Court of King's Bench of Alberta

Citation: Xemex Contracting Inc v Koor Energy Ltd, 2023 ABKB 577

Date: 20231012
Docket: 2201 01829
Registry: Calgary

Between:

Aspen Properties (Northland Place) Ltd.

Appellant/
Defendant

- and -

Xemex Contracting Inc.

Respondent/
Plaintiff

- and -

Koor Energy Ltd.

Defendant

Reasons for Decision
of the
Honourable Justice R.A. Neufeld

Appeal from the Endorsement Decision by
J.R. Farrington
Filed on the 25th day of March, 2023

I. Introduction

[1] Aspen Properties (Northland Place) Ltd ("Aspen") appeals an Applications Judge decision in which it was decided that a builder's lien registered against a small downtown commercial/office building had been validly registered. The lien was filed by Xemex Contracting Inc. ("Xemex") in respect of work it had done under contract with a tenant of Aspen, for which it had not been paid. The tenant (Koor Energy Ltd) did not defend an action brought by Xemex and did not take occupancy of the premises, leaving it in a state of disarray for Aspen.

[2] At issue before the Applications Judge, and for this Court on appeal, is whether Aspen's fee simple ownership of the building can properly be subject to a lien. This turns on whether Aspen was an "owner" as defined in s.1(j) of the *Builder's Lien Act* (now the "*Prompt Payment and Construction Lien Act*"):

> (j) "owner" means a person having an estate or interest in land at whose request, express or implied, and
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> i. on whose credit,
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> ii. on whose behalf,
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> iii. with whose privity and consent, or
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> iv. for whose direct benefit
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> work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after commencement of the work or the furnishing of the material;

[3] The Applications Judge found that Aspen was an "owner", as the work was done at Aspen's implicit request and Aspen directly benefitted from it. Consequently the lien was declared to be valid.

[4] Decisions from an Applications Judge are reviewable on a standard of correctness. Appeals are to be conducted on a *de novo* basis. On appeal, new evidence may be provided, and new arguments made. Alternatively the parties may simply reargue their positions, relying on the previously filed affidavits and case authorities. That is the case here.

[5] The decision of the Applications Judge correctly began its analysis of the validity of the lien by referencing the findings of our Court of Appeal in ***Royal Trust Corp of Canada v Bengert Construction Ltd (1988)***, 85 A.R. 210, as quoted in the more recent ABCA decision of ***Acera Developments Inc v Sterling Homes Ltd***, 2010 ABCA 198:

> "...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 more than mere knowledge or consent.
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> 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 ones wants or desires known". "Requests", he says has a suggestion of greater courtesy and formality in the manner of asking".

[6] The Applications Judge went on to conclude that according to the case law, the common element of an "ownership" finding is that there was "something more" present beyond mere knowledge that the construction was taking place. The leasehold improvement inducement, together with the approval and monitoring activities of Aspen were, in the opinion of the Applications Judge, sufficient to classify it as an "owner" of the renovation project and therefore subject to a valid lien.

[7] Aspen argues that the Applications Judge erred in his application of the case authorities to the facts of this case. It says that the building construction guidebook, including the approval of plans, placement of insurance, and identification of procedures to be used during construction, is not directed at the tenant improvements themselves. Rather, those protocols and procedures are directed at ensuring that the work done on site do not adversely affect the building, other tenants, or the landlord. For example, the guidebook imposes requirements on use of common areas during construction, noise mitigation, use of elevators, use of loading docks, and responsibility of contractors and subcontractors to comply with occupational health and safety laws. More importantly, the actual activities of the landlord during the construction fell far short of what the landlord could theoretically have done under the terms of the Construction guidebook. For example, at no point did the landlord approve plans other than those pertaining to work that could affect the building itself, or other tenants, and at no point did the landlord conduct inspections or give specific directions to Xemex.

[8] Xemex responds that the Applications Judge correctly found that the purpose of participating in the project is irrelevant. Even if Aspen was only participating to protect its other tenants and the structural integrity of its building its participation was sufficient to make it an owner of the project for the purpose of the ***Act***. Xemex also says that the landlord benefitted from the renovation work done as owner of the improved building.

II. Assessment

[9] As noted in ***Royal Trust Corp of Canada v Bengert Construction Ltd (1988)***, 85 A.R. 210, cases involving liens placed against fee simple owners by contractors working for tenants must be decided on their own individual facts and circumstances.

[10] If there is a common thread to the case authority regarding owner liability (for builders lien purposes) it is that once the owner of property moves beyond being a passive, or knowledgeable observer of work done on their property and becomes actively involved in the project they will be at risk of having their interest in the land subjected to a lien. For landlords, this means that if a tenant wishes to undertake work on a building, an important decision must be made: that is, whether to distance oneself from potential liability to lien claimants (on default of the tenant), or incur that risk in order to make sure that the work is properly done, will not adversely affect the building and other users, and will in the event of default by the tenant actually improve the building rather than detract from it.

