Date Corrigendum Filed: 2023 05 16
Date: 2023 05 04
Docket: S-1-CV 2022 000 117

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANA MANAGEMENT LIMITED

Applicant

-and-

SMI CONSTRUCTION LTD.

Respondent

Application to declare lien invalid under *Mechanics Lien Act*

Heard at Yellowknife: January 11, 2023

Written Reasons filed: May 3, 2023

REASONS FOR JUDGMENT OF THE

HONOURABLE JUSTICE K.M. SHANER

Corrected judgment: A corrigendum was issued on May 16, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Counsel for CANA Management Limited: Toby Kruger

Counsel for SMI Construction Ltd: Douglas G. McNiven

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INTRODUCTION

[1] The Applicant, CANA Management Limited ("CANA") seeks an order to invalidate a mechanics lien registered by the Respondent, SMI Construction Ltd. ("SMI") against the leasehold interest of Ventura Stanton Inc. ("Ventura") in land held in fee simple by the Commissioner of the Northwest Territories. For simplicity, I will refer to both the Commissioner and the Government of the Northwest Territories as the "GNWT".

[2] In its own cross-motion, SMI seeks a declaration that the lien is valid.

[3] Neither Ventura, nor the GNWT are parties to this application.

[4] CANA's application turns on whether Ventura, is an "owner" under the *Mechanics Lien Act*, RSNWT 1988, c M-7.

[5] For reasons that follow, I find Ventura is not an owner and accordingly, CANA's application is granted and SMI's is dismissed.

LEGAL FRAMEWORK

[6] Subsection 4(1) of the *Mechanics Lien Act* provides:

> 4(1) The lien shall attach to the estate and interest of the owner in the building, erection or mine in respect of which the work is done or the materials or machinery are placed or provided and the land occupied or enjoyed in connection with the building.

[7] "Owner" is defined in s 1:

> "owner" includes
>
> (a) A person having an estate or interest in the lands on or in respect of which work is done or materials or machinery are placed or provided, at whose request and on whose credit, or on whose behalf or consent or for whose direct benefit, the work is done or materials or machinery are placed or provided, and
>
> (b) A person claiming under a person referred to in paragraph (a) whose rights are acquired after the commencement of the work or the placing or providing of the materials or machinery in respect of which the lien is claimed.

[8] Within the statutory provision, one finds three elements to the definition of "owner":

(a) The person against whom the lien is filed must have an estate or interest in the land;

(b) The person must have requested, expressly or impliedly, the materials be provided or the work done;

(c) The work must have been done or the materials provided to the person:

i. on their credit, *or*

ii. on their behalf; *or*

iii. with their consent; *or*

iv. for their direct benefit.

[9] This definition, albeit in differing formats, is shared in lien legislation in various Canadian jurisdictions including Alberta and Ontario and accordingly, case law from those jurisdictions which considers whether a party is an "owner" is helpful.

[10] The lien claimant must satisfy all three elements to demonstrate a party falls within the definition of "owner". *Royal Trust Corp of Canada v Bengert Construction Ltd,* 1988 ABCA 58 at para 13 (sub nom *Gypsum Drywall (Northern) Ltd v Coyes*).

[11] Whether each component in the definition of "owner" is satisfied is a question of fact, to be determined by looking beyond the formal contractual relations and delving into the substance of the relationships and the transactions amongst the parties. Among other things, the "request" for work or materials may be express or implied; and it is not necessary there be a privity of contract or a direct relationship between the lien claimant and the party whose interest the claimant seeks to encumber. *Hamilton (City) v Cipriani,* [1977] 1 SCR 169 at 173, 1976 Canlii 35; *Northern Electric Co Ltd v Manufacturers Life Ins Co,* [1977] 2 SCR 762 at 769, 1976 CanLII 203 (SCC); *Parkland Plumbing & Heating Ltd v Minaki Lodge Resort 2002 Inc,* 2009 ONCA 256 at 67.

[12] The Ontario Court of Appeal explained the rationale for this analytical framework in *Parkland Plumbing*:

> [67] The absence of direct dealings between the person said to be an owner under the Act and construction suppliers is only one factor to consider in examining the relation-ship between the parties. It is not determinative. Were it otherwise, a developer could easily escape its obligations to suppliers by the simple device of arranging for an associated or related company to directly engage suppliers for the provision of services or materials. This would defeat the intended protection provided to lienholders under the Act. *For this reason, the courts have recognized that a "request" for work to be done may be inferred from the totality of the circumstances, viewed in light of the substance of the relationship between the parties.* [citations omitted and emphasis added]

[13] To find an implied request, a court must have evidence of something more than just knowledge, acquiescence, or consent by an owner. In *Royal Trust,* Laycraft, CJA (as he was then) endorsed the following passages from *MacDonald v MacDonald Rowe (1964),*1963 CanLII 633 (PE SCAD), 49 MPR 91 (PEI SC) at 98:

> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept 'request' in s. 1(j): - it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.
>
> In ordinary language the word 'request' indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with 'ask' and 'solicit', synonyms which agree in meaning 'to seek to

> obtain by making one's wants or desires known'. 'Request', he says, has a suggestion of greater courtesy and formality in the manner of asking.

