

## SEEK LEGAL ADVICE EARLY TO AVOID LOSING LIEN RIGHTS – by Orië Niedzviecki

Once you have made the decision to lien, you can sometimes find yourself out of luck. The general rule, as set out in Ontario's Construction Lien Act, is that you have 45 days to place a lien (or "preserve the lien" in legal language) from the date of the abandonment of the contract or its completion. This general rule applies in cases where there is no certificate of substantial completion.

Many times a smug contractor will respond to my questions about the timing of the lien with an answer that everything is ok, because they sent a painter out to do some touch-up two months after they walked off the job for non-payment. As the recent case of *Micon Interiors General Contractors Inc. v. D'Abbondanza Enterprises Inc.* sets out, that may not be enough.

The Micon decision was delivered in October 2008 in Newmarket, Ontario. In that case, the contractor placed a lien on March 9, 2006 in the amount of \$22,800.58 – out of a total contract price, including extras, of \$205,264.52. The defendants went to court to argue that the lien was placed out of time. Construction Lien law is very strict – there are no second chances – miss a deadline and your lien is thrown out.

The Defendants said that since the Contractor had sent an invoice which was called a "final" invoice on August 3, 2005, then the 45 days should start to run from that date – and the lien of March 9, 2006 was clearly too late.

The Contractor argued that the lien was in time, based on the fact that further work was done subsequent to the August 3, 2005 date of the "final" invoice on the following items:

- 1) a defective fan;
- 2) the air balancing report; and
- 3) sprinkler drawings and hydraulic flow calculations.

The Contractor argued the following with respect to these three items of work:

- 1) since repair work on the fan was done on January 27, 2006, the lien was placed in time;
- 2) despite having completed the air balancing report on November 17, 2005, the report was not submitted until January 26, 2006, so the lien was placed in time; and
- 3) though it completed all sprinkler work in August 2005, it did so without obtaining the proper permit. It submitted drawings to obtain the permit for the sprinkler system in November 2005. It then hired another company in March 2006 to complete proper sprinkler drawings, perform a hydraulic flow test and relocated and reinstall some sprinkler heads in order to conform to code.

As the job was not abandoned, the judge had to answer the question of whether the contract was completed or not, and when. If it was not completed at all, then the lien would be good no matter what. If it was completed, no more than 45 days before the lien was placed, then the lien would also be good. Any other result, and the court would discharge the lien.

The Construction Lien Act defines a completed contract as one where the price of completion, correction of a known defect or last supply is not more than the lesser of 1 per cent of the contract price and \$1,000.00. In other words, when very little is still left to be done, the law considers the contract to be completed and may start counting the 45 days within which to place the lien.

In the end, the court discharged the lien. It began by looking at the August 3, 2005 date – not because the contractor called the invoice a final one (which is irrelevant) – but because it was agreed that there were only three things done after this date. Analyzing each of the three items completed after August 3, 2005, the court ruled as follows:

- 1) fan repair work – generally, work done or materials supplied to rectify defective or improper work does not extend the time for filing a lien;
- 2) air balancing report – the late delivery of the report does not extend the time to file a lien when the report had been completed previously. Furthermore, as the completion of the report was the last item due under the contract, the court found the contract complete as of November 17, 2005; and
- 3) The sprinkler work was also found to be repair work and could not extend the time to register the lien.

Therefore, the lien was discharged. The Contractor was not entirely out of luck, however, as the claim continued as a breach of contract claim – just without the extra guarantees of payment that a lien provides.

The lesson to be learned is don't wait. If you think you may have a problem with payment, seek legal advice early to avoid losing your lien rights. Don't rely on tricks or sending someone to touch-up the paint.

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