PRINCIPLES OF MARYLAND LAW GOVERNING THE OWNER'S REMEDIES FOR DEFECTIVE CONSTRUCTION

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by Scott A. Livingston[1]

I. Scope

This article address the principles of Maryland law governing an owner's remedies where construction work is defective. It focusses on remedies against the contractor, after the construction is completed but the work proves defective. Under some circumstances, the owner may recover damages from other parties, such as the architect/engineer. These are briefly outlined in the end of the article.

II. Summary

In general, the owner can seek judicial relief in actions sounding in contract and tort. The gist of the contract action is the contractor failed to perform in accordance with the plans and specifications. The tort action alleges the contractor performed in a negligent manner.

In both cases, the owner is apt to start at the result -- rather than the cause -- of the problem. The owner notices that something is wrong and he reckons the work construction was defective. The lawyer, of course, must trace back from the allegedly defective work. The lawyer must identify factually why the work is defective.

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This article focusses little on the truly important first analytical step -- the facts. Instead, the article addresses the less important step -- the law. This article focusses on work which is performed "improperly" in the sense that the result is defective or faulty.[2]

III. Owner's Actions Against the Contractor

A. Contract

1. General

In general, the owner is entitled to performance by the contractor in accordance with the terms of the contract. Accordingly, a contractor is liable on the contract if the contractor performs the work improperly. K&G Construction Co. v. Harris, 223 Md. 305 164 A.2d 451 (1960).

It has been generally stated that there is no "hard and fast rule for determining the rights and liabilities of the parties" where the contractor performs in an imperfect manner. See 17A C.J.S. Contracts §515a. Common sense dictates that if the contractor's performance is defective, the owner is not obligated to pay the full price agreed upon in the original bargain. After the work is performed, however, the focus shifts to what remedies are available to the owner who finds that the work product is defective.

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[2] Other articles focus on work performed improperly in other ways, e.g., performance in an untimely manner.

If the owner (or his architect acting as his agent) approves the work as fully complying with the contract requirements, the owner may not be able recover for allegedly defective work. In Charles Burton Builders v. L&S Const. Co., 260 Md. 66, 271 A.2d 534 (1970), given the approval by the engineer at time of completion, the owner could not recover four years later for allegedly defective work. If the defect is latent (hidden), the rule is otherwise. See, infra, at §III A 2b.

In the old case of Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas, 115 Md. 535, 81 A1 (1911), the contract provided that the architect's approval was conclusive. There, the architect approved the plaster work prior to acceptance. The owner could not recover damages from the contractor when the plaster work proved defective. Analytically, there was a risk that work might turn out defective. Once the architect approved it, however, the risk of defect was allocated to the owner. In this case, there was no allegation of fraud, collusion, or mistake on the part of the architect.

For other cases concerning waiver of defects through acceptance of work, see Laurel Realty v. Hummelfarb, 194 Md. 672, 72 A.2d 23 (1950), Kandalis v. Paul Pet Construction, 210 Md. 319, 123 A.2d 345 (1956). On a related issue, a party must act in good faith where acceptance is conditioned upon performance to owner's satisfaction. See First National Realty Corp. v. Warren-Ehret, 247 Md. 652, 233 A.2d 811 (1967).

Williston §724

if defect is known it ought to be known

2. Meaning of Term "Defective" Work

a. In General

No single definition completely describes the term "defective" work. In general, work is defective if it does not fulfill the promises bargained for by the parties to the contract. "[T]he word 'defect' is usually used in connection with the quality of the workmanship or the materials that go into the construction of a house or other building." Heckrotte v. Riddle, 224 Md. 591, 168 A.2d 879 (1961). If the work conforms to the contract requirements, the owner may yet find it not to his liking, but this does not justify recovery for an owner. Dillon Properties v. Minmar Builders, 257 Md. 274, 262 A.2d 740 (1970).

