Fisgard v. Bond Street, 2012 NWTSC 11

Date: 2012 02 03
Docket: CV 2009000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FISGARD CAPITAL CORPORATION

Plaintiff

- and -

BOND STREET PROPERTIES INC. and SHAKEEL MOHAMMED KIANI (also known as MO KIANI) and GEORGINA KIANI

Defendants

Application to determine who has priority to lien funds that have been paid into Court.

Heard at Yellowknife, NT on August 19, 2011.

Reasons filed: February 3, 2012

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Plaintiff: Douglas McNiven

Counsel for RTL Robinson Enterprises Ltd.: Peter Roberts

No one appearing for the Defendants.

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REASONS FOR JUDGMENT

Introduction

[1] This is an application to determine who has priority to funds that have been paid into court. The Plaintiff Fisgard Capital Corporation ("Fisgard"), who is the mortgagee, asserts that it has priority. RTL Robinson Enterprises Ltd. ("RTL") asserts that it has priority as a lien claimant under the *Mechanics Lien Act*, R.S.N.W.T. 1988, c. M-7.

Background

[2] The facts are not at issue. The Defendant Bond Street Properties Inc. ("Bond Street") purchased property in Yellowknife for the development of condominium lots. Beginning in 2006 and continuing until October 2007, RTL did excavation work and installed water and sewer lines and roadways on the property. Until May of 2007, Bond Street paid RTL's monthly invoices. In June of 2007, it made only a partial payment and thereafter made no payments at all.

[3] In April 2007, Bond Street began discussions with Fisgard about short term financing for the condominium project. Fisgard was aware that RTL was doing work on the property. Bond Street and Fisgard entered into an agreement dated April 18, 2007 whereby Fisgard agreed to loan Bond Street $3,000,000.00 in exchange for which Bond Street would give various forms of security, including a mortgage over the property. The money was advanced in or about May of 2007 and the mortgage was registered on title on July 27, 2007.

[4] In September, November and December 2007, RTL filed claims of lien against the title to the property; these were eventually consolidated into one lien. In January 2008, RTL commenced a civil action against Bond Street claiming payment of the monies owed. Whether that action also asserted a claim of lien is at issue. In July 2008, RTL took out a consent judgment in the amount of $751,364.09 against Bond Street and in September 2009 a writ of execution was issued. Fisgard was not named as a party in that action.

[5] Bond Street defaulted on the mortgage and in January 2009, Fisgard commenced the within foreclosure proceedings. An Order Nisi was granted in May 2009. In December 2009 the property was sold to a third party for the sum of $3,500,000.00 pursuant to an Order Confirming Sale. A term of that Order was that the sum of $1,062,589.09 ("the lien funds') be paid into court in place of the registered claims of RTL and one other lien claimant. The Order preserved Fisgard's right to dispute the validity of the liens, their registration and priority.

[6] The other lien claim has been resolved. The issue on this application is whether RTL has priority over Fisgard to the extent of $751,364.09 of the lien funds.

Positions of the parties

[7] RTL takes the position that it is entitled to priority over Fisgard to the extent that the work done and materials placed by it on the property increased the selling value of the property.

[8] Fisgard challenges RTL's claim on a number of grounds, including that there was no equity in the property to which the lien could attach and there is no evidence of the extent, if any, to which RTL's work and materials increased the selling value of the property. Fisgard's main argument is that RTL failed to perfect its lien by commencing an action within the 90 day period prescribed by s. 24(1) of the

Mechanics Lien Act. If the action commenced against Bond Street is an action based on the lien, Fisgard says that RTL's failure to add it as a defendant is fatal to RTL's claim for priority. Finally, Fisgard says that the consent judgment taken by RTL against Bond Street results in merger of RTL's lien claim and the issue of priority is thus *res judicata*.

[9] In opposing Fisgard's position, RTL says that the Order Confirming Sale does not permit Fisgard to challenge RTL's claim on the basis that no lien action was commenced in time against Fisgard. If the challenge is permitted, RTL says that the failure to add Fisgard as a party to the action against Bond Street should be excused pursuant to s. 10 of the *Mechanics Lien Act* or, alternatively, it need not have added Fisgard because Fisgard was the "undisclosed principal" of Bond Street.

