

Contractor Recovers Big Against Both Owner and Subcontractor

by

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In a must-read decision because of the number of issues covered and their importance to frequently recurring construction disputes, the Eighth Circuit Court of Appeals recently affirmed judgments exceeding \$1,500,000 from jury verdicts and federal district court orders in favor of a contractor and against an owner and a subcontractor for breach of contract. The case is *The Weitz Co. v. MH Washington v. Summit Steel Fabricators*, 2011 WL 43620 (C.A. 8 Mo.), decided January 7, 2011.

The end result of this high-stakes litigation, after applying set-offs, was a finding for the contractor and against the owner of \$696,575.93 for breach of contract for nonpayment, \$318,924.53 in attorney fees, \$46,454.54 in court costs, and prejudgment interest in an amount not disclosed in the opinion. There also was a finding for the contractor and against its subcontractor (a subcontractor picked by the owner on a rebid to find a lower bid) of \$326,839 for breach of contract for poor workmanship and delays, \$198,812.45 in attorney fees and \$41,265.43 in court costs.

The case involved, among other issues: A201 General Conditions, incorporating from the prime contract another contract, alter ego of owner companies, progress payment applications, mechanic's liens, counterclaims, liquidated damages, Missouri's Prompt Payment Act, change orders, final completion date, delays, expert testimony, critical path analysis, poor workmanship, prevailing party concepts, architect certificates and mitigation of damages.

The project was the construction from 2004 to 2006 of the 46th and Washington Townhomes located near the Country Club Plaza in Kansas City, Mo. Mackenzie House, LLC, a Colorado real estate company, was the developer; MH Washington LLC was the managing member; The Weitz Company, an Iowa company, was the general contractor and Summit Steel, a Texas corporation, was the steel subcontractor to Weitz.

The prime contract consisted of A111, a standard form AIA agreement between owner and contractor on large projects with a guaranteed maximum price (GMP), where payment was based on cost-of-the work plus a fee. The A111 contract adopted by reference (and thus incorporated) AIA Document A201, General Conditions of the Contract for Construction.

The dispute arose after project delays whereby the owner decided to withhold payment of \$701,876 from the general contractor. Without this money several unpaid subcontractors filed mechanic's liens.

The Eighth Circuit faced a myriad of legal challenges on appeal, all of which it rejected. Among them, MacKenzie House argued that it was not co-liable with MH Washington as the owner for the adverse judgment because the prime contract listed only MH Washington (not MacKenzie) as the owner. However, the A201 contract stated that the owner was MacKenzie House and evidence showed that MacKenzie directed all the work. The evidence also supported the trial court's decision that there was either a principal-agent relationship or an alter-ego between the two companies, further supporting liability for each.

The court further concluded that it was for the jury to decide when Weitz' work was complete such that liquidated damages could be assessed by the owner at \$500 per building per day, given the contract's ambiguity on this point. The project had three buildings and a total of eighteen units.

The owner argued that contractor delays and quality problems supported its request for a new trial. The jury had "ample evidence" for its verdict, the Eighth Circuit concluded, especially since it was the owner that had selected a new group of low-bid subcontractors for Weitz to use after the subcontractors that Weitz had selected had provided bids considered by the owner to be too high. This prompted an unusual rewrite of the contract, at Weitz' behest, such that the owner agreed to accept the "risk for the performance and payment defaults of the Contractor's subcontractors in the performance of the work."

The Eighth Circuit supported the decision to allow the testimony of Weitz' expert, a professional engineer, who analyzed project delays by using a "windows analysis." This analysis distinguished activities on the critical path from those where there was float time. The court did not find his testimony to be inherently unreliable. "Expert opinion necessarily involves some speculation."

The Eighth Circuit also found the award of attorney fees to be proper even though the owner had recovered a partial off-set on its claim against Weitz. After comparing the results, the court found Weitz to be the "net prevailing party" as it ultimately was the one that would be compensated for its claim. Citing from an earlier court opinion, the Eighth Circuit noted that each "side may score, but the one with the most points at the end of the contest is the winner."

As for the sizable amount of attorney fees awarded, the court found the award to be a proper yet costly result of a "concede nothing, litigate everything attitude." The Eighth Circuit also stated that the payment by a party of its legal fees before knowing if it would prevail was the "best evidence" as to the reasonableness of the amount of the fees.

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