The Court of Appeals settled this point in Gaybis v. Palm, 201 Md. 78, 93 A.2d 269 (1952):

> If a building contractor does his work in accordance with the plans and specifications and without negligence, he will not be liable to the owner where the building is subsequently damaged by reason of some defect in the building or some fault of the soil, in the absence of an express warranty that the plans and specifications are sufficient, inasmuch as he does not warrant their sufficiency but only the skill and care with which he performs his work and the soundness of the materials used therein.

In Gaybis, the parties recognized a risk that unusual water conditions might be encountered subsurface. The contract provided that the owner pay extra money in order to deal with any such conditions. The contractor excavated and notified the owner of

wet conditions. He informed the owner that it would cost extra money to provide a dry basement, but the owner declined to pay extra.

The contractor constructed the basement in accordance with the original plans -- no extra money was paid to deal with the wet ground conditions and likewise no extra work was performed. The contractor fulfilled his part of the bargain and there was no breach. "Of course," concluded the Court of Appeals, "a contractor is liable for breach of contract when he fails either to perform the work which he undertook to do or to perform it with skill and care." In short, the work was not defective because it conformed to the contract requirements. See also Reinhart Const. v. Mayor of Baltimore, 157 Md. 420, 423, 146 A 577 (1929) and Hammaker v. Schleigh, 157 Md. 652, 664 147 A 790 (1929).

b. Latent Defects

In general, parties are competent to waive contract rights. In particular, an owner can waive his right to proper performance of the work by final acceptance of the project. A contractor, or his surety, cannot usually avoid liability for breach of contract where the owner unknowingly accepts defective work.

As to latent (hidden) defects, the owner's acceptance of the work constitutes a waiver of defective performance, where (1) the owner accepted the work knowing that it did not satisfy the contract requirements, or (2) the defects were discoverable by reasonable inspection. On the other hand, if the work was not performed according to the contract and the owner had no knowledge

of the latent defects, the owner's acceptance does not preclude a claim for damages. See School Board of Pinellas County v. St. Paul Fire and Marine Ins. Co., 449 So.2d 872 (Fla.); Town of Tonawanda v. Stappell, Mumm and Beals Corp., 270 N.Y.S. 377.

3. Warranties

a. Express Warranties

(1) Scope of the Undertaking

The first type of warranty is one which is expressed in the language of the contract.* Where a statement of the warranty is set forth in the document, the ordinary rules of contract interpretation apply.

A warranty forms part of the undertaking for which the contractor bargained. Where the owner seeks recovery in action on the warranty, the cases turn on the scope of the undertaking. A warranty may provide a basis for a contract action against the ill performance by the contractor.

In Kerr v. Milwee, 202 Md. 235, 96 A.2d 1 (1953), for example, the owner hired a contractor to backfill earth around a foundation wall. The owner directed the contractor how to perform the backfill work. The contractor, however, made no representations or warranties about the possible impact of pressure exerted by the contractor's equipment. The contractor made no promises about the stresses to which the foundation wall might be subjected. During backfill operations, the pressure of the bulldozer and earth exerted against the unsupported base of the wall caused damage to the foundation.

The Court of Appeals held the contractor was not liable for damage to the foundation wall. There was, significantly, no express warranty made by the contractor concerning responsibility for the wall. Protection of the wall was beyond the scope of his undertaking.

(2) Express Warranties in Standard AIA Contracts

Parties often enter into contracts based on the Standard American Institute of Architects agreements. It is worthwhile, therefore, to notice the warranties expressed in the contracts.[3]

In the AIA Document A201 "Standard Agreement Between Owner and Contractor," an express warranty is contained in Paragraph 4.5.1, as follows:

> The Contractor warrants to the Owner and the Architect that all materials and equipment furnished under this contract will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by the provisions of Paragraph 13.2.

[3] This is not meant as an endorsement of the AIA documents. It is usually better practice, depending on the circumstances, for parties to draft construction contracts which are precisely tailored to the intentions of the parties, rather than to rely on the AIA documents for some standard approach.

