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WHEN IS IT REALLY OVER? TERMINATION OF CONSTRUCTION CONTRACTS AND THE BUILDER'S LIEN ACT

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A recent case from the BC Supreme Court, *Alexander Construction v. Al-Zaibak*, illustrates a common problem in construction management and disputes: when is termination of a contract effective and how does this affect the 45 day time period in which to file a builders lien.

In this case the owner retained a general contractor to construct a house pursuant to a written contract. The owner and general contractor suffered a poor relationship in the project and ultimately the owner stopped paying the general contractor's invoices on the project.

The general contractor eventually filed a claim of builder's lien against title to the owner's property and sued for the outstanding debt owed on the project. However, the owner took the position that the lien was invalid as it was not filed within 45 days from the date of termination of the contract as required by the *Builder's Lien Act*. The general contractor took the position that the lien was within time as the contract was not terminated as alleged by the owner and was only much later terminated pursuant to the express terms of the written contract by the general contractor.

The court found that while the general contractor not been paid, all work had stopped on the project (with the exception of one item carried out without the consent of the owner) and the owner had hired a new contractor to complete the project such conduct did not constitute termination of the contract as the procedure for termination clearly set-out in the provisions of the contract had not yet been followed. Further, written communications from the owner and consultant to the general contract advising as to this situation was also found to be insufficient to satisfy the requirements for termination under the contract.

The court held that not until the owner followed the express termination provisions in the contract requiring that the owner notify the general contractor in writing of a "default" under the contract and the consultant to the project gave a written statement to the parties that sufficient cause existed to justify termination





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could there said to be “termination” under the contract. Further, the court held that without an effective termination under the Contract, the 45 day limitation period to file a lien under the *Builder’s Lien Act* could not start to run.

The owner never followed precisely the express written termination provisions in the contract so that the owner failed to start the clock running in filing a lien by the general contractor. As a result the general contract’s lien was found to be filed in time.

This case clearly demonstrates the need for parties with written contracts to:

- (a) carefully follow the express written termination provisions of the contract if they wish to effect termination; and
- (b) only by doing so will an owner commence the 45 day time period to file a lien after termination of the contract as set-out in the *Builder’s Lien Act*.

A word of caution, a contract is only over when you do what the contract says to make it so. And only when it’s over can an owner start the clock running on filing a lien.



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