Do the terms of the Order Confirming Sale permit Fisgard to challenge RTL's claim?

[10] Paragraph 7 of the Order Confirming Sale states that "notwithstanding the payment in of the Monies in accordance with this Order, the Applicant and any other person interested in the funds paid in, shall be entitled to dispute the validity of the Registered Liens or the impropriety of their registration with respect to time, form, the Mortgaged Lands upon which the Registered Liens have been registered, priority or any other matter in respect to the entitlement of the Respondent to them".

[11] Although the Applicant referred to is clearly Fisgard, the reference to Respondent is awkward in that there is no respondent named in the style of cause or the Order. However, when read in context, it must be taken to refer to the lien claimants, including RTL. The paragraph provides that Fisgard is entitled to dispute the validity of the liens, their priority or any other matter in respect to the lien claimants' entitlement to them. Fisgard claims that RTL's lien does not have priority over Fisgard's mortgage, in part because RTL did not claim such priority in its action against Bond Street. Fisgard also claims that RTL is not entitled to the lien as the lien has been extinguished by reason of failure to comply with s. 24(1) of the *Mechanics Lien Act*. In my view the wording of the Order is wide enough to include the grounds upon which Fisgard challenges RTL's claim.

Fisgard's assertion that there was no equity in the property to which RTL's lien could attach and that there is no evidence of the extent to which RTL's work and materials increased the selling value of the property

[12] Section 4 of the *Mechanics Lien Act* provides as follows:

> 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 furnished and the land occupied or enjoyed in connection with the building, erection or mine.
>
> ...
>
> (3) If the land on or in respect of which work is done or materials or machinery are placed or furnished as described in paragraphs 3(a) to (c) is encumbered by a prior mortgage or other charge and the selling value of the land is increased by the work, materials or machinery, the lien under this Act has priority over the mortgage or other charge on the increased value of the land.

[13] Fisgard points to evidence that the property was worth $1,200,000.00 when it was purchased by Bond Street in 2005. Since the mortgage debt exceeded $3,000,000.00, Fisgard says there was no equity to which RTL's lien could attach. The simple answer to this is that Bond Street's interest in the property was the equity of redemption and that is an interest to which the lien could attach: *Modern Const. Ltd. v. Maritime Rock Products Ltd.,* [1963] S.C.R. 347.

[14] Fisgard also argues that because the condominium project was never completed, it is impossible to determine whether the selling value of the property was increased by RTL's work and materials and therefore whether RTL would be entitled to priority over Fisgard's prior mortgage under s. 4(3).

[15] When Fisgard applied for the Order Confirming Sale to the purchaser, it relied on the affidavit of value sworn by its appraiser (the "MacDonald affidavit"), who opined that the land alone was worth $920,000.00. The infrastructure, which was RTL's work and had been mostly completed, was said to have increased the value by $2,000,000.00. After taking into account the salvage value of improvements and deducting the cost to complete the infrastructure, the appraiser arrived at a market value of $2,270,000.00 for the property.

[16] The affidavit of Bond Street's appraiser (the "Jackson affidavit") stated that the value of the land was $2,235,000.00. It allocated a value of $2,500,000.00 to

the infrastructure installed by RTL. It arrived at a much higher market value of over $5,000,000.00 for the property.

[17] Despite the differences of opinion as to market value, according to both the MacDonald and the Jackson affidavits, RTL's work added at least $2,000,000.00 in value to the property. The actual sale price confirmed by the Order Confirming Sale was $3,500,000.00.

