Subcontractors and suppliers who don't register a claim for lien for unpaid supply of materials and services are missing out on a strong mechanism to recover money from those who benefitted from their supply. While unjust enrichment is often pleaded in civil actions against contractors and owners, we don't often see a judgment founded on that cause of action.

Recently, the Ontario courts refreshed the unjust enrichment cause of action by confirming that the common law remedy exists to allow subcontractors and suppliers to obtain money owed on a project from the owner - despite the fact that no lien was registered and no contractual relationship existed with the owner.

In NKP Painting v. Boyko, a subcontractor sought to recover the amount of unpaid services and materials from the owner of the buildings because it was not paid by the contractor who made an assignment in bankruptcy. The owner of the high rise condo buildings had hired the contractor to perform upgrades and repairs. The contractor subcontracted NKP to supply painting and wallpapering materials; however, the contractor went bankrupt before paying NKP for its work.

Unfortunately, neither the contractor nor NKP had registered liens under the Construction Lien Act (the "Act"). Aside from a claim in the bankruptcy, this meant NKP's only other option was to seek the common law remedy against the owner.

Under the common law, the principle of "unjust enrichment" will remedy a situation where an individual has obtained a benefit at another person's expense without a valid reason. There are three elements of unjust enrichment that NKP had to prove:

1. The owner had received a benefit from NKP;
2. NKP had suffered a loss equal to the benefit received from the owner; and

3. There was no valid or "juristic" reason for the owner to keep the benefit without payment.

On the first element, the Court found that the owner had received 100% of the benefits but had only paid 90% of the invoiced work because it held back 10% from the contractor in accordance with the terms of the Act.

The second element was met because NKP had performed the work by supplying the materials but did not receive payment.

Finally - and this is the element that the court wrote most about - there was no juristic reason (a valid reason in law or justice) for the owner to keep the money (the 10%). Other cases have found that a benefit with a corresponding loss is acceptable if there was an intention to make a gift or if the transaction was pursuant to a contract.

The owner's situation did not fit under any of the established categories, so the Court examined the reasonable expectations of the parties and public policy decisions to determine if a new category should be created.

First, the owner could not have reasonably expected that it would pay 90% of the contract price and receive 100% of the benefit. Second, the purpose of the holdback fund is remedial in nature and represents a source of funds to compensate unpaid providers of service and materials who improved a property. Therefore, there was no juristic reason to allow the owner to keep the holdback - and the Court awarded NKP the amount equal to the holdback ($23,893.74).

In summary, this decision is a reminder that, despite failing to register a claim for lien, there are other mechanisms available to claim for unpaid supply of materials and services.

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