CITATION: Selectra Inc. v. The Corporation of the Town of Penetanguishene, 2016 ONSC 2293
BARRIE COURT FILE NO.: CV-15-0904
DATE: 20160404

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SELECTRA INC.	)	
	)	Howard L. Shankman, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	Derek A. Schmuck, for the Defendant Sona Construction Limited
THE CORPORATION OF THE TOWN OF PENETANGUISHENE and SONA CONSTRUCTION LIMITED	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** March 17, 2016

RULING ON MOTION

DOUGLAS J.

Overview

[1] On this motion the Defendant Sona Construction Limited (hereinafter "Sona") seeks:

(a) An order reducing the amount of the security posted with the court;

(b) In the alternative, an order discharging the Plaintiff's claim for lien.

[2] The motion arises in an action under the *Construction Lien Act*, RSO 1990 c. C30 as amended (hereinafter "the Act") wherein it is alleged that the Plaintiff (hereinafter "Selectra") supplied goods and services in respect of the construction of a water treatment plant in the Town of Penetanguishene pursuant to a contract with Sona.

[3] The Corporation of the Town of Penetanguishene did not participate in this motion.

[4] Selectra's claim for lien was registered July 23, 2015. It was vacated when Sona posted a lien bond in the amount of $1,372,552.36 (being the amount of Selectra's lien of $1,322,552.36 plus $50,000 for costs as required by the Act).

[5] Sona submits that inappropriate non-lienable items were included in Selectra's claim for lien which, when accounted for and applied in reduction of the amount claimed for lien, reduces the claim to $611,811.04 which, after adding an additional discretionary twenty-five percent for costs, brings the amount for security to $764,763.80.

[6] Selectra concedes the following deductions as being appropriate:

a) Site supervisor mileage allowance	$17,042.20
b) Site supervisor hotel	$17,839.92
c) Site supervisor per diem	$17,806.25
d) Security for Eramosa's lien (including additional 25%)	$118,411.46
e) Security for Summa's lien (including additional 25%)	$130,786.81
f) Project management time reduction from 940 hours to 880.75 (difference 59.25 hours x $107.28) hours x $107.28	$6356.34
g) Project supervision;	$35,026.92
h) HST on project supervision;	$4553.49
i) HST on items (a),(b) and (c)	$6,849.48
j) Bonding	$12,367.67
k) Additional 25% of Summa and Ermosa liens	$49,839.65
Grand total deductions conceded by Selectra	$416,888.14

[7] Thus it is Selectra's position that the appropriate amount of security is calculated as follows:

a) Selectra lien	$1,322,552.36
b) Less deductions calculated above	($416,888.19)
c) Plus $50,000 costs	$50,000.00
d) Total	**$955,664.17**

[8] It is to be noted that my ruling in this matter should not be seen as having any impact upon the viability of the parties' positions on the issues for trial. My sole function is to determine an appropriate quantum of security, without deciding the ultimate merit of any claims.

[9] For the reasons that follow I order that:

(a) The amount of security to be posted with the Court by Sona shall be reduced to $858,385.78;
(b) Upon posting the security referred to in (a) the existing security shall be delivered up to Sona.

(c) If unable to agree on costs the parties may make written submissions through my assistant at Barrie, limited to 3 pages, excluding Offers and Bills of Costs, within 30 days.

Legal Framework

[10] Section 44(5) of the Act provides as follows:

> Where an amount has been paid into court or security has been posted with the court under this section, the court, upon notice to such persons as it may require, may order where it is appropriate to do so,
>
> (a) The reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; or
> (b) The reduction of the amount of security posted with the court, and the delivery of the security posted with the court for cancellation or substitution, as the case may be.

[11] Section 1(1) of the Act defines "price" as the contract price agreed upon.

