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Spring 2013

ARCHITECTS & ENGINEERS NEWSLETTER

SITE VISIT LIABILITY

Few, if any cases, in which I have defended architects and engineers in lawsuits or arbitration proceedings have failed to include a claim for failure to find construction defects. Claims of this nature arise typically in two instances; 1) from owners who allege breach of contract for defects in their project they want corrected and, 2) in personal injury cases by plaintiffs who make the same claim based upon negligence. Personal injury cases in Ohio do not require privity of contract; rather, they are based on a claim of breach of the duty of ordinary care. Ordinary care is defined as the duty of care of a similarly situated architect performing similar services in the State of Ohio. Ohio requires a certificate of merit before an action can be taken against a physician; however, such is not the case in an action against an architect or engineer.

This article will examine both claims by owners based on contract and claims of third persons based upon negligence.

CLAIMS BY OWNERS

Claims by owners for defects in their project are based upon the contractual relationship between the owner and architect/engineer. The 1997 edition of the AIA Document required the architect to endeavor to guard owner against defects and report known deviations from the Contract Documents. That language has been changed in the 2007 edition.

Sections 3.6.2 and 3.6.3 of the AIA B101-2007 require the architect during construction to:

1) Visit the site at intervals appropriate to the stage of construction (Sec. 3.6.2.1);

2) Determine in general if the Work observed is being performed in a manner indicated that the Work will be in accordance with Contract Documents (Sec. 3.6.2.1);

3) Report any known deviations from the Construction Documents and any defects and deficiencies observed in the Work (Sec. 3.6.2.1);

4) Issue certificates that the quality of the Work is in accordance with the Contract Documents (Sec. 3.6.3.1).

The above language in the B101 - 2007 is complemented by the language in the A201 - 2007 confirming that the architect is not responsible for the contractor's means and methods, sequences or procedures. On-site visits are to be at appropriate intervals to become generally familiar with the progress and quality of the Work, and Section 4.2.2 makes it clear that the architect is not required to make exhaustive or continual on-site inspections to check the quantity or quality of the Work. Most importantly, the A201 - 1997 provides in Section 4.2.3 that the architect is to report to the owner known deviations from the Contract Document and defects and deficiencies that are observed. Not stopping there, Section 4.2.3 states that the architect will not be responsible for the contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.

Leaking roofs, leaking windows, foundation settlement, and inefficient heating or cooling, are some of the more typical claims brought by owners based upon breach of contract. The owner in those cases is alleging that the architect or engineer violated its standard of care and as a result, the project is not performing as expected. Owners can also look to designers as a result of claims by contractors for construction delay damages brought on by design issues. The 1997 endeavor to guard language was vague and open to interpretation. The 2007 language makes the duty more objective. As before, the architect has a duty to report to the owner known deviations from the Contract Documents, however, now there is a duty to report to the owner defects and deficiencies that are observed.

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The C141 - 2007 has provisions that bind the consultant to the same extent that the architect is bound to the owner. Section 3.1.7 of the C141 makes it clear that the consultant is not responsible for the acts or omissions of the architect. Article 4.5 sets forth the contract administration services of the consultant. Section 4.5.3 requires the consultant to visit the sites at intervals appropriate for the part of the project for which the consultant has been retained. The site visits have the same obligation for the consultant as the architect, which is to become generally familiar with the progress and quality of the Work. The consultant is to report known deviations from the Contract Documents to the architect. Further, the consultant is to report to the architect defects and deficiencies that the consultant has observed.

LIABILITY TO A THIRD PARTY

In personal injury and property damage cases in Ohio, third parties can bring a cause of action based upon negligence against an architect or engineer. In other words, if the architect fell below the standard of care in design or contract administration and that failure was the proximate cause of personal injury or property damage, the person or entity damaged can bring suit against the designer. These cases differ from an owner's suit against the architect or engineer which are based on contract.

An article written by William H. Locke, Jr. entitled "Liability of Architects and Engineers for Observation and Inspection Services," was presented in July 2012 at the 34th Annual Advanced Real Estate Law Course in San Antonio, Texas. In the article, Mr. Locke provides an interesting case study of the obligation of an architect for site visits and a lawsuit brought as a result of a personal injury. The case is entitled *Black & Vernooy Architects v. Smith,* 346 Southwest 3rd 877 (Texas Appeals-Austin 2011). This case involved significant injuries to two plaintiffs who were standing on a second floor balcony of a friend's home when it collapsed. The home had been completed one year before and had been designed by a well-known architectural firm. When Lou Ann Smith and Karen Gravely, who were visiting the owners of the home, stepped out onto the balcony, it separated from the exterior wall of the home and collapsed. Lou Ann Smith was rendered a paraplegic. Karen Gravely suffered injuries, although not as severe as Lou Ann Smith. The suit was brought against the general contractor as well as Black & Vernooy Architects.

