



Supreme Court Denial of Certification Leaves Owner's Protections Under Lien Law and Privity in Doubt

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Background

Under principles set forth in Insulation Contracting and Supply v. Kravco, Inc. 209, N.J. Super 367 (App. Div. 1986) and F. Bender, Inc. v. Jos. L. Muscarelle Inc., 304 N.J. Super 282 (App. Div. 1997), subcontractors and suppliers on New Jersey construction projects have no right to bypass the parties they contracted with and sue others further up the contractual chain. Thus, subcontractor and suppliers cannot sue a general contractor or the owner for lack of payment under legal theories such as unjust enrichment, restitution, quasi-contract or quantum meruit.

The Craft Statement

In March 23, 2004, the Supreme Court decided Craft v. Stevenson Lumber Yard, 179 N.J. 56 (2004), an important case in the evolution of the Construction Lien law. The Court held that where payments are up to date when a contractor walks off a project, there is no money remaining in the contract to pay subcontractors, and, hence, no liability to the owner. Although that holding alone resolved the case, the Supreme Court also held that suppliers on construction projects are obligated to allocate the payments they receive from builders to the specific projects for which they were supplied in order to be entitled to file construction lien claims.

In the opinion, the Supreme Court stated, "put another way [the lien claimant] can exercise other means to recoup payments for the supplies it delivered to [the builder] including suing the builder, [the owner] and all other owners for the benefit of whose property it delivered supplies." The comment was made in passing and the Court did not expand upon it.

The Court's statement was consistent with existing case law to the extent that it noted that the lien claimant still had other remedies against the builder. It was directly contrary to the holdings in Insulation Contracting and Supply and F. Bender, to the extent it indicated that the lien claimant had remedies against the owner or others with whom the lien claimant did not have privity. Neither Insulation Contracting and Supply nor F. Bender is cited by the Court in Craft. The statement alone does not appear to constitute the type of unmistakable intention to depart from controlling

precedent that the Supreme Court uses when it expressly decides to overrule a case or depart from controlling precedent. See State v. Hicks, 283 N.J. Super 301, 308 (App. Div. 1995)

The statement appears to have been nothing more than an illustration of the Supreme Court's view of the applicable law at the time (albeit mistaken). As such, the comment is obiter dictum, which is not entitled to great weight or precedential value.

A-Tech

Nonetheless, on the basis of the Supreme Court's statement in Craft, the Appellate Division in an unpublished decision captioned A-Tech Concrete Co., v. West Orange Public Schools, R.W. Merkel, Inc. and Pike Construction Co., Docket No. A-1944-07T3, ruled that a sub-subcontractor that failed to perfect its Municipal Mechanic's Lien Law Claim, was entitled to pursue a quantum meruit claim against the owner. As in Craft, the applicable law under Insulation Contracting and Supply and F. Bender was not put before the trial court or the Appellate Division.

The municipal entity in A-Tech that petitioned for certification to the Supreme Court relies on the holdings in Insulation Contracting and Supply and F. Bender. However, the Supreme Court denied certification without stating the basis for the denial.

The Aftermath

What is the result? Based on the holding of Craft and A-Tech, can other subcontractors with imperfect liens bypass links in the contractual chain by bringing quantum meruit claims against those with whom they do not have privity? Does the Supreme Court's denial of certification of a case that was decided on obiter dictum from the Supreme Court trump published precedent? Certainly in the wake of A-Tech, owners can no longer rely on privity and the lien laws for protection from subcontractor or supplier claims. Prudent owners and general contractors will require waivers from all subcontractors and suppliers known to have performed on the project.

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