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*Oct. 27, 28, 29, 30 Nov. 30

THE CORPORATION OF THE COUNTY OF LAMBTON .... APPELLANT;

AND

CANADIAN COMSTOCK COMPANY LIMITED, THE BERNADO MARBLE, TERRAZZO AND TILE COMPANY LIMITED, WILLIAMSON ROOFING AND SHEET METAL LIMITED, AND HOSPITAL AND KITCHEN EQUIPMENT COMPANY LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Time for filing—Whether from date of substantial completion or entire completion—Waiver of lien—Estoppel—The Mechanics' Lien Act, R.S.O. 1950, c. 227, as amended by 1952, c. 54.

A general contractor, T, entered into an agreement with the appellant municipality for the erection of a building, and awarded sub-contracts to the respondents. On December 21, 1955, the architect wrote to T that as all work had been substantially completed he wished to be in a position to certify substantial completion of the whole job by December 31, so that the hold-back period could be calculated from that date. T was instructed to obtain from the sub-contractors a notice that their work was completed or a waiver of lien. T wrote to the sub-contractors who acknowledged on January 4, 1956, that their work had been completed, but before these acknowledgments were received by T, the architect sent to the municipality a progress estimate showing 100 per cent. completion. By February 29, 1956, T had received the balance of the contract price, including the 15 per cent. holdback. The sub-contractors were not paid in full and filed liens. None of the liens was filed within 37 days of January 4, and the evidence showed that each sub-contractor had done work after that date. But all the liens were filed within 37 days of completion of the work. The municipality contended that the sub-contracts had been completed by January 4 and that the sub-contractors were estopped from denying this. The trial judge dismissed the action on the ground of estoppel, but this judgment was reversed by the Court of Appeal. The municipality appealed to this Court.

Held: The appeal should be dismissed.

None of the sub-contracts was completed when the acknowledgements were given, and all the sub-contractors did some work after January 4 without which they could not have successfully sued for the balance of their contract price, and this was not work done after completion and in pursuance of the warranty clause in their contracts. The fact that the work was trivial when compared with the size of the contract made no difference if it was done in good faith to complete the contract. Time only begins to run from the events mentioned in the subsections of s. 21 of the Act, regardless of triviality and of lapse of time

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Ritchie JJ.

from the substantial performance of the contract. There is no basis for the application of any different rule to a lump sum contract under s. 21(1). The only certainty is the point of time when the sub-contractor is able to sue for his contract price in full and he cannot do this until he has performed all that he is bound to do under his contract. This is the meaning that the Court of Appeal in conformity with the authorities, has correctly attributed to the word "completion" under the section. The doctrine of substantial performance has no relevancy to the present problem. The fact that a contractor, who has substantially completed his work, may sue for the contract price, subject to deductions for minor defects or omissions, does not and cannot determine when time begins to run under the Act. Completion means what it says.

The acknowledgments given in this case did not amount to an "express agreement to the contrary" as required by s. 5(1). There was nothing in them to indicate that those who signed them were renouncing the application of the Act and the remedies provided by it. An acknowledgment from which it is inferred by the other side that time under the Act is running against the claimant when the facts of the case and the Act provide that it is not running, can only have legal effect if it is a waiver of lien under the Act. Estoppel cannot do what the section says only a signed express agreement can do.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Shaunessy J. Appeal dismissed.

W. B. Williston, Q.C., J. W. Brooke and *R. N. Robertson,* for the appellant.

M. Lerner, Q.C., and *M. A. Bitz,* for Canadian Comstock Co.

W. B. Henderson, Q.C., for Bernardo Marble, Terrazzo and Tile Co.

W. B. Henderson, Q.C., and *T. W. I. Gibson,* for Williamson Roofing and Sheet Metal Ltd.

J. S. Mallon, Q.C., for Hospital and Kitchen Equipment Co.

The judgment of the Court was delivered by

JUDSON J.:—The judgment of the Court of Appeal[1] awards to the four respondents liens against the Home for the Aged, a public building recently built by the appellant, the Corporation of the County of Lambton. In 1954 the county entered into a contract with Town and Country Construction Limited for the construction of this building

[1] (1957), 10 D.L.R. (2d) 583.

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for the sum of $665,008. The respondents are sub-contractors who were paid 85 per cent. of their claims. The 15 per cent. holdback, amounting to $77,000, was paid by the county to the general contractor on February 29, 1956, but none of this money reached these sub-contractors and they filed claims for liens.

