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# WHEN IS AN ARCHITECT LIABLE

By: GIBSON B. WITHERSPOON*

THE LIABILITY of an architect is governed by the rules of common law. Usually it is held that the architect's judgment is binding on all parties because he has been agreed upon by them and thus he acts in a quasi-judicial capacity, without a court of appellate jurisdiction to overrule his decisions. Of course, it has been held that where the difficulty of proving fraud were overcome the architect is liable to his employer for the resulting damages.[1] Also, where there was a fraudulent combination on the part of the architect with the builder to give a false certificate, a cause of action was allowed against both.[2] It was held an architect is responsible for damages sustained by his employer where due to unreasonable negligence and lack of skill his plans and specifications were faulty and defective.[3] The fact that the owner approved the plans before they were used does not excuse the architect.[4] There is no warranty, either express or implied, as to a satisfactory end result and liability, if any, rests only on unskillfulness or negligence and not upon errors of judgment.[5] It developed early in our jurisprudence that the architect was the favorite of the law and as he was acting in a dual capacity, his judgment should be final. Now where mistakes in the plans and specifications of an architect engaged to draw plans and supervise a pretentious country home were excused, the Court pointing out that the house was of an unusual design and there necessarily would be some mistakes in the plans and specifications in such an undertaking. Therefore, the Court held the architect was not liable for the errors where the record disclosed that he devoted to this work a reasonable degree of skill and fidelity.[6]

Usually the architect's certificate is agreed to be conclusive as between the parties and as he is acting in a dual capacity and

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1. Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351.
2. Corey v. Eastman, 166 Mass. 279, 44 N.E. 217.
3. Schreiner v. Mller, 67 Iowa 91, 24 N.W. 738; Chapel v. Clark 117, Mich. 638, 76 N.W. 62.
4. Annotation 25 ALR(2d) 1090.
5. Coombs v. Beede, 89 Me. 187, 36 A. 104.
6. Annotation 25 ALR(2d) 1091.

quasi-arbitrator there is no resulting liability.[7] The courts are not liberal in allowing the measure of damages once liability is established. One rule allows damages measured only by the cost of remedying the defect.[8] The more liberal rule allows the measure of damages as the difference between the value of the building as designed and built and the value it would have had if it had been properly designed and constructed.[9]

The American Institute of Architects has zealously fought to preserve the high standing of all architects in the courts of our nation and to preserve the immunity which its members have enjoyed for centuries. The contracts, which they have promulgated and which are used as standard forms in most building contracts, are most favorable to the architects.[10] Their members of the Association are loyal and fraternal in the defense of fellow members and if you had to prove lack of good faith, fraud, failure to exercise skill and care, or negligence, you probably would be confronted with a most difficult situation. Perhaps your status would be analogous to the Plaintiff in a malpractice case and you wished to secure the testimony of a disinterested doctor.

Nevertheless there has been at least one new field recently opened for liability against an architect by a very outstanding decision. Chester Owen was a contractor, with the usual skills plus a pleasing personality. On July 6, 1951, Owen contacted the achitect and told him his job was in good condition and requested $11,000.00 of the retained percentage on his school job be released. After some conversation the architect gave the contractor a letter to the Board of Trustees as follows:

"Gentlemen:

Enclosed is estimate of Chester Owens. There is a balance due on original contracts of $15,347.38. If the entire 15% is retained there will be due this estimate $1,544.09. Mr. Owen wishes to draw $11,000.00 of the retained percentage in order to meet an obligation in Meadville. If the board wishes to make this advance, this office approves. This would leave a balance of $2,803.29 which should be sufficient to complete the contract.

Yours very truly,"

The contract was on the Standard AIA form providing for 85% progress payments monthly and Article 5 provided:

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7 42 LRA(NS) 282, Ann. Cases 1913 E 653.

