

JUDGEMENT

- 1.) This case was heard by me on July 14, 2011, after a full day of evidence and summation. Mr. Rex McCafferty of Wolfson Law Professional Corporation acted for the defendant, Sousa Truck and Trailer Repair Ltd, hereinafter referred to as "Sousa Ltd.". Mr. Harry Kopyto acted for the plaintiff, numbered company, 1493385 Ontario Inc. The other defendant, Carrier One Express Inc. did not defend the action. Evidence was given by its president, Mr. S. Lenard that Carrier One Express Inc. was "judgement proof". The court has no way of confirming this, in the end judgement for the claim of \$25,000.00 and costs was awarded as against Carrier One Express Inc. to 1493385 Ontario Inc.
- 2.) The plaintiff contended that the Sousa Company was also jointly and severally liable to the plaintiff for damages suffered, thus the trial proceeded in its normal course with evidence presented by 1493385 Ontario Inc. and in defence by Sousa Ltd. Prior to a review of the law and evidence a brief summary of the facts as proven at trial is in order. The defendant's claim was also heard at the same time.
- 3.) The plaintiff's company, 1493395 Ontario Inc. acts as the owner/operator of inter-provincial trucks and trailers. The defendant, Sousa Inc. maintains repair facilities in Mississauga, Ontario where it operates a business repairing trucks and trailers.
- 4.) The co-defendant, Carrier, also operated in Mississauga, Ontario and provided carrier services on a commercial basis.
- 5.) The vehicle in issue is and was a 2003 straight line freightliner. This vehicle was at all material times owned by the plaintiff and registered in the plaintiffs name at the ministry of transportation. A motor vehicle search would have revealed that the plaintiff owned the truck.
- 6.) The co-defendant, Carrier, under agreement with the plaintiff, operated the truck and used the truck in performing operational services. Carrier operated the vehicle for commercial purposes and was the owner of the Ontario licence plates, which were on the vehicle at all material times.
- 7.) The plaintiff owned the vehicle (truck), however Carrier operated the vehicle and owned the licence plates, which were affixed to it. A search of the licence plate number would have shown Carrier One Express Inc. as the owner of the plates.

- 8.) The vehicle with its V.I.N. number on it was brought in by an employed driver of Carrier to Sousa Inc's. repair shop. The vehicle was brought to Sousa's for repairs. The driver signed a written authorization by way of a work order, #WR087898 on April 29, 2008 authorizing repairs.
- 9.) The bill was subsequently made out to Carrier One. It was signed by an employee of Carrier One. At all material times the repair work, which was done, was billed to Carrier One and not to 1493385 Ontario Inc. John Gonsalves a director of Sousa gave evidence that his company had done previous work for Carrier One and that Sousa was always paid for its work by Carrier One.
- 10.) In this case there was damage to the trucks roll-up-door. The bill was only partially paid for by Carrier, however Carrier was permitted to take possession of the truck on April 29, 2008 with \$410.56 of the bill remaining unpaid. This date is of importance as the repairer Sousa had through its bailiff "Big Dog Solutions" repossessed the truck on June 17, 2010. It is 1493385 Ontario Inc's. position that the bill, although unpaid in full is outside the two year limitation period and as such, unenforceable

OTHER FACTS NOT IN DISPUTE

- 11.) Carrier failed to pay the balance of the repair invoice, \$410.56; Sousa registered a non-possessory lien pursuant to the Ontario Repair and Storage Act ("the act"); The bailiff "Big Dog" seized the truck removing it to its impound yard.
- 12.) Big Dog issued an invoice on June 17, 2010 for its services. Fred's towing issued an invoice on June 24, 2010. In order to release the vehicle the bailiff demanded its account together with towing and the balance of the outstanding invoice (repair) totalling \$2,589.26 be paid in full.
- 13.) On June 22, 2010, 1493385 Ontario Inc. brought on an application under S.24 of the Act and paid the sum of \$2,589.26 into court as security, thereafter on June 24, 2010, 1493385 Ontario Inc. received possession of the vehicle.
- 14.) There are a number of issues raised, which I will address in order.
 - (a.) Is Sousa barred from enforcing its unpaid invoice? This was raised in the pleadings, however it was briefly argued in summation,
 - (b.) Was Sousa's seizure of the vehicle lawful? If so, is 1493385 Ontario Inc. responsible for the balance of \$410.56 plus the towing and bailiff's costs?

