IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Macdonald and Pace, JJ.A.

B E T W E E N:

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| TITAN CONSTRUCTION SERVICES LIMITED<br><br>appellant<br><br>- and -<br><br>ROBERT WASSON and BAACO PIZZA ATLANTIC LIMITED and LOUGHEAD ENTERPRISES LIMITED<br><br>respondent | Raymond F. Wagner and Anna Marie Butler<br>for appellant<br><br>Respondents were unrepresented<br><br>Appeal Heard:<br>October 8, 1987<br><br>Judgment Delivered:<br>November 6, 1987 |

THE COURT: Appeal allowed and the order of the trial judge varied per reasons for judgment of Pace, J.A.; Jones and Macdonald, JJ.A., concurring.

PACE, J.A.:

This is an appeal from the decision and order for judgment made pursuant thereto by the Honourable Judge Robert F. McLellan, a supernumerary judge for the County Court for District Number Four, wherein he dismissed the appellant's claim for lien against the respondent, Baaco Pizza Atlantic Limited, hereinafter referred to as "Baaco", in an action brought under the Mechanics' Lien Act, R.S.N.S., 1967, c. 178.

The facts are briefly that on December 27, 1984 Baaco Pizza Systems Limited signed a license agreement with David Loughead to operate a Baaco Pizza outlet in locations approved by Baaco.

On April 30, 1985 Robert Wasson, the owner of Civic Number 24 Inglis Street in the Town of Truro, in the County of Colchester, Nova Scotia, entered into a lease of the aforesaid premises to Baaco for the purpose of establishing a Baaco Pizza restaurant. The terms of the lease provided the tenant could sublet to David Loughead so long as he remained a Baaco Franchisee, and thereafter to any person who was a Baaco Franchisee. The lease also provided for leasehold improvements in accordance with the specifications as set forth by Baaco and upon sale by the landlord the tenant was allowed 60 days to exert its option to purchase at fair market value less the value of the leasehold improvements. This lease was duly registered in the Registry of Deeds in Truro on May 22, 1985.

In or about the month of April 1985 Mr. Reid Cox, representing Baaco Pizza Atlantic Limited, invited the appellant, who was in the business of general interior renovations, construction and the supplier of goods and materials, to tender on the construction and renovations of several Baaco Pizza outlets in Nova Scotia. The appellant, after a number of consultations with Mr. Cox and viewing the specifications supplied by Baaco, decided to tender on the Inglis Street job. By letter dated April 24, 1985 addressed to Baaco Pizza for the attention of Mr. Cox, the appellant tendered a proposal to carry out certain work at the Baaco Pizza outlet in Truro. The price quoted was $70,805.00.

The tender was accepted by Mr. Cox, who then advised the appellant that the contract for the work on the Inglis Street property should be drafted in the name of Loughead Enterprises Limited. This, evidently, was the first time that David Loughead or his company was brought into the transaction. However, on June 17, 1985 a contract was signed by the appellant and Loughead Enterprises Limited to carry out the work at the Inglis Street property.

The work went forward under the direction of the appellant and Mr. Cox. However, upon submitting appropriate invoices, payment was not forthcoming and a Claim of Lien for Registration was filed on September 12, 1985 and

subsequently the action proceeded to trial.

The trial judge found there were no complaints as to the workmanship and that it was carried out in good workmanlike manner. He found the appellant had proved its claim against Loughead Enterprises Limited in the amount of $62,042.09, and awarded the appellant this amount with interest at the rate of 10.01 per cent from September 12, 1985 to the date of judgment. He dismissed the appellant's claim against the respondent Baaco Pizza Atlantic Limited on the grounds that Baaco did not come within the meaning of "owner" as set forth in s. 1(d) of the Mechanics' Lien Act.

Although the appellant has set forth three grounds of appeal, I have concluded that the sole issue in this appeal is whether the trial judge erred in law in his interpretation of the definition of "owner" as contained in s. 1(d) of the Act.

The trial judge found that Baaco and Loughead Enterprises Limited both had an estate or interest in the lands sought to be charged. However, he found that Baaco made no request to have the work performed by the appellant.

