with change orders increasing the purchase price to $1,219,367.21 (the "Contract").

[12] Wolf retained several subcontractors as part of the Defendants' home build project (the "Project"), including but not limited to the Plaintiff, a painting subcontractor.

[13] The Defendants paid Wolf a total of $952,915.99 under the Contract. The Defendants paid all of the invoices as rendered by Wolf for the Project and then Wolf went into bankruptcy protection on or about November 10, 2021. Wolf simultaneously abandoned the Project and had not performed any further work on the Project since October of 2021.

[14] At the time of Wolf's assignment, the Project was incomplete, and the Defendants had to hire a new general contractor, namely Urban Signature Homes, to finish the home at a management fee of $56,351.57 and also paid additional subtrades another $243,214.16, collectively for work to complete the Project.

[15] The Defendants also remitted into the King's Bench, the sum of $95,291.56 representing the 10% builder's lien fund, under the *Builders Lien Act*, RSA 2000, c. B-7, as there were approximately eight (8) builder's liens filed and registered against the Lands. Wolf was paid 100% of all of its invoices by the Defendants.

[16] The Plaintiff initially registered a builder's lien against the Lands on November 24, 2021 in the sum of $43,934.63 but it failed to file a Certificate of Lis Pendens or a Statement of Claim at King's Bench within the prescribed time frame in order to perfect its builder's lien, as required under the *Builders Lien Act*, RSA 2000, c. B-7. The Plaintiff could have filed and protected its claim and took part in the pro-rata disbursement out of the $95,291.56 lien fund.

[17] Accordingly, effective Sept 2, 2022, the Plaintiff's lien was extinguished by a King's Bench Court Order and some 27 days, it decided to proceed with its civil claim in this Court.

[18] Due to Wolf's bankruptcy and abandonment of the Project, the Defendants incurred significant cost overruns including hiring new subtrades and incurring significant legal fees in the sum of approximately $150,000.00, a new general contractor and hiring exclusive of all accrued legal fees to date.

[19] In December 2021, the Defendants contracted with the Plaintiff for the Additional Work in the sum of $9,528.22 and duly paid the Plaintiff this amount in full in 2 tranches as agreed among the parties.

[20] Datta in his affidavit states that this was the only "oral contract" between the Defendants' and the Plaintiff, and it did not constitute an agreement to also pay any amounts owing by Wolf to the Plaintiff under Plaintiff's subcontractor agreement with Wolf.

[21] Crisan, in his affidavit claims that he had an oral agreement with the Defendants to do the Additional Work but conditional only if the Defendants also paid his previous unpaid work (that Wolf did not remit to the Plaintiff).

[22] Crisan, at para 6 of his affidavit, claims that before he commenced the Additional Work, the Defendants assumed all liability for payment of the Additional Work and the Original Work. Further, Crisan claims he would not have done the Additional Work but for the Defendants oral agreement to pay for the Original Work.

[23] In addition, Crisan claims at paragraphs 13 and 14 of his affidavit that he should be compensated under the doctrine of "unjust enrichment", as there is no evidence before the Court that the Defendants paid for Plaintiff's Original Work directly.

[24] Actually, there is evidence before the Court contained in Datta's affidavit at paragraphs 7, 8, 9, 10 and 13, as the Defendants paid Wolf all of its invoices relating to the Project rendered by Wolf prior to its bankruptcy filing in November of 2021.

Viva Voce Hearing

[25] At the continuation of the Application with the *viva voce* hearing on April 26, 2023, the Court heard oral testimony from Crisan and Datta and also from Mr. Tahir Rafiq relating to the "oral contract issue", which was also tested by way of cross-examination.

[26] Datta testified to the fact that he was a physician and surgeon licensed to practice medicine in the Province of Alberta and he and his wife Adita purchased the home built by Wolf. Wolf went bankrupt in November 2021 and did not complete the Project. At least 2 subtrades that worked with Wolf were hired to do additional work. Datta did not agree to pay Plaintiff's old unpaid invoices that Wolf did not pay.

