

construction litigation bulletin

January 2010

the lien clock doesn't tick forever

Subcontractors have to fish or cut bait when it comes to registering lien claims. Ontario Courts will not allow them to extend the expiry date for preservation of their lien claim by returning to the job site to carry out trivial repairs after a subcontract is otherwise complete.

In *Applewood v. Baun*,¹ a building owner hired Baun Construction Inc. ("Baun") to refurbish the entrance of the Sheraton Centre in Toronto, located between Queen Street and Richmond Street, running east from York Street. Baun subcontracted out the supply and installation of several doors to the plaintiff, Applewood Glass & Mirror Inc. ("Applewood"). The subcontract was for \$50,236.50.

Applewood finished the door installations on June 25, 2006. On the same day, it invoiced Baun for the entire amount of the subcontract. Baun did not satisfy the invoice.

In late August, Applewood mentioned to Baun that it had accidentally installed a regular butt hinge on one of the doors instead of an electronic transfer hinge as required by the subcontract. Baun agreed to satisfy Applewood's June 25 invoice so long as Applewood installed the proper hinge by September 1, 2006. The hinge was installed on September 1, but Baun still did not pay what was owed.

Forty-five days later, Applewood registered a lien on title and sued the leasehold owners for the amount of the lien and the value of the statutory holdback set out in the *Construction Lien Act*.²

Section 31(3)(b)(i) of the CLA provides, among other things, that a person has a lien for services or materials supplied to an improvement that expires after 45 days from the date on which the person last supplied services or materials to the improvement. Applewood registered its lien on title on October 16, 2006, 45 days following September 1. The owners argued that Applewood's claim for lien expired on August 9, 2006, 45 days after it had finished installing the doors and invoiced Baun for its work on June 25, 2006. The Court agreed.

The Court found that the 45 day period for registering the lien started to run when the subcontractor provided its last legitimate supply of services and materials under the subcontract. As Applewood had invoiced Baun for the entire amount of the subcontract on June 25 for services that were performed by that date, the 45 day period started to run from then, and ended on August 9.

¹ *Applewood Glass and Mirror Inc. v. Baun Construction Inc. et al.*, [2009] O.J. No. 4845 (S.C.J.)(QL) [Applewood].

² R.S.O. 1990, c. C.30 [CLA].

The Court ruled that Applewood's subsequent installation of the electronic transfer hinge valued at only a few hundred dollars and which took only a few minutes to install, did not start the lien-clock running anew for two reasons:

1. doing work to rectify defective or improper work did not extend the time for registering a claim for lien; and
2. a trivial amount of work performed or services supplied after completion of a contract did not serve to extend the time within which a claim for lien had to be registered.

As the Court put it, "...an attempt to bootstrap lien rights after their expiry by additional work will not extend the time within which the claim for lien must be registered failing which it is not preserved."

Accordingly, Applewood's claim for lien was found to have expired on August 9 and had not been validly registered in October. The claim against the owners was dismissed.

The owners in this case were fortunate to incur no liability to Applewood. Section 22 of the CLA required the owner to holdback 10% from any payments due under its contract with Baun until all liens that could be claimed against the holdback had expired. The owners paid Baun the entire amount due on Baun's contract without holding back 10% and without any assurance that Baun had paid all its subcontractors. Had the Court found Applewood's lien to be registered within the proper period, it would have held the owners liable for the holdback, in this case amounting to \$13,327.92.

There is a clear lesson from *Applewood* for subcontractors and owners alike. Courts will not permit subcontractors to extend the period for filing a lien indefinitely. Once the subcontract is complete or abandoned, the 45 day clock starts to run and will not be reset where the subcontractor returns to the work site to effect trivial repairs or additions.

For their part, owners should be aware of when the 45 day period for lien registration begins and ends. Owners should not pay out the statutory holdback on any contract with a contractor until the time for registering all liens has expired and no liens have been registered. Should owners release holdback funds in advance of this time, they risk liability to subcontractors and having to effectively pay twice for the same work.

If you would like further information on this bulletin or have any questions with regard to Construction Litigation please contact Jason J. Annibale at jason.annibale@mcmillan.ca (416.865.7912) or Jeffrey Levine at jeffrey.levine@mcmillan.ca (416.865.7791).

by Jason J. Annibale and Jeffrey Levine

For additional information, contact any of the lawyers listed below:

Calgary	Matthew D. A. Potts	403.531.4704	matthew.potts@mcmillan.ca
Toronto	Luigi (Lou) Macchione	416.865.7116	luigi.macchione@mcmillan.ca
Montréal	Earl Cohen	514.987.5045	earl.cohen@mcmillan.ca

a cautionary note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2009.