



Practice Tips

Nuts & Bolts should be a forum for lawyers who practice in construction law to share the benefit of experience in dealing with some of the practical day to day issues that we all face. The editors offer the following two modest points for your consideration. We would be pleased to reproduce any points of practice of general interest to construction lawyers in this forum, particularly for matters outside of Toronto. Please send your practice points to either Brendan Bowles at bbowles@glaholt.com or Jeffrey Armel at armel@gsnh.com. There may or may not be a prize for the best one!

1. Reduction in Staff in Toronto Masters' Offices

At the beginning of January, 2012, the administrative support available to Masters in Toronto was re-structured due to government cut-backs. Specifically, the Construction Lien Masters will no longer each have their own dedicated registrar for *ex parte* court, and the scheduling of trials, pre-trial conferences, and motions.

Members of the construction law bar have long depended on the construction lien masters and their administrative support to provide "real-time" means to arrange for vacating and discharging construction liens from a construction project, and also to conduct all stages, up to and including trial, of lien actions that have been referred to the master. Some members of the OBA Construction Law Section have expressed concern over the reductions in staffing in the Masters' office. Therefore we have created a forum for you to pass on your views and experiences with this new structure – good, bad or indifferent.

If you have had any such experiences you would like to share with the OBA on this topic, please send an email to the following address: constructionlien@oba.org

To read a letter from the president of the OBA to the Ministry of the Attorney General, please go to the following: (note: you will be asked to fill in your last name and OBA membership #)

http://www.oba.org/En/OBA_PDF_Reader/PDF/Default2.aspx?Code=HzqiEa30LfMtDY7voVssRZF9HI2eKvuOqiQR3hG0z%2fQ6TZ8iOOKzUzNXaH9NuWIXxZWckE0S11jFMF79V4IkIprWSQgwArW

2. Claims Against a Non-Party in Lien Actions

Submitted by Varoujan Arman, associate, Blaney McMurtry LLP, varman@blaney.com, and member of Blaney McMurtry's Architectural/Construction/Engineering Services Group. Thanks to Andrew Heal for his comments on these practice points.

In a recent construction lien matter, the question arose whether a party defendant could add a non-party as a defendant to counterclaim. In fact the non-party to be added was the very lawyer acting for the plaintiff/lien claimant. The issue involved the statutory provisions in the *Construction Lien Act*, as well as broader principles dealing with the agency relationship of the lawyer-client. The following discussion highlights the main points of interest on this point of practice.

Sections 55 and 56, *Construction Lien Act*, R.S.O. 1990 c. C.30

Adding a non-party lawyer as a defendant to the counterclaim, or any non-party, is not permitted in a construction lien action. Section 55 of the *Construction Lien Act* provides that a defendant in an action may counterclaim “against *the person who named the defendant* as a defendant in respect of any claim that the defendant may be entitled to make against that person...” More broadly, the statutory language appears to preclude counterclaims against anyone not already a lien claimant/plaintiff.

The issue is therefore one of statutory interpretation. A common sense view suggests that the language “against the person who named the defendant” refers exclusively to the plaintiff. The provision does not intend an interpretation such that the phrase “the person who named” could mean the lawyer acting as agent for the plaintiff. The person who names the defendant is obviously the plaintiff(s) indicated in the title of proceedings, the person(s) claiming the lien.

It also appears that pursuant to section 56 of the *Construction Lien Act*, plaintiff’s counsel would not meet either the statutory definition or the definition provided in the case law decided under this section in order to advance a “third party claim”. Section 56 provides that in a construction lien proceeding, leave of the court is required to add a third party so as not to delay the main lien proceeding. The case law sets a high bar for leave to issue a third party claim, which must be obtained via motion on notice. Procedurally, a third party claim is very different than a counterclaim. Lien proceedings are supposed to be of a summary character, and adding a third party whose proximity to the factual matrix giving rise to the lien may be questionable would unduly complicate and lengthen matters.

Broader Principles of Agency Relevant to all Matters (i.e. non-construction lien cases)

Other relevant jurisprudence not limited to construction lien actions includes *Banzon v. Madsen*, [2001] O.J. No. 2216 and *Admassu v. Pantel*, 2009 CanLII 35726 (O.N.S.C.).

In *Banzon*, the court explained the rationale for the rule that there should be no liability on a solicitor to a non-client who does not reasonably rely upon him/her. The court noted that the lawyer would be responsible to someone who neither retains him nor pays him. Imposing a duty on the lawyer who is a mere agent to a third party is illogical as that is a duty even the client himself/herself does not have. Additionally, to find such a duty to a third party would risk or cause the lawyer to be in a conflict of interest with his/her own client. The *Admassu* case stands for this principle as well. The rationale becomes even more compelling when the proximity allegedly causing the duty of the lawyer to the third party is in the adversarial context of a lawsuit.