

CANADA / JUDGMENT

Gabrielle v. Enns Framing & Formwork Ltd.

2022 BCSC 2506

COURT

Supreme Court of British Columbia

DECIDED

29 September 2022

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2022 BCSC 2506 Gabrielle v. Enns Framing & Formwork Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gabrielle v. Enns Framing & Formwork Ltd.,

2022 BCSC 2506

Date: 20220929

Docket: S57784

Registry: Vernon

Between:

Andrew Joseph Gabrielle and Ashley Karen Gabrielle

Petitioners

And

Enns Framing & Formwork Ltd. and Marla Dawn Nolin

Respondents

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

M.E.A. Danielson

Counsel for the Respondents:

L.H. Marriott

Place and Date of Hearing:

Vernon, B.C.

September 22, 2022

Place and Date of Judgment:

Vernon, B.C.

September 29, 2022

- [1] THE COURT: The issues before the court arise out of a builders lien dispute.
- [2] The petitioners were the former owners of property (the "property") for which they engaged the respondent, Enns Framing & Formwork Ltd. ("Enns Framing"), to build a new home.
- [3] Enns Framing registered a claim of lien against the title to the property on February 28, 2022 in the amount of \$160,048.20.
- [4] There are three points in issue in this petition:
 - 1) Is the claim of lien extinguished because Enns Framing failed to commence a lien enforcement action within the time prescribed by s. 33 of the Builders Lien Act, S.B.C. 1997, c. 45 [BLA];
 - 2) Was the claim of lien invalid having been filed after the time limit prescribed by s. 20 of the BLA; and
 - 3) What are the costs issues arising from my determination of the first two issues.
- [5] What happened in this case is that the parties entered into a security agreement (the "security agreement"), which, as is the invariable case, provided that the security would stand as security in substitution for the lands. The security agreement was made in lieu of an order under s. 24 of the BLA, with the petitioners and Enns Framing to be in exactly the same position as if the claim of lien were cancelled by way of an order of the court made under s. 24 of the BLA.
- [6] The case authorities make it clear that a security agreement operates in exactly the same way as a lien: *Outback Developments Inc. v. Hare*, 2019 BCSC 2404; *Century Group GP Co. Ltd. v. KRS Excavating Ltd.*, 2022 BCSC 357.
- [7] The petitioners gave notice to Enns Framing to commence an action which triggered the operation of s. 33(1) of the BLA. Section 33(1) provides:

Limitation and notice to commence an action

33 (1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered, not later than one year from the date of its filing, in the land title office or gold commissioner's office in which the claim has been filed.

[8] As I understand Enns Framing's argument, they rely on paragraph 7 of the security agreement, which provides as follows:

7. Pursuant to the implementation of the security agreement, Enns [Framing] will not file any further charge against the Lands in relation to the Lien Claim.

[9] Enns Framing says, therefore, that it would not be able to commence an action or file a certificate of pending litigation because there is a conflict between s. 33(1) and the security agreement.

[10] I am not able to accept that position. Section 33(1), in the first couple of lines of the subsection, says:

33 (1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered []

[11] Here we have a situation where the claim of lien has been removed because of the security agreement. Therefore, the argument of Enns Framing has no application.

[12] The notice of civil claim that was filed eventually was a claim in debt for the unpaid work. It was not a notice of civil claim to enforce the lien and, even if it were, it was filed out of time.

[13] In my view, it is incontrovertible that the lien is extinguished because the action was not filed as required.

[14] I should say also that it is trite law that there is no exercise of discretion on the part of the court to overlook the strict application of the BLA or to extend any time limits: *Alan Jones Construction Limited v. Hicks*, 2019 BCSC 568.

[15] There are many cases that refer to the principles underlying the requirement for a strict observance of the BLA provisions, and essentially they boil down to the fact that a lien provides a form of prejudgment security for a judgment that has not yet been obtained. That is an extraordinary remedy, but exists in order to keep construction projects running smoothly.