8. Foeller v. Heintz, 137 Wis. 169, 118 N.W. 543.; 24 LRA(NS) 32 Annotation LRA (1918D) 898.

9. Bayshore Development Co. v. Bondfoey, 75 Fla. 455, 78 So. 507.

10. Note the Fifth Edition Form A2 A.I.A.

"ACCEPTANCE AND FINAL PAYMENT—Final payments shall be due 30 days after substantial completion of the work provided the work be then fully completed and the contract performed. Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection and when he finds the work acceptable under the contract and the contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in the contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the contract, and noted in said final certificate, is due and payable."

"Before issuance of final certificate the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills, and other indebtedness connected with the work have been paid."

"If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the contractor, and the Architect so certified, the owner shall, upon certificate of the architect, and without termination of the contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims."

On July 2nd, just four days before the letter quoted above was written, the Architect had written the Board of Trustees advising the auditorium and cafeteria building had been substantially completed but noting five substantial items to be done by the contractor before acceptance. Considering that the Fourth of July was a holiday and that the contractor received a copy of the letter of July 2nd on the 3rd and spent the 4th with his family and the 5th getting up estimate No. 8, there was no opportunity for completing the five outstanding and unfinished items.

Having obtained the architect's letter July 6th and knowing the Board of Trustees would probably require the 5 items to be completed before releasing the 11,000.00 retainage, our contractor appears at the Superintendent of Education's office. This politically inclined gentleman was out making his campaign for re-election. Armed with the architect's letter and blessed by regular features, he appeared to the young lady in charge of the office, the Deputy. Soon he had from her a directive to the Chancery Clerk to pay, without the usual Trustees' Order and secured the warrant for estimate No. 8 and the 11,000.00 retainage.

The contractor, after collecting his warrant, notified his surety that he was in default and for it to finish the bulding and complete

the contract, which included the payment of $17,500.00 outstanding material bills which he had not liquidated. After the completion of the building and the payment of the bills the subrogated surety had a cause of action (A) against the architect, (B) against the Superintendent of Education, for a breach of his faithful performance obligation, and (C) against the surety of Superintendent of Education for breach of his statutory bond.

The architect may never have been sued had it not been for the apparent liability of the Superntendent of Education and his surety. Neither the contractor's surety's Home Office nor the attorneys could find where any such suit against an architect had prevailed. At the subsequent trial the architect testified that he asked the contractor if his bills were paid and he replies, "Yes." The contractor and the architect's secretary neither remembered any conversation about the bills being paid but rather that he needed the retained percentage to pay an obligation. The architect's damaging letter of July 8th stated, "Mr. Owen wishes to draw $11,000.00 of the retained percentage in order to meet an obligation in Meadvlle." The able counsel for the architect raised every conceivable defense to this litigation.

1. That the retainage is not a trust fund and that there is no lien thereon either legal or equitable for the benefit of the surety or others.

2. Conceding the right of the surety to the retainage, by the doctrine of equitable subrogation, it was contended that the surety's rights did not arise until its cause of action accrued which did not accrue with either.

(A) On July 12th when the contractor gave the surety notice of his default, or

(B) Subsequently when the surety paid the outstanding bills for materials furnished on the job.

3. That there was no privity of contract between the architect and the surety, either by virtue of the contract or otherwise—therefore the architect owed no duty to the surety and could not be held liable regardless of negligent conduct and resulting damages.

4. The defense of contributory negligence.

5. The architect was the sole judge of when the building was substantially completed and as to what evidence should be rerequired that the bills for labor and materials were paid.

The Supreme Court in a very able opinion by Justice Holmes[11] held:

(1) Where there is a contest between the contractor's assignee and the surety that the surety has no superior equity in the progress payment funds over the assignee.[12] But where the contract provides for progress payments not to exceed 85% of the contract price and 15% retainage, this said 15% retainage is for the mutual benefit and protection of the owner and surety and where the surety is required to pay bills for labor and materials going into the construction it may assert a claim to the retainage fund under the equitable doctrine of subrogation.[13]