[18] Fisgard cites *Warwick v. Sheppard*, 1917 O.J. No. 213 (Ont. C.A.) for the proposition that where the work done is not an improvement by itself unless the entire project is finished, it does not increase the selling value of the land. However, in *Warwick*, the problem was that the Court could not determine by how much each lien claimant's work increased the value when several lien claimants had done work on the property. I do not understand the case to state that one can never determine whether there is an increase in selling value when the work on the project is not complete. In the case at bar, although the purchaser would have to obtain development approvals and have further work done in order to complete the condominium project, the evidence satisfies me that the selling value, as reflected in the price paid by the purchaser, was increased due to the value of the improvements made by RTL. On either of the scenarios put forward by the appraisers, it can be inferred that the work done by RTL added to the selling value of the property. The value contributed by RTL exceeds the amount for which it claims priority and therefore section 4(3) is not a bar to the claim.

Did RTL fail to perfect its lien?

[19] No issues were raised about the registration of RTL's claim of lien. The dispute arises from s. 24(1)(b) of the *Mechanics Lien Act*, which provides as follows:

> 24. (1) A lien that is duly registered under this Act ceases to exist
>
> (a) on the expiry of 45 days after the last day on which the claim of lien could have been registered under section 21 or 22, or
>
> (b) on the expiry of 90 days after the day on which the period of credit expires, where a period of credit is referred to in a claim of lien registered under section 21 or 22,
>
> unless, in the meantime,

> (c) proceedings are commenced under this Act to realize the claim of lien, and
>
> (d) a certificate of proceedings is duly registered in the land titles office in which the lien is registered.

[20] Section 25 is also relevant:

> 25. A lien may be realized in the Supreme Court according to the ordinary procedure of the Supreme Court.

[21] RTL commenced proceedings in 2008 by way of a statement of claim filed in the Supreme Court against Bond Street alone. Fisgard was not named as a defendant, nor, in the statement of claim, did RTL claim priority over Fisgard's mortgage. The statement of claim states that RTL filed a claim of lien and gives details of its registration. It also seeks leave to refer to the claim of lien at trial. It further seeks an order that in default of payment of the monies claimed, the interest of the defendant (described as "the Village") in the lands described be sold and the proceeds applied in accordance with the *Mechanics Lien Act*.

[22] Fisgard takes the position that the statement of claim does not advance a lien claim at all. It points out that it contains no request for a judgment or declaration that RTL is entitled to a valid lien and that it seeks a sale of the interest of "the Village", which makes no sense. In my view the reference to the Village is likely a simple misdescription capable of amendment. An amendment could also cure the absence of a request for a declaration as to the validity of the lien. The named defendant, Bond Street, would not have been misled since the registered lien is referred to along with the *Mechanics Lien Act*. In my view the statement of claim is sufficient to advance a claim on the lien as against Bond Street. It does not, however, advance any claim for priority as against Fisgard.

[23] Because RTL did not add Fisgard as a party to the action against Bond Street within the 90 days provided in s. 24, Fisgard says that RTL is barred from advancing the claim now. RTL has not commenced a separate action or sought to re-open the action against Bond Street, but seeks to advance its claim now against the lien funds.

[24] Fisgard relies on *Roch Lessard Inc. v. 167684 Canada Inc.*, [1995] N.W.T.R. 113 (S.C.). In that case, the lien claimant sought to amend its statement of claim to

add as a defendant the holder of a prior mortgage and claim priority over that mortgage. Richard J. held that by operation of law, the lien had ceased to exist as against the mortgagee because the action had not been commenced as against the mortgagee within the 90 days required by s. 24(1) of the *Mechanics Lien Act*.

[25] RTL, however, relies on s. 10 of the *Mechanics Lien Act*:

> 10. Substantial compliance only with section 9 is required and no lien is invalidated because of failure to comply with section 9 unless, in the opinion of the Supreme Court or a judge adjudicating on the lien under this Act, the owner, contractor, subcontractor, mortgagee or other person is prejudiced by the failure to comply, and the lien is invalidated only to the extent to which that person is prejudiced, and the Supreme Court or judge may allow the affidavit and statement of claim to be amended accordingly.