[14] Former Chief Justice Laycraft also stated:

> [23] The Supreme Court of Canada has considered the definition of 'owner' in similar words in other statutes in three cases since 1976: *City of Hamilton v. Cipriani* 1976 CanLII 35 (SCC), [1977] 1 S.C.R. 169, 67 D.L.R. (3d) 1, 9 N.R. 83; *Nor. Elec. Co. v. Mfr. Ins. Co.*, 1976 CanLII 203 (SCC), [1977] 2 S.C.R. 762, 79 D.L.R. (3d) 336, 18 N.S.R. (2d) 32, 12 N.R. 216; and *Phoenix Assur. Co. v. Bird Const. Co., supra*. None of these cases, in my opinion, stands for the proposition that contracting with a builder, of itself, brings one within the definition of 'owner'. In all of those cases, there was an *active participation* by the entity eventually held to have made a "request" and so to be within the definition of 'owner'. [emphasis added]

[15] Each of the terms "behalf", "consent" and "direct benefit" in the definition of "owner" under s 1(a) of the *Mechanics Lien Act* have been considered by courts in other jurisdictions under identical or substantially similar legislation. Their meanings are discussed in more detail later in these reasons.

[16] As there is no specific provision in the *Mechanics Lien Act* which binds the GNWT to its terms, the GNWT's freehold interest in the land cannot be subject to a lien. *Interpretation Act*, SNWT 2017 c 19, s 8. Ventura's leasehold interest, however, is an interest in land which may be subject to a lien provided other criteria of owner are met. *Pitts v Steen,* 1981 CanLII 2688 (NWT SC) at para 3, [1981] 3 WWR 89.

EVIDENCE

[17] In September of 2015 the GNWT contracted with Boreal Health Partnership to build a new hospital and to complete initial remediation work on what is now the old Stanton Hospital (the "Project Agreement"). A portion of the Project Agreement was tendered at the hearing, along with an internet link to the publicly available portions of it. Ventura is not mentioned in the Project Agreement, nor is there any other evidence in the record which links Ventura to the Boreal Health Partnership.

[18] The GNWT owns the land described as Lot 1, Block 162, Plan 1475, Yellowknife in fee simple on which the old Stanton Hospital (the "Building") sits. In 2016, it granted a 30-year lease to Ventura (the "Head Lease") for the land and the building.

[19] In 2017, Ventura, as landlord, and the GNWT, as tenant, entered into a 20-year lease for the Building (the "Building Lease"), subject to extension for a further term to run to the term of the Head Lease, less one day.

[20] The commencement date for the Building Lease is the first day following the expiration of the fixturing period, ie. the period during which the tenant has access to the premises to make tenant improvements. Paragraph 3.1.2 of the Building Lease provides the parties will attempt to enter into an agreement to complete the tenant improvement work required by the GNWT during the fixturing period; but in the event they do not enter into that agreement, paragraph 3.1.3 stipulates the GNWT will be granted possession of the Building to perform the work. There is no evidence Ventura and the GNWT entered into an agreement for Ventura to perform the work or to arrange for it to be done.

[21] Paragraph 6.6.1 of the Building Lease allows the GNWT to make tenant improvements at its own expense after the commencement date. Under the same provision, Ventura may make tenant improvements on the GNWT's behalf, if so requested. There is no evidence the GNWT made this request of Ventura.

[22] It is not entirely clear if SMI's work was performed during the fixturing period or after the commencement date. The date of the subcontract between CANA and SMI, being January 21, 2021, suggests the latter.

[23] Paragraph 7.7.2 provides any improvements not removed by the GNWT at the end of the term will revert to Ventura.

[24] Ventura is a general partner in Ventura Stanton Limited Partnership, along with SFT Stanton Limited Partnership. The purposes of the Ventura Stanton Limited Partnership are set out in a Certificate of Limited Partnership, filed with the Corporate Registry on October 2, 2020 as, follows:

> The Limited Partnership was formed for the purposes of providing leasing, refurbishing, developing, and subleasing the repurposed Stanton Hospital in Yellowknife, NWT, with a view to deriving income and to making a profit . . .