(2) The Surety's rights of subrogation began on the date of the execution of its bond and was therefore vested in the surety at the time the retained funds were leased to the contractor. The surety had the right to the $11,000.00 retained, by equitable subrogation in the event the contractor failed to complete his contract. The fulfillment of his contract required not only that he complete the structure but that he also pay for all labor and material therefor.[14]

(3) This bond of the contractor was a statutory bond not only for the completion of the building but the additional obligation to make prompt payment to all persons supplying labor and material for the job. Such provisions and additional obligations are required to be read into the bond, whether the bond expressly so provides or not.[15] The architect prepared the contract on a form provided by the A.I.A. and he knew its provisions with reference to the retainage and the purpose thereof. He was charged with the knowledge of the law which imposed upon the surety, in the event of the default of the contractor, the obligation to pay labor and material bills. One very important duty was not to approve progress payments in excess of 85% of the contract price before final payment to make an inspection to find if the work was acceptable under the contract and if the contract had been fully performed and to require the contractor to submit satisfactory evidence that

11. State of Miss., For the use of National Surety Corporation v. E. L. Malvaney, 72 So(2d) 424.

12. First National Bank of Aberdeen v. Monroe County, 131 Miss. 803, 95 So. 727.

13. Canton Exchange Bank v. Yazoo County, et al 144 Miss. 579, 109 So. 1.

14. Jackson Lumber Co. v. Mosley, 193 Miss. 11 So.2d 199. "This was a three-way arrangement, consisting of the building contract, including the plans and specifications, the bond and the application therefor, with the mutually independent obligations, and rights therein contained. The contract obligated the contractor not only to go forward and complete the structure but also to pay for all material and labor therefor."

15. Magee Commercial Bank v. Evans, 145 Miss. 643, 112 So. 482.

all payrolls, material bills and other indebtedness connected with the work have been paid.

> "'This duty was owing both to the trustees and the surety, for whose mutual benefit and protection the retainage funds were provided. A contractual relation between the architect and the surety was not requisite to the existence of this duty. It arose out of the general contractual arrangements which contained mutually interdependent rights and obligations. 'On the other hand, a contractual relation between parties is not necessary to the existence of a duty the violation of which may constitute actionable neg-negligence, where the relation which is requisite to existence of a duty to exercise due care, is to be found in something else.' "[17]

(4) There was no evidence of contributory negligence on the part of the surety.

(5) The architect, by his contract with the trustees assumed the obligation to supervise the performance of the contract and his failure to exercise due care and diligence to ascertain if there were outstanding bills for labor and materials before releasing the retainage might result in loss to the surety by depriving it of its rights under the doctrine of equitable subrogation. So the architect undertook the performance of an act, which it was apparent, if negligently done would result in loss to the surety. Therefore the law imposes upon the architect a duty to exercise due care to avoid such a loss.

> "Accordingly. the law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons or the property of other persons, the duty to exercise his sense of intelligence to avoid injury, and he may be held responsible at law for injury to person or to property which is directly attributable to a breach of such duty. The duty so arising is absolute. The law requires nothing more; it will excuse nothing less than performance, although the degree of care to be exercised is relative to the circumstances of the case." [17]

The holding of this far reaching decision will undoubtedly cause the architects to be more careful in the future before the retained percentage is released. It should not be very difficult, as a practical proposition, to get letters or receipts from the materialmen that their bills are paid. Especially where the architect makes regular inspections he knows who is furnishing the various materials which go into the job and it would take only a few minutes time to scan the receipts or ackniwledgments before the final certificate is issued

16. 38 Am. Jur., Sec. 21, Page 663.
17. 38 Am. Jur., Pages 656, 657.

and the 15% retainage is released. Perhaps the A.I.A. will change their contract but this is doubtful. The members of the association are certain to be alerted to the court's ruling and the effect of this ably rendered opinion will be most wholesome on the architects when they handle the release of the retainage in the future.

After reviewing this late case we conclude the architect is more than just the owner's agent [18] with authority to decide everything without regarding the contract between the parties, which is the source of his connection with the building project.

18. Hall v. Union Indemnity Company, 61 F.24 85 (8th Cir. 1932).

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