[27] Exhibit 1 was entered during Datta's examination, which was the Plaintiff's Estimate for additional painting work for $ 9,074.50 plus GST $9,528.22 total due; It was accepted verbally by Datta.

[28] Datta testifies that in December of 2021, Crisan did not ask Datta to pay for the Original Work invoices that Wolf had not remitted to the Plaintiff before doing the Additional Work, or any other combination or permutation regarding doing more work contingent upon the Original Work being paid by Datta. That is simply not credible according to Datta's testimony under exam and cross- exam and also under re-exam by the Court. Furthermore, at no time during the discussion did Crisan deliver the 3 unpaid invoices to Datta or discuss payment terms in December 2021.

[29] Exhibit 2 was entered under Datta's examination, which contained emails and various text messages (including but not limited to the 3 old unpaid invoices rendered by Plaintiff to Wolf - i.e., Invoice Nos. 3104, 3138 and 3174), between Crisan and Datta's wife cell phone number on or about May 16, 2022 (some 5 months after the Additional Work was duly completed by the Plaintiff and paid by Datta).

[30] These 3 old invoices sent by Crisan to the Defendants on Monday May 16, 2022 were never produced to the Defendants back in December of 2021 at the time of the Additional Work and at the time of the delivery of the Estimate on or about December 17, 2021. These 3 old invoices were never accepted or acknowledged by Datta. Datta testifies that these old unpaid invoice matters were before the King's Bench Court in the bankrupt estate of Wolf and were to be dealt with in that particular forum and it appeared he was somewhat perplexed as to receiving these and never agreed to pay these to the Plaintiff.

[31] Next, witness #2 for Defendant, namely Mr. Tahir Rafiq (the owner of Urban Signature Homes) testified to the fact that he played a role in finishing the construction of the Project after Wolf's bankruptcy including having the building permits reissued in his company's name instead of Wolf. He initially reached out to the Plaintiff for the Additional Work to be estimated and then contracted directly with the Plaintiff.

[32] Rafiq testified that Datta received the December 17, 2021 Estimate to finish the Additional Work and then at no time did Crisan engage counsel to properly "paper" the Additional Work, and if the Additional Work was conditional upon the Original Work invoices being paid by the Defendants. The Plaintiff should have made serious legal efforts to protect its interest and document same and actually disclose and deliver the three unpaid invoices in December 2021 as opposed to May 16, 2022. No mention of Original Work invoices were made to Rafiq and he knew of no agreement that the Defendants were to pay for the Original Work contingent upon the Additional Work being done by Plaintiff. Rafiq noted that some other previous subtrades (i.e., electrical and plumbing subtrades) would not return to do further work on the Project unless first paid in full by the Defendants. That was not going to happen. They were not paid by the Defendants and thus new electrical and plumbing subtrades were contracted to finish the new work in that regard.

[33] Moreover, evidence was proffered by Rafiq that there were several other painters that could have done the Additional Work and this Additional Work performed by Plaintiff was not conditional or contingent upon Defendants paying Plaintiff for the unpaid Original Work, which was the sole responsibility of Wolf.

[34] Next, Crisan testified on behalf of the Plaintiff. He stated that on or about December 15, 2021, he was contacted by Rafiq on behalf of the Defendants to do the Additional Work. The parties went through the house and determined the estimated work to be performed and then the Estimate at Exhibit 1 came in at $9,528.22, as the total due to the Plaintiff.

[35] Crisan met Datta at the house and claims Datta would pay the three old invoices, but there is no corroborating evidence or emails or texts to verify this agreement and moreover Datta vehemently denies this under oath. Furthermore, the Defendants never replied to the May 16th texts containing the three old invoices, as these were matters before the King's Bench in the bankruptcy of Wolf.

[36] Crisan admits that the first payment on the Estimate was fully paid by Datta's cheque and the second payment was fully paid by Datta's e -transfer for the total sum due of $9,528.22.

