COURT OF APPEAL FOR ONTARIO

CITATION: [redacted] v. Advantagewon Inc., 2015 ONCA 709
DATE: 20151023
DOCKET: C60059

Feldman, Juriansz and Brown JJ.A.

BETWEEN

[redacted]

Applicant
(Appellant)

and

Advantagewon Inc.

Respondent
(Respondent)

Paul Gemmink, for the appellant

Ali Chahbar, for the respondent

Heard: September 28, 2015

On appeal from the judgment of Justice Peter A. Douglas of the Superior Court of Justice, dated January 29, 2015.

Brown J.A.:

I. Overview

[1] The appellant, [redacted], appeals from the judgment of Douglas J. which declared that the respondent, Advantagewon Inc., was entitled to a non-

possessory lien under Part II of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R. 25 ("*RSLA*"), in respect of the appellant's 2011 Nissan Titan (the "Vehicle").

[2] In July 2013, the appellant purchased low profile rims and tires for his Vehicle from Xclusive Performance Group ("Xclusive"). To finance the purchase, the appellant entered into an agreement with the respondent for a loan in the amount of $4,124.21.

[3] Three documents evidenced the transaction: (i) a July 3, 2013 invoice from Xclusive to the appellant (the "Invoice"); (ii) a June 28, 2013 Advantagewon Loan Application and Preapproval Document signed by the appellant (the "Loan Application"); and, (iii) a July 2, 2013 Advantagewon Contractual Repair Agreement purportedly signed by Xclusive and the appellant (the "Contractual Repair Agreement"). The Loan Application and Contractual Repair Agreement identified Xclusive as the repairer, and further disclosed that Xclusive intended to assign any of its lien rights in the Vehicle.

[4] The Loan Application suggested that Xclusive intended to assign any lien rights to the respondent. By contrast, the Contractual Repair Agreement indicated that Stephan Bernier and Lorraine Berube were the assignees and, in August 2013, a claim for lien under the *RSLA* was registered, on behalf of Bernier and Berube. In the result, that differing identification of assignees in the transaction documentation was of little practical significance because, by

Assignment of Debt and Lien dated May 23, 2014, Bernier and Berube assigned to the respondent any entitlement to the debt owed by the appellant, including "any and all rights arising from the *Repair and Storage Liens Act*."

[5] After entering into the transaction, the appellant promptly defaulted on his monthly payment obligations under the Loan Agreement, and the respondent attempted to seize the Vehicle based on a purported non-possessory lien under the *RSLA*. The appellant thereupon commenced an application seeking a declaration that the respondent does not have a lien under the *RSLA* in respect of the Vehicle.

[6] The application judge declared that the respondent is entitled to a non-possessory lien in the Vehicle under Part II of the *RSLA*.

[7] This appeal involves two main issues:

(i) The appellant submits that the application judge's conclusion that the respondent has a non-possessory lien in the Vehicle was based on a palpable and overriding error in finding that Xclusive had installed the rims and tires on the Vehicle;

(ii) The respondent submits that in the event this court finds the application judge made such an error, it nevertheless is entitled to a non-possessory lien by reason of the terms of its contract with the

appellant or by operation of the deemed possession provisions of s. 3(4) of the *RSLA*.

II. Did Xclusive install the rims and tires on the Vehicle?

[8] Section 3(1) in Part I of the *RSLA* provides, in part, that "a repairer has a lien against an article that the repairer has repaired...and the repairer may retain possession of the article until the amount is paid." Part II of the *RSLA* concerns non-possessory liens. In that Part, s. 7(1) provides, in part, that "a lien claimant who is entitled to a lien under Part I (Possessory Liens) against an article, and who gives up possession of the article without having been paid the full amount of the lien... has, in place of the possessory lien, a non-possessory lien against the article for the amount of the lien claimed under Part I that remains unpaid."

[9] In concluding that the respondent was entitled to a non-possessory lien on the Vehicle under the *RSLA*, the application judge stated that the respondent had "advanced funds to a third-party who performed the installation work" for the tires and rims. The appellant submits that the application judge made a palpable and overriding error of fact in finding that the third-party, Xclusive, had performed the installation work. It submits that Xclusive never repaired the Vehicle or even possessed it.

[10] I accept the appellant's submission.

[11] Although the Xclusive Invoice for the sale of the rims and tires described them as "mounted and balanced", the appellant deposed that neither Xclusive nor the respondent had installed the new rims and tires on his Vehicle. Instead, he had installed them on the Vehicle after their purchase. The appellant also filed a chain of emails between himself and Xclusive in which Xclusive had stated that "on these deals we don[']t install them [p]hysical[l]y as we[']re not set up for that." The respondent did not file any evidence from Xclusive. The evidence before the application judge therefore established that that neither Xclusive nor the respondent had possessed the Vehicle or installed the rims and tires on the Vehicle. Consequently, the application judge erred in finding that Xclusive had performed the installation work.