Under Paragraph 1.1.3, labor, material and equipment comprise the "work" which is the subject of the warranty. Paragraph 1.1.3 states:

> The Work comprises the completed construction required by the Contract Documents and includes all labor necessary to produce such construction, and all materials and equipment incorporated or to be incorporated in such construction.

b. Implied Warranties

The scope of the undertaking, and the contractor's liability for failure to fulfill his part of the bargain, is not confined to express warranties set forth in the document. Maryland law recognizes certain warranties are implied by operation of law in construction contracts. Most notably, "[t]he obligation to perform work with skill and care is implied by law and need not be stated in the contract." Gaybis v. Palm, supra, 93 A.2d at 272. See also Johnson v. Metcalfe, 209 Md. 537, 121 A.2d 825, 828 (1956), where the Court stated succinctly, "A contractor, of course, is liable for breach of contract when he fails to perform work with skill and care. This is implied by law." See Worthington Construction Corp. v. Moore, 266 Md. 19, 291 A.2d 466 (1972). 6 ALR 3d 1394, "Construction Contractor's Liability to Contractee [Owner] for Defects on Insufficiency of Work Attributable to the Latter's [Owner's] Plans and Specifications."

Absent a very clear exclusion of such warranty, Maryland courts would imply a warranty that the work must be performed in a workmanlike manner. Thus, an owner can ordinarily recover in

an action on the contract where faulty workmanship caused a defective product. For a case on doctrine of implied warranty of fitness, see Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator, 274 Minn. 17, 143 N.W.2d 622. Likewise, an implied condition of a construction contract is that the structure will meet the requirements of the building code. Denice v. Spotswood I. Quinby, 248 Md. 428, 237 A.2d 4 (1968).

In some cases, the contractor furnishes the plans as well as performs the work. In such cases, the contractor assumes some responsibility for design flaws. The law implies a duty to act in a reasonable or prudent manner, and this applies to the design element which is part of the design-build contract. In effect, a contractor who furnishes plans may find that the law implies a warranty that the plans are free from defect, or, at least, that the plans meet the customary standards of the trade. Kerr v. Milwee, supra. See also Robertson Lumber v. Stephen Farmers Cooperative Elevator, surpa.

In analogous cases, other State courts emphasize the owner's reliance on the contractor's promise to provide a satisfactory "end product." Thus, for example, in Lewis v. Anchorage Asphalt Paving, 535 P.2d 1118 (Alaska, 1974), "The nature of the contract determines to a large degree who is liable for defects in the end product. If the contract calls only for a certain result, then the contractor must rely on his own expertise in devising a satisfactory means of achieving that end." This rationale is related to the cases which deny extra compensation to a federal

government contractor whose work does not measure up to "performance" specifications. E.g., Monitor Plastics Co., ASBCA 14447, 72-2 BCA ¶9626 (1972).

In any event, the contractor is not liable for defects if he performs the work strictly in accordance with the plans, even if the result is defective, where the plans furnished by the owner (or his architect) contained the defects. Dewey Jordan, Inc. v. Maryland-National Capital Park and Planning Commission, 265 A.2d 892, 258 Md. 490 (1970) supports the proposition that a contractor is not liable where he follows owner's specifications but the result proves faulty. See 6 A.L.R.3d 1394, 1397, supra.

A contractor is not liable if owner-furnished materials turn out to be defective. Hammaker v. Schleigh, 157 Md. 652 147 A 790 (1929). In general, a builder is not liable for defective material used in construction, if he had no knowledge of the defect and otherwise exercised reasonable care and skill. See also 61 A.L.R.3d 792, Annotation, "Liability of Builder or Subcontractor for Insufficiency of Building Resulting from Latent Defects in Materials Used."

c. Warranties Imposed by the Uniform Commercial Code

The State of Maryland generally adopted the Uniform Commercial Code. See Md. Com. Law Code Ann. §2-314 et seq. (1975). However, construction contracts are usually viewed as contracts for "services," rather than for "sales" of goods. UCC warranties do not generally apply. It is beyond the scope of

this article to discuss in detail the application of UCC-based warranties. See Braude and Patin "UCC Problems in Construction" Briefing Paper No. 83-6, Federal Publications (1983).

