August 28, 2018

REID BUILT SERVICE LIST

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Your reference

Our reference
1001004429

Dear Developers, Lenders and Lienholders:

Georgetown Townhouse GP Ltd. v. Crystal Waters Plumbing Company Inc. ("Georgetown Application")

Reid Group October 3, 2018 "Owner Application"

As you are aware, the Receiver has scheduled an Application before Justice Graesser at the Edmonton Court House for October 3, 2018 to obtain directions with respect to various builder lien holdbacks arising from the sale of various developer properties.

In the Receivers Tenth Report, we had referenced the Georgetown Application, which was heard before Master Prowse. The Georgetown Application decision has now been released, a copy of which is enclosed for your reference.

The Master Prowse decision concludes a review of various indicia in addition to the lot sale agreements between Reid Group and the developers. The information reviewed is consistent with the information requested by the receiver in the draft Lienholder and Developer Affidavits previously distributed by our offices (and re-distributed yesterday, August 27th). The Georgetown Application decision highlights the importance that lienholders and developers each complete the information requested in the template affidavits so that the proper factual matrix is available for the Court's review on October 3.

We look forward to receiving filed template affidavits from various affected lienholders and developers at your earliest convenience.

Yours very truly,

Howard A. Gorman Q.C.
Partner

Copies to: Todd Martin / Tom Powell, Alvarez & Marsal Canada Inc.

Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc, 2018 ABQB 617 (CanLII)

Date: 2018-08-20
File number: 1701 15571
Citation: Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc, 2018 ABQB 617 (CanLII), <http://canlii.ca/t/htng5>, retrieved on 2018-08-28

Court of Queen's Bench of Alberta

Citation: Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc, 2018 ABQB 617

Date: 20180820
Docket: 1701 15571
Registry: Calgary

Between:

Georgetown Townhouse GP Ltd.

Applicant

- and -

Crystal Waters Plumbing Company Inc.; R. and R. Bruno Enterprises Ltd.; Kidco Construction Ltd.; Siena Flooring Inc.; Spindle, Stairs & Railings 2002 Ltd., Rob's Drywall Services Ltd.; 840307 Alberta Ltd. operating as Wildwoord Cabinets; Double R Building Products Ltd.; WM. Schmidt Mechanical Contractors Ltd.; Lehigh Hanson Materials Limited operating as Inland Concrete; Lehigh Hanson Manson Materials Limited; E2 Construction Ltd.; Gienow Canada Inc. doing business as Ply Gem; High Caliber Construction Inc.; TBA Cleaning Services Ltd.; Signature Fan Company Ltd.; Scotty's Rentals And Landscaping Ltd.; Majestic Electric Inc.; Prairie Pipe Sales Ltd.; 789072 Alberta Ltd.; R.K.G. Developments Ltd.; And Prairie Pipe Sales Ltd., 789072 Alberta Ltd.; And R.K.G Developments Ltd. operating as Lenbeth Weeping Tile Calgary And Watt Consulting Group Ltd.

Respondents

Reasons for Decision
of
J.T. Prowse, Master in Chambers

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[1] This case involves an often litigated issue: can a registered owner of land, who knows that work is being done on the land, defeat the liens of unpaid contractors on the basis that the it is not an 'owner' for the purposes of section 1(j) of the *Builders' Lien Act* (the "BLA") where it does not expressly request the work nor agree to pay the contractor for it.

[2] Section 1(j) of the BLA defines an owner as follows:

> "owner" means a person having an estate or interest in land at whose request, express or implied, and
>
> (i) on whose credit,
>
> (ii) on whose behalf,
>
> (iii) with whose privity and consent, or
>
> (iv) for whose direct benefit,
>
> work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

[3] There are three common categories of cases where this issue arises:

(i) a landlord (registered owner of land) disavows liens placed on its land by unpaid contractors of a tenant,

(ii) a purchaser who agrees to buy land upon which a building is to be built, and later takes a transfer of the land after the structure has been built, disavows liens subsequently placed on his/her land by unpaid contractors of the builder,

(iii) a developer/vendor (registered owner of land) who agrees to sell land, and allows the purchaser to build on the land prior to completion of the sale, disavows liens placed on its land by unpaid contractors of the purchaser.

[4] This case involves category (iii) but I will briefly discuss the other two categories. Typically, mere knowledge by the registered owner that the work is being done is not sufficient to constitute 'express or implied' consent so as to make the registered owner an 'owner' for the purposes of section 1(j) of the BLA. Rather, the registered owner must become actively involved in the building process to be held to have given express or implied consent.