[12] Pursuant to s. 14(1) of the Act:

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

[13] Section 15 of the Act provides as follows:

> A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

[14] In *Structform International Ltd. v. Ashcroft Homes Construction Inc.*, [2013] ONSC 4544, Master McLeod reduced the security relating to a claim for lien to reflect items that were either not lienable or were clearly exaggerated. He found it inappropriate to engage in an extensive review of the merits and to determine the viability of contested questions of fact on a motion to reduce security. In doing so he observed:

> 11. …it will however only be appropriate to reduce the security if it can convincingly be demonstrated that the maximum recovery by the lien claimant will be less than the amount it has liened for.
>
> 12. The test to be applied on a motion of this type is similar to the test on a summary judgment motion. That is the court must be satisfied on the basis of the motion materials that there is no reasonable prospect of the Plaintiff proving a lien for the amount it has claimed. Despite the analogy to summary judgment, however, it is important to note that a motion under s. 44 of the Act is not a full-fledged summary judgment motion under r. 20. Several cases establish that a motion under the security provisions of the Act is not the venue for determining complex issues of contested facts going to the merits of the claim.
>
> 14. The largest part of the Plaintiff's claim is for damages for delay and not all aspects of a delay claim may be lienable. To properly be the subject of a lien the claim must be reflective of the value of the work done on the improvement. That is it must come within the definition of "services or materials supplied to the improvement" and is limited to the "amount owing to the lien claimant in relation to the improvement". Thus additional expenses incurred because the project takes longer than anticipated such as labour costs, equipment rental and similar costs of remaining on the job will readily be found to be the basis for a valid lien. Damages at large, however, such as lost opportunity costs, loss of profits or aggravated damages will not be.

> Additional costs incurred offsite such as administrative overhead or lost profit and even onsite office overhead costs have been held not to be lienable. If a portion of the lien claim is attributable to damages that are not properly the subject of a lien then the security should be reduced to take that into account.
>
> 17. Both parties filed extensive motion material. The material filed by the lien claimant primarily consisted of its own internal calculations and records showing how the claim for lien was calculated. The material filed by the owner was primarily contract documentation, project communication and transcripts of cross-examination. There are numerous triable issues which will call for findings of credibility and interpretation of events and evidence. These determinations cannot made be made on a motion of this nature. The issue before me is not whether the lien claimant will succeed but only whether the security posted in court may legitimately be reduced at this point in time.
>
> 25. There are separate charges for "overtime" and for "extended duration costs". The fact that there are defences to these claims does not mean that the lien claimant should be deprived of the security of a lien. It will only be appropriate to reduce this portion of the security if the claim is simply not viable. A lien claimant acknowledges that Ashcroft never authorized overtime charges or an acceleration schedule. In fact it is acknowledged that there was never a change order request for overtime. These facts may ultimately defeat the claim but it is not possible to determine on this motion that claims for overtime are impossible. If overtime had to be paid to complete the work then that would be a cost that could form part of a lien claim.
>
> 27. The extended duration costs include some costs such as crane and forming equipment as well as outside rentals such as concrete pumps. These represent claims for equipment onsite for the extended duration of the contract and are legitimately lienable. Some element of the "delay costs" is simply a damage claim however and is not subject to lien rights. This would include the "head office overhead". Similarly there are meal allowance and fuel allowance charges which are amounts that were never the responsibility of Ashcroft under the contract. These amounts must be backed out of the claim for extended duration (delay) for lien purposes.

[15] General managerial work performed, distinguished from work as a site supervisor, that is not so directly related to the construction of the improvement will not entitle the claimant

to a lien under the Act (see *697470 Ontario Ltd. v. Presidential Developments Ltd.,* 1989 CarswellOnt. 698 Ontario Divisional Court).

[16] In *Marino v. Bay-Walsh Ltd.,* [2002] O.J. No. 2211 ONSC, Zelinski J. observed:

> 110. When there has been a price agreed upon the person who has provided services or materials is (absent abandonment) entitled to a lien for that price for those services or materials. It is the price that has been agreed upon and the requirement that those services or materials be supplied "to the improvement" which defines the eligibility for and quantum of the lien claim.
>
> 111. Project managers whose responsibilities, whether onsite or off contributed "in a direct and essential way to the construction of the improvement" are persons who have supplied services "to the improvement" whether or not the services are supervisory, managerial, physical or manual.

