Querrey & Harrow
Result Oriented. Success Driven.

Issue No. 64
Spring 2014

Construction Law Quarterly

Court Invalidates Mechanics Lien Claim for Failure to Provide Sworn Statement

Jason Callicoat
Querrey & Harrow, Chicago

Mechanics lien claimants who do not provide a contractor's sworn statement at the owner's request risk having their lien claims invalidated, based on a recent appellate court decision. In *Cityline Construction Fire and Water Restoration, Inc. v. Roberts*, 2014 IL App (1st) 130730, the appellate court affirmed summary judgment granted in a homeowner's favor, invalidating the mechanics lien placed on the owner's property, because the contractor had not provided the sworn statement the owner requested.

In *Cityline*, the owner and contractor made an oral contract for the contractor to provide restoration and reconstruction services to the owner's residence after it had been damaged by a fire. The contractor completed work on the project and recorded a mechanics lien on the property. The lien claim asserted that the contractor was still owed $397,302 for its work on the owner's residence. The contractor then filed a lawsuit to foreclose its mechanics lien. The owner filed a motion for summary judgment as to the mechanics lien claim, asserting the lien was invalid because the contractor failed to provide a contractor's sworn statement.

Section 5 of the Mechanics Lien Act (770 ILCS 60/5) requires a contractor to provide the owner with a written sworn statement of the names and addresses of all subcontractors who provided work or materials for the project, along with the amounts to be paid to each. In *Cityline*, the owner requested this statement, but the contractor provided only an affidavit that stated all subcontractors had been paid.

The appellate court held this affidavit did not provide the owner with all of the information required by Section 5 of the Act. The court cited numerous prior cases establishing that all of the requirements of the Act must be strictly followed in order to create a valid lien. The contractor argued that the owner suffered no prejudice from the lack of a sworn statement, because all of the subcontractors had, in fact, been paid. The court held this did not matter and the requirements of the Act still had to be scrupulously observed. The lack of prejudice to the owner would not excuse any failure to comply with the technical and procedural requirements for creating a valid lien.

In reaching its decision, the court noted that invalidating the lien would not allow the owner to simply "escape" a $397,302 bill, because the contractor still had pending claims in the lower court for breach of contract and *quantum meruit* (asserting it was entitled to be paid for the value of its work). However, mechanics lien claims are potentially much more powerful remedies, as they allow the owner's property to be foreclosed on and sold to satisfy the lien. Contractors should therefore be aware of the requirement to provide owners with a proper sworn statement if the owners make that request. Failure to follow that requirement can result in the loss of the best remedy available, leaving the contractor in a weaker position to enforce its right to payment.

Subcontractor's End Run Fails

Douglas C. Giese
Querrey & Harrow, Chicago

Ordinarily, a property owner is not a party to a subcontract for construction on the property and cannot be sued by a subcontractor for a general contractor's breach of contract, unless a

subcontractor can show that at the time the contract was executed, the general contractor was acting as an agent of the owner. In *Triple L Lawn Maintenance & Landscaper Contractors, Inc. v. T-Mobile USA, Inc. and Nextel Communications of the Mid-Atlantic, Inc.,* 2014 Il.App. 112161-U (1st Dist. 2014),* the Illinois Appellate Court re-affirmed this general rule when it dismissed a complaint which failed to properly plead the existence of an agency relationship between a general contractor and owner.

The subcontractor entered into a contract with the general contractor to build cell towers for several wireless service providers. The subcontractor followed construction plans provided by the general contractor, which bore the name of certain wireless providers. The general contractor failed to pay the subcontractor for its work and the subcontractor filed a breach of contract suit naming the general contractor and the wireless providers as defendants. The general contractor claimed that the service providers were liable to pay the sum it was owed, because the general contractor was their agent.

The subcontractor contended that service providers had clothed the general contractor with apparent authority "to act as their agent by 1) providing their names, and (2) directly communicating with the subcontractor concerning the cell tower projects. The court dismissed the case, finding that the general contractor lacked apparent authority to bind them as parties to the subcontract.

_____

*The "U" at the end of the case citation means that the opinion may not be used as precedent for other cases.

Verbal Notice to the Project Manager Satisfies a Contract's Written Notice Requirement for a Warranty Claim

Tim Rabel
Querrey & Harrow, Chicago

In *Sundararaj vs. Kot*, 213 Ill.App. (1st) 130973-U*, held that the home buyers' verbal notice of water infiltration to the contractor's project manager was sufficient to meet the contract's written notice requirement for claims to be made within the one-year warranty period. There, the contractor agreed to build and sell the home buyers a home. The contract contained a warranty waiver and an express limited warranty. The limited warranty was against defects and latent defects arising from faulty workmanship material or defects for a period of one year. The contract required a written notice to the contractor prior to the end of the warranty period.

