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Express Contract Terms Limit Subcontractor's Remedies

RULING OFFERS GUIDANCE FOR GENERAL CONTRACTORS SEEKING TO MITIGATE RISK

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In the complex array of relationships that arise within the context of a large construction project, it is incumbent upon an injured party to determine what recourse is available under their contract (or subcontract as the case may be) and seek redress from a party that may actually be held legally responsible for their injury.

In the recent case of *Suntech of Connecticut v. Lawrence Brunoli Inc.* 2013 WL 2993211 (June 25, 2013), the Connecticut Appellate Court upheld the judgment of the trial court rendered in favor of a defendant-general contractor and its payment bond surety. The court held that under the terms of the applicable subcontract, the general contractor was not responsible for additional costs, expenses, damages and delays claimed by a subcontractor, in the absence of trial evidence that proved a breach of the subcontract or that the subcontractor's claimed damages were caused by the general contractor.

The plaintiff, Suntech of Connecticut, Inc., (Suntech) is a glass and curtainwall fabricator and installer who entered into a subcontract with Lawrence Brunoli, Inc. (Brunoli), for facade renovation work at Bradley International Airport on a project owned by the Connecticut Department of Transportation. Brunoli had a direct contract with ConnDOT and was the project's general contractor.

Suntech's contractual scope of work included the construction of a curtainwall comprised of an alu-

minum framing system and glass panels. Suntech's bid to Brunoli was based, in part, on plans and specifications that had been prepared by ConnDOT and distributed to prospective bidders. Suntech had reviewed the ConnDOT plans prior to submitting its bid and contracting with Brunoli. However, it was not until after contracting with Brunoli that Suntech detected a discrepancy between ConnDOT's architectural plans and structural plans in relation to the specified height of the curtainwall.

As a result of the discrepancy, Suntech changed the design of the aluminum framing system and submitted the changes for ConnDOT's review and approval. The design changes increased the length of aluminum support structures within the framing system, which, in turn, necessitated additional steel reinforcements to meet the framing system's revised capacity for movement and ability to bear stress, adding 44,000 pounds of steel to Suntech's scope of work. Subsequently, ConnDOT rejected Suntech's design revisions as noncompliant with ConnDOT's specifications. Following additional negotiations, design issues were resolved and Suntech submitted a change order request for additional costs incurred to resolve the design issue.

Brunoli transmitted Suntech's request to ConnDOT, who ultimately rejected the request. Notwithstanding ConnDOT's rejection, Brunoli executed a change order for an additional \$110,440 to Suntech in relation to increased costs to the curtainwall framing system and made payment accord-



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ingly. However, Brunoli claimed the payment was made under duress, following threats by Suntech that it would discontinue work unless open payment issues were resolved to its satisfaction. Brunoli pursued an appeal of ConnDOT's rejection of the Suntech change order submission, however, unsuccessfully so. As a result of numerous delays, the project was eventually finished in excess of three years after the anticipated April 30, 2007 completion date.

Breach Of Contract Suit

Suntech filed suit against Brunoli and Safeco Insurance Co. of America (Safeco), Brunoli's payment bond surety. Against Brunoli, Suntech asserted causes of action for breach of contract, unjust enrichment, delay and violation of Connecticut General Statutes § 49-41a. Against Safeco, Suntech asserted a cause of action for violation of C.G.S. § 49-42 to enforce its right to payment under the Safeco payment bond.

In its breach of contract claim, Suntech alleged that Brunoli breached the contract by failing to pay Suntech on a monthly basis for completed work, by failing to request payment from ConnDOT, by failing to pay Suntech for completed and approved change order work, and by failing to pay Suntech

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following full performance of the subcontract. Suntech claimed \$164,600 due and owing on the original subcontract price, in addition to \$657,675 for unpaid change orders.

In refusing to find that Brunoli breached the subcontract, the trial court focused on the actual provisions of the subcontract to ascertain exactly what Brunoli's obligations were. Per the trial court's interpretation, the subcontract provided that all Suntech's "billings" had to be approved by ConnDOT. Accordingly, after ConnDOT's review of invoices submitted by Brunoli for itself and its subcontractors, including Suntech, ConnDOT would pay the invoices according to its own opinion of the amount of work in place. Once Brunoli had received payment from ConnDOT, it would then, in turn, pay Suntech for the portion of payment received that was attributable to Suntech's work.

The trial court also recognized that the "State of Connecticut Department of Transportation, Standard Specifications for Roads, Bridges and Incidental Construction, Form 816 (2004)" had been incorporated by reference into the subcontract, in particular, Sections 1.05.01 and 1.09.06. The trial court interpreted Sections 1.05.01 and 1.09.06 as giving ConnDOT's engineer ultimate decision making authority to approve any of Suntech's particular invoices. Based on the evidence presented, the trial court concluded that Brunoli forwarded Suntech's monthly invoices to ConnDOT in satisfaction of Brunoli's contractual obligations.

Although it was undisputed that the project was plagued by many delays resulting from a variety of causes, there was insufficient evidence to prove that Brunoli had caused or was responsible for the delays. Per the trial court, the subcontract lacked any contractual provision that made Brunoli responsible for delay damages absent evidence that Brunoli caused the delay, and there was no legal basis to hold Brunoli responsible to Suntech for delays caused by ConnDOT or other subcontractors. The trial court refused to make an automatic connection between the mere existence of damage to Suntech, and Brunoli's and Safeco's liability for such damage, without proof of the same.

