



## Alerts

### Engineering Company Found Liable for Professional Negligence Despite Lack of Contractual Relationship

October 19, 2015

*Professional Lines Alert*

*Apex Directional Drilling, LLC v. SHN Consulting Engineers & Geologists, Inc.*, No. 15-cv-02501, 2015 WL 4749004 (N.D. Cal. Aug. 11, 2015)

#### Summary of the Case

This litigation arises from problems with a municipal sewage construction project. In April 2013, the City of Eureka, California publicly solicited bids from contractors for installing a new wastewater pipeline by using a technique called horizontal directional drilling (“HDD”). Defendant SHN Consulting Engineers & Geologists, Inc. (“SHN”) contracted separately with Eureka as lead engineer and project manager. SHN conducted geological studies of the site as part of its project descriptions, and their findings went into a report, the Geotechnical Baseline Report (“Report”). This Report indicated the majority of the subterranean region targeted was composed of stable soils suitable for HDD, a representation that was critical to contractors on the project. Apex Directional Drilling, LLC (“Apex”) relied on SHN’s representations as to the site conditions and, thus, submitted the lowest qualifying bid (roughly \$3.6 million), which subsequently resulted in winning the bid to contract with Eureka.

Apex found the site conditions adverse, drilling into mud and flowing sands; these difficult conditions ran much farther and deeper than anticipated. Apex struggled on with the project and incurred unforeseen expenses and lost valuable equipment to the flowing sands. After the subterranean conditions became known, SHN allegedly still unreasonably continued to maintain that the project was proceeding in the competent soils described in the Report and, based thereon, repeatedly gave Apex illogical instructions to proceed with the project.

Over the beginning months of 2014, Apex requested for Eureka to authorize change orders to reimburse it for costs overrun and easements necessary to complete the project. Based on SHN’s recommendations, however, Eureka rejected Apex’s change order requests. On March 25, 2014, Eureka terminated Apex from the project.

Immediately after termination from the project, Apex sued Eureka in California state court for breach of contract. That matter has since been compelled to arbitration. SHN was not a party to the contract between Apex, and Eureka and is not a party to the arbitration. Over a year later, Apex sued SHN in the U.S. District Court, Northern District of California, asserting claims for relief under

#### Service Areas

Professional Liability



California law, including: (1) breach of professional duty; (2) negligent misrepresentation; and (3) tort of another. SHN moved to dismiss the complaint for failure to state a claim.

### **Questions Before the Court and How the Court Ruled**

*Did SHN owe Apex a duty of care such that it may be held liable for professional negligence?*

Yes. Acknowledging the absence of any case directly on point, the district court relied on the factors from *Biakanja v. Irving*, 49 Cal.2d 647, 650 (1958), as interpreted in *Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992) and *Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP*, 59 Cal.4th 568 (2014): (1) “the extent to which the transaction was intended to affect the plaintiff,” (2) “the foreseeability of harm to him,” (3) the degree of certainty that the plaintiff suffered injury,” (4) the closeness of the connection between the defendant’s conduct and the injury suffered,” (5) “the moral blame attached to the defendant’s conduct,” and (6) “the policy of preventing future harm.” *Biakanja*, 49 Cal.2d at 650. Weighing all relevant considerations, the district court determined that several of the *Biakanja* factors tipped in favor of finding SHN owed a duty to Apex. Pertinent factors, among others, included the first factor, that SHN undertook to define key conditions affecting the cost and scope of the project, as well as the third and fourth factors, involving foreseeability, which indicated that SHN had knowledge, by the time Apex was terminated from the project, that its actions were directly responsible for considerable losses. Given the balance of factors tipping toward a finding of duty, the district court denied SHN’s motion to dismiss the professional duty claim.

*Did SHN owe Apex a duty of care under a negligent misrepresentation theory?*

Yes. Citing *Bily*, the district court noted that California has adopted the Restatement (Second) of Torts test for identifying categories of plaintiffs to whom a defendant owes a duty of care under a misrepresentation theory. Under this test, an objective standard, the court looks to whether the plaintiff is a member of a specific class of persons who was involved in a transaction that the defendant supplier of information intended the information to influence. The district court held that under the Restatement test, the complaint’s allegations placed Apex firmly within the category of plaintiffs who may recover from SHN for negligent misrepresentation. The district court further analogized this action to *M. Miller Co. v. Dames & Moore*, 198 Cal.App.2d 305 (1961), wherein the plaintiff contractor based its bid for a municipal sewage construction project on a soil report prepared by a defendant engineering firm. The district court observed that *Bily* noted *M. Miller’s* general consistency with the Restatement approach to negligent misrepresentation liability. Having found that SHN owed Apex a duty of care, the district court denied SHN’s motion to dismiss the negligent misrepresentation claim.

*Did SHN clearly violate the traditional tort duty such that it would be liable for the “tort of another”?*

Yes. The “tort of another” claim is essentially a determination of whether Apex could state a claim against SHN for either breach of professional duty or negligent misrepresentation. In a simple, brief discussion, the district court held that because the foregoing tort claims were viable, the “tort of another” claim was viable, too. Thus, the district court denied SHN’s motion to dismiss the tort of another claim.

For more information, please contact your regular Hinshaw attorney.

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