

COURT FILE NUMBER 1901 09008  
COURT COURT OF KING'S BENCH OF ALBERTA  
JUDICIAL CENTRE Calgary  
PLAINTIFF Sunbelt Rentals of Canada Inc.



DEFENDANT 1712775 Alberta Ltd. Operating as HD Construction and Excelstar Holdings Ltd.

DOCUMENT **CHAMBERS ENDORSEMENT**

- Order Granted**
- Information Required**
- Order Rejected**
- Unable to Complete – see Comments/Reasons for further information**

**Comments/Reasons:**

This matter was heard as a special chambers application on April 13, 2023. While a number of very interesting points of builders' lien law were argued, I find that in the end, the decision is largely one that turns upon its facts.

On January 12, 2020 I granted a consent order declaring the lien of the applicant Sunbelt to be valid in the amount of \$28,851.11. The order was consented to by both counsel for the general contractor and counsel for the owner. Sunbelt was a subcontractor. There is another lien claimant, namely Detailed Painting Ltd. in the amount of \$15,774. No contest or issues were raised with the Detail Painting lien claim in that amount or the sufficiency of registration. While Detailed Painting makes no formal application for payment out of its lien claim, it was a subcontractor under the same prime contract, and it necessarily needs to be part of the lien payout consideration in order to ensure equity of treatment among lien claimants. I am satisfied that based

upon the lack of objection from any interested party in the face of a clear suggestion in the Sunbelt brief that the Detailed Painting lien should be paid, I find that the Detailed Painting lien is valid in the amount claimed of \$15,774.00 and I make that declaration.

There is a third claimant. Canada Revenue Agency claims a deemed trust claim for \$120,913.38 for unremitted source deductions of the general contractor HD Construction. While it does not make a formal application for payment of those funds, its affidavit does claim priority over all other claimants.

Understandably, the subcontractors Sunbelt and Detailed Painting would like to be paid now. They do not wish to be involved to the end of what may or may not be contested litigation between the general contractor HD Construction and the owner Excelstar. Long protracted litigation would be unfair to the lien claimants. No progress in the litigation would be even more unfair.

The lien claimants seek an order directing that payment of their liens be made now because they say that the evidence leads to the inevitable conclusion that the lowest that the lien fund could possibly be would still permit payment of the two liens and the CRA claim. No funds have been paid into Court so the liens remain as claims against the subject lands.

Given that CRA has not made a specific application for any monies at this point to be paid to it other than to claim its priority, I do not think that I can include the CRA claim in any application for payment. Its claim is not a lien claim that would need to be treated similarly to other lien claims. Further, I struggle with the idea that I can direct the owner to pay anything. The Court typically grants judgements, and if judgements are not paid, then enforcement proceedings may happen. I do not know if the owner has the ability to pay or not, and in this case there are disputes about the lien fund including whether major lien fund and minor lien fund concepts make a difference to the result. In my view, the most that I can do is grant a judgement and anything that might flow from a judgment. To that end, I find that the case is distinguishable from the decision made by Master Prowse, as he then was, in ***Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc, (Stealth Energy Services)***, 2017 ABQB 431.

There was also much discussion about major lien funds and minor lien funds and the posting or provision of a certificate of substantial performance. No attempt, however, was made to characterize segregate the work which was done into work that would qualify for a major lien fund or a minor lien fund.

I have reviewed the entire Court file. I do not see any defences from the owner that are filed. It appears that the distinction between the major lien fund and the minor lien fund is something that was not raised by way of a defensive pleading, but instead it was raised in resistance to this application.

One remedy under the ***Builders' Lien Act, RSA*** 2000, c. B-7 (as it then was) for non-

payment of a valid lien is sale of the subject lands. One defence to such a claim against an owner is to apply to fix the lien fund (or plural funds) and pay, it or them into Court, but that has not been done here, and it appears that little is being done in the dispute between the general contractor and the owner to do so. In fact, I am advised that there is a standstill agreement in the action between the general contractor and the owner. Accordingly, in my view, the lands remain subject to sale.

Further, I am not satisfied that there is a certificate of substantial performance that has an effect here for lien purposes for several reasons.

First, the HD Construction deponent says that he “sent” a certificate of substantial performance to Excelstar.

Sections 20 of the **Builders’ Lien Act**, as it then was, provides:

20(1) A person issuing a certificate of substantial performance under [section 19](#) shall, within 3 days from the date of issuing the certificate, post a signed copy of it in a conspicuous place on the job site to which the certificate relates so that persons working or furnishing materials have a reasonable opportunity of seeing the certificate.

(2) Where the person issuing a certificate of substantial performance fails to comply with this section, that person issuing the certificate is liable for legal and other costs and damages incurred by and resulting to a person by reason of the non-compliance.

