

## CONSTRUCTION LAW: AN OVERVIEW FOR HOMEOWNERS

Most homeowners will conceive a construction project at some time in their lives, whether the construction of a new home or the remodeling of an existing one. Unfortunately, homeowners are frequently at a disadvantage because they are less familiar with the construction process and the laws that govern it than the contractors and architects with whom they deal, occasionally causing them to fall victim to unscrupulous or incompetent individuals. This article provides a brief overview of the issues faced by homeowners at each stage of a construction project, with hints that may help homeowners avoid common pitfalls.

### PRE-CONSTRUCTION

Many homeowners initiate a construction or home improvement project without the assistance of an attorney, but there are several key services for which the assistance of an attorney early on is essential. The nominal cost of involving legal counsel at the preconstruction stage may preserve rights that homeowners frequently lose when they allow architects and contractors to set the terms of their respective contracts.

#### **Contract Review and Negotiations With Respect to Architects**

The first stage of any construction or home improvement project is its design, and only a licensed professional architect can offer design services.<sup>1</sup> The architect may be retained directly by the homeowner or by the contractor on the owner's behalf, although retaining an architect directly may be a homeowner's best option to retain control over project design and avoid the possibility of an unscrupulous contractor illegally offering design services. The following are some concerns for homeowners during contract review and negotiation with respect to architects:

- **Licensing.** As mentioned above, architects must be licensed by New York State. Do not rely on the architect's representations; licensing status may be verified through the New York State Department of Education's Office of the Professions, which provides an online licensing

verification application on its web site: go to <http://www.op.nysed.gov/opsearches.htm> for more details;

- Scope of services. Certainly the architect will be designing the project, but the architect may assume other responsibilities which must be described in the contract. These include whether the architect will also oversee the construction process and certify payments. This is another reason why a homeowner may wish to have his or her own, disinterested architect, rather than an agent of the contractor;
- Timing of services. If the project needs to be completed within a specific timeframe, it is important to specify a date of completion and whether time is of the essence; and
- Dispute resolution and attorneys' fees. While no one wants a contract dispute, homeowners must always be prepared for one. The alternatives for dispute resolution are discussed in greater detail below under **Enforcement of Contract Rights**, and it is important to give thought to these options and incorporate them in the initial contract. Ideally, the contract should also provide that the homeowner is entitled to its reasonable attorneys' fees and costs if he or she must enforce the contract.

### **Contract Review and Negotiations With Respect to Contractors**

Once a construction or home improvement project has been designed, it is necessary to hire a contractor to carry out the work. Too often, homeowners find themselves the victims of unscrupulous or incompetent contractors, but a few proactive steps may minimize the occurrence of such situations. The following are some concerns for homeowners during contract review and negotiation with respect to contractors:

- Licensing. While New York State does not license home improvement contractors, New York City and the counties of Nassau and Suffolk require businesses or individuals be licensed in order to perform home improvement work, and many towns and cities independently license home improvement contractors as well. Rather than relying on a contractor's representations,

licensing status should be verified with the county and city or town, many of which have online applications to search licensed individuals;

- Payment schedule. Too many homeowners have paid substantial amounts to contractors up front, only to have the contractor perform defective work or fail to perform altogether. Ideally, homeowners should pay a reasonable deposit, followed by progress payments at specific stages of completion;
- Required contract terms. General Business Law establishes very specific requirements for home improvement contracts between homeowners and construction contractors with contract sums exceeding \$500.00.<sup>ii</sup> Home improvement contracts must be in writing, signed by all parties, and include, among other things, the contractor's license number, the projected start and end dates of the project, a description of the work to be performed, and notices of the contractor's lien law rights and the homeowner's right to cancel the contract within three business days;<sup>iii</sup>
- Provisions regarding payments of subcontractors and material suppliers. Homeowners are occasionally left on the hook by contractors who accept the homeowner's payments but do not pay third parties for their work; those parties may then seek payment from the homeowner. The contract should provide for the contractor to timely pay all subcontractors—and to indemnify the homeowner against demands from subcontractors and material suppliers;
- Insurance. In the event that the contractor's negligence creates a situation of liability, the contract must have liability insurance in place, with the homeowner named as additional insured. Proof of insurance should be provided before work begins; and
- Termination, dispute resolution, and attorneys' fees. It must be clear in the contract that the owner has the right to terminate the contractor in the event of deficient performance, and the contract should specify dispute resolution procedures and provide that the homeowner is entitled to its reasonable attorneys' fees and costs in the event he or she must enforce the contract.

