



Cohen Highley^{LLP}
L A W Y E R S

Newsletter

Commercial Leasing

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BELIEVE IT OR NOT, the rent money you receive from your property could be deemed to be received and held in trust for the benefit of any contractor you hire to do work on your property. And what may be more surprising is that directors, officers and employees of a corporate landlord may be held personally liable for breach of trust if the rent money is used to pay normal operating expenses instead of the contractor.

This is exactly what happened to Westcola Holdings Inc., and its sole principal. Westcola hired a contractor to renovate the underground parking garage in Westcola's commercial building. Westcola did not obtain any specific financing for the project, and made payments to the contractor from its general revenue.

The project was certified substantially complete, and the contractor was still owed about \$90,000.00 which Westcola never did pay. After the project was certified substantially complete, Westcola received rent money in the normal course and deposited this into its general operating account from which it paid normal operating costs and expenses associated with the property.

Section 7(3) of the *Construction Lien Act* provides that any money in the owner's hands at the time a project is certified as substantially performed, or received thereafter, constitutes a trust fund for the benefit of the contractor equal to the unpaid price of the contract. If the landlord is a corporate entity, then s. 13(1) of the *Construction Lien Act* makes its directors and officers, and employees with effective control of the corporation or its relevant activities, liable along with the corporate landlord if they:

Assent to, or acquiesce in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation.

Needless to say, the Ontario Court of Appeal held that all rental monies coming into the hands of Westcola were subject to a trust in favour of the contractor. Westcola was in breach of trust by using these monies for its own purposes, and not to pay the contractor. Also, Westcola's principal was held to be personally liable along with Westcola for breach of trust as he "reasonably ought to have known" that Westcola's conduct was a breach of trust. The court dismissed the principal's argument that it never occurred to him that the rent monies received by Westcola might be trust funds.

In short, the contractor was able to get judgment for \$90,000.00 directly against the corporate landlord's principal even though its construction contract was only with the corporate landlord.

If you have any questions about the rights of a commercial landlord, please contact Angelo D'Ascanio by telephone at Cohen Highley LLP, 519-672-9330 or fax 519-672-5960 or by e-mail dascanio@cohenhighley.com

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