[37] Datta admits the Plaintiff was paid in full for the Additional Work and no more as nothing more was agreed to. The Court finds Datta's testimony more reliable and credible than Crisan's.

[38] Under cross-examination of Crisan, he admitted that his $43,934.63 builder's lien claim was filed on March 30, 2022.

[39] Crisan also admitted he abandoned the builder's lien claim and failed to file a Certificate of Lis Pendens in a timely manner despite sending texts to the Defendants claiming he would file a Certificate of Lis Pendens.

[40] Instead, Crisan proceeded with filing a civil claim in Sept 28, 2022 against the Defendants as an alternative potential remedy, after the King's Bench extinguished Plaintiffs alleged builders lien by way of an Order by Applications Judge Mattis on Sept 2, 2022.

[41] Datta then was re- sworn in and further testified to the Court that he never agreed to pay any of the Plaintiff's three old invoices as a condition precedent for the Plaintiff to perform the Additional Work. That was not the agreement, the agreement was limited to the $9,528.22 for the Additional Work, as per the December 17, 2021 Estimate contained in Exhibit 1.

The Law

[42] With respect to summary disposition of the Application), Section 8 of the *Court of Justice Act,* RSA 2000, c C-30.5, (the *Act*) states:

> 8(1) The practice and procedure of the Court shall be as provided in this Act and the regulations.
>
> (2) Where this Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may
>
> (a) apply the *Alberta Rules of Court*, and
>
> (b) modify the *Alberta Rules of Court* as needed.

[43] In the *Alberta Rules of Court, Alta Reg 124/2010* (the *Rules*), *Rule* 7.3 deals with summary judgment applications. It reads, in part:

> (1) A party may apply to the Court of summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> a) there is no defence to a claim or part of it;
>
> b) there is no merit to a claim or part of it;
>
> ...
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in 7.3(1) have been met or by other evidence to the effect that the grounds have been met.
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:
>
> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
>
> ...

[44] In considering summary dismissal applications, the Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49 ("*Weir-Jones*"), and the Supreme Court of Canada in *Hryniak v Mauldin,* 2014 SCC 7 (CanLII) ("*Hryniak*") enunciated a three-part test for when summary judgment is an appropriate procedure as follows:

> There will be no genuine issue requiring a trial when the Court can reach a fair and just determination on the merits on a motion for summary judgment/ dismissal. This will be the case when the process:
>
> (1) allows the Court to make the necessary findings of fact;
>
> (2) allows the Court to apply the law to the facts,
>
> and
>
> (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[45] Specifically, at para 47 of the Court of Appeal decision in *Weir-Jones*, the Court outlines four (4) key considerations.

The important considerations are, after having reviewed the record:

1) can the Court fairly resolve the dispute on a summary basis;
2) have the moving parties demonstrated that there is either no merit to the claim or no defense to the claim;
3) that there is no genuine issue of material fact requiring a full blown trial; and
4) the Court must have sufficient confidence in the state of the record that the Court is prepared to summarily resolve the action on a summary basis.

[46] Further, at paragraph 25 of the *Weir-Jones* decision, the Court states:

> ... "it comes down to whether summary disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantial reason to conclude that summary disposition would not" achieve a just result".

[47] The above outline of the procedural approach to summary dispositions encompasses a number of points. To enable a "fair and just summary determination", the record before the Court must:

> (a) *Allow the judge to make the necessary findings of fact.* An important thing to observe about this part of the test is that it assumes the chambers judge is able to make findings of fact. The chambers judge is entitled, where possible, to make those findings from the record and draw the necessary inferences. Summary judgment/dismissal is not limited to cases where the facts are not in dispute. If the chambers judge is not able to make the necessary findings of fact, that is an indication that there is a "genuine issue of material fact requiring a trial".
>
> (b) *Allow the judge to apply the law to the facts.* There are cases where the facts are not seriously in dispute, and the real question is how the law applies to those facts. Those cases are ideally suited for summary judgment dismissal: *Tottrup v Clearwater (Municipal District No. 99)*, 2006 ABCA 380 (CanLII) at para. 11, 68 Alta LR (4th) 237, 401 AR 88. If the record allows the judge to make the necessary findings of fact (as contemplated by the first part of the test), applying the law to those facts essentially comes down to a question of law.
>
> (c) *Assuming the first two parts of the test are met, the third criterion is a final check, to ensure that the use of a summary judgment procedure (rather than a full blown trial) will not cause any procedural or substantive injustice to either party.*
>
> Summary judgment dismissal will almost always be "more expeditious and less expensive" than a trial. In the end, if the chambers judge finds that summary adjudication might be possible but might not "achieve a just result," there is discretion to send the matter to trial. This discretion, however, should not be used as a pretext to avoid resolving the dispute whenever reasonably possible.

[48] The above foundational criteria set the procedural framework of the modern law of summary disposition. They set the procedure for determining whether there is "no merit" or "no defense" to a claim under *Rule* 7.3.

[49] In *Weir-Jones*, at para 47, it was noted that the resisting party on a summary disposition application, in this case, the Plaintiff/Respondent, shall be presumed to have put its "best foot forward" and in so doing, must demonstrate on the record that there is a genuine issue requiring a full-blown trial. The Court is not to speculate as to what evidence might be called at trial but rather, shall decide summary disposition applications based on the record before it and sometimes, as in this case, by way of the chambers justice's discretion to permit *viva voce* evidence, as before this Court proceeding.

[50] Dealing with the within actions, the record before the Court was made up of the pleadings, the affidavit sworn by the Defendant Datta and the affidavit sworn by the Plaintiff's corporate representative Crisan, as well as the *viva voce* testimony heard on the continuation date

of April 26, 2023. The cross-examinations were conducted by agreement of the parties through the Defendants' counsel and the Plaintiff's agent.

[51] The Court also considered the oral submissions of counsel and the court agent made at the initial hearing of the within Application.

[52] The threshold burden of the moving party with respect to the factual basis of the summary judgement/dismissal application is proof on a balance of probabilities (see *Weir-Jones* at paragraph 33).

[53] A dispute on material facts, or one depending upon issues of witness reliability and credibility, could potentially leave genuine issues requiring a trial. However, the resisting party (here the Plaintiff) can only succeed by demonstrating a severe complexity of the issues which makes the case unsuitable for summary disposition, or in other words, that there are genuine issues requiring a full blown trial and testimony at a full blown trial will materially differ from the *viva voce* hearing on the "oral contract" issue.

[54] Again, this test/threshold must be met on a balance of probabilities, with the resisting party (herein the Plaintiff) putting its "absolute best foot forward" and providing all necessary and key information, facts, documents and testimony at such Application, thereby proving its defense beyond a balance of probabilities, (i.e. tipping the scales in its favor) in order to defeat the Application and move the matter forward to a full blown trial.

[55] On this point, the Supreme Court of Canada in *Attorney General vs. Lameman, 2008 SCC 14* ("*Lameman*") at paragraph 19, states as follows:

> P 19: "a summary judgement motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgement must be judged on the basis of the pleadings and the materials *(including any viva voce evidence)* actually before the chambers judge, not on suppositions about what might be plead or proved in the future".

The Decision

[56] Based on the rules set out *in Hryniak, Weir Jones and Lameman*, this Court concludes that it is able to make the necessary findings of fact, regarding this issue and that the chambers justice is able to apply the law to those facts and this Court concludes on a balance of probabilities, that the summary dismissal of the Plaintiff's claim is duly warranted, as it is proportionate, more expeditious and less expensive means then trial to achieve a just result.

[57] Moreover, the *viva voce* evidence proffered herein bolstered the Applicant's position. The Plaintiff's evidence does not overcome the threshold required of it regarding proving beyond a balance of probabilities that a contract existed for payout of both the old work invoices and the Additional Work. The Plaintiff did not put its "best foot forward" and falls short of the mark and does not tip the scales in the Plaintiff's favor to defeat such Application.