[17] In *Metron Construction Inc. v. Belleville Race Track Development Corp.,* [2011] O.J. No. 1129 ONSC Master Sandler observed:

> 72. …the *Presidential* case stands for the proposition that the work performed by the lien claimant there was "not so directly related to the construction of the improvement" because the lien claimant "acknowledged that he did not do any site work on Stouffville (the property liened) and he did not superintend any of the construction at the Stouffville project". Presidential Developments had construction projects going on at a number of sites and each one had a site superintendent. The lien claimant was not acting as a project superintendent but described his work as the general manager of Presidential Homes. So whatever work he did (through his company) he did not do it at the property liened, ie. the Stouffville project. This is actually what the *Presidential* case decides….
>
> 74. …in [*Marino v. Bay-Walsh*]…Zelinski J. comments on the *Presidential* and *Tamma Construction* cases and makes the same observation about the facts in the *Presidential* case that I noted above, and then distinguishes the *Presidential* case…he then examines the western authorities….which hold that project management and site supervision fees are eligible for a lien claim when they are incurred as "an integral and necessary part of the actual physical construction of the project". He makes his ruling, at para. 111, that the project management services in that case were a supply of services to an improvement and were lienable in law.

> 75. …a lot of what Metron did was budgets and costs preparation but this work was directly related to the project and in my view, based on the law above noted, might well be found to be lienable.

[18] In *1353025 Ontario Inc. v. Waldon Group Canada Ltd.,* [2006] O.J. No. 1681 OSCJ, Gordon, J. observed:

> 13. To grant the relief requested by the Applicant would be determinative of the action insofar as lien security is concerned, and in that respect it is analogous to a motion for summary judgment, though indeed the right to claim damages without the security of the lien would survive.
>
> 14. …one must determine if there are triable factual issues involved. If there are genuine triable issues, that is answers are not clear and unequivocal, the issues are better dealt with at trial.
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> 15. In the case at hand the affidavits conflict on the issue of the Respondent's entitlement to fees and presumably *viva voce* evidence would do the same. There have been no cross-examinations to test the trustworthiness or reliability of the allegations, nor do affidavits provide a court with visual and audio indicators thereof. There are at least factual issues that are triable.
>
> 20. On the face of it the services rendered here, even if they give rise to fee entitlement, do not result in traditional construction improvement. There are no building materials or services supplied by persons on the land with regard to the building phase financing. However, that traditional perception has been expanded somewhat in judicial precedent. It now includes on some facts architectural services, engineering drawings and services and surveying services amongst others. These have been held to be services that do not in themselves necessarily improve the land and premises but are as McLeod J. said in *Smith & Smith Kingston Ltd. v. Kinalea Development Corp.,* [1994] O.J. No. 2263 "services provided related directly to the land to be liened and were not notional in nature". In that case the services involved surveying carried out upon the subject land.
>
> 23. The salient factor giving rise to a lien entitlement may be whether or not in the facts of each particular situation the services are for the "direct" purpose of enabling the owners to proceed with construction. Whether or not it is "direct" would in each case depend upon the facts.
>
> 24. Though on the facts of this case I tend towards a view that the type of services rendered by the Respondent should not be entitled

> to lien, the appropriate place for decision is at trial where the truth and reliability of the allegations can be tested for trustworthiness and a witnesses' credibility may be properly evaluated.

[19] In the case of *B.I.L.D.O.N. Construction (801) Inc. v. Project 801 Inc.,* [2011] O.J. No. 3177 ONSC, Master Polika observed:

> 25. …any person who performs any work or service, directly or indirectly, to the improvement that is, in the reference before me, the construction of the condominium, has a lien on the interest of the owner in the land upon which the condominium was being built. If construction management services during the construction phase come within this definition, a question of fact, then they are lienable.
>
> 27. The delineation between which services support a claim for lien and which do not and in particular the allocation of the price therefore I find to be a genuine issue for trial.

[20] In *Smith & Smith Kingston Ltd. v. Kinalea Development Corp., supra* McLeod, J. was addressing the issue of whether surveying services were lienable. In concluding that they were he observed:

> 5. The Plaintiff in these cases performed services that were directly related to the actual construction of the improvements. Without the surveyor's work, construction could not have taken place without the surveying work done by the representatives of the Plaintiff. The survey work performed in these cases was a necessary element to the construction of the improvements on the owner's properties.
>
> 6. Whether or not a lien attaches on behalf of a surveyor depends on the particular facts and the nature of the actual work performed. The case law is clear that if the services performed relate to the actual improvement, then the lien attaches. If the nature of the work done by a surveyor is such that there is no improvement, then the lien would not attach….
>
> 7. In these cases, the services provided related directly to the lands to be leined and were not notional in nature…

[21] In *Stucore Construction Ltd. v. Brock University,* [2001] O.J. No. 4060 ONSC Talliano J. found that charges relating to a superintendent, carpenter, labour foreman and the project manager onsite for the duration of the delay were arguably related to the supply of services and materials to the improvement as extras to the contract price. As such

Talliano J. concluded those charges would support a claim for lien. I note however that the reasonableness of those charges in relation to the delay claim was not argued before Talliano J. in contrast to the circumstances before me. Talliano J. noted that damages flowing from lost profits on other jobs which a claimant was unable to undertake because of undue delay would not be lienable.