[11] Although individual cases vary in result, the case law provides some direction as to the markers of active participation that may lead to a finding that a landlord is an "owner" of a project. For example, if a landlord approves plans for leasehold improvements and conducts inspections it is much more likely to be found to have actively participated in the project (and hence impliedly requested that it be undertaken): Providing inducement for tenant improvements would fortify such a finding by making it clear that the landlord knew of such plans in advance

(at least in a general way), and indeed facilitated the work through financial incentives. Similarly if a landlord benefits directly from the work done such as through improvements to areas occupied by the landlord itself, or through sharing in increased revenue due to the improvements, a finding of active participation is more likely to be made as the direct benefit of the improvements may explain why the work was impliedly requested in the first instance.

III. Did Aspen expressly or impliedly request the work to be done?

[12] Xemex argues that Aspen actively participated in the renovation, in the following ways: by issuing a comprehensive manual dealing with

1. the prerequisites for approval of construction by the landlord (approval of demolition by the landlord, and a City demolition permit: approval of architectural, mechanical, structural and electrical drawings by the landlord's property manager/project manager; a city of Calgary building permit; and proof of insurance;
2. procedures for minimizing construction impacts on and within the building;
3. security measure, procedures and responsibilities;
4. loading dock procedures;
5. eevator use requirements and restrictions;
6. hours of work restrictions;
7. garbage disposal requirements;
8. recommended waste diversion methods;
9. restrictions on use of common areas;
10. approval by landlord of X-Ray, coring cutting and chipping activities and plans;
11. procedures for and approval of work affecting base building systems such as HVAC, electrical, Plumbing, Life Safety;
12. requirements for life safety systems, including use of designated subcontractors;
13. restrictions on hoarding;
14. construction cleaning requirements;
15. occupational health and safety requirements and responsibility;

[13] All of the foregoing were to be accepted by the contractor in advance. Xemex complied by signing the acknowledgement specified in the manual.

[14] In addition to the requirements of the manual itself, Xemex says that Aspen took a hands-on approach during the renovation project. It assigned three employees to liaise with Xemex, one of whom acted as the facilitator of the first construction kick-off meeting held before Xemex started work. It reviewed and approved plans as submitted by Xemex, as required by the manual. It had meetings with Xemex and its subcontractors, conducted walk throughs, reviewed the initial bid, reviewed building permits, change orders and invoices, and required Xemex to

execute a Prime Contractor Agreement Assignment and Assumption of Prime contractor Status letter accepting liability for OHSA obligations and indemnifying Aspen.

[15] Aspen does not deny having put these protocols, procedures and restrictions in place. It argues that the purpose of those restrictions was to protect itself, its building and its other tenants from the potentially adverse impacts of construction. The purpose was not to encourage or facilitate improvement of the building for Aspen's advantage. Aspen argues that the Applications Judge erred in law by finding that the purpose of Aspen's "active participation" was irrelevant to the issue whether there was an implied request by Aspen that Xemex undertake the renovation Project. It also says that when Xemex left the job due to lack of payment by Koor Energy Ltd, the project was in a state of disarray, and unsuitable for marketing without substantial investment (estimated at $6-$8 per square foot).

[16] Where it is alleged that a landlord became an "owner" of a project under the *Act* by virtue of controls exercised over the project, the landlord's purpose or objectives in doing so is relevant to the ownership issue. This is relevant not only to the question of whether there was an implied request that the work be done but also to whether the work as performed would be of be direct benefit to the landlord. Ultimately, both prongs of the definition of "owner" inform the basic policy of ensuring that those who own land are not unfairly benefitted by those who provided work or materials for its improvement and who remain unpaid.

[17] It follows that if the purpose of participation in a project by a landlord in leasehold improvements by a tenant was to prevent the contractor from doing work in a way that would adversely affect others in the building (or the building itself), that should be considered as one factor in deciding the "ownership" issue.

[18] To that extent, I respectfully disagree with the decision below.

[19] I do not however disagree with the finding of active participation. Not only was Aspen entitled to review and approve various aspects of the renovation plans, it actually did so. It was also actively involved in discussions with Xemex regarding construction planning, kick-off and execution, all in an effort to facilitate an orderly and safe construction program. For example it provided checklists for Xemex to follow to prevent construction delays and detailed procedures for ensuring that work done on the renovation would be integrated with existing building systems. It also kept itself informed of change orders and invoicing matters.

[20] I therefore agree with the Applications Judge that Aspen's conduct went beyond that of a mere knowledge of the project and became one of active participation. This is sufficient to ground a finding that Aspen implicitly requested Xemex to perform the renovation in accordance with its protocols and procedures, satisfying the first component of the definition of "owner" in the ***Act***. Aspen's purpose is becoming actively involved was not however the pursuit of a direct benefit from the renovation project. I turn to the direct benefit question next.

IV. Direct Benefit

[21] Under the terms of the lease agreement negotiated between Aspen and Koor Energy Ltd, Aspen agreed and indeed incentivized Koor Energy Ltd to renovate the demised premises. By clearing the way for the premises to be leased, the renovation benefitted both the landlord and the tenant.

[22] It is not as clear that Aspen received a direct benefit from the renovation, as that term is used in the ***Act***.

