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Construction and Real Estate Law Update

Recently, North Carolina state and federal courts have decided several cases related to construction and real estate development. Three cases that are of particular interest to these industries are summarized below. Also included is a summary of recent legislation impacting the industry.

Lenders: Beware of Liens on Funds

In *Pete Wall Plumbing Co., Inc. v. Sandra Anderson Builders, Inc.*, 2011 N.C. App. LEXIS 456 (March 15, 2011), the plaintiff-supplier filed lien claims on six lots in which the contractor had a limited-time leasehold interest. The court held that a construction lender with a primary deed of trust could be held liable to the supplier-lien claimant if it disbursed loan proceeds to the contractor or borrower after it received the supplier's notice of claim of lien. The decision arguably treats construction lenders as "owners" for purposes of liens upon funds in North Carolina, and the Court of Appeals has opened the door to increased exposure for lenders who "pay over" a lien upon funds. We expect to see lenders being joined as defendants in more subcontractor and supplier lien actions as a result of this case. This decision will impact how subcontractor and supplier liens are prepared and how lenders respond to them.

Personal Liability for Construction Company Owners?

In *White v. Collins Building, Inc.*, 2011 N.C. App. LEXIS 155, 704 S.E.2d 307 (January 4, 2011), the North Carolina Court of Appeals held that an officer of a small, closely-held general contracting company was personally liable to the plaintiff-homeowners for the company's defective work based on his alleged failure to properly supervise the day-to-day construction of their house. The allegations included his failure to properly supervise the installation of the doors and windows, and the design and installation of the plumbing system. Despite the company officer's argument that he was insulated from liability because he was acting as an employee of the company, the Court of Appeals concluded that he was responsible for his own negligent acts, and the homeowners were not required to "pierce the corporate veil" to obtain a judgment against him personally, in addition to their judgment against the company.



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This case has not been appealed further and appears to be a significant expansion of potential liability for construction company officers.

Attorneys' Fees May Now Be Recoverable Under Construction Contracts

Historically, attorneys' fees have not been recoverable in construction disputes in North Carolina even if the agreement between the parties provides for such. However, a recent North Carolina federal court case and a newly-enacted statute (discussed below in the "Legislative Update") appear to change that. In *United States ex rel. SCCB, Inc.*, 751 F. Supp. 2d 813 (M.D.N.C. Nov. 9, 2010), the federal court for the Middle District of North Carolina held that an attorneys' fee provision in a construction contract was enforceable. SCCB, a second-tier subcontractor, filed suit against the first-tier subcontractor for breach of contract and against the general contractor and its surety on a payment bond claim under the Miller Act. After SCCB was awarded damages for breach of contract and prevailed on its payment bond claim, SCCB filed a motion for attorneys' fees. The court acknowledged the general rule in North Carolina that attorneys' fees are not recoverable even if a contract states that they are, unless there is a statute that applies that specifically provides for their recovery. The court analyzed General Statute section 6-21.2, which provides that obligations to pay attorneys' fees in a promissory note, conditional sale contract or "other evidence of indebtedness" are valid and enforceable. The court considered whether the construction subcontract at issue was an "evidence of indebtedness," and concluded that it was. There have not yet been any North Carolina state court decisions citing this case, but the possibility that a fees provision may be enforceable, either in light of newly-enacted Senate Bill 414 or North Carolina statute section 6-21.2, should be carefully considered when drafting or reviewing construction contracts and in assessing potential recoveries in disputes.

Legislative Update

In the current legislative session, the North Carolina General Assembly has considered several bills affecting the construction and real estate development industries.

- **House Bill 36: Employers and Local Government Must Use E-Verify**

This bill requires employers of more than twenty-five employees to use the federal E-Verify program to verify their employees' work authorization. It was ratified and was signed by the governor. It becomes effective October 1, 2011 as it applies to counties and municipalities. It becomes effective October 1, 2012 for employers of 500 or more employees; January 1, 2013 for employers of 100-500 employees; and July 1, 2013 for employers of 25-100 employees.

- **House Bill 174: Commercial Real Estate Broker Lien Act**

This bill provides brokers a right to file a lien on commercial real estate. It was ratified and has been signed into law by the governor. The law becomes effective October 1, 2011. This new law may have the affect of requiring that lien waivers be obtained from all brokers at real estate closings.

- **Senate Bill 414: An Act to Allow Attorneys' Fees in Business Contracts**

This bill makes reciprocal attorneys' fees provisions in certain business contracts (including commercial construction contracts) valid and enforceable. It was ratified and has been signed by the governor. It applies to business contracts entered into on or after October 1, 2011.

- **Senate Bill 243: Public-Private Partnerships for Schools**

This bill extends the "sunset" on the law allowing private, capital lease financing for public schools. It was ratified and has been signed by the governor.

- **House Bill 489: Lien and Bond Law Revisions**

This bill proposes significant changes to North Carolina's lien and bond law statutes. Among other things, it would require a Notice of Commencement to be filed for all projects. This bill was not passed by the House. It has been referred to committee for further study and will not be acted upon in this session.

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