- (c.) Is Carrier One liable for the costs claimed by Sousa and is it liable for the damages claimed by 1493385 Ontario Inc. as set out in clause #11 of the claim together with the costs paid by 1493385 Ontario Inc. in order to obtain the return of the vehicle?
- (d.) Did Sousa act reasonably in seizing the vehicle for the \$410.56 in non-paid repairs and should it have known that 1493385 Ontario Inc. was the owner of the vehicle and did not authorize the repair work to its truck?
- 15.) Before briefly summarizing the law I would be remiss if I failed to comment on counsel. This being a court of equity and on the evidence having realized that the plaintiff, 1493385 Ontario Inc. for non-payment of a \$410.56 account, which it did not authorize, was put through a great deal of stress and inconvenience leading to a payment into court of a sum almost seven times the original bill. This itself would make the court sympathetic to the situation the plaintiff, 1493385 Ontario Inc. found itself in.
- 16.) I requested but did not receive any assistance from Mr. Kopyto, by way of directing me to other cases of a similar nature. What I did receive was a “stirring summation” of the facts and plight of his client, but I did not receive any case law. On the other hand Mr. McCafferty, who represented Sousa, was brief, to the point and submitted a number of cases on point.
- 17.) Turning to the clearest issue first. I find Carrier One Express Inc. liable for the sum of \$410.00 being the balance (rounded) off of the repair bill. Sousa shall also have interest thereon calculated at 1% per month from the date of the invoice, April 29, 2008. It shall have its costs plus a counsel fee of \$300.00 as against Carrier One Express Inc.
- 18.) I find that the account for repair work remains unpaid by Carrier One Express Inc., and that the claim is not statute barred limitations wise as both parties entered into negotiations to extend materially the terms of repayment past October 7, 2009, putting the issue of non-payment of the balance of the bill within the two year period.
- 19.) 1493385 Ontario Inc. shall also have judgement as against Carrier One Inc. for \$25,000.00. Carrier One Inc. did not defend the claim. Its actions caused the plaintiff, 1493385 Ontario Inc. to pay the ultimate sum of \$2,589.26 into court and to suffer the damages due to the non-payment by Carrier One Inc. of the original repair bill.

