NEWS Release

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There's A Construction Lien On My Property!

If not paid for their work, tenants' contractors and their subcontractors are entitled to register a construction lien against the tenant's interest in the leased property. Unfortunately but realistically, the leasehold interest of a tenant who is not paying its bills usually has little value to the unpaid contractors and subcontractors. For this reason, tenants' contractors frequently register construction liens against the landlord's interest in the property. Can they do that?

Not unless:

(a) the contractor gave the landlord notice, pursuant to section 19(1) of the *Construction Lien Act ("CLA"),* of its intention to claim a lien against the landlord's interest before the work starts. Upon receiving the required notice, the landlord's property will be subject to a claim for a construction lien unless, within **15 days** of receiving the notice, the landlord gives the contractor written notice that it assumes no responsibility for the improvements to be made; OR

(b) there is a direct relationship between the landlord and the contractor such that the landlord is an "Owner" with respect to the work done by the contractor. While the landlord may be the owner of the lands, in order to prove the landlord is the "Owner" under the *CLA* (i.e. one whose interest may be liened by the contractor), the contractor must show that the work was done:

i) upon the landlord's credit, **OR**

ii) on behalf of the landlord, **OR**

iii) with the landlord's privity or consent, **OR**

iv) for the landlord's direct benefit;

AND

that the work was done **at the landlord's request**.

Usually, a tenant's contractor performs work at the tenant's request, upon the tenant's credit, on the tenant's behalf, etc. How does a tenant's contractor get around this and justify a claim for a construction lien against the landlord's interest? By pointing to the lease between the landlord and the tenant. The usual provisions of a commercial lease respecting tenant's work or improvements, at first blush, lend support to a tenant's contractor's claim for a lien. How so?

A commercial lease generally requires that a landlord approve plans for the tenant's construction before the work begins. Contractors argue that: (i) by reviewing and approving plans before construction begins, the landlord had notice of the contractor's claim under section 19(1) of the *CLA,* and (ii) unless the landlord disavows such a claim, in writing, within 15 days of receiving the plans (which of course the landlord never does), the contractor is entitled to claim a lien against the landlord. Although this argument is frequently made, it does not hold up. Sending plans to a landlord for approval before construction commences is not sufficient to trigger section 19(1) of the *CLA.* There is no prescribed form for a *CLA* section 19(1) notice, however the section clearly states that the notice must be in writing and the courts have held that such notice must be sufficiently "arresting" or "attention-getting" or "distinct and memorable" to allow the landlord to know that its land will be looked to as security for any money owed by its tenant to the contractor *(Venneri Engineering v. Zonenward Leasex Management).* Sending plans to a landlord for approval simply does not meet this test.

When it comes to the issue of whether or not the landlord is an "Owner" under the *CLA,* contractors again point to the lease and argue as follows:

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a) the lease requires the tenant to construct its improvements – accordingly, the work was done at the landlord's request;

b) the landlord agreed in the lease to reimburse the tenant for, or to pay a tenant allowance to be applied to, all or part of the construction costs – accordingly, the work was done on the landlord's credit;

c) the landlord has the right under the lease to approve the plans before the construction can commence – this establishes privity and consent between the landlord and the contractor;

d) the landlord has the right under the lease to monitor/supervise the tenant's work; landlords often do in fact carefully monitor the work being done – contractors argue that this shows that the work was done on behalf of the landlord; and

e) upon installation, at law, and/or upon lease expiry, the lease provides that improvements belong to the landlord – which, it is argued, demonstrates that the landlord received a direct benefit from the work.

The leading legal decisions in the area make it clear that a landlord is generally not to be regarded as an "Owner" solely on the bases outlined above. "A landlord is entitled to protect the integrity of its building without fear of being held liable as an 'Owner' " *(Southern Plumbing v. Quality Craft Interiors).* The "ultimate ownership of improvements by landlord" argument was also rejected in *Pinehurst Woodworking v. Rocco (Ont.Div.Ct.).*

Nevertheless, there have been cases in which landlords have been held to be "Owners" under the *CLA* and have had to suffer the consequences of liens properly attached to their lands by tenants' contractors. In those cases, the courts either found a direct relationship between the landlord and contractor, or that since the tenant was so closely related to the landlord, the tenant was in reality the landlord's agent or surrogate. In determining whether or not the landlord is an "Owner", the courts will go beyond the form of a transaction and look at the substance of it, to determine the true relationship between the parties. For example, where the landlord leases to a related company, but ultimately it is upon the landlord's credit that construction proceeds, the landlord's lands will be subject to a claim for lien.

While the law is well established in this area, it still appears to be fertile ground for construction lien claims against landlords. Tenants' contractors point to the line of cases holding that the courts will look beyond the form of the transaction to determine if the landlord is an "Owner" under the *CLA*. They will argue, often creatively, that the transaction in question is not a typical commercial lease; they will try to find something to justify a claim for lien against the landlord's interest. Barring special circumstances, however, a landlord is generally not an "Owner" under the *CLA* and as a result, tenants' contractors are more often than not left without recourse against the landlord.

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