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Via Fax: 416-361-2741

Borden Ladner Gervais LLP
Scotia Plaza
40 King Street West
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Attention: Bruce Reynolds

Dear Mr. Reynolds:

RE: *Construction Lien Act* - Contractor Abuse of Lien Rights

I read in the latest online issue of the Lawyer's Weekly that you have been retained by the Ontario Government to review the *Construction Lien Act.*

Although I am a lawyer, I write to you today as a developer.

On one of my development projects, the concrete forming contractor became dissatisfied with my refusal to admit the legitimacy of its delay claims and the amount of claims made for extras. In response, the forming contractor delivered a letter to the construction lender described as a "Notice of Lien Claim" notifying the lender that it had a lien claim against the project. The alleged claim was not for arrears of payment - it was for alleged extras and alleged increased costs due to delay.

No lien was registered. It was simply a letter from the contractor to the lender notifying the lender that it claimed money owed. Of course as any prudent lender would do, the lender stopped advancing funds.

Because no lien had been registered I could not move to pay funds into court to lift the lien. Despite the "Notice of Lien Claim" letter to the lender the forming contractor continued to work on the project. As long as the contractor continued to work on the project the 45 day time limit to register a lien would never commence and in the meantime construction financing was stopped.

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At the time the only thing I could think of to do was to compel the forming contractor to register a lien. I terminated the contract (there were other breaches) and banned the forming contractor from the site, which triggered the running of the 45 day period. I invited the forming contractor to register a lien so that I could vacate and get construction funding flowing again but they refused to register until the 44th day.

While this was going on I was required to scramble and find funds for the monthly advances to keep the project moving. Had I not been able to do this the project would have come to a stop and TARION Occupancy dates missed. A stoppage on a project of this size (39 unit midrise building) would have completely destroyed all construction momentum and would also have caused considerable harm to the trust and goodwill developed with the other trades.

I highly doubt that this was the first time that this contractor has pulled such a stunt. The timing appeared to be very calculated.

I suppose that what we could have done was bring a motion before one of the Construction Masters to have the Notice of Lien Claim letter treated as if it was a lien and allow us to pay funds into court. We were prepared to try this when the lien was registered.

What this contractor did was stop construction financing without having to register a lien and handcuffing my ability to re-commence construction financing. In my opinion this is an abuse of the lien rights by the contractor as the owner is unable to pay funds into court to lift the lien - because it is not registered.

There are probably a number of different ways to address the issues raised. If you require further information or have questions, please feel free to contact me.

Yours truly,

AZEVEDO & NELSON

Antonio F. Azevedo

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