

COMMERCIAL REAL ESTATE INSIGHT & NEWS

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Contractors Beware: How You May Be Liable to a Homeowner For Doing as Directed

BY LYNETTE PACZKOWSKI • FEBRUARY 8, 2016

A contractor's business is frequently only as good as its ability to deliver what its client wants at the lowest possible cost. A recent Massachusetts Appeals Court decision, however, places contractors in the unique and uncomfortable position of potentially being liable to their clients for double or treble damages for doing just that.

In Downey v. Chutehall Construction Co., Ltd., the Appeals Court held that an oral waiver of building code requirements by a homeowner did not preclude the contractor's liability for a building code violation and, therefore, a violation of the Consumer Protection Act, M.G.L. c. 93A, particularly where the violation carried potential public safety consequences.

In Downey, Chutehall was hired to install a roof on the Downeys' townhouse. Chutehall ultimately installed a new rubber membrane over the Downeys' existing roof. Chutehall presented evidence at trial that Mr. Downey represented to Chutehall that there was only one layer of roofing in existence at the time of Chutehall's work, that Mr. Downey refused to permit Chutehall to strip the roof, that Mr. Downey refused to permit Chutehall to do test cuts in the roof to determine the number of existing layers, and that Mr. Downey specifically instructed Chutehall to install a new rubber membrane over the existing roof. The problem for Chutehall is that the applicable building code permits no more than two layers of roofing on a building. A few years after Chutehall installed the new rubber membrane, the Downeys sought to install heating, ventilation, and air-conditioning equipment. The HVAC contractor, when cutting a hole through the roof, discovered that there were four layers of roofing materials and evidence of leaking, at which time the Downeys hired a new roofing contractor to strip the roofing materials, put on a new roof, and reinstall the deck. The Downeys then filed suit against Chutehall seeking to recover,among other things, the cost of replacing the roof and a roof deck. To add insult to injury, violations of the building code are a violation of the Consumer Protection Statute, subjecting Chutehall to liability for double or treble damages.

At the end of the day, the Appeals Court stressed the legislature's intent to facilitate a homeowner's Chapter 93A remedies. The Court went on to note that G.L. c. 142A, §17(10) explicitly prohibits a contractor from violating building

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laws and that, by installing a fourth layer of roofing, Chutehall undeniably violated the relevant building code. The Court noted that a statutory right to a remedy may generally be waived when the waiver would not frustrate public policy, but went on to state that not only does G.L. c. 142A, §2(9) specifically provide that no home improvement contract may waive any rights conveyed to the owner under the provisions of the chapter, but also that the applicable building code's purpose "is to ensure public safety, health and welfare insofar as they are affected by building construction…" Thus, the Court stated, "to permit a waiver by a homeowner of his or her right to compel a contractor to comply with the contractor's obligations under the building code would permit, even encourage, contractors, and perhaps consumers, to waive provisions of the building code on an ad hoc basis, in the hope of saving money in the short-run, but endangering future homeowners, first responders, and the public in general."

In light of the above, contractors are well-advised to ensure their contracts adequately include walk away provisions in the event a homeowner begins requesting or requiring shortcuts that could ultimately lead to building code violations.

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