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CAN A HOMEOWNER WHO ORALLY WAIVES THE STATE BUILDING CODE HOLD THE CONTRACTOR LIABLE FOR DAMAGES RESULTING FROM ITS VIOLATION?

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I. INTRODUCTION.

Homeowners from Beacon Hill hired a contractor to replace the roof on their town house. There was no question that the State Building Code only allows for *two* plies of roofing on a roof. Contained within the roofer's proposal was an item to strip the roof.

The contractor said the following through its witnesses at trial. The homeowner, for whatever reason, would not allow the roofer to strip the roof. The contractor wanted to do test cuts to determine how many plies there were. The homeowner wouldn't let him. Instead, based on a homeowner's oral waiver of the requirements of the State Building Code and the homeowner's specific representation to the contractor that there was *only* one existing ply on the roof, the roofer installed a rubber roof on top of the roof that was there, again, something he was specifically directed to do by the homeowner.

Several years later, the homeowner was having some HVAC work done, which necessarily involved stripping the roof. It was then discovered that there were *four* plies of roofing on the roof and that the roof was leaking into the roof insulation. The homeowner had a new roof installed and sued the roofer not only for the cost of the new roof and deck but for triple damages for unfair and deceptive trade practices.

At trial, a jury returned a verdict for the defendant contractor. The jury *did* find that the installation of a new roof was over three preexisting layers, which violated the building code. But, the jury also found that the violation was the result of directions given by the homeowners to the contractor. Accordingly, they did not assess damages.

On appeal, there was a single issue. Namely, if the contractor violated the state building code because the homeowners told it to, could that oral waiver by the homeowners be a complete defense to a C. 93A violation claim?

The name of the case is *Downey v. Chutehall Construction Co., LTD.*

II. BACKGROUND INFORMATION HELPFUL TO UNDERSTANDING THE DECISION.

Before we get to the decision, some preliminary information having to do with two statutes involved with the resolution of the appeal will assist many readers in understanding it.

As most contractors know, there are a variety of statutes and procedures applicable to home improvement contracts in the state of Massachusetts. These include having specific statutory content which must be included in home improvement contracts. (There is an article in the 'Construction Articles' section of our website – www.sauerconstructionlaw.com - discussing this.) A lengthy series of other requirements for home improvement construction are contained within the Home Improvement Contractor statute, which is M.G.L.A. 142A.

That statute contains the following provisions:

Section 17 of that statute provides that "The following acts are prohibited by contractors or subcontractors".

And, one of those prohibited acts is "Violation of the building laws of the commonwealth or of any political subdivision thereof".

And, in the event one of those prohibited acts occurs, Section 17 also provides that "Violations of any of the provisions of this chapter ***shall*** constitute an unfair or deceptive act under the provisions of chapter ninety-three A." (Emphasis added)

There is ample Massachusetts case law holding that the word 'shall' when contained within a statute is a mandatory word.

Chapter 93A is a statute dealing with claims for unfair and deceptive trade practices. Those plaintiffs who are successful with such claims recover either double or triple actual damages plus an award of attorneys' fees. Although recoveries of such damages by one business against another business are uncommon, recoveries by consumers – in this case, homeowners – against businesses are more frequent.

So what this section of the Home Improvement Contractors law says is that the act of simply violating the 'building laws' of the commonwealth, such as the State Building Code, amounts to an *automatic* violation of C. 93A . Nothing else needs to be proved!

III. THE DECISION.

The jury's verdict was reversed and the case was remanded to the trial court for further proceedings. The Appeals Court agreed with the homeowners that an oral waiver of the building code requirements does not preclude the contractor's liability for a building code violation and the resulting C. 93A violation, particularly where that violation carries potential public safety consequences.

The Court said that it based its decision upon Section 17 of Chapter 142A referenced above and also with consideration of the public policy in favor of protecting the public.

The Court in citing (referring) to another case said: "(a) statutory right or remedy may be waived when the waiver would not frustrate the public policies of the statute . . . A statutory right may ***not*** be disclaimed if the waiver could do violence to the public policy underlying the legislative enactment." (Emphasis added)

The Court also referenced another section of the Home Improvement Contractor statute which says that "No such agreement may waive any rights conveyed to the owner under the provisions of this chapter."

