

COURT OF APPEAL FOR ONTARIO

CITATION: Swan v. Durham Condominium Corporation No. 45,
2019 ONCA 1016
DATE: 20191220
DOCKET: C66287

Huscroft, Trotter and Zarnett JJ.A.

BETWEEN

Leslie Arthur Swan

Plaintiff (Appellant)

and

Durham Condominium Corporation No. 45

Defendant (Respondent)

Howard Wright, for the appellant

Sheldon Inkol, for the respondent

Heard: December 20, 2019

On appeal from the judgment of Justice Sandra Nishikawa of the Superior Court of Justice, dated March 8, 2019.

APPEAL BOOK ENDORSEMENT

[1] We see no error in the motion judge's conclusion that Mr. Swan's claim for indemnification is barred on the basis that it is *res judicata*. Sosna J. determined that Mr. Swan was not entitled to the indemnity because he acted in bad faith in the exercise of his duties as director. His motion for leave to appeal that decision was dismissed. The motion judge properly concluded that his claim for indemnification is a collateral attack on the October 2015 decision and an abuse of process. There is no merit to the argument that his clear finding of bad faith is somehow undermined by the terms of the order the parties took out.

[2] Nor did the motion judge err in concluding that the lien should not be vacated. We see no error in the motion judge's analysis, particularly at paras. 27-35 of her reasons, where she determined that the lien was valid.

[3] There was no evidentiary basis before the motion judge that would have justified vacating the lien. The real issue in this case concerns the amount of the lien.

[4] The order contemplates recalculation of the amount the respondent may claim in accordance with the reasons, provision of an updated statement to the appellant, discharge of the original lien amount and registration of a lien for the revised amount. In other words, the original lien is to be revised in accordance with the order, and the motion judge retained jurisdiction to address any matters arising in this regard. This is not a situation in which a new lien must be registered in

accordance with the timeliness requirements of the Act. In the circumstances, the discharge and re-registration does not affect the underlying validity of the lien for the revised amount.

[5] The appeal is dismissed.

[6] The respondent is entitled to costs in the agreed amount of \$7,000, inclusive of taxes and disbursements.