[25] On January 18, 2021, the GNWT and CANA entered into a contract for the tenant improvements to the Building. CANA then executed two subcontracts with SMI to perform some of the work, on January 29, 2021. Ventura is not a party to the contract between the GNWT and CANA, nor is it a party to either of the subcontracts between CANA and SMI. There is no evidence Ventura was involved in negotiating either subcontract.

[26] SMI was not paid for all of its work. That is the subject of a separate proceeding it filed against CANA and others.

[27] SMI registered a lien under the *Mechanics Lien Act* on May 6, 2022 against Ventura's leasehold interest.

[28] Michael Stack is a director of SMI and gave affidavit evidence on its behalf. In cross-examination on his affidavit, he confirmed: SMI dealt solely with CANA, including sending all invoices to CANA; Ventura made no requests to SMI for work or materials; SMI took no direction from Ventura; Mr. Stack did not know if Ventura inspected SMI's work; Ventura provided no credit to SMI; and it was CANA which removed SMI from the project. Mr. Stack was asked if he had personal knowledge of arrangements between Ventura and the GNWT. His response was:

> I don't know the ins and outs of it. I know there's an arrangement there. I know that Ventura will be renting a building or taking control of the building for 30 years … I know [the GNWT is] going to be paying them quite a substantial amount of rent during that period of time, so I know that.

ISSUES

[29] It is not disputed that Ventura's lease makes it a person with "an estate or interest" in the lands on which SMI performed the work. It is also clear Ventura is not a party to the subcontracts between CANA and SMI, nor the one between the GNWT and CANA. Further, Ventura did not make an *express* request for the work to be done or the materials supplied.

[30] The remaining questions are these:

(a) Based on the substance of the transactions amongst Ventura, the GNWT and CANA, if any, can it be inferred the work was done or the materials were supplied at Ventura's request? and

(b) If there was such a request, was the work done or were materials provided

i. on Ventura's credit; or

ii. on Ventura's behalf; or

iii. with Ventura's consent; or

iv. for Ventura's direct benefit?

THE PARTIES' POSITIONS

[31] CANA's position is Ventura is not an owner as that term is defined in the *Mechanics Lien Act*. It points to the following in support of its argument: there is no evidence Ventura requested the work and further, even if a request could be implied, the work was not done on Ventura's credit, on its behalf, with its consent, or for its direct benefit. The lien is therefore invalid.

[32] SMI argues the substance of the relationships and transactions amongst the CANA, Ventura and the GNWT is such that the Court should find there was an implied request by Ventura. The factors it cites in support of its position can be summarized as follows:

(a) This is part of a public-private partnership ("P3") infrastructure project designed in part to permit the GNWT to distance itself from potential liability associated with it. Specifically, the GNWT and Boreal Health Partnership used Ventura and CANA to create the distance by having SMI and others build the tenant improvements;

(b) Ventura and the GNWT get the benefit of SMI's work, with the GNWT receiving the benefit of leasing a long-term health facility under the Building Lease and Ventura receiving rent from the GNWT. Ventura also benefits from the tenant improvements at the end of the term; and

(c) Ventura is a partner in Ventura Stanton Limited Partnership, the purposes of which include building tenant improvements so it can become the GNWT's landlord and profit from its leasehold interest.

ANALYSIS

Was there an implied request?

[33] Respectfully, the evidentiary record does not allow the Court to conclude Ventura made an implied request that the work be performed, or the materials supplied.

[34] SMI's asserts the Boreal Health Partnership and the GNWT utilized a P3 structure under which they contracted with Ventura and CANA, to avoid liability. This is a speculative assertion which lacks any evidentiary foundation. Further, the P3 contract between the GNWT and Boreal Health makes no mention of Ventura.

[35] There is no doubt Ventura, as landlord, had knowledge of the tenant improvements and by the terms of the Building Lease, it consented, generally, to them being performed. As set out in *Royal Trust*, however, knowledge and consent do not amount to an implied request. There must be some degree of active participation. That participatory threshold has not been met. There is no evidence Ventura actively participated in any aspect of the tenant improvements.

[36] Contrary to SMI's assertion, Ventura *did not* build the tenant improvements. There is no evidence to support this. Moreover, and as noted, the Building Lease provides the parties *may* enter into an agreement for Ventura to construct the tenant improvements during the fixturing period but if they do not, the GNWT is permitted to perform the work itself. The Building Lease also permits the GNWT to make alterations and improvements following the commencement date or to request Ventura perform the work on its behalf. There is no evidence the GNWT asked that Ventura perform, direct or request, nor that Ventura did indeed perform, direct or request, any work for the GNWT as tenant. Rather, the work was requested and directed by the GNWT and its general contractor, CANA.

