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Materials Testing Company Owed No Duty to Concrete Subcontractor

April 7, 2011
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The Illinois Appellate Court for the First District recently held that a concrete subcontractor on a project to construct a new building could not maintain a negligence action against the materials testing company hired by the owner to test the concrete. *Rojas Concrete Inc. v. Flood Testing Laboratories, Inc.*, 941 N. E.2d 940 (Ill. App. Dec. 15, 2010). The court held that defendant materials testing company owed no duty to plaintiff subcontractor under its contract with the owner or based upon the voluntary undertaking doctrine.

A prime contractor hired the subcontractor to provide concrete work for a large facility. The subcontractor's work included concrete for the floor decks, grade beams, roofs, stairs and other areas, in accordance with specifications that called for lightweight calcium chloride-free concrete. The owner hired the testing company directly to monitor and test the concrete poured during the construction of the facility. The contract between them provided as follows:

Inspection and testing services are required to verify compliance with requirements specified or indicated. These services do not relieve Contractor of responsibility for compliance with Contract Document requirements.
* * *
Nothing contained herein shall create a contractual relationship with, or any rights in favor of, any third party, including any subcontractor.

The testing company inspected and tested each load of concrete delivered by the subcontractor and advised the subcontractor as to whether the concrete met the specifications. The subcontractor alleged that over a two-month period the testing company tested and approved concrete that did not conform to the project plans. The subcontractor further contended that, in reliance on that approval, it poured approximately 710 cubic yards of nonconforming concrete, which the owner later required the subcontractor to remove and replace, causing damages in excess of $950,000.

The subcontractor sued based on negligence and negligent misrepresentation theories to shift its nonperformance to the testing company. The trial court dismissed the case. The appellate court affirmed, holding that the testing company owed no duty to the subcontractor under the testing company's contract with the owner. The court determined that the contract (1) clearly provided that the testing company's duties did not extend to third parties such as the subcontractor, and (2) did not relieve the subcontractor of its duty to

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comply with the terms of its own separate subcontract to provide concrete that complied with the project specifications.

Additionally, the court found that the testing company owed no duty of care within the context of any particular relationship between it and the subcontractor. The testing company's contract to provide testing services did not create a contractual relationship with the subcontractor. The testing company was also merely testing, not supervising, the subcontractor's work. In addition, the court declined to find that the testing company owed the subcontractor a duty to exercise due care because it was foreseeable that the subcontractor would be affected by any faulty testing and approval of the concrete by the testing company.

The court also refused to find a duty under the voluntary undertaking doctrine, which is outlined in Section 324(A) of the Restatement (Second) of Torts (1965). The voluntary undertaking doctrine applies where "one who gratuitously or for consideration renders services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care of such competence and skill as one possesses." The court found that the testing company owed no duty under the doctrine because the subcontractor did not allege that any bodily harm had occurred as a result of the negligent testing and provided no reason for extending the doctrine to a purely economic loss.

Practice Note

The appellate court's decision followed the traditional rule that a professional service provider's duties will not be expanded beyond the scope of duties set forth in its contract. The subcontractor here filed a negligence action to shift its responsibilities to the testing company and recover purely economic losses by doing an "end run" around the economic loss doctrine by alleging the existence of duties based on foreseeability, the existence of a particular relationship among the parties and the voluntary undertaking doctrine. The appellate court kept to the four corners of the contract and rejected arguments that it should adopt concepts of foreseeability from products liability law to find the existence of a duty.

The court's opinion shows the value of a well-drawn contract, which in this case specifically limited the testing company's duties to the owner that hired it and not to third parties who were responsible for performance of their own contracts.

For further information, please contact your regular Hinshaw attorney.

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