

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

2292912 ONTARIO INC.

Applicant

-and-

2380009 ONTARIO LIMITED

Respondent

FACTUM OF THE MOVING PARTY

December 1, 2017

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**FACTUM
OF THE MOVING PARTY**

PART I – OVERVIEW

1. This is a motion by Eco Energy Home Services Inc. ("**Eco Energy**"):
 - (a) for a declaration under s. 32(1)(7) of the *Construction Lien Act* (the "**Act**") that its contract with the Respondent, (whereby Eco Energy sold and installed two HVAC systems in the Respondent's building, municipally known as 2370 South Sheridan Way, Mississauga (the "**Property**")), has been substantially performed; and
 - (b) for a declaration that Eco Energy, which has not been paid in full for its performance of the contract, is the beneficiary of a trust created under s. 7(3) of the *Act* from rental payments received by Collins Barrow Toronto Limited, the Respondent's receiver (the "**Receiver**").

PART II – THE FACTS

2. The Respondent is the owner of the Property. In January 2014, the Respondent hired Eco Energy to supply and install an HVAC system on the Property. The Respondent's principal, Marcelo Hernandez ("**Hernandez**") represented to Eco Energy that the Respondent was the owner of the Property and the operator of the business therein.

Affidavit of Bianca Myles-Jansen, paragraph 3

3. This was almost true. Bultrite Technologies Inc. is the tenant with exclusive use of the Property (the "**Tenant**"). The majority of the shares of the Tenant are owed by the shareholders of the Respondent. Hernandez and Elias Mancebo are the sole directors of the Respondent and the Tenant. (This formal distinction between the Respondent and the Tenant was not known to Eco Energy until after the appointment of the Receiver.)

First Report of the Receiver, paras. 10, 16 and 17

4. The Respondent and the Tenant entered into a lease of the Property on January 15, 2014 (the "**Lease**"). The Lease was not registered on title. On the same day, the Respondent directed the Tenant to make all Lease payments to Timbercreek Asset Management, the servicing agent for the Applicant. The Lease payments were to be applied to reduce the Respondent's indebtedness to the Applicant, which indebtedness was secured by a mortgage registered on title to the Property.

Fourth Report of the Receiver, para. 68, 90

First Report of the Receiver, para. 71 and Exhibit E

5. Eco Energy delivered and installed the HVAC systems on the Property. The price of the contract was \$43,392.00. Although some payments were made on account, a balance of

\$12,550.20 is still due and owing. As payment had not been made in full, Eco Energy has retained ownership of the HVAC system.

Affidavit of Bianca Myles-Jansen, paragraphs 5, 6 and 7

6. The Receiver was appointed on February 7, 2017. The Receiver stopped payment of the Lease payments to the Applicant, and has collected the Lease payments from the Tenant from March 1, 2017 to August 31, 2017. The amount collected by the Receiver exceeds Eco Energy's claim.

Affidavit of Bianca Myles-Jansen, paragraphs 9 and 10

Fourth Report of the Receiver, para 91

7. As at December 5, 2017 there was owing to Eco Energy the total amount of \$40,580.75 calculated as follows:

(a) Principal	\$12,560.20
(b) Interest from January 24, 2014 to and including December 5, 2017	\$11,644.85
(c) Legal fees incurred	<u>\$16,375.70</u>
TOTAL:	<u>\$40,580.75</u>

Affidavit of Bianca Myles-Jansen, paragraph 12

PART III – THE ISSUES AND THE LAW

THE ISSUE

8. The issue before this Honourable Court is whether the funds currently held by the Receiver are impressed with a trust in favour of Eco Energy, pursuant to s. 7(3) of the *Act*.

THE LAW

Eco Energy is the Beneficiary of a Trust

9. Section 7(3) of the Act is as follows.

7(3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.

10. Such a trust applies to completed contracts as well as to substantially completed contracts. The owner or trustee cannot avoid the creation of s. 7(3) trust by refusing to certify substantial completion. The contractor must be free to apply to the court for such a declaration.

Royal Bank v. Penex Metropolis Limited 2010 ONSC 636

11. The Receiver has asserted that the limitation period for Eco Energy's trust claim has passed, and that it is therefore relieved from any duty to disgorge the trust funds. The Receiver is incorrect, for the following reasons.

12. The general principal applied in insolvency cases is the rule in *Ex Parte James*. Whatever the technical circumstances, the Receiver, as an officer of the Court, should do the fullest equity and pay the funds impressed with a trust to the beneficiary, here Eco Energy. Even if the Receiver has a legal right to the Property, the Court should not permit it to exercise that right in a manner that is inconsistent with natural justice.

Houlden & Morawetz Bankruptcy and Insolvency Analysis at F§73(i)

13. Moreover, the Receiver's argument is incorrect in law as well as in equity. A trust and the rights of a statutory trust beneficiary in that trust come into existence only with the creation of the fund to which those rights attach. Unless and until a trust fund comes into existence in the hands of a trustee with whom the beneficiary has privity of contract, the trust does not arise.