- 20.) 1493385 Ontario Inc. shall also receive \$12,000.00 for remuneration of 400 hours of driving at \$30.00 per hour. It shall also have judgement for an additional \$10,000.00 against Carrier One Inc. for monies earned and which was with-held by Carrier. A further \$2,500.00 is owed for insurance deductibles for each truck. The total slightly exceeds the \$25,000.00 maximum. I will cap the damage claim as against Carrier at \$25,000.00. Pre-judgement interest as per the Courts of Justice Act from June 1, 2010, plus a counsel fee of \$700.00 and costs is awarded to 1493385 Ontario Inc.
- 21.) Turning now to the issues as between 1493385 Ontario Inc. and Sousa. Sousa technically has not been paid on the balance of \$410.56 plus interest therein to date; accordingly it has also sued 1493385 Ontario Inc. requesting that the monies in court be paid out to it and to the bailiff and towing firm.
- 22.) 1493385 Ontario Inc. and Carrier One were in an agency relationship. 1493385 Ontario Inc. was providing a commercial service and benefited financially from this arrangement by allowing Carrier One to use its vehicle while knowingly permitting Carrier's plates to be used this; places some onus on 1493385 Ontario Inc. to act reasonably. It is not a completely innocent third party.
- 23.) If 1493385 Ontario Inc. had utilized its own plates on the vehicle then their position with respect to the improper seizure, would have more weight. They are not innocent third parties who suffered damages. 1493385 Ontario Inc. should have been aware that by allowing Carrier to plate the vehicle, and by allowing Carrier's operators to oversee repairs that the exact scenario could (and did) arise as a result of partial payment for the repairs. Indirectly 1493385 Ontario Inc. did derive a benefit from the actions of Sousa, as the vehicle, which 1493385 Ontario Inc. owned was now repaired.
- 24.) The work order and subsequent invoice was made to Carrier not to 1493385 Ontario Inc. Carrier caused the damage and as in past dealings paid Sousa for the repairs. Should Sousa have known, or did it know that 1493385 Ontario Inc. was the owner, and at least given it the opportunity of paying the \$410.00 balance, before repossessing the vehicle?
- 25.) Again, the evidence is unclear on this matter. Mr. Gonsalves testifying for Sousa, was unsure as to which company the driver worked for. This of itself would lead the court to conclude that Mr. Gonsalves knew or ought to have known of the relationship between 1493385 Ontario Inc. and Carrier, since Carrier had done business with Sousa on an ongoing basis and always paid for the repairs.

- 26.) Nothing in the trial pointed to Carrier advising that it was the owner, only that it was the owner of the licence. I find that as this was a custom in the trade that Sousa should have taken reasonable steps prior to doing the repairs to determine ownership of the vehicle. Under the act written authority of the owner or its lawful representative is first required. Sousa would be successful if its actions were authorized by the act and it lawfully followed the act in the repossession of the vehicle. Sousa must prove that Carrier was a lawful representation of the owner. I find that this fact was proven at trial.
- 27.) 1493385 Ontario Inc. is also seeking in its claim, not just a return of the monies paid into court but also a return of full storage payments made directly. I do not see where the 1493385 Ontario Inc. made any additional direct payments, other than what was paid into court. It also claims damages for loss of use of the freightliner. The freightliner was returned within (I find) a reasonable time, my notes indicate that the plaintiff, 1493385 Ontario Inc. had not led any evidence on the loss of business due to loss of use of the freightliner. That portion has not been proven on the balance of probabilities.
- 28.) What is the validity of the repairer's non-possessory lien, given that the vehicle's repair bill was not given to the owner of the vehicle and it appears, at least on the balance of probabilities was not authorized by the owner and further the owner was not named on the work order and repair bill?
- 29.) Mr. McCafferty cited a number of cases where non-owners authorized the repairs and were binding on the owner. In *Mullins .v. 897634 Ontario Inc.*, a decision on appeal from the Small Claims Court to the then Divisional Court, Justice Boyko had to decide whether the decision of the Deputy Judge awarding judgement for the plaintiff because she as owner did not sign an acknowledgment of indebtedness in any form should be overturned.
- 30.) Under section 7(s) of the Act "A non-possessory lien is enforceable only if the lien claimant obtains a signed acknowledgement of the indebtedness, which may be on the invoice or other statement of account".
- 31.) Justice Boyko had to decide whether Section 7(s) required that the signed acknowledgement of debt be signed by the registered owner of the vehicle. In *Mullins* the owner wife owned the vehicle, work was done and the husband John Mullin made arrangements with the mechanic for a return of the repaired car on a promise to pay for the repairs. When the cheque failed to clear the mechanic through a bailiff repossessed the car.

