KOSKIE MINSKY

JUSTICE MATTERS

Civil Litigation

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

Reminder...You Can't Sue an Employee for Negligence

When acting for an employer we are often asked whether an employee can be sued for damages that the employer sustains as a result of an employee's negligence. The answer is no. A case recently decided by the Alberta Court of Queen's Bench, *Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd* , does not purport to change the law in that area. However, the law does bear repeating, as we often see claims being advanced against employees by their employers for damages allegedly sustained as a result of the employee's negligence.

Employees are not liable to their employers for acts of simple negligence. Recent authority for this proposition was cited by the Alberta Court referencing *Douglas v. Kinger*, 2008 ONCA 452, *Kirby v. Amalgamated Income Ltd. Partnership*, 2009 BSCC 1044 and *1746646 Alberta Inc. v. Aman Carrier Ltd.*, 2014 ABPC 270. Employees may be liable for intentional or reckless actions where:

1. They are "skilled" workers, and are held to a reasonable standard of care associated with their roles. This will arise in a case such as a CPA performing duties as an accounting professional. However, as a result of the power imbalance inherent in the employment relationship, the employers generally bear the onus to establish the employee is a "skilled worker" which is a high threshold test;
2. They act fraudulently or commit acts of intentional wrongdoing beyond the scope of their authority; and
3. Those employees who are directors and officers are held to the standard of reasonable business judgment in exercise of their discretion and can be liable where their actions fall below that standard.

The recent decision of *Shamac* considered whether a company could bring an action against a related company and its employee for negligence in causing a fire. The Plaintiff attempted to shift liability for the damages caused by a fire at its premises upon a related company and its employee. The Court

considered whether the defendant employer was vicariously liable for the actions of the employee, as well as whether in fact the plaintiff was a common employer to the employee against which it now sought to attach its claim. The Court drew upon the principal of a "borrowed employee" suggesting that although the relationship may not have been a true employment relationship, it was one like a "transferred employment" relationship where the control lay with the plaintiff who was seeking to sue the employee for the employee's negligence. The Court concluded that whether one looked to the doctrine of common employer, or the concept of 'borrowed employee', the considerations were similar, and the question to be decided was: "who was the employer who exercised control over the employee".

The Court applied the common employer doctrine even though the case was one of vicarious liability and not wrongful dismissal, and held that the doctrine did apply. The Court concluded that the plaintiff and the corporate defendant collectively employed the employee. Accordingly, the Court went on to conclude that the plaintiff employer could not bring an action against the defendant employee for negligence, and that the employee was not liable for the causing of the fire forming the subject matter of the litigation.

While employees are not always liable for the consequences of their negligence, it bears mention that negligence may be grounds for termination of employment for cause.

Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd., **2015 ABQB 518, 2016 CLLC 210-002**

Can Section 6 of the Construction Lien Act Save Me?

There are certain situations where Section 6 of the Construction Lien Act (CLA) can be used to cure a defect in a lien, but only if the defect is minor.

Section 6 of the CLA states:

> Minor irregularities
>
> 6. No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32 (2) or (5), subsection 33 (1) or subsection 34 (5), unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered. **[1]**

*Note that only the editor's heading, which does not form part of the legislation, and not the section itself refers to minor irregularities.

Section 6 Test

As expressed in the recent decision of Master Albert in *Govan Brown & Associates Ltd. v. Equinox 199 Bay Street Co.*, the test for whether a defect can be cured under Section 6 depends on the factual circumstances:

> A lien claim that fails to comply with the requirements of subsection 34(5) of the Act is invalid. But if it is merely a failure to "strictly" comply then absent prejudice the lien claim remains valid unless the court determines that it is invalid due to prejudice. The test is one of degree**[2]**

When there is a mistake in the lien, the court must first consider whether the non-compliance is a minor or technical irregularity, and if it is, then section 6 can be applied. If not, only then may the court consider the question of prejudice. This is based on a close reading of the statute itself.

