RHODE ISLAND LAWYERS WEEKLY

'Intended beneficiary' status not shown in suit vs. subcontractor

By: Barry Bridges February 7, 2019

The building at the center of 'Hexagon Holdings, Inc. v. Carlisle Syntec Incorporated, et al.'

In a split decision, the Rhode Island Supreme Court has ruled that a plaintiff building owner did not demonstrate it was a third-party beneficiary of a subcontract between its general contractor and a roofing company and therefore could not maintain breach of contract and implied warranty actions against the roofer.

The plaintiff, Hexagon Holdings, contracted with A/Z Corporation to construct a new building. In turn, A/Z subcontracted the roofing work to McKenna Roofing and Construction. Faced with a leaking roof, Hexagon sued McKenna for replacement costs, alleging breach of contract, breach of implied warranty, and negligence. Hexagon did not sue A/Z, the general contractor.

Writing for the majority in upholding a lower judge's grant of summary judgment for the defendant roofing company, Justice Gilbert V. Indeglia faulted Hexagon for relying in its opposition to the contractual claims on an undisputed statement of facts from McKenna that did not identify the property owner.

Indeglia iterated that a party opposing summary judgment has a duty to establish that a genuine issue of material fact exists and may not rest solely on allegations and denials in the pleadings. In the majority's view, Hexagon should have introduced its own evidence, such as the subject contract.

"[W]e do not know the 'central purpose' of the subcontract between A/Z Corporation and McKenna, because the contract is not before us," Indeglia wrote. "We certainly do not know enough to find a genuine issue of material fact about McKenna's intent to benefit Hexagon."

On the negligence claim, the court concluded that the economic loss doctrine, which dictates that a plaintiff is precluded from recovering economic losses through a negligence action, barred Hexagon's recovery, even though there was no privity of contract with McKenna.

Offering a "vigorous" dissent on the intended beneficiary question was Justice William P. Robinson III, who argued that the pleadings and "other appropriate evidence" were sufficient to create a dispute of material fact.

The 20-page decision is *Hexagon Holdings, Inc. v. Carlisle Syntec Incorporated, et al.*, Lawyers Weekly No. 60-009-19. The full text of the ruling can be found here.

Sufficiency of evidence

John A. Caletri of Providence's Melick & Porter, who defended McKenna, said the holding is significant for establishing that, in order to survive a summary judgment motion under a third-party beneficiary theory, a plaintiff has to present evidence that the contracting parties entered into their relationship with the intent to benefit the plaintiff.

"The law presumes that parties contract for their own benefit, not for the benefit of a third party," Caletri said.

Meanwhile, Hexagon's counsel, Johnston's Joel K. Goloskie, countered that Hexagon did not have to prove its case at the summary judgment stage.

"It merely had to defeat the proposition that no reasonable jury could have found it to be an intended beneficiary of McKenna's subcontract based upon McKenna's unequivocal admission that it entered into a subcontract to install a roof on Hexagon's building," Goloskie said.

He added that his client agreed, "unsurprisingly, with the dissent's view that McKenna's admission did indeed defeat that proposition, and that Hexagon was not required to introduce additional evidence in support of McKenna's admission."

Other Providence construction attorneys weighed in on the holding.

"It seems reasonable to surmise that a building owner is the intended beneficiary of a roofing subcontract," J. Richard Ratcliffe said. "However, the court was limited to the record before it."

Ratcliffe added that though no one hires a general contractor to construct a building with a leaking roof, the plaintiff needed to present sufficient evidence to establish that it contracted for such a roof and that the subcontractor agreed to install it.

The outcome might have been different if the subcontractor agreement had language specifying at least the location of the work and the identity of the project owner and had been presented to the court, Randall L. Souza suggested.

Nicholas J. Goodier said the decision seems to "promote subcontractors engaging in arrangements that are limited in terms of controlling language, particularly references to an associated project and ownership thereof. Subcontractors can operate in this manner somewhat comfortably, given the liberal application of the mechanics' lien statute by courts in Rhode Island."

On that point, James A. Hall noted that *Hexagon* is consistent with Rhode Island's statute and line of cases relating to mechanics' liens, which state that a subcontractor is not in direct privity with an owner.

"A subcontractor therefore does not have a claim against an owner and is relegated to the lien law," he said.

Although Hall said he was not certain the court had that dynamic in mind when deciding *Hexagon*, he wondered if the holding would have been the same had the dispute involved an arena other than construction, describing the court's cited cases on third-party beneficiaries as narrow and subject-matter dependent.

As for the economic loss doctrine, Souza said the court made clear that the doctrine applies to commercial entities in both contractual situations and situations in which there is no contract between the parties.

