

March 2007

LEASEHOLD

Generals apparently do not realise that a landlord's land will not be subject to a general's lien arising from a tenant's failure to pay for leasehold improvements. The general has a right to lien against the tenant's leasehold interest in the land, but not necessarily against the land itself. The lien against a leasehold interest is worthless if the lease goes into default and has no extrinsic value. Under the Construction Lien Act, the landlord may be liable for the general's lien in the following circumstances:

1. The landlord is an "owner" for purposes of the work (i.e. the work was done on the landlord's credit or behalf or the work was done with the landlord's privity or for its direct benefit).

2. Under section 19(1) of the Act, the general has notified the landlord that the general is commencing the work and is looking to the landlord to be responsible for payment. The landlord has 15 days from the date of the notice to refuse responsibility for the improvement that the general is about to make on behalf of the tenant. If the landlord does not do so, it is liable; if the landlord does do so, the general either gets more security from the tenant or proceeds at its own risk.

We will not discuss the first possibility, save to suggest that it is very difficult to prove in a normal landlord-tenant situation. The case of 1276761 Ontario Ltd. v. 2748355 Canada Inc., a 2006 decision of the Ontario Divisional Court is instructive regarding the second possibility.

Notice

The regulations to the Act provide that if the notice is sent in the prescribed form 2, then the notice is adequate. The form requires the following: the name of the landlord and the general, the address of the work, a description of the work, a description of the contract (including the contract price), and a warning that sets out the terms of section 19(1).

The problem is that no one uses the form, probably because generals are unaware that it exists. Accordingly, a court usually has to try to determine whether the correspondence between the general and the landlord, or other indicia of notice, constitutes sufficient notice under section 19(1).

Some judges have decided that there may be no formal notice, but that other notice events are sufficient. Other judges have stated that there must be a sufficient express notice, not just some events that might lead to a landlord's liability.

The notice in the case above simply stated, "*(the general) will be working on your premises doing the leasehold improvements and Buildout of the (tenant's) bar & grill.*" In addition, however, the following notice events were present:

- a) details of the work were set out in the tenant's lease;
- b) the landlord and the general met;
- c) the landlord gave to the general its manual relating to tenant's work;
- d) the landlord reviewed and approved the plans; and

- e) the landlord was aware of the construction costs.

Not Enough

The court held that notice events, to be relevant, have to occur before the work begins. After all, the purpose of the notice is to ensure that the landlord knows it could be liable. To have a subsequent dawning on the landlord that it might be liable is not sufficient.

The court also held, quoting a previous Divisional Court decision, that "*the notice in any particular case envisages something 'arresting in the sense of attention getting' and that it must be 'sufficiently distinct and memorable to allow the landlord to know when the 15 day period, within which he may deny liability, commences'*".

The court decided the general's notice was insufficient to meet this test; the notice was not a fair warning of liability.

Moral

In every case that a general (and that means anyone who is contracting directly with an owner, be it a true general contractor or, for example, an electrical subcontractor) enters into a contract, the general should conduct a title search - the disbursement for which is approximately \$20.00 - to determine exactly who owns the lands. If the person with whom the general is contracting is not the owner, find out why the owner is not a party to the contract. If the owner will not be a party to the contract because it is the landlord, send the proper notice. If the landlord denies liability, get security from the tenant.

SLOPPY

Sloppy can refer to many things on a construction project: sloppy work, sloppy safety measures etc. In Delaurentis Construction Ltd. v. Sentinel Polymers Canada Inc., a 2006 decision of the Ontario Superior Court of Justice, sloppy refers to the manner in which the parties set up their contractual dealings.

Nutshell

The owner needed a contractor to demolish and renovate leasehold premises. The owner wanted the work completed as soon as possible because the sooner it was done, the sooner the owner could move in and open for business.

The owner obtained a CAT layout drawing. The contractor twice walked through the building and then quoted the work. It was not a large job; the quote was for approximately \$45,000. The owner accepted the quote and the contractor started the work.

The project did not go well. The owner and the contractor argued about the progress of the work, the number of men on site, and other matters. Within a couple of months, the owner threw the contractor off the site. However, as the contractor's principal put it, *"he accepted with a measure of relief, (the owner's) instruction to leave the worksite."*

The owner alleged that the contractor breached the contract because it was not proceeding quickly enough. The contractor commenced an action for payment for the work that it had performed and the owner counterclaimed for delay.

Contract

What is the first question

that you should ask? If you did not say, "What did the contract state?" you asked the wrong question.

In this case, the written contract stated precious little. From what we could see, there was but an oral acceptance to a bare bones written quote. Accordingly, the trial judge had to piece together the contract from oral testimony.

Ultimately, after listening to four days of evidence, the judge concluded that the contract did not contain any provision, written or implied, that the general would complete the work by a particular date; accordingly, the judge held that the contract had to be completed within a reasonable time. *"What is reasonable, of course, depends on the nature of the work and the circumstances under which the work was undertaken."*

Result

The judge held that the owner delayed the contractor because it did not supply the correct detailed drawings in a timely manner. The judge felt that it was unreasonable for the owner to expect the construction to proceed based solely on the original layout drawing. Further, the owner had ordered extras that also delayed the project.

The judge therefore held that the owner improperly terminated the contract, was liable for the work that the contractor performed, and could not set off for delay.

Although a proper contract would not have guaranteed that there would be no dispute, it would have gone a long way to resolving it. The owner obviously had unrealistic expectations that would have been dealt with at the beginning of the project, rather than at the end.

Speigel Nichols Fox LLP
44 Peel Centre Dr., Suite 400
Brampton, Ontario L6T 4B5
Tel: 905-791-6262
Fax: 905-791-6446
www.ontlaw.com

Jonathan Speigel*+
Brian Nichols
Irving Fox
Ian Latimer*
Robert McIntyre
Susanne Balpataky*
Carrie Kennedy
Paul Roth*

* members of construction litigation group
+ certified by Law Society as a specialist
both in civil litigation & construction law
+ roster mediator – Ontario Mandatory
Mediation program – Toronto

MISSION STATEMENT

**OUR CLIENTS COME
FIRST. EVERYTHING
ELSE FOLLOWS.**

Building Relationships is provided as information to our clients and friends on new developments and legal issues. of significance. The information is not intended to provide legal services. Readers should seek professional legal advice on any issues that directly concern them.