With the exception of one part of the claim of Canadian Comstock Company Limited, where the right to lien was undisputed, and the claim of Hospital and Kitchen Equipment Company Limited, the claims were disallowed at trial. On appeal to the Court of Appeal, the disallowed claims were allowed in full and the county now appeals from this judgment.

Two main submissions were made on this appeal. The first was that because these respondents had acknowledged in writing that they had completed their work, they were estopped from denying that the time for filing their claims for liens commenced to run from the date of these acknowledgments. The second was that these sub-contractors had in any event completed their contracts on or before January 4, 1956, within the meaning of s. 21(1) of *The Mechanics' Lien Act* and that they were out of time because they failed to file their claims within thirty-seven days of this date.

On December 21, 1955, the architect wrote to the general contractor stating that all work had been substantially completed and that he wished to be in a position to certify substantial completion of the whole job by December 31. He then said: "To allow this notice of substantial completion, we should have one of two things—a notice from the sub-trades that they have completed their work and/or a waiver of lien." On December 23, 1955, the general contractor wrote to each sub-contractor stating that the architect had asked for a notice certifying that his work was completed. Waiver of lien as an alternative was not mentioned. The four respondents each answered this request and acknowledged that they had completed their contracts, two of them in absolute terms and two of them referring to minor matters to be attended to within a few days. The general contractor sent these letters to the architect on February 2, 1956.

On December 29, 1955, the architect sent progress estimate no. 12 to the County Treasurer. This showed 100 per cent. completion. In January the general contractor, having received the necessary funds from the county, disbursed the balance of the monies owing to these respondents less the 15 per cent. holdback. This payment was therefore made on the basis of 100 per cent. completion of the sub-contracts. On February 6 and February 17, 1956, two sub-contractors other than these respondents filed claims for liens, and on February 29, 1956, the county paid to the general contractor the balance of the monies owing under the contract amounting to $77,000, retaining only sufficient funds to settle the claims of the two sub-contractors who had registered liens. The respondents subsequently registered liens and they now claim that they had not completed their work within the meaning of s. 21(1) of *The Mechanics' Lien Act* when they gave their written acknowledgments and that they are not estopped by these acknowledgments from asserting this fact.

The learned trial judge found as a fact that on December 31, 1955, three of these four sub-contractors had substantially completed their contracts and that they had acknowledged full completion in writing not later than January 4, 1956. He rejected the submission of counsel for the defendant municipality that substantial completion of a sub-contract was enough to start the time running for filing a lien under s. 21(1) of the Act. Nevertheless he did hold that time began to run from January 4, 1956. It is therefore apparent that he decided the case on the basis of estoppel when he rejected the claims of Comstock, Bernardo and Williamson, with the exception of one part of the Comstock claim, which was undisputed. The ratio of his judgment is emphasized by his separate treatment of the claim of Hospital and Kitchen Equipment Company Limited. Although this sub-contractor had given the same acknowledgment as the others, he held that both parties knew that this sub-contract had not in fact been completed, since a compressor for one of the refrigerators had not been installed. This work was not done until March 22, 1956, and the claim for lien of this sub-contractor was held to be in time. On appeal the claims of the three unsuccessful

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claimants were allowed, the Court of Appeal being of the opinion that there was no estoppel and that time did not begin to run under s. 21(1) of the Act until completion—not substantial completion—of the sub-contracts.

The contract of Canadian Comstock Company Limited was for the plumbing, heating, ventilating and electrical work and totalled $199,000. In addition, two other contracts were made by this company for the installation of a hydro-pneumatic pump and a fire pump. I agree with counsel for the appellant that these were additional, separate and distinct contracts and that they were not extras. The appellant admits that Comstock had a lien for these contracts but this fact has no bearing upon the determination of this litigation. Work on these additional contracts does not extend the time. Comstock's lien, if any, for the balance of its payment under the $199,000 main contract must stand on its own feet. Work done and materials supplied under separate contracts for the same owner or contractor cannot be run together in a general account so as to extend the time for filing the lien: *Fulton Hardware Co. v. Mitchell*[1]. Although Comstock, on December 27, 1955, certified completion of the original contract "excepting such minor details as balancing the heating system which will be carried out within the next few days", the fact is that this sub-contractor did much work in January, February and March, 1956. This work is all outlined in the reasons of the Court of Appeal. Some of it was trivial, some of it was not. Some of it was by way of completion of the contract; some of it was to remedy defects in work already done; some of it was in connection with the hydro-pneumatic pump and the fire pump; some of it was done on the specific instructions of the architect. None of it was done surreptitiously or for a colourable purpose and all of it was done to the knowledge of the architect. The Court of Appeal has held that this respondent had not completed its work on January 4, that the architect knew this and that the claim for lien had not been lost. There is ample evidence to support this finding. The plea of substantial completion as the point at which time begins to run under the statute against a contractor or sub-contractor was rejected.

