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Construction Law

August 2014

Construction Bits and Bites

This is the first in a series of newsletters which we have named, "Construction Bits and Bites". The series will address topics of interest to the construction industry in a short, 'bite sized', format. This newsletter focuses on some of the perils to avoid when exercising lien rights in Ontario to ensure that a lien will be valid and enforceable. It will address:

*Registering a Lien on the Wrong Land
*Incorrectly Calculating the Lien Expiry Date
*Naming the "Wrong" Owner
*Naming the "Wrong" Lien Claimant
*Incorrectly Asserting a General Lien

Registering a Lien on the Wrong Land

While every attempt should be made to complete a Claim for Lien accurately, perhaps the most vital information contained in the Claim for Lien is the legal description of the land to which the lien attaches. Although there has been the odd exception, generally, if a lien claimant fails to identify the correct property, the lien will be found to be invalid. Such was the case in the 1998 decision of *Electrical Equipment Co. v. General Motors of Canada* where the lien claimant registered its lien on the defendant's head office rather than its truck plant where the work was done. In *Bravo Cement v. University of Toronto* the court clearly stated that the discretionary power of the court under s. 6 does not extend to permit a court to validate a claim for lien where wrong lands are named. Identifying the wrong lands is a fatal flaw which a court is not empowered under the *Construction Lien Act* of Ontario to correct.

In *Riverside Glass Ltd. v. Charron's Quality Market Ltd.* the defendant owned two adjoining lots, Lot 111 and Lot 112. The lien claimant supplied materials for the improvement of Lot 111 but registered a lien on Lot 112. Eventually Lot 112 was going to be used as a parking lot for the market that was being built on Lot 111. In reaching the decision that the lien was valid, the court relied primarily on the definition of "premises" in the *Construction Lien Act* which includes "the land occupied by the improvement, or enjoyed therewith". The court invoked section 6 to "cure" the defect. This case is one of the very few where a lien on the wrong land was saved. In most 'wrong land' cases the lien is found to be invalid.

Incorrectly Calculating the Lien Expiry Date

When a lien expires depends upon a number of factors, some of which are not in the control of the lien claimant.

The lien of a contractor (a person who supplied directly to the owner) expires 45 days after publication of the Certificate of Substantial Performance of the contract or the date the contract is completed or abandoned, whichever occurs first. The lien of any other person in the construction pyramid expires 45 days from the date of publication of the Certificate of Substantial Performance of the contract (between the owner and the contractor) or the lien claimant's date of last supply, whichever comes first. If there is no Certificate of Substantial Performance, the triggering point is the date of contract completion, in the case of a contractor, or last supply, in the case of anyone else. However, where a Certificate of Substantial Performance has been published, it has the potential of shortening the lien expiry period.

In some cases, a subcontract is certified as complete, using a procedure in section 33 of the *Construction Lien Act.* If the subcontract is so certified then the lien of that subcontractor expires 45 days from the date of its last supply or the date the subcontract was certified as complete, whichever occurs first.

Where a person has supplied services or materials before and after the date of substantial performance of the contract, the lien rights for the supply on or before the date of substantial performance expire without affecting the lien rights for the supply after substantial performance.

The *Act* also contains a "deemed completion" provision which affects the lien expiry period of a contractor. A contract is deemed to be completed and services and materials are deemed to be last supplied when the price of completion, correction of a known defect or the last supply is not more than the lesser of, 1% of the contract price and $1,000.00.

If the lien expiry period falls on a Saturday, Sunday or holiday, then the lien may be preserved on the next day.

For those who thought that liening was nothing more than 'counting 45 days', this may come as a surprise.

Naming the "Wrong" Owner

A lien claimant has a lien on the interest of the owner in the premises improved for the price of the services or materials supplied. The correct owner must be identified in the Claim for Lien. Naming the wrong owner may result in the lien being invalid.

An "owner" within the meaning of the Construction Lien Act ("CLA") means any person, including the Crown, having an interest in a premises, at whose request, and

(a) upon whose credit, or
(b) on whose behalf, or
(c) with whose priority or consent, or
(d) for whose direct benefit,

the improvement is made.

The definition of "owner" in the CLA is expansive enough to include a tenant or subtenant who has work done on leased premises. In a few cases, mortgagees have been found to be owners within the meaning of the CLA.