As to the architectural firm, the case focused on negligence in performing the site visits. The claim was that the site visits should have revealed that the balcony was not constructed in accordance with the Contract Documents. The owner architect agreement was the 1997 B141 which had the language that the architect would "endeavor to guard the owner against defects and deficiencies in Work." The architect came to the site at expected times and took multiple photographs, including several of the second floor balcony. During the course of the trial, the architect testified that the photographs taken during the site visits showed that the handrail was not connected to the wall as required, joist hangers were missing and support pipes were not connected to the house as required. Interior photographs depicted plywood where the rim joist and blocking should have been. The architect testified that the rim joist was critical to the structural integrity of the balcony. When asked about the absence of the rim joint in the photograph, the architect acknowledged that it was obvious it was not there, but that it had not been noticed at the site or when the photographs were reviewed during construction.

The plaintiff's expert testified that a prudent architect would have identified the defect and that the defects should have been observed. Plaintiffs' expert stated that the condition was open and obvious and not hidden. The jury sided with the plaintiffs and held the architect ten percent responsible for the injuries to the plaintiffs.[1]

AVOIDING SITE OBSERVATION CLAIMS

Because site observations are so misunderstood as to the responsibility of the architect, there is no sure fire way to avoid these claims. Owners want to believe that site observations are thorough inspections of each element of the project as a second layer of protection to assure against defects.

There is no way to completely protect against these claims, but in my experience the following recommendations can help to stave off these claims. It is important to select qualified people for the site observations. Many who have evaluated this issue recommend that only individuals with an architectural background should perform site observation. However, I have defended cases in which the architectural firm utilized someone with a strong construction background, and cases in which the principal design architect did the site observations. Frankly, I do not think it matters as long as the individual has a great deal of experience in design or construction and specifically for that type of project. If the individual has a strong construction background but not an architectural background, he needs to have support at the main office from the actual design team in order to answer design issues that always arise during site visits. The individual must have a thorough knowledge of the plans and specifications. He or she must not only be knowledgeable in design or construction, but must have good communication skills. Not only is this individual going to be the face of the architectural firm at the OAC meeting, but he or she is the individual who will be called upon to explain his or her performance should it become an issue.

[1] This was reversed on appeal finding that under Texas law, the architect had no duty to Third-Parties to identify defects.

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I have found that it is also equally important that the site observation reports, no matter what form they take, be done in a manner to show due diligence during the course of the site visits. Due diligence is to be construed in light of the requirements of the Contract Documents and the standard of care. Site observation reports should demonstrate what takes place during the course of a normal site visit. The architectural firm's representative is typically going to have to participate in scheduled meetings during the course of the site visits and many non-scheduled meetings as well. The observation report should not only reflect the scheduled meetings, the agenda and what was discussed, but also report meetings during the course of the site observation with various contractors and subcontractors, as well as suppliers and owner's representatives. Construction that does not conform with the Contract Documents or is defective needs to be reported in writing to establish that due diligence is being performed. Site observation reports that have no reference to any non-conformity or defects represent a very unusual project, or suggest an architectural firm representative who is being overly sensitive to the reaction of the contractor. The site observation report needs to reflect that the architect is addressing defects and non-conformity.

Photographs that are taken during the course of the site observation need to be dated and kept in a photo log. The dating of the photographs will match with any site observation reports to provide a clear picture of what was happening at a given time. Most importantly, photographs need to be reviewed by another member of the design team, not only to see if the design intended is being met, but also to see if any defects of non-conforming work are pictured.

Also consider a checklist for site visits that include the following:[2]

1) Workmanship for conformity with drawing and specifications;
2) Workmanship and materials against approved samples where applicable;
3) That Work is carried out regularly, accurately and in proper sequence;
4) Finished Work is adequately protected;
5) Unfixed goods and materials for conformity with specifications;
6) Unfixed goods and materials for storage and protection;
7) Fixed goods and materials for adequate protection;
8) Materials against approved samples where applicable;
9) That materials included for and previous certificate have not been removed;
10) Any RFIs outstanding;
11) General progress, any delays and their causes;
12) Observed non-compliance and workmanship, goods or materials;
13) Architect's instructions not yet acted upon;
14) The results of test verifications required under the contract; and
15) Any site instructions to be confirmed.

As a final note, when non-conforming or defective Work is encountered, the architectural representative should notify the contractor and owner in writing.