There is a recent case, however, which may suggest a trend in Maryland law towards aplication of the UCC to construction cases. In Anthony Pools v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983), the Court of Appeals dealt with construction of a swimming pool and diving board. This presented a case of a mixed or hybrid transaction, i.e., a contract partially for rendering services and partially for supply of consumer goods. There, a consumer got hurt when he fell off a diving board which was furnished and installed by the contractor. The plaintiff sought damages for breach of the UCC implied warranty of merchantability on the grounds that the diving board was defective.

The plaintiff alleged that defective diving board came within the definition of consumer goods. He argued that the contractor's attempted disclaimer of this warranty was therefore ineffective. The Court ruled that the diving board retained its character as a consumer good. The UCC based, implied warranty was effective, therefore.

The Court addressed only the application of the UCC based, implied warranties to sale of "consumer goods." Under CL §9-109 (1) refers to such goods as those bought or used "primarily for personal, family or household purposes."

It is unsettled whether the Court's reasoning applies to defective items installed as a minor part of a public work project. It is difficult to see how such construction would justify application of the UCC. See, e.g., White v. Peabody Construction 386 Mass. 121, 434 N.E.2d 1015 (1982) where UCC's implied warranty did not apply to leaky windows in contract for construction of a housing project. For a detailed discussion of the UCC and Anthony Pools case, see the Note by Bodley "Uniform Commercial Code -- Implied Warranty Provisions of the Maryland Uniform Commercial Code are Applicable to Consumer Goods Even When the Transaction is Predominantly One for the Rendering of Consumer Services," 13:2 U. Balt. L. Rev. 405 (1984). See also Snyder v. Greenbaum, 38 Md. App. 144, 380 A.2d 168 (1977) for the Court's application of UCC to contract to furnish and install carpeting.

On a related matter, see Burton v. Artery Company, 279 Md. 94, 367 A.2d 935 (1977), where the Court dealt with an action on contract for sale of sod, trees and shrubs. The Court of Appeals ruled that the contract action was subject to the four year statute of limitations prescribed in Maryland UCC. For other cases on statutes of limitations in actions against contractors involving defects in construction, see 12 A.L.R.4th 866. For cases reiterating the rule that "purchasers of a new house may not (in the absence of legislation) recover for defective con-

struction under the doctrine of implied warranty, see Thomas v. Cryer, 251 Md. 725, 248 A.2d 795 (1969) and Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968).

4. Guarantees

Defective construction may be actionable as a violation of a guarantee expressed in the contract. It is common that a contractor will guarantee, for example, that the contractor will make any necessary repairs of defective work for a period of one year.

At its simplest level, this is but another illustration of the principle that the contractor's liability is fixed by the terms of his contract. Since a contractor is obligated to perform in accordance with the terms of the agreement, he is liable insofar as performance falls short. 13 Am. Jur. 2d Building, Etc. Contracts §27, citing Hall v. MacLeod, 191 Va. 665, 62 S.E.2d 42.

The State Department of General Services uses the following clause in some of its contracts for construction:

> 7.17 Guarantees:
>
> The contractor guarantees for a two year period (unless another period is specified), commencing on the date fixed by the parties:
>
> 1. That the Work contains no faulty or imperfect material or equipment of any imperfect, careless, or unskilled workmanship.
>
> 2. That all mechanical and electrical equipment, machines, devices, etc. shall be adequate for the use to which they are

> intended, and shall operate with ordinary care and attention in a satisfactory and efficient manner.
>
> 3. That he will re-execute, correct, repair or remove and replace with proper Work, without cost to the State, any work found not to be as guaranteed by this section. The contractor shall also make good all damages caused to other Work or materials in the process of complying with this section.
>
> 4. That the entire work shall be watertight and leak-proof in every particular.