[12] At common law, when a worker applied skill, labour or money to the repair or improvement of personal property, with the authority of the owner, a lien attached to the personal property and continued in existence so long as the personal property remained in the lien claimant's possession: *Royal A. Vaillancourt Co. Ltd. v. Trans Canada Credit Corporation Ltd.*, [1963] 1 O.R. 411 (C.A.), at p. 413. Section 52 of the former *Mechanic's Lien Act*, R.S.O. 1980, c. 261, recognized the lien created at common law and gave the lienholder the right to sell the personal property upon compliance with the conditions set out in the section: *Vaillancourt*, at p. 414.

[13] With its enactment in 1989, the *RSLA* created a new legislative regime for repairer's liens: S.O. 1989, c. 17. Part I of the *RSLA* is entitled, "Possessory Liens". In that Part, s. 3(1) codifies the common law right to a lien by providing that a repairer has a lien against an article that the repairer has repaired "and the repairer may retain possession of the article until the amount is paid."

[14] In the present case, Xclusive sold the rims and tires to the appellant without installing them or taking possession of the Vehicle; the respondent financed their purchase. Neither had possession of the Vehicle at any time. The usual conditions necessary to create a Part I possessory lien against the Vehicle did not arise.

[15] Usually such circumstances would be fatal to a claimant's entitlement to a non-possessory lien under the *RSLA* because such entitlement depends on the claimant first having the right to a possessory lien. Section 7(1) of the *RSLA* provides that a non-possessory lien arises where "a lien claimant who is entitled to a lien under Part I (Possessory Liens) against an article...gives up possession of the article without having been paid the full amount of the lien to which the lien claimant is entitled under Part I...".

[16] To overcome the fact that neither it nor Xclusive ever possessed the Vehicle, the respondent advances two arguments to support its claim to a non-possessory lien in the circumstances: (i) the appellant granted Xclusive such a

lien by contract; and, (ii) Xclusive had deemed possession of the Vehicle under s. 3(4) of the *RSLA* thereby enabling it to obtain a non-possessory lien.

III. Did a non-possessory lien arise under contract?

[17] The respondent submits that a lien on the Vehicle in favour of Xclusive was created by the Contractual Repair Agreement, one term of which states:

> Lien – Applicant acknowledges his or her total indebtedness and understands and agrees that the Repairer has a repairer's lien against the Vehicle described above pursuant to the Repair and Storage Liens Act Ontario, for the total amount which the Applicant has agreed to pay for the repair described in Repairer's Invoice 00021200, plus associated fees, totalling $5,633 as further detailed below.

Xclusive had issued the Invoice to the appellant for the tires and rims.

[18] I do not accept the respondent's submission.

[19] A lien under Parts I and II of the *RSLA* arises by operation of statute, not by contract. For a valid lien to arise, a lien claimant must satisfy the requirements of the *RSLA*.

[20] Xclusive did not satisfy these requirements. For a possessory lien to arise against an article, a person must have "repaired" the article: *RSLA*, s. 3(1). The definition of "repair" in s. 1 of the *RSLA* includes "an expenditure of money on, or the application of labour, skill or materials to, an article for the purpose of altering, improving or restoring its properties." However, Xclusive did not expend

any money on, nor did it apply any "labour, skill or materials" to the Vehicle. Xclusive simply sold tires and rims to the appellant, who later attached them to his Vehicle. Accordingly, Xclusive did not make a "repair" to the Vehicle within the meaning of the Act. As a result, no possessory or non-possessory repairer's lien arose in favour of Xclusive which it could assign to the respondent.

[21] On its part, the respondent submits that it satisfied the *RSLA*'s requirements, pointing to the application judge's conclusion that because it had financed the appellant's purchase of the tires and rims, "the R[espondent] has made an expenditure of money, and this expenditure is linked to the 'repair' in that it financed the installation of tires and rims." I do not accept that submission.

[22] First, although s. 1 of the *RSLA* includes within the definition of "repair" an "expenditure of money on...an article for the purpose of altering, improving or restoring its properties," the Loan Application and Contractual Repair Agreement did not treat the respondent as the repairer in whose favour a lien was created. They treated Xclusive as the repairer. If no lien arose in favour of Xclusive, the respondent had no lien it could take by assignment.

[23] Second, the respondent's submission blurs the distinction between liens that may arise under the *RSLA* and security interests which can be taken in personal property under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"). Whereas possession of the personal property to which a lien attaches

plays a key role under the *RSLA*, under the *PPSA* a person can take a security interest in personal property which it never possessed.

[24] The respondent financed the appellant's purchase of personal property – i.e. the tires and rims. It did not conduct a repair on the Vehicle. A person who finances the acquisition of personal property may take an interest in that personal property, or in other personal property, to secure payment of the debt obligation, and may perfect its security interest in accordance with the provisions of the *PPSA*. The evidence disclosed that the respondent did just that, registering a security interest in the Vehicle under the *PPSA* on behalf of Bernier and Berube. However, at the hearing, counsel advised that the *PPSA* registration had lapsed. Having failed to protect the registered security interest under the *PPSA* in the Vehicle, the respondent lost its statutory rights to seize and sell the Vehicle upon the appellant's default on the loan.