[22] In *Proform Construction Ltd. v. Noble Star Properties (Central) Inc.,* (2001) CarswellOnt 4414, in relation to a motion similar to the one before me, Master Saunders did not allow claims that were uncertain or unsupported by the evidence in determination of the quantum of security to be posted. In some cases the court disallowed claims based upon estimates.

[23] Costs incurred offsite such as administrative overhead and onsite office overhead costs are not lienable. Such services include, *inter alia:*

(a) Setting up a sales office;

(b) Making building permit applications;

(c) Negotiating with various building trades;

(d) Dealing with local municipal officials;

(e) Communicating with and assisting the site supervisor with respect to decision making;

(f) Supplying construction management services including *inter alia* reviewing tenders, selection of trades, supervision of site superintendent and coordination of trades;

(g) Hiring;

(h) Reviewing tender documents and calculation of bids;

(i) Review of blueprints to assess material and labour requirements;

(j) Communications with suppliers to solicit quotes and coordination of the responses;

(k) Maintenance of binders at the office containing key project information;

(l) Preparation of progress billing statements (see *697470 Ontario Ltd. v. Presidential Developments Ltd., supra*).

[24] General overhead expenses cannot be considered a supply of materials or services upon or in respect of an improvement as those services were "not so directly related to the construction of the improvement" to fall within the contractual chain on construction projects that are given a financial preference and a security interest by the Act. As such, general overhead expenses are not lienable (see *Rudco Insulation Ltd. v. Toronto Sanitary Inc.*, [1998] O.J. No. 4105 ONCA).

[25] Expenses incurred with respect to the purchase and repair of equipment that is not for the exclusive use of the subject property and merely adds to or maintains a person's

equipment to be used by that person on future projects is not leinable (see *Taylor Hardware Ltd. v. Canadian Associated Goldfields Ltd.*, [1929] O.J. No. 23 ONCA).

[26] To recover for delay the contractor must proceed as follows:

(a) The cause of the delay must be isolated and defined;

(b) The delay must be analyzed to determine whether it is excusable or the responsibility of the contractor;

(c) If the delay is the contractor's responsibility the contractor must bear the cost. If it is excusable the extent of the delay must be determined;

(d) The contractor must prove that actual or constructive notice of the delay was given if required by the contract;

(e) If must be established whether the delay affected items on the critical path or whether it merely reduced or eliminated the float;

(f) The contract must be reviewed to assess whether it provides that the contractor is entitled to a remedy of extension of time only or time and compensation; and

(g) The quantum of compensation must be determined

(see *Bemar Construction (Ontario) Inc. v. Mississauga (City)* 2004 CanLII 34321 ONSC)

[27] Expenses incurred as a result of excusable delays are not lienable. Excusable delays include:

(a) Weather

(b) Strikes

(c) Floods

(d) Acts of municipal and government authorities

(e) Acts of God or Force Majeure

(f) Delays by subcontractors and suppliers arising from unforeseen events caused beyond the control and without the fault or negligence of the contractor, subcontractor or suppliers; and

(g) Unanticipated soil conditions beyond the reasonable contemplation of either party (See *Bemar Construction (Ontario) Inc., supra*)

[28] As a lien is limited to the amount a contractor is owed. If there is a fixed price contract, in the absence of approved change orders, the contractor cannot include in its claim for lien extra labour or materials charges for work described in the fixed price contract simply because those costs were more than usual or anticipated when the fixed price contract (or

change orders) were agreed to. Some amount of risk of a cost escalation is assumed by the contractor (see *Structform International Ltd. v. Ashcroft Homes Construction Inc.*).

