

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Applewood or Provincial Partitions, V.I

When it comes to registering a claim for lien, the Superior Court will not allow subcontractors to extend the date for preservation of their lien by returning to the job site to carry out trivial repairs after a subcontract is otherwise complete. What you might find interesting is what the Court considers to be a trivial repair.

In *Applewood v. Baun*, a building owner hired Baun Construction Inc. (“Baun”) to refurbish the entrance of the Sheraton Centre in Toronto. Baun subcontracted out the supply and installation of several doors to the plaintiff, Applewood Glass & Mirror Inc. (“Applewood”). Applewood finished the door installations on June 25, 2006. On the same day, Applewood invoiced Baun for the entire amount of the subcontract but Baun did not pay the invoice. In late August, Applewood informed Baun that it accidentally installed a regular butt hinge on one of the doors instead of an electronic transfer hinge as required by the subcontract. Baun agreed to pay Applewood as long as Applewood installed the proper hinge by September 1, 2006. The correct hinge was installed on September 1 but Baun failed to pay. As such, 45 days later Applewood registered a lien.

Baun argued that Applewood’s claim for lien expired on August 9, 2006, being 45 days after it had finished installing the doors and invoiced Baun for its work on June 25, 2006. The Court agreed and found the 45 day period for registering Applewood’s lien started to run from June 25, 2006. The Court also found that replacing the butt hinge was “not” a legitimate supply of services and materials under the subcontract.

The factors the Court considered in determining the lien-clock did not start running anew were:

- Applewood had invoiced Baun for the entire amount of the subcontract on June 25 for services that were performed by that date.
- Applewood’s installation of the electronic transfer hinge was valued at only a few hundred dollars; and

- The installation of the electronic transfer hinge took only a few minutes.

In general, the Court's position was that doing work to rectify defective or improper work did not extend the time for registering a claim for lien, and that a trivial amount of work performed or services supplied after initial completion of a contract did not serve to extend the time within which to register a claim for lien.

What should we take away from the Applewood case? It appears the Courts will not permit subcontractors to bootstrap their rights where the subcontractor returns to the work site to effect trivial repairs or additions when a subcontract has otherwise been completed. However, is the Court's reasoning and interpretation of the facts always interpreted in the same way? In our continued analysis we will examine a more recent case, *Provincial Partitions Ltd. v. Toronto (City)*.

Applewood Glass and Mirror Inc. v. Baun Construction Inc. et al., [2009] O.J. No. 4845 (S.C.J.)(QL)

Court Declines to Reinstate Stale Action Against Elderly Couple

The Plaintiff, Canada Trust Company ("Canada Trust") was the trustee of a self-directed RRSP investment on behalf of Joseph Sasso ("Sasso"). Sasso advanced \$180,000 from his RRSP to various Defendants which was secured by mortgages against four properties in Windsor. All Defendants, aside from Boulos and Henriette Dahers (collectively the "Dahers") are bankrupt and default judgment was ordered against them in October 2007.

The Dahers executed a mortgage in favour of Sasso on September 27, 2004. The Dahers did not have independent legal advice and they are an elderly Lebanese couple with limited faculty for the English language.

The mortgages at issue fell into arrears in June 2006. Canada Trust brought an action on June 15, 2007 for payment and possession on the mortgages in default. The Dahers defended the action relying, in part, on the defence of *non-est factum*.

Canada Trust took no steps for approximately two years to advance the litigation against the Dahers. Rather, the Plaintiff's litigation counsel who also acted for all of the parties on the mortgages at issue, was put on notice that he could not act as he would be in an irreconcilable conflict of interest and a witness given his role as the transactional lawyer for all parties on the mortgages. Nevertheless, the Plaintiff chose not to appoint successor counsel until June 2009.

Shortly thereafter, in November 2009, the Dahers issued third party proceedings against the Plaintiff's litigation counsel for negligence, contribution and indemnity. On April 23, 2010, the Court ordered a

timetable which required the action be set down for trial by January 31, 2011. Nevertheless, the Plaintiff took no steps to advance the litigation until discoveries took place in March 2011.

The Plaintiff's litigation counsel brought a motion for summary judgment in July 2011 and subsequently brought a further motion to amend his defence to plead the limitation period. Master Pope granted the motion to amend the defence before the summary judgement motion could be adjudicated. The Dahers appealed. While the appeal was pending, the main action and third party claim were administratively dismissed by Registrar Order dated May 3, 2013. In November 2013, the Dahers entered into minutes of settlement with the Plaintiff's litigation counsel to abandon the appeal and dismiss the third party claim relying upon the administrative dismissal of the main action, which by operation of law resulted in the dismissal of the third party claim.