In the AIA Contract A201 (1976 Ed.), paragraph 13.2.2 sets forth the following guarantee with respect to repair of defects:

> If, within one year after the Date of Substantial Completion of the work or designated portion thereof or within one year after acceptance by the Owner of designated equipment or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be defective or not in accordance with the Contract Documents, the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This obligation shall survive termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.

As a practical matter, it is usually cheaper for the contractor who built the structure to return and correct defective work. Assuming the business relationship between the owner and contractor is on a sound footing, the contractor is much better able to perform the corrective work than would be a new contractor.

Apart from this practical advantage, an owner may run into legal difficulties if he elects not to call in the original contractor. In some states, for example, the contractor's guarantee is construed as the owner's exclusive right against the contractor. See e.g., Independent Consol. School Dist. No. 24 v. Carlstrom, 151 N.W.2d 784 (Minn. 1967). See Annotation 84 A.L. R.2d 338; 17A CJS Contracts §515, n.77. Ordinarily, unless the contract clearly expresses it, the one year guarantee period will not be construed as an exclusive remedy. See Bender-Miller Company v. Thomwood Farms, 179 S.E.2d 636 (Va. 1971); Pierce "The Fundamental Rights and Responsibilities of the Owner - What Does the Owner Do When the Roof Leaks?", Public Law Institute (April 7, 1981). See also Austin Co. v. Vaughn Bldg., 643 S.W.113 (1982 Tex.).

With respect to defects noticed prior to completion and acceptance of the work, it is worth noticing that the Maryland Department of Transportation uses a clause which is closely related to the warranty that work performed is free from defects in standard federal government contracts. General Provisions 5.02 and 5.09 which are among the clauses required since 1976 for all Md. DOT construction contracts, provide that:

> GP-5.02 Conformity with Contract Requirements
>
> All work performed and all materials furnished shall be in conformity with the Contract requirements.
>
> In the event the Engineer finds the materials or the finished product in which the materials are used or the work performed are not in reasonably close conformity with the Contract

> requirements and have resulted in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor.
>
> In the event the Engineer finds the materials or the finished product in which the materials are used are not in conformity with the Contract requirements but that acceptable work has been produced, he shall then make a determination if the work shall be accepted. In this event, the Engineer will document the basis of acceptance by a Change Order which will provide for an appropriate adjustment in the Contract price.
>
> GP-5.09 Removal of Defective Work
>
> All work and materials which do not conform to the requirements of the Contract will be considered unacceptable, unless otherwise determined acceptable under the provisions in GP-05.02.
>
> Any defective work, whether the result of poor workmanship, use of defective materials, damage through carelessness or any other cause, found to exist shall be removed and replaced by work and materials which shall conform to the Specifications or shall be remedied otherwise in an acceptable manner by the Engineer.
>
> Upon failure on the part of the Contractor to comply promptly with any order of the Engineer, made under the provisions of this Article, the Engineer shall have authority to cause defective work to be remedied or removed and replaced and unauthorized work to be removed and to deduct the costs from any monies due or to become due the Contractor under this Contract.

To date, the MSBCA has not yet issued any significant interpretations of this clause. The best source for case law interpreting this clause can be found, by analogy, in the decisions issued by the former U.S. Court of Claims, now known as the Claims Court,

and various federal boards of contract appeals. See, e.g. Southwest Welding & Mfg. Co. v. United States, 88 Ct. Cl. 925, 413 F.2d 1167 (1969); Valley Asphalt Corporation ASBCA NO. 17595, 74-2 BCA ¶10,680 (1974).

B. Tort

1. Negligence

Defective construction can give rise to a claim based on the tort theory of negligence. The claim comprises the traditional elements of negligence: (1) the contractor had a duty, express or implied, to construct the building in a workmanlike manner; (2) the contractor breached the duty; (3) the breach of the duty proximately caused damages. See 16 M.L.E. Negligence.

