

Think you missed your 45-Day lien deadline? Perhaps not...

By Mark Rathwell

There has been an important development in the area of construction law relating to builders' liens.

It has been commonly understood that an unpaid contractor or supplier must register a builder's lien within 45 days from the date that the last substantive services were performed or materials were furnished.

Historically, the 45-day period has been viewed as somewhat absolute, meaning that, if a lien were not registered within the 45-day prescribed time period, the lien rights would be unconditionally lost, relegating the claimant to the position of an unsecured creditor, regardless of the claimant's reasons for the failure to register a lien.

In a recent decision by the Court of Queen's Bench, that long-held view may now be altered in limited circumstances.

On October 1, 2015, Master J. T. Prowse, Q.C. released his written decision in the case of *Boulevard Real Estate Equities Ltd., operating as Avenue Living v. 1851514 Alberta Ltd.*, 2015 ABQB 619. The legal issue addressed in *Boulevard* was whether the doctrine of promissory estoppel is applicable to deadlines contained within the Builders' Lien Act, and specifically, whether an owner of land can be estopped from asserting that a builders' lien filed against the land was filed out of time.

The facts of the case are note-worthy:

In *Boulevard*, the contractor ("185") provided work and materials at the request of Boulevard with respect to two projects owned by Boulevard; one in Camrose, Alberta, and another in Lloydminster, Alberta. 185 was not paid and it registered builder's liens; one against each project, within the prescribed 45-day period.

The uncontested evidence of 185 was that, following the registration of the liens, Boulevard promised to pay 185 on the condition that 185 discharge its builder's liens registered against the projects. Based on that promise, 185 discharged its liens and waited for payment from Boulevard. Subsequently, Boulevard failed to pay 185, so 185 re-registered its builder's liens against both projects (well beyond the initial 45-day lien period). Boulevard then applied to the Court for an Order discharging both liens on the basis that they had been filed out of time.

In response, 185 argued that the doctrine of promissory estoppel should be applicable to the 45-day lien deadline. The concept of promissory estoppel is itself, a complex area of law. If available, the doctrine prevents a party who has made a false promise (to pay money) to another party, who relies and acts upon the promise to his detriment (by discharging or forbearing from filing a lien) from later raising the lack of formal compliance as a defence.

There being no Alberta judicial authority on the point, Master Prowse reviewed previous cases from Ontario (upholding the estoppel argument), as well as cases from Nova Scotia and British Columbia (declining the estoppel argument).

Master Prowse concluded that, where supported by appropriate evidence, an owner of land in Alberta may be estopped from asserting that a builders' lien filed against the land was filed out of time.

Very importantly, however, Master Prowse made it clear in his decision, that the only time when estoppel can allow late filing is in a case where no third party rights are involved. That is, when the only two parties whose interests are being affected by the late filing are the owner who made the false representation and the party who relied upon the representation. The reason for that is simple; it is intended to avoid

the chaos that would occur if no one ever knew if the time for filing a builders' lien had expired. For example, a purchaser could acquire land, free and clear of encumbrances, only to find the land later subjected to a late-filed lien. That will not occur with the strict limitation imposed on the application of the doctrine.

Whether promissory estoppel may be available to extend your lien rights beyond the 45-day timeframe will almost certainly require a thorough analysis of

the facts and circumstances by an experienced and knowledgeable lawyer. It would be unwise to simply assume that you are entitled to file a late builders' lien without first obtaining legal advice on the issue. To do so in the absence of legal advice may very well expose you to legal costs and damages arising from an improperly registered lien.

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