
CANADA / JUDGMENT

Amplified Electric Inc. v. Husch

2018 BCSC 969

COURT

Supreme Court of British Columbia

DECIDED

14 June 2018

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2018 BCSC 969 Amplified Electric Inc. v. Husch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Amplified Electric Inc. v. Husch,

2018 BCSC 969

Date: 20180614

Docket: 118452

Registry: Kelowna

Between:

Amplified Electric Inc.

Plaintiff

And

Rory Craig Husch and Jamie Lynn Husch

Defendants

Before: Master Wilson

Reasons for Judgment

Counsel for the Plaintiff:

T.T. Brown

Counsel for the Defendants:

T.R. Fulkerth

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 6, 2018

Place and Date of Judgment:

Kelowna, B.C.

June 14, 2018

- [1] The defendants apply for cancellation of a claim of builder's lien and certificate of pending litigation that was registered against their home at 4236 Spiers Road, Kelowna, BC, by the plaintiff. The defendants say they are entitled to the orders sought because the plaintiff did not file its certificate of pending litigation in these proceedings within 21 days of having received notice to commence its action pursuant to s. 33(2) of the Builder's Lien Act, S.B.C. 1997, c. 5 (the "Act").
- [2] The facts in this matter are not in dispute.
- [3] On December 21, 2017, the plaintiff registered its claim of builder's lien ("CPL") in the Kamloops Land Title Office as against the defendants' property.
- [4] On January 23, 2018, the defendants prepared a Form 6 - notice to commence an action within 21 days (the "21 day notice") pursuant to s. 33 of the Act. On the same day, the defendants sent the 21 day notice by registered mail to the address indicated on the plaintiff's CPL. The address on the claim of lien was a solicitor's office. There is no issue with the form of the notice.
- [5] Someone at the plaintiff's solicitor's office signed for delivery of the registered mail on January 26, 2018.
- [6] On February 16, 2018, the notice of civil claim was filed on behalf of the plaintiff.
- [7] On February 20, 2018, the plaintiff obtained a certificate of pending litigation which was registered against the defendants' property on the same date.

Issue to be decided

- [8] Section 33(2) of the Act provides that an owner may serve on a lien claimant a notice to commence an action to enforce the claim of lien, and to file the certificate of pending litigation, "within 21 days after service of the notice".
- [9] The key sections on this application are sections 33(3) and (4) which provide as follows:

33 (3) The notice served under subsection (2) must be in the prescribed form, and service is validly effected if the notice is

- (a) served personally on the lien claimant, or
- (b) mailed or delivered to the address for service given in the claim of lien.
- (4) If service is by mail the notice is conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post Office at any place in Canada.
- [10] The Builders Lien Act in s. 33(5) goes on to provide that unless the action is commenced and the certificate of pending litigation registered, the lien is extinguished.
- [11] The narrow issue to be decided here is whether the plaintiff's 21 day deadline started to run on January 26 when the registered mail was signed for, or from January 31, 2018, which was the eighth day after it was deposited with Canada Post.
- [12] If the time started to run on the earlier date, being the date of receipt, the CPL would have been filed out of time and the lien would be extinguished pursuant to s. 33(5) of the Act. If time started to run based upon the deemed date for service under s. 33(4) of the Act, the CPL was filed in time.

Discussion

- [13] A claim of builder's lien is an extraordinary remedy and affords those involved in the construction industry with remedies not available to creditors in normal everyday commerce. A claim of lien may have significant implications for the owners of a property. They will generally be unable to sell their property because they are unable to clear title. They will be prevented from utilizing the equity in their property by refinancing for the same reason. The lien may also preclude further draws on a previously registered mortgage due to concerns regarding priorities between the lien and subsequent draws.
- [14] Because of the implications of a claim of lien on a property, owners have a number of remedies available to them that have the effect of clearing the title or moving any litigation forward. As for the former, the Act permits owners (and others) to apply to post substitute security and obtain a discharge of any claims of lien. As for the latter, owners can provide notice to the lien claimant to commence its claim on 21 days' notice, as opposed to waiting for up to a year to see if the lien claimant will choose to try to prove the lien.
- [15] The defendants argue that the notice was "served personally" pursuant to s. 33(3)(a), or alternatively should be considered to have been "delivered" pursuant to s. 33(3)(b), on the date that the registered mail was signed for.
- [16] In support of this proposition, the defendants refer to the decision in *Kawana v. Shemal*, 2013 BCSC 1573. The relevant portions of the judgment from the defendants' perspective as it relates to this application are paragraphs 20 to 27:

- [20] Under s. 33(2) of the Builders Lien Act, an owner may serve a lien claimant with notice to commence action to enforce the claim of lien and to register in the Land Title Office a Certificate of Pending Litigation within 21 days after service of the notice.
- [21] Service is validly effected if the notice is served personally on the lien claimant or is mailed or delivered to the address for service given in the claim of lien.
- [22] Under s. 33(4), if service is by mail, the notice is conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post office at any place in Canada.
- [23] Here, Ms. Kawana mailed her notice to commence action on March 26, 2012 and it was delivered to Pyramids West Builders Inc. on March 27, 2012.
- [24] The notice to commence action was mailed and delivered to 2967 Robson Drive, Coquitlam, B.C., the address for service given by Pyramids West Builders Inc. in its claim of lien.
- [25] Ms. Kawana has adduced in evidence the Xpresspost tracking document confirming that actual service of the notice to commence action was effected on March 27, 2012. Further, by s. 33(4) of the Builders Lien Act, where, as here, service is by mail, the notice is conclusively deemed to have been served eight days after its deposit with Canada Post. Because the notice was deposited with Canada Post on March 26, 2012, the date of deemed service was April 3, 2012.
- [26] I have found actual service occurred on March 27, 2012. Pursuant to s. 33(2) of the Builders Lien Act, the lien claimant was required to commence its action to enforce the claim of lien within 21 days after service of the notice, that is, by no later than April 17, 2012. Alternatively, using the deemed date of service, the lien claimant had until April 24, 2012 to commence its action and register its Certificate of Pending Litigation in the Land Title Office.
- [27] Pyramids West Builders Inc. did not commence its action until May 10, 2012. It follows that the builder's lien action was commenced out of time.

[Emphasis added]

- [17] The defendants argue that the court concluded in paragraph 25 that service was proven when the Xpresspost was signed for, and that the 21 days in this case therefore commenced upon receipt.
- [18] The plaintiff's position is that the notice was sent by registered mail, which is a form of mail, and that the 21 days commenced eight days after mailing based upon the deemed service provision in s. 33(4) of the Act.
- [19] The plaintiff says that the effect of conclusive deeming provisions in legislation is to impose or create a fact that may not actually be correct and refers to the Court of Appeal's decision in *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.*, [1989] B.C.J. No. 965; 1989 CanLII 2747 (BCCA) at para. 80 which states as follows:

- [80] In my view, construing "deemed" in s. 3(3) to mean "conclusively deemed" would (as observed by Cartwright J. in *Grey v. Kerslake*) be to impute to Parliament the intention to hold to be a fact a type of transaction quite possibly contrary to the true factual situation and the further intention to deny the parties to the transaction the opportunity of proving the true situation. If such was the intent of Parliament it could have used the term "conclusively deemed" as was done in *R. v. Sutherland*, 1980 CanLII 18 (SCC), [1980] 2 S.C.R. 451 at 456, [1980] 5 W.W.R. 456, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 7 Man. R. (2d) 359, 35 N.R. 361:

The purpose of any "deeming" clause is to impose a meaning, to cause something to be taken to be different from that which it might have been in the absence of the clause. In the present instance, the patent purpose of s. 49 is to cause certain provincial forest, wildlife management areas, and the like, to be regarded as occupied whether or not, on the facts, they can properly be said to be occupied.

- [20] The plaintiff then referred me to authorities that have held that the effect of conclusive deeming provisions such as the one found in s. 33(4) are not rebuttable, such that the intended recipient will not be able to avoid the consequences of failing to act even if the notice was not actually received.
- [21] The parties both say they are not aware of any authority that is directly on point and would decide whether a notice sent by registered mail constitutes "mail" and is subject to the deeming provisions in s. 33(4), or whether signature for the registered mail constitutes either service or delivery pursuant to ss. 33(3)(a) or (b) respectively.

Was the notice served personally?

- [22] The defendants argue that the notice, which was sent to the address for service in the CBL, was served pursuant to s. 33(3)(a), relying on *Kawana v. Shamal*.
- [23] First, I need to determine if the first sentence of paragraph 26 in *Kawana* where the court stated that service was effected when the mail was actually received is binding on me. I have concluded that it is not. Upon review of the judgment as a whole, the question of when the s. 33(2) notice was served pursuant to s. 33(3) was not in issue in the case. Subsequent to the comment about service, the court went on to say that the notice had been mailed and referred to service being deemed to have occurred eight days after mailing. The court referred to both deadlines, one commencing on the date of receipt and the other based upon deemed service based on the date of mailing. The lien was cancelled because it was clear that the claim had been filed out of time regardless of which deadline applied. The application to cancel the claim of lien was not opposed by the lien claimant, who did not attend the hearing.