Master Sandler, in *Williams & Prior Ltd. v. Taskon Construction Ltd*, stated, "strict compliance with these sections is the required standard. A failure to comply *strictly* can be over looked provided no prejudice has been suffered. But *if* the failure to comply is *more than* a failure to comply *strictly*, then s. 6 cannot apply." **[3]**

In *Williams & Prior*, the plaintiff registered a lien for work done for a numbered company ("379") but failed to name it as an owner. Instead, Williams registered the liens as against the leasehold interest of the two head tenants and landlords, however 379 was the subtenant. 379 was later added as a party defendant because it was held to be an owner under s. 1(1). After being added as a defendant, 379 moved to dismiss the action and to discharge and vacate the lien.

Master Sandler found that the failure of the lien claimant to name 379 as an "owner" i.e., as a person whose interest in the premises was improved was an "**extremely serious error**" and could not be cured by section 6. This was not a case of misnomer, but rather went beyond a mere minor or technical irregularity.

What then is a minor or technical irregularity?

Master Albert, in *Govan,* concluded that a lien claimant may register the lien against the incorrect leasehold owner and have section 6 be available to cure it, but only when the mistake is due to a "corporate name shell game".

In *Ambler-Courtney Inc. v. CAAG Land Development Ltd.*, the court agreed that s. 6 could be used where the legal description of the land was improper because it referred to the old registry system entry which had an outdated description of the land that included only part of the parcel**[4]**

In *Petroff Partnership Architects v Mobius Corp*, the court took into account the entire lien document in deciding that the claimant's failure to name the tenant as an owner in the correct section of the form could be cured by s. 6.**[5]** The Court did so because the lease was registered on title, the tenant was identified as an owner under the PIN and the tenant was also identified as an owner elsewhere in the form.

CONCLUSION

The test for whether a defective lien can be cured by Section 6 is one of degree and must be judged on a case by case basis. However, where a party fails to name the owner, the correct property or both, such an error would likely be considered a serious error and Section 6 will not be available to assist you.

[1] *Construction Lien Act*, RSO 1990, c C.30, s. 6.

[2] *Govan Brown & Associates Ltd. v. Equinox 199 Bay Street Co.*, 2014 ONSC 3924, 2014 CarswellOnt 8856 at para 28.

[3] *Williams & Prior Ltd. v. Taskon Construction Ltd.*, [2003] O.J. No. 498, 120 A.C.W.S. (3d) 941, 22 C.L.R. (3d) 1, at para. 75. and *Wellington Plumbing & Heating Ltd. v. Villa Nicolini Inc.*, 2012 ONSC 5444, at para. 41.

[4] *Ambler-Courtney Inc. v. CAAG Land Development Ltd.*, 1998 CarswellOnt 1636, 38 C.L.R. (2d) 58 at para 6.

[5] *Petroff Partnership Architects v. Mobius Corp.*, 2003 CarswellOnt 2260, [2003] O.J. No. 2434 at para 22.

Master Wiebe confirms obtaining judgment does not necessarily secure a lien bond

In *Built-Con Contracting Ltd. v. Lisgar Construction Company a Division of United Shelters Limited,* Master Wiebe determined that a plaintiff's default judgment obtained from a registrar over the counter was insufficient to satisfy section 37 of the *Construction Lien Act* which requires a perfected lien must be set down for trial within two years after the action is commenced.

Built-Con, the plaintiff in this case, registered a claim for lien on May 2011. The defendant, Lisgar, posted a lien bond in early June 2011 and obtained an order vacating the lien. On June 20, 2011, Built-Con commenced an action against Lisgar. The statement of claim asserted a lien against the posted security but after service of the statement of claim very little occurred. Eventually, Built-Con noted Lisgar in default and obtained default judgment from the registrar on March 29, 2012. Nothing happened thereafter until Lisgar discovered the default judgment in July, 2015. It then brought a motion to set aside the default judgment and a declaration the claim for lien had expired pursuant to section 37 of the *Construction Lien Act.*

Master Wiebe dismissed the motion to set aside the default judgment by finding that Lisgar had not put forward evidence to support a credible defence. Accordingly, the default judgment was upheld. Nonetheless, Lisgar argued the lien claim had expired and the default judgment from the registrar was not sufficient to satisfy section 37 of the *Construction Lien Act.* Based upon this technical, but correct

argument, Master Wiebe determined the registrar does not have jurisdiction under R. 19.04 of the *Rules of Civil Procedure*, to issue default judgments for lien remedies. As a result, Master Wiebe ordered the lien bond posted by Lisgar to be returned for cancellation. Built-Con argued, with some persuasiveness, that it was illogical to set an action down for trial where judgment was obtained. However, Master Wiebe confirmed that jurisdiction is jurisdiction. The proper course of action would have been for Built-Con to bring a motion for judgment before a judge under R. 19.05 in order to obtain judgment on its lien remedies, as opposed to seeking relief from a registrar over the counter.