[58] The Court concludes that having heard the Application in its entirety including oral testimony of Datta, Crisan and also Rafiq, the Court does not find an oral contract as referred in the Plaintiff's pleadings, affidavit and by way of Crisan's oral testimony. A fair and just

determination on a summary basis can be made in this action, in satisfaction of the requirements enunciated in *Weir-Jones*.

[59] Moreover, the *Hryniak* test is to be also applied based upon the record actually before the Court. This means the pleadings, the affidavits and Defendants' counsel and Plaintiff's agent's respective legal arguments at the Application and also in this case, the added and very helpful viva *voce* testimony of both Crisan and Datta. The parties must "put their absolute best foot forward", and they cannot rely on speculation or supposition as to what may be found in the future or what further evidence or corroboration may be proffered at a trial.

[60] Using *Hryniak*, a leading case with respect to summary judgement, the Court suggests that: "increasingly there is a recognition that a cultural shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favor of proportional procedures tailored to the needs of a particular case. The balance between procedure and access struck by our justice system must, to reflect modern realities and recognize that new models of adjudication can be fair, just and equitable.

[61] Furthermore, at paragraph 46 of *Weir – Jones*, Justice Slater points out that quote whether a summary disposition will be fair and just will often come down to whether the chambers justice has a sufficient measure of confidence in the factual record before the Court and the chambers justice's discretion and opinion based on witness reliability and credibility, if v*iva voce* testimony is proffered, as was in this case.

[62] In practical terms, that level of confidence may not be reached in very close cases, but the parties must always put their "best foot forward" in the affidavits (albeit even with self- serving affidavits) and counsel's arguments of their client's respective positions.

[63] Using *Guarantee Company of North America v Gordon Capital Corporation, [1999] 3 R C. S. 423,* a self-serving affidavit (Note: Plaintiff's affidavit filed some 5 months after the Datta affidavit) is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting corroborating evidence, especially when we have heard *viva voce* testimony from both affiants relating to the "oral contract" issue.

Using *Sherwood Steel Ltd. v. Odyssey Construction Inc., 2014 ABCA 320* at para 8,

> "a judge may, however still consider whether to grant summary judgment (dismissal) even if the affidavit evidence clashes – as in the case before us. He or she must assume the relevant facts asserted by the party opposing the summary application and determine whether the law permits judgment on those facts".

[64] This Court also had the added benefit of the *viva voce* hearing on April 26, 2023 to further ascertain the relevant facts and also assess the reliability and credibility of the witnesses and of the parties positions on putting their "absolute best foot forward". As a result, the Plaintiff was not successful in meeting its burden.

[65] In dealing with the Plaintiff's "unjust enrichment claim", the Defendants have not been unjustly enriched whatsoever.

[66] In fact, the Defendants have incurred significant cost overruns as a result of Wolf's unanticipated and unfortunate assignment into bankruptcy back in November of 2021.

[67] Moreover, and very importantly, the Plaintiff has no "privity of contract" with the Defendants at all here. That is why the *Builder's Lien Act*, RSA 2000, c. B-7 and such lien claim regime was put into place all across Canada, it is there to protect claimants and subtrades, exactly for the Plaintiff in this particular case, as an unpaid subcontractor/ lien claimant in a construction project.

[68] Instead of perfecting its rights and lien claim in King's Bench, the Plaintiff opted (with or without legal advice) to forgo that route at its peril and elected to proceed with its civil claim in this Court with respect to the debt owing by Wolf to the Plaintiff.

[69] The Plaintiff could and should have perfected its builder's lien claim and then it would have had an opportunity, albeit not a full 100% recovery, but a least a pro rata chance at recovering some percentage on the dollar of its $43,934.63 originally filed lien relating to its unpaid invoices with Wolf and the Trustee.

