

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Buchanan Design Group (Re), 2005 NSSC 133

Date: 20050429

Docket: S.H. 240711

Registry: Halifax

In the Matter of: The *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended

- and -

In the Matter of: The Claim for Lien by **3025369 Nova Scotia Limited**, a body corporate, operating under the business name, Buchanan Design Group, with head office at Lantz, Hants County, Nova Scotia, Claimant, against or upon the lands of **3072560 Nova Scotia Ltd.**, a body corporate, owning lands described as Hwy. No. 613 Lower West Pubnico, Yarmouth County, Nova Scotia and against **Canadian American Specialized Inc.**, of Truro, Nova Scotia, registered in the Registry of Deeds for Yarmouth County as Document Number 81258155

Judge: The Honourable Justice C. Richard Coughlan

Heard: April 5 and April 29, 2005 (in Chambers), at Halifax, Nova Scotia

Decision: April 29, 2005 (Orally)

Written Release: May 31, 2005

Counsel: R. Dan Harasemchuk, for the Applicant, R.J.S. Mechanical Inc.
Joseph M. J. Cooper, Q.C., and Karen Anthony, for the Respondent, 3025369 Nova Scotia Limited

Coughlan, J.: (Orally)

[1] R.J.S. Mechanical Inc. applies for an order:

... vacating the Claim for Lien pursuant to subsection 29(4) of the *Builders' Lien Act* and ordering that the Prothonotary shall pay out of Court the amount of \$41,687.50, plus interest in accordance with *Civil Procedure Rule* 41.13(3).

[2] Section 29(4) of the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, formerly the *Mechanics' Lien Act*, provides:

29(4) Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

[3] By order dated February 15, 2005, Goodfellow, J. made an order vacating the lien on the following terms:

1. That upon payment into the Court of the amount of \$41,687.50 by R.J.S. Mechanical Inc., the Lien registered by 3025369 Nova Scotia Limited, a body corporate, operating under the business name Buchanan Design Group against the lands of 3072560 Nova Scotia Limited and Canadian American Specialized Inc. as Document Number 81258155 at the Registry of Deeds for Yarmouth County, be and hereby is vacated pursuant to subsection 29(4) of the *Builder's Lien Act* of Nova Scotia;

2. That the \$41,687.50 paid into court by R.J.S. Mechanical Inc. will act as security exclusively for the claim of lien of 3025369 Nova Scotia Limited, a body corporate, operating under the business name Buchanan Design Group and for no other lien claims and will remain with the Court until such time as the Court shall order otherwise.

3. That by registering a Certificate Vacating Lien at the Registry of Deeds for Yarmouth County, it will be sufficient proof of the vacating of the Lien registered as Document Number 81258155 and that a notation will be entered at the Registry of Deeds for Yarmouth County indicating that the aforementioned Lien and any subsequently filed Lis Pendens related thereto, has been vacated and, therefore, no longer affects the properties listed in that Lien.

[4] Now the applicant is bringing an application pursuant to s. 29(4) not to have the registration of the lien vacated, but rather on the ground that no lien exists. Is the applicant able to bring such an application?

[5] The issue of *res judicata* does not apply as Goodfellow, J. did not make a decision on the prior application on the merits of the case. The issue in this application is different from the first application, in that the first application was based on a payment into court, and the present application is based on an argument that the lien is void.

[6] The question remains, is the application presently brought by R.J.S. Mechanical Inc. one that is authorized by s. 29(4) of the *Act*, or should the application have been more properly brought pursuant to Civil Procedure Rule 13?

[7] In dealing with an application for an order to vacate a lien on the ground that no lien exists, O Hearn, J.C.C. stated in *McLanders Contractors Limited v. Eastern Flying Services Limited* (1982), 55 N.S.R. (2d) 449 at p. 450:

The applicant is seeking to have the lien vacated not on the basis of payment into court, but on the ground that no lien exists. In such an application there is a heavy burden on the applicant to show that this is clearly the case and that the claim can safely be disposed of on a summary application, whether original or interlocutory, of this nature. The application is in some respects analogous to an application for summary judgment. The policy of the Mechanics' Lien Act is to provide mechanics and builders and other people in the construction industry with an important security, which should not be taken away except on the clearest grounds.

[8] The *Act* provides a mechanism to allow a determination no lien exists, and I find the application is properly brought pursuant to s. 29(4) of the *Builders' Lien Act*.

[9] R.J.S. Mechanical Inc. says the lien was registered out of time as the lien had ceased prior to the registration.

[10] For the purposes of this application, I assume the lien claimant, 3025369 Nova Scotia Limited last performed work on the lands and premises of 3072560 Nova Scotia Limited on December 8, 2004.

[11] The *Builders' Lien Act* provides in s. 24(3):

A claim for lien for services may be registered at any time during the performance of the service or within forty-five days after the completion of the service.

[12] The time limitation in s. 24(3) was extended from forty-five to sixty days by Chapter 14 of the *Acts* of 2004. Chapter 14 also provided in s. 21(2):

Section 9 applies to a lien pursuant to Section 24 of Chapter 277 with respect to an event referred to in Section 24 that occurred on or after the coming into force of Section 9.

[13] The amendments in Chapter 14 came into force January 1, 2005.

[14] The work which is the subject of the claim of lien having been completed in December, 2004, the time for filing a claim of lien is forty-five days after December 8, 2004.

[15] The claim for lien was filed January 25, 2005, more than forty-five days after the last work was performed on the lands. The forty-five days ended on Saturday, January 22, 2005. By virtue of the *Interpretation Act*, R.S.N.S. 1989, c. 235, the lien could be filed Monday, January 24, 2005. On January 24, 2005, there was a serious winter snow storm in Nova Scotia. Government offices were closed and therefore the claim of lien could not be registered. Government offices were opened January 25, 2005 and the claim of lien was registered. R.J.S. Mechanical Inc. says the registration was out of time and therefore the lien had expired.

[16] The *Interpretation Act* provides:

7(1) In this Act and in any other enactment,

....

(j) "holiday" includes Sunday, New Year's Day, Good Friday, Canada Day, Christmas Day, the birthday or the day appointed for the celebration of the birth of the reigning Sovereign, Victoria Day, Labour Day, Remembrance Day and any day appointed by any statute in force in the Province or by proclamation of the Governor General or of the Lieutenant Governor as a general holiday or for

general fast or thanksgiving, and whenever a holiday other than Remembrance Day falls on a Sunday the expression holiday includes the following day.

....

9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

....

19 In an enactment,

....

(k) where the time limited for the doing of any act expires or falls upon a Saturday or a holiday, the time so limited extends to and the act may be done on the first following day that is not a Saturday or a holiday;

[17] Every enactment is to be deemed remedial and interpreted to attain its objects. The purpose of s. 19(k) is to extend the time to do an act when the office where the act was to be done was closed and it is therefore impossible to perform the act on that day. Bearing in mind that object and the use of the word “includes” in the definition of “holiday”, the definition of “holiday” is not restricted to the days set out in s. 7(1)(j). For the purposes of s. 19(k), holiday includes a day

Government offices are closed. Therefore, the claim of lien was registered in time and the lien had not expired.

[18] The application is dismissed.

[19] I have heard submissions from counsel on the issue of costs. This was a case where there is no direct authority on point and I take that into consideration. I award the respondent costs in the amount of \$750.00 in the cause.

Coughlan, J.