

Legal Scope

A Construction Law Newsletter by Bright Law Firm, PLLC

Advertising Material

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Can a Subcontractor Sue the Owner for Payment?

When a construction project deteriorates into a legal dispute, the problems often trickle down. When this happens, subcontractors may find themselves without payment for the work performed. Usually, the subcontractor has a contract with the general contractor. But what if the general contractor has filed for bankruptcy, or gone insolvent, or is absolutely missing? It is tempting for subcontractors to seek payment from the project owner, and this attempt is met with mixed success.

The most straightforward path for subcontractor payment is to have a contract and sue for breach of contract. Subcontractors are generally in contract (called privity) with general contractors. Unless the subcontractor also entered a separate contract with the owner, the subcontractor generally cannot succeed on a claim for breach of contract against the owner.

Assuming the typical circumstances (e.g. no contract between owner and subcontractor), the best method to seek payment from an owner is through filing a

mechanics' lien claim. Also, while not technically a claim against the owner, another viable option is to file suit on a payment bond (if one exists on the project).

If a mechanics' lien claim or payment bond claim are not an option—perhaps timelines have been missed, or some other obstacle exists—then, few options remain. Subcontractors can attempt to pursue payment from an owner under a creative theory of unjust enrichment, estoppel, or other causes of action. Sometimes these claims are successful in pursuing payment, but it is very fact specific and depends on the individual circumstances.

In Pennsylvania, rare cases have recognized a subcontractor's right to payment from the owner on the theory of unjust enrichment. This generally requires the owner to have represented to the subcontractor that payment would be assured. *See D.A. Hill Co. v. CleveTrust Realty Investors*, 573 A.2d 1005 (Pa. 1990); *Gee v. Eberle*, 420 A.2d 1050 (Pa. Super Ct. 1980). To emphasize, the majority of Pennsylvania cases have rejected the subcontractor's claim for unjust enrichment against the owner. Maryland case law indicates a similar position: recovery against the owner on the theory of unjust enrichment is not impossible, but it is still rare and usually requires the owner to have made certain representations to the subcontractor. *Bennett Heating & Air Conditioning, Inc. v. NationsBank of Maryland*, 674 A.2d 534 (Md. 1996).

In other rare circumstances, the subcontractor may also have a priority right to the specific construction funds. *See, e.g., Trevdan Bldg. Supply v. Toll Bros., Inc.*, 996 A.2d 520 (Pa. Super. Ct. 2010). These claims are complex because the specific funds must be identified and attached. Timing becomes crucial; the subcontractor may need to first acquire a judgment, or perhaps place the fund-holder on notice prior to the funds being dissipated.

When payment is withheld or delayed, it is important to timely consult with an attorney to evaluate legal rights. Failure to act in a timely manner may result in the waiver or loss of certain legal rights.

The Numbers:

691.2 Billion

- Year-to-date total construction in the U.S. through July 2017.
- This is a 4.7% increase compared to 2016.
- Private construction is leading the way. Total private construction is up 7.9% compared to 2016.
- Total public construction is down 5.1% compared to 2016.

Source(s): U.S. Census Bureau, Monthly Construction Spending, Release No. CB17-146 (9/1/17).



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Legal Scope is written by Jeffrey Bright, an attorney licensed in Pennsylvania and Maryland. For more information, contact Bright Law Firm. This newsletter is not legal advice. Unlike this newsletter, legal advice is specifically tailored to the facts, law and objectives unique to each circumstance. **To join or remove yourself from this subscription list, email jbright@bright-lawfirm.com.**