Louisiana Construction Law and News Update

Shields Mott Lund L.L.P. • New Orleans

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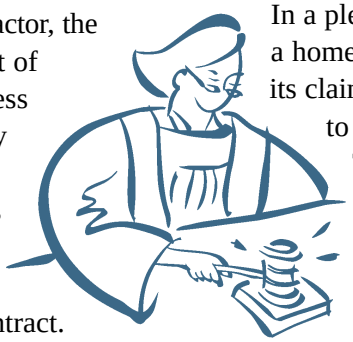
Construction Law Update

Introduction

This newsletter covers recent case law and other developments of significance to the construction industry. However, the information contained in this newsletter should not be considered legal advice and does not create an attorney-client relationship with the readers. Readers should always seek the advice of competent legal counsel for any matters on which they need legal advice.

Limitation on subcontractor's assignment of accounts receivable

In the Matter of: Advanced Systems, Inc., CA No. 01-30282 (5th Cir. 2002): In a case handled by our firm for the general contractor, the United States Fifth Circuit Court of Appeals ruled that even an express and unconditional assignment by a subcontractor of its accounts receivable is subject to provisions in the subcontract which allow the general contractor latitude in payments made on the subcontract. The subcontract at issue contained the following language:



"Should subcontractor at any time fail to pay all labor, materials or supplies used by Subcontractor in work when done, Contractor may pay for same and charge to Subcontractor, without Subcontractor's consent."

Applying the Uniform Commercial Code as adopted by Louisiana at La. R.S. 10:9-318(3), the court wrote: "Although § 9-318(3) of the U.C.C. states that an account debtor must pay the account assignee, rather than the assignor, upon receiving notice of the assignment, section (1) (A) of that same provision also provides that 'the rights of an assignee are subject to...all the terms of the contract between the account debtor and the assignor and any defense or claim arising therefrom.'... Stated differently, the contractual provision permitting [contractor] to pay ASI's materials suppliers directly and to receive a credit for the amount paid as enforceable against PNB, the assignee. [Contractor] is therefore entitled to a credit of $24,982, the cost of the materials."

Proving the contractor's claim: "...each and every item"

In a plea for "offset" against claims by a homeowner, a contractor was denied its claims for job expenses for failing to provide adequate proof of same. The court in *Politz v. Randy Key Construction, Inc.*, 2001-2172 (La.App. 1st Cir. 10/2/02), 2002 WL 31186674 wrote:

"Where the owner denies being indebted to the contractor, the contractor has the burden of proving each and every item of expense in connection with the job. He is under a duty to itemize every expenditure."

Although there are factors in the case (including that the contractor had deliberately and erroneously cut and failed to repair a significant support beam in the kitchen area of the home at issue) which may have led to the court taking a hard line with the contractor, this case is once again support for the overriding maxim in construction claims: "Document everything."[1]

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[1]*Note: this case has not yet been released for publication in the permanent law reports and is subject to revision or withdrawal.*

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Letter From the Partners

Welcome to the first edition of, "Louisiana Construction Law and News Update." This newsletter is provided to keep you and your company current on legal topics that affect the construction industry. The firm hopes you find this information insightful and relevant to your work.

The newsletter will be published on a quarterly basis by the firm and is distributed free of charge to the construction industry. We encourage suggestions and ideas for articles from our readers so that this publication can be as current and useful as possible.

We appreciate the opportunity to provide this newsletter to you. If you know of others in the industry whom you think might enjoy receiving the publication, please let us know so that we can add them to our industry list.

Sincerely,

Lloyd N. Shields
Norman A. Mott
Daniel Lund, III
Stuart G. Richeson
Shields Mott Lund L.L.P.

Decisions Involving Federal Projects

Extended overhead cost claim refused

Recognizing the appropriateness of the "Eichleay formula" for the calculation of unabsorbed home office overhead, the court in *Sergent Mechanical Systems, Inc. v. United States*, 54 Fed. Cl. 47, 2002 WL 31285335, denied a contractor such costs even though a government-imposed delay occurred in the contract. According to the court, the contractor failed to prove that it was placed on "standby" during the delay, i.e., the contractor did not show that it was expected to remain ready to perform at any time "with the government having the prerogative of calling the contractor back to perform on such short notice." The court found that neither the general contractor nor its subcontractors were required during the delay to have workers ready to perform, and that no "short notice" to recommence work was given after the delay.

