

MID ATLANTIC REAL ESTATE JOURNAL

NEW JERSEY-PENNSYLVANIA-DELAWARE-MARYLAND-VIRGINIA

Friday, July 23, 2010

Volume 20, Issue 14

MARYLAND SPOTLIGHT

By Jason C. Tomasulo, Cohen Seglias

Maryland court clarifies subcontractor licensing requirement

In Maryland, contractors who perform a home improvement are required to be licensed with the Maryland Home Improvement Commission. The failure to do so may result in civil and criminal fines and penalties. However, the more significant penalty may be the inability to enforce contracts, which means the contractor cannot require payment for the services performed.

A recent case before the intermediate appellate court in Maryland raised a question regarding what happens when a subcontractor was not licensed when it contracted with a general contractor to perform certain home improvements, or when it performed the work, but obtained a license before it filed a lawsuit against the general contractor for payments due and owing.

In a decision that may surprise some, the Court of Special Appeals in *Alcoa Concrete & Masonry, Inc. v. Stalker Bros., Inc.*, Case No. 2816 (CSA March 31, 2010), determined that the subcontractor is able to enforce its contract for payments due. The policy behind such licensing requirements in Maryland is to protect the public from unscrupulous contractors. However, the court, after reviewing the applicable statute and case law, determined that: (a) the law did not include a policy to protect general



Jason Tomasulo

contractors from unlicensed subcontractors; and (b) the policy of protecting the public is not implicated in the arms-length transaction between a general contractor and a subcontractor.

The court pointed out that the Maryland Home Improvement Act allows exceptions for payment to unlicensed contractors where the contractor loses its license through expiration, suspension or revocation. The court interpreted a section of the Act to mean that the prohibition against paying an unlicensed contractor is limited to the time when payment under the subcontract is to be made. Although one might question whether the language was intended to require licensing at the time of contracting or during performance (and not when the work is complete and the subcontractor is seeking payment), the court rejected those arguments because such

language was not stated in the statute. The court also concluded that it would not be a reasonable construction of the statute to allow the general contractor to withhold payment once the subcontractor was licensed when the general contractor had made payments when the subcontractor was unlicensed.

The court also noted that the Act makes general contractors part of the enforcement process. Accordingly, the requirement for general contractors to withhold payment until a subcontractor is licensed "ferrets out" unlicensed subcontractors and causes other unlicensed subcontractors to be licensed.

As a result of the *Alcoa* decision, a subcontractor should be able to enforce its subcontract for a home improvement if it gets licensed before filing suit. However, as with any court decision, one must recognize that a case with even slightly different facts may be decided differently. In this case, there were no allegations of defective work or project delays by the subcontractor, and the general contractor had induced the subcontractor to continue working based on promises of future payment. These facts may have played a role in the court's decision.

Jason C. Tomasulo, senior counsel at Cohen Seglias, focuses his practice on construction law and government contracts. ■