## **Contract Review and Negotiations With Respect to House Lifters**

In the wake of the massive flooding caused by Superstorm Sandy, increasing numbers of homeowners are turning to house lifting services to guard their property from damage in future storms. Unfortunately, some contractors hold themselves out as having greater expertise in house lifting than they actually do, and the resulting defective work can cause substantial injury to homeowners. The considerations for contract negotiations with house lifters are similar to those for home improvement contractors. In addition, the following may be concerns when retaining a house lifter:

- Municipal requirements. Many towns and cities are amending their building codes to provide standards for house elevations in response to flooding during recent hurricanes.

## **Insurance Claims**

Frequently, construction projects arise after a catastrophic loss, such as a fire or flood, for which the homeowner is being reimbursed by an insurance company. Several special concerns arise in such situations, including the following:

- Settlement amount. It goes without saying that the insurance company makes more money if it pays less to homeowners, and it also goes without saying that homeowners get a better home if the insurance company pays more. Thus, negotiation of an optimum settlement amount, coordinating with the architect and contractor's estimates of construction costs, is essential; and
- Coordination with lender. Most homeowners have a mortgage on their primary residence, meaning that insurance proceeds will be made payable to the lender as well as the homeowner and will probably be disbursed by the lender. The lender may also need to review and participate in contract negotiations.

## **DURING CONSTRUCTION**

The importance of contract negotiation cannot be emphasized enough, but the assistance of an attorney is equally essential during the construction phase of a project. This is the point where the quality of services on a contract will be tested, and in the event that the homeowner has concerns, it is important to have a strong advocate to interpret and enforce the homeowner's contract rights.

## Monitoring Contractor Performance

The contractor's work must be monitored throughout the construction process and held to compliance with the project plans and specifications, municipal codes, and the terms of the construction contract. Several concerns may arise during construction which must be addressed, including:

- Abandonment of work. This is a breach of the construction contract;<sup>iv</sup>
- Working without a building permit. This is also a breach of the construction contract;<sup>v</sup>
- Wrongful work stoppages and payment demands. This is also a breach of the construction contract;<sup>vi</sup>
- Dangerous conditions being permitted on the project site. This concern is especially pressing due to potential owner liability for worker injuries under the Scaffold Law;<sup>vii</sup>
- Defective and nonconforming work. In addition to breaching the contract, this may also inflict property damage or raise the possibility of personal injury.

## Termination/Replacement of Faulty Contractors

When concerns continue arising with a contractor's work, it may be necessary to terminate and replace the contractor. When a construction contractor breaches its contract, the homeowner has the right to terminate the contract and seek damages.<sup>viii</sup> Nevertheless, this must be done in accordance with the terms of the contract or may not constitute a valid termination, so consultation with an attorney is essential. A replacement contractor must also be properly vetted so as to prevent the homeowner from repeating the hassles of the terminated contractor.

## Lien Filings

People and businesses that provide services related to the improvement of real estate are entitled to mechanic's liens that attach to the property.<sup>ix</sup> It is not unheard-of for contractors to file mechanics' liens to exert pressure on homeowners to meet payment demands, so best practice is to obtain lien waivers over the course of the project. Once a stage of the project has been completed, the contractor (and, where applicable, subcontractor) should be required to provide a waiver of mechanics lien in the

amount of all payments to date.

## POST-CONSTRUCTION

Ideally, project completion will be the end of the construction process, and the parties will go their respective ways pleased with the outcome. In practice, construction projects often create disputes that must be dealt with even after the improvement has been completed.

### Homeowner Defense

At times, architects, contractors, and others may assert claims against homeowners. Typical claims that must be defended include the following:

- Payment claims. These may include demands for delay damages and change orders, occasionally when not approved by the homeowner. Other payment claims may originate with subcontractor or suppliers who have not been paid by the prime contractor on the project. Even if the homeowner believes these claims are false, it is important to assert defenses, including defective construction and lack of a home improvement license,<sup>x</sup> rather than risk defaulting.
- Mechanics' liens. As mentioned above, New York law provides for mechanics' liens for those who provide construction work. The consequences of failing to defend against a mechanic's lien include foreclosure of the home in much the same manner as in a mortgage foreclosure by a bank, but homeowners possess numerous defenses. Mechanics' liens must strictly comply with the Lien Law in terms of contents, filing, service, and timing, and may occasionally be discharged without further legal action. Homeowners may also counterclaim if a mechanic's lien willfully exaggerates the amount due, meaning that the contractor intentionally filed a lien knowing that he was not entitled to the full amount sought.

