

STATEMENT BY STUART S. ZISHOLTZ

Almost every project has an architect preparing the plans and reviewing the work. Sometimes the architect maintains a limited role in a project and is hired to only to draw up the plans. Other times, the architect takes a more aggressive approach on a project and is involved in the day-to-day aspects of the project, determines certain disputes, approves change orders, etc.

Recently, in a decision decided by the Appellate Division, Second Department, a contractor sought to recover from an owner \$100,000 for work performed and materials furnished.

Within the contract between the contractor and the owner, there contained a clause requiring the contractor to obtain written acceptance of its work from the architect prior to final payment. This acknowledgment, according to the owner, was a condition precedent to receiving final payment.

According to the contractor, all of the work was completed and the tenant had moved into the premises. Neither the owner, nor the tenant, requested the architect's certification, nor was there any indication that any of the work was inferior. In addition, according to the contractor, the architect played practically no role in supervising any of the work and was simply operating as a conduit to the owner.

Both parties moved for summary judgment. The lower Court granted the owner summary judgment finding that the failure by the contractor to obtain written acceptance from the architect was a requirement that was not waived and, as such, it could not collect the outstanding balance due and owing.

The Appellate Division, Second Department, reversed and found that there were issues of fact that needed to be determined at trial as to whether the owner waived the right to insist that the contractor obtain written acceptance from the architect prior to final payment under the contract.

I am once again emphasizing the importance of reviewing your contracts and understanding the terminology and requirements that are contained within it. If the contract requires that you receive architectural certification before final payment, you must do so or the possibility exists that you will not receive your final payment. You can argue that the clause was waived by the owner, etc., but you may be stuck in a battle with the owner. On the other hand, you can review your contract, modify the clauses that do not pertain to you or are waived, and proceed accordingly. I would not recommend that you simply sign the contract because you think its “a good job” without reviewing or understanding the terms of the contract.

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