

NEWSLETTERS

Michigan Court Of Appeals – Update On When 'Pay If Paid' Clauses Are Applicable

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A recent decision from the Michigan Court of Appeals should have general contractors examining the scope and limits of “pay if paid” clauses in their subcontracts. In *Macomb Mechanical, Inc. v. LaSalle Group, Inc.* and *Travelers Casualty and Surety Company of America*, an unpublished opinion per curiam of the Michigan Court of Appeals, entered April 23, 2015 (Docket No. 319357), the Michigan Court of Appeals reversed in part the trial court’s decision, holding that there may be limits to the applicability of “pay if paid” clauses when it involves extracontractual work.

In *Macomb Mechanical, Inc.*, the general contractor engaged a subcontractor to provide plumbing and mechanical work for the construction of a dining facility. This work was originally scheduled to take six months, but unforeseen circumstances extended the work to 15 months. The subcontractor claimed that a change in project scope caused this delay, but the contractor refused to sign change orders necessary to secure the subcontractor payment, claiming that the orders were in the RFP. That, along with the fact that the contractor had yet to be paid by the project owner, caused the plaintiff to file suit for contracted payments, extracontractual payments, and delay damages.

After defendant general contractor obtained summary judgment against the subcontractor, along with attorney fees, the plaintiff appealed. In reversing in part on whether the contract’s “pay if paid” clause applied, the Michigan Court of Appeals reasoned that it was a genuine issue of material fact if defendant had changed project drawings after plaintiff bid on the project, thereby requiring plaintiff to provide extracontractual work, and thus incurring additional expenses.

The court distinguished its facts from those in *Berkel & Co. Contractors v. Christman Co.*, 2010 Mich App 416; 533 NW2d 838 (1995), where the court held that there was no ambiguity in a “pay if paid” clause, regardless of whether the delay was excessive. The *Macomb Mechanical, Inc.* court agreed with *Berkel* in cases where there is no contradicting evidence that the defendant has not yet received payment, and the contracting party has not rendered impossible completion of the required work. However, in this case, because there is a genuine issue of material fact on whether the additional work was provided pursuant to the RFP or was extracontractual, the court remanded for further proceedings on whether the “pay if paid” clause applied. Likewise, the court held that delay damages were not precluded until the contractor was paid, despite a “no damages for delay” clause, if the delays involved work outside the scope of the contract.

As evidenced above, “pay if paid” clauses are impacted by numerous

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variables, and it is important for a general contractor to understand the scope of its coverage. In *Macomb Mechanical, Inc.*, the court only allowed “pay if paid” provisions to apply when the work was within the scope of the contract, and the contractor did not interfere or cause unreasonable delay. Otherwise, that work may be outside the scope of the contract and thus outside the scope of the “pay if paid” clause.

Accordingly, if you are a general contractor or subcontractor engaged in commercial or residential construction, it is important that you review your “pay if paid” policy and understand the scope of its coverage in order to avoid the unpleasant surprise experienced by the general contractor in *Macomb Mechanical, Inc.*

For more information about this topic and the issues raised in this article, please contact Scott R. Murphy in our Grand Rapids office at smurphy@btlaw.com or (616) 742-3930.

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