BURR ALERT

The Architect's Role in the Construction Project

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Recently, the Alabama courts have issued two significant decisions regarding the architect's role in the construction project, which will have an impact on owners, contractors, and subcontractors. It is important that you understand these decisions as they could affect the success of your construction claim. This article provides a short summary of these decisions.

A. Submission of Claim to the Architect is a Condition Precedent to Filing Suit.

In lawsuits involving construction projects where the AIA contract documents were used, the Contractor or Owner's failure to submit its claim to the Architect before filing suit could be fatal to its case. In the recent Alabama case of Bella Investments, Inc. v. Multi Family Services, 97 So. 2d 787 (Ala. Civ. App. 2012), the Owner brought an action against the General Contractor on a hotel construction project, which included a breach-of-contract claim among other claims. The specific defects included cracked tile that was noticed during the punch list stage, as well as later issues involving floors and walls buckling which caused doors to bind; improper installation of the fiber cement siding; and improper grading of the project site.

Because the Owner failed to submit its dispute to the Architect for determination prior to filing suit, the Court held that the Owner's breach-of-contract claim was due to be denied on appeal. The Court explained that:

> [Owner] and [General Contractor] entered into an contract for construction on June 3, 2005. The contract between [them] was a standard AIA A101–1997 form contract which adopted the AIA Document A201–1997, General Conditions of the Contract for Construction. The General Conditions specifically state that submission of a Claim to the architect is a condition precedent to litigation. The General Conditions define a 'claim' as a 'dispute ... between the Owner and Contractor arising out of or relating to the Contract.' Section 4.3.1 continues, 'claims must be initiated by written notice.'
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> Section 4.4 of the General Conditions states:
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> > "Claims ... shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due...."

Accordingly, the Court held that since the Owner failed to present any evidence indicating that it had either filed a claim with the Architect or that the provisions of the General Conditions were inapplicable to the AIA form construction contract entered into between the parties, its appeal was due to be denied on the breach-of-contract contract claim.

B. Absent a Showing of Bad Faith, the Architect's Decision on Conformity to Contract Requirements is Final.

In Finish Line v. J.F. Pate & Associates Contractors, Inc., 90 So. 3d 749 (Ala. Civ. App. 2012), the Court affirmed the Baldwin County Circuit Court's grant of summary judgment in favor of a General Contractor that was in a dispute with the Tile Vendor. Two separate sets of tile material had been supplied by the Tile Vendor, one of which was acceptable and one of which was rejected by the project Architect. The rejected material had to be removed and replaced by the General Contractor.

The Court considered the effect of the Architect's determination that the one lot of tile must be rejected. The Court reasoned:

> [Subcontractor]'s subcontract with [the General Contractor] specified that "the work to be done by [Subcontractor] ... includ[ed] all labor, materials, equipment ... and other items required" to complete the subcontract. Pursuant to paragraph 9 of the subcontract, [Subcontractor] warranted "to the Owner, Architect and Contractor that materials and equipment furnished under this Subcontract" would be "of good quality." [Subcontractor] agreed that its receipt of payment was dependent upon "certificates of payment issued by the architect." Paragraph 8 of the subcontract provided:
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> > "Authority of Architect. The Architect will have the authority to reject work which does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Prime Contract."

The Court explained that Alabama case law has upheld the right of contracting parties to agree that the decision of an expert such as an architect or engineer is final. Over a century ago in 1900, the Alabama Supreme Court in Abercrombie & Williams v. Vandiver, 28 So. 491 (Ala. 1900), recognized the rule that:

> "the parties to a contract may stipulate that the estimate of the work done and the compensation due under it, to be made by a third party, shall be final and conclusive, and such stipulation is binding in the absence of fraud or bad faith."
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> In Shriner v. Craft, 51 So. 884 (Ala. 1910), the Alabama Supreme Court held that:
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> "Where a building contract specially provides that the certificate of the architect shall be final and conclusive, it is conclusive and binding in its legal operation and effect on the parties to the contract, and can be impeached only for fraud, or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment."

In Alabama Chemical v. International Agric. Corp., 110 So. 614 (Ala. 1926), the Court explained the reason for the fraud-or-bad-faith exception to the rule that an expert's decision designated as "final" in the contract is binding upon the parties:

> "Mere mistake or error in the decision of the umpire does not avoid it; if so, the purpose of the stipulation would fail, the right of contract denied, and the chosen means of avoiding controversy made the breeder of litigation. The importance of such provisions in the conduct of many lines of present day business demands that they be annulled only upon substantial and well-established legal grounds."

The Finish Line Court pointed out further that:

> Although Alabama appellate courts have not addressed the specific question whether a challenge to the factual basis for an architect's decision under circumstances similar to the present case makes summary judgment inappropriate, the North Carolina Court of Appeals decided the issue in Top Line Construction Co. v. J.W. Cook & Sons, Inc., 118 N.C.App. 429, 455 S.E.2d 463 (1995). In that case, a subcontractor who had agreed to provide the labor and materials necessary to complete the masonry work in the construction of a middle school sued the general contractor who had refused to pay the subcontractor's final bill for the 10% retainage fee withheld pursuant to the subcontract. The general contractor asserted the defense that the subcontractor had failed to perform the masonry work consistent with the requirements of the subcontract. In support of its motion for a summary judgment, the general contractor submitted a letter from the architect, stating that the masonry work was the "worst he had ever seen" in his 40 years as an architect. In opposition to the motion, the subcontractor submitted evidence indicating that the masonry work had been completed according to project specifications and that the general contractor had "approved the work on a weekly basis prior to payment." Consequently, the subcontractor argued, the "credibility [of the architect] is at issue and cannot be resolved on summary judgment." The trial court entered a summary judgment for the general contractor, and the North Carolina appellate court affirmed, stating the following:
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> > "The subcontract designates [the architect] as the judge of acceptable work. '[W]here the contract provides that the work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, ... the parties are bound by his decision, in the absence of fraud or gross mistake.' Welborn Plumbing and Heating Co. v. Randolph County Board of Education, 268 N.C. 85, 90, 150 S.E.2d 65, 68 (1966) (quoting 13 Am.Jur.2d Building, Etc. Contracts, § 34 (1964)). There is no evidence here of fraud or gross mistake. [The subcontractor] expressly agreed to be bound by this clause and [the general contractor] retained its right to recover damages for malperformance of the contract. Accordingly, there are no genuine issues of material fact. [The architect's] judgment as to the quality of the masonry work is final as between the parties and [the general contractor] is entitled to

> recover from [the subcontractor] the amount it was back-charged by the school board. Summary judgment was properly entered against [the subcontractor]."

> The North Carolina Court of Appeals has also held that, "[w]hen an architect is vested with the authority to render judgment on a contractor's performance, the determination is prima facie correct, and the other parties have the burden of proving fraud or mistake."

Because the Tile Vendor neither alleged nor submitted evidence indicating that the Architect's decision was the product of fraud, bad faith, or gross mistake "as would imply bad faith or a failure to exercise an honest judgment," the trial court was not presented with substantial evidence creating a genuine issue of material fact. As a result, the Court concluded that the Architect's decision regarding the tile was final.

Understand that the Finish Line decision is largely dependent on the language in the contract documents. Most contract documents at least allow the architect to make final and binding decisions based on aesthetic issues. Under these contract documents, the architect's decision may well be preclusive.

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