

Personal Liability for Abandoned Liens – Caution for Claimants

Date: May 30, 2017

Author: Chad Kopach

A December, 2016 decision from Justice MacLeod called *Petrelli Construction v Phillips*, [2016] O.J. No. 6798 reminds us that a decision to initiate but not prosecute a lien action can result in personal liability on the directing mind of the lien claimant.

In this case, Petrelli Construction filed a claim for lien in 2013. Because the lien was not bonded off, Petrelli Construction perfected its lien by commencing an action against the owners of the property. The initial contract for home renovation services was in the amount of approximately \$466,000.00, of which \$422,000.00 was paid. After factoring in alleged extras, the plaintiff's lien was for approximately \$185,000.00.

Because of a significant amount of set-offs that the owners were able to prove, the defendants were successful on a motion in 2014 to vacate the lien without the necessity of posting security. For more than two years after that motion, the plaintiff took no steps to prosecute the action; "Mr. Petrelli", the directing mind of Petrelli Construction, was content to just "let it drift".

There was no question that the action could be dismissed given that the action had not been set down for trial within two years (a time limit imposed by the *Construction Lien Act*). The issue before Justice MacLeod was whether the costs incurred by the defendants should be paid by Petrelli Construction alone, or whether Mr. Petrelli should also be responsible.

Mr. Petrelli was found jointly and severally liable with Petrelli Construction to the owners for their costs on a substantial indemnity scale. Justice MacLeod referred to the *Construction Lien Act*, including section 35, which permits an owner to claim damages for grossly excessive liens, and section 86, which permits an owner to claim costs against a person who "participates" in the preservation/perfection of a lien that is without foundation or is grossly excessive. Justice MacLeod also referred to section 131 of the *Courts of Justice Act* and Rule 37, which His Honour stated allow for the awarding of costs against a non-party governing mind of a corporation.

Faced with the prospect of having to prosecute a vigorously defended lien claim, it can be tempting for the directing mind of a corporate plaintiff to simply abandon the proceeding instead

of spending the legal fees to properly discontinue the action (and discharge any related lien on title), safe in the knowledge that the corporate plaintiff has little or no assets, and is therefore “judgment proof” when it comes to an adverse costs award. *Petrelli Construction* is a caution that in some circumstances, the directing mind of the corporate plaintiff who engaging in this strategy may be found jointly and severally liable for costs owing by the corporation.