[70] Furthermore, there is no "juristic reason" for the enrichment. In my view, there is no proper claim for unjust enrichment and or quantum meruit, for the simple reason that there were usual and separate and distinct legal contractual relationships between the owner (the Defendants), the general contractor (Wolf), and the subcontractor – (the Plaintiff).

[71] Accordingly, the Defendants paid Wolf, then Wolf would in turn pay its subcontractors. This is what is exactly expected by all parties, subject only to the 10% holdback requirements of which the Defendants have paid into Kings Bench in the sum of $95,291.56. Wolf did not pay the Plaintiff, so its claim is solely against Wolf/and or the Trustee. It is because of the fact that contractors, subcontractors, suppliers and workers are sometimes unpaid in a construction project, that the builder's lien regime was created. There is no need for equity to impose an unworkable obligation as well, without something more in the specific. [See *Bova Steel Inc. v Constructions Beauce-Atlas Inc., 2016 ABQB 589* at paras 18-20].

[72] Using *Iona Contractors Ltd. v. Guarantee Company of North America*, 2015 ABCA 240, at para 20,

> The general provisions of the *Builders' Lien Act* are well known. At common law, subcontractors have no claim against the owner of property that they improve, because there is no privity of contract between them. The *Builders' Lien Act* provides a partial remedy to that problem. It allows an unpaid subcontractor to file a lien against the owner's property, and potentially to sell the owner's property to satisfy its claim. The owner can post security in substitution for the lien, in which case the subcontractor's rights are transferred to the security. The owner can also limit its exposure by keeping statutorily mandated "holdbacks", which it can decline to pay to the contractor until it is satisfied that there are no liens. If necessary, the owner can pay the holdback into court, and allow the contractor and the subcontractors to litigate entitlement.

[73] The Court has reviewed the entire record and has heard from counsel for the Defendant and from the agent of the Plaintiff. It has also heard *viva voce* testimony from each of Datta and Crisan and also Rafiq, all subject to cross examination.

[74] The Court has fully reviewed and considered the contents of the affidavits filed for the Application and is confident in the state of the record and is prepared to resolve the action summarily.

[75] Considering the record, the law, the evidence and the facts at bar, the Court can fairly and reasonably and expeditiously resolve and reasonably determine the dispute on a summary basis and provided a just result. The Court concludes that there are no genuine issues requiring a trial and that the defendants' (Applicants') application for summary dismissal is hereby granted with costs.

[76] The Court has presumed that all parties have "put their best foot forward" at the hearing of the Application through the record, as presented by counsel for the Defendants and agent for the Plaintiff.

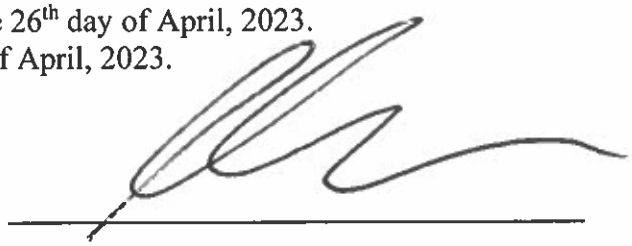
[77] Based on the full and complete record and all of the submissions of the parties, the Court finds in favor of the Defendants.

Costs

[78] This Court has discretion in awarding costs for this two-part Application. The Court hereby awards costs payable to the Defendants pursuant to Column 4 of the *Tariff of Recoverable Costs*, Practice Note 2, in the sum of $1,030.00 for the interlocutory steps taken in this litigation, including but not limited to preparation of pleadings and disclosure of documents, as well appearances at 2 dates for this contested Application.

[79] The Court also awards to the Defendants, reasonable disbursements for their filing fees, service, searches and copying costs in this action in the sum of $200.00.

Heard on the 14th day of April, 2023 and also on the 26th day of April, 2023.
Dated at the City of Calgary, Alberta this 28th day of April, 2023.



G.P. Shannon
A Justice of the Alberta Court of Justice

Appearances:

Agent – Mr. Jason Moore
for the Plaintiff

Counsel, Mr. Anthony Burden
for the Defendants