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INFORMATION

Section 39 of the Construction Lien Act allows a party further down the construction ladder to obtain information regarding the contracts between parties one and two rungs up the construction ladder. A subcontractor, who is not being paid, wants to know what is happening between the owner and the general contractor. Section 39 requires an owner or general to give the following information to subs or subsubs: the name of the parties to the contract, the contract price, the state of accounts, and a copy of any labour and material bond. The information a general or sub is required to provide regarding a subcontract is the same as for the prime contract, in addition to providing confirmation whether there is a provision in the subcontract for certification and a statement whether the subcontract has been certified as complete.

Usually the answers that a responding party gives to the section 39 request are relatively terse. Are these terse answers sufficient? This question and others are answered in Comstock Canada Ltd. v. Durr Systems, Inc., a 2007 decision of the Ontario Superior Court of Justice.

Stonewall

A sub registered a claim for lien. The owner posted security and vacated the lien from title. The sub made a section 39 request for information. The owner refused to supply any information.

The owner first argued that since it had posted security to remove the lien, it was no longer forced to provide infor-

mation. In essence, the fight was now between the general and the sub.

The judge felt that this argument overlooked "the distinction between the source of the recovery and the merits of the claim." The information may not be relevant to the source of the recovery, but could be very relevant to the merits of the claim. In any case, section 39 is not limited to information that is relevant. Further, the person supplying the information need not be a party to an action.

The owner also argued that since discoveries were upcoming, it need not give the information. The sub could obtain the information at the discoveries. The judge stated, "I do not see any reason to limit the application of s. 39 to situations where there is no discovery or where the discovery has been completed."

Finally, the owner then argued that there was a settlement between the owner and the general that had a confidentiality agreement provision. The easy answer to that argument was "So what!" Two parties contracting between themselves cannot abrogate the rights of others under section 39.

Detail

The interesting aspect of the decision dealt with the detail that the judge ordered the owner to provide. He stated that the information must contain at least the total amount the general billed, the total amount the owner paid, the dates of all invoices the general submitted relating to the work that the sub did, and the dates and amounts of all payments from the owner. Further,

he noted, "Depending on the facts of the case and the degree to which defendants' bills can be related to the plaintiff's claim, I can foresee a court ordering more detailed information. For instance, if the lien dispute focuses on a particular extra then it would seem reasonable that the information about that extra should be broken down."

While this degree of detail might be helpful for a lien claim, it is crucial for a trust claim. In a trust claim, the plaintiff has to prove that the defendant received money that it did not pay down in the normal course; it is through the owner/payor that the plaintiff can determine what really happened.

Use

By the way, a request for information under section 39 need not come only from a lawyer. There is no reason why a claimant cannot make the request to the payor. Accordingly, if, for example, a sub is not being paid, the sub should quickly send a section 39 request for information to the owner.

IMPROVEMENT AGAIN

We reported on Kennedy Electric Limited v. Dana Canada Inc. (see newsletter of July 2006) regarding improvements to an assembly line. The Ontario Court of Appeal has now rendered its decision on the appeal. If you recall, the case dealt with the attempt of a subcontractor, who had moved an assembly line, to lien the project. Whether the sub's work was lienable depended on whether the contractor provided work to the improvement or, in essence, just dealt

with chattels that were being supplied to the improvement, but were not part of the land and building themselves.

The trial judge decided, in his wisdom, that the work the sub performed was work that was not integrated into the building; it was merely work that could be portable from building to building. The Divisional Court by a 2-1 majority upheld the trial decision. The Court of Appeal unanimously upheld the Divisional Court and dismissed the appeal.

Why

Appeal courts can reverse on an error of law. The standard of review is one of correctness (i.e. if the appeal court disagrees with the decision in law, it can overrule).

The standard of review on a question of fact or a question of mixed fact and law is very different. In these situations, an appeal court can overrule only if the trial judge made a palpable and overriding error. For example, assume that, on a key issue, the trial judge stated that the facts were one way and, on the record, not only was there no evidence to support that finding, there was ample evidence to the contrary. In that scenario, the trial judge would have made both a palpable error and one that was sufficiently important that it would have affected the ultimate decision in the case. In this situation, an appeal court can overturn a trial decision.

Conversely, assume that the trial judge hears the evidence, prefers the evidence of one party to those of the other, and, based on that evidence, finds facts on which he or she bases a decision. Since there was evidence to support those findings of facts, an appeal court cannot overturn the decision based on the facts alone, even if the appeal court would have found the facts differently. Since the trial judge sees and hears the

witnesses give evidence, the appeal court must defer to the trial judge's findings of facts.

In *Kennedy Electric*, the Court of Appeal stated, "*the finding of portability is a finding of fact and therefore on appellate review subject to a standard of palpable and overriding error. I do not agree that the trial judge committed (a) palpable and overriding error in making this finding. There was evidence to support the finding. The assembly line had been built and disassembled before being transported to St. Marys for installation. The assembly line could be readily disconnected from the addition to the plant with no damage to the plant or its services. Moreover, Dana had a history of moving assembly lines from one plant to another. While a different judge may have come to another conclusion on the issue of portability, I am satisfied that it was open to the trial judge to reach the conclusion that he did.*"

Upshot

Whether a sub can lien a project regarding work on an assembly line is a question of fact. As the court stated, "*Each case will depend on its facts. In most cases, the installation or repair of machinery used in a business operated in a building, particularly where the machinery is portable, will not give rise to lien rights under the C.L.A. On the other hand, where machinery is installed in a building for the use of a business and is completely and permanently integrated into the building, a lien claim will arise. However, based on the findings of fact made by the trial judge in this case, it was open for him to find that no lien claim arose.*"

Since the sub did not have the right to lien, then, when the general went bankrupt, the sub had no priority for its work. The secured creditors received any money that ultimately was paid from the general's estate and the sub received nothing.

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