



Legal Corner

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"Promises, Promises"

In a previous article, I addressed the issue of whether an owner or general contractor could become liable for the payment of debts owed to a sub-subcontractor or a material supplier who may have missed the "bond rights" but, nonetheless, still wanted to be paid. Circumstances arose on some projects where sub-subcontractors or suppliers were assured by the general contractor, or in some cases the owner, that they would get paid if they continued working on the project. In essence, they were given verbal assurances that they would be paid if they continued to work.

In Massachusetts, as is true in most jurisdictions, there is a statute which is referred to as the "Statute of Frauds" which attempts to regulate "verbal promises" relating to many different aspects. One of the things which is governed by the statute relates to the verbal promise to "pay the debt of another". The statute of fraud, in essence, provides that any verbal agreement to pay the debt of another is not enforceable, and that any such agreement must be in writing or it is unenforceable.

A recent case decided in September of 2007 by the Massachusetts Appeals Court revisited this issue. In this case, an unpaid subcontractor sought to collect from the owner on the basis that s/he had requested that the work be completed by assuring payment of the overdue balances. Apparently, the general contractor had developed cash flow problems and was unable to complete a theatre complex for the owner.

The subcontractor was owed a substantial sum of money for this project, as well as monies owed for other

projects. The subcontractor refused to do any further work until payment was received. Apparently, the owner made partial payment by a joint check, and the subcontractor proceeded to complete work on the project which enabled the owner to open up substantially earlier than scheduled.

The subcontractor then made demands on the owner to make further payments towards outstanding balances owed for the work performed on the project. The owner took the position that, because there was never a written agreement to make these payments, the subcontractor would have to chase after the delinquent general contractor.

The court held that the owner was obligated to pay, notwithstanding the lack of any written agreement using what is referred to as the "leading purpose exception". In essence, the "leading purpose exception" means that the primary or major reason that the subcontractor continued on the project was to provide a benefit to the owner or general contractor, i.e. getting the job completed and expedited. The owner/

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general contractor really was the beneficiary of the performance by the subcontractor and, therefore, received the principal benefits and thus obligated the owner to make the payment despite the lack of any written "promise".

The court found that the verbal promise to pay was supported by "consideration" in that the owner had a direct economic interest in the timely completion of the project. The promise by the subcontractor to perform and continue with the work was sufficient consideration to support and requires the owner to pay the amounts incurred by the subcontractor to complete the work which, as previously noted, was for the benefit of the owner.

In order for the general contractor to be protected against any such liability on a project, there should be a written agreement defining what is expected of the sub-subcontractor or supplier. Will the general contractor agree to make payments of past due balances, or only amounts which are incurred on a going forward basis (this, of course, presumes that they are beyond the notice provision for a timely bond claim)?

If they are beyond the bond notice provision, then the general contractor has to determine whether it is worth allowing the sub-subcontractor to continue work on the project inasmuch as that would revive their claim for payment against the surety for all of their balances. A contractor should not let a sub-subcontractor return to the job if they are beyond the 65 day window unless, of course, a timely notice is provided so that work can continue against the payment bond. ■



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