During construction, the home buyers dealt almost exclusively with the project manager. Approximately five months after completion of the home and the closing, the home buyers noticed a large water stain on the dining room wall. They called the project manager who came to the house, inspected the problem, identified some additional work that needed to be performed and then oversaw the work. The project manager told the home buyers that the problem had been resolved.

The water leak continued and almost three years later the home buyers discovered that the leak caused mold problems. When the home buyers called the contractor, the contractor refused to discuss the problem. The home buyers had the mold remediated and the structural repairs performed. The home buyers then brought suit against the contractor for breach of contract, breach of warranty, consumer fraud, and negligent hiring and supervision.

The trial court found in favor of the home buyers, finding that the contractor failed to construct the home according to the plans and specifications and undertook the repair of the construction defects within the one-year warranty. The trial court found that the contractor had received actual notice through its agent, the project manager, who undertook the repairs and, therefore, had effectively waived the requirement of written notice under the contract. The trial court also awarded monetary damages.

The contractor's sole contentions on appeal were that the contractor was never given written notice. The appellate court disagreed.

The appellate court noted that this case is a prime example of equitable estoppel. The project manager was given actual notice within the one year warranty period and the project manager as the contractor's agent voluntarily undertook the repairs without requiring any written notice. He then assured the home buyers that the repairs resolved the problems. The home buyers rightfully relied upon the project manager's statements. The contractor's testimony proved that he would have done what the project manager had done had he been notified. He would have put the project manager in charge of the repairs. Therefore, the trial court's finding that the contractor was estopped from relying upon the written notice provision in the contract as a defense was not against the manifest weight of the evidence. The judgment was affirmed.

_____

*The "U" at the end of the case citation means that the opinion may not be used as precedent for other cases.

Court Holds Sales Rep Act Does Not Apply to Construction

Helena Gonzalez Jorgensen
Querrey & Harrow, Chicago

In *Johnson v. Safeguard Construction Co.* 2013 IL App (1st) 123616, the appellate court held that an Illinois corporation engaged in the business of facilitating the repair of damaged homes was not a "principal" within the meaning of the Sales Representative Act, 820 ILCS 120/0.01 *et seq.* (West 2010). The plaintiff sued the defendant corporation under the Act after the defendant cancelled its independent sales agreement with the plaintiff. The agreement between the parties entitled the plaintiff to a percentage of the defendant's net profits, in consideration "for the sale of Safeguard products and services." In the instant case, the plaintiff complained that he was entitled to a substantial commission from the procurement of a roofing job involving a church.

However, the circuit court granted summary judgment in favor of the defendant on the basis that the defendant was not subject to the terms of the Act, and the appellate court affirmed. The relevant section of Act provides, in pertinent part, that all "commissions due at the time of termination of a contract between a sales representative and principal shall be paid within 13 days of termination." 820 ILCS 120/2 (West 2010). The Act further defines "principal" as a:

> sole proprietorship, partnership, corporation or other business entity whether or not it has a permanent or fixed place of business in this State and which:
> (A) Manufactures, produces, imports, or distributes a product for sale;
> (B) Contracts with a sales representative to solicit orders for the product; and
> (C) Compensates the sales representative, in whole or in part, by commission.

820 ILCS 120/1(3) (West 2010). Relying upon the plain language of the Act, the appellate court recognized that the Act referred to "products," and therefore only applied to purveyors of tangible goods, not services.

The plaintiff argued that the defendant was both a purveyor of tangible goods and services, based upon the defendant's references to "products and services" on its website and in its independent sales agreement with the plaintiff. Although the defendant's website posted various descriptions of products and services relating to the repair of damaged homes, the defendant subcontracted the actual repair work to third parties, and neither manufactured, produced, imported, nor distributed any of the products used by the subcontractors in repairing the home. The defendant further qualified the phrase "products and services" in the independent sales agreement by referencing the plaintiff's job responsibilities: to canvas storm-damaged neighborhoods, provide free inspections to homeowners, interface with insurance adjusters, and obtain contracts from homeowners for the restoration work. Even viewing these facts in a light most favorable to the plaintiff, the court held that the defendant was not a purveyor of tangible goods because it was engaged exclusively in the sale of services.

