



Weekly Wright Report (11/13/17)

CONSTRUCTION LAW

What, You've Spent the Money????!!!

When Does Personal Liability Kick in Under Maryland's Construction Trust Statute?

Contractors and subcontractors often work on thin margins, to say the least. As many experienced in the construction industry know, less solvent companies often “rob Peter to pay Paul” to keep afloat various construction projects simultaneously. For certain construction projects, the Maryland Construction Trust statute (Real Property section 9-201, *et seq.*) affords subcontractors with a useful tool to hold the general contractor's owners or officers personally liable for non-payment when that general contractor has received payment for the sub's work, but has refused to pay that sub. The Court of Special Appeals recently examined the types of construction projects applicable to the Construction Trust statute in the case of *C&B Construction, Inc. v. Dashiell*, 2017 WL 4990671, -- A.3d --- (Nov. 1, 2017).

C&B Construction contracted with Temco Builders, Inc. to provide Temco with drywall, ductwork, and related services for various Maryland construction projects. Temco received payment for C&B's work, but failed to pay C&B, and C&B sued Temco and its officers for breach of contract under the Construction Trust statute. The trial court entered judgment against Temco, but not its officers, holding that the Construction Trust statute only applied to public construction projects that are subject to Maryland's Little Miller Act, new commercial construction, or commercial renovations that improve the property by at least 15% (and, thus, are subject to Maryland mechanic's lien law). The Court of Special Appeals agreed, finding that the projects at issue were neither subject to the Little Miller Act nor lienable and, therefore, the Construction Trust statute was inapplicable.

Thus, to impose personal liability on a general contractor's owners, managers, or officers, the project must either be public construction (and subject to the Little Miller Act), new commercial construction, or commercial construction renovations that improve the project by at least 15% of its value (and thus subject to a mechanic's lien). If not, an unpaid subcontractor's most likely collection option is from the pockets of the general contractor. Hopefully, that general contractor has enough in those pockets to pay both Peter and Paul. Ask Jason jpotter@wcsllaw.com.

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EMPLOYMENT LAW

Does A Supervisor's Comment About a "New Face" Constitute Age Bias?

The U.S. Court of Appeals for the Eighth Circuit answered in the negative in a case where the plaintiff accused his employer of violating the Age Discrimination in Employment Act (ADEA) following his supervisor's comment and his subsequent termination. James Aulick alleged that in 2012, his new supervisor issued a memo expressing disappointment with his division's performance, suggesting the company should explore other managerial options. When an outside individual was hired for the role, the supervisor stated it was based in part on a desire for a "new face." After Aulick was terminated in 2013—at the age of 63—he sued, pointing to the comment as evidence of age bias. But the federal appellate panel disagreed, affirming a district court's grant of summary judgment and writing, "The comment about a 'new face' was facially and contextually neutral when made to Aulick...[n]o reasonable fact finder could hold otherwise."

Skybridge Americas hired Aulick in 2011 at age 61, when it purchased the company where Aulick worked as an IT professional. In 2012, the Skybridge CEO prepared a memo, which addressed, among other things, Aulick's shortcomings as a leader and suggested that departments be combined and "other alternatives for management of IT" be explored. Departments were combined and Aulick interviewed for the newly created Chief Technology Officer (CTO) position, which had been created following an independent audit of the company's needs. When an external candidate was selected, the CEO suggested that the company needed a "new face," leading Aulick to believe that the comment was related to his age, particularly after he and two other employees, all of whom were over the age of 60, were terminated shortly after his non-selection as CTO. Aulick sued, alleging that Skybridge violated the ADEA by failing to hire him as CTO and subsequently terminating him.

The appellate court held that Skybridge was consistent with the reason given for Aulick's termination. Its reasons for hiring the external candidate were based on his broader management experience. Once the CTO position (created as a result of "an independent audit and not animus") was filled, Aulick's job was superfluous, the court added. "The record also shows that [the company] had hired three new executives over the age of 57 in the two years prior to Aulick's termination, further undercutting any claim of age discrimination." Concluding that Aulick failed to prove the elements of his case, the panel affirmed summary judgment in favor of Skybridge on his age discrimination claims.

This case demonstrates that when staffing changes are based on sound business decisions, they stand up to challenges of discrimination. Oftentimes, companies talk about wanting to "head in a new direction" or wanting "new blood" or seeking a "new face." These comments stem from desires to be more efficient, more streamlined, or more profitable and are legitimate, non-discriminatory reasons for hiring new employees or firing existing ones. When discussing changes to your business, choose your words carefully. Ask Laura LRubenstein@wcslaw.com

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