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Sheltering and Saving an "Expired" Lien

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There are time limits to preserve and perfect lien claims, as well as a time limit to set the lien down for trial. The enforcement of the two-year limitation period is mandatory and the Court retains no jurisdiction to exercise its discretion in applying it. If the two-year limitation period expires and the appropriate steps under section 37 have not been taken, it will not matter if the parties are engaged in settlement negotiations, in the middle of mediation or arbitration, or some other exigent circumstances. In *Deslaurier v. Le Groupe Brigil*, 2012 ONSC 3350 (CanLII),

Master MacLeod addressed the thorny problem of when a construction lien expires because of the two year limitation period to set an Action down for trial. Given that a lien proceeding is, per se, a class action, is it a requirement that all actions be set down for trial, or alternatively, that they be consolidated, in order to avoid the expiration of your particular claim, or will the setting down of one of the proceedings suffice?

In this case the general contractor set down its proceeding within the two year limitation period. That action is the "Pomerleau lien action" which met the two year limitation period by filing a trial record on September 7th, 2011. The defendant Le Group Brigil ("Brigil") was the developer of a condominium project in Orleans known as Petrie's Landing. The improvement in question was the construction of a 15 story residential tower; the first of four towers to be constructed on the 16 acre site. Pomerleau Inc. was the general contractor under a CCDC 3 cost plus construction contract and Brigil was the owner. A dispute arose between Pomerleau and Brigil and as a consequence Pomerleau registered a lien for more than $5 million against the project in the fall of 2009.

[5] Though Pomerleau was the general contractor with its own subtrades, Brigil had entered into direct contracts with three finishing trades, Tripoli (for drywall), Deslaurier (for cabinets), and Jo-Peach (for painting). Each of Tripoli, Deslaurier and Jo-Peach registered their own liens against the property. In addition to registering liens, each lien claimant also started an action and registered a certificate of action. The dates are important. They are as follows:

a. Deslaurier: action 09-46161 commenced September 9th, 2009
(lien was registered, July 28, 2009)
b. Jo-Peach: action 09-46119 commenced September 10th, 2009
(lien was registered, Aug 7, 2009)
c. Pomerleau: action 09-46228 commenced September 16th, 2009
(lien was registered, August 5, 2009)
d. Tripoli: action 09-46270 commenced September 18th, 2009
(lien was registered, August 6, 2009)

The parties sought an order for joint case management of the actions and had discussed proceeding by a judgment of reference. All of the plaintiffs assumed there would be a judgment of reference and the case conference would serve as the first hearing for directions under the reference rules or what in the Toronto practice used to be referred to as the "first pre-trial". Consent was ultimately not forthcoming and no judgment of reference had been obtained when the second anniversary of the first of these actions

approached. On September 7th, 2011 the Pomerleau action was set down for trial by counsel for the plaintiff in that action. None of the other actions were set down. On September 28th, 2011 then counsel for the defendant wrote to the plaintiffs and took the position that the Deslaurier, Jo-Peach and Tripoli liens which are the subject of these motions had expired. The question is whether or not this is so.

In simplest terms, provided a "preserved" lien has not expired (that is it was registered in time and more than 90 days have not elapsed since the date when the lien arose) the lien is "perfected" by sheltering as soon as any other lien claimant (having a lien arising from the same "improvement") commences an action and registers a certificate of action. Thus in this case all four liens, which had been duly registered and were unexpired preserved liens at the time, were "perfected" when the Deslaurier certificate of action was registered on September 9th, 2009. Had no other lien claimant started an action, they would all have remained sheltered under the Deslaurier lien which was perfected on September 9th, 2009. Assuming Deslaurier waited until the last possible day to register its lien in the first place, the Deslaurier lien would not have expired until September 11th, 2009. The registration of the Deslaurier certificate of action not only perfected the Deslaurier lien but also perfected the other liens by sheltering. Although the lien claimants are not subtrades of each other and all stand in a direct contractual relationship with Brigil, there can be no doubt that the building they were all working on is the same "improvement" within the meaning of the Act, and that horizontal sheltering is permitted. Of course the other liens which had been "perfected by sheltering" on September 9th, were then directly perfected when each one of them was the subject of their own timely certificate of action. In the final result there were four liens and four separate actions.

It is common ground that there has been no order for the trial of any of the actions. The Pomerleau claim was set down before the second anniversary of the date on which the first of these actions (Deslaurier) was commenced. The liens other than Pomerleau will therefore have expired under s. 37 unless the Pomerleau action is "an action in which the lien may be enforced" within the meaning of the statute. Read literally there can be no doubt that this is so. The requirement is not that "the action that perfected the lien" be set down for trial (or ordered for trial) but that "an action" be set down. And it need not be an action in which the lien "will be" or "must be" enforced but an action in which the lien "may be enforced". The plain wording of s. 37 therefore suggests that it is sufficient if another action in which the lien may be enforced is set down for trial. In fact every action commenced to enforce a lien is an action in which all of the other liens may be enforced because by operation of the Act all lien claimants will become parties to the action at the time of trial. This is consistent with the sheltering rules, which provide that only one action need be commenced to perfect all of the liens (providing it is commenced in time) and is evident from the following provisions of the Act.

a) S. 60 of the Act requires that when the date is set for trial of a lien action, the plaintiff must serve a notice of trial on any other person having a preserved or perfected lien;
b) S. 57 (1) of the Act provides that all parties served with the notice of trial are parties to the action;
c) S. 51 of the Act requires the court to try the action and all questions "that arise therein or are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it or on whom notice of trial has been served" and to give all necessary relief to all "parties to the action".

Under provisions such as ss. 44, 65, 80 and 84 the funds paid into court or the proceeds of sale of the land to which the liens attach are pooled and shared pro-rata by the lien claimants as their interests may appear and subject to the priority rules. Consequently unless the funds exceed the total of all of the liens those funds cannot be distributed until all subsisting lien claims have been adjudicated. This is the nature of the lien action as a class proceeding. Every action commenced to enforce a lien is therefore hypothetically an action in which every lien arising from the same improvement may be enforced.

D.W. Buchanan Construction Ltd. v. Bruce Township (1996) 27 C.L.R. (2d) 180 (Gen.Div.) had been taken to stand for the proposition that obtaining an order for trial of one action does not protect the others and that consolidation after a lien has expired cannot save an expired lien. However in that case it was not clear whether the sheltering rules would have saved some or all of the liens, and therefore the case was distinguishable on that basis.

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