

Court File No. CV-20-639601-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

ZURICH INSURANCE COMPANY LTD.

Plaintiff

and

2442931 ONTARIO INC., BONDFIELD CONSTRUCTION COMPANY
LIMITED, JOHN AQUINO, VASOS GEORGIU and
UNITY HEALTH TORONTO

Defendants

Court File No. CV-20-636493-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

URBAN MECHANICAL CONTRACTING LTD.

Plaintiff

and

PROVIDENCE ST. JOSEPH'S AND ST. MICHAEL'S HEALTHCARE,
UNITY HEALTH TORONTO, formerly known as Providence St. Joseph's and
St. Michael's Healthcare, 2442931 ONTARIO INC., BONDFIELD
CONSTRUCTION COMPANY LIMITED and ZURICH INSURANCE COMPANY LTD.

Defendants

Court File No. CV-18-00610995-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE RECEIVERSHIP OF 2442931 ONTARIO INC.

BETWEEN:

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant

- and -

2442931 ONTARIO INC.

Respondent

NOTICE OF MOTION

Urban Mechanical Contracting Ltd. (“Urban Mechanical”) will make a motion to a Judge, **on a date to be scheduled**, at 330 University Avenue, Toronto, Ontario, M5G 1R8.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

1. an order requiring Zurich Insurance Company Ltd. (“Zurich”) to pay amount due and owing under the Labour and Material Bond No. 6343517 (“L&M Bond”);
2. an order directing a Reference, or an alternative process, to determine the quantum of any disputed amount that Zurich is required to pay under the L&M Bond;
3. an order, if necessary, granting leave to bring the motion in this action and an order for leave to intervene in the motion brought by Unity Health Toronto, formerly, St. Michael’s Hospital (“SMH”) in the proceedings with court file no. CV-20-639601-CL (“Zurich Action”);
4. an order that the bond action of Urban Mechanical with court file no. CV-20-636493 (“Bond Action”) be put on the Commercial List;
5. in the alternative, and if necessary, leave to bring the within motion in the Bond Action, or the Receivership Application;
6. costs of this motion on a substantial and indemnity basis;
7. such further and other relief as this Court considers appropriate.

THE GROUNDS FOR THE MOTION ARE:

Overview

1. Urban Mechanical has interest in SMH’s motion in the Zurich Action because Zurich has directly tied the allegations against SMH in its defence of Urban Mechanical’s Bond Action.

2. Zurich alleged that it is not bound by the L&M Bond based on the “material facts and misrepresentations” and allegations against SMH in the Zurich Action. Urban Mechanical thus has an interest in the subject matter of the Zurich Action and the motion of SMH’s motion.
3. A determination of whether Zurich can rescind the L&M Bond given the allegations of misrepresentations will dispose of all or part of its counterclaim and result in substantial saving of costs.

Background

4. Urban Mechanical has been severely prejudiced by the fact that it has not been paid for undisputed amounts with respect to its subcontracts. This includes the outstanding holdback for the Mechanical Subcontract of \$6,291,416.92 and extras of \$2,978,105.49. The amount owing on its other subcontract which is the Fire Protection Subcontract is \$252,541.55, which includes holdback of \$224,987.95 and contract amounts of \$27,553.60.
5. The fact that these monies have not been paid has severely prejudiced the financial position of Urban Mechanical as it seeks to continue various projects given the difficult environment created by the pandemic emergency. Urban Mechanical also continues to carry out its work at the St. Michael’s Hospital as detailed below.

Project

6. Urban Mechanical is a subcontractor of the St. Michael's Hospital Redevelopment Project ("Project"). The Project includes, among other things, the design and construction of a 17-storey patient care tower at the corner of Queen and Victoria Streets in Toronto, Ontario that connects the existing wings, creating a unified hospital campus.
7. Unity Health Toronto operates St. Michael's Hospital in Toronto, Ontario ("SMH").
8. SMH, with the assistance of Ontario Infrastructure and Lands Corporation, initiated the Project, which is structured as a Design-Build-Finance model.
9. The Project was awarded to 2442931 Ontario Inc. ("Project Co"), a special purpose entity incorporated and wholly owned by Bondfield Construction Company Limited ("BCCL") for the purposes of bidding on and completing the Project. SMH and Project Co entered into a Project Agreement made as of January 27, 2015 ("Project Agreement"). BCCL in turn was the construction contractor on the Project pursuant to a separate Design and Construction Contract made as of January 27, 2015 between BCCL and Project Co ("Design and Construction Contract").
10. To fund the Project, Project Co entered into a Credit Agreement with a number of financial institutions (the "Lenders"), represented by BMO.

11. The Project Agreement and Credit Agreement required that Project Co obtain a Performance Bond and a Labour and Material Bond. Project Co obtained those bonds from Zurich:
 - a. Private Partnership Performance Bond bearing Bond No. 6343517 in the amount of \$156,325,362.60 ("Performance Bond Amount"); and
 - b. Labour and Material Payment Bond bearing Bond No. 6343517 in the amount of \$142,113,966.00.
12. Urban Mechanical and BCCL entered into a subcontract whereby Urban Mechanical was the supplier and the installer of mechanical systems including equipment and material (Contract 433) including related matters ("Mechanical Subcontract").
13. Urban Mechanical and BCCL also entered into a subcontract whereby Urban Mechanical was the supplier and installer of Division 21 - Fire Protection - Sections 210501 to 213013 (Contract 470) including related matters ("Fire Protection Subcontract").