Analysis

[29] Selectra has included in its claim for lien the sum of $683,266.08 in relation to its "delay claim". From that there have been some concessions by Selectra referred to in paras. 6(a),(b,)(c),(f) and (i) above, totaling $65,894.19. The remaining components of Selectra's "delay claim" remaining in dispute are as follows:

(a) Site Supervisor - 3882 hours at $107.28 = $416,460.96

(b) Project Management - 880.75 hours at $107.28 = $94,486.86

(c) Office and storage sea -containers - 22 months x 4 at $150 per month = $13,200

(d) Generator rental - 12 months at $800 per month = $9,600

(e) Temporary Services – 22 months at $180 per month = $1,980

(f) Scissor Lift – 22 months at $425 per month = $9,350

(g) ESA costs for temporary services - $537.72

Grand Total = $545,615.54

[30] Selectra says the purchase order from Sona was accepted by Selectra on January 17, 2012 and that the contract terms required the total project to be completed by August 13, 2015, or five hundred working days. Sona says that commencement of the project was delayed by two years; as a result, Selectra was merely delayed in starting the project and no additional costs were incurred nor were such payable pursuant to the parties' fixed price contract.

[31] Additional deductions sought by Sona are as follows:

(a) Schellenberger onsite credit $107.28 - $52.55 = $54.73 per hour x 3882 hours = (site supervisor labour)	$212,461.86
(b) Office and storage containers	$13,200
(c) Bond costs	$22,184.16
(d) Site supervisor time	$60,505.92
(e) Generator notional rental costs	$9,600
(f) Temporary services	$1,980
(g) ESA permits	$537.72
(h) Work not done	$28,613.42

(i) Scissor lift notional rental	$9,350
(j) Project Management fifty percent reduction	$50,421.60

Site Supervisor Labour

[32] Selectra says the Site Superintendent was Pete Schellenberger, who, during the twenty-six month "delay" from August 31, 2013 to October 31, 2015 was required to be onsite an additional 4492.5 hours. After excluding travel time Selectra's records show Mr. Schellenberger spent a total of 3555.5 hours onsite from August 25, 2013 to July 11, 2015. The difference in the hours calculated by Selectra in its delay claim, being 3882 hours and the 3555.5 hours actually spent onsite is 326.5 hours (which Selectra says was spent in the Selectra office or in travel time). This time was charged to Sona at $107.28 per hour, which, for 326.5 hours, results in a charge to Sona of $35,026.92, an amount Selectra already concedes ought to be deducted, per para. 6(g) above.

[33] Sona says it never issued a change order or otherwise extended the time for completion of the contract and that it never agreed to pay Selectra extra for delay costs. It is further alleged that Selectra was at least partially responsible for any delay. Sona further submits that the $107.28 hourly rate includes fees for services provided offsite and after the completion date that did not directly contribute to the improvement, were not supply to the improvement, are not lienable, and beyond the ambit of the parties' fixed price contract.

[34] On this motion, as in *Structform*, it is not possible or necessary for me to determine whether Selectra's claim for lien will succeed; rather, the question is whether there is a reasonable possibility of success. On the evidence before me I find that there is a reasonable possibility of success. At this stage it is not possible to determine the cause of the delay. Mr. Schellenberger's time onsite is arguably a service rendered in improvement of the property. Therefore there will be no further reduction in this respect.

Office and Storage

[35] Sona argues that the Selectra's delay claim and lien claim include the notional rental costs of a site office trailer and storage sea container. Sona submits that as Selectra owns these items they are not rented from a third party and thus there is no cost to Selectra.

[36] In cross-examination Selectra's witness did not know when Selectra's office trailer or sea-container were shipped to the project site. It was also acknowledged that the claim for the office trailer and sea container was an estimate given that Selectra owns the containers and did not pay any rental charges. Further, Selectra's witness did not know whether the containers Selectra used on this particular site were the same as those shown in the invoice for another project and on which it based its delay claim amounts.

[37] Sona argues that these items are not lienable as these materials and services are general overhead expenses and thus are not directly related to the construction of the

improvement and were not the responsibility of Sona as there was a fixed price contract and these services and materials were within the original scope of that contract.

[38] This component of the claim for lien should be deducted. There is no actual cost of rental and the claim appears to be for lost opportunity costs given that the trailer and container, being positioned on the subject work site, were not available for rental elsewhere. These costs are not lienable (see *Structform International Ltd., supra* at para. 14). Further, the claim in this regard appears to be based upon an estimate. This element of uncertainty can result in a claim being disallowed upon such a motion as I have before me (see *Proform*).

