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Construction Liens and Adjudication Orders: the Court weighs in on having to "Pay Twice"

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From the moment the draft Adjudication provisions were presented to the construction industry, payors (owners mostly) made it clear they were very concerned about situations where they may have to “pay twice”, given that unpaid contractors and subcontractors are permitted to run lien claims and Adjudications simultaneously.

In the case of a construction lien, an owner may have to post the full amount of the claim, plus security for costs, into court to clear title. The owner could also end up having to pay an adjudicator’s determination on an interim basis, while their dispute makes its way through the court system to (hopefully) obtain an order that they are not liable for the claim, and to recover the funds paid into court. In the meantime, they will have “paid twice”; once to satisfy the Adjudication Order, and a second time to post security with the court.

Owners were also concerned about being faced with an Adjudicator’s order to pay a contractor in the face of a perfected lien from a subcontractor, which can result in the Owner having to “pay twice” in respect of its holdback obligations.

The “pay twice” issue was front and center in the recent decision of Justice Fraser in *Okkin Construction Inc. v Apostolopoulos*, released November 10, 2022.

The facts are familiar to most construction lawyers. Apostolopoulos as owner (“Owner”) retained the Bond Group Ottawa 2018 Inc. (“Bond Group”) as contractor for an improvement to the Owner’s home. The Contractor subcontracted part of the work to Okkin Construction Inc. (“Okkin”).

The project was a victim of fluctuating prices of structural steel, resulting in cost overruns that put the project over-budget. The Owner refused to pay, and terminated his contract with the Bond Group.

Not surprisingly, the Bond Group took issue with the termination, and commenced an Adjudication and registered a construction lien for $402,000. Okkin registered its own lien for $196,000.

The Adjudication resulted in an order that the Owner pay the Bond Group $207,000, said to be the cost of the structural steel.

The Owner did not seek leave to have the Adjudication determination judicially reviewed, and did not seek a stay of the Adjudicator's Order. The Adjudicator's Order was registered with the Court, and thereafter became, in Justice Fraser's words "enforceable as an Order of this Court."

The Owner brought a motion for directions within Okkin's lien action. His complaint was that the Adjudicator's determination, which requires payment to the Bond Group, failed to account for: (a) the fact that there was an existing subcontractor's lien (Okkin's lien for $196,000); and (b) the statutory prohibition against making payment in the face of a lien set out in section 24 of the *Construction Act*. As for relief, the Owner sought to vary the Adjudicator's determination pursuant to Rule 59.06(c) of the *Rules of Civil Procedure*.

To put it bluntly, a motion to vary an Adjudicator's Order in a separate proceeding (in this case, Okkin's lien proceeding) is not the proper way to proceed. Justice Fraser determined that she did not have jurisdiction in Okkin's lien proceeding to make an order varying the Adjudicator's Order.

Justice Fraser cited the (at the time) only two published decisions to address Adjudications under the *Construction Act*, *SOTA Dental v. Andrid Group*, and *Pasqualino v MGW-Homes Design*. Having done so, Her Honour concluded that: "absent a stay… an Adjudication Order must be paid even if it means that someone will have to pay twice in the short term."

Although not determinative of the issue, Justice Fraser did point to the trust provisions of the *Construction Act* to address some of the Owner's concerns. Her Honour noted that upon payment of the amount ordered in the Adjudication, "the Bond Group is a trustee for Okkin. It may not appropriate or convert to its own use any part of the trust until all the subcontractors and other persons who supply services or materials have been paid. [Owner] will get credit for this payment."

On the issue of "paying twice", the takeaway from this decision seems to be that if an Owner is concerned that an Adjudicator's Order for payment could possibly put them offside of section 24 of the *Construction Act*, then the Owner must raise that issue before the Adjudicator, and ask that it not be required to pay the holdback portion until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under the *Construction Act* (per section 22). Specifically, the Owner should raise s.13.19(1), which reads: "A requirement to pay an amount in accordance with this section is subject to any requirement to retain a holdback in accordance with Part IV."

Contact us to learn more about these issues and other construction related matters.

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