A claim of negligence may be unnecessary. After all, there may be little or no difference between a breach of the duty in contract versus the duty in tort to perform in a workmanlike manner. "The mere negligent breach of a contract, absent a duty imposed by law independent of that arising out of a contract itself, is not enough to sustain an action sounding in tort." Heckrotte v. Riddle, 224 Md. 591, 168 A.2d 879, 881-92 (1961); 5 M.L.E. Actions §24.

Owners tend to make such allegations, perhaps in some abundance of caution. One commentator, Pierce, supra, at 444, suggested that the negligence count may make contribution available when parties are jointly liable in tort. Depending on the case, computation of damages may differ between contract and tort recovery. See Baltimore Federal Savings & Loan Assn'n. v.

Gordon, 272 Md. 52, 321 A.2d 157 (1973). Cf. Mullan v. Hacker, 187 Md. 261, 49 A.2d 640 (1946); Taylor v. King, 291 Md. 50, 213 A.2d 504 (1965); Sainato v. Potter, 222 Md. 263, 159 A.2d 632 (1960).

2. Misrepresentation

Maryland law provides relief for the victim of misrepresentation, deceit, or fraudulent concealment. Owners may resort to this theory in an effort to recover for defective work discovered after completion of the work.

The alleged misrepresentation may occur in numerous fatual situations. For example, as a precondition of obtaining final payment, the contractor usually must represent that there are no known defects and that the work was performed in a workmanlike manner. The fraudulent misrepresentation claim arises because the contractor allegedly deceived the owner by making these representations.

Few cases present a strong enough factual foundation to prove deceit or fraudulent misrepresentation on the part of the contractor. The elements of deceit were reiterated recently in Martens Chevrolet, Inc. v. Seney, 292 Md. 328, 439 A.2d 534, 537 (1982), quoting Gittings v. Von Dorn, 136 Md. 10, 15-16, 109 A 553, 554 (1920):

> To entitle the plaintiff to recover it must be shown: (1) that the representation made is false; (2) that its falsity was either known to the speaker, or the misrepresentation was made with such a reckless indifference to truth as to be equivalent to actual knowledge; (3) that it was made for the purpose of defrauding the person claiming to be

> injured thereby; (4) that such person not only relied upon the misrepresentation, but had a right to rely upon it in the full belief of its truth, and that he would not have done the thing from which the injury resulted had not such misrepresentation been made; and (5) that he actually suffered damage directly resulting from such fraudulent misrepresentation.

These principals were generally reflected in Polson v. Martin, 238 Md. 343, 180 A.2d 295 (1961), where an owner purchased a house, but the vendor declined to give a guarantee about its quality. After purchase, the cracks appeared in the basement. In this case, the vendor asserted that the house was built in accordance with the building code and there was no evidence that the statement was made without honest belief in its truth. The Court of Appeals ruled there was no fraudulent misrepresentation. See also Fowler v. Benton, 245 Md. 540, 226 A.2d 556 (1967).

The owner may seek recovery on a theory of negligent misrepresentation. Here, the element of scienter, or intent to deceive, may be less difficult to approve. Despite some earlier remarks to the contrary, the Court of Appeals has settled that an action lies for negligent misrepresentation. As set forth in Martens Chevrolet, Inc., the elements of negligent misrepresentation are:

> (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
> (2) the defendant intends that his statement will be acted upon by the plaintiff;

> (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
> (4) the plaintiff, justifiably, takes action in reliance on the statement; and
> (5) the plaintiff suffers damage proximately caused by the defendant's negligence.

In an earlier case, Delmarva Drill Co., Inc. v. Tuckahoe Shopping Center, Inc., 268 Md. 147 A.2d 37 (1973), the Court of Appeals dealt with an alleged promise to produce usable water where there was no evidence that it was made with the intention of not performing. In its opinion, the Court also stated, at 41 of 302 A.2d that "there can be no recovery in an action for deceit on the ground of negligent misrepresentation." However, this statement was overruled by the Court of Appeals in Martens Chevrolet, Inc. v. Seney, supra.