[26] On its face, s. 10 appears to be restricted in its application to s. 9, which deals with the posting of payrolls. In *Pitts v. Steen*, [1981] 3 W.W.R. 289 (N.W.T.S.C.), it was held that s. 10 had been put in the wrong place in the statute and must have been intended by the legislature to have a wider application than simply to s. 9. The Court held that s. 10 must be interpreted to allow the Court, in a proper case, to grant relief against non-compliance with the procedural requirements of the *Mechanics Lien Act* generally. (It is worth noting that thirty years after *Pitts* was decided, the reference to s. 9 has still not been corrected).

[27] In *Pitts*, the problem before the Court was that the claim of lien had not been registered in the land titles office as required by the *Act*, because the land was unpatented and the land titles office kept no record of such land. The claim of lien had, however, been registered in another government office. The Court held that the irregular registration was substantial compliance with the tenor of the *Act*, the purpose of which it said is to provide notice to the owner or other interested persons that a lien claim is being pursued. The Court in *Pitts* also found that no one had been prejudiced by the manner of registration and that the action based on the lien had been commenced promptly.

[28] In *Roch Lessard*, Richard J. distinguished *Pitts*. RTL argues that he erred in doing so. It points out that there is no requirement stated in the *Mechanics Lien Act* that a mortgagee over whom the lien claimant claims priority must be added as a party in the lien action. It also argues that s. 10 requires that even if there has not

been substantial compliance with the *Act*, prejudice must be found before a lien is invalidated.

[29] In *Roch Lessard*, Richard J. noted the difference between irregular registration of the claim of lien in *Pitts* and the failure in the case before him (as in the instant case) to commence legal proceedings against the prior mortgagee within the statutory limitation period. He held that "even a generous interpretation of s. 10 cannot permit such a serious omission to be cured" (paragraph 17). He relied on *Bank of Montreal v. Haffner*, (1884) 10 Ont. App. R. 592, [confirmed on appeal to the Supreme Court of Canada (Cassels' S.C. Dig. 526, May 12, 1885)], where it was held that the 90 day time limit in the comparable Ontario statute applied to any proceeding against a mortgagee to obtain a declaration of priority over the prior mortgagee, concluding that by operation of law, a mechanics lien ceases to exist against a prior mortgagee if proceedings are not commenced in the Supreme Court against that mortgagee within the 90 day period stipulated in s. 24(1) of the *Act.*

[30] In *Pitts*, the Court stated that the curative provision in s. 10 had been put in the wrong place in the statute "since inferentially it deals with the adequacy of the lien, the affidavit (of verification) and the statement of claim" (paragraph 15). Indeed, when one looks to the former Ontario statute, which was at issue in many of the cases cited by counsel, that inference is fortified. Section 18 of the 1975 version of Ontario's *Mechanics Lien Act*, R.S.O. 1970, Chapter 267 as amended 1975, Chapter 43, is comparable to s. 10 of the Northwest Territories statute (see *Mechanics' Liens in Canada*, Macklem and Bristow, Fourth Edition, Carswell, 1978). It refers to substantial compliance with specific provisions: ss. 16, 17, 21a and 29. Those sections deal, respectively, with the registration and contents of the claim of lien, other matters included in the claim of lien, requirements when the lien is based on a Crown or municipal contract and the filing of a statement of claim in the Supreme Court. Not referred to in s. 18 is s. 23, which provides that the lien ceases to exist on the expiration of 90 days.

[31] I understand *Pitts* as indicating that the scope of s. 10 was meant to cover the "procedural requirements" in advancing a claim of lien. The last few words of s. 10 refer to the Court having discretion to "allow the affidavit and statement of claim to be amended accordingly", which also supports this interpretation.

[32] The limitation period in s. 24 cannot be considered a mere procedural requirement. It is a statutory limitation period which, if not properly complied

with, results in extinguishment of the lien: *Cole v. Hall*, [1889] O.J. No. 294 (Ont. C.A.). Surely the purpose of s. 24 is to require prompt action by the lien claimant to enforce its lien against the land and any priority it claims over other encumbrances against the land. By s. 25, that prompt action is to be taken in the Supreme Court according to its ordinary procedure, which is by commencing proceedings by a statement of claim.

[33] For the above reasons, I think *Pitts* should be distinguished from *Roch Lessard* and Richard J. was correct in doing so.