A certificate of substantial performance needs to be posted. That is so that lien claimants to the major lien fund receive notice that it is time to file their lien. The deponent for the general contractor does not indicate that there was any posting, and my review of the file and transcripts does not find any posting, other than to lead to speculation that it may or may not have been done.

Secondly, there do not appear to be any lien claimants that require distinguishing between them as to a major lien fund and a minor lien fund. If there are two funds, the owner has done nothing toward fixing them and accounting for them and the undistributed balance remains part of a lien fund (see cases such as **Chandos Construction Ltd v Twin Peaks Construction Ltd**, 2016 ABQB 296).

Thirdly, there does not appear to be any evidence that the owner released the entire holdback on the strength of the certificate of substantial performance. Instead, the owner made some incremental payments but there was no formal release of a holdback or a lien fund on the strength of an actual analysis of a major lien fund. The purpose of the major lien fund and minor lien fund concept is to allow the bulk of creditors on a project to be paid without waiting for minor work to be completed at the end of the contract. There is none of that in the evidence here.

Finally, I am not even satisfied that the certificate of substantial performance that was

forwarded was even of the type contemplated or intended to be one under the **Builders' Lien Act**. Clause 5.5.1 of the CCDC contract used contemplates a similarly named "Certificate of Substantial Performance of the Work" for contractual purposes and payment review purposes which would arguably be something different.

Finally, the declaration of validity of the Sunbelt lien was made on consent without any clarification being sought as to whether it was being made with respect to a major lien or a minor lien fund.

Given the foregoing, in my view, section 24(2) of the **Builders' Lien Act** applies, which provides:

- 24(1)** When a certificate of substantial performance is issued,
- (a) any lien arising out of work done or materials furnished before the date of issue of a certificate of substantial performance is a charge on the major lien fund, and
  - (b) any lien arising out of work done or materials furnished on and after the date of issue of a certificate of substantial performance of the contract is a charge on the minor lien fund.
- (2) When a minor lien fund does not arise under [section 23](#), any lien arising out of work done or materials furnished is a charge on the major lien fund.**

(Emphasis added)

Section 49(6) of the **Builders' Lien Act** urges dealing with claims in a summary way, if possible, having regard to the amount and nature of the liens in question, and enforcement of them at the least expense. The liens here are relatively small and they are intertwined with the much larger dispute between the owner and the general contractor. The parties to that larger dispute have not evidenced a great enthusiasm to proceed with their dispute. Similarly, modern summary judgement law encourages summary dispositions when they can be done fairly. The general contractor supports a direction that the lien claims be paid.

So where does that leave matters?

Section 61(3) of the **Builders' Lien Act** says that in a forced sale subcontractors come before the general contractor. As indicated, the general contractor supports having the subcontractor liens paid.

I am satisfied, on a balance of probabilities basis that while it is arguable as to whether the minimum amount available from the lien fund might pay all of the two subcontractor liens and CRA (which may assert a priority position), I can conclude on a balance of probabilities basis that there will likely be at least enough funds to pay the two subcontractor lien claims. While I do not make a specific direction that those amounts be paid for the reasons which I have indicated earlier, and it is not presently known whether CRA will formally apply for payment of funds to it, I grant the following order:

If the lien claimants' claims have not been paid by the owner, or otherwise, within 4 months of release of these reasons, or the lien fund fixed on application by the owner and paid into Court within that time, the lien claimants shall each have leave to apply before me for an order directing sale of the subject lands to realize on the lien claims. They shall also have leave to speak to interest pursuant to the **Judgment Interest Act**, RSA 2000, c J-1 only (since the relief is primarily against the land) and standard schedule C costs.

The facts may or may not give a priority to CRA. CRA may have various options as to what it may do to assert its claim and there will likely be discussions necessary between the various parties to coordinate what happens next, particularly if CRA asserts a priority claim and is successful because that potentially affects the realization that might be necessary from a sale or voluntary payment by the owner or the general contractor.

I would make the following suggestion with respect to costs to be included in the liens if it is agreeable to the parties. Sunbelt would be entitled to standard Schedule C costs of this application to be included in its lien, as although it did not have a formal carriage role, it largely fulfilled that role. Detailed Painting would be entitled to \$500 in costs for its smaller supporting and monitoring role. If the parties are in agreement, they may put that costs disposition in the order. If the parties are not in agreement, they may certainly speak to costs before me by appointment and the order should simply reflect that costs may be spoken to.

Hopefully this gives the parties a path forward.

Thank you very much to the parties and their counsel for their helpful submissions.

**DATE OF DECISION: 2023-04-24**

Signed: \_\_\_\_\_

APPLICATIONS JUDGE J. R. FARRINGTON