

Potential Personal Liability for Unsigned Change Orders

Mark F. Himsworth, Esq.

The case of *Scungio Borst & Associates v. Shurs Lane Developers, LLC* presents a lesson for why you can't play fast and loose with change orders. While this case presents some extenuating facts, the mere threat of personal exposure is enough for you to stand up and take notice.

The plaintiff contractor alleged that it entered into a construction contract with the owner, a limited liability company (LLC). The plaintiff alleged that the owner had in fact been paid by the construction lender. After the plaintiff stopped receiving payment from the LLC, the plaintiff alleged that he was personally assured by a member of the LLC that payment would be forthcoming. Based upon the assurances, the contractor alleges he continued to work, incurring in excess of \$1 Million in charges for labor and material, interest and costs correlating with "change orders" or "cost events" that were authorized by the member of the LLC. The plaintiff alleged that the member of the LLC would routinely verbally authorize change orders, but would not sign them.

The plaintiff argued that the member of the LLC was an "agent of the owner," thus liable to it for sums due, citing § 502 of the Contractor and Subcontractor Payment Act, which defines "owner" as "a person who has an interest in the real property that is improved and who ordered the improvement to be made." The term includes successors in interest of the owner and "agents of the owner acting with their authority." 73 Pa. C.S. § 502 (emphasis added). The plaintiff also cited the Contractor and Subcontractor Payment Act, which defines "construction contract" as "an agreement, whether written or oral." Thus, the plaintiff claimed that the verbal authorizations for change orders were encompassed in the agreement for which the member of the LLC was individually liable. Nonetheless, the trial court entered summary judgment for the member of the LLC and against the plaintiff.

On appeal, however, the Court reversed. Significantly, the Court found there were factual issues with respect to who said what to whom at the building site, and since they were obviously contradictory, the Court found that there were issues of fact which precluded summary judgment and reversed the summary judgment. Consequently, in this particular case, personal exposure of the member of the LLC continues to loom.

No matter how difficult, even in the trenches, insist on written, signed, duly authorized change orders.

For more information, please contact Mark Himsworth at 215-661-0400 or MHimsworth@HRMML.com.