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Watertight Defense for Landmark Building Owner

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Sued by the City of Chicago for alleged violations of its building code, the owner of a 111-year-old landmark building undergoing maintenance prevailed in its defense that abatement efforts were under way to maintain the building in compliance with the code. In *City of Chicago v. Old Colony Partners*, 364 Ill. App. 3d 806, 847 N.E.2d 565 (1st Dist. 2006), the City alleged that Old Colony had violated Sections 13-196-530(b) and (e) of the Chicago Municipal Code by failing to keep the building in "sound condition and repair" and free from dangerous and hazardous conditions. The Code mandates:

The foundation, exterior walls, and exterior roof shall be substantially watertight and protected against rodents, and shall be kept in sound condition and repair:

* * *

(b) Every exterior wall shall be free of holes, breaks, loose or rotting boards or timbers, and any other conditions which might admit rain, or dampness to the interior portions of the walls or to the exterior spaces of the dwelling.

* * *

(e) All cornices, rustications, quoins, moldings, belt courses, lintels, sills, oriel windows, pediments and similar projections shall be kept in good repair and free from cracks and defects which make them hazardous and dangerous.

At a bench trial, the evidence showed that scaffolding had been placed in certain areas around the building and that portions of terra cotta, bricks and limestone had been removed and temporarily shored

up and sealed. The City alleged that these conditions constituted continuing violations of the Code and sought injunctive relief and daily fines accruing to \$1.945 million. However, the trial court found that the City had failed to prove by a preponderance of the evidence that a violation had occurred, and entered judgment in favor of Old Colony. The City appealed.

On appeal, in addition to challenging the admission into evidence of Old Colony's pertinent documents, the City argued that the trial court's interpretation of the Code ran contrary to the plain meaning of its explicit provision requiring that an owner must keep its building in "sound condition and repair," rendering the Code meaningless. The court upheld the admissibility of the challenged documents under the business documents exception to the hearsay rule. Looking at the statutory language, the court agreed that it was somewhat ambiguous, but that, therefore, the trial judge was left with discretion as to what constitutes a violation.

Following an in-depth statutory construction analysis of the subject provision, the appellate court found that Sections 13-196-530(b) and (e) require conditions that might admit water into the building or create dangerous and hazardous conditions for a violation to have occurred. Here, the undisputed evidence admitted at trial showed that the landmark building was merely under temporary maintenance to assure weather resistance and that no dangerous or hazardous conditions were found. Moreover, it found that there was no evidence of wetness in the building. Accordingly, the appellate court held that Old Colony was not in violation of the Code, and affirmed the judgment of the trial court.

An important aspect of this case is that the appellate court confirmed that no notice of violation by the City to the owner is required under the Code to trigger the commencement and accrual of the \$200 to

\$500 automatic daily fines. The appellate court also noted that the Code does not provide any indication that compliance may mitigate against fines. Thus, once a violation is found by the court, fines are mandatory and not affected by a lack of notice or subsequent compliance. Here, however, given the City's failure to prove that Old Colony had violated the Code, no fines could be imposed. Interestingly, the reviewing court specifically noted its "serious concerns" over the City's view of what constituted a violation as "[h]ypothetically, this would make it possible for the City to fine any building owner attempting to make exterior repairs to its building."

Sanctions May Result For Frivolous Appeal of Arbitration Award

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In a recent case, the court forewarned litigants and their attorneys in future cases that the court will be "ready, willing, and able" to impose sanctions for parties who attack arbitration awards in court when they have no "legal basis for doing so." *Bravo L.B.L. Harbert International, L.L.C. vs. Hercules Steel Co.*, 441 F.3d 205 (11th Cir. 2006). There, the loser had attempted to set aside an arbitration award because it claimed that the arbitrator had manifestly disregarded the law.

The court noted that, under the Federal Arbitration Act, there are four statutory grounds for setting aside an arbitration award. 9 U.S.C. Section 10(a). Manifest disregard of the law was not a ground. The court noted that, besides the statutory grounds, an award could also be set aside if it was arbitrary and capricious or contrary to public policy.

The court rejected the loser's argument, noting that the arbitration involved a typical contractual dispute. The court stated that there were arguments concerning interpretation of the contract and noted that it could not set aside the award simply because the arbitrator may have contradicted an expressed provision of the contract.

The court stated the loser's actions had been a cost to both the other party and the judicial system. It noted that the loser, by litigating this matter had deprived the other party and the judicial system of the "principal benefits of arbitration." The court stated that "instead of costing less, the resolution of this dispute has cost more than it would have had there been no arbitration agreement. Instead of being decided sooner, it has taken longer than it would have to decide the matter without arbitration. Instead of being resolved outside the courts, this dispute has required the time and effort of the district court and this court."