### Enforcement of Contract Rights

Homeowners are entitled to have the full scope of project construction work performed in a workman-like manner, free of deficiencies, and in accordance with the project's plans and specifications and the requirements of all applicable building codes. Typical claims by homeowners against contractors and architects include defective design, defective construction, defective house

lifting, delay damages, and property damage. To pursue these claims, homeowners have several remedies, including the following:

- Complaints to consumer protection agencies. New York City and Nassau and Suffolk Counties each have their own Department of Consumer Affairs which licenses home improvement contractors. They also take and investigate consumer complaints against contractors and may impose fines and license suspensions or order restitution to consumers;
- Litigation. By filing a complaint in the proper court, homeowners can present their claims to a judge with the goal of obtaining a judgment. The length and complexity of litigation depends on the amount of monies sought and the court in which the action is commenced;
- Arbitration. Alternatively, homeowners may wish to take advantage of the arbitration process, which runs in a quicker timeframe and is less formal. In arbitration, a neutral third-party will hear both sides' cases in much the same manner as a judge and issue an award which may be converted into a judgment; and
- Settlement. Ideally, the parties may settle any claims before or during any of the processes described above. Settlement generally involves each side compromising but also avoids some of the costs involved in pursuing litigation or arbitration to their conclusions.

### **Judgment Collections**

In the event the homeowner obtains a judgment against an architect, contractor, or other party to the home improvement contract (who is then referred to as a "judgment debtor"), that judgment will be enforceable for 20 years. There are several options for seeking recovery under the judgment, including the following, which may be issued by an attorney as officer of the court:

- Information subpoenas to locate assets of the judgment debtor;<sup>xi</sup>
- Restraining notices to preserve assets of the judgment debtor to satisfy the judgment;<sup>xii</sup>
- Income executions on wages earned by an individual judgment debtor;<sup>xiii</sup> and
- Executions to seize property of the judgment debtor to satisfy the judgment.<sup>xiv</sup>

## CONCLUSION

As discussed above, construction projects present many legal challenges and concerns to homeowners, who may not be as well-versed in the construction business as the architects and contractors with whom they deal. With the assistance of counsel with experience in construction law, however, homeowners may protect important rights and limited their exposure to negligent and fraudulent practices on the part of individuals and businesses in the construction industry.



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had legal articles published and is appointed to serve as an arbitrator to the American Arbitration Association Construction Industry Panel of Neutrals. Mr. Caravella is also a member of the Nassau County Bar Association Construction Law Committee, Broward County Bar Association Construction Law Committee, New York State Bar Association and writes for The [Construction Law Blog](#). He is admitted to the New York State Courts, Federal Court – Eastern District of New York, and Florida State Courts. He earned his B.S. degree from New York Inst. of Tech., Old Westbury NY, followed by earning his J.D. from Nova Southeastern University, Ft. Lauderdale FL.

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<sup>i</sup> Education Law §§ 7301 (defining practice of architecture to include “design and construction of buildings”) and 7302 (only licensed architect to practice architecture).

<sup>ii</sup> General Business Law § 770.

<sup>iii</sup> General Business Law § 771.

<sup>iv</sup> See, *City of Elmira v. Larry Walter, Inc.*, 76 N.Y.2d 912, 564 N.E.2d 655 (1990).



<sup>v</sup> *Barrett v. Johnson*, 150 N.Y.S.2d 853 (App. Term 2d Dep't 1956).

<sup>vi</sup> *Remodeling Const. Servs. v. Minter*, 78 A.D.3d 1677, 913 N.Y.S.2d 446 (4<sup>th</sup> Dep't 2010).

<sup>vii</sup> *See, e.g.*, Labor Law § 240.

<sup>viii</sup> *See, e.g., Markham Gardens L.P. v. 511 9th LLC*, 38 Misc. 3d 325, 331, 954 N.Y.S.2d 811, 815 (Sup. Ct. Nassau Cty. 2012).

<sup>ix</sup> Lien Law § 3.

<sup>x</sup> *See, e.g., B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689 (1990).

<sup>xi</sup> CPLR R. 5224.

<sup>xii</sup> CPLR § 5222.

<sup>xiii</sup> CPLR § 5231.

<sup>xiv</sup> CPLR § 5230.