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CASE COMMENT

DIVISIONAL COURT SKIRTS CONSTRUCTION LIEN ACT DEADLINE: 1475707 ONTARIO INC. v. FORAN

In a recent appeal decision, a divided panel of the Ontario Divisional Court found that service of a trial record where pleadings had not closed will satisfy the requirement of the *Construction Lien Act*[1] that a plaintiff set its action down for trial within two years of commencing the action. The majority granted leave to a plaintiff to serve an amended trial record after it had delivered a defence to counterclaim. In so doing, it provided hope to lien claimants that courts will find ways to relieve against the harsh consequences of the *Construction Lien Act*. But a strong dissent and the fact that the court departed from prior case law – and, arguably, the clear intent of the Act – suggest that this issue is ripe for re-consideration at a later date.

1. Background

The issue in *1475707 Ontario Inc. v. Foran*,[2] was at first blush a narrow one: whether a plaintiff in a construction lien action could set the action down for trial without having first served its statement of defence to the defendant's counterclaim. But on this narrow issue turned the survival of the plaintiff's lien claim.

The *Construction Lien Act* provides strict deadlines for lien claimants. For instance, a lien claimant which has properly preserved its lien rights (usually by registering a claim for lien on title) must perfect its lien by commencing an action to enforce the lien. (Under certain circumstances, a preserved lien may "shelter" under the umbrella of another perfected lien.) If the relevant deadlines for either the preservation or perfection of a lien claim are missed, the claimant's lien rights will expire, and cannot be revived.

But properly preserving and perfecting a lien claim does not allow a lien claimant to rest easy. Section 37 of the Act provides that a

* **Editorial note**: The author of the dissenting judgment referred to in this case comment is the editor of this journal.

1. R.S.O. 1990, c. C.30.
2. *1475707 Ontario Inc. v. Foran*, 2013 ONSC 6882, 117 O.R. (3d) 772, 2013 CarswellOnt 15238 (Ont. Div. Ct.) ("*Foran*").

perfected lien expires immediately after the second anniversary of the commencement of the action unless either an order is made for the trial of an action in which the lien may be enforced, or such an action is set down for trial. If neither of these events occurs, the plaintiff's lien rights expire. It is too easy for counsel to pay strict attention to the deadlines for preserving and perfecting a lien, only to let the subsequent two years slip by without turning their minds to the requirement to proceed to trial.

Indeed, mistakes are made regularly enough that Master Sandler devoted nearly 1500 words (and no small measure of exasperation) to the topic of processing lien claims to trial in the case of *Pineau v. Kretschmar Inc.*[3] His comprehensive summary is an invaluable guide for any advocate looking to navigate the shoals of the *Construction Lien Act*.

Foran presents the type of situation that so exercised Master Sandler: a lien claimant attempting to process its action to trial, but making mistakes along the way. The issue in the case was whether the mistakes were fatal to the claimant's lien rights, or merely an irregularity that could be relieved against by the curative provision of the *Rules of Civil Procedure*.[4]

In *Foran*, the plaintiff perfected its lien claim by commencing its action on May 11, 2009, and registering a certificate of action on title the following day. The defendant served a statement of defence and counterclaim. The plaintiff, however, did not deliver a defence to counterclaim. On April 28, 2011, about two weeks before its lien was set to expire, the plaintiff purported to set its action down for trial by serving and filing a trial record. The problem for the plaintiff was that while it had evidently turned its mind to the Act's deadline, it had paid less heed to the requirements under the Rules respecting the service of trial records. A trial record, of course, cannot be served and filed until pleadings have closed; but the plaintiff's defence to counterclaim was still outstanding. In fact, the plaintiff did not serve its defence to counterclaim until October 16, 2012 – nearly 18 months after it served its trial record.

On a plain reading of the Rules, it would seem that the plaintiff had had no ability to serve a trial record when it did; and on a plain reading of the Act, it would seem that the plaintiff's failure to properly serve a trial record had been fatal to its lien rights. *Foran* turned on the issue of whether such a plain reading is correct or incomplete.

3. *Pineau v. Kretschmar Inc.* (2004), 37 C.L.R. (3d) 29, 2004 CarswellOnt 548, [2004] O.J. No. 396 (Ont. Master).
4. R.R.O. 1990, Reg. 194.

2. The Defendant's Motion

The defendant brought a motion to vacate the plaintiff's setting down of the action for trial, and to declare the plaintiff's lien expired.

The plaintiff sought refuge in rule 2.01, which states that a failure to comply with the Rules is an "irregularity" and does not render a step or a document a nullity. The court is empowered to grant whatever amendments or other relief may be necessary to ensure a just determination of the real matters in dispute.

The motions judge found in the defendant's favour, and held that the plaintiff's lien had expired because of its failure to file a proper trial record after the close of pleadings and within the two-year deadline provided for in the *Construction Lien Act*.

The plaintiff appealed to the Divisional Court.

3. Appeal

On appeal, by a two-to-one majority, a divided Divisional Court allowed the appeal and set aside the order of the motions judge. In so doing, the Divisional Court specifically declined to follow previous case law which had suggested that in precisely this scenario, a lien claimant would lose its lien rights.

The plaintiff submitted that rule 2.01 granted discretion to the court to relieve against the "irregularity" of a trial record which, in the words of the Justice Pardu writing for the majority, "did not contain the Statement of Defence to the Counterclaim". This wording somewhat elides the fact that at the time the trial record was served, there was no defence to counterclaim for the trial record to contain.

In response, the defendant submitted that allowing the relief sought would indirectly permit an extension of the time limit mandated by s. 37 of the Act.