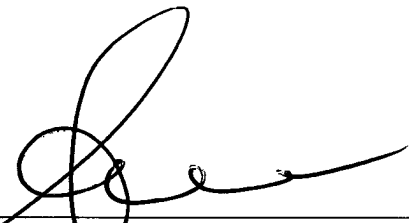
- 32.) As in the case at hand on the evidence it was not clear who actually brought the car in for repair, however in Mullins the work order had the husband's name John Mullins. The case Justice Boyko on appeal decided that the trial deputy judge was wrong in law in misapprehending the evidence before him in deciding that under Section 7(s) for a non-possessory lien to be enforceable, it required the owner of the vehicle to sign the acknowledgment of indebtedness. Justice Boyko decided that Section 7(s) of the repair Storage Lien Act required a signed acknowledgement of indebtedness before a non-possessory lien can be enforceable; however there is "no express requirement" as to whether or not it must be the owner of the vehicle who signs the acknowledgment of indebtedness.
- 33.) Justice Boyko overturned the lower court and granted the appeal to the bailiff. Her honour then goes into a brief history of "Part I" of the act, in that the Section 7(s) non-possessory lien is derived from the common law right to a lien because a person (repairer) has bestowed labour, skill and materials on an article belonging to another person.
- 34.) The case of Castellon .v. Thompson (1862) 13 C.B.N.S. 103 is quoted and of assistance. "Where work is done at the request of a person who has no title to the property, a lien will only arise against the owner where it can be shown that the individual or agent acted within the scope of his apparent authority in requesting that the work be done.
- 35.) I also refer both counsel to General Electric Capital Systems Inc. and Interlink Freight Systems at 42 O.R. (3rd) 348. At issue was the priority as between a non-possessory lien holder for mechanical work and subsequent creditors of the insolvent contractor. In deciding that the trustee had no higher rights than the bankrupt and in granting a priority to the non-possessory lien holder for O'Connor J.A. at paragraph #12 in reviewing the intent & purpose of the act writes "The RSLA is designed to protect persons who bestow a benefit upon an article without requiring them to undertake a whole range of searches before the work is commenced. Once the lien is created, a priority exists not only against the owner, or one claiming under the owner. Repair work on chattels would not be done expeditiously where a registry search required prior to repairs commencing".
- 36.) This makes commercial sense and assists me in deciding that the repairer was not required or obliged to complete or search as to ownership prior to commencing its repairs.
- 37.) In this case I find that the person requesting the work, (Carrier) had the authority of the owner, 1493385 Ontario Inc. and thus Section 7(s) of the Act was not breached.

- 38.) The vehicle was improved, the owner knew that the possessor of the vehicle had taken the vehicle to Sousa for repairs, and finally 1493385 Ontario Inc. had consented to Carrier One's plates being used during all critical times. I conclude therefore that Section 7(s) was not breached and accordingly applies.
- 39.) I do have great difficulty in accepting the bailiff's account. Given the short time the vehicle was in storage, the relative ease of repossession and the quick repayment into court of the funds claimed, I find the bailiffs fees to be excessive. The bailiff's account charges the outstanding lien amount, which is correct, MTO searches, bailiff fees of \$1,500.00, along with administrative charges of \$150.00 and towing charges (over and above Fred's Towing charge) of \$325.00, none of which were explained or broken down.
- 40.) The court views unfavourably upon Sousa not having brought the bailiff or the towing operator to give evidence as to its actions and to explain their account at trial.
- 41.) The work arrears of \$410.56 are acceptable. Bailiffs fees are reduced to \$1,000.00, administration fees, which were never explained on the invoice are dismissed, towing charges are reduced to \$200.00 as Fred's towing was paid in full. This sum totals \$1,610.56 plus H.S.T. of \$209.37, for a total of \$1,819.93.
- 42.) I order that the funds in court be released as follows; to Sousa Truck and Trailer Repair Ltd. \$1,819.93. The balance of \$810.00 to 1493385 Ontario Inc. as both parties have been partially successful and to uncomplicate collection there shall be no order as to costs as between Sousa and 1493385 Ontario Inc. costs have been ordered against Carrier One Express Inc. There shall be no pre-judgement interest calculated on the monies in court.

DATED AT MISSISSAUGA THIS



DAY OF SEPTEMBER 2011



Stanley F. Boguski, Deputy Judge