

Owner Recovers Almost \$5,000,000
in Liquidated Damages and Costs to Complete

by
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This article appeared in *St. Louis Construction News and Review*, p. 18-19, March-April, 2012.

The Eighth Circuit Court of Appeals (located in St. Louis) recently upheld a multi-million dollar jury verdict against a terminated contractor for liquidated damages and the denial of the contractor's claim for breach of contract. In doing so, the court reaffirmed its substantial deference to what a jury decides.

The case is *The Weitz Company LLC v. MacKenzie House, LLC*, 2012 WL 18018 (C.A. 8 (Mo)), decided January 5, 2012.

The Weitz Company had sued MacKenzie House, LLC and MH Metropolitan, LLC for breach of a construction contract involving a multi-building apartment project known as the Metropolitan Apartments in the Kansas City, Missouri area. MacKenzie House was the developer of the project and the managing member of MH Metropolitan, the owner of the apartments. MH Metropolitan had hired Weitz as the general contractor and they agreed to a maximum price for the work of \$13,498,006 with completion to occur within 458 days.

Work on the apartments was delayed. Weitz had attributed the delays to its subcontractors. MH Metropolitan blamed Weitz, asserting several material breaches of contract including failing to provide lien waivers, allowing liens to be filed against the project, providing poor quality construction and allegedly falsifying a pay application.

MH Metropolitan had withheld payment on two of Weitz's pay applications. Weitz then stopped work but at that point the first building on the project was four months late and the entire project was two months late. A couple weeks later, MH Metropolitan terminated Weitz for cause and finished the project with another contractor.

Weitz sued MacKenzie House and MH Metropolitan for the unpaid contract balances. MH Metropolitan counterclaimed for breach of contract, seeking liquidated damages and the cost to complete. MH Metropolitan alleged that Weitz's mismanagement provided just cause to stop payment and cancel the contract.

Weitz also filed third-party claims against two of its subcontractors, Arrowhead and Concorde for allegedly defective work as well as the cost to complete their work and delays. Arrowhead counterclaimed for amounts due under its subcontract, arguing Weitz terminated it improperly.

After a 12-day trial, the jury awarded MH Metropolitan liquidated damages of \$3,022,520 due to project delay and \$1,969,450.87 for the cost of completion. The jury awarded Arrowhead \$556,110 and found in favor of Concorde.

Weitz argued on appeal that the district court incorrectly excluded evidence of two other construction projects involving the same parties. One of the projects resulted in litigation and was the subject of a previous column entitled "Contractor Recovers Big Against Both Owner and Subcontractor" that appeared in the March-April, 2011 edition of *St. Louis Construction News & Review*. In that case, the Eighth Circuit affirmed judgments following jury verdicts and court orders in favor of Weitz that exceeded \$1,500,000.

In this case, the Eighth Circuit held that the trial court properly excluded evidence of prior litigation between the parties. Such evidence would only be properly admissible to prove a motive, intent, plan or knowledge that might be at issue. The Eighth Circuit noted that the claims were for breach of contract and therefore such evidence was not appropriate.

The Eighth Circuit also found that the liquidated damage clause in the contract was a reasonable forecast of delay damages that the parties had agreed to at the time they entered into the contract. Thus, it was enforceable.

The Eighth Circuit rejected an argument by Weitz that a Missouri Supreme Court decision from 1908 limited liquidated damages for construction delay to the period of time before the owner removed the contractor from the project. The Eighth Circuit decided that this 1908 case was different because in that case the project was not late when the owner terminated the contract. By contrast, in this case, Weitz's performance was late by several months at the time of termination.

The Eighth Circuit concluded that it was up to the jury to decide whether MH Metropolitan's damages were in fact cost to complete or were delay damages excluded by the language in the contract. The Eighth Circuit emphasized that its review of a jury verdict is "extremely deferential."

The Eighth Circuit also found that the jury was entitled to reject Weitz's evidence that its subcontractor Arrowhead had breached the

subcontract. Apparently, the jury concluded that Weitz was the first to breach the contract and thus Arrowhead was relieved from its obligation to further perform.

Finally, Concorde did not have counsel at trial. Weitz attempted to obtain a default judgment on the basis that Concorde was not defending itself. The trial court rejected this argument and allowed the matter to go to the jury. The jury rejected Weitz's claims against Concorde. The Eighth Circuit affirmed the jury's decision.

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