Alternatively, the plaintiff urged the court to broaden its interpretation of the term "principal" to include the defendant because its services involved tangible goods necessary to replace damaged parts of a home. The court declined to do so, holding it would:

render meaningless the plain terms under the Act that a "principal" is a business entity which contracts with a sales representative "to solicit orders for the product," language which shows that a tangible product sold must be a main purpose and focus of the client contracts.

Accordingly, because any tangible goods associated with the repair work were merely incidental to the defendant's services, the defendant could not be held liable as a "principal" under the Act.

Supreme Court Enforces a Forum-Selection Clause

Megan Monaghan
Querrey & Harrow, Chicago

The U.S. Supreme Court recently held that courts are not to consider private interest factors when considering whether a case should be transferred pursuant to a forum-selection clause. In *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), a contractor entered into a subcontract for a construction project in Texas. Despite a forum-selection clause requiring that any dispute between the parties be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division, the subcontractor filed suit against the contractor in the United States District Court for the Western District of Texas.

The contractor sought to have the case transferred to the U.S. District Court in Virginia pursuant to the forum-selection clause. When courts are deciding whether to transfer a case, they usually take into account both private and public interest factors. After considering these factors, the District Court for the Western District of Texas refused to transfer the case to the court in Virginia due to the subcontractor's private interests. The court afforded significant weight to the fact that compulsory process was not available for the majority of the subcontractor's witnesses, along with the substantial expenses that willing witnesses would incur if the case was transferred. The district court concluded that the contractor failed to meet its burden of showing that the transfer "would be in the interest of justice or increase the convenience to the parties and their witnesses." The appellate court affirmed the district court, finding that the district court had not abused its discretion in refusing to enforce the forum-selection clause and transfer the case.

The Supreme Court, however, reversed the lower courts' decisions and enforced the forum-selection clause, thereby requiring that the case be litigated in the U.S. District Court in Virginia. The Supreme Court's decision may potentially have a profound impact on parties who have entered contracts containing forum-selection clauses. The Supreme Court determined that courts must adjust their analysis in three ways because a forum-selection clause is bargained for by the parties and its enforcement protects their expectations and furthers the interests of justice.

First, since a forum-selection clause exists, the plaintiff exercised its privilege to bring a suit in any proper forum before the dispute arose. Therefore, the subcontractor bore the burden of proving that transfer to the U.S. District Court in Virginia was unwarranted. Second, and most significant, courts are not to consider the parties' private interests since parties waive the right to challenge the contractual forum on grounds of convenience as any potential inconvenience was foreseeable at the time they entered into the contract. The subcontractor was thus responsible for showing that public interest factors overwhelmingly disfavored the transfer. Finally, when a forum-selection clause exists, the original venue's choice of law rules do not follow the case to the transferee court. The interest in preventing defendants from defeating possible state-law privileges stemming from the plaintiff's venue privilege is not present. Allowing the choice-of-law rules to follow the case to the transferee court would thus be inequitable and encourage gamesmanship.

As a result of this decision, contracting parties must use significant caution when agreeing to a forum-selection clause. Otherwise, they may find themselves incurring significant expenses litigating a dispute in a distant forum where compulsory process is not available, regardless of any private interests that would have normally precluded transfer.

Editor's Note: This case probably applies only to cases filed in the federal courts, since the Supreme Court was interpreting the federal choice of forum statute in its ruling. However, state courts may not give preference to choice of forum provisions in contracts especially where they have statutes voiding certain forum selection clauses. In Illinois, an Illinois statute provides that suits involving construction or projects in Illinois must be filed in Illinois. 815 ILCS 665/10

QUERREY & HARROW WELCOMES MAURI ANN THOMAS

Querrey & Harrow is pleased to announce that Mauri Ann Thomas has joined its Chicago office and will continue her practice in medical malpractice, insurance defense and products liability. Managing Shareholder Kevin Caplis says Mauri is a good fit with the Firm because of her extensive health services and complex litigation experience.

Ms. Thomas earned her JD from Duquesne University School of Law in 1998 and her BA from West Virginia Wesleyan College, *cum laude,* in 1993. Ms. Thomas is a native of Pittsburgh, Pennsylvania, and relocated to Chicago upon earning her JD in 1998.

Bruce H. Schoumacher
Editor

Querrey & Harrow

www.querrey.com
800.678.2756

Illinois
Chicago: 312.540.7000
Joliet: 815.726.1600
Waukegan: 847.249.4440

Indiana
Merrillville: 219.738.1820

Querrey & Harrow, Ltd.
175 W. Jackson Blvd., Suite 1600, Chicago, IL 60604