IV. Did Xclusive have deemed possession of the Vehicle under *RSLA* s. 3(4)?

[25] In oral argument, the respondent advanced a second basis for its claim to a non-possessory lien. It submitted that the assignor of the lien, Xclusive, was entitled to a Part I possessory lien by reason of the deemed possession provision contained in s. 3(4) of the *RSLA*. That sub-section reads:

> 3(4). For the purposes of this Act, a repairer who commences the repair of an article that is not in the repairer's actual possession shall be deemed to have

> gained possession of the article when the repair is commenced and shall be deemed to have given up possession when the repair is completed or abandoned.

[26] Xclusive's Invoice to the appellant described the product sold as rims "mounted and balanced with a set of...tires". The respondent contends that "mounted and balanced" referred to placing the tires on the rims. Even though Xclusive did not install the rims and tires on the Vehicle, the respondent submits that by mounting and balancing the tires on the rims, Xclusive commenced a repair on the Vehicle and, by virtue of *RSLA* s. 3(4), was deemed to have gained possession of the Vehicle.

[27] I do not accept this submission. First, it is difficult to accept the respondent's contention that the reference in Xclusive's Invoice to mounting and balancing referred to placing the tires on the rims, when the respondent did not file any evidence from Xclusive to explain the Invoice's language. In any event, the email exchange between the appellant and Xclusive disclosed that Xclusive did not intend to "repair" the Vehicle. In an email the appellant had asked: "[J]ust wondering are you guys going to mount them or am just picking them up?" To which Xclusive responded: "[O]n these deals we don[']t install them [p]hysical[l]y as we[']re not set up for that." That response indicates that Xclusive did not intend to apply any labour, skill or materials to the Vehicle in satisfaction of the RSLA's definition of "repair".

[28] Second, s. 3(4) must be read together with s. 3(5) of the *RSLA* which provides:

> A repairer who, under subsection (4), is deemed to have possession of an article may remove the article *from the premises on which the repair is made*. [Emphasis added.]

[29] When *RSLA* s. 3(4) and 3(5) are read together, they appear to address a situation where a repairer makes a repair to an article at a location away from the repairer's premises, and the article remains in the actual possession of the person entitled to it. In those circumstances, s. 3(4) deems the repairer to have gained possession of the article when the repair is commenced, and then deems the repairer to have given up possession when the repair is completed or abandoned. By deeming the repairer to have gained possession of an article despite the repairer's lack of actual possession, s. 3(4) enables the repairer to obtain a possessory lien. When the deemed possession ends, the repairer may either remove the article from the premises on which the repair is made under s. 3(5) or register a non-possessory lien under Part II of the *RSLA*.

[30] This interpretation of the purpose of ss. 3(4) and 3(5) finds support in the legislative history of the *RSLA*. In 1985, the Ministry of the Attorney General issued a "Discussion Paper on Repair and Storage Liens", which contained a draft *RSLA*. That draft proposed the scheme of possessory and non-possessory liens that ultimately was enacted by the *RSLA*. However, the draft did not propose any provision similar to *RSLA* ss. 3(4) or 3(5).

[31] Later that year, Arthur Close wrote a Commentary on the Discussion Paper which appeared in (1985), 10 Canadian Business Law Journal 359. In the course of discussing the limitations of the proposed legal framework for a scheme of non-possessory liens, the author observed, at p. 364:

> The second observation that might be made about s. 7(1) is that in order to claim a non-possessory lien, the lien claimant must once have had a possessory lien. This is a serious limitation on the scope of Part II. There are many situations in which work will be carried out on the premises of the owner. An example is where a piece of heavy equipment breaks down at a remote work site and it is wholly impractical to relocate it to the repairer's premises. It is doubtful whether the person who performs repairs at a place which is under the effective control of the owner of the property being repaired can ever be said to have possession of the property sufficient to support a lien. Yet to deny him a non-possessory lien creates a wholly artificial distinction between work which is lienable and work which is not, depending on the essentially irrelevant issue of where the repairs are made.

[32] When the *RSLA* was enacted in 1989, it included ss. 3(4) and 3(5). That legislative history suggests that the deemed possession created by s. 3(4) is designed to protect a repairer who repairs an article at a location other than the repairer's premises.

[33] While it is not necessary for the purposes of this appeal to interpret definitively s. 3(4) of the *RSLA*, in my view it is clear that s. 3(4) has no application to the facts of this case, in which the lien claimant was a vendor of

personal property who never applied any labour, skill or materials to the article against which a lien is claimed.

V. Disposition

[34] For the reasons given, I would allow the appeal, set aside the judgment, and grant an order declaring that no lien on the Vehicle arose under the *RSLA*.

[35] The parties have agreed that the successful party on the appeal is entitled to costs in the amount of $6,000, all inclusive. I would order the respondent to pay the appellant that amount. As to the costs of the proceeding below, I would order the respondent to pay the appellant costs of the application in the amount of $2,000, all inclusive.

Released: October 23, 2015 (KF)

"David Brown J.A."
"I agree K. Feldman J.A."
"I agree R.G. Juriansz J.A."