The Devil (And Perhaps Your Profits) Is In The Details: A Recent Reminder About Potential Construction Contract Pitfalls

Client Alert
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Recently, the Court of Appeals issued a decision in the case of *Factory Mutual Insurance Company v. The Christman Company*, 2022 WL 1702356 (Mich. App. May 26, 2022), which serves as a reminder of some of the pitfalls that often times arise in negotiating or are found in construction contracts.

In *Factory Mutual*, the Court of Appeals held that the trial court erred by granting defendant-subcontractor (Site Development) summary disposition of plaintiff-insurer's (Factory Mutual Insurance Company) and plaintiff-university's (Oakland University) breach of contract action arising out of a construction project. Plaintiffs asserted Site Development failed to prevent the accumulation of rainwater in an excavation pit that Site Development had dug as part of the project, resulting in water damage to a building. The trial court found no genuine issue of material fact existed as to whether Site Development breached its subcontract. The trial court focused on the lack of complaints from the defendant-contractor (Christman) and the insufficiency of expert testimony from a civil engineer. The appellate court held that the trial court erred in finding that the civil engineer manufactured facts not in evidence. The civil engineer "did not assert defendant was contractually obligated to use a specific dewatering system, he alleged defendant-subcontractor's system of choice was insufficient and could not keep enough water out of the pit during the storm, and, as a result, defendant breached its contractual duty to keep the pit dewatered 'as necessary.'" The appellate court held that, had the trial court "properly viewed the evidence in the light most favorable to the nonmoving party, it would have concluded that a genuine issue of material fact existed" as to the adequacy of Site Development's dewatering system. However, because there was a genuine issue of material fact, the appellate court held that a genuine issue of material fact "also existed as to whether

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defendant kept the pit dewatered 'as necessary' under the subcontract, after its dewatering system was overwhelmed by the storm." The Court of Appeals also rejected Site Development's argument that the claim could not be maintained because Oakland University waived its right to file suit when it tendered final payment to Christman. The appellate court held that "Defendant's subcontract explicitly excludes the payment and dispute provisions of Christman's contract with Oakland University, and nowhere in the language of the original clause does it state payment constitutes a waiver of all claims against all parties, including those not party to the contract. Defendant is correct Oakland University's final payment would waive all its claims against Christman, but the subcontract does not provide defendant with the same protection, and, in fact, explicitly excludes the payment and dispute resolution provisions." The appellate court further held that, even if the clause applied to Site Development, "a genuine issue of material fact exists as to whether the third exception to the provision" applied to the claim, as "a genuine issue of material fact exists as to whether defendant used an adequate dewatering system, and therefore whether [it] dewatered the pit 'as necessary.'" The Court of Appeals, therefore, reversed and remanded the decision of the trial court.

As mentioned above, *Factory Mutual* serves as a reminder of some pitfalls in construction contracting.

First, it reminds us of certain waiver provisions that are often times "buried" within in construction contracts. For example, a contractor may waive its right to a claim relative to a project or a contract if it does not timely provided notice of that claim or commence that claim in accordance with the requirements of the contract for the project. See, e.g., Section 15 of AIA Document A201-2017, General Conditions of the Contract for Construction and Section 12 of EJCDC C-700-2018, Standard General Conditions of the Construction Contract. Or, like noted in *Factory Mutual*, a waiver of a claim upon acceptance of final payment. See, e.g., Section 9.10.5 of AIA Document A201-2017, General Conditions of the Contract for Construction and Section 15.07 of EJCDC C-700-2018, Standard General Conditions of the Construction Contract.

Second, it reminds us of issues that could arise if "upstream" contracts or subcontracts (e.g., a subcontract between a contractor and a subcontractor) are not incorporated into "downstream" contracts or subcontracts (e.g., a sub-subcontract between a subcontractor and a sub-subcontractor). For example, subcontracts often times contain pay-if-paid clauses or pay-when-paid clauses that do not require payment from a contractor to a subcontractor until the contractor receives payment from the owner for the subcontractor's work. If the subcontractor does not incorporate its subcontract with the contractor into its sub-subcontracts with its sub-subcontractors, in particular, the pay-if-paid clause or pay-when-paid clause of its subcontract with the contractor, the subcontractor could find itself liable to pay its sub-subcontractor despite not receiving payment from the contractor for its work. And such issues are not limited to just payment. Frankly, they can arise with respect to any contractual provision, notably changes or claims, which is why it is imperative to obtain a copy of upstream contracts, be familiar with their terms and conditions, and consider incorporating "upstream" contracts or subcontracts into "downstream" contracts or subcontracts in negotiating the same.

If you have any questions or concerns or need any assistance in handling any construction project related matters, in particular, contract, subcontract, and sub-subcontract related matters, please contact the authors of this alert or any of the attorneys in Butzel's Construction Law Practice Group.

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