

SUPERIOR COURT OF JUSTICE

In the matter of a reference under the *Construction Act*, R.S.O. 1990, c.C.30,

MASTER WIEBE

Date: July 12, 2021;
Title: KSV Koffman Inc., in its capacity as Court-appointed receiver and manager, without security, of all of the assets, undertakings and properties of 1033803 Ontario Inc., operating as Forma-Con Construction and Forma-Con Finishing ("Forma-Con"), and 1087507 Ontario Inc. (together with Forma-Con, the "Debtors") acquired for, or used in relation to, a business carried on by the Debtors v. MOD Developments (197 Yonge) Limited Partnership;
File No.: CV-19-616137;
Prop. address: 197 Yonge Street, Toronto, Ontario; 60 story condominium tower named "Massey Tower;"
PIN: 21239-0513 LT;
Trial Management Directions #2 (by phone).

Counsel present:

Leonard Finegold for *KSV Koffman Inc.* ("KSV"); tel.: 416-597-3376; fax: 416-597-3370; email: finegold@gsnh.com;

Michael Farace for *MOD Developments (197 Yonge) Limited Partnership* ("197"); tel.: 416-561-3953 (cell); fax: 905-660-0139; email: mfarace@millერთhompson.com.

Issues:

In advance of these trial management conference Mr. Finegold emailed the notice of trial that he served. It is not the original notice of trial. I required that he serve all proper parties with the original notice of trial within ten days in order that there is no question as to the propriety of the reference going forward.

Counsel then discussed the nature of their ongoing discussions. The receiver is in a difficult position as it did not run the Forma-Con contract work, and as the Forma-Con employees are all dispersed. It has nonetheless amassed the relevant Forma-Con documentation and is approaching who it believes was the Forma-Con construction manager of the project, one Pino Bisignano, concerning the issues. At this point, Mr. Farace interjected and advised that, according to his client, Mr. Bisignano was not the construction manager on this project. This issue will have to be ironed out.

Counsel then summarized for my benefit the issues being discussed:

- The Forma-Con receivership happened in November, 2018 when its work on this project was about 95% done. They were on the last floor, the 60th floor. In part for this reason and part because of the receivership stay, 197 entered into an arrangement with KSV whereby the contract was not terminated and KSV was allowed to complete the work using Advance with 197 paying KSV to do so.
- The KSV claim of \$2,038,704.26 concerns holdback (about \$1.8 million) and alleged outstanding contract and extras invoices.

- The 197 set-off and counterclaim of \$5,788,940 plus HST has now increased to \$7,227,788.30 (HST inclusive). Mr. Farace said he gave notice of this change by email on February 24, 2020. Mr. Farace gave a breakdown of what this counterclaim includes: costs to complete; legal fees and lien bond costs; general condition costs of delay; additional construction management costs; additional construction loan costs; trade chargebacks linked to delay; warranty claims; and Tarion costs. The primary issue is the delay 197 alleges Forma-Con is responsible for prior to the receivership.
- The core of the discussion is the extent to which 197 will be able to offset its set-off and counterclaim against the KSV lien claim. Mr. Farace said that 197 has no present desire to pursue the receiver for recovery of a substantive judgment in 197's favour.
- Mr. Finegold stated that he believed his impending interviews with Mr. Bisignano will help the process considerably, although he conceded that he will have to clarify the extent to which Mr. Bisignano was involved in the project.

In the circumstances, counsel asked for another delay in instituting serious litigation. The cost of litigation in this case will be significant. I granted that request.

Orders

In the circumstances, I made the following orders:

1. **Necessary filings:** On or before **ten (10) days** from July 12, 2021 KSV must serve and file electronically the original notice of trial and proof that it was properly served.
2. **Next trial management conference:** The next trial management conference shall be held before me by telephone conference on **Monday, November 1, 2021 at 12 noon** using the following coordinates: phone: 866-500-5845; ID#: 3232044. The purpose of the next trial management conference is to make orders for necessary interlocutory steps to get the claims that remain to be resolved ready for trial.
3. This order which forms part of my procedure book is effective without further formality.

Date: July 12, 2021

Charles Wiebe

MASTER C. WIEBE

DIRECTIONS REGARDING THE RECORD: In a construction lien reference the official record of a hearing for directions where no oral evidence is given is the endorsement or directions prepared by the presiding master. Where no oral evidence is given, a reporter is present and the hearing for directions is recorded, such recordings are for use of the presiding judicial official, similar to his or her own notes. As such transcripts are not available. Any request for a transcript or access to an audio recording must be made by motion to the presiding reference master, on notice to all parties, and will be granted only in unusual circumstances.