In arriving at this conclusion, the trial judge stated:

> "There are numerous references to Cox' activities during the negotiations leading up to the signing of the contract above referred to which might indicate that Cox was an agent of Baaco Pizza. I do not propose to consider these in further detail because of the following direct testimony of Pomeroy (p. 12) and more particularly in cross-examination (p. 22). He

identified exhibit # 7 as the contract which he prepared "for our signatures for this project." This is the standard form of construction contract. It was signed by David Loughead on behalf of Loughead Enterprises Limited as owner and by Gerald Pomeroy as contractor. It is dated June 17, 1985. In cross-examination of Pomeroy the following appears:

> 'Q. So to the best of your knowledge so far as your company is concerned we are dealing with Loughead Enterprises Limited?
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> A. Our contract was with them, yes, we did the work for them and they were to pay us.'

"Opposite the word 'project' in the contract, the words 'Baaco Pizza Outlet - Truro, Nova Scotia' are typed in but the name of this defendant does not appear elsewhere in the document. Based upon this evidence I find that there was a request by Loughead Enterprises Limited to the plaintiff to perform the work but there was no request made by the defendant, Baaco Pizza Atlantic Limited for the performance of that work. I am not prepared to infer any request by Baaco in the circumstances summarized above.

It is clear from this statement the trial judge made no finding as to the agency status of Mr. Cox, but relied solely on the contract to determine the party upon whose request the work was to be performed.

In determining "with whose privity or consent" the work was performed the learned trial judge said:

> " There were no direct dealings between the claimant and Baaco unless it can be found upon a preliminary finding that Cox was an agent of Baaco. In limine, Pomeroy was justified in his belief that Cox was some sort of agent of Baaco's but the fact is that before the construction contract was prepared, he knew that the work was to be done for Loughead Enterprises Limited and whatever role Cox played, it was not as an agent of Baaco with authority to legally bind Baaco for renovation costs."

I turn now to the law applicable in the present appeal.

Section 1(d) of the Mechanics' Lien Act reads as follows:

> "1 In this Act,
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> ...
>
> (d) "owner" extends to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
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> (i) upon whose credit; or
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> (ii) on whose behalf; or
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> (iii) with whose privity and consent; or
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> (iv) for whose direct benefit;
>
> work, or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;"

A mechanics' lien is purely a creation of our provincial statute and in derogation of the common law. Thus the statutory provisions creating the right to a lien must be strictly construed. However, upon the claimant establishing that he falls within the statute the enforcement is remedial in nature and should be given fair liberal and beneficial interpretation.

Clearly, the definition of the word "owner" as it appears in the Act purports to enlarge the meaning of the word in the ordinary sense and envisages under certain

specific circumstances there may be more than one owner within the meaning of the statute.

The Supreme Court of Canada in John A. Marshall Brick Co. et al., v. The York Farmers Colonization Co. (1917), 54 S.C.R. 569, restricted the meaning of "privity and consent" by requiring some direct dealing between the contractor and the person whose interest is sought to be charged. Anglin, J., in delivering the majority judgment of the Court stated at p. 581:

> " While it is difficult, if not impossible, to assign to each of the three words 'request,' 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in Graham v. Williams, 8 O.R. 478; 9 O.R. 458, and approved in Gearing v. Robinson, 27 Ont. App. R. 364, at page 371, that 'privity and consent' involves
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> 'something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged * * *. Mere knowledge of, or mere consent to, the work being done is not sufficient.'
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> " There is no evidence here of any direct dealing by the respondent company with the purchaser's contractor such as is necessary to establish the 'privity' requisite to constitute the respondent company an 'owner' within the definition of the 'Mechanics' Lien Act.'"

In City of Hamilton v. Cipriani et al., [1977] 1 S.C.R. 169, Chief Justice Laskin in delivering the unanimous judgment of the Court stated at p. 173:

> " Schroeder J.A. in the Ontario Court of Appeal, looking to the substance of the transactions between the City, the Commission and McDougall, construed the interrelationship as one where the Commission became

> the general contractor for the City and, as such, proceeded to carry out its contract through another general contractor. In my opinion, this is a proper analysis, recognizing the fact that the Commission was being the City's banker. The City was and remained the 'owner' within s. 1(d) so as to make its land lienable under s.5, and it is idle formalism to contend that the work was not done at its request. I do not regard Marshall Brick Co. v. York Farmers Colonization Co. (1917), 54 S.C.R. 569, as standing in the way of this conclusion. That case turned largely on the words 'privity and consent' which were then conjunctive under the statute and they are now disjunctive. If the submission is that direct dealing is required before a request can be found, I am unable to accept such a limitation under the present Mechanics' Lien Act."