[37] There is no evidence Ventura provided instruction to CANA, the GNWT or any subcontractors directly or indirectly after the work began. There is no evidence Ventura played any role in inspecting or approving SMI's or other subcontractors' work on the tenant improvements.

[38] The fact that Ventura entered into the Ventura Stanton Limited Partnership, the purposes of which are ". . . leasing, refurbishing, developing, and subleasing the repurposed Stanton Hospital in Yellowknife, NWT, with a view to deriving income and to making a profit . . ." does not affect the result. Ventura Stanton Limited Partnership is not the landlord. The landlord is Ventura, a separate corporate entity, which is legitimately collecting rent and permitting tenant improvements under the terms of the Building Lease. There is no evidence Ventura Stanton Limited Partnership is involved in the leasing arrangement between Ventura and the GNWT.

[39] There being no express or implied request by Ventura for tenant improvements, the lien against its leasehold interest in the land is invalid.

Was the work done or were materials provided on Ventura's credit; or on Ventura's behalf; or with Ventura's consent; or for Ventura's direct benefit?

[40] Although the foregoing is sufficient to dispose of the matter, I have considered whether one or more of the factors in the second set of criteria have been made out. In my view, none of them have.

[41] The work was not done on Ventura's credit. This was confirmed by SMI's representative, Mr. Stack.

[42] The work was not done on Ventura's "behalf". This term, as it is used in the *Mechanics Lien Act,* implies agency, specifically the GNWT or CANA acting on Ventura's behalf. *Haas Homes Ltd v March Road Gym & Health Club Inc,* 2003 CanLII 8607 (ONSC) at para 17. The evidence does not support such a finding. There is no evidence of Ventura making a request of either CANA or the GNWT to contract as its agent for the construction of improvements. The only conclusion the evidence supports is that in contracting with SMI, CANA was acting solely on behalf of the GNWT.

[43] The work was not done with Ventura's "consent". The terms of the Building Lease permit tenant improvements; however, this is not the "consent" contemplated in the definition of "owner" in the *Mechanics Lien Act.* In this context, "consent" is akin to direct dealings between the SMI and Ventura. Mere knowledge of, or mere consent to, the work is insufficient, as are the provisions in the Building Lease allowing for tenant improvements before and after the commencement date. *John A Marshall Brick Co v York Farmers Colonization Co,* [1917] 54 SCR 569 at 581, 1917 CanLII 596; *Pinehurst Woodworking Co v Rocco,*1986 CarswellOnt 669 at para 54, [1986] OJ No. 41.

[44] Finally, the work was not done for Ventura's "direct benefit." To be a "direct benefit" as that term is used in the *Mechanics Lien Act,* there must be an immediate benefit to Ventura. Neither a reversionary interest, which will only materialize years later once the Building Lease has run its course, nor a contingent interest based on the possibility of the GNWT's future default, offer a direct benefit. *Royal Bank of Canada v 1679775 Alberta Ltd,* 2019 ABQB 139, at paras 146-151; *Synergy Projects (Destiny) Ltd v Destiny Bioscience Global Corp,* 2022 ABQB 384 at para 69.

CONCLUSION

[45] Ventura is not an "owner" under the *Mechanics' Lien Act* and accordingly, the lien filed against its leasehold interest is invalid.

ORDER

[46] An order will issue declaring the lien registered as instrument number 213088 invalid and directing the Registrar of Land Titles to cause the lien to be cancelled upon presentation of the order.

[47] CANA requests damages be assessed against SMI for wrongful filing of the lien and that costs be awarded against SMI on a solicitor-and-client basis. These applications are adjourned without a date and may be brought back by CANA on notice to SMI in the usual manner.

"K.M. SHANER"

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
4th day of May, 2023

Counsel for CANA Management Limited: Toby Kruger

Counsel for SMI Construction Ltd: Douglas G. McNiven

Corrigendum of the Reasons for Judgment

Of

The Honourable Justice K.M. Shaner

1. An error occurred in Paragraph 31

   Paragraph 31 reads:

   [31] (…) there is no evidence **CANA** requested the work and further, even if a request could be implied, the work was not done on Ventura's credit, on its behalf, with its consent, or for its direct benefit. (…)

   Paragraph 31 has been corrected to read:

   [31] (…) there is no evidence **Ventura** requested the work and further, even if a request could be implied, the work was not done on Ventura's credit, on its behalf, with its consent, or for its direct benefit. (…)

2. The file number has also been amended to read:

   S-1-CV-2022-000 **117**

3. The citation has been amended to read:

   Cana Management Limited v SMI Construction Ltd., 2023 NWTSC 7.cor 1

(The changes to the text of the document are highlighted and underlined)

S-1-CV-2022-000 117

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