SUPREME COURT OF YUKON

Citation: *Kareway Homes Ltd.* v. *37889 Yukon Inc.,* 2010 YKSC 07

Date: 20100212
Docket S.C. No.: 09-A0095
Registry: Whitehorse

BETWEEN:

KAREWAY HOMES LTD.

Plaintiff

AND:

37889 YUKON INC.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
James Tucker — Counsel for the Plaintiff
Bruce Willis — Counsel for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by 37889 Yukon Inc. ("the numbered company"), the defendant in this matter, to vacate a claim of lien filed on November 23, 2009 against certain property in Whitehorse by the plaintiff, Kareway Homes Ltd., ("Kareway").

[2] Three arguments were raised by counsel for the numbered company. The first and third of those arguments I understand him to have abandoned, both at the outset of the hearing and during the course of the hearing. The remaining argument is that the lien was out of time.

[3] The lien is based on the supply of certain materials to the numbered company, as the owner of the subject property, on November 5, 2009. Those materials consisted of a number of items, including instruction packages and remote controls for the gate security system which had been previously installed on the property. The construction project here involved two large buildings within which there were multiple separate condominium units.

[4] Kareway entered into a development agreement with the numbered company in 2007, and agreed, as the builder, that it would do a number of things, including supplying the labour and materials to do the construction work required for the project, and that it would expect, in turn, payment for the cost of work on the project, which included various items set out in para. 2.1 of the development agreement. Among those items included were the cost of all materials, products, supplies and equipment incorporated into the work on the project.

[5] During the course of the construction, up until the termination of the contract by Kareway in November 2009, a number of advances had been made by the numbered company to Kareway, as set out in Exhibit "H" of the affidavit of Alex Shaman filed in this hearing, which records various payments from 2006 through to June 1, 2009. Certain garage doors and mail boxes were incorporated into the project and were invoiced in 2007 and 2008, from the supplier to Kareway.

[6] Mr. Willis raises a novel argument, in my respectful view, on behalf of the numbered company. He says that, because these garage doors, mail boxes and items related to the security of the condominium units were invoiced in 2007 and 2008, I can

make an inference that the cost of those items was reimbursed by the numbered company to Kareway long before the date of the delivery of the various electronic keys, remote controls, and so on, for the security system.

[7] I understand it is not in dispute that 90 percent of the total cost of the work has previously been paid by the numbered company to Kareway. The claim of lien in this matter is for the remaining 10 percent, which has been held back by the numbered company.

[8] Mr. Willis points to s. 8(1) of the *Builders Lien Act*, R.S.Y. 2002, c. 18, the relevant portion of which reads as follows:

> "All payments up to 90 per cent of the price to be paid for the work … or materials mentioned in section 3, … shall operate as a discharge *pro tanto* of the lien …."

He then invites me to conclude that the specific cost of these items which were delivered by Kareway to the owner on November 5, 2009, the box of instruction packages, remote controls and so on, must have been paid for, and therefore fall within the 90 percent which has already been paid on the project. Consequently, that "deemed" payment must operate as a discharge, to that extent, of the lien claimed by Kareway.

[9] No case law was filed in support of that proposition. I note that s. 3 of the *Builders Lien Act* reads, and I am quoting the relevant portions:

> "[E]very … builder … doing work on or furnishing materials to be used in the construction, … of any building shall, because of being so employed or furnishing, have *a lien for the price of the work*, … or materials, on the building, … and

> the lands occupied thereby …, limited in amount to the sum justly due to the person entitled to the lien." (my emphasis)

As I interpret that wording, it is not open to me to specify whether the lien is for *particular materials* that have been employed in the construction of the building, but rather that the lien is available to the builder to be claimed for the entire sum justly due for the construction and the materials supplied, that is, "the price of the work." In this case, Kareway, as the builder, says that it is still owed at least 10 percent of the cost of the work under the development agreement, again "the price of the work," and that is the basis for the filing of the claim of lien.

[10] There is no dispute that the subject materials constitute "an integral and necessary part of the actual physical construction of the project," as that wording is used in the case of *Kettle Valley Contr. Ltd.* v. *Cariboo Paving Ltd.*,1986 CanLII 1009 (BC C.A.), at para. 64. In that paragraph the British Columbia Court of Appeal also held that it was not essential for a lien that a contractor's work had been done on the site, provided that the work is an integral and necessary part of the actual physical construction of the project. The box of materials, which was delivered by Kareway to the owner on November 5th, was not delivered to the site. Rather, it was delivered to the registered office for the owner, which was a solicitor's office, following a demand made by the owner's solicitor for those materials. However, the place of delivery was not an argument pursued by the owner.

[11] I digress momentarily to indicate that there was a factual dispute about where these items were kept prior to November 5th. There was evidence of Chris Johnson, on behalf of the owner, in para. 8 of his affidavit, that these materials were delivered to the

construction site some time prior to November 5, 2009, were then taken away from the site by Kareway, and then only returned on November 5th pursuant to the solicitor's demand. The evidence from Kareway is that it maintained possession and control of these items at all material times prior to November 5th. However, I do not need to resolve that factual dispute, because it is not essential to the claim of lien that materials be delivered *on site*, provided that they are an integral and necessary part of the actual construction, and I am satisfied that they are.

[12] I do not know whether these particular materials can be considered paid for or not, but I am satisfied that it is irrelevant to my decision in this matter. What is relevant is whether there is a shortfall, or a claimed shortfall, for the *total cost of the work due* from the owner to Kareway under the development agreement, and that is the basis for the claim of lien.

[13] The final materials being delivered to the owner on November 5, 2009, and the claim of lien having been filed on November 23rd, allows me to conclude that the claim of lien was filed within time and not outside of the 30-day time limit under s. 19 of the *Builders Lien Act*. Therefore, I dismiss the owner's application.

_____

GOWER J.