The Court said further:

> "To permit a waiver by a homeowner of his or her right to compel a contractor to comply with the contractor's obligations under the building code would permit, even encourage, contractors, and perhaps consumers, to waive provisions of the building code on an *ad hoc* basis, in the hope of saving money in the short-run, but endangering future homeowners, first responders, and the public in general.

These and other factors lead to the Court's conclusion (and holding) that "a consumer's oral waiver of a building code requirement cannot defeat the contractor's liability for the violation under G.L. c. 142A, section 17 (10), and G.L. c. 93A."

IV. ARE THERE LESSONS HERE FOR PUBLIC WORKS AND COMMERCIAL CONTRACTORS, AS WELL?

The answer is 'probably'.

The State Building Code was statutorily-created and has numerous statutory provisions highlighting its importance.

For example, M.G.L.A. 143 § 51 Liability for violation of statutes; criminal prosecution; notice to firm or corporation, provides:

> "The owner, lessee, mortgagee in possession or occupant, being the party in control, of a place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment or building shall comply with the provisions of this chapter and the state building code relative thereto, and such person shall be liable to any person injured for all damages caused by a violation of any of said provisions."

While the above provision is understandable – for the protection of the public - owners, lessees, mortgagees and occupants might be totally unaware of the fact that the buildings they use have violations of the state building code. And, such violations may have occurred on someone else's watch. So, to a certain extent, there might be strict liability as to these individuals, meaning liability without fault.

And, as per M.G.L.A. 143 § 94. Powers and duties:

> "(a) . . .Whoever violates any provision of the state building code, except any specialized code as described in section ninety-six, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both, for each such violation. Each day during which a violation exists shall constitute a separate offense."

Both of these statutory sections seem serious enough.

Granted, a homeowner vis-à-vis a contractor is at several disadvantages, including some level of ignorance as to construction materials and methods, as well as, in many instances, proper construction practices, contracts and business practices. A commercial owner/manager can be presumed to have a somewhat higher level of knowledge. But, still, it is equally clear that those who manage, manage, and that those who construct, construct. Each may have some knowledge as to the other's subject matter and business but that information may be minimal.

The 8th edition of the Base Code is comprised of the International Building Code 2009 (IBC), several companion I-codes and a separate package with Massachusetts amendments to the I-codes. The amendments themselves with various appendices are about 305 pages long! And, what would any Massachusetts resident, whether consumer or business person, necessarily know about an 'international building code'? So, even with those engaged in business dealing with construction and contractors, the contractors are in a better position to know – and they *should* know – a lot more about these things than would a consumer or commercial non-contractor.

We then get into the rather hard to define legal issue of 'public policy'. Very generally speaking, 'public policy' reflects a governmental intent to protect the public welfare in certain subject areas. While it is more than this, 'public policy' reflects a kind of turbo-charged – stricter - enforcement of legal statutes and concepts that are necessary to protect a state's residents when there is a legally-stated 'public policy' involved.

There *is* a public policy to protect homeowners. And, the same ideas behind protecting consumers in their homes who have to live with the results of construction - good and bad alike, the particulars of which they will largely not understand - also applies to commercial buildings. For, residents, consumers and other innocent third parties will visit these buildings and potentially have even *less* understanding of their construction than they might as to their own homes. After all, homeowners would have said a say as to the construction and home improvements done to their home. And, it is customary for someone buying a home to have a home inspection service look at it.

But, when residents/consumers visit a mall, restaurant, movie theater or office building, what do they really *know* about that buildings construction and safety? Most likely, very little.

Some of the same rationales applying to the protection of homeowners also apply to residents and third parties involved with public and commercial buildings. True, that those non-homeowners do not enjoy the protection of the home improvement contractor laws. But, as is set forth above by example only, they do have the protection of other laws.

Many professions have 'third party liability' to individuals who didn't hire them. An example of this is certified public accountants as to various of their reports and certifications.

Contractors dealing with homeowners and commercial clients should be aware of their potential liability to non-customer third parties as well as directly to homeowner clients and commercial clients.

As to public work projects, there is some law holding that an owner's representatives have no authority to bind the owner through his/her/its oral statements when they waive contractual or legal requirements. This is another way of saying that for public construction, it would be even more difficult for a court to find any form of waiver through oral statements and, possibly, through a public owner's representatives' acts and conduct.

