ONTARIO BAR ASSOCIATION
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NUTS AND BOLTS

February 2013 Construction Law Section

Plus Ca Change---
Timeliness of Lien Settled by Use of New Summary Judgment Rule

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In *Urbacon Building Groups Corp. v. The Corporation of The City of Guelph,* [1], a subcontractor, Swan & Associates Inc., moves for a declaration that its claim for lien was timely, and for partial summary judgment with respect to that issue. Guelph, the owner, opposes on the basis that the Swan lien was registered out of time. Urbacon, the contractor, consents to Swan's motion. The other subcontractor lien claimants did not oppose Swan's motion. The motion was brought in the context of a previous finding[2] that Guelph's minimum holdback obligation is $3,272,714.15, that $1.83 million be paid out to various subcontractors of Urbacon, and previous orders granting declarations and partial summary judgment for lien claimants Tagg Industries and On-Time Construction. This leaves about $1.32 million paid into court.

The Court found as follows:

1. The motions for partial judgment may finally resolve issues prior to trial and thus may expedite the trial process. As a result consent to bring these motions was granted.
2. The cases are replete with examples of concocted attendances at a job site to extend the time for filing a claim for lien. The court will not permit a claimant to bootstrap its claim by late attendance at a job site after its lien rights have expired. On the other hand, where there is no certificate or declaration of substantial completion of the contract or the subcontract (as is the case here), a subcontractor lien claimant is entitled to register a claim for lien within forty-five days from "the date on which the [claimant] last supplies services or materials to the improvement".
3. There is no proposition of law that says that "unlike a contractor, a subcontractor cannot take a hiatus or holiday from work".
4. The question is whether there is continued supply of services and materials under the contract, or whether a subsequent attendance is a sham or "bootstrapping" attendance to revive expired lien rights. The cases are fact-specific, and a sweeping conclusion that non-attendance at a construction site for 45 days will terminate lien rights is not correct.
5. Sometimes a fine distinction must be made between services and materials supplied in order to complete a contract and the same services and materials supplied merely for the purposes of extending the time for filing a lien which otherwise would have expired. This distinction is a question of fact in every case and often a difficult one to make. While it is trite law that the 45 day lien period does not extend if the work that is done is to repair deficiencies, this proposition is, it can be difficult to apply. The phrase "repair defects" and "remedy defects" and "remedy deficiencies" and "correct a known defect" are phrases that could cover many different factual situations, from uncompleted work (i.e. work that is not capable of being completed by factors beyond the lien claimant's control such as site unavailability, or hold-ups by other sub-trades, or the like), to incomplete work, to originally defective work, to subsequently discovered defects.

[1] 2012 ONSC 81 (CanLII),

[2] *Urbacon* v. *Guelph* (2009), 91 C.L.R. (3d) 145,

Care must be taken in using these expressions, and in determining, exactly, the nature of the "later work" sought to be relied upon by a lien claimant to extend the time for registration. Much will turn on the facts of each case.

6. The parties exchanged materials and conducted cross-examinations on this motion. On reading the materials, the court concluded that the matter could be decided on the written record, and that nothing would be added by observing the demeanour of the witnesses in the witness box. Swan tendered the evidence of witnesses with personal knowledge of the issues in question. Guelph did not: Guelph relied upon the documentary record, its cross-examinations of Swan's witnesses, and evidence given on examinations for discovery. The court was satisfied that it had the full factual record on the issue of the timeliness of Swan's lien. Guelph's concerns, arising from documentary evidence, are answered by Swan. There are no inconsistencies in the evidence. Guelph challenges the credibility of Swan's evidence, but does not go so far as to suggest fraud or deceit. And when Swan's evidence is placed in context, it makes sense. The court was satisfied that Swan has proven, on a balance of probabilities, that its date of last supply was September 19, 2008, and thus that its claim for lien was registered in time. The Court of Appeal's recent decision respecting the recent amendments to the *Rules* regarding summary judgment did not change this result.
7. Guelph raised the misnaming of Swan in oral argument. Misnaming a lien claimant can be a serious issue. However this this case had been going on for roughly three years. "*It is simply not acceptable for counsel to posit a new theory for the defence, without any notice, during argument on a judgment motion. To be sure, if new information comes to light, a party may change its position. But new information means disclosure of new evidence, not a fresh idea in counsel's mind. "*
8. *G*uelph objects to admissibility of a key piece of evidence adduced by Swan, a photocopy of a timesheet allegedly recording hours for one of Swan's employees, on the Guelph job site, on September 19, 2008. Guelph objects to this document on the basis that it is double-hearsay. First, the document is a copy of a business record. Second, the document was used to refresh the memory of witnesses produced by Swan. This does not lead to the document being admitted for the truth of its contents: it is the witnesses' refreshed recollection that is admitted, and not the document through which the recollection has been refreshed. However, the recollection of Ms. Swan, once refreshed, also renders the document "past recollection recorded". And that is a basis on which the document may be admitted for the truth of its contents.Third, the document was proved by one of its makers. The person who made the key notation on the document gave evidence: Ms. Swan, identified her handwriting, and testified about what happened. The document produced was a photocopy of the original. The failure to produce the original goes to whether the court is prepared to accept that the copy is, in fact, a genuine copy of the original, and may affect the weight given to the document. The original of the document was, apparently, in Mr. Swan's possession. The original was not located in the aftermath of his death. In the circumstances, the court was satisfied that the timesheet was admissible, and that the photocopy is the best evidence that remains of the original document. Thus the photocopy is admissible as evidence of the original. Admitting the timesheet into evidence for the truth of its contents did not mean, of course, that the court will necessarily accept the contents as true. The timesheet was admitted as one piece of evidence, to be weighed along with the rest of the evidence.

This case is a demonstration of how what was formally done at a settlement conference and a mini-trial of an issue can now be accomplished by a series of motions for summary judgment under the new Rule 20 that came into effect in January of last year. Plus Ca Change….

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