The court stated that arbitration "awards" rest upon the arbitrator as being the decision maker. The court noted that it cannot prevent parties from appealing arbitration awards, but if there is no legal basis for the appeal, the appellant should be liable for sanctions. Although the court decided not to award sanctions in the present matter, it specifically warned litigants and their attorneys that in the appropriate case it may award sanctions in the future.

Seventh Circuit Denies Indiana Subcontractor's Claim for "Constructive Acceleration"

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The Seventh Circuit Court of Appeals in *Murdock & Sons Constr., Inc. v. Goheen Gen. Constr., Inc.*, 2006 U.S. App. LEXIS 21056 (7th Cir. 2006), recently denied a subcontractor's claim for "constructive acceleration." Constructive acceleration occurs when an owner requires a contractor to adhere to the original contract performance deadline, even though the contract entitles the contractor to a longer period in cases of excusable delay.

The plaintiff, Murdock, was a masonry subcontractor for the construction of a maximum security prison for the State of Indiana in Terre Haute. The prison required much masonry and the specifications required extra reinforcement. Murdock's bid was

approximately 50% lower than the next lowest bid, so Murdock was awarded the masonry subcontract.

Typically, a mason can lay 200 blocks a day. Due to the extra reinforcement required, Murdock had estimated that the union masons could complete 150 blocks a day. However, it turned out that the masons were only laying 50 blocks a day.

The masonry contractor's agreement with the local union prohibited Murdock from setting any minimum level of productivity. So, to improve productivity, Murdock fired slow workers, provided additional equipment, modified the construction process and finally hired more masons, more than doubling the original number. While productivity initially increased, it was only temporary.

Murdock notified the general contractor that it needed additional time. The state denied the request. Murdock then stopped work and filed a claim in federal court against the general contractor and the state alleging constructive acceleration. A bench trial was held, and the district court ruled in favor of the general contractor and the state. Murdock appealed the decision.

In order to successfully prosecute a claim for constructive acceleration, a contractor must prove six elements:

- 1) the contractor must experience an excusable delay entitling it to a time extension;
- 2) the contractor must properly request the extension;
- 3) the project owner must fail or refuse to grant the requested extension;
- 4) the project owner must demand that the project be completed by the original completion date despite the excusable delay;
- 5) the contractor must have actually accelerated the work in order to complete the project by the original completion date; and
- 6) the contractor must have incurred added costs as a result.

The trial court found that Murdock had failed to prove that it had experienced an excusable delay under the contract. The Seventh Circuit agreed and affirmed the judgment of the district court.

The contract provided that the contract time would be extended if the progress of the work was delayed by labor disputes or any causes beyond the contractor's control (known as a *force majeure* clause). The court concluded that the delay was not caused by either a labor dispute or any cause beyond Murdock's control.

Critical to the court's determination was the fact that Murdock never conclusively established the cause of the delay. Although there was speculation that the delay was caused by an organized work slowdown by the masons designed to force more masons to be hired, the court concluded that this was "nothing more than pure speculation." The court reasoned that if Murdock could not prove the cause of the delay, then it could not prove the cause was beyond its control.

In the end, the court implied that the delay was ultimately the result of an error of judgment on Murdock's part in underestimating the time and cost of the job. The court reasoned that Murdock understood that the masons might work slower than anticipated and accepted that risk when it prepared its bid. In conclusion, the court noted that mistakes of judgment are not a legitimate reason for obtaining relief from an inaccurate bid.

The lesson for contractors is two-part. First, the doctrine of constructive acceleration cannot be used to extend the contract time unless the contractor can demonstrate the actual cause for the delay and prove that the delay was excusable as defined by the contract. Second, *force majeure* clauses cannot be used as escape clauses unless the contractor can prove that the delay was caused by forces beyond its control and not just the result of a mistake of judgment in preparing the bid.

General Owes No Duty of Care to Subcontractor's Employee

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Recently, the Illinois Appellate Court examined whether a general contractor owed a duty of care to an employee to assure that his employer, an independent subcontractor, was fit. Furthermore, the court examined whether the failure to comply with municipal code provisions regarding building permits and contractor licensing created a private cause of action. The court answered both of the foregoing propositions in the negative.

In *Recio v. GR-MHA Corporation*, 366 Ill. App. 3d 48, 851 N.E.2d 106 (1st Dist. 2006), an employee of an unlicensed construction independent subcontractor fell when he lost his balance while carrying shingles up a ladder to a roof. Due to the fall, the employee sustained serious injuries which resulted in his death. The employee's widow filed a survival and wrongful death lawsuit against the general contractor alleging that it was liable because it violated an applicable municipal ordinance by hiring an unlicensed and unfit subcontractor.