Bond Costs

[39] Selectra sent an invoice to Sona for extended bonding costs in September 2013 in the amount of $22,184.16.

[40] Sona argues that bonding costs are not supplied to the project and thus do not enhance its value.

[41] Selectra acknowledges that the sum of $12,367.57 should be deducted in this regard.

[42] On the evidence before me it appears that the bonding costs had not been invoiced to Sona when the claim for lien was registered.

[43] I also find that the bonding costs do not add value to the improvement and thus do not form a proper part of the claim for lien. Thus, the full amount of $22,184.16 shall be deducted or, a further $9,816.59 in addition to the $12,367.57 already conceded.

Site Supervisor Time

[44] Sona seeks an additional deduction of $60,505.92 regarding site supervisor time. In this regard I have been given little by way of explanation as to calculation of this figure and its underpinnings beyond a reference in a written summary of Sona's position on the motion presented to me during submissions.

[45] I can find no reference to this item in the evidence. Therefore there shall be no reduction in respect of this item.

Generator Notional Rental Costs

[46] Sona seeks a deduction of $9,600 in respect of the generator notional rental costs included in Selectra's delay claim. Selectra advances its claim calculated as twelve months at $800 per month for a total of $9,600.

[47] The generator is apparently owned by Selectra. Sona submits that the generator expense is not lienable as this is a general overhead expense and not so directly related to the construction of the improvement as to fall within the contractual chain on construction projects that is given a financial preference and a security interest by the Act and in any

event, this was a fixed price contract and any expense for generator was within the original scope of that contract.

[48] Selectra submits that because of the two year delay in the completion of the work, Selectra was deprived of the use of its generator that it could have used on other projects. It is has therefore claimed the fair market rental value of the generator.

[49] This part of the claim should be deducted. There was no direct cost to Selectra; rather, the claim sounds more appropriately in damages at large rather than an expense incurred in improvement of the property.

Temporary Services and ESA Permits

[50] Selectra claims as part of its delay claim an expense for the provision of temporary services at the worksite at the rate of $180 per month for eleven months for a total of $1,980. It also claims $537.72 paid to the Electrical Safety Authority for the permits to allow it to work on the job to extend the temporary service until the project was completed.

[51] Sona argues that these costs were not material or services provided to the improvement. Sona further argues that the temporary services is a deemed rental charge the Plaintiff is claiming for equipment that it owns, none of which is lienable as these materials and services are general overhead expenses and thus are not so directly related to the construction of the improvement as to trigger a security interest under the Act. It is further argued that these expenses were not the responsibility of Sona as there was a fixed price contract and these services and materials were within the original scope of that contract.

[52] In my view the permit expenses should be not be included, and these should be deducted as it is analogous to a building permit expense which was not allowed in *Presidential Developments, supra* as being part of administrative or onsite office overhead.

[53] As to the cost of temporary services, it too should be deducted as not representing a direct contribution to the improvement of the property.

Work Not Done

[54] Included in Selectra's claim for lien is the amount of $28,613.42 plus HST which was admitted by Selectra's representative in cross-examination to represent work that had not been completed as of the date of registration of the lien.

[55] The sum of $21,613.42 was actually invoiced to Sona by Selectra on July 22, 2015 although the sum of $28,613.42 is referred to in Selectra's affidavit in response to this motion. It is the sum of $21,613.42 that must be deducted from Selectra's claim for lien in this regard. The invoice referenced "work completed but not yet billed".

[56] There was also evidence that the work was done but not yet billed. Selectra's evidence in this regard is inconsistent and therefore unreliable. I am therefore satisfied that this item ought to be deducted.

Scissor Lift Notional Rental

[57] Included in Selectra's delay claim and lien amount are notional rental amounts for "Scissor Lifts". The Plaintiff owns this equipment.

[58] Selectra argues that because of the two year delay in the completion of the work Selectra was deprived of the use of its generator, scissor lifts and office trailers that it could have used on other projects. For this reason Selectra has claimed as part of its delay claim the fair market rental value of these items because Selectra was deprived of the use of its office trailer and scissor lift as a result of the delay on this project, Selectra actually incurred additional expenses by having to rent these items in the marketplace for use on other projects.

