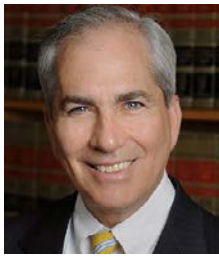


WHEN AN INCORRECT SITE CONDITION REPRESENTATION CAN CONSTITUTE FRAUD



By Henry L. Goldberg, *Managing Partner, Goldberg & Connolly & STA Legal Counsel*

Subcontractors are all too familiar with the perils of site investigation disclaimers in their subcontracts. Such provisions attempt to shift the risk of changed site conditions onto the subcontractor by requiring the subcontractor to conduct its own investigation of the project site and by barring the subcontractor from relying upon any representations by the general contractor concerning site conditions. In the event of changed site conditions, any additional costs that the subcontractor incurs are its own to bear.

A recent New York appellate court decision, however, scored a refreshing victory for subcontractors by reinstating a subcontractor's fraud claim against a general contractor based upon the general contractor's allegedly false representations regarding site conditions on the project, despite the existence of a site investigation disclaimer in the subcontract.

The subcontractor had entered into a subcontract with the general contractor to perform masonry work on a construction project at a university, after the "concrete foundations were installed, structural steel was in place, metal framing was erected and concrete floors had been poured."

The subcontract contained a site investigation disclaimer which stated: "[the subcontractor] accepts responsibility for the inspection of conditions that could affect the Subcontract Work at the Project site, and based on that inspection, and not in reliance upon any opinions or representations of [the general contractor], its officers, agents or employees, acknowledges its responsibility to satisfactorily perform the Subcontract Work without additional expense to [the general contractor]."

In its fraud claim against the general contractor, the subcontractor alleged that, after it executed the subcontract, but before it began its masonry work on the project, the general contractor was informed by at least one of its other subcontractors that its substrate work was not "accurate, flat or level." Nevertheless, the general contractor represented to the subcontractor that the substrate work "had been erected in accordance with the contract requirements and was plumb, level, and true and that [the general contractor] had performed a professional survey of the structural steel to confirm the same."

The subcontractor alleged that the general contractor's representations to it "were false," and that the general contractor "concealed and recklessly withheld from [the subcontractor] knowledge that the substrate was not dimensionally accurate, flat or level." Additionally, the subcontractor alleged that the general contractor made those false representations "in order to deceive [the subcontractor] and induce [it] to commence installation upon the substrate."

The subcontractor further alleged that it relied on the general contractor's representations to its detriment, and that it would not have commenced installation of the masonry work had the general contractor not misrepresented that the substrate had been installed in accordance with contract requirements.

Finally, the subcontractor alleged that it suffered damages as a result of its reliance on the general contractor's knowingly false representations.

The lower court dismissed the subcontractor's fraud claim against the general contractor based upon the site investigation disclaimer in the subcontract, and the subcontractor appealed.

In its appeal, the subcontractor argued that the disclaimer applied only to site inspections and representations that occurred before execution of the subcontract, and not to any representations occurring after execution of the subcontract. The appellate court found that other language in the site investigation disclaimer section of the subcontract supported the subcontractor's position, as it was written in the past tense, and concerned conditions of the site rather than conditions of the work performed by others.

The appellate court first noted that a disclaimer clause will preclude a fraud claim only where the clause "specifically disclaims representations concerning the very matter to which the fraud claim relates." The appellate court reversed the motion court and reinstated the subcontractor's fraud claim, holding that the site investigation disclaimer was "ambiguous" as to whether it precluded the subcontractor from relying on representations of the general contractor "concerning work performed by others after [the subcontractor] executed the subcontract...." Thus, the disclaimer did not "conclusively establish a defense" against the subcontractor's fraud claim.

It should be noted that the appellate court's reinstatement of the subcontractor's fraud claim only preserved the claim at the initial stage of the litigation. However, the subcontractor is now able to attempt to prove the claimed fraud by the general contractor at trial.

G&C Commentary

A subcontractor should not automatically assume that the inclusion of a site investigation disclaimer in its subcontract leaves it with no recourse if it relied upon a general contractor's incorrect characterization of any site condition. A general contractor's knowingly incorrect or inaccurate representation may still constitute fraud if the disclaimer does not specifically include reliance on representations directly related to the subject at issue. Here, the court held that the disclaimer did not clearly address subsequent (i. e., post-contract-signing) representations by the general contractor concerning work by others on site after the subcontract was executed. As a result, the disclaimer was ineffective in insulating the contractor from liability for misrepresenting, in this particular case, the condition of the substrate.

Henry L. Goldberg, Esq. can be reached by email at hlgoldberg@goldbergconnolly.com. or by telephone at (516) 764-2800.

Stephen L. Brodsky, an associate with Goldberg & Connolly, assisted with the preparation of this article.

©Goldberg & Connolly 2017

This article has been prepared for informational purposes only. It is not a substitute for legal advice addressed to particular circumstances. You should not take or refrain from taking any legal action based upon the information contained herein without first seeking professional, individualized counsel based upon your own circumstances. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you written information about our qualifications and experience.