[16] Moving on to the second issue: was the claim of lien invalid as having been filed after the time limit prescribed by s. 20 of the BLA?

- [17] I say that it has been extinguished under s. 22, and the reason is again because of the application of the provisions of the BLA which permit no scope for discretion. We start with the definition of "head contractor". Enns Framing is a head contractor for the project, as it was a contractor engaged to do all or substantially all of the work respecting the project. This is provided in the definitions section, s. 1(1) of the BLA.
- [18] The time limit for filing a lien is no later than 45 days after the head contract was completed, abandoned, or terminated, if the owner engaged a head contractor. So that 45-day time limit applies here. The reference is s. 20(2)(a) of the BLA.
- [19] Now we look at the formula which is known as the "3-2-1 formula". The petitioners have calculated the formula, and I have no reason to disagree with the calculations. Enns Framing says that--and again, as far as I understand the argument--that the project was substantially completed sometime in February 2022.
- [20] Affidavit #1 of Angela Enns, secretary for Enns Framing, made July 22, 2022, says that the work continued into February 2022. At paragraph 5, she says, by way of argument, rather than fact:
- [5] As the contract price could not be determined until all the work had been complete, I do not believe it would have been possible to determine with certainty when the Project was substantially complete using the "3-2-1" test without significant prejudice to Enns [Framing].
- [21] The court's duty in this matter is not to assess whether there is prejudice to Enns Framing. Rather, the court is required to assess whether the statutory requirements have been met on the basis of the facts as presented. I agree with counsel for the petitioners that the letters attached to Ms. Enns' affidavit from other contractors are inadmissible hearsay.
- [22] In any event, the assertion as to whether the contract was completed really has nothing to do with the application of the 3-2-1 formula.
- [23] In the petitioners' written submissions at paragraph 40, the calculation is as follows, based on the total invoice amount of \$937,090.86:
40. [] the head contract was completed for the purposes of section 20(2)(a) of the Builders Lien Act when the cost of work that remained to be completed was \$23,741.82 (being the "3-2-1" formula amount calculated on the Invoice Amount). Consequently, the cost to complete or correct the work would have needed to exceed \$23,742.82 after January 14, 2022 (being 45 days before the registration of the Claim of Lien), for the Claim of Lien to be filed within the time limit prescribed by the Builders Lien Act.
- 41 [Enns Framing] invoiced the Petitioners in the amount of \$18,546.08 on December 17, 2021 [] for work that was performed by subcontractors between October and December 15, 2021 []
- [24] Just to summarize, I accept the facts summarized in the petitioner's written submissions from paragraphs 42 through 45.

[25] In sum, the builder's lien was filed out of time. Counsel for Enns Framing described the company as "a mom and pop operation". I take from that submission that the Enns Framing principals might have been unfamiliar with the requirements of the BLA. However, it is important to note that filing a late lien can be due to misunderstanding, but the costs of disputing the lien are still payable: *Century Group GP Co. Ltd. v. KRS Excavating Ltd.*, 2022 BCSC 357. I cite that decision with respect to the costs issue, but a misunderstanding certainly applies throughout the BLA analysis in the sense that, to reiterate, there is no scope for the exercise of discretion, and strict compliance with the requirements of the BLA is required.

[26] The lien was filed out of time. Now I turn to the costs issue.

[27] In the interests of efficiency, I simply refer to the written submissions of the petitioners at paragraphs 46 through 51. Those submissions accurately set out the two bases on which costs should be awarded, and I agree with the petitioners' position. Accordingly, for the purpose of the court summary sheet for today's purposes, I make the order set out in paragraph 51, which is as follows:

1. The petitioners are awarded their "lien investigation/removal costs", being their legal expenses associated with negotiating the replacement of the claim of lien with the security; and
2. The petitioners are awarded their "lien litigation costs", i.e., the costs of this proceeding, at Scale B.

[28] There is no reason to put "in any event of the cause", because the petition is concluded.

"Associate Judge Harper"

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