Lincoln Mechanical v. Cardillo: Case Comment

by Jay Nathwani

In *Lincoln Mechanical Contractors, a Division of Lincoln Plumbing & Heating Ltd. v. Cardillo*[1], the Ontario Superior Court considered when a landlord will be a statutory owner under the *Construction Lien Act* ("*CLA*") in respect of improvements made by a tenant.

The defendant RioCan Holdings Inc. ("RioCan") was the owner of a commercial plaza in St. Catharines. Its tenant (and co-defendant to the action) was 1540958 Ontario Inc., operating as Premier Fitness ("Premier"). As part of the lease, RioCan agreed to pay Premier a Leasehold Improvement Allowance ("LIA") of approximately $2.2 million to subsidize the cost of renovations. Premier hired Lincoln Mechanical Contractors ("Lincoln") to do HVAC work, but did not pay in full; Lincoln claimed that it was owed $271,000. Lincoln claimed that RioCan was an owner within the definition contained in s. 1 of the *CLA*, and alleged that approximately $234,000 of the LIA funds had been held back by RioCan. If Lincoln were correct, the balance of the LIA funds would have been impressed with a trust pursuant to s. 7 of the *CLA*, and should have been applied to Lincoln's outstanding account.

RioCan brought a motion for summary judgment against Lincoln. Its position was that because it did not make any request for work to be done, and because it did not satisfy any of the four factors set out in the statutory test for ownership, there were no reasonable grounds upon which a court could conclude that it was an owner; therefore, there was no genuine issue for trial.

The registered owner of a property is not necessarily the statutory owner for the purposes for a claim under the *CLA*. Henderson J. reviewed the definition of "owner" in s. 1(1) of the *CLA*:

> "... any person, including the Crown, having interest in a premises at whose request and,
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> (a) upon whose credit, or
> (b) on whose behalf, or
> (c) with whose privity or consent, or
> (d) for whose direct benefit,
>
> an improvement is made to the premises but does not include a home buyer."

The first step in determining whether RioCan was an owner was to decide if RioCan had made a request to Lincoln. All parties acknowledged that there had been no direct dealings between RioCan and Lincoln, but Lincoln could still succeed at trial if it could prove that an implied request should be inferred. The question on the summary judgment motion was whether an implied request could reasonably be inferred from the totality of the circumstances; so long as there were a reasonable possibility, Lincoln's claim against RioCan would be allowed to proceed to trial.

Lincoln argued that an implied request could be inferred based on the terms of the lease between RioCan and Premier. The lease provided that Premier would deliver to RioCan a contractor's

[1] 2011 ONSC 664, [2011] OJ No 362

quote outlining the scope and cost of the work, as well as a complete set of drawings and specifications. The work, drawings and specifications would be subject to RioCan's approval. The lease set conditions on the payment of the LIA, including a provision that the work would be completed to RioCan's satisfaction. Lincoln also pointed to the payment of the $2.2 million, which represented approximately half the cost of Premier's work.

RioCan submitted that no request could be reasonably inferred, and pointed to several factors. There was no privity of contract between RioCan and Lincoln, nor were there any direct dealings. While the lease provided that RioCan would receive materials from the contractor, there was no evidence that RioCan ever received a quotation, drawing or specification in respect of Lincoln's work, or that it was ever asked to approve Lincoln's work. No RioCan representative ever inspected Lincoln's work. All invoices were sent to Premier, and Premier paid Lincoln directly. With respect to the LIA, Lincoln was not even aware that RioCan was making payments to Premier until the end of the contract.

In the court's view, these facts were similar to those in the case of *Pinehurst Woodworking Co. v. Rocco*[2], in which no implied request between the landlord and contractor was found. The fact that the landlord had certain rights under the contract, without evidence that the rights were exercised, did not support an inference that a request was made.

While the LIA in this case was larger than the allowance in *Pinehurst*, the court considered the amount of the LIA irrelevant; its nature was what was relevant. Lincoln did not have an interest in the LIA payments; it submitted its invoices to Premier and was paid by Premier. The fact that Premier received reimbursement was irrelevant to Lincoln, as evinced by the fact that it did not know of the payments until the work was finished.

The court found that a trial judge could not reasonably infer from the circumstances that a request was made from RioCan to Lincoln. The court also found that there was no evidence to bring RioCan within the four factors enumerated in s. 1(1). The work could not be said to be upon RioCan's credit, as Lincoln was not aware of the LIA payments. There was no agency relationship that would have meant the work was on RioCan's behalf. Privity of contract did not exist between RioCan and Lincoln, and in the court's opinion it was clear that RioCan had not consented to the work. (The court pointed to the *Pinehurst* decision as authority for the proposition that consent or privity requires "a significant element of direct dealing.") The court found that for the work to be done for RioCan's benefit, "there must be more than the benefit to a landlord as a reversioner, and in the present case any benefit to RioCan would be the benefit as a reversioner."

The court granted summary dismissal of the claim against RioCan.

This case will be helpful to counsel who are advising landlords on potential liability under the *CLA* where the landlord's tenant has made improvements to the premises. The fact that a landlord has the right to approve or oversee work under a lease will not render that landlord an owner where those rights are not exercised. A landlord may also provide its tenants with an improvement allowance without attracting liability.

[2] [1986] OJ No 41 (Div Ct)

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