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Litigation Update – Architect’s Duties to Subcontractor

This article will examine a recently decided case involving the scope of an architect’s duties toward a subcontractor pursuant to language found in the standard AIA contract language.

In a South Carolina case,¹ the owner hired the architect to prepare plans for renovation of a hospital. Bids were received and a contract was signed for about \$3.26 million with the general contractor. Construction started in June, 1993, and the architect approved six payments totaling some \$1.966 million. Despite receiving this money, the general contractor apparently failed to pay its subcontractors. The subcontractors began to complain and the architect requested a copy of the general contractor’s payment bond. The general contractor submitted a document entitled “General Agreement of Indemnity” issued by an insurance company in response to the architect’s request.

Despite not having received the requested payment bond, the architect approved reducing the retainage from ten to five percent. Furthermore, the architect approved four additional pay requests from the general contractor totaling some \$1.25 million. Finally, in May, 1994, the general contractor admitted that there was no payment bond on the project, and that the money that it had received from the owner had been used to pay unrelated legal bills.

The mechanical contractor, who was owed \$426,728.87, and other subcontractors then sued the general contractor, the owner, the architect and others. Default judgments were obtained against the general contractor, but these turned out to be uncollectible. Apparently, the claims against the owner were settled for substantially less than the total amount owed. This left the architect as the last party with any real assets.

The subcontractor had no contract with the architect. The subcontractor’s theory against the architect was that the architect owed it a professional duty distinct from any contractual duty. The subcon-

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tractor contended that the project manual, the contract between the owner and architect and the contract between the owner and general contractor all created this duty. The subcontractor argued that the architect undertook to marshal and assemble contract documents and to supervise payments on the project, thereby creating a duty to do so with due care. The subcontractor further argued that the architect had a legal duty not to injure foreseeable parties with whom it had a special relationship even absent contractual privity.² The relevant part of the A201, General Conditions, are as follows:

1.1.2 The Contract

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

The architect/owner agreement (apparently the B141, 1987 edition) contained this language:

9.7 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

Based on these provisions, the court found that there was no privity between the architect and the various subcontractors. Therefore, to support liability, the subcontractor had to show some extracontractual duty by the architect. It hired an expert who presented his opinion that the architect had several duties which it breached. These included a duty to review the payment and labor bond for sufficiency under the contract. According to this expert, the architect breached its duty to the subcontractor by failing to secure a payment bond from the general contractor and then misrepresenting that failure to the subcontractor. The expert further opined that the architect should not have certified payments to the general contractor before assuring that the payment bond had been provided, and that the architect should not have certified payments without having made sure that the subcontractors had been paid.

The court refused to find that the architect had any “special rela-

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tionship” with the subcontractor. Therefore, there was no tort duty. As to the question of whether the architect owed the subcontractor a legal duty based on the owner/architect contract, the court held for the architect, finding no such duty under these facts. Under South Carolina law, an architect owes a legal duty to foreseeable third parties to design and supervise construction with due care. The subcontractor’s argument that the architect’s contract gave the architect effective control over all facets of the work was not convincing. The issue, according to the court, was whether the subcontractor actually relied on the architect’s actions. For instance, the subcontractors knew that they should be furnishing lien waivers with each draw, yet they did not. The fact that the subcontractors were not asked to furnish lien waivers put the subcontractors on notice that their interests may not be protected. Complaining to the architect did not create a legal duty on the part of the architect. In the end, the court found that the architect did not owe a legal duty to the subcontractors and was not liable for their loss.

Architects and owners should be careful to follow the contract documents and require the general contractor to produce evidence of bonds and payments required by those documents. Usually, if the subcontractors are not timely paid, the architect and owner will become aware of the problem rather quickly. AIA Document A201 has provisions that can address that situation. Direct payments to subcontractors may be called for in order to remedy the situation. Subcontractors who are not properly paid should notify the owner and architect of that fact, and consider the timely filing of liens to protect their interests. Where a general contractor runs into financial problems, all other parties to the project will likely suffer unless they act promptly.

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1. *Cullum Mechanical v. South Carolina Baptist Hospital*, 1999 S.C.App. LEXIS 71 (May 3, 1999).
2. Privity is a legal term used to describe a direct contractual relationship, whether written or oral. If there is no direct contractual relationship, there is no privity.

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