

STATEMENT BY STUART S. ZISHOLTZ

During the course of construction, a contractor or subcontractor may be asked to perform additional work outside the scope of the original contract. These change orders are usually the cause of future litigation between the owner and the contractor or the contractor and subcontractor.

In a recent case, a contractor entered into a contract with an owner to construct a 34-story residential building. At the end of the Project, the contractor claimed that there was additional work performed totaling approximately \$3,500,000. The contractor filed a Mechanic's Lien and pursued a claim to foreclose the lien and recover the outstanding balance due.

The owner sought to dismiss the claim on the grounds that there was a provision in the contract which required a Notice of Claim to be filed prior to any litigation.

The Appellate Court refused to dismiss the claim finding that the owner failed to establish that the contractor waived its claim. The Court found that the Notice of Claim clause is not a condition precedent to litigation. The Court held that substantial compliance with the contract will suffice. The Court continued by stating that substantial compliance may be found where there is proof that the contractor provided the owner with actual notice of the claim. Notice to the owner can include submission of the proposed change orders as well as other relevant documentation.

Once again, it is essential for you to understand the contract provisions prior to its execution. In this case, the contractor was fortunate to have the court find in its favor. The Notice of Claim requirement could very easily have been found to be a condition precedent which would have resulted in a dismissal.

NEVER LET YOUR LIEN TIME RUN OUT!!!

For a free copy of a pamphlet pertaining to Mechanic's Liens and payment bond claims,
kindly contact me or the Association.