The case of *Williams & Prior* involved improvements to a retail store which was subleased to a numbered company carrying on business as Hugo Boss. The lien claimants were subcontractors hired to provide labour and materials to renovate the store. The lien claimants did not make reference to Hugo Boss anywhere on their Claims for Lien. Instead, the liens named the landlord of the building as the only owner. Their liens were found to be invalid. The court held that,

> *In the event that a lien is claimed against a leasehold interest, it is fundamental to the survival of the lien that the name of the tenant against whom the lien is claimed be named in the Claim for Lien itself. The total omission to do so is a fundamental error in the assertion of a valid claim for lien against a subtenant's interest in the premises.*

In the Hugo Boss case, Master Sandler distinguished between a "misnomer", which may be cured, and the total omission of the owner's name, which cannot be cured. Master Sandler went on to recommend that, if the exact name of the owner of the leasehold interest is not known, the best description possible should be used (for example: "Any person or entity having an interest in the premises known as the Hugo Boss store") to increase the likelihood of the curative provisions of the CLA being successfully used to correct the error later.

However, Master Sandler reached a different conclusion in *Petroff Partnership Architects v. Mobius Corp* on almost identical facts. *In Petroff*, the lien claimant failed to list the tenant in the "Owner" section of an electronic Claim for Lien and only named the landlord. However, the electronic registration included the following 'statement': "The lien claimant claims a lien against the interest of every person identified as an owner of the premises described in said PIN to this lien". If one were to look at the parcel abstract for that land, one would have found that notice of the 25 year lease was registered on title. Master Sandler, on these particular facts, concluded that the information contained in the balance of the Claim for Lien made it sufficiently clear that the lien was also being claimed against the tenant, and he 'saved' the lien. However, not all leasehold interests are registered on title. Therefore, it is foolish to assume that every electronically registered lien will permit a *Petroff* type cure. Naming the correct owner is critical to the validity of a lien.

Naming the "Wrong" Lien Claimant

While it seems difficult to imagine, there have been situations in which a lien claimant improperly identifies *itself* in a Claim for Lien with fatal consequences. This usually arises when there is some confusion or ambiguity about the lien claimant's corporate name or legal status.

In *Triple "R" Demolition Inc. v. 1186468 Ontario Ltd.* the lien claimant entered into a contract in a corporate name before that corporation had been brought into legal existence. The lien claimant represented itself as operating a valid corporate entity throughout the contractual negotiations, during the construction and until completion of most of the work. Then a dispute arose over payment. Only then was the corporation incorporated and a lien registered. The court found that since the underlying contract was non-existent, a claim for lien based on a void contract could not be upheld, and the lien was discharged. Since the corporate entity that registered the lien was non-existent at the time of the underlying contract, the court refused to 'save' the lien using the curative provisions of section 6 of the *Construction Lien Act*.

The *Triple "R"* case can be contrasted to the decision reached in the case of *G.C. Rentals Ltd. v. Falco Steel Fabricators Inc.* In *G.C. Rentals*, the lien claimant improperly identified itself on the Claim for Lien as "G.C. Rentals Ltd." when the correct registered business name was "G.C. Rentals & Repairs". The court held that because G.C. Rentals & Repairs was still a legal entity capable of suing and being sued, the misnomer was a minor irregularity and could be saved by section 6 of the *Act.* The court also found that no one had been prejudiced by the mistake, as all parties knew who they were dealing with despite the misnomer.

A corporation that is dissolved (sometimes for technical reasons, like failing to make annual filings), can be procedurally revived after its dissolution. A Claim for Lien filed by a dissolved corporation is without validity unless the corporation is revived 'in time'. If the corporation is revived after its lien rights have expired, the Claim for Lien registered by the dissolved corporation is a nullity and cannot be saved by section 6 of the CLA.

Incorrectly Asserting a General Lien

Pursuant to section 20 of the *Construction Lien Act,* where an owner enters into a single contract for improvements on more than one premises of the owner, a lien claimant can choose to have its lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials that the plaintiff supplied to all of the premises. An example of a situation where a general lien might arise is where a new homes builder enters into one contract with a paving subcontractor to pave the driveways of all the homes in a subdivision. In that case, there exists a single contract for work on multiple lots all owned by one owner, the home builder.

However, no general lien arises under or in respect of a contract that provides in writing that liens *shall arise and expire on a lot-by-lot basis*. Where a lot-by-lot clause exists, the only way to properly preserve a lien is to register individual liens on each lot for which lien rights still exist. This can be a costly exercise and requires diligent monitoring of the lien expiry dates for each lot.

The consequences of improperly registering a general lien are serious. The Court of Appeal in *Gillies Lumber v. Kubassek Holdings Ltd.* held that where a general lien has been improperly asserted, the effect in law is to discharge the lien claim from title to all lots, including the lots which would have been subject to a lien claim if a Claim for Lien had been registered separately in respect of those lots. The entire lien is wiped out and there is no way to revive even part of it.

The registration of a general lien should be approached with caution. The contract under or in respect of which the lien arises needs to be scrutinized carefully in order to determine whether a lot-by-lot provision exists. If in doubt, it may be prudent to register a general lien along with individual liens so that the individual liens will survive even if the general lien is found to be invalid.

Look out for our next newsletter in the Construction Bits and Bites series, which will include more topics of interest.

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