

## STATEMENT FROM STUART S. ZISHOLTZ

One of the questions repeatedly asked by prospective clients is whether they are entitled to recover legal fees in connection with their litigation. My response is routinely no except in limited circumstances.

Legal fees are recoverable in litigation if there is a particular statute which is being relied upon in the litigation or if the parties contractually agreed to the recovery of legal fees. In the first instance, there are limited statutes which address the recovery of legal fees. Specifically, General Obligation Law § 5-322.3 requires the filing of a payment bond in a private project where the work exceeds \$100,000. The statute continues by stating that any owner who fails to file such payment bond shall be liable for the reasonable attorney's fees, as determined by the Court, if the Claimant is successful in bringing an action or proceeding on the bond.

Another example is New York State Finance Law § 137(3)(b) which allows for the payment of reasonable attorney's fees in a public project where the defense interposed was without substantial basis in law or fact. The recovery of legal fees is discretionary under the statute due to the fact that there must be a finding that the defense interposed was without substantial basis in law or fact.

Aside from the two statutes, most claims seeking recovery of legal fees are based solely on the contract between the parties. Legal fees are recoverable if the agreement permits the recovery of legal fees. There must be language in the agreement that states that if contractor is required to engage an attorney to collect the outstanding balance, that the contractor will be entitled to recover reasonable attorney fees. Without this terminology, or without relying upon the two statutes pertaining to payment bond claims, you will not be able to recover legal fees. It is essential that you incorporate the appropriate language in your contract prior to executing it.

While attempts can be made to recover the full amount due, including accrued interest, in order to offset the costs of the legal fees, it is not a guarantee and should not be relied upon. My suggestion is that you incorporate language in your contract to allow for the recovery of legal fees in the event a claim is necessary.

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.