Finally, there may be actionable fraud where the law imposes a duty to disclose defective construction, and the contractor fails to do so. See e.g., Walsh v. Edwards, 233 Md. 552, 197 A.2d 424; see also Annotation, "Duty of Contractor to Warn Owner of Defects in Subsurface Condition," 73 ALR 3d 1213.

One further, albeit remote, tort theory for recovery where the owner finds defective construction is an action of intentional infliction of mental distress.

IV. Other Legal Remedies for the Owner

A. Claims Against the Subcontractor

1. Contract

In the usual case, owners cannot recover contract damages against a subcontractor for defective work. The owner usually lacks privity of contract with the subcontractor. Although the concept of privity is steadily being eroded, liability for defective work usually goes no further than the prime contractor. It is he who promised proper performance and the owner should look to the prime contractor for damages.

There are cases which turn on the theory that an owner is the third-party beneficiary of the subcontract between the prime and the subcontractor. In general, it is the rule that owners are incidental beneficiaries of the subcontracts. Accordingly, defective work by the subcontractor does not permit recovery by the owner in action against the subcontractor. See "Contracts for the Benefit of Third Parties in the Construction Industry," 40 Fordham L. Rev. 315 (1971); See Sears, Roebuck v. Jardel, 421 F.2d 1048 (3rd Cir. 1970).

2. Tort

An owner may pursue recovery from a subcontractor based on a negligence theory. The elements of this theory were outlined in the section on contractor's negligence. One legal hurdle to overcome concerns proving it was "reasonably foreseeable" that the owner would be injured by the subcontractor's defective work. The other elements of the negligence claim are similar whether

the owner's action is against the prime or the subcontractor. See also Reid v. Royal Ins., 390 P.2d 45, 80 Nev. 137 where the contractor was held liable for subcontractor's negligence.

B. Claims Against Manufacturer or Vendor/Supplier

1. Contract

As noted, an owner may notice the result of defective work, e.g., the basement is wet, but does not immediately know the source. If the real defect is faulty materials, e.g., the waterproofing agent was chemically defective, the owner may have recourse against the supplier.

An owner's rights in such cases may involve the application of the Uniform Commercial Code. Again, it is beyond the scope of this article, however, to discuss in detail such matters. Suffice it to say that where the owner had an agreement for sale directly with the manufacturer or material supplier, the guarantees and warranties contained in the contract are more apt to protect him than otherwise. See Construction Briefings #81-3 (Spragers, "Builders New Home Warranties") and Construction Briefings #83-6 (Braude and Patin, "UCC Problems in Construction"), surpa.

2. Tort

Strict liability theory of recovery in tort law may provide a source of relief for the owner under very limited circumstances. For a brief summary, see Sheehan v. Anthony Pools, 50 Md. App. 614, 620-26. 440 A.2d 1085, 1089-92 (1982), which the

Court of Appeals adopted at Anthony Pools v. Sheehan, 445 A.2d at 441 (1983). See also Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).

V. Owner Remedies Against Architect/Engineer

In some cases, an owner may recover damages from an architect, under contract and tort theories, where the building constructed is defective. The contract action is for breach on the grounds that the architect failed to peform the contract for design. The tort action is for negligence on the grounds that the architect breached his duty to apply professional skill in the design of the project. See Fred Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

In general, an A/E owes a duty to the owner to perform his work properly, but not perfectly. An A/E can be held liable, in other words, where his performance is improper, but not so if it is merely imperfect. "The duty owed by an architect to his employer is that he will exercise and apply his skill and ability, judgment and taste, reasonbly and without neglect," as set forth in Bayshore Development Co. v. Bonfoey, 75 Fla 455, (1918), citing Coombs v. Beede, 89 Me. 187, 36 A 104 (1896); Ressler v. P.S. Neilsen, 76 N.W. 157 (1956). See Bell, Professional Negligence of Architects and Engineers, 12 Vand. L. Rev. 711 (1958).

