

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

**IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*,**  
**R.S.O. 1990, c. C.30, AS AMENDED**

**AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD.**  
**FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE**  
***CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED**

**RESPONDING FACTUM OF THE TRUSTEE**

(re motion of Screen Painting Ltd.)  
(returnable October 5, 2016)

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**TO: THE SERVICE LIST**

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**PART I – NATURE OF MOTION**

1. This factum is filed by Collins Barrow Toronto Limited (“**CBTL**”), in its capacity as Court-appointed *Construction Lien Act* (Ontario) (the “**CLA**”) trustee (the “**Trustee**”) with respect to certain lands and premises owned by 144 Park Ltd. (“**144 Park**”), in response to the motion of Screen Painting Ltd. (“**Screen**”) seeking payment in the amount of \$74,749 from the net sale proceeds of the property held by the Trustee, on account of its holdback claim with respect to its construction lien registered against the property.

## PART II – FACTS

### Background

2. 144 Park was the registered owner of lands and premises known municipally as 142, 144 and 148 Park Street and 21 Allen Street West, Waterloo, Ontario (the “**Property**”). 144 Park constructed a 19-story residential condominium tower on the Property.

Responding Motion Record of the Trustee, Tab 1, Tenth Report of the Trustee dated June 7, 2016 (the “**Tenth Report**”), para. 1.

Motion Record of Screen Painting Ltd., Tab 2, Affidavit of Haysam Fattah sworn April 26, 2016 (“**Fattah Affidavit**”), para. 2.

3. On January 22, 2015, CBTL was appointed by the Court as Trustee pursuant to the Order of The Honourable Mr. Justice Penny made under the *CLA*.

Tenth Report, para. 1.

4. Pursuant to the Order (re Construction Lien Claims Process) of the Court dated April 23, 2015 (the “**Claims Process Order**”), the Court authorized the Trustee to implement and administer a construction lien claims process, which included making recommendations to the Court regarding the determination of holdbacks and priorities with respect to the improvement and the Property.

Tenth Report, paras. 2 and 7.

5. Pursuant to the Order of the Court dated August 5, 2015, the Court authorized and directed the Trustee to retain funds from the net sale proceeds of the Property in respect of construction lien claims, to be held by the Trustee pending further order(s) of the Court.

Tenth Report, para. 8.

6. In accordance with Court Orders, the Trustee has made distributions to construction lien claimants on account of the deficiencies in the holdbacks in priority to the claims of the mortgagees of the Property.

Tenth Report, paras. 10-19.

7. The Trustee continues to hold funds in the amount of \$74,749 in reserve with respect to the holdback claim of Sreen, discussed below.

Tenth Report, paras. 20 and 23.

### **Claim of Sreen**

8. Pursuant to a Contract/Purchase Order dated September 19, 2014 and signed by Sreen on October 6, 2014 and by 144 Park on October 7, 2014 (the “**Contract**”), the parties agreed, for the contract price of \$540,700, that Sreen would complete the following work at the Property:

- (a) touch-up painting on floors 1 through 9 of the condominium tower;
- (b) painting on flooring 10 through 19 of the condominium tower, which covered “caulking in suites wall/ to wood, HM frames & doors, staining of varnish at wood in, garbage room, electrical, hoist suites 406-906-supply and install, touch-up material, common area, garage, staircases, townhouses -8- touch-ups”; and
- (c) painting of eight townhouses.

Tenth Report, paras. 24-25; Fattah Affidavit, para. 2 and Exhibit A.

9. Sreen claims to have supplied services and materials to 144 Park in the aggregate amount of \$747,490.55 inclusive of HST. Sreen has calculated its basic holdback amount to be

\$74,749, being ten per cent (10%) of the total amount of services and materials claimed to have been supplied to 144 Park.

Tenth Report, para. 26; Fattah Affidavit, para. 4.

10. Sreen allegedly issued fourteen (14) invoices to 144 Park with respect to the work completed by Sreen (invoice nos. 69, 70, 72, 73, 74, 74-1, 76, 77, 79, 80, 81, 82, 91, and 92 (collectively, the “**Invoices**”). The aggregate amount of the Invoices is \$747,130.55.

Tenth Report, para. 27; Fattah Affidavit, para. 4 and Exhibit B.