BCCL Financially Distressed

14. BCCL became financially distressed in the Fall of 2018, and the Project has been significantly delayed, resulting in additional costs and expenses by Urban Mechanical.

Project Co. Receivership

15. Accordingly, the Lenders brought an application to the Court for the appointment of a receiver for Project Co, which order was granted by the Court on December 21, 2018. The appointed Receiver made a call on the Performance Bond that same day.
16. Ultimately, Alvarez & Marsal Canada Inc. ("A&M" or the "Receiver") was appointed as a receiver of Project Co by Court Order dated December 21, 2018.

BCCL Monitor

17. On April 3, 2019, the Ontario Superior Court of Justice (Commercial List) granted BCCL protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), pursuant to an initial order ("Initial Order"). The Initial Order, among other things, appointed Ernst & Young Inc. to act as Monitor ("Monitor") and granted a stay of proceedings which was subsequently extended.

Zurich's Role

18. Urban Mechanical has abided by the stay order and continued to provide services and materials.

19. Urban Mechanical continued to provide services and materials in reliance of the commitment and representations that payment would be made by Zurich or the other Defendants.
20. Urban Mechanical also entered into a Ratification of Subcontract/Purchase Order, Release and Assignment with Zurich dated April 23, 2019, which again ratified and acknowledgment the obligations under the L&M Bond.
21. Zurich played a lead role in terms of the work continuing the Project. Outstanding trade accounts at issue are either for work performed at the direction, request, acquiescence or on the consent of Zurich, for which Zurich is responsible pursuant to agreements entered into by Zurich with trades pursuant to its obligations under the Performance Bond, or for the claims of trades for work performed under their respective subcontracts with BCCL, pursuant to Zurich's obligations under the L&M Bond.
22. Urban Mechanical has made claims and is entitled to be paid under the L&M Bond so there is really no reason why the payments should not be made with respect to the work carried out in good faith in co-operation with Zurich and SMH, and under its contractual obligations with BCCL.

BCCL Contract and Subcontracts

23. On December 20, 2019, the Court granted an Order that, among other things, permitted SMH to exercise a remedy pursuant to Section 34.4(d) of the Project Agreement to engage and directly make payment to suppliers of labour, services or materials to the Project.
24. As a result of SMH exercising this remedy, BCCL's contract effectively was terminated on December 20, 2019, though it appears that formerly it remains. To the extent any subcontractors and suppliers were engaged in connection with the Project thereafter, such engagement was to be as directed by SMH.
25. On December 18, 2019, the Monitor sent a letter advising Urban Mechanical of the orders and that SMH, and not BCCL, would be directing the scope of work.
26. Urban Mechanical carried out the scope of its Mechanical Subcontract and Fire Protection Subcontract.
27. In order to protect its rights, Urban Mechanical registered two liens, commenced two lien actions and commenced an action with respect to its bond claims after obtaining leave of BCCL's monitor.

28. On December 23, 2019, Urban Mechanical registered and delivered a Claim for Lien for the sum of \$34,832,109.73 against title to the Lands in the Land Registry Office for the Land Titles Division of Toronto, (No. 80), as Instrument No. AT5328598 for its Mechanical Subcontract.
29. On December 23, 2019, Urban Mechanical registered a Claim for Lien for the sum of \$252,541.55; against title to the Lands in the Land Registry Office for the Land Titles Division of Toronto, (No. 80), as Instrument No. AT5328599 with respect to Fire Protection Subcontract.
30. On February 18, 2020, a statement of claim was also issued with respect to the Bond claims with court file no. CV-20-636493.
31. All the actions are now stayed given the various stay orders that impact BCCL and Project Co.
32. On May 18, 2020, Zurich served a Statement of Defence, Crossclaim and Counterclaim that alleged, in part, it was not bound bond by the L&M Bond on the basis of the “material facts and misrepresentations” and allegations against SMH in the Zurich Action. Zurich relies on the allegations in the Zurich Action as against Urban Mechanical.

33. Urban Mechanical thus has an interest in the subject matter of the Zurich Action and the motion of SMH.
34. The within motion is necessary and would expedite the resolution of the issues in dispute.
35. A party may move before a judge for a determination, before trial, of a questions raised by pleadings where the determination of the questions may dispose of all or part of the actions, substantially shorten the trial or result in a substantial saving of costs.
36. Zurich is not entitled to the defence and counterclaim even if it were able to prove all the material facts as set out in statement of defence and counterclaim.
37. The Bond Action involves commercial matters that are already being dealt with in other proceedings in the Commercial List.
38. The interests of justice, judicial economy and to avoid inconsistent findings requires the issues in these proceedings be adjudicated together, expeditiously and in a common process.

39. Section 11 of the *Companies Creditor Arrangement Act*, R.S.C. 1985, c.C-36 and, particularly, section 11.04 of same;
40. Rules 1.04, 2.01, 3.02, 5,6, 11, 13, 16.04(1), 16.08, 20, 21, 30, 37.07(2), 40, 54 and 57 of *the Rules of Civil Procedure*.
41. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
42. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Pleadings;
2. the affidavit of Paul Di Lucia; and
3. such further and other evidence as counsel may advise and this Court may permit.

May 22, 2020

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TO: THE SERVICE LIST

ZURICH INSURANCE COMPANY LTD v. 2442931 ONTARIO INC. et al.

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ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at TORONTO

**NOTICE OF MOTION OF URBAN
MECHANICAL CONTRACTING LTD.**

**BISCEGLIA & ASSOCIATES
PROFESSIONAL CORPORATION**

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