Spearin doctrine inapplicable where no damages result

The Spearin doctrine (from the case of *United States v. Spearin*, 248 U.S. 132 (1918)), provides an avenue for contractor damages when the government is deemed to have breached its implied warranty that satisfactory contract performance will result from adherence to the specifications provided by the government. In *Franklin Pavkov Construction Co. v. Roche*, 279 F.3d 989 (Fed. Cir. 2002), the court rejected a claim under the doctrine by a contractor who failed to prove increased costs resulting from the alleged shortcoming in specifications. In the case, the contractor bid based upon an older set of specifications, but it was proven before the Board of Contract Appeals that the later issued set (and from which construction was ultimately performed) required a lesser work scope and, therefore, reduced cost to the contractor. The BCA (as affirmed by the Court of Appeals) rejected the contractor's argument that its costs would have been lower if it had the benefit of the later specifications at an earlier time.

Read before you write: site condition claims rejected for failure to read bid document

The contractor in *Comtrol, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002), filed a differing site condition claim based upon encountering quicksand and a hidden fuel pipeline at a construction site. The Court of Appeals rejected both claims, affirming the trial court's decision on the items. Both claims were "Type I" claims, which are claims for site conditions which consist of "subsurface or latent physical conditions at the site which differ materially from those indicated in the contract." Federal Acquisition Regulation § 52.236-2(a)(1)(1994).

As regards the quicksand, the court found not only that the specifications did not declare that only hard material would be encountered (the contract indicated that hard material "may" be encountered), but it also found that the contractor failed to read an engineering report which might have suggested to the contrary, and that the contractor could not have relied upon the report in its bid. With regard to the hidden pipeline, the court found that the bid documents were sufficiently vague and ambiguous on the point - although referencing a proposed relocation of the pipeline - such that a reasonable contractor would have inquired about the location and condition of the pipeline.

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Recent decisions under La. R.S. 9:2771

The cited Louisiana statute provides that a contractor is immune from construction defect liability if the contractor constructs in compliance with plans and specifications not provided by the contractor and if those plans and specifications prove to be faulty or insufficient. In *Peterson Contractors, Inc. v. Herd Producing Company, Inc.*, 35,567 (La.App. 2nd Cir. 2/27/02), 811 So.2d 130, the rule was upheld when a road construction contractor, following the specifications calling for "native rock," substantially completed a road which failed to be suitable for intended use by logging trucks. The court noted that the term "native rock" had no geographical significance in Louisiana, that there was an understanding between the contractor and the owner as to what the term meant, and also that the contractor had noted to the owner the contractor's concerns about the material, which concerns were disregarded by the owner. (Ultimately, the road was repaired by another contractor using what it referred to as "native gravel" from a pit in Arkansas.)

However, in *Austin Homes, Inc. v. Thibodeaux,* 2001-1282 (La.App. 3rd Cir. 5/8/02), 821 So.2d 10, the court noted a judicially recognized exception to La. R.S. 9:2771:

"Notwithstanding, if the contractor knew or should have known of the defective specification, in order to escape liability, he had a duty to report the problem to the homeowner; if the homeowner instructs him to continue according to the plan, anyway, the contractor is immune from liability."

In the *Austin Homes* case, the contractor was refused blanket immunity under the statute. Instead, the court of appeal chose to individually examine separate items of construction individually in order to determine whether the contractor breached any obligation it had to the owner to inform it of shortcomings of the plans. Ultimately, the blanket immunity granted by the trial court was reversed in part by the court of appeal (including, in favor of the owner, on the portion of the work involving a Jacuzzi, which was installed - according to plans and specifications - without any water source or a drain).

