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ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

A Primer on Liens, Encumbrances and Other Instruments Affecting Real Property

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What is Lienable Supply?

Construction Lien Act (“*CLA*”) s. 14(1):

- “A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials”
 - “Supply of Services”
 - “Materials”
 - “Improvement”

What is Lienable Supply?

Supply of Services

- Must be tangible benefit to property
- benefit provided must not be fleeting (e.g. snow removal, sanding or salting)

Materials

- Every kind of movable property (a) that becomes or is intended to become part of the improvement, or that is used directly in the making of the improvement, or that is used to facilitate directly the making of the improvement (b) that is equipment rented without an operator for use in the making of the improvement
- Materials are supplied to an improvement when they are placed on the land on which the improvement is being constructed, or are incorporated into or used in making the improvement

What is Lienable Supply?

Improvement

- Construction, installation, alteration, addition, repair that is essential to the normal or intended use of the land or building
- Large range of activities qualify:
 - Architectural design services
 - Installation of material to land (including industrial, mechanical, electrical work)
 - Complete or partial demolition of existing structure

When does your lien arise?

- “upon the mere supply of lienable services or materials”
- Purely a creature of statute: there are no common law lien rights

“Homebuyers” and the *Construction Lien Act*

- Under the CLA, the definition of “Owner” excludes “Homebuyer”
- “Homebuyer” means “a person who buys the interest of an owner in a premises that is a home, whether built or not at the time the agreement of purchase and sale in respect thereof is entered into, provided,
 - (a) not more than 30 per cent of the purchase price, excluding money held in trust under section 53 or the Condominium Act, is paid prior to the conveyance, and
 - (b) the home is not conveyed until it is ready for occupancy, evidenced in the case of a new home by the issuance of a municipal permit authorizing occupancy or the issuance under the Ontario New Home Warranties Plan Act of a certificate of completion and possession.

“Homebuyers” and the *Construction Lien Act*

- Key point: no liens may subsist after a sale to a homebuyer
- Unpreserved lien rights are extinguished on closing of a sale to a homebuyer
- s.9 Vendors trust: an amount equal to the proceeds of sale (net of sale costs) become a statutory trust for the benefit of those who did the work
- The former owner is the trustee of the trust

L.D. Ducharme Systems Inc. v. Denamer Homes Inc. 1994 CarswellOnt 947, 17 C.L.R. (2d) 107

“In essence, therefore, those who supply services or materials to the building are forced to look to the vendor for payment and cannot create lien rights in the property. A "home buyer" is not a person whose interests can be the subject of a lien. The answer to the question whether or not a "home buyer" has an interest in which a lien can be created cannot in my view be different when the "home buyer" acquires title after a lien is registered.” [emphasis added]

“Homebuyers” and the *Construction Lien Act* – what if it is not clear?

- Lien claimant, through s.39(1)3 is able to request that the owner “who is selling the owner’s interest in a premises that is a home” provide:
 - Name/address of purchaser
 - Sale price
 - Amount of purchase price paid or to be paid prior to conveyance
 - Scheduled date of conveyance
 - Legal description of the premises included in agreement

Solicitor's Role in a Lien Proceeding

- Lien rights are powerful
 - Sale of property and realize a proven lien from the sale proceeds
- Provisions to address an improperly registered lien, or a grossly excessive lien

Solicitor's Role in a Lien Proceeding

- S.35 - A lien claimant's solicitor has personal liability to "any person" who suffers damage as a result of any intentional or reckless misuse of the CLA
- Creates a direct right of action between or among non-privies
- The solicitor should be the gate-keeper to keep grossly inflated or non-existent liens out of the system

What Happens when a Lien is Found on Title at Closing

Discovered a lien on title - now what?

- Several options:
 1. Pay claimant the amount specified in lien; or
 2. Dispute lien

What Happens when a Lien is Found on Title at Closing

1. Pay claimant the amount specified in lien
 - Then **discharge** lien
 - Once discharged, the lien cannot be revived
2. Dispute lien
 - **Post security to vacate registration of claim for lien**
 - **Any “person” can bring a motion under s.44**
 - **Motion can be brought without notice**

Lien Act Priorities

- Part XI ss.72 – 85
- The value of the improvement to the real property is preserved for the benefit of those who did the work
- A construction lien has priority over the owner's general creditors from the date the lien first arises
 - “All judgments, executions, assignments, attachments, garnishments and receiving orders except those executed or recovered upon before the time when the first lien arose in respect of the improvement”
- Any increase in the value of the property at the time the lien first arises is likely due in whole or in part to the supply of services or materials by the lien claimants

Lien Act Priorities

- s.78(1) – all liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises
- Generally, lien claimants have priority over all other interests
- Plead all priorities so that your client gets notice of secured creditors enforcing their rights of sale

Lien Act Priorities

- Generally, lien claimants have priority over all other interests
- However, *CLA* provides for certain exceptions
- S.78(2) Building mortgage
- S. 78(3) Prior mortgages, prior advances
 - To the extent of the lesser of: (a) the actual value of the premises at the time when the first lien arose; and (b) the total amounts that prior to that time were (i) advanced in the case of a mortgage; and (ii) advanced or secured in the case of a conveyance or other agreement

Lien Act Priorities

- S. 78(4) Prior mortgages, subsequent advances
 - To the extent of the lesser of: (a) the actual value of the premises at the time when the first lien arose; and (b) the total amounts that prior to that time were (i) advanced in the case of a mortgage; and (ii) advanced or secured in the case of a conveyance or other agreement
- S.78(5) – (10)
- S.78(11) – subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer

Lien Act Priorities

- Worker's Priority
 - The lien of a worker has priority over the lien of any other person in the same class to the extent of 40 regular-time working says' wages

Questions

- Any questions?