[1] [1923] 4 D.L.R. 1205, 54 O.L.R. 472.

Williamson Roofing and Sheet Metal Limited acknowledged completion of its work by letter dated January 4, 1956. This contractor had supplied the architect with a bond that the roofing was completed on July 22, 1955, but it was still under obligation to make water-tight and do flashing on stacks subsequently installed on the roof by other trades. It was called back by the main contractor to do this flashing on March 5, 1956. This was minor work but it was undoubtedly part of its contract. The work was done on March 6 and the lien filed on March 13.

Bernardo Marble Terrazzo and Tile Company Limited is in much the same position. This company gave an acknowledgment of completion on January 4, 1956, but on January 26, 1956, it was called back by the main contractor to do some grinding that should have been done and had been overlooked on a terrazzo floor in one of the washrooms. This work was of a minor character and was done on February 8 and the lien filed on March 15.

Hospital and Kitchen Equipment Company Limited came back at the request of the architect. He informed this company on February 27, 1956, that a refrigerator would not work and that there were certain minor defects in some of the equipment. The refrigerator was the main complaint and it appears that the compressor unit had not been installed. It had been shipped in November, 1955, but had not been installed for some reason or other by the local electrician employed by this sub-contractor. This was done on March 22, 1956. Further complaints about the operation of the equipment were made on April 2 and May 15, 1956. The company made the necessary alterations and adjustments and filed its lien on May 24, 1956.

After a full review of the facts the Court of Appeal found that none of the contracts in question were completed at the time when the acknowledgments were given and that each of these sub-contractors did work after January 4, 1956, without which they could not have successfully sued for the balance of their contract price and that this was not work done after completion and in pursuance of the warranty clause in their contracts. I agree with this conclusion. The fact that in three of the cases—Hospital & Kitchen Equipment, Williamson and Bernardo—the work was trivial when

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compared with the size of the contract makes no difference if it was done in good faith to complete the contract. *Russell v. Ont. Foundation & Engineering Co.*[1], overruling *Summers v. Beard*[2], and *Neil v. Carroll*[3]. I can well understand that in the case of these three sub-contractors the work was so trivial that it was overlooked when the acknowledgments were given. These omissions were, however, brought to the attention of these sub-contractors by the owner, its architect or the main contractor and were remedied. Comstock's case that it had not completed its contract is much more clearly defined—so much so that I have difficulty in understanding how it could possibly give this acknowledgment, except for the purpose of urging on payment of the balance of its account. This company's sub-contract was by far the largest of the four and amounted to $199,000. It had many odds and ends to complete and at least 20 items are listed in the reasons for judgment of the Court of Appeal.

I agree with counsel for the appellant that when one measures the work remaining to be done on January 4, 1956, against the size of their contracts, all of these four sub-contractors had substantially completed their contracts when they gave these acknowledgments. He submits that this is the completion which starts time running under s. 21(1) of *The Mechanics' Lien Act*, R.S.O. 1950, which reads:

> 21(1). A claim for lien by a contractor or sub-contractor in cases not otherwise provided for, may be registered before or during the performance of the contract or of the subcontract or within 37 days after the completion or abandonment of the contract or of the subcontract as the case may be.

He sought to draw a distinction between this subsection and subss. (2) and (4), which deal with liens for materials and services. Time runs in these cases from the furnishing of the last material (subs. (2)) or the completion of the service (subs. (4)). These are readily identifiable events and the course of judicial decision in Ontario summed up in the *Russell* case demonstrates a literal adherence to the wording of the subsections in the determination of these matters.

[1] (1926), 58 O.L.R. 260, 1 D.L.R. 760.
[2] (1894), 24 O.R. 641. [3] (1881), *ibid.* 642.