Compare the decision in *Morgan v. Lafourche Recreation District No. 5,* 2001-1191 (La.App. 1st Cir. 6/21/02), 822 So.2d 716, in which the statute is applied to a negligence (as opposed to a contract) claim. In that case, a basketball player suffered a knee injury while playing on a new floor, and alleged that the contractor knew that it was hazardous to install a tennis surface on a court that would be used for basketball. The contractor asserted an absolute defense under La. R.S. 9:2271, and was granted summary judgment in the trial court based upon the defense. In reversing the trial court, the court of appeal held that the granting of summary judgment in favor of the contractor under the statute required that the contractor prove that either the situation created by the construction was not hazardous or that the contractor had "no justifiable reason to belief a hazardous situation was being created..." by his construction. The court of appeal sent the matter back to the trial court for further findings of fact on those issues.

"Lien" on me: recent decisions involving lien rights

Byron Montz, Inc. v. Conco Construction, Inc., 2002-0195 (La.App. 4th Cir. 7/24/02), 824 So.2d 498: La. R.S. 9:4822K allows persons with lien rights but not in privity with the owner (i.e., the claimant has no contract with the owner) to provide to an owner notice of an obligation which might lead to a lien claim. A person providing such notice is entitled under subsection L of the statute to receive from the owner notice within three days of the filing

of the notice of termination/substantial completion of the work (or notice of actual substantial completion or abandonment of the work, if a notice is not filed in the public records). The statute allows the lien claimant to recover attorney's fees and costs "for the establishment and enforcement of the claim or privilege" if the owner fails to provide that statutorily required notice.

In this case, the subcontractor complied with its requirements under the statute, and the owner admittedly failed to provide notice of substantial completion. Ultimately, the subcontractor filed its lien late (claiming that it did not timely receive the required notice from the owner), but was denied by the court the ability to enforce the lien. According to the court, nothing in the cited statute allows for the extension of the period within which a lien can be filed, but only allows for recovery of attorney's fees and costs in the event a timely lien is filed and enforced and the owner failed to comply with its requirement to provide notice of substantial completion. The subcontractor's claim was dismissed on summary judgment.

Ducote v. Voinche, 2002-0060 (La.App. 3rd Cir. 6/19/02), 820 So.2d 656: The trial court found that the

News and Notes

Construction Specifications Institute releases draft of revision of specifications handbook

The Construction Specifications Institute released in October, 2002, a draft of its revision to its specification document. CSI's coding system, called "MasterFormat," is a list of numbers and titles for organizing information about construction requirements, products and activities on a construction project (the well-known 16 "divisions"). The current draft and further information on the revisions are available at CSI's website: www.csinet.org/technic/mfrevisions.htm.

According to an article which appeared in the November 6, 2002, edition of The Wall Street Journal, the most recent draft makes room for new divisions in communications and life safety, and expands MasterFormat to cover civil engineering projects like dams, tunnels and sewers. The author of the WSJ article, Ryan Chittum, noted also that the expansion of categories will more than double the number of divisions, which has raised industry objections based upon a belief that the changes will create new paperwork more than anything else.

SML adds a new partner

Shields Mott Lund is pleased to announce the addition of Stuart G. Richeson as partner in the firm. Stuart practices principally in the areas of construction litigation, surety claims and intellectual property. Stuart has been licensed to practice law in Louisiana since 1995, and is a graduate of Tulane University School of Law and Michigan State University. Stuart joined the firm in 1996.

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liening contractor performed substandard work and was entitled to no money, and ordered cancellation of the lien. However, attorney's fees requested by the homeowner under La. R.S. 9:4833 - which provides for attorney's fees after a demand for voluntary dismissal of a lien is unreasonably refused - was rejected by the trial court. In granting attorney's fees, the court of appeal ruled that the failure to dismiss the lien was in fact unreasonable, and that the language in the statute allowing for attorney's fees is mandatory (using the word "shall" in its text).

The importance of this decision is in its utilization of the statute wherein the lien is deemed unenforceable for reasons of substance rather than purely procedural or technical reasons (such as the lien being filed untimely or lacking a legally required element, like a property description). Because the statute speaks at its subsection D of being enforced by "summary proceeding," its application is typically limited to attack of liens on purely legal grounds and not where the attack is rooted in the facts underpinning a lien (which would ordinarily require a regular trial rather than a summary proceeding).

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