

CONSTRUCTION LAW

Recent decisions on home improvement subcontractors' rights

By Karl Silverberg

Two recent Appellate Division decisions ruled on legal issues affecting subcontractors' rights when performing home improvement work. First, subcontractors performing home improvement work must be licensed as a home improvement contractor to secure their right to payment from the general contractor.¹ Second, subcontractors, as well as suppliers, do not have mechanic's lien rights against a residential homeowner's property when the general contractor is not licensed as a home improvement contractor.²

The CMC case

"A home improvement contractor who is unlicensed at the time of the performance of the work for which he or she seeks compensation forfeits the right to recover damages based on either breach of contract or quantum meruit."³ Suffolk, Nassau, Westchester, and New York City counties, as well as certain townships and villages, require that contractors performing home improvement work be licensed by their local department of consumer affairs.

CPLR § 3015(e) states: "Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs . . . the complaint shall allege . . . that plaintiff is duly licensed and shall contain the name and number . . . of such license The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal." "The fact that the homeowner was aware of the absence of a license or even that the homeowner planned to take advantage of its absence creates no exception to the statutory requirement."⁴

In *CMC Quality Concrete III, LLC v. Chris Craftsman Development, Inc.*⁵, the Second Department, without much discussion, concluded that the forfeiture rule noted above extends to unlicensed subcontractors trying to collect payment from a general contractor on home improvement projects.

The *CMC Quality* case appears to be a policy shift. The Second Department had ruled in the past that a home improvement subcontractor was required to be licensed, but that case provided a textural analysis of the East Hampton Town Code at issue. In that case, the court found, "The relevant [Town] Code provisions state that a contract for home improvement services between . . . a contractor and 'an owner or his agent' constitutes a 'home improvement contract' within the meaning of the Code[:]. . . . the Code also broadly defines the term 'owner' as including 'any owner, . . . , or any other person who orders, contracts for or purchases the services of a home improvement contractor or any person entitled to performance of such service. . . . [T]he record supports the conclusion that the general contractor was the owner's agent for obtaining the services of subcontractors."⁶

The *CMC Quality* court did not conduct a similar textural analysis of the Westchester County Code at issue. The Westchester Code is arguably narrower, and states: "'Home improvement business' means the business of providing for a profit, a home improvement to an owner;" "'Home improvement contract' means an agreement between a 'contractor and an owner.'" Additionally, the "Legislative Findings," states, "[B]ecause of the increase in complaints by residential



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dwellers in the County of Westchester about abuses on the part of home improvement contractors, it has become desirable to safeguard and protect such residents by regulating the home improvement, remodeling and repair business."

The Westchester Code appears to be focused on protecting consumers, as opposed to businesses that are presumably knowledgeable enough to protect themselves. Further, CPLR § 3015(e) uses the word "consumer."

It would now appear that all home improvement subcontractors in the Second Department need to be licensed when performing home improvement work no matter which county or local code applies.

The Kamco Supply case

In *Kamco Supply Corp. v JMT Brothers Realty, LLC*⁷ the First Department affirmed a lower court's ruling dismissing a supplier's mechanic's lien against a residential property. The Appellate Court's decision was based on the trial court's finding that the general contractor was not a licensed home improvement contractor.

The court based its decision on the long standing proposition that mechanic's lien rights of subcontractors and suppliers exist only to the extent that the owner owes a debt to the general contractor. Lien Law § 4(1) states: "If labor is performed [by a] . . . subcontractor[,] . . . the lien shall not be for a sum greater than the sum earned and unpaid on the [general] contract." As stated by the *Kamco* court: "Where a home improvement contract has been rendered unenforceable, there can be no funds due and owing from the owner to the unlicensed general contractor to support a sub-

contractor's mechanic's lien claim."⁸

The rule that lien rights are derivative puts urgency on unpaid subcontractors and suppliers to file mechanic's liens as early as possible while there still might be funds due from the owner to the general contractor. Once the owner pays the general contractor in full, the owner has no obligations to those that file liens after final payment.

As a practical matter, subcontractors and suppliers that improve residential property should confirm that the general contractor is licensed. This should be done to protect their mechanic's lien rights. Confirmation should also be obtained because if the general contractor cannot collect payment from the homeowner, it could make the general contractor insolvent, making it difficult for the subcontractors and suppliers to get paid.

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1. *CMC Quality Concrete III, LLC v Indriolo*, 95 A.D.3d 924 (2d Dep't 2012).
2. *Kamco Supply Corp. v. JMT Bros. Realty, LLC*, 950 N.Y.S.2d 701 (1st Dep't 2012).
3. *CMC Quality Concrete III, LLC*, 95 A.D.3d at 925.
4. *Racwel Constr., LLC v. Manfredi*, 61 A.D.3d 731, 733 (2d Dep't 2009).
5. 95 A.D.3d 924 (2d Dep't 2012).
6. *Lorenzo Marble & Tile v. Meves*, 236 A.D.2d 448, 449 (2d Dep't 1997).
7. 950 N.Y.S.2d 701 (1st Dep't 2012)
8. *Id.*