In answer to the defendant's submission, the majority engaged in an unusual purposive interpretation of s. 37 of the Act. The purpose of the section, Justice Pardu wrote, "is to promote speedy trial of construction lien actions". She reasoned that since by setting the action down for trial the plaintiff had been precluded from taking further interlocutory steps, the action had been expedited and the Act's purpose had been served. That being the case, the majority could see "no reason why the motion judge could not have granted leave to the Plaintiff to file an amended record containing the missing Statement of Defence to the Counterclaim and leaving the lien claim alive since the Trial Record was originally filed within two years".

This reasoning is puzzling. It seems to elevate the simple act of filing a document with the words "Trial Record" on the cover above the substantive requirement that service of a trial record reflect, at a minimum, that no further pleadings need to be delivered. It is doubly strange in the circumstances of the case: if a plaintiff can let pleadings languish for *18 months* after delivery of a trial record without penalty, in what sense are the courts promoting "speedy trials" of lien actions?

Perhaps more significantly for defendants to lien claims, the majority's reasoning seems to view the provisions of the Act as discretionary, subject to weighing the equities of a given situation. Indeed, Justice Pardu commented that "[b]oth parties dragged their feet at times", and stated that "There are no particular equities favoring the Plaintiff or the Defendant other than the possible loss of a lien to the Plaintiff and the preservation of the lien against the defendant." This reasoning imports the equitable exercise of discretion into the strict legal framework of the Act. In so doing, it arguably devalues the right of defendants to rely on the provisions of the Act. The Act puts significant legal firepower in the hands of lien claimants; the corollary is that it requires them to protect their rights in strict compliance with the Act, and to move their lien claims to trial expeditiously. That defendants ought to be able to rely on the protections of the Act as much as plaintiffs is itself an equity overlooked in Justice Pardu's reasons.

The majority's approach is novel, and notably diverges from that of Justice Quinn in the 2010 case of *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*[5] In that case, too, a defendant attempted to vacate the service of a trial record in a construction lien action. The defendant argued that pleadings had not closed when the plaintiff served its trial record, because the *defendant* had not yet filed its *reply* to the plaintiff's defence to counterclaim. Justice Quinn found that because the defendant had no right to file a reply under the Act, the pleadings *had* closed and the action had been properly set down. But Justice Quinn also stated that had pleadings *not* been closed, "I would have found it necessary to hold that the liens had expired". These comments were *obiter*, but they did signal a particular interpretive approach to the Act and the Rules.

In *Foran*, the majority specifically disagreed with Justice Quinn's thinking. Justice Pardu found that granting permission to file an amended trial record is not "necessarily the equivalent of extending the time limit" for setting down an action for trial.

5. *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 ONSC 6338, 95 C.L.R. (3d) 190, 5 C.P.C. (7th) 440 (Ont. Div. Ct.).

Justice Pardu is undoubtedly right that amending a trial record is not *necessarily* equivalent to an extension of time. For instance, if a trial record were filed with an inadvertently omitted document, that would seem to be an "irregularity" within the meaning of rule 2.01. But allowing a plaintiff to set an action down for trial while the *plaintiff's own pleading* is outstanding amounts to allowing a plaintiff to ignore the deadlines in the Act.

4. A Note of Caution

In spite of the majority's reasons, lien claimants would be wise not to be careless about the deadlines in the *Construction Lien Act*. A strong dissent by Justice Matlow suggests that this issue is ripe for re-consideration at a later date.

In his dissent, Justice Matlow noted that s. 37 of the Act is not aimed solely at speeding lien actions to trial, but at balancing competing interests, including the interests of landowners who "seek to free their affected lands from the clouds of title created by the registration of claims by plaintiffs".

Justice Matlow called the *Construction Lien Act*'s deadline "an unqualified declaratory provision", and properly observed that the Act "recognizes no allowance for granting relief to those who do not comply with it, regardless of the reason for the non-compliance". Of course, the issue in *Foran* was precisely whether the plaintiff's incomplete trial record did, in fact, comply with the Act's requirements. Justice Matlow gets to the heart of the issue when he interprets s. 37 as "a requirement that the action be set down *correctly* in accordance with the Rules" (emphasis added).

Implicitly rejecting the majority's view that a court is empowered to weigh equities in a case of non-compliance with the Act's deadlines, Justice Matlow argues that the motions judge "had no jurisdiction to grant relief for the plaintiff's non-compliance with section 37 of the Act".

Justice Matlow's dissent notes the crucial point that was glossed over by the majority: the plaintiff did not merely "omit" the statement of defence to counterclaim; rather, "at the time that the plaintiff purported to set the action down for trial, the 'missing' defence to the defendant's counterclaim had not yet even been delivered and, when it was later delivered, more than three years had passed since the commencement of the action".

Justice Matlow also notes that "the plaintiff's non-compliance with section 37 was not disputed". In his view, no Rule can "remedy non-compliance with section 37, whether the non-compliance stems from an irregularity or something more". This has been the traditional understanding of the construction bar in the province – an understanding now cast into doubt by the reasons of the majority.

5. Conclusion

Lien claimants should take heart that the courts will go out of their way at times to ensure that the rights protected by the Act – namely, the right to be paid for the work they performed – will be protected. But the approach taken by the majority in *Foran* may well be vulnerable to reversal by an appellate court in future, particularly in light of foregoing jurisprudence and Justice Matlow's dissent. Lien claimants would be well-advised to comply strictly with the deadlines in the Act – if for no other reason than to save the cost of an appeal to the Divisional Court!

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