

Timeliness of the Lien - Rethinking the "Date of Last Supply"

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Generally speaking, subcontractors' liens expire 45 days from the date of last supply^[1]. This is the key deadline all subcontractors are looking at when waiting on payment. When determining if they still have time to lien, most subcontractors look to their time sheets to find out when their workers were last on site, thinking that they are out of time to lien if the last timesheet is dated more than 45 days ago.

Similarly, the owner and general contractor will often rely on site records (including log books and time sheets) to determine what subcontractors still have lien rights based on who was on site within the last 45 days.

However, the recent decision from Justice DiTomaso in *Toronto Zenith Contracting Ltd. v. Fermar Paving Ltd.*^[2] is a reminder that the inquiry into timeliness cannot stop with a review of site records. When determining timeliness, a Court will look at the subcontract to determine if off-site work performed after the last date on site will be the trigger date for the start of the 45 day time to lien.

Facts

Fermar was the general contractor retained to make improvements to interchanges on Highway 400 in and around Barrie, which included work on ramps and bridges. Fermar retained Toronto Zenith as the structural subcontractor with a contract worth about \$1 million. Toronto Zenith's work started in 2013, and continued through 2014.

As is common with road work, the project had scheduled shutdowns for winter. The 2014-2015 shut down started in mid-December, 2014. The last date that Toronto Zenith's forces were physically on site was December 19, 2014.

During the shutdown, Toronto Zenith and Fermar got into a dispute regarding Toronto Zenith's work, delays, and payment. Toronto Zenith terminated its contract by way of notice dated February 6, 2015.

Toronto Zenith did not preserve its claim for lien within 45 days of December 19, 2014 (which would have been February 2, 2015), but instead waited until March 18, 2015.

Fermar brought a motion alleging that Toronto Zenith's lien was preserved well beyond the 45 day period in the *Construction Lien Act* (the "Act"), and accordingly had expired when it was purportedly preserved.

In response, Toronto Zenith argued that it had last supplied services and/or materials to the improvement on February 6, 2015 (the day the contract was terminated). Toronto Zenith's position was that its contract was for more than just the physical, on-site supply of services and materials, but was also for design and other preparatory work that was being performed on an ongoing basis over the winter, in anticipation of a spring restart.

Discussion

A significant majority of services and materials supplied to an improvement are supplied physically. Accordingly, in many cases a subcontractor's date of last supply is the same day that the subcontractor was last physically on site. However, the Act does not limit "supply" to mean only physical supply, and defines the supply of services as including "any work done or service performed upon or in respect of an improvement" (emphasis added).

Previous court decisions have held that this expanded definition means that a lien arises for work done not only directly to the improvement, but also indirectly, and has been defined broadly enough to include off-site work.

In this case, Justice DiTomaso accepted Toronto Zenith's position that it was performing off-site work under its subcontract during the winter shutdown. Toronto Zenith's position seems to have been bolstered by admissions by Fermar's representative about Toronto Zenith's post-shutdown work, including that there was an ongoing need for Toronto Zenith to complete its preparatory work during the winter.

As a result, Justice DiTomaso denied Fermar's motion for a declaration that Toronto Zenith's lien had expired, and Fermar had to pay \$15,000.00 in costs to Toronto Zenith.

The Takeaway

Not every subcontract will allow the subcontractor to lien for work done off-site. However, this decision is a reminder to all involved that site records may determine the last date a subcontractor was physically on site, but are not determinative of the last date on which a subcontractor supplied services or materials to an improvement.

For lenders, owners, and general contractors, the time within which a subcontractor can lien may run well beyond 45 days from the last date the subcontractor was physically on site. However, the Act provides a way to obtain certainty. A declaration of last supply under section 31 of the Act (using prescribed Form 5) will set out a date that "shall be deemed to be true against the person making the declaration".

If anyone in the construction pyramid has a question about whether a subcontractor has supplied services after the last date they were physically on site, the subcontractor should be asked to provide a Form 5 declaration.

[1] Actually, it is more involved than this; per s.31(3), the lien expires if not preserved within 45 days from the earliest of (a) publication of the certificate/declaration of substantial performance of the contractor's contract; (b) the date on which they last supplied services or materials to the improvement; or (c) the date the subcontract is certified to be completed.

[2] ("*Toronto Zenith*") [2016] O.J. No. 3868.