

## **Litigation Update - Architect's Duties to Subcontractor (Part 2)**

About two years ago, we reported on a South Carolina case<sup>1</sup> that involved the scope of an architect's duties toward a subcontractor pursuant to language found in the standard AIA contract language. Recently, the Supreme Court of that state reversed the decision. We now revisit the case.

In this case, the owner hired the architect to prepare plans for renovation of a hospital. Under the Contract Documents, the general contractor was required to furnish a payment bond. No payment bond was ever furnished. During the project, Cullum, the mechanical subcontractor, was not being timely paid. Near the start of the project, Cullum telephoned the architect to inform it that Cullum and other subcontractors were not being paid. Cullum asked the architect if the general contractor was bonded, and the architect responded that it did not know.

When other subcontractors began to complain about lack of payment, the architect, in response to the owner's inquiry, requested a copy of the general contractor's payment bond. The GC responded by furnishing a "General Agreement of Indemnity" which did not comply with the contract terms because it was not a payment bond. The architect never recommended to the owner that the GC be terminated for failing to furnish the bond. Although the architect knew that there was not a payment bond and that subcontractors were not being paid, the architect continued to certify payments and reduced the amount of retainage from ten percent to five percent.

After the project was completed and Cullum was not fully paid, Cullum sued the architect. The trial court held that the architect did not owe a duty to the subcontractor, Cullum, and dismissed the case. The appellate court affirmed the trial court, but the South Carolina Supreme Court reversed. That court sent the case back to the trial court for a determination of whether there was a "special relationship" between the architect and the subcontractor, so as to

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create a duty owed by the architect to the subcontractor.

Among the provisions of the contract that the court reviewed and cited in its opinion is an earlier version of the following section of A201:

**9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluations of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

The court also noted that the architect had the ability to withhold certification for payment to the general contractor if the subcontractors were not properly paid. See ¶ 9.5.1.3 of A201. Because of the knowledge of the architect that the subcontractors were not being properly paid and the architect certified payments anyway, the court found that a further inquiry into the facts of this case was warranted. A “special relationship” between a design professional and a contractor could arise out of duties created outside of the contractual duties of the architect. The court did not elaborate on these duties or how they might arise. In fact, the court stated that “generally, an architect does not have a duty to assure payment to subcontractors.” It then proceeded to carve out an apparent exception.

There are good reasons why courts should not follow this case. First, A201 states that “**1.1.2** . . . 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

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Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor.” Thus, there is no contractual relationship between the architect and any subcontractor. Second, the contracts, including the Owner-Architect Agreement and A201 are intended to spell out all of the duties of the architect. There should not be any other duties imposed on the architect, with the exception of statutory duties.

The appellate court made the right decision, which was unfortunately reversed. Judicial decisions are not always correct. That is one reason that there are so many conflicting cases involving the same documents. Undoubtedly, the court was upset about the architect’s actions in ignoring the fact that the contractor was not paying the subcontractors and did not obtain the required bond. Courts will often disregard clear contractual requirements if they believe “justice” requires them to do so. Architects and others in the construction process cannot simply rely on contract language to keep them out of trouble. They must also do what the contracts call for. Even then, there are no guarantees in the judicial system.

Here, the architect should have paid attention when notified that the bond was not in place. At the least, a letter should have been written to the owner, asking the owner to investigate the bond situation. The subcontractor complaints should not have been ignored. Again, a letter to the owner notifying the owner of possible lack of payment to the subcontractors could have been written, with a request for direction from the owner. Finally, it was unwise to certify payment to the general contractor in light of these matters, unless the architect had a letter from the owner specifically sanctioning the architect to authorize payment in light of the problems.

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1. *Cullum Mechanical v. South Carolina Baptist Hospital*, 520 S.E.2d 809 (Ct.App. 1999)

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