[23] In ***Royal Bank of Canada v 1679775 Alberta Ltd***, 2019 ABQB 139, Justice Graesser of this Court reviewed the evolution of the case law interpreting the meaning of "direct benefit". At paras 140-143 he states:

> "[140] ***Northern Electric*** [[1977] 2 S.C.R. 762], remains the main binding precedent from the Supreme Court in this area. The majority found that the construction activities were for the direct benefit of Manufacturer's Life as they would share in the gross revenues from the developed property over the 80-year period of the lease with Metropolitan Projects Limited.
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> [141] No authority has been provided to me, and I am not aware of any other authority, suggesting that a reversionary right to improvements at the end of a lease or on termination of the lease by the landlord for tenant default, without more, is a "direct benefit" to the landlord.
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> [142] ***Northern Electric*** found a direct benefit because the chambers judge and the Supreme Court concluded that the development was as much for Manufacturers Life's benefit as for the developer, Metropolitan. In ***Hamilton v Cipriani,*** [[1977] 1 S.C.R. 169], the Supreme Court concluded that the Ontario Water Services Commission acted as Hamilton's contractor (and banker) such that Hamilton became an owner and was liable for liens filed by contractors and suppliers working for the Commission. In ***Phoenix v Bird,*** [54 N.R. 109 (S.C.C)], the Supreme Court concluded that the improvements were for the direct benefit of Phoenix and its subsidiary because the construction was in effect for Phoenix's head office.
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> [143] Before ***Acera, Suss Woodcraft*** [[1975] 5 WWR 57], was the leading Alberta case on "direct benefit." There, McDonald J (as he then was) found a direct benefit because of the participation rent the landlord was entitled to, not the landlord's reversionary interest in the improvements at the end of the lease. McDonald J considered the effect of the reversion at the end of the term, as well as the potential forfeiture of the improvements to the landlord in the event the tenant defaulted under the lease during the term. However, those comments (as well as the comments by the trial judge in ***Northern Electric*** referred to in ***Suss Woodcraft***) do not hold that the reversion, or the possibility of forfeiture because of the landlord's default, constitute by themselves direct benefit."

[24] He concluded that:

> "[147] All three of the Supreme Court cases, ***Northern Electric, Hamilton v Cipriani*** and ***Phoenix v Bird***, make it clear that there must be some immediate benefit for there to be a "direct benefit." A request may be inferred from the immediate benefit that makes it clear that the improvement is really being constructed at least partly for the imputed owner."

[25] In argument Xemex relied heavily on comments made by our Court of Appeal in ***Acera*** regarding the direct benefit issue. At paragraphs 37 to 39, Justice Berger (as he then was) stated as follows:

> "[37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.
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> [38] Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.
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> [39] In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera."

[26] Like Justice Graesser, it is my view that the comments made by the Court in ***Acera*** must be considered in light of the unusual circumstances of that case. ***Acera*** involved the development of a planned residential development near Cochrane, Alberta. The developer/landowner (Acera) undertook extensive construction of infrastructure for the community, and detailed planning prior to approval of the subdivision. Because no subdivision was in place, it had no lots to convey to builders, but was eager to see construction start so that marketing and sales could take place as soon as subdivision approval was granted.

[27] Sterling Homes entered into an agreement with Acera to buy twelve lots and was encouraged to do so before subdivision approval. Acera was actively involved in approval of the home designs, grades and utilities connections. Sterling started construction, spending approximately $1,700,000 on excavations, foundations and framing before learning that Acera would be defaulting on its obligations under the agreement. It was clear that the work done by Sterling conferred an immediate, substantial and direct benefit to the Acera development.

[28] I do not consider that ***Acera*** supports the proposition that mere legal ownership of leasehold improvements on expiry or termination of a lease constitutes a direct benefit to the landlord for the purpose of the ***Act***. That may constitute an indirect benefit, but more is required,

such as participation by the landlord in increased revenue from the demised premises, or improvement of areas beyond those leased in order for a direct benefit to be found. In other words, I agree with Justice Grasser that ***Acera*** was not intended, and should not be read as a change in the law concerning the direct benefit issue as articulated in earlier Supreme Court of Canada cases such as ***Northern Electric Co Ltd v Manufacturers Life Insurance Co***, [1977] 2 SCR 762; ***Phoenix Assurance Co of Canada v Bird Construction Ltd,*** 54 N.R. 109 (S.C.C); and ***Ciprani v Hamilton (City),*** [1977] 1 S.C.R. 169.

[29] In this case, I am not satisfied that Aspen would receive any direct benefit from the work done by Xemex. Its uncontroverted evidence is that the renovation project was left in a state of disarray and was not complete; the design produced an office layout that would not be attractive to prospective tenants, and that to make the space available for marketing would cost considerable money ($6.00- $8.00 per sq foot). The benefit to Aspen's residual interest in the demised premises was indirect, and of uncertain value.

[30] The appeal is therefore allowed and the lien is declared invalid.

Heard on the 13th day of September, 2023.
Dated at the City of Calgary, Alberta this 12th day of October, 2023.

R.A. Neufeld
J.C.K.B.A.

Appearances:

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