This case demonstrates a technical but important lesson for plaintiff's side construction lien counsel. Specifically, when moving for judgment on an undefended construction lien action, it is imperative counsel moves for judgment before a judge; not a master. Otherwise, the above issue could occur and the client will be left with the normal enforcement remedies available, garnishments, writs, etc., as opposed to the superior remedies afforded by the *Construction Lien Act.*

Ontario Court of Appeal: Substantive Justice Outweighs Finality

In a number of recent decisions by the Ontario Court of Appeal[1], Ontario's top Court has highlighted the court's predisposition to have cases resolved on their merits rather than dismissed on procedural grounds.

The latest decision of *Labelle v. Canada (Border Services Agency)* ("*Labelle*") is consistent with the Court of Appeal's liberal interpretation of the *Reid* factors over the past few years. In this case, by applying the mandated contextual approach, the Court of Appeal allowed the appeal of the motion judge's Order declining to set aside the Registrar's Order, which administratively dismissed the action for delay.

In *Labelle*, one of the appellants slipped and fell in January 2008 at the border crossing in Fort Frances, Ontario. The appellants put the respondent, Canada Border Services Agency ("CBSA"), on notice of the claim in April 2008 and the Statement of Claim was issued in December 2009. The Claim was served on all respondents, including Abitibi Consolidated Inc. ("Abitibi") and International Bridge Company ("International"), in March 2010. By May 2010, the action was defended and CBSA cross-claimed against Abitibi.

In April 2009, Abitibi and International entered into protection under the *Companies' Creditors Arrangement Act ("CCAA")*. As a result, the appellants' claims against them were stayed.

The appellants made little effort to advance the action beyond the close of pleadings because her counsel was uncertain how to proceed in light of the above noted CCAA proceedings. The action languished until a Status Notice was generated by the Court in March 2012. Appellants' counsel inadvertently omitted to request a status hearing which prompted the Registrar to administratively dismiss the action. In July

2012, appellants' counsel promptly obtained the respondents' agreement to restore the action but failed to bring a motion to reinstate the action for approximately two years. By this time, the motion to set aside the Registrar's dismissal Order was opposed.

On March 25, 2015, the motion judge declined to reinstate the action. The lower Court found the respondents had suffered actual prejudice because: (1) CBSA lost its crossclaim when the action was administratively dismissed and CBSA was out of time to pursue third party claims against Abitibi and International; (2) CBSA was unable to defend itself because certain maintenance records were not available; and (3) the respondents were entitled to finality in the proceedings.

On appeal, the Court of Appeal unanimously allowed the appeal holding that the motions judge erroneously assessed the issue of prejudice for the following reasons:

(1) the motion judge did not appreciate that only prejudice occasioned by the appellants' delay in the proceeding is relevant. In this case, any actual prejudice pre-dated the litigation. The CCAA proceeding preceded the issuance of the Statement of Claim and therefore could not constitute prejudice relevant to the motion; and

(2) a defendant cannot create prejudice by failing to preserve and take appropriate steps to collect relevant evidence to alleviate any such prejudice. CBSA took no steps to preserve evidence despite timely notice of the litigation. CBSA also took no steps to pursue its claims against Abitibi and International in the CCAA proceedings.

As a result, the lower Court's analysis of prejudice, being the key *Reid* factor, was fundamentally flawed and the appeal was allowed permitting the appellants to pursue the action to trial on the merits.

***Labelle v. Canada (Border Services Agency)*, 2016 ONCA 187**

[1] *MDM Plastic Limited v. Vincor International.*, 2015 ONCA 28, *H.B. Fuller Company v. Rogers (Rogers Law Office)* 2015 ONCA 173, *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592

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