"The court has announced a rule that if the economic loss doctrine prevents the project owner from suing its general contractor for negligence, it also by necessity prevents the project owner from suing any subcontractor for negligence," Souza explained.

According to Jeffrey S. Brenner, complaints often are filed with both contract and negligence claims as alternative pleadings. Parties typically may plead a count sounding in negligence because it triggers insurance. But if there is a contract, that is what controls in economic losses, he said.

Brenner added that both the intended beneficiary and economic loss elements of the decision restated what the law has been in Rhode Island for more than 20 years, so in that respect the holding was not unique.

"But with only one appellate level court in Rhode Island, and with changes in its composition over the years, it's important for the court to rearticulate these doctrines of law from time to time," he said.

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>
> *— John A. Caletri, Providence*

Defective roof

In 2006, plaintiff Hexagon hired A/Z Corporation as the general contractor for a new building at Quonset Business Park. In turn, A/Z subcontracted the roofing work to McKenna Roofing and Construction, which installed a roofing system manufactured by Carlisle Syntec.

Maintaining that the roof began to leak almost immediately after its installation, Hexagon brought suit in 2015 against McKenna and Carlisle to recoup replacement costs. The complaint alleged breach of contract, breach of implied warranty, and negligence. Hexagon did not assert claims against A/Z, the general contractor.

McKenna moved for summary judgment and submitted an undisputed statement of facts. In its opposition to the motion, Hexagon accepted those facts in their entirety and presented neither the general contract between Hexagon and A/Z nor the subcontract between A/Z and McKenna.

Superior Court Judge Bennett R. Gallo held that Hexagon failed to show it was an intended beneficiary of the subcontract between McKenna and A/Z Corporation.

Further, Gallo said the economic loss doctrine barred Hexagon from recovering economic damages in a negligence action.

'Sparse record'

A majority of the Supreme Court agreed with Gallo, emphasizing that to prevail as a third-party beneficiary, a claimant must prove that it is an intended beneficiary of the contract.

The court described the issue as "whether the owner of a building may survive summary judgment based on a third-party beneficiary theory where the only evidence presented was that the subcontractor may have had knowledge of the identity of the property owner, who was the ultimate beneficiary of the work that was performed."

Looking at the circumstances for any indication that McKenna intended to give Hexagon the benefit of the promised performance, the court found the record lacking.

Stating that "the language employed by the parties to a contract is the best expression of their contractual intent," Indeglia emphasized that Hexagon submitted into evidence neither the subcontract between A/Z and McKenna, nor the general contract between Hexagon and A/Z.

"[N]either has it provided any evidence in the form of affidavits, interrogatories, or depositions to prove that the intent of A/Z Corporation and McKenna was to directly benefit Hexagon," Indeglia wrote.

Indeglia said Hexagon's only evidence from the undisputed facts supplied by McKenna was that McKenna may have known Hexagon owned the building.

"This alone does not create an issue of material fact as to McKenna's intent under the circumstances to benefit Hexagon. … We are left with a sparse record containing no indication that, at the time A/Z Corporation and McKenna entered into the subcontract, there was a specific intent to benefit Hexagon," the judge continued.

As for the economic loss doctrine, Indeglia noted that Hexagon, a commercial entity, would not be able to bring a negligence claim against the general contractor, with which it was in privity of contract.

"At least in this setting, where Hexagon deliberately avoided suing the general contractor, A/Z Corporation, Hexagon is barred from asserting a lack of privity with McKenna to avoid application of the economic loss doctrine," he concluded. "In such a context, a party who is injured must resort to contract law for recovery."

Robinson, meanwhile, was not persuaded that the "drastic remedy" of summary judgment favoring McKenna was proper, notwithstanding the absence of an express contract in evidence.

"[T]here is no legal requirement that Hexagon had to introduce its own evidence in order to survive McKenna's motion for summary judgment," Robinson wrote in his dissent. "There is enough evidence here (notably, McKenna's

answer to Hexagon's complaint and the statement of undisputed facts) to suggest that a jury could find that there was a third-party contractual obligation between Hexagon and McKenna."

Justice Maureen McKenna Goldberg did not participate in the holding.

CASE: *Hexagon Holdings, Inc. v. Carlisle Syntec Incorporated, et al.*, Lawyers Weekly No. 60-009-19

COURT: Rhode Island Supreme Court

ISSUE: In a claim for breach of contract and implied warranty, did a building owner demonstrate that it was an intended beneficiary of an agreement between its general contractor and a subcontractor?

DECISION: No

Issue: FEB. 11 2019 ISSUE

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