

Can Property Owners Sue Subs?

by Quenda Behler Story

Some time ago in Colorado, a property owner hired a contractor to construct a building. Not long after it was completed, a heavy snowfall caused the roof to collapse. The property owner did what you would expect him to do: He sued the contractor. But he also sued every sub who had ever set foot on the job site.

Is that legal? Can a property owner sue a subcontractor? "Hey," I hear all you outraged subs saying, "my contract is with the prime contractor, not the property owner — which is why if I'm not paid, I can't sue the property owner. As it is, I have to jump through hoops to file a mechanic's lien. So if I can't sue the property owner, surely he can't sue me!"

Well, most of the time, he can't — but there are circumstances in which a property owner may be able to successfully sue a subcontractor. A property owner's ability to sue a sub with whom he doesn't have a contract hinges on two legal theories, one that deals with "third-party beneficiaries" and another that addresses negligence lawsuits based only on economic loss.

Third-Party Beneficiaries

To explain, let's look at another lawsuit, this one in Pennsylvania. The court allowed a property owner to sue a sub because the property owner was a "third-party beneficiary" of the contract between the prime contractor and the property owner. The reason the property owner was a third-party beneficiary, the court said, was threefold: He had directed the contractor to use that particular sub; there had been a prior direct relationship between the property owner and that sub; and the sub had helped plan the project.

In other words, the court decided that the three parties were so closely and so directly involved with each other, the usual subcontractor-prime contractor-property owner relationship didn't exist. In the court's opinion, the relationship that did exist among these three parties was different enough from the norm that the usual rules did not apply.

Negligence Without Injury

Could these waters get any muddier? Oh, yes. In yet another lawsuit in Colorado, a property owner claimed he didn't need a contract to sue a sub who performed work on his building because that subcontractor had a duty to perform his work carefully, and since he hadn't, the property owner could sue that sub for negligence even though no one had been injured.

Allowing a negligence lawsuit in which there are only economic damages is startling for a couple of reasons. First, for most of the past thousand years, negligence lawsuits had to start with a personal injury: Someone was stupid, and because of that stupidity someone else was hurt. That, in a nutshell, is negligence law — no physical injury, no foul. This particular suit upset that old equation.

Second, a negligence lawsuit allows the plaintiff to ask for, and possibly win, money for things that a plaintiff could never, ever win in a lawsuit based on a breach of contract. For example, suppose a beer delivery truck ran a red light and hit your car. You don't have to have a contract with the beer company to sue it, because it has a duty to see to it that its beer trucks are driven carefully and don't hurt anybody. The company failed to meet that duty, and as a result you were injured and your car was damaged. Therefore, you can sue the company for negligence. You can demand — and you could win — money for all sorts of things, like your pain and suffering, or even loss of consortium. Try to get that kind of award the next time you sue someone for not paying the money he promised you in the building contract.

To put it another way, by suing the sub for negligence rather than for breach of contract, the plaintiff dramatically increased the amount he could conceivably collect.

The truth is that the old rules have been eroding — slowly but surely — for quite a while. In some cases, the courts have said that all of the parties on a construction project, including the subcontractors, have a

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duty to do their work carefully, and those courts didn't seem to care much about the lack of a physical injury. For them, it was enough that the subs were careless. And in several of those lawsuits, some plaintiffs who suffered only economic loss were allowed to sue subs for negligence.

Why Subs Get Dragged In

So if you're a sub, how worried should you be? What are your chances of getting sued by a property owner?

As is so often the case, the answer depends on the particular circumstances. If I'm representing a property owner, I will not usually bother to add the name of, say, the drywall sub as a defendant in my lawsuit against the prime contractor — unless, that is, the prime contractor doesn't look too good for the money. Maybe the prime contractor doesn't have enough insurance, and maybe the drywall sub does.

In that case, I would add everybody on the job site to the lawsuit — including the drywall guy — because I'm looking for deep pockets, and the drywall sub's insurance company is rich.

Will I succeed in the suit? I might. Legal outcomes turn on the specifics of each case and on the intricacies of local law, so it's impossible to predict.

My advice to you is to always be sure you are not the only one on the job site with insurance. When your contractor asks you for that insurance certificate, ask to see his. And if you do find yourself the defendant in one of these lawsuits, notify your insurance company right away. Insurance companies keep attack-trained lawyers on staff whose whole job is to get out there and defend you.

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