

STATEMENT FROM STUART S. ZISHOLTZ

There is a lot of confusion and misunderstandings when it comes to recouping legal fees in litigation. Clients regularly ask whether they can recover the legal fees associated with their litigation. The response I give them is almost always no.

Legal fees are recoverable in litigation if there is a particular statute which is being relied upon in the litigation or if the party has 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 and there must be a finding that the defense interposed was without substantial basis in law or fact. Obviously, in order for a Court to determine whether the defense is without substantial basis in law or fact, the litigation must proceed. If the case proceeds to trial, the Court will most likely not award legal fees since issues of fact existed that required a trial.

Aside from a few statutes, most claims seeking recovery of legal fees are based solely on the contract between the parties. Legal fees are recoverable if the agreement between the parties permits the recovery of legal fees. There must be clear and concise language in the agreement that states that if the Contractor is required to engage an attorney to collect any outstanding balance due, then the Contractor is entitled to recover reasonable attorney's fees. Without this terminology, or without relying upon a statute, you will not be able to recover legal fees. All

costs associated with the legal fees will be your burden. It is essential, therefore, that if you want to recover your legal fees, you must incorporate the proper language in your contract at the time that you sign the agreement.

While attempts can be made to recover the full amount, 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 our pamphlet pertaining to mechanic's liens and payment bond claims, kindly contact me.

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