(i) a landlord (registered owner of land) disavows liens placed on its land by unpaid contractors of a tenant,

[5] There is a well-developed body of case law on what degree of participation by a landlord is sufficient to make the landlord's title lienable notwithstanding that the tenant's contractor did not serve the landlord with a notice under section 15(1) of the BLA, which states:

> 15(1) When the estate on which a lien attaches is a freehold estate for a life or lives or a leasehold estate then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or that person's agent, notice in writing of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or that person's agent, within 5 days after the receipt of the notice, gives notice that the person holding that estate will not be responsible for the doing of the work or the furnishing of the materials. (emphasis added)

[6] In my decision in ***Labbe-Leech Interiors Ltd. v TRL Real Estate Syndicate (07) Ltd.***, 2009 ABQB 653 (CanLII), 2009 CarswellAlta 1898 (Alta. Q.B.), I listed chronologically and summarized eight of those earlier decisions issued between 1977 and 2001, including ***K.& Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.***, 1998 ABCA 178 (CanLII), 1998 CarswellAlta 417, and ***Lightning World Ltd. v Help-U-Build Ltd.***, 1998 ABQB 930 (CanLII), 1998 CarswellAlta 1010.

[7] In my view, it is better to consider cases specifically decided under category (iii), as discussed below, rather than to deal with landlord – tenant case law.

> **(ii) a purchaser who agrees to buy land upon which a building is to be built, and later takes a transfer of the land after the structure has been built, disavows liens subsequently placed on his/her land by unpaid contractors of the builder,**

[8] There are also a number of cases dealing with this situation.

[9] The leading case is ***Royal Trust Corp. of Canada v Bengert Construction Ltd.***, 1988 ABCA 581, 1988 CarswellAlta 39, where the plaintiffs entered into an agreement with a builder for the purchase of a lot and a home to be built on the lot. When the builder failed and foreclosure ensued, surplus funds were paid into court where a contest arose between the plaintiffs and the lienholders. The Court of Appeal held that the plaintiffs were not 'owners' of the property within the meaning of section 1(j) of the BLA, and their purchasers' lien took priority to the builders' liens.

[10] A similar result occurred subsequently in ***Permasteel v Semon***, 2000 ABQB 275 (CanLII), [2000] A.J. No. 523, where the purchaser 676 agreed to purchase the land from Semon with a building to be built, and Semon hired Permasteel to construct the building. After the building was completed and the land transferred to 676, Permasteel (who had not been paid in full by Semon) filed a builders lien. 676 argued, successfully, that it was not an 'owner' under the BLA, and its title was not subject to Permasteel's lien.

[11] Unsuccessful attempts were made, in two related decisions, by a party named the Gemba Group to assert that it was merely a purchaser of buildings to be built by Karmis, and therefore not subject to builders' liens. However, in each case, it was found that Gemba was in fact a joint venturer with Karmis, and hence an 'owner' under the BLA. See ***Con-Forte Contracting Limited Partnership v Eagle Hill Developments Ltd.***, 2012 ABQB 724 (CanLII),

2012 CarswellAlta 2246, and ***MCAP Service Corp. v Anthony Plaza II ULC***, 2013 ABQB 41 (CanLII), 2013 CarswellAlta 97.

[12] Again, in my view it is better to consider cases specifically decided under category (iii), as discussed below, rather than to deal with cases involving purchasers who agree to buy land with a building to be erected on the land and then conveyed to them.

> **(iii) a developer/vendor (registered owner of land) who agrees to sell land, and allows the purchaser to build on the land prior to completion of the sale, disavows liens placed on its land by unpaid contractors of the purchaser.**

[13] This is the category of cases directly relevant to this application. Georgetown is a developer/owner who agreed to sell the 48 lots in question to 167 (doing business as ReidBuilt Homes). Georgetown says that its interest in the land cannot be liened by contractors and sub-contractors of 167.

[14] The key factual component is the degree to which Georgetown became involved in 167's building activities. In the end it appears that, while Georgetown reserved to itself (in its contract with 167) the authority to become quite involved in the building process, Georgetown did not exercise that authority to any significant extent.

[15] The contract between Georgetown and 167 allowed 167 to occupy the land and build houses upon payment of the first two installments, constituting 15% of the lot purchase price.

