

Subcontractor Cannot Recover Where Owner Paid Title Company

by

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Having to decide between an owner and a subcontractor when the subcontractor has not been paid, the Missouri Court of Appeals for the Eastern District ruled recently in favor of the owner. The case is *County Asphalt Paving, Company, Inc. v. Mosley Construction, Inc.*, 2007 WL 4234639 (Mo.App. E.D.), decided December 4, 2007.

This decision emphasizes the importance of contractors and subcontractors filing mechanics' liens to protect their rights. It also underscores the necessity of each party in the construction chain—owner, contractor, subcontractor and escrow title company—taking proactive measures to ensure that the payment process operates correctly.

The facts and the issue in this case are typical of many construction projects. The owner was Christian Embassy Church. It decided to build a new worship facility in Black Jack, Missouri. The general contractor was Mosley Construction, who entered into a subcontract with CAPC to furnish and install asphalt pavement for the new church facility.

Church obtained a construction loan for \$1.2 million. The funds went into an escrow account with Title Insurers Agency, Inc., who was to act as the disbursing agent on the project.

The initial subcontract was for \$54,256.00 but three change orders bumped the contract total to \$70,433.00. There was no dispute that CAPC fully performed the contract and completed the work including the change orders. Construction of the facility as a whole also was completed at about the same time.

CAPC received \$51,594.30, leaving a balance owed by Mosley of \$18,838.70. Mosley approved payment of the remaining balance. The title company issued a check from the escrow account but the check was returned for insufficient funds.

As it turned out, the title company's principals were indicted for federal mail and wire fraud for allegedly misappropriating money from escrow

accounts, including Church's account. Thus, neither Mosley nor CAPC received any of the \$18,838.70.

Other subcontractors also did not receive payment. They filed mechanics' liens to protect their rights and leverage their chances to secure payment. CAPC did not file a timely mechanics' lien and thus it could not proceed on this basis in a lawsuit against Church. Had it done so, its legal troubles may not have occurred regarding its efforts to collect from Church.

Nevertheless, CAPC could still pursue, as it did, a lawsuit against its general contractor Mosley for breach of contract. CAPC's lawsuit against Church, however, was limited to a claim of unjust enrichment, also known in Missouri and other states as quantum meruit. The appellate decision focused on this ill-fated claim against Church.

CAPC sued Church on the basis that CAPC had provided \$18,838.70 in value that it had not received in payment; thus, Church had been unjustly enriched by this amount. The problem was that Church had paid the money to the title company.

There is considerable case law to support that an owner is not subject to payment a second time on a claim for unjust enrichment when it has paid in full its general contractor for all the work, including the subcontractor work. This applies even when the general contractor fails to pay its subcontractor.

In this case, however, Church had not paid Mosley. It had paid its escrow agent who decided not to pay anyone. Thus, neither the general contractor nor the subcontractor had received any of this money.

The appellate court had to decide how to balance the interests between an innocent owner who had paid once and an innocent subcontractor who had not been paid. The court emphasized that since the owner had paid someone—in this case the escrow agent—it should not be required to pay again.

The court decided that while the subcontractor had legitimate yet uncollectible claims against the title company and against Mosley, CAPC did not have a legally viable claim against Church. In reaching this result, the court focused on what the owner had paid rather than on what the general contractor or subcontractor had received.

By doing this, the court reaffirmed the need for each party in the construction link to consider what it must do to protect itself. The owner, who prevailed in this case, only did so because the subcontractor

did not file a mechanics' lien. The owner needs lien waivers and control over the payment process.

The general contractor needs similar control over owner payments when they are made through an escrow agent.

Most importantly, the subcontractor needs to file a mechanics' lien if at all possible. Under Missouri law, a properly filed mechanics' lien allows the subcontractor to sue to enforce this lien and would require the owner to pay the subcontractor even if the owner had already paid once for this work. This is an exception to the general principle that no one should have to pay twice for labor and materials.

Without these protections all parties may be at risk and as in this case, the owner is likely to prevail.

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