Given the limited amount of time available during a site visit, it is not possible to see all the Work before it is concealed. If there is Work of particular sensitivity or interest, the architect should make it clear to the contractor that the Work should not be covered prior to the next visit. If that Work is covered before the architect can observe it, then Section 12.1.1 of the A201 requires the contractor to uncover the Work at its own expense. Written notification should be sent to the contractor confirming that the contractor had been informed that the Work was to be left uncovered and that pursuant to 12.1.1 of the A201, the contractor is to uncover the Work for the architect's observation.

CONCLUSION

There are good, solid public policy considerations for the architect making site visits and observing the Work. At the same time, this responsibility most always become a focus of the claims being made. Use good, experienced people and document the visits properly.

REFERENCE

Locke Jr., William H. "Liability of Architects and Engineers for Observation and Inspection Services." 34th Annual Advanced Real Estate Law Course (July 2012), San Antonio, TX. ■

[2] "Transform Architects" under a site entitled Construction Site Visit Checklist-Transform Architects, May 1, 2011.

HOW LONG DOES AN OWNER HAVE TO BRING SUIT AGAINST A DESIGN PROFESSIONAL REVISITED

In the inaugural issue of the Architects and Engineers Newsletter in the fall of 2010, we explained the difference between tort and contract actions and the statute of limitations that apply to each. Claims that are brought by owners for defects in the building are based in contract. Claims that are brought by individuals for personal injury or property damage are based in tort. Both types of claims may use the word "negligent" in the context of claiming that there was a breach of contract. In essence, the claim by the owner is that the architect or engineer fell below the standard of care in performing its contractual responsibility and thus was negligent.

In 2010, we reported the statute of limitations which governed actions brought by owners based upon breach of contract was 15 years. We noted that in *Kocisko v. Charles Shuterump and Sons Company* (1986) 21 Ohio St.3d 98, an owner brought an action against a designer 11 years after the building was complete. The court relied upon R.C. §2305.131 to determine that the action was not barred since it was based on contract and the statute of limitations in Ohio for written contracts was 15 years. In that case, the owner alleged that the design failed to ensure that the roof would not leak.

In September 2011, the Ohio General Assembly passed legislation reducing the time period in which to bring an action based on contract to eight years (O.R.C. §2305.06). Therefore, owners will now have to bring a cause of action based on breach of contract against a designer for defects in any project within eight years from the time of the breach. The time of the breach can differ depending on whether it is alleged to have been during design phase or construction phase. Therefore, the allegation as to the breach has to be carefully scrutinized to determine exactly what the owner is claiming was the breach of the contractual responsibility.

The good news is that Ohio has come in line with most other jurisdictions in greatly reducing the statute of limitations based upon written contracts. ■

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STATUTE OF REPOSE

In 2005, the State of Ohio enacted a Statute of Repose that applies to real property improvement. Ohio Revised Code §2305.131 provides for a ten-year period of limitation to bring a cause of action from the date of substantial completion of the project. This limitation only applies to bodily injury, wrongful death, or injury to real or personal property. The Statute of Repose applies to designers, planners, supervisors of construction, and contractors who perform services for the project. The project is not limited by type, size, or scope. There is only one exception to the ten-year period of time in which to bring the cause of action. If a party determines that a defect or unsafe condition caused a bodily injury, wrongful death, or personal or property damage within the last two years of the statute, then the injured party has an additional two years from the date of discovery of that defect or unsafe condition to bring suit.

The Statute of Repose does not prohibit any suits being filed if they are based on warranty or guarantee that is longer than the period of the Statute of Repose. Nor does it prevent any actions that are based on fraud in regard to the design, planning, supervision of construction or construction of the improvement to real property.

O.R.C. §2305.131 defines "substantial completion" as the date the improvement to real property is first used by the owner or tenant or when the real property is first available for use after having the improvement completed in accordance with the contract, whichever occurs first. Therefore, when evaluating the applicability of a Statute of Repose to a claim or a cause of action, one must first look at the date of substantial completion. Assuming that the bodily injury, wrongful death, or damage to personal or real property is beyond 10 years from the date of substantial completion, the claim or action will be barred unless it falls within the exception, was based on fraud, or is based on a warranty or guarantee period that has not expired.

Ohio has now limited actions based on breach of contract (O.R.C. §2305.06) to eight years and personal injury or property damage actions to a maximum of 10 years (O.R.C. §2305.131). In the past, actions based on contract could be brought as long as 15 years after the contract breach. Actions based in tort could be brought multiple years after the improvement to the real property as long as the action was filed within two years of the date of the discovery of the defect or unsafe condition in the building improvement. With the advent of §2305.06 and §2305.131, Ohio has greatly reduced the exposure of designers by limiting time periods to bring action. ■

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