[16] The goal for 167 was to complete and sell individual houses (and pay Georgetown in full for such lots on conveyance to the purchaser) so that, when the remaining 85% became due in 603 days, most or all of that 85% would already have been paid from the sale of individual completed houses.

[17] In the contract, it was provided that Georgetown had the right to approve the style and colours of the homes to be constructed. There is no evidence that Georgetown was ever asked for that approval or gave that approval.

[18] The contract further provided that 167 would not apply for a building permit for a house until it had first obtained Georgetown's approval for the plans for the house. There is no evidence that Georgetown was ever asked for or gave that approval, notwithstanding the 167 must have obtained building permits for the few houses which it built.

[19] The contract also provided that 167 was to provide utility servicing within the lot boundaries but only with contractors approved by Georgetown, and the work was to be supervised by Georgetown's engineers. There is no evidence that Georgetown approved the contractors used by 167 to install utilities within the lot lines, or that Georgetown's engineers supervised that work.

[20] The contract provided that167 was to keep the lots with an orderly and tidy appearance to the satisfaction of Georgetown, but there is no evidence that Georgetown ever directed 167 to tidy up their lots.

[21] The contract provided that Georgetown was to provide marketing support to 167 for the sale of homes on the lots, but the only evidence in that regard is that Georgetown set up and

maintained a website for the subdivision indicating that the single family dwellings in the subdivision were to be constructed by ReidBuilt Homes (167).

[22] Finally, the contract provided that Georgetown's approval was required for 167's onsite signage and advertising, but there is no evidence that such approval was ever sought or given.

[23] The lienholders argue that it is the expected arrangement at the outset that should count. In other words, the fact that Georgetown signed a contract giving them the authority to become extensively involved in the building process is what matters, not what in fact happened.

[24] I disagree. While Georgetown's contractual authority is a relevant factor to consider, to me it is not as significant as what in fact happened.

[25] For example, if a contract was silent as to the developer's authority to become involved in the building process, but the developer in fact became extensively involved, that would be of critical importance.

[26] I note that in ***K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.***, 1998 ABCA 178 (CanLII), 1998 CarswellAlta 417, which was a category (i) case, the Court was looking at the degree of involvement of the landlord in construction by the tenant and upheld the ruling that the landlord was not an 'owner' for the purposes of section 1(j) of the BLA.

[27] The Court noted that the landlord had reserved contractual rights to become involved in the construction, but had not exercised many of those rights. The Court commented:

> 8 Whether or not active participation is established is a question of fact. The learned Master held as follows:
>
> > ....the applicant (sic) participation in the substantial renovations consisted of:
> >
> > (a) approving concept plans and;
> >
> > (b) approving the selection of paint for the exterior of the building.
> >
> > The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials. ...
>
> 10 Our review of the record reveals no overriding or palpable error on the part of the adjudicators below. There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

[28] There are three cases which deal with the category (iii) situation involving developers who allow purchasers to begin building prior to conveyance to the purchaser, and I will now refer to them chronologically.

[29] In ***Stealth Enterprises Ltd. v Hoffman Dorchik***, 2000 ABQB 311 (CanLII), 2000 CarswellAlta 311, S & U Homes Ltd. ("S&U") was the registered owner of an apartment building. They sold the building by agreement for sale to 632766 Alberta Ltd. ("632") who intended to convert it into condominiums. In order to obtain financing to close the purchase, 632 refinished four of the apartment suites into show suites and spent other money on refreshing the lobby and improving other units. The deal collapsed and an unpaid contractor hired by 632 filed a lien against S&U's title.

[30] S&U was aware that the work was being done by 632 but had no direct dealings with 632's contractors. S&U had the following clause put into its written agreement to sell to 632:

> In the event the purchaser fails to complete on July 31, 1995 (or August 31, 1995 if extended) all work done by the purchaser shall become the property of the vendor without compensation and the vendor shall be entitled to all benefits and registrations and plans to stratify the building without compensation to the purchaser.

[31] S&U was held not to be an owner for the purposes of section 1(j) of the BLA. The Court reasoned as follows:

> 40 In this case, there was no active participation by either [of the principals of S&U]. [One of the principals of S&U] may have directed or given approval to [the lien claimant] to carry out certain work with respect to cleaning apartments so they could be re-rented; however, that work was relatively minimal. Certainly S&U obtained a benefit from the work which was done in that some of the suites had been upgraded and the lobby was expanded and made more visually appealing. Work had been done on the exterior. But none of the renovations were carried out at their request. They could have cared less about condominiumizing this building. They had no say in what was done, they gave no directions with respect to how anything should be done. The only way in which they stood to benefit was should the transaction not proceed, they would receive, without paying for them, certain upgrades. However, they were more interested in selling the building than reaping the so called benefits.