[34] RTL also relies on cases which it submits stand for the proposition that despite the rule in *Haffner*, strict compliance with the 90 day limitation period has been excused where there are special circumstances. One such case is *Hubert v. Shinder*, [1952] O.W.N. 146 (C.A.). In that case a prior mortgagee was not joined as a defendant in proceedings under Ontario's *Mechanics Lien Act*, nor served with the statement of claim. A notice of trial was, however, served on the mortgagee well within the 90 days prescribed by the statute and he participated in the trial. The mortgagee's appeal from the trial decision on the ground that he had not been joined as a defendant was dismissed. The case can be distinguished, however, on the basis that the mortgagee was deemed to have waived the limitation period by participating in the trial.

[35] Another case is *Glebe Electric Ltd. v. 595524 Ontario Ltd.* (1991), 78 D.L.R. (4th) 579 (Ont. C.J.). A lien claimant moved to add mortgagees who had not been named as defendants in his lien action. The Ontario Court of Justice said that cases where plaintiffs were permitted to add defendants outside the time limited for commencing an action appeared to have "some special circumstances" which the courts weighed in favour of adding the parties. In *Glebe* itself, however, the Court refused to allow the mortgagees to be added as defendants because the time to perfect the lien had expired and accordingly the lien had expired as against the mortgagees' interest in the land. The Court noted that no explanation or justification why they had not been added as defendants within the 90 days had been advanced. It also noted that there was no suggestion that the mortgagees were aware of the liens.

[36] RTL says that there are special circumstances in this case: Fisgard knew or should have known about RTL's lien within the 90 day period specified by s. 24 and even before Fisgard advanced the mortgage funds, it should have known that RTL

might lien the property. That may be so, but those circumstances are likely to exist in many cases and are not "special".

[37] RTL makes the further submission that s. 10 of the *Mechanics Lien Act* should be interpreted as containing two separate parts: (1) if there has been substantial compliance with the prescribed section of the *Act*, the lien is not invalidated; and (2) even if there has not been substantial compliance, the lien will not be invalidated unless the party relying on the non-compliance is prejudiced thereby, and then only to the extent that it is prejudiced. RTL says this is another reason why *Roch Lessard* should not be followed: because the Court in that case did not consider the issue of prejudice.

[38] Clearly, as regards Fisgard, there was not substantial compliance with s. 24 of the *Act*. RTL says that is not fatal because, on the second part of s. 10, there is no prejudice to Fisgard as a result of its not having been added as a party in the action against Bond Street. RTL takes the position that, under the second part of s. 10, if the noncompliance, no matter how serious, does not result in prejudice, it will not defeat the lien. RTL submits that there is no prejudice because Fisgard is in the same position now that it would have been had it been added as a party. In other words, RTL says that Fisgard can now make the same arguments it could have made in the lien action about whether RTL's work increased the selling value of the property.

[39] The cases that RTL relies on in support of this argument are *Robock v. Peters* (1900), 13 Man. R. 124 (K.B.) and *North York Steel Fabricators Ltd. v. City of Hamilton et al* (1980), 27 O.R. (2d) 456 (Ont. C.A.). In *Robock*, Manitoba's version of s. 10 was used to cure a defect in a claim of lien where no prejudice resulted. It had no application to the issue of how priority could be claimed by the lien claimant against a prior mortgagee because the Manitoba statute provided for a procedure which did not involve making such a mortgagee a party to the action. In *North York*, the defect sought to be cured was in the affidavit of verification attached to the claim of lien.

[40] Neither case supports the proposition that the curative provision should be used where the defect is failure to bring an action within the applicable limitation period against the mortgagee against whom priority is claimed. Whether s. 10 should be read as submitted by RTL for other procedural requirements I need not decide. In my view s. 10 does not operate to cure a lien that no longer exists by operation of s. 24, whether prejudice results or not.

