

City May Proceed With Lawsuit
Against Contractor over Sewer Project

By

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Missouri Southern District Court of Appeals has allowed the City of Kimberling City to proceed with its breach of contract and warranty lawsuit against its general contractor Leo Journagan Construction Company, Inc. for construction of a sanitary sewer system. The case is *City of Kimberling City v. Leo Journagan Construction Co., Inc.*, 2011 WL 549499 (Mo. App. S.D.), decided February 21, 2011.

In reading this result, the appellate court overturned the trial court's decision that no trial was necessary because the City's claims were without merit and thus the contractor was entitled to summary argument in its favor. The trial court had largely based its decision on the findings of the City's architect, E.T. Archer Corporation, that the contractor had performed its duties and obligations under the contract and was entitled to final payment by the City. The architect's decision—the trial court concluded—precluded the City from proceeding with its claim that Leo Journagan's work was unsatisfactory and defective.

This dispute—and the Southern District's holding—touch on two issues that frequently arise in construction disputes; namely, (1) does an architect's decision bind the owner and (2) must a contractor or owner first present its claims to the architect for consideration before being allowed to proceed with those claims.

The court's decision did not specifically identify the source of the contract between the owner and contractor. However, the contract language cited in the opinion clearly shows it was based on AIA A201, an industry standard for drafting construction contracts. Thus, this decision has broad applications in the construction industry.

At the end of the project architect Archer sent a letter to the Missouri Department of Natural Resources wherein Archer affirmed that to the best of its knowledge and belief the contractor substantially completed the wastewater facilities in accordance with the contract's plans and specifications. Contracts typically require architects to provide statements to governing bodies such as state or local agencies about whether the contractor has complied with the contract and the project's level of completeness. The appellate court concluded that this letter was not a binding admission by the City that the work complied with the contract documents, thereby precluding the City from bringing any further claim against the contractor.

The contractor also argued that by virtue of the City's final payment, it released any claim it had that the work was not satisfactory. The appellate court relied on the contract

to conclude that final payment did not waive any owner claims arising from defective work for failure to comply with the contract documents.

The Southern District further emphasized that there was a legitimate factual dispute over whether Journagan properly performed its work. For example, the City contended that the contract documents required 95% compaction. Testing showed that streets continued to sink throughout the City and that actual compaction at four locations ranged from 87.1% to 93.3%. The City also claimed that the contractor did not properly trench, using clay and chert instead of the contractually mandated granular fill.

The contractor also argued that the City waived any further warranty claims by not objecting that Journagan's warranty work was incomplete at the time. Journagan also asserted that the owner waived an additional warranty claims by not first presenting them to the architect for consideration and recommendation.

Journagan relied on the fact that the contract stated that the architect was to be "the initial interpreter of the requirements of the contract documents and judge of the acceptability of the work thereunder." According to Journagan, this made the architect the gatekeeper of all claims, including warranty claims.

The appellate court decided that the contract did not clearly state whether warranty claims had to be presented first to the architect. It allowed for two different interpretations on this. Also, the court noted that the parties in practice did not act as if all warranty claims had to be presented first to the architect for consideration.

Thus, the trial court erred by deciding this issue as a matter of law. Instead, the dispute will be decided at trial after hearing all the evidence.

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