In Blockston v. United States, 278 F. Supp. 576, (Md. 1968), the Federal District Court of the District of Maryland citing Bloomsburg Mills v. Sardoni Construction, 401 Pa. 358, 164 A.2d

210 (1960) assumed the same obligation applied to engineers as architects, namely "while an architect is not absolute insurer of perfect plans, he is called upon to prepare plans and specifications which will give the structure so designed reasonable fitness for intended purpose, and he impliedly warrants their sufficiency for that purpose." The A/E's implied warranty of accuracy of sufficiency generally makes the contractor not responsible for consequences of the errors contained in the plans. See U.S. v. Spearin, 248 U.S. 132 (1918).

In general, an A/E can be held liable for defective work attributable to the plans and specifications which he prepared under his contract with the owner. See Hazen and Sawyer, ASBCA No. 26949, 84-1 BCA ¶85,531 (1984). Ordinarily, the duty to perform properly arises out of the contractual relationship.[4]

In order for an owner to recover damages for breach of contract from the architect who allegedly prepared defective plans, the owner must affirmatively carry the burden of proof on two issues. First, the owner must prove that the contractor built the project in accordance with the architect's plans and specifications. Second, the owner must show that the plans were defective. See e.g., Lake v. McElfatrick, 34 N.E. 922 (N.Y. 1893). Realistically, if these two issues are not resolved in favor of

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4 Whether or not an action founded on contract alone constitutes an election of remedies remains controversial. See, Prosser, Torts §92, at 614 (4 ed. 1971).

the owner, the responsibility for the defect should not be placed on A/E. See e.g., Ressler v. Neilson, 76 N.W.2d 157 (N.D. 1956).

A/E potential liability for defects goes beyond preparation of plans and specifications in the design phase. An A/E may contractually obligate itself to perform services during the construction phase of the project. See also Williar v. Nagle, 109 Md. 75, 71 A 427 (1908). For example, AIA Document A201 General Conditions of the Contract for Construction (1976 Ed.), paragraph 2.2.3 and 2.2.4, provide that:

> The architect will "visit the site at intervals appropriate to the stage of construction ... However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work.

The AIA contracts carefully attempt to preclude any liability of defective construction. Paragraph 2.2.3 merely allocates to the architect the duty to "endeavor to guard against defects or deficiencies in the work of the contractor" based on the architect's on-site observation. See J&J Elecric v. Gilbert H. Moen, 561 P.2d 217 (Wash. App. 1974).

The AIA Documents emphasize the limited scope of the architect's undertaking by referring to the role as passive "observation." The AIA Documents avoid the term "supervision," which the court in Reifsnyder v. Dougherty, 152 A 98 101 (Pa. 1930) defined

as to "pass upon the sufficiency of the work, labor and material to determine the right of the contractor to receive payment, to interpret the plans and specifications..."

In Jay Dee Shoes v. Ostroff, 191 Md. 87, 59 A.2d 738 (1948), the Court of Appeals discussed the role of the jury in connnection with an architect's alleged negligence in preparation of specifications. This case, however, did not address remedies for defective construction. AIA Document A201 General Conditions of the Contract for Construction, paragraph 2.2.7 provides:

> The Architect will be the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both the Owner and Contractor.

Paragraph 2.2.11 provides that:

> The Architect's decisions in matters relating to artistic effect will be final if consistent with the intent of the Contract Documents.

In making decisions in this role as interpreter, the architect is generally cloaked with immunity against negligence claims. In general, in the absence of bad faith or fraud, an architect is not liable for his decisions made in his capacity as interpreter of the contract requirements. See Clarke Baridon v. Merritt-Chapman & Scott, 311 F.2d 389 (4th Cir. 1962). Durham v. Reidsville Engineering, 255 N.C. 98, 120 S.E.2d 564. Accordingly, the owner cannot hold the architect responsible for defective construction if the gist of the claim is that the architect's

interpretation of the contract requirements differed with the owner's. See e.g., Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas, supra.