[59] On cross-examination Selectra's witness did not know whether the scissor lifts and office trailers that Selectra used on the job site were the same as those shown in the invoice to and for another project and upon which it based its delay claim amounts. The witness also did not know whether the scissor lift was actually onsite every day after August 23, 2013, even though a claim was made for every day. Selectra owned five or six scissor lifts but had about twenty projects on the go during the subject period and thus Selectra would have needed those scissor lifts on all projects from time to time. The scissor lift was brought to the site by Selectra in 2013 and removed from the site in May 2015 according to a response to an undertaking given by this witness.

[60] Selectra claims $9,350 calculated as $425 per month for twenty-two months.

[61] For the same reasons set out above regarding the generator, this expense will be deducted.

Project Management

[62] Selectra includes in its delay claim the sum of $100,843.20 calculated as ten hours per week for ninety-four weeks at $107.28 per hour.

[63] Selectra concedes in submissions that the total of 940 hours was an estimate and that the actual time is 880.75 hours, which at $107.28 per hour results in $94,486.86 for a difference of $6,356.34 compared to its original claim amount in this regard.

[64] As indicated at the commencement of these reasons Selectra has conceded there should be a credit or deduction in this amount.

[65] It appears this claim for project management delay expenses is for five people, three project managers and two project coordinators. The ten hours per week was an estimate. The five employees of Selectra were all paid less by Selectra than $107.28 per hour.

[66] The Selectra witness at cross-examination did not know whether some of the delays caused to the job were due to poor weather.

[67] Sona submits the court should consider the following additional concerns regarding this part of Selectra's delay claim:

(a) Calculation of the hours worked appears to be estimated rather than based on genuine time logs.

(b) Selectra is claiming project management and project coordination time for Ryan Herbert, but he was brought on to the job two years after it started in July 2014 because another employee left Selectra; thus, Ryan Herbert would have required time to get up to date on the details of the project which time is being claimed against Sona.

(c) Ryan Herbert charged some project management time for work he did while in the Straford office in relation to a Penetanguishene job.

(d) Ryan Herbert is senior management and he is not paid for all of his travel time, even if he does travel to a site. Selectra charged Ryan Herbert's project management and project coordination time in its delay claim at $107.28 per hour which rate was to include travel, even though Ryan Herbert was not paid for all of his travel time.

(e) Of the 880 hours attributable to this project management claim, Ryan Herbert was responsible for 365 hours of which 237.5 hours was actually on the jobsite.

(f) Of the five people relating to this expense, only two were licensed electricians.

(g) Of the five, one spent all of her time in the Selectra office and another did no physical work on the jobsite.

[68] Sona argues further that the project management fees, including work completed at the Selectra head office, did not directly contribute to the improvement, and were not supplied on or in respect of an improvement and are thus not lienable. It is further argued that as this was a fixed price contract Sona was not responsible for these expenses and the services were within the original scope of the contract. It is further argued that these costs were either not incurred or were exaggerated as Selectra arrived at the figure by arbitrarily charging ten extra hours per week for a period of ninety-four weeks.

[69] Sona submits that one half of this claim ought to be deducted in the amount of $50,421.60.

[70] As to whether there should be a deduction in respect of this item, I conclude there should be, in part, to reflect the uncertainty of the time estimates. Otherwise, I am satisfied that this component of the claim represents project management which contributed in a direct way to the construction of the improvement and for which there is a reasonable possibility of success at trial. I have no reason to conclude that although this project was for electrical work, only qualified electricians would supply services within the meaning of the Act, as submitted by Sona.

[71] There will be a deduction of 33% of $94,486.86, or $31,180.66.

[72] Therefore, the amount to be held as security shall be calculated as follows:

a) Claim for lien	$1,322,552.36
b) Less Selectra's concession per para. 6 above	($416,888.19)
c) Less office and storage	($13,200)
d) Less generator	($9,600)
e) Less temporary services and ESA	($2,517.72)
f) Less bonding costs	($9,816.59)
g) Less work not done	($21,613.42)
h) Less scissor lift	($9,350)
i) Less project management	($31,180.66)
k) Plus Costs	$50,000
TOTAL SECURITY	**$858,385.78**

Douglas, J.

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