Plaintiff's counsel did not seek consent to restore the main action until February 2014, which request was promptly rejected. The Plaintiff's motion to reinstate the action was not served until April 2015, approximately two years after the action was dismissed by the Registrar.

By applying the mandated contextual approach and *Reid* factors, Justice Thomas dismissed the Plaintiff's motion to restore the action for the following reasons:

- (a) There were significant unexplained periods of litigation delay following the commencement of the action;
- (b) The Plaintiff did not move promptly or forthwith to reinstate the action as required by the *Rules*;
- (c) There was significant presumed and actual prejudice to the Dahers as approximately 12 years had passed since the impugned mortgage was given. The Dahers pleaded *non-est factum*. As such, credibility and *viva voce* evidence would be central to the fair adjudication of their defence at trial.
- (d) The Dahers filed uncontested evidence, including an affidavit from their treating physician that they were not fit to stand trial as a result of serious medical conditions. Boulos Daher also filed uncontroverted evidence that his health had deteriorated over the past two years following the dismissal of the action and he had suffered memory loss, which would jeopardize the ability to have a fair trial.

As prejudice is invariably the key *Reid* factor, Justice Thomas placed significant weight on the uncontested medical evidence filed that the Dahers would suffer actual prejudice if the action was restored. As a result, the Court determined the just order in these circumstances was to dismiss the motion.

Canada Trust Company v. 2054509 Ontario Limited, 2016 ONSC 4341 (SCJ)

Court of Appeal for Ontario confirms subsection 20(2)

of the Construction Lien Act applies to subcontractors

In *Yorkwest Plumbing Supply Inc. v. Nortown Plumbing (1998) Ltd, et al*, the Court of Appeal for Ontario confirmed that a subcontractor is bound by Section 20(2) of the *Construction Lien Act* (the “Act”) with respect to its right to register a general lien over multiple premises with one owner.

The plaintiff, Yorkwest Plumbing Supply Inc. (“Yorkwest”) was a plumbing supply subcontractor for the contractor Nortown Plumbing (1998) Limited (“Nortown”). The owner, Intercorp Projects (Milton on the Escarpment) Limited (“Intercorp”) owned multiple premises subject to an improvement. Intercorp’s contract with Nortown specified that all lien rights would arise and expire on a lot-by-lot basis.

Following Yorkwest’s last supply of the project it filed a general lien against each premises, and in each case claimed a lien for the total amount owed for what it had supplied to all the lots in the subdivision. Those liens were discharged pursuant to motions for summary judgment brought by the owner. The motion was upheld by the Divisional Court on the basis that section 20(2) of the Act confirms that a subcontractor cannot claim a general lien on a project where the contractor and the owner have agreed that liens will arise and expire on a lot-by-lot basis. This section of the Act is particularly relevant in a housing development involving multiple lots. Yorkwest appealed to the Court of Appeal for Ontario.

Section 20(2) of the Act only refers to ‘contracts’ and not ‘subcontracts’. Accordingly, Yorkwest argued that as the subcontract between Nortown and Yorkwest did not address the right to register a general lien, section 20(2) of the Act did not apply, and it was permitted to file a general lien over all premises. In a unanimous decision written by Feldman, J.A., the Court of Appeal confirmed that Yorkwest was bound by the terms of the contract between owner (Intercorp) and contractor (Nortown) that precluded general liens. The fact that a subcontract is silent on the right to file a general lien has no bearing on the analysis.

Feldman, J.A. took notice that the Legislature’s intent in passing subsection 20(2) of the Act was to permit the owner and contractor to contract out of the right to file a general lien. Feldman, J.A. determined that the appellant’s interpretation would undermine the ability of contractors and owners to make provisions in their contracts to allow the owner to release holdback on a lot-by-lot basis. This would considerably undermine the purpose of subsection 20(2) of the Act.

The lesson for subcontractors is to ensure they exercise their rights under section 39 of the Act and obtain a copy of the contract between the owner and contractor before registering a lien. Had Yorkwest reviewed the main contract in this case before registering its general lien, it would have realized it was limited to lien on a lot-by-lot basis. As a result Nortown lost its security.

KOSKIE MINSKY

JUSTICE MATTERS

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