V. CONCLUSION.

This decision seems unfair to the contractor if the contractor's version of the evidence is to be believed. As between the homeowner and the contractor, the homeowner by his unreasonable behavior was the party more responsible for the claimed loss.

Again, here are the key items of evidence, according to the contractor: (a) the contractor intended on stripping the roof as part of its proposal, which the homeowners would not allow; (b) the contractor wished to perform test cuts of the existing roof to determine how many plies of roofing were there, which the homeowner would not allow; (c) the homeowners represented to the contractor that there was only one ply of roofing on the town house; (d) the homeowners instructed the contractor to install the rubber roof over the existing roof.

For whatever reasons, the contractor honored the homeowners' wishes. Based on what subsequently happened, it shouldn't have. The behavior of the homeowners suggested a difficult owner and a quite possibly difficult job. But, 20-20 hindsight is a wonderful thing. It's a shame it isn't available until *after* something bad has happened.

There are at least **four** lessons to be learned from this case.

The **first** is to not violate the norms of your trade, including, but not limited to, violating the terms of the State Building Code or of some specialty codes, such as those that are applicable to plumbers and electricians. I don't say this facetiously or to try to convince you to do the right thing *because* it is the right thing. It's simple common sense and reasonable behavior, both of which frequently figure into the resolution of litigations, as unlikely as that often seems.

Rules are rules. They are there for a reason. And, when things don't go well – either in the construction itself or in litigation that follows the construction – trying to defend a contractor's *not* following the code and technical requirements for its trade can be a daunting task and an incredibly hard sell to the fact-finder. Judges are tasked to enforce the law. And, the State Building Code is provided for by law and is actually *part* of the law.

Secondly, and not to belabor the obvious, if you are put in a position of having to go against that which you must or should otherwise comply with – such as the State Building Code – get a written waiver from your customer. Under the law, for most purposes, something that is 'written' can be an email Remember that the definition of a legal 'waiver' is 'an intentional relinquishment of a known legal right'. Proving 'intentional' and 'known' really require a writing to establish the meaning and application of these words. And, better practice suggests that before the contractor obtains the written waiver, it should inform the client in writing of the potential detriment he/she/it might suffer due to not complying with the applicable code or applicable technical requirements. The writing obtained from the client should include : (a) statements to the effect that he/she/it has been advised of what the code and technical requirements are; (b) the client understands the possible consequences of not complying with the applicable code and technical requirements, and; (c) notwithstanding, that he/she/it agrees to accept any potential consequences resulting from this.

Keep in mind, however, that even a client's written waiver of the State Building Code might not be sufficient to prevent a contractor's liability because of the public policy concerns involved with protecting the public, particularly as to homeowners, who enjoy a substantial number of statutory protections. Whether a written waiver would be sufficient or not, it is clearly superior to only having an *oral* waiver, the 'oral' part of which has potential significant

proof problems in court. In discussing with clients the possible effect of the other side's anticipated testimony in court, the client should hope that the other side's witnesses can't lie better than the client is able to tell the truth.

Thirdly, it is often a good idea to run the situation past a knowledgeable construction lawyer before you begin violating code or technical requirements at a customer's direction. Today, to litigate and go to trial on a several day construction case in the superior court and then to appeal an adverse finding to the Appeals Court sounds like fifty to seventy-five thousand dollars *of your money* in legal fees and costs and court costs. These costs will be incurred whether or not one wins or loses the case. Three or four hours of a construction lawyer's time before a potential disaster is knowingly entered into might very well prove to be a bargain, especially when compared against the possible consequences of taking an inappropriate action.

And, while consumers of legal services seem to primarily focus on financial costs, the greatest cost of a lengthy litigation is how much *time* this will take away from you and from your key people in participating in the discovery, pretrial preparation, trial phases and appellate phases of a case. Contractors make most of their money in preparing good estimates and then in performing excellent project management of their jobs. Anything taking away from either can be very costly indeed. And, litigation of anything but a very simple case often turns into being a time (and money) sump.

Fourthly, there are just some jobs and some clients that you are best to walk away from. This roofing job sounds as if it might have been just such a job. Remember that frequently no good deed goes unpunished! And, a customer that is simply too difficult to work for ceases being such when you refuse to work for him/her/it in the first place!

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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