The general contractor moved for summary judgment asserting that it did not owe the employee of an independent subcontractor a duty of care. The general contractor argued that, because it did not direct, control, or supervise the manner and means of the employee's work, it owed no duty of care to the employee. The trial court agreed with the general contractor and granted summary judgment. The appellate court affirmed following the general rule that a contractor is not liable for a subcontractor's acts or omissions unless it retains control.

Restatement (Second) of Torts. Sec. 411 (a) provides that an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor to do work which will involve a risk of physical harm unless it is skillfully and carefully done. Applying the general rule and the Restatement of Torts, the appellate court reasoned that, because the general contractor hires the independent contractor and relies on its expertise, it can assume that its employees possess the same qualifications. Thus, the

court concluded that an employee of an independent contractor is not within the class of third parties to whom a duty of care in hiring an independent contractor extends.

The appellate court also determined that, absent express language in a municipal code provision regarding building permits and contractor licensing, a private cause of action does not exist. Furthermore, the violation of such a municipal code provision which is designed to protect human life or property is only evidence of lack of reasonable care and does not create a duty of care. A licensing violation could only be used if the violation caused the employee's injury, which was not true in this case. Thus, summary judgment was appropriate.

Brokers Duty to Procure Insurance Upheld

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In *Country Mutual Insurance Co. v. Carr*, 2006 Ill. App. LEXIS (July 14, 2006), a general contractor, Steve Carr, d/b/a Carr Construction, was sued for alleged damage to a house he constructed when he allegedly placed inappropriate backfill in and around certain basement walls and then operated heavy equipment near those walls. Upon receiving notice of the suit, Carr filed a claim with his insurer, Country Mutual, to defend the lawsuit. Citing a general provision in the insurance policy, Country Mutual filed a declaratory judgment action asserting that it owed Carr no duty to defend or indemnify because the damage was caused by his own work, which was expressly excluded from the commercial general liability coverage contained in the policy.

Based on Country Mutual's denial of coverage, Carr then filed a third-party complaint against his insurance broker for breach of a statutory duty to provide ordinary care in selling and procuring insurance. This claim was based on Carr's allegation that the broker told Carr that the policy being purchased "would provide general and complete coverage for all matters and usual, customary, and obvious risks associated with being a general contractor" and that

the broker's duty to him was breached when the policy did not provide coverage for the most obvious risks associated with being a general contractor.

The broker moved to dismiss Carr's complaint stating that an insurance agent does not owe a duty to an insured. In opposition to the broker's motion, Carr pointed to an Illinois statute, which states that "an insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured" 735 ILCS 512-2201 (a). The trial court agreed with the broker and dismissed Carr's cause of action.

On appeal, the appellate court reversed the ruling. The appellate court noted that an interpretation of § 2-2201, based on its plain meaning alone, created a statutory duty that requires insurance agents, along with insurance brokers, to act with ordinary care when procuring insurance policies for their customers. Furthermore, the appellate court noted that Carr's complaint properly alleged a breach of the duty created by § 2-2201 because Carr sought an insurance policy from the broker that would cover the jobs he performed in his construction business and that the broker told Carr that the policy would do so.

Construction Notes

In a recent opinion, an Illinois bankruptcy court held that a mechanics lien claim had priority over the real estate tax homestead exemption. See *Bunch v. Richardson* (*In re Bunch*, 2005 Bankr. LEXIS 154 (C.D. Ill.2005)).

Although not a construction case, an Illinois appellate court upheld a limitation of liability provision under which a shipper's remedy for delayed delivery was limited by the provisions of the terms contained on the envelope provided by the air courier. There, the court upheld the limitation of liability provision limiting the amount of damages to essentially the price that the customer paid for the shipment

envelope. *Hicks v. Airborne Express, Inc.*, 2006 Ill. App LEXIS 651 (Ill.App. Ct.2006).

As a follow-up to two recent articles discussing whether a demolition company and tree cutter's commercial general liability policies covered acts where the wrong property had been demolished or the wrong trees had been cut, an Illinois Appellate Court decided that clearing trees off of the wrong lots may be covered by a tree cutter's commercial general liability policy. The court found that the insurer owed the tree cutter a duty to defend. See *Pekin Insurance Co. v. Miller*, 2006 Ill.App.LEXIS 696 (Ill. App. Ct.2006). The previous articles were "When Are Demolition Blunders Intentional," appearing in the Summer 2006 issue and "Surety Destroys Demolition Company Tender," appearing in the Spring 2006 issue of the *Construction Law Quarterly*.

The American Bar Association has just published a guidebook for home owners for remodeling projects. It discusses many problems which are likely to arise during remodeling projects. The book is *American Bar Association Legal Guide to Home Renovation: Everything You Need to Know About the Law and Insurance, Permits, and Contracts*, (Random House reference), 2006.

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