[32] The Court of Appeal dismissed an appeal from this ruling at 2003 ABCA 58 (CanLII), 2003 CarswellAlta 242.

[33] The second decision of note is ***E. Gruben's Transport Ltd. v Alberta Surplus Sales Ltd.***, 2010 ABQB 244 (CanLII), 2010 CarswellAlta 653. In that case the owner/developer (registered owner) was Alberta Surplus Sales Ltd. who agreed to sell 3 lots totalling 150 acres to1327923 Alberta Ltd. ("132"). In the agreement for sale Alberta Surplus allowed 132 to move ahead with development prior to closing, which involved 132 doing road work in order to further subdivide the land from 3 lots into 42 lots.

[34] Gruben's was a subcontractor doing road construction work needed for the further subdivion, and when the purchase fell through Gruben' filed a lien against Alberta Surplus' land.

[35] The Court disallowed Gruben's lien, reasoning as follows:

> Alberta Surplus Sales accommodated 1327923 in its effort to have the land subdivided. Though it had a reason for itself wanting the land subdivided, and though its approval of the subdivision documents was required to effect the subdivision, it had no direct or indirect involvement in arranging for the road work to be done. Its participation in the road work was entirely passive. It did not request that work either expressly or impliedly. It was not an "owner" within the meaning of s. 1(j) of the Builders' Lien Act. Gruben's lien is invalid.

[36] The third decision on point is ***Acera Developments Inc. v Sterling Homes Ltd.***, 2010 ABCA 198 (CanLII), 2010 CarswellAlta 1928, a decision which cited neither the ***Stealth Enterprises*** decision nor the ***Gruben's Transport*** decision.

[37] In ***Acera***, Acera Developments Inc. was the developer/vendor (registered owner of land) who agreed to sell land to Sterling Homes Ltd. and allowed Sterling to build on the land prior to completion of the purchase, in fact, prior to finalization of the subdivision of the land.

[38] When subdivision approval of the land was refused, Stirling filed a builders' lien for the value of the work done.

[39] Dealing with the first requirement under section 1(j) of the BLA that the work done by Stirling was done at the request, express or implied, of Acera, the Court of Appeal focussed on the degree to which Acera became involved in the construction. The Court stated at para 36 of its decision:

> ... there was, in my opinion, sufficient interaction between the builder and the developer to support the conclusion that the construction proceeded prior to subdivision at the owner's request. Indeed, the liened party who was actively involved in the supervision of the construction was fully aware that the construction was proceeding prior to subdivision approval. The lien claimant was contractually bound to construct improvements to a specific standard and scope. Indeed, Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing, and landscaping. All such plans were approved prior to construction. The construction was inspected by Acera as work progressed. In my opinion, that is sufficient to conclude that the homes were constructed at the request of the liened party.

[40] Dealing with the second requirement under section 1(j) that the work done by Stirling was for the direct benefit of Acera, the Court of Appeal stated at paragraphs 37, 38, and 39 of its decision:

> 37 It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is

directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.

38 Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.

39 In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

Conclusion

[41] In my view, considering the three decisions cited above, and based on the observations contained in paragraphs 17 to 22 of this decision, it is clear that Georgetown did not become sufficiently involved in 167's construction process so as to render Georgetown an 'owner' for the purposes of section 1(j) of the BLA.

[42] Another observation I would make, but not one upon which I make my decision, is that it seems one of the factors leading to upholding the lien filed by the builder in ***Acera*** was the unfairness of the developer encouraging and participating in construction by the builder prior to subdivision taking place, and then the developer through its own default (failing to meet a municipal requirement for subdivision) not accomplishing subdivision. That is not a factor in the present case.

[43] I rule that the liens filed by the respondent lien claimants are invalid and that the $245,045.21 paid into court to discharge the liens be paid out to the solicitors for Georgetown.

Costs

[44] If the parties cannot agree on costs they may seek a ruling from me in that regard.

Heard on the 15th day of August, 2018.
Dated at the City of Calgary, Alberta this 20th day of August, 2018.

J.T. Prowse
M.C.C.Q.B.A.

Appearances:

Jeffrey Wreschner
Masuch Law LLP
for the Applicant Georgetown

Glen Hickerson
Wilson Laycraft
for the Respondent lienholders