Time only begins to run from the events mentioned in the subsections, regardless of triviality and regardless of lapse of time from the substantial performance of the contract. I can see no basis for the application of any different rule to a lump sum contract under s. 21(1), and there are very sound reasons for refusing to depart from this principle. How does a tribunal decide when there has been substantial completion so as to start time running against a sub-contractor? How would a sub-contractor be able to recognize his position if this doctrine were applied? The only certainty in the situation is the point of time when the sub-contractor is able to sue for his contract price in full and he cannot do this until he has performed all that he is bound to do under his contract. This is the meaning that the Court of Appeal, in conformity with a long line of judicial decision, has attributed to the word "completion" under s. 21(1), and in my opinion it was correct in so doing. Indeed, unless whatever certainty the legislation has is to be lost there is no other alternative.

We were pressed with the authority *Day v. Crown Grain*[1], to the effect that time begins to run when the contractor can sue "as for a completed contract", the submission being that this could be something short of completion. When the facts of the case are examined I do not think that this case lays down any rule different from that which has always been followed, namely, that time does not begin to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder.

The doctrine of substantial performance, as illustrated by such cases as *Dakin v. Lee*[2] and *Hoenig v. Isaacs*[3], has no relevancy to the present problem. The fact that a contractor, who has substantially completed his work, may sue for the contract price, subject to deductions for minor defects or omissions, if there are any, does not and cannot determine when time begins to run against him under *The Mechanics' Lien Act*. Completion means what it says. I do not think that time begins to run under s. 21(1) until it can

[1] (1907), 39 S.C.R. 258. [2] [1916] 1 K.B. 566.
[3] [1952] 2 All E.R. 176.

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be said that the contractor or sub-contractor has done all that he promised to do and is entitled to maintain his action for the full amount.

Having found as a fact, in agreement with the finding of the learned trial judge, that these sub-contracts had not been completed when the acknowledgments were given, the Court of Appeal next rejected the defence of estoppel because the county did not rely on the representations and alter its position to its prejudice. I agree with the Court of Appeal that progress estimate no. 12 given by the architect to the county, certifying 100 per cent. completion and asking for all the money less the fifteen per cent. holdback, was issued before these acknowledgments were received. I agree also with the finding of the Court of Appeal that to the knowledge of the architect all three appellants did work under the provisions of their sub-contracts after January 4, 1956. Therefore, although these acknowledgments were obviously given by the sub-contractors for the purpose of inducing payment of the balance of their monies, it is equally clear that their representations, even if they were made to the county through its main contractor and architect, did not in fact induce the payment of the holdback. What did induce payment was the assumption of the architect that time was running against these sub-contractors from a date not later than January 4, 1956.

What the county is really seeking to do is to turn the acknowledgment into an agreement that the work had been completed, regardless of the actual and known state of facts and to set this up as a waiver of lien under the Act.

I can readily find that by the giving of these acknowledgments, these sub-contractors hoped to get their money faster and that they knew that they would be used by the county for the purpose of computing the time when it would be safe to pay out the holdback. But the Act provides (s. 5(1)) that "Unless he signs an express agreement to the contrary" a person who does certain things shall have a lien. The acknowledgments given in this case do not, in my opinion, amount to an "express agreement to the contrary"

as required by the Act. There is nothing in them to indicate that those who signed them were renouncing the application of the Act and the remedies provided by it.

Counsel for the appellant says that he seeks only to prevent these respondents from asserting in these proceedings a fact contrary to that contained in their own acknowledgments. Then he says time begins to run against them and that this is not the waiver of lien referred to in para. 5(1) of the Act. They still have their lien but they must assert it within a certain time for time begins to run against them from the date of their acknowledgments. This argument does not overcome s. 5(1) of the Act. An acknowledgment from which it is inferred by the other side that time under the Act is running against the claimant when the facts of the case and the Act provide that it is not running, can only have legal effect if it is a waiver of lien under the Act. I would not make any inroad on the principle laid down in *Anderson v. Fort William Commercial Chambers Limited*[1], that estoppel cannot do what the section says only a signed express agreement can do.

I am therefore of the opinion that the judgment of the Court of Appeal on this branch of the case was well founded both on fact and law and that the argument based on estoppel fails.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Bullbrook & Cullen, Sarnia.

Solicitors for Canadian Comstock Co.: Lerner, Lerner & Bitz, London.

Solicitor for Bernardo Marble, Terrazzo & Tile Co.: R. E. Fairs, London.

Solicitor for Williamson Roofing & Sheet Metal Co.: W. B. Henderson, London.

Solicitors for Hospital & Kitchen Equipment Co.: Taylor, Jamieson, Mallon, Fowler & Oliver, Sarnia.

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[1] (1915), 34 O.L.R. 567, 25 D.L.R. 319.