[41] RTL also submits that by Fisgard's conduct and participation in the instant hearing, it has precluded itself from the "technical" operation of s. 24. However the instant hearing arises because Fisgard foreclosed on the subject property and the liens registered against the property had to be dealt with in some fashion. There is no suggestion that Fisgard waived the limitation period in s. 24 so I find no basis to say that Fisgard is precluded from arguing that RTL's lien was extinguished by its failure to commence an action against Fisgard pursuant to s. 24.

The undisclosed principal argument

[42] In an alternative argument, RTL submits that the nature of the security agreements between Bond Street and Fisgard made Fisgard the undisclosed principal of Bond Street. Therefore, RTL says, the proceeding against Bond Street was a proceeding against Fisgard.

[43] RTL relies on the "Offer to Finance", pursuant to which all of Bond Street's fixed price contracts, including its contract with RTL, were assigned to Fisgard and became the property of the latter. It was also a condition precedent to the loan made by Fisgard to Bond Street that Fisgard be provided with and approve the budgets and construction plans for the project. According to RTL, it must therefore be inferred that Fisgard became aware of and approved the scope and cost of the work RTL had done and was contractually obliged to complete in 2007. Fisgard would have known before it funded the loan that there was potential for RTL to have a lien claim against the property.

[44] RTL argues that these facts constitute Bond Street the undisclosed principal of Fisgard for purposes of dealing with RTL. RTL says further that since neither Bond Street nor Fisgard gave RTL notice of the assignment of the RTL contract, it was necessary for RTL to give notice of the lien litigation to Bond Street alone, not Fisgard.

[45] The difficulty with this argument is that the undisclosed principal rule deals with contracts made by agents for undisclosed principals, not with contracts made by one party and subsequently assigned to another. The relevant time for determining that a principal is undisclosed is at the time of contracting between the parties: *Canadian Agency Law*, G.H.L. Fridman, Q.C., LexisNexis Canada Inc. 2009; *Agency Law Primer*, 4th ed., Harvey and MacPherson, Carswell 2009, p. 108.

[46] Another problem with this argument is the rule that when an agent makes a contract for an undisclosed principal, the third party can sue either the agent or the principal, but can obtain satisfaction only from one or the other. Once the third party has elected from whom to obtain satisfaction, it cannot obtain satisfaction against the other. When it elects by taking judgment against one, the third party's rights against the other cease to exist by the doctrine of merger.

[47] In this case, whether RTL knew or not of the assignment of its contract to Fisgard, it was in a position to ascertain that Fisgard was the mortgagee on title. Whether through inadvertence or, as submitted by Fisgard, a hope that Bond Street would come up with the money to satisfy the lien, RTL chose to name only Bond Street as a defendant in the action commenced in the Supreme Court and obtain judgment against it without claiming priority as against Fisgard as mortgagee. In all these circumstances, I do not see that the undisclosed principal rule can have any application to this case or be of any assistance to RTL.

Merger

[48] An argument was also made by Fisgard that even if RTL's claim in the action against Bond Street was a claim under the *Mechanics Lien Act*, the fact that RTL took a consent judgment in debt against Bond Street results in merger and RTL has lost any lien remedy.

[49] I need not decide whether merger applies in this case as even if RTL's lien remedy did not merge in the judgment in debt, since it did not add Fisgard as a party to the action or commence a separate action against Fisgard within the 90 days prescribed by s. 24, it cannot now claim against Fisgard.

Conclusion

[50] It follows from the reasons given that because RTL did not commence proceedings against Fisgard within the 90 days prescribed by s. 24 of the *Mechanics Lien Act*, RTL's lien ceased to exist as against Fisgard. Section 10 does not operate to cure the defect. Accordingly, RTL is not entitled to priority as against Fisgard to the funds held in Court. RTL's application is therefore dismissed.

[51] Costs normally follow the event but if counsel wish to make submissions, they may seek a date for that purpose by communicating their joint available dates in writing to the Registry. Alternatively, they may agree on a schedule for written submissions as to costs.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
3rd day of February 2012

Counsel for the Plaintiff: Douglas McNiven

Counsel for RTL Robinson Enterprises Ltd.: Peter Roberts

No one appearing for the Defendants.

CV 2009000001

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