

Fraudulent Lien Waivers Cost Owners of Contracting Company

by

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After a bench trial in Jackson County, Missouri, the circuit court awarded a defrauded owner \$124,299.23 to reimburse for all payments to its contractor plus \$13,051.42 in prejudgment interest, \$150,000.00 in punitive damages and court costs.

The Western District Court of Appeals recently affirmed the court judgment. The Missouri Supreme Court declined further review, making the judgment final.

The case is *John Knox Village v. Fortis Construction Co.*, 449 S.W.3d 68 (Mo. App. W.D. 2014).

John Knox Village (“JKV”), as the owner, entered into a contract with Fortis Construction Company as the general contractor for a project known as the PACU Project. Fortis represented and warranted that with each application for payment, all work to that point would be free and clear of all liens and claims and all subcontractors would be paid.

JKV also contracted with Triad Construction Company, Inc., as a general contractor, on a project known as the Hospice Project. Triad made the same representations as Fortis regarding payments and liens.

Fortis was a limited liability company owned and controlled by Armando Diaz, Tom Nadler, Don Nadler and Gary Rodenberg. The two Nadlers and Rodenberg also were owners of Triad. Triad and Fortis frequently subcontracted work to each other. Both companies had offices in the same building.

JKV entered into a joint check agreement with Triad and Fortis on both projects. Fortis was the subcontractor to Triad on the Hospice Project.

The appeal involved the Hospice Project. JKV paid Triad and Fortis pursuant to the joint check agreement a total of \$124,299.23 for the Hospice Project. JKV received lien waivers per applications for payment and a final waiver of lien. Triad had certified that all subcontractors had been paid or would be paid.

JKV's architect discovered after final payment that none of the subcontractors on the Hospice Project had been paid and that \$127,121.14 was owed to them.

Several of the subcontractors provided notice of their intent to file liens on the Hospice Project property. JKV negotiated payments in lieu of the filing of mechanic's liens at 70% of what was owed for some, 90% for one and 100% for another. In total, JKV paid an additional \$70,373.78 directly to the subcontractors.

Triad filed a petition for Chapter 7 bankruptcy in federal court. JKV then filed a lawsuit against the individuals who owned Triad.

The issue on appeal was JKV's claim against the individuals (not Triad) for fraudulent representation, fraudulent conveyance, and civil conspiracy, all of which the trial court found in favor of JKV.

The appellate court agreed that there was sufficient evidence that Triad falsely represented that it would timely pay any subcontractors for work performed on the Hospice Project after receiving JKV's payments. The court also found that the individual defendants had entered into a civil conspiracy to unlawfully benefit themselves by "absconding with the money JKV paid."

The individual defendants argued that the bankruptcy court had exclusive jurisdiction and thus the circuit court could not enter judgment against them. The appellate court determined that the bankruptcy trustee was aware of the JKV lawsuit and never asserted that this claim belonged in the bankruptcy proceeding.

The appellate court found there was sufficient evidence to pierce the corporate veil from Triad to its owners so that the owners were personally liable. The court affirmed that when a corporation is used for an improper purpose to perpetuate an injustice, the usual protections of the corporate veil no longer exist and the individuals behind the corporation can be personally liable.

In essence, piercing the corporate veil requires a finding that the owners of the corporation had sufficient control over the finances and the policies of the company, used such control to commit fraud or other wrongful actions and that such control was the proximate cause of the damage claimed, in this case by JKV.

The Western District also affirmed as damages the money JKV paid to the contractor even though this exceeded the money JKV ultimately paid to the subcontractors and defendants had completed the construction project. The court decided that JKV received nothing of value in return for its payment because in reality the owner was subject to mechanic's liens in excess of what it had paid.

The appellate court also determined there was clear and convincing evidence of outrageous conduct by the defendants to infer an evil motive and justify punitive damages.

The appellate court noted that it was the knowingly false representations by defendants that elevated this case and allowed the piercing of the corporate veil. This is a distinction from what the court described as a “garden-variety breach of contract action involving the non-payment of subcontractors.”

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