



Design Professionals Dismissed from Two New Hampshire Lawsuits

Two New Hampshire Superior Courts recently dismissed Error and Omission claims against design professionals. In both actions, Donovan Hatem LLP represented the interests of the design professionals.

In the first case, Susan A. Janicki v. Town of Bradford et. al. Belknap County Superior Court, Civil Action No. 08-C-0464, the Belknap County Superior Court granted a Civil Engineering firm's motion to dismiss on the grounds that the Civil Engineer did not owe a legal duty to the plaintiff absent a contractual relationship, even though property damage was claimed. In July 2004, the Civil Engineer entered into an agreement with a Town relative to the design and construction of a local subdivision (the "Project").

The agreement included a detailed scope of services for the Civil Engineer to review plans for compliance with Subdivision Regulations, prepare a report, attend planning board meetings, and to make periodic site visits. The agreement included enumerated Terms and Conditions stating that the contractor had responsibility for means and methods of construction. The plaintiff sued every entity associated with the Project in October 2008, claiming water runoff from the Project caused extensive property damage to her house. The plaintiff alleged that the Civil Engineer failed to use due care in reviewing the plans for Subdivision Guidelines, and the plaintiff also alleged that the Civil Engineer breached a duty of public protection to guard against hazards arising from the Project.

The Civil Engineer moved to dismiss arguing that its agreement with the Town did not include in its scope of services an obligation to ensure public protection to abutters of the Project, and the Civil Engineer did not owe a duty beyond its Agreement. The plaintiff opposed the motion arguing that the Civil Engineer negligently performed site observations in breach of Site Plan Regulations, and that the Civil Engineer owed a duty to the plaintiff whose harm from the alleged negligence was foreseeable. The Civil Engineer replied that the Site Plan Regulations were the contractor's responsibility, and reiterated that its obligations were limited by its contract. The plaintiff countered that the Subdivision Regulations included provisions similar to the Site Plan Regulations, an argument previously addressed by the Civil Engineer to the effect that it was to determine the Project's conformance with Subdivision Guidelines at completion of construction. The court granted the motion to dismiss holding that the Civil Engineer's obligations were limited by its contract, and that the plaintiff failed to allege that she relied upon the Civil Engineer's services and that no alleged misrepresentations could be supported.

Thereafter, the plaintiff moved for reconsideration and to amend her complaint to add additional facts. The Civil Engineer opposed the motions. The plaintiff replied citing erroneous case law, to which the Civil Engineer responded. Interestingly, the court granted the motion to amend, but then dismissed the action outright on the same basis as its initial ruling.

Similarly, in Robert Parkhurst and Mark Royal v. Mason Lakes Winn Limited Partnership et. al. Merrimack County Superior Court, Civil Action No. 07-C- 0267, consolidated with 07-C-0101, the Court granted summary judgment in favor of an Architect in a personal injury matter because the plaintiff and co-defendants failed to adequately disclose an expert to opine on the Architect's standard of care. In 2008, plaintiffs sued an Architect and a Structural Engineering Firm alleging personal injuries related to the

design and renovation of a multi-family dwelling (the “Project”). The matter was consolidated with a lawsuit previously filed against other entities associated with the Project. In December 2004, the plaintiffs alleged that they were standing on a staircase that collapsed following completion of the Project. Donovan Hatem LLP obtained voluntary dismissal of the claims against the Structural Engineering Firm early in the litigation by demonstrating that the staircase was not within the Structural Engineer’s scope of services. Although the staircase was not in the scope of the Architect’s services either, the plaintiff and a co-defendant refused to dismiss arguing that the Architect could have identified the defects in the staircase during its Construction Administration services.

The Architect moved for summary judgment on the grounds that the plaintiffs and co-defendants failed to properly disclose a standard of care expert to opine on causation and the scope of the Architect’s duty to inspect. The other parties opposed the motion arguing that the Architect’s agreement for services and its deposition testimony established the standard of care and that it breached that standard. The Architect replied that a lay jury was not permitted to interpret disputed contractual language in AIA documents. The court dismissed the Architect holding that duties and obligations contained in standard form contracts require the testimony of an expert to establish both the standard of professional care, and whether the Architect failed to exercise the reasonable care that an ordinary, prudent architect would exercise under the same or similar circumstances.

Both of these well-reasoned decisions will assist in the defense of design professionals in future actions. This is particularly important in New Hampshire where trial courts rely heavily on state law precedent.

Risk Management Prevention Tip

Although they are based on New Hampshire law, these Superior Court decisions reiterate the importance of having a sound contract in place before beginning work on a new project. By limiting your duties to the exact job specifications and those to whom you are bound under the agreement, you can help reduce your potential exposures. It is also important to remember that when defending against a claim, expert opinions, or the lack thereof, can serve as key pieces of testimony, ultimately deciding the outcome in court.

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