

Construction Liens and Leasing – What to Know

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What is a Construction Lien?

A construction lien is a security interest in real property, which protects a legal claim for payment for good or services that have been supplied to improve the said property. The right to preserve a construction lien arises automatically once improvements to a property have been made. The right to preserve a construction lien extinguishes automatically following the passage of time. The rules regarding the preservation and perfection of construction lien claims are set out in Ontario's *Construction Act*.

Who is the “Owner”?

The *Construction Act* defines “owner” as “any person, including the Crown, having an interest in a premises at whose request and, a) upon whose credit, or b) on whose behalf, or c) with whose privity or consent, or, d) for whose direct benefit, an improvement is made to the premises but does not include a home buyer.

The “owner” is distinct from a landlord. A landlord may *also* be an “owner” within the meaning of the *Act* but is not necessarily the owner simply because their name appears on title.

Recent Changes to the *Construction Act* that Affect Leasing

- The attachment of liens to leasehold interests is governed by section 19 of the *Construction Act*
- In 2018, numerous sections of the *Construction Act* underwent extensive revisions, including section 19
- Under the “old” *Construction Lien Act* (i.e. the *Construction Act* as it read prior to July 1, 2018), where the “owner”, as defined in the *Act*, is a tenant, the interest of the landlord was subject to a lien if: a) the contractor gave the landlord written notice of the improvement before it was made, and b) the landlord failed, within 15 days of receiving notice, to provide written notice to the contractor that they assume no responsibility for the improvement.
- Under the “new” *Construction Act*, lien claimants no longer need to provide the landlord with notice of the improvement, and the landlord no longer needs to accept or reject responsibility for the improvement in response to the notice; **the relevant question is whether the landlord has provided financial assistance towards the improvement under the terms of the lease (or any other agreement).**

- If a landlord has financed the improvement under the terms of the lease (or any other agreement), the landlord's interest in the property can be subject to a lien for up to 10% of the value of the payment/funding (i.e. if the landlord has contributed \$200,000 towards tenant improvements, they may be liable for up to \$20,000).
- When a lien is registered against a leasehold interest, no termination of the lease deprives the lien claimant of their lien rights except termination for non-payment of rent.
- When a landlord intends to terminate a lease for non-payment of rent, the landlord is obligated to provide written notice of the impending termination to the lien claimant. The lien claimant may, within 10 days of receiving the notice, agree to pay the tenant's arrears and add the arrears to the value of their lien claim (as a practical matter, lien claimants will rarely choose to exercise this right).

What to Remember if You're a Lien Claimant

- Use your rights under section 39 of the *Act* to request information from the landlord as to whether they have funded the tenant's improvements.
- If there is any ambiguity as to whether the landlord has financed the improvements, name the landlord as a party in your lien action. If the tenant/owner is insolvent or otherwise impecunious, and if the landlord has contributed financially towards the improvement, the landlord's interest in the premises may be your only viable means of recovering even pennies on the dollar on your lien claim.

What to Remember if You're a Landlord

- Address the issue of funding for tenant improvements in your lease. If the landlord does not intend to contribute financially toward tenant improvements, this should be expressly stated in the lease to avoid creative arguments that any sort of credit or financial assistance made by the landlord has created potential liability under section 19 of the *Act*.
- A lien claim registered against a leasehold interest can only be extinguished by termination of the lease made for non-payment of rent. When drafting a lease, consider "monetizing" defaults under the lease so that they can be correctly characterized as non-payment of rent.
- When a lien is registered against the leasehold interest, terminate the lease with caution. Be sure that a notice of intention to terminate the lease has been delivered to the lien claimant in accordance with section 19(3) of the *Act*, and that the lien claimant has been given 10 days (in accordance with section 19(4) of the *Act*) to pay the tenant's arrears prior to termination, otherwise the lien may continue to attach to the leasehold interest of a future tenant.