As to Suntech's other causes of action against Brunoli, the trial court concluded that Suntech's unjust enrichment claim was barred by the existence of remedies within the subcontract, that Suntech's cause of action for "delay" was no different than the breach of contract claim, and that Suntech's cause of action pursuant to C.G.S. § 49-41a, claiming breach of statutory prompt payment obligations, had to fail in the absence of evidence that Brunoli had received payment from ConnDOT on account of Suntech's work.

The trial court also refused to find that Safeco violated C.G.S. § 49-42 by failing to pay Suntech's payment bond claim. The trial held that "a claim under [C.G.S. § 49-42] can only be triggered by the condition that the general contractor has received payment from the owner of the contract, and then in turn, failed to pay the subcontractor per the terms of [C.G.S.] § 49-41a."

'Pay-When-Paid' Interpreted

The trial court granted judgment for Safeco on Suntech's payment bond claim in light of Suntech's failure to prove that Brunoli was in possession of funds paid on Suntech's account or that Brunoli breached the subcontract. The trial court noted that there is no authority that C.G.S. § 49-42 allows prosecution of claims against a contractor for which the contractor would not otherwise be responsible and no authority that the statute is meant to circumvent the subcontract between the parties.

On appeal, Suntech claimed that the trial court erred in concluding that Suntech had not proven Brunoli breached the subcontract or that Safeco violated C.G.S. § 49-42. The Appellate Court was not persuaded.

The Appellate Court confirmed all aspects of the trial court's interpretation of Brunoli's obligations under the subcontract, in light of ConnDOT having ultimate authority over the approval of payments to Suntech. The Appellate Court rejected Suntech's argument that the trial court misapplied the "pay-when-paid" clause of the subcontract as excusing payment by Brunoli. Per the Appellate Court, that clause merely required Brunoli to pay Suntech within a certain time period of receiving payment from ConnDOT and Brunoli had not breached this clause because the clause did not obligate Brunoli to make payments to Suntech that had not been approved and paid for by ConnDOT. The subcontract gave ConnDOT's engineer the authority over approval of payments and Brunoli merely passed payments from ConnDOT to Suntech.

Suntech's arguments were further rejected based on the Appellate Court's conclusion that Suntech, per the terms of the subcontract, clearly and unambiguously waived delay damage claims against Brunoli under the circumstances. The subcontract provided: "The Subcontractor agrees not to assess any delay damages or claims against [Brunoli] unless the Owner accepts responsibility and payment." Per the Appellate Court, this clause, as applied to the undisputed facts of the case, precluded Suntech's claim for delay damages against Brunoli because the subcontract clearly and unambiguously permitted Brunoli to pass Suntech's claims on to ConnDOT, however, Brunoli had no

obligation to pay such claims, unless ConnDOT made payment to Brunoli.

In a footnote, the Appellate Court rejected prior precedent offered by Suntech as authority governing the application and effect of pay-when-paid clauses, suggesting that under the facts of this case, Brunoli and Suntech created a valid condition precedent to Brunoli's obligation to pay because ConnDOT, not Brunoli, had control over the "condition," Suntech had available recourse through appeals to ConnDOT, and Brunoli and Suntech knowingly contracted for the allocation of risk in dealing with the sovereign.

Suntech made further arguments that the trial court failed to apply the Spearin Doctrine (See *United States v. Spearin*, 248 U.S. 132 (1918)); that Brunoli admitted liability and accepted responsibility for Suntech's claim by filing a notice of claim for Suntech's claimed damages pursuant to C.G.S. § 4-61 (waiver of sovereign immunity for those making claims under a direct contract with the State); and that the trial court could have found Brunoli responsible for damages resulting from delays by other subcontractors if caused by Brunoli's failure to coordinate their work. The Appellate Court rejected each of these arguments based upon the language of the subcontract.

Suntech argued that the trial court erred in rejecting its claim under C.G.S. § 49-42, because its decision was wholly dependent on its decision relating to the breach of contract claims against Brunoli. The Appellate Court summarily concluded that the trial court did not commit error in denying Suntech's breach of contract claim, therefore, it properly found in favor of Safeco on the payment bond claim. In doing so, the Appellate Court appears to have concluded that a subcontractor's cause of action under § 49-42 does not accrue until payment is owed by a contractor to a subcontractor (or subcontractor to sub-subcontractor, etc.) under C.G.S. § 49-41a, following the contractor's receipt of payment from the project owner on account of the subcontractor's work.

Suntech v. Brunoli appears to provide general contractors with an opportunity to mitigate risk through the careful drafting of contractual provisions that limit their duty to the forwarding of subcontractors' claims, and that have the effect of establishing third-party approval as an absolute contractual condition precedent to their liability for such claims. For subcontractors, having limited rights against a general contractor due to acts or omissions of a project owner is a known risk of doing business. For payment bond sureties, the case may further limit a potential bond claimant's ability to pursue a statutory bond claim under C.G.S. § 49-42. ■