Reply Motion Record of Sreen, Tab 1, Reply Affidavit of Haysam Fattah sworn June 16, 2016 (“**Reply Fattah Affidavit**”), Exhibit A.

Supplementary Responding Motion Record of the Trustee, Tabs 1 and 3, Transcript from the Cross-Examination of Haysam Fattah held on August 26, 2016 and continued on September 20, 2016 (“**Fattah Transcript**”), Answers to Q. 67-69.

11. Sreen has confirmed it received payment in full from 144 Park with respect to the work completed and detailed on Invoices 69, 70, 72, 73 and 74, in the aggregate amount of \$446,047.70.

Tenth Report, paras. 28-30; Reply Fattah Affidavit, para. 16 and Exhibits “A” and “C”; Fattah Transcript, Answers to Q. 75-76 and 81-82.

12. Sreen registered a construction lien against the Property on December 22, 2014 in the amount of \$345,952.00 as instrument number WR858991. Sreen also commenced an action under the *CLA* and registered a certificate of action against the Property.

Fattah Affidavit, paras. 6 and 7 and Exhibits “C”, “D” and “E”.

13. Notwithstanding the amount listed in its construction lien, Screen now claims to be owed the aggregate amount of \$300,554.24 with respect to the work allegedly completed and detailed on Invoices 74, 74-1, 76, 77, 79, 80, 81, 82, 91, and 92 (collectively, the “**Unpaid Invoices**”).

Fattah Reply Affidavit, Exhibit C; Fattah Transcript, Answers to Q. 76-78.

**Unpaid Invoices**

14. The following is a summary of the information contained in the Unpaid Invoices:

<b>Invoice No.</b>	<b>Invoice Date (mm/dd/yyyy)</b>	<b>Description</b>	<b>Amount (incl. of HST)</b>
74-1	09/26/2014	Amount of Contract  Amount of this bill  10 % holdback	\$152,550.00
76	09/23/2014	PDI from July 28, 2014  320 hrs @ \$ 45 an hr  From Aug 11, 2014  296 hrs @ 45 an hr  Materials	\$34,261.60
77	09/23/2014	PDI from Aug 26, 2014  314 hrs @ \$ 45 an hr  From Sep 8, 2014 298 hrs @ \$ 45 an hr  Materials	\$33,097.70
79	11/10/2014	PDI. Sep 8 to 19, 2014  283 hrs @ 45 an hr  Materials	\$15,916.05

<b>Invoice No.</b>	<b>Invoice Date (mm/dd/yyyy)</b>	<b>Description</b>	<b>Amount (incl. of HST)</b>
80	11/10/2014	PDI. Sep 22 to Oct 03, 2014  264 hrs. @45 an hr.  Materials	\$15,401.90
81	11/10/2014	PDI. Oct 6 to Oct 17, 2014  210 Hrs @ 45 an hr  Materials	\$11,639.00
82	11/10/2014	PDI. Oct 20 to Oct 31, 2014  234 Hrs @ \$ 45 an hr  Materials	\$13,537.40
91	11/28/2014	P.D.I. Nov 3 to Nov 14, 2014  188 hrs @ 45 an hr  Materials	\$10,802.80
92	11/28/2014	P.D.I. Nov 17 to Nov 28, 2014  234 Hrs. @ \$ 45 an hr  Materials	\$13,876.40

Tenth Report, para. 27.

15. Screen claims to have submitted the Unpaid Invoices to 144 Park for payment by fax, but has no documentation confirming that the Unpaid Invoices were actually faxed to 144 Park.

Fattah Transcript, Answers to Q. 86-90.

16. The books and records of 144 Park contain no record of any authorization by 144 Park to Screen to complete the work referred to in the Unpaid Invoices.

Tenth Report, para. 31.

17. Sreen has no documentation to support that the work referred to in the Unpaid Invoices was authorized or requested by 144 Park.

Fattah Transcript, Answers to Q. 57-59.

18. Sreen does not have any time sheets from the individuals who completed the work that was allegedly performed and detailed in the Unpaid Invoices, nor does it have an accounting or any other system that tracks or details the work completed by its employees.

Fattah Transcript, Answers to Q. 27-30.

19. The only documentation that Sreen has in support of the alleged work being completed is a handwritten calendar agenda that lists hours worked by individuals on certain days and the project worked on.

Fattah Transcript, Answers to Q. 30-38,

Unpaid Invoice 74-1

20. Unpaid Invoice 74-1, in the amount of \$152,550.00, contains no description of the work allegedly completed by Sreen.

Tenth Report, paras. 27 and 32; Fattah Affidavit, Exhibit "B".

21. On cross-examination, Hayasam Fattah, the owner of Sreen, claimed that Invoice 74-1 represented work Sreen completed in painting five floors at the Property with a price of \$30,000 per floor. However, Invoice 74-1 makes no reference to the floors painted by Sreen, and the



Invoices that were paid by 144 Park in full referred to completion of the painting of all floors as detailed in the Contract.

Fattah Transcript, Answers to Q. 93-135.

Unpaid Invoices re PDIs

22. The descriptions in Unpaid Invoices 76, 77, 79, 80, 81, 82, 91, and 92 are vague and only refer to PDI's allegedly performed by Sereen.

Tenth Report, paras. 27 and 33; Fattah Affidavit, Exhibit "B".

23. Sereen has produced no documentation that details the units where the PDI work was completed, nor documentation that supports that any PDIs were in fact conducted by Sereen at the Property during the relevant time period.

Tenth Report, para. 33.

24. Sereen claims to have received verbal requests to complete the PDIs referred to in the Unpaid Invoices. Sereen has no documentation that supports that 144 Park requested that Sereen complete PDIs in the time period covered by the Unpaid Invoices, nor any documentation that sets out the units that Sereen allegedly performed the PDIs on.

Fattah Transcript, Answers to Q. 165-166.

**PART III – ISSUE**

- (a) Does Sereen have a valid and enforceable lien against the Property in the amount of \$300,554.24 that would entitle it to payment of a holdback of \$74,749?

#### PART IV – LAW AND ARGUMENT

25. Pursuant to section 14 of the *CLA*:

A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

*Construction Lien Act*, R.S.O. 1990, c. 30, s. 14.

26. It is trite law that a person claiming entitlement to a lien under the *CLA* has the onus of establishing on a balance of probabilities that it supplied the services or materials claimed to have been supplied to the owner.

27. The Trustee respectfully submits that Sreen has failed to satisfy this onus.

28. Sreen has no documentation to support that the work it allegedly completed as described in the Unpaid Invoices was authorized or approved by 144 Park. Sreen argues that the work was authorized in verbal communications, but made no attempt to solicit evidence or testimony from former Mady employees or Mady agents that would have made verbal authorizations.

29. The descriptions in the Unpaid Invoices are wholly inadequate and contain no references to the actual work that Sreen performed (i.e. which floors were painted, which units had PDIs completed by Sreen, etc.). On cross-examination, the owner of Sreen was unable to provide any additional details. Sreen cannot even produce corroborating documentation that it sent the Unpaid Invoices to 144 Park for payment.

30. Based on the review of the books and records completed by the former controller of 144 Park, there is no record of 144 Park authorizing the work alleged to have been completed by Sereen in the Unpaid Invoices.

31. In these circumstances, the Trustee respectfully submits that Sereen has failed to put its “best foot forward” and establish on a balance of probabilities that it supplied services or materials to 144 Park in the amount of \$300,554.24 as referred to in the Unpaid Invoices. As a result, Sereen does not have a valid and enforceable lien against the Property, as it was paid in full for all work it completed with respect to the Property, and thus does not have a claim for payment of any holdback amount.

**PART V – RELIEF REQUESTED**

32. The Trustee respectfully requests that the Court dismiss Sereen’s motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**

*SAM RAPPOS*

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## SCHEDULE “A”

### STATUTORY AUTHORITIES

***Construction Lien Act, R.S.O. 1990, c. C.30***

#### **Interpretation**

#### **Definitions**

1. (1) In this Act, ...

“*supply of services*” means any work done or service performed upon or in respect of an improvement, and includes,

(a) the rental of equipment with an operator, and

(b) where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner’s interest in the land, and a corresponding expression has a corresponding meaning;

“*price*” means the contract or subcontract price,

(a) agreed upon between the parties, or

(b) where no specific price has been agreed upon between them, the actual value of the services or materials that have been supplied to the improvement under the contract or subcontract

#### **Creation of lien**

14. (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

**SCHEDULE "B"**

**CASE AUTHORITIES**

NIL

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