- [24] In order to constitute service under s. 33(3)(a), the plaintiff would need to be personally served. The requirement for personal service under subsection (a) must be contrasted with subsection (b) which references the address for service given in the lien. The only permitted methods of service to the address for service on the claim of lien are mailing or delivery. The address for delivery on the plaintiff's CPL is the office of its counsel for the purpose of this litigation but is not the plaintiff's registered and records office.
- [25] Since subsection 33(3)(b) refers to the address for service given in the claim of lien but subsection (a) does not, I must assume that the legislature deliberately excluded the address for service in the claim of lien for the purposes of personal service under s. 33(3)(a).
- [26] It follows that the notice was not served personally.

When was the notice considered served as a result of being mailed or delivered pursuant to s. 33(3)(b)?

- [27] The plaintiff says that registered mail is a form of mail and since the defendants availed themselves of the services of Canada Post, service is deemed to have been effected eight days after mailing, regardless of when it is actually received. It says that s. 33(4) would deem the notice to have been received eight days after mailing regardless of whether it arrived after eight days or indeed never arrived at all.
- [28] The defendants say that mail and registered mail are different and that the deeming provisions of s. 33(4) apply only to regular mail, not to registered mail. I do not agree.
- [29] The defendants are essentially arguing that the phrase "service by mail" should be interpreted as service by regular mail only.
- [30] I was not provided with any authority for the proposition that registered mail is not 'mail'. If the legislature had intended that mail as contemplated in subsections 33(3)(b) and 33(4) was limited to regular mail only, it could have said so.
- [31] Presumably if registered mail is not considered to be "mail" for the purposes of s. 33(4), it would also not be mail for the purposes of s. 33(3)(b) either. The effect of the defendants' argument if accepted would be that notices sent by registered mail would only be effective if the notice were actually received. As such, an owner's attempts to send a notice by registered mail could be frustrated by the intended recipient's refusal to receive it.
- [32] This outcome would seem contrary to the intentions of s. 33(2) that provides an owner with a mechanism to force a lien claimant to commence the claim.

When was the notice served?

- [33] The defendants say that signing for the registered mail constituted delivery under s. 33(3)(b), whereas the plaintiff says time started to run based on the deeming provision eight days after mailing, notwithstanding the date of actual receipt.

- [34] This issue appears to have been considered by Quijano J. in *Wilson v. Environmental Appeal Board*, 1995 CanLII 2339 (BCSC). In that decision, the petitioner had been charged with an offence under the Wildlife Act and a hearing was held to determine whether the offence had occurred and to fix the penalty.
- [35] The legislation provided that the minister could give notice of a decision either by personal service on the person affected or by sending notice of the decision by registered mail. It then went on to say, "[i]n the case of service by mail, the notice shall be conclusively deemed to be served on the fourteenth day after it is deposited in Canada Post at any place in Canada."
- [36] Pursuant to the legislation, the person charged was afforded 30 days from service to appeal. According to the facts as set out in the brief oral decision, the decision of the deputy director was sent by registered mail on November 9, and the appellant's appeal was served on December 19, 1994. Although the date of actual receipt is not stated in the decision, the fact that the appeal was perfected only 40 days after mailing leads me to assume that the registered mail must have been actually received well before the deemed service of 14 days after mailing.
- [37] Quijano J. held that the deeming provision for service by registered mail was the operative date, and not the date it was signed for:

Nowhere in section (3.1) is there a reference to the ability to serve notice by registered mail as though it were personal service with the date of receipt to be the date of service: If that was what was intended, it would be clearly stated in the language of the section.

I think what was intended by the section was to provide the minister with the administrative flexibility to serve a person affected by a decision by way of registered mail the advantage of having service be deemed to have been effected that way whether or not the notice was ever received. The language of the section clearly defines the deemed date of service by registered mail to be fourteen days from the date that piece of mail is deposited at the Canada Post office.

It is my view that the proper interpretation of section 103 is that either personal service of the notice of the minister's decision is effected on the date the notice is actually physically delivered to the recipient or is effected fourteen days from the day that the notice is sent by registered mail, that is fourteen days from the day the notice is deposited with Canada Post, not the date the Notice is signed for upon receipt. [Emphasis added]

- [38] This analysis is apposite here. The date to file a notice of civil claim and to file and register a certificate of pending litigation is calculated based upon the deemed date under s. 33(4) of the Act, regardless of when, or indeed if, the notice is actually received, should it be sent by mail which includes registered mail. Earlier receipt does not cause the limitation to start to run sooner.

[39] In all of the circumstances, I conclude that the defendants' notice to the plaintiff in this case was deemed to have been served on the plaintiff for the purposes of s. 33(3) of the Builder's Lien Act eight days after it was mailed. The plaintiff's certificate of pending litigation was therefore filed on time.

[40] The defendants' application is dismissed, with costs to the plaintiff.

"Master Wilson"

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