

March 26, 2024

Construction Lien Reference to Small Claims Court Is Discretionary

Key Takeaway

Even if the monetary amount in dispute is within the jurisdiction of the Small Claims Court, the court has discretion on whether to refer a lien action to the Deputy Judge for trial. This discretion may depend on the most proportionate, timely, and affordable process for the determination of the matter.

The Background

On August 26, 2022, the court rendered its decision on a motion by the plaintiff referring a construction lien action to an Associate Judge for trial.¹ The defendant opposed the reference and requested the trial be referred to Small Claims Court as the amount in dispute was under \$35,000, and therefore within its monetary jurisdiction.

Construction Lien Reference

Section 58(1) of the Construction Act (the “**Act**”) states the following:

On motion made after the delivery of all statements of defence, or the statement of defence to all crossclaims, counterclaims or third party claims, if any, or after the time for their delivery has expired, a judge **may** refer the whole action or any part of it for trial,

- (a) to an associate judge;
- (b) to a person agreed on by the parties; or
- (c) if the action is for an amount that is within the monetary jurisdiction of the Small Claims Court, as set out under section 23 of the Courts of Justice Act, to a deputy judge of that Court or to the Small Claims Court Administrative Judge.

The crux of the defendant’s opposition to the motion of reference to an Associate Judge relates to the monetary amount in dispute, being within the jurisdiction of Small Claims Court, and the statutory interpretation of the word “may” within section 58(1) of the Act.

The defendants’ position was that section 58(1)(c) of the Act establishes a condition precedent where if a lien action falls within the monetary jurisdiction of the Small Claims Court, there is a duty on the court to refer the action to the Small Claims Court for determination. The court disagreed with this interpretation.

Reference to Small Claims Court

The court found that pursuant to 58(1)(c), should the matter be within the monetary jurisdiction of Small Claims Courts, it is within the court’s discretion to refer this matter to Small Claims Court, as the section

¹ Voutour v. MVG Investments, [2022 ONSC 4911](#).

clearly uses the words “may” not “shall”. Just because reference to this court is available, does not mean it must occur.

In utilizing the court’s discretion, the court considered which route would result in the matter being adjudicated in a manner that is most “*proportionate, timely and affordable.*”

The court concluded referring the action for trial to an Associate Judge, rather than to Small Claims Court, was the best course of action because:

1. The defendants previously attempted to avail themselves by this court in their unsuccessful motion to discharge the lien under section 47 of the Act to an Associate Judge;
2. The defendants had paid monies into this court because of the lien and required an order from this court for these funds to be paid out to the successful party;
3. A trial could be scheduled more expeditiously to an Associate Judge (likely by next week), rather than to Small Claims Court (which faced severe backlogs); and,
4. An Associate Judge has broad powers under section 58(4) of the Act to direct and manage the trial in an efficient manner that is proportionate to the amounts in issue.

The Court therefore allowed the plaintiff’s motion to refer the action for to an Associate Judge for trial.

When intending to refer a lien action to the Small Claims Court, parties should take into consideration that the referral process itself could be a lengthy and expensive exercise, especially if the Judgment of Reference is contested or if there are counterclaims that exceed the monetary jurisdiction of the Small Claims Court.

As a result, although the referral to the Small Claims Court is intended to make the lien action process less costly, it will not always be the most proportionate, timely, and affordable process for the determination of the matter.



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