

STATEMENT BY STUART S. ZISHOLTZ

On a weekly basis, I encounter a situation where a subcontractor wants to pursue a claim against the general contractor and the owner for an outstanding balance due. The rationale raised by the subcontractor is that the general contractor owes the money and is required to pay while the owner receives the benefits of the work performed and materials furnished. Unfortunately, the law is not always on the side of the subcontractor.

Only a party that has “privity of contract” can sue for breach of contract. This requirement means that the subcontractor can only sue the general contractor for breach of contract. The owner, who is a third-party to the agreement between the subcontractor and general contractor, is not responsible to the subcontractor for breach of contract. Moreover, the owner is not responsible to the subcontractor as a third-party beneficiary of the work performed and materials furnished.

Many times construction contracts between contractors and owners have a provision reinforcing the claim that the owner is not a third-party beneficiary of any relationship between the contractor and the subcontractor. This provision protects the owner from lawsuits by the subcontractors and vendors.

Other arguments against the Owner consists of a quasi-contractual relationship. This means that the owner was unjustly enriched due to the subcontractor’s work performed and materials furnished. This argument is not available to the subcontractor because of the existence of a contract between the subcontractor and the general contractor.

There are limited instances where the subcontractor can sue the owner. The first instance is by filing and properly recording a Mechanic’s Lien. This unique area of the law allows a subcontractor to pursue a claim against the general contractor and the owner in order to sell the

real property or leasehold and receive payment.

In other instances, the owner may agree to a Joint Check Agreement or a direct payment, and this option allows for the owner to remit payment directly to the subcontractor or as a joint check with credit being applied to the account of the general contractor.

It is important to understand that without the proper Mechanic's Lien or separate agreement with the owner for a direct payment or a joint check, the owner is not liable to the subcontractor for payment. The key to compelling the owner to remit payment to the subcontractor is to timely file the Mechanic's Lien or execute a Joint Check Agreement. Otherwise, your only option is to seek payment from the general contractor.

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.

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