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OPINION

KNOWING WHEN TO WALK AWAY

Contractors Violate Building Code While Adhering To Client Requests

When Your 'Reward' For Delivering What The Client Wants Is To Owe The Client More

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SPECIAL TO BANKER & TRADESMAN

We all know that the construction business is driven by delivering what the client wants at the lowest possible cost. A recent Massachusetts Appeals Court decision, however, paves the way for courts to protect homeowners from themselves, and places the burden on contractors to do more than due diligence, in effect forcing them to have potentially uncomfortable conversations with their homeowner clients or maybe even walk away from projects to avoid the risk of later liability.



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If contractors merely defer to the homeowners' wishes and information, and that deference happens to lead to a building code violation, the contractors may be liable to their clients for double or treble damages, even if the contractors did not know of the violations or the facts which could give rise to the violations. This decision is a significant and problematic extension of the Consumer Protection Act, M.G.L. c. 93A.

Downey v. Chutehall Construction Co., Ltd. In that case, a contractor was hired to install a roof. The contractor installed a new rubber membrane over the existing roof. A few years later, the homeowners

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; the applicable building code permitted no more than two layers of roofing on a building. Accordingly, the homeowners hired a new roofing contractor to strip the roofing materials, put on a new roof and reinstall the deck. They then filed suit against the original contractor 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 constitute violations of the Consumer Protection Statute, subjecting the contractor to liability for multiple damages.

Had the contractor ignored the building code or simply been lazy in deciding not to investigate the existing roof prior to doing its work, one might understand why the court would be quick to give the homeowners recourse under the Consumer Protection Statute. Here, however, the contractor presented evidence at trial that the homeowners made representations that there was only one layer of roofing in existence at the time of the work; that the homeowners refused to permit the contractor to strip the roof; that the homeowners refused to permit the contractor to do test cuts in the roof to determine the number of existing layers; and that the homeowners specifically instructed the contractor to install a new

rubber membrane over the existing roof.

In light of that evidence, the outcome of the case feels like a windfall for the homeowners at the contractor's expense. If the violation were never discovered, the homeowners saved money by cutting corners on the work. Where the violation was later discovered, the contractor who delivered exactly what the homeowners wanted paid the price.

Contractor, Protect Thyself

Given the Appeals Court's holding that a homeowner cannot waive building code requirements and that any such attempt at a waiver would not preclude a contractor's liability for a building code violation and, therefore, a violation of the Consumer Protection Act, it is clear that contractors must take steps to protect themselves, even if it means passing on a job. In Massachusetts, contractors are expressly prohibited by