In Northern Electric Company Limited et al. v. The Manufacturers Life Insurance Company, [1977] 2 S.C.R. 762, Chief Justice Laskin in delivering the majority judgment of the Court stated at p. 720:

> " I would go further than the Nova Scotia Court of Appeal and further than my brother Martland in assessing whether the respondent is an 'owner' under s. 1(d). In my opinion, the work herein can properly be said to have been done also on the respondent's behalf, if not also for its direct benefit. It may be said that it was also done on behalf of Metropolitan and for its direct benefit, but, if so, this does not preclude a similar finding in respect of the respondent, having regard to the arrangement between it and Metropolitan."

I glean from the aforementioned cases that the Court must not only look to the contract, but also the substance of the transaction between the parties. Cipriani makes it clear that it is no longer necessary to have direct dealings between the parties before a request can be found and Northern Electric extends the definition of "owner" as

contained in s. 1(d) to include more than one party for whose direct benefit the work has been performed.

In the present appeal the trial judge refused or failed to make a finding that Mr. Cox was the agent for Baaco, although it was clear on the unrefuted evidence of Gerald Pomeroy, president of the appellant company, that such a relationship existed. Mr. Cox conducted the negotiations with Mr. Pomeroy which led to the appellant submitting the tender to Baaco Pizza. The Baaco lease with Mr. Wasson provided for leasehold improvements according to its plans and specifications, and the work was carried out by the appellant under the supervision of Mr. Cox in accordance with Baaco's recommendations. It must not be forgotten that the end result of this entire exercise was to build from a shell building a Baaco Pizza restaurant.

The fact that a contract was made between the appellant and Loughead Enterprises Limited does not, in my opinion, preclude a review of all the evidence to determine the real relationship between the parties in the light of the definition of "owner" as contained in s. 1(d) of the Act.

There can be no doubt on the evidence before us that Mr. Cox requested the appellant to tender on the job on behalf of Baaco and it was only after the tender was accepted by Baaco instructions were given by Mr. Cox to make the contract out in the name of Loughead Enterprises Limited, a franchisee of Baaco. By the terms of the license to

Loughead and by the provisions in the lease to Baaco it is reasonably clear that before any leasehold improvements could be undertaken approval and consent had to be forthcoming from Baaco. Although direct benefits would accrue to Loughead if all went well in the business, the same would, in my opinion, apply to Baaco. Baaco by the terms of its license was to receive six per cent of the gross income derived from the business and was entitled to charge a continuing advertising fee. Under the terms of the lease Baaco was to provide leasehold improvements and, if the landlord decided to sell the premises, Baaco had 60 days to exert its option to purchase and the costs of leasehold improvements was to be deducted from the purchase price.

Upon a review of all the evidence and for the reasons I have already stated, it is my respectful opinion the appellant is entitled to a lien against Baaco Pizza Atlantic Limited in the sum of $62,042.09 for the work and material supplied by the appellant at Baaco's request and within the conditions as contained in s. 1(d) of the Act.

In the result, the appeal should be allowed with costs to the appellant both in this court and the court below, and the order of the trial judge varied to include a lien against Baaco Pizza Atlantic Limited upon the same terms and conditions as those set forth in the order of the trial judge against Loughead Enterprises Limited.

Pace, J.A.

Concurred in: Jones, J.A.

Macdonald, J.A.

CANADA

PROVINCE OF NOVA SCOTIA 1987, S.C.A. 01744

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

on appeal from the

COUNTY COURT OF DISTRICT NUMBER FOUR

IN THE MATTER OF: The Mechanic's Lien Act

BETWEEN:

TITAN CONSTRUCTION SERVICES LIMITED, a body corporate

Plaintiff

- and -

ROBERT WASSON and BACCO PIZZA ATLANTIC LIMITED, a body corporate and LOUGHEAD ENTERPRISES LIMITED, a body corporate

Defendants

Heard Before: The Honourable Judge R.F. McLellan, J.C.C.

Place Heard: Truro, Nova Scotia

Date Heard: July 28, 1986

Counsel:

Raymond F. Wagner, Esq., for the Plaintiff;

Peter Markus, Esq., for Bacco Pizza Atlantic Limited and Loughead Enterprises Limited;

Thomas E. Hart, ESq., for Continental Bank

C A S E O N A P P E A L