Sunview Doors Limited v. Academy Doors and Windows Limited 210 ONCA 198 citing with approval the Statement made by David I Bristow in *Construction Builders and Mechanics Lien in Canada*

14. In *Employment Professionals of Canada Inc. v. Steel Design and Fabricators*, the motion judge held:

*...the assessment of when the plaintiff should have discovered the claim in the circumstances ... turns on the facts of this case and not the date on which payment was due under the agreement. I accept the plaintiff's submission that a **breach of trust does not exist if the trust does not exist. The trust does not exist until monies have been received by the contractor from the general contractor or are payable.***

Employment Professionals Canada Inc. v. Steel Design Fabricators (SDF) Ltd. 2016 ONSC 1722, emphasis added

15. Leave to appeal this decision to the Divisional Court was refused. The court held:

The motion judge held that a determination of when EPC could have discovered the breach of trust claim turns on the facts of the case and need not simply be the precise date payment was due under the contract. In his review of the evidence before him it did not demonstrate conclusively that the limitation period had lapsed.

The correctness of the decision is therefore not, in my opinion open to serious debate.

Employment Professional Canada v. Steele Design and Fabricators (SDF) Ltd. 2016 ONSC 4230 (Div. Ct.)

16. In short, a trust does not exist until the corpus of the trust (the money) has been received by the trustee. In this case, a trust in favour of Eco Energy did not come into

existence until the Receiver had funds making up the corpus of that trust, which did not occur until sometime after the Receiver's appointment in February 2017, well within the limitation period asserted.

MGL Construction Inc. v. Ibuild Corporation, et al 2017 ONSC 5741 (Div. Ct.)
Franks Drilling & Blasting Inc. v. Isbester 2015 ONSC 3581

17. Further, until Eco Energy could reasonably discover that the trust funds had flowed to the Receiver, the limitation period could not commence. The applicability of the doctrine of discoverability to a trust claim was confirmed by Justice Mew in *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Company, et al* 2014 ONSC 9918. Eco Energy did not discover the existence of the fund until earlier this year.

PART IV – ORDER SOUGHT

18. Eco Energy respectfully requests:

- (a) a declaration under s. 32(1)(7) of the *Construction Lien Act* that Eco Energy's contract with the Respondent has been substantially performed;
- (b) a declaration that Eco Energy is the beneficiary of a trust created under s. 7(3) of the *Act*, in the amount of \$40,580.75, which trust is held by Collins Barrow Toronto Limited, the Receiver;
- (c) an order requiring the Receiver to pay to Eco Energy the sum of \$40,580.75, out of the Lease payments the Receiver has collected from the Tenant; and
- (d) costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY



COLBY LINTHWAITE
OF COUNSEL FOR ECO ENERGY HOME SERVICES INC.

SCHEDULE "A"

Authorities Cited

1. *Royal Bank v. Penex Metropolis Limited* 2010 ONSC 636
2. *Houlden & Morawetz Bankruptcy and Insolvency Analysis* at F§73(i)
3. *Sunview Doors Limited v. Academy Doors and Windows Limited* 210 ONCA 198 citing with approval the Statement made by David I Bristow in *Construction Builders and Mechanics Lien in Canada*
4. *Employment Professional Canada v. Steele Design and Fabricators (SDF) Ltd.* 2016 ONSC 4230 (Div. Ct.)
5. *Employment Professional Canada v. Steele Design and Fabricators (SDF) Ltd.* 2016 ONSC 4230 (Div. Ct.)
6. *MGL Construction Inc. v. Ibuild Corporation, et al* 2017 ONSC 5741 (Div. Ct.)
7. *Franks Drilling & Blasting Inc. v. Isbester* 2015 ONSC 3581
8. *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Company, et al*

SCHEDULE "B"

Statutes and Regulations Cited

See attached.

Construction Lien Act

R.S.O. 1990, Chapter C.30

Owner's trust

Amounts received for financing a trust

7. (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (1).

Amounts certified as payable

(2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (2).

Where substantial performance certified

(3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (3).

Obligations as trustee

(4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner. R.S.O. 1990, c. C.30, s. 7 (4).

Rules governing certification or declaration of substantial performance

32. (1) The following rules govern the certification and declaration of the substantial performance of a contract:

1. On the application of the contractor, the payment certifier shall determine whether the contract has been substantially performed in accordance with section 2, and, if the payment certifier so determines, shall certify the substantial performance of the contract by signing a certificate in the prescribed form. If there is no payment certifier, the owner and contractor shall make the determination jointly and shall both sign the certificate.
2. The payment certifier or the owner and the contractor jointly, as the case may be, shall set out in the certificate the date on which the contract was substantially performed.
3. The date set out in the certificate as the date on which the contract was substantially performed is deemed for the purpose of this Act to be the date on which that event occurred.
4. Where the payment certifier certifies the substantial performance of a contract the payment certifier shall within seven days of the day the certificate is signed give a copy of the certificate to the owner and to the contractor.
5. The contractor shall publish a copy of the certificate once in a construction trade newspaper.
6. Where the contractor does not publish a copy of the certificate within seven days of receiving a copy of the certificate signed by the payment certifier or, where there is no payment certifier, signed by the owner, any person may publish a copy of the certificate.
7. Where there is a failure or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the court, and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract.
8. Unless the court otherwise orders, the day the declaration is made shall be deemed to be the date the contract was substantially performed.
9. The person who applied to the court shall publish a copy of the declaration of substantial performance once in a construction trade newspaper.
10. For the purposes of this Part, a certificate or declaration of the substantial performance of a contract has no effect until a copy of the certificate or declaration is published. R.S.O. 1990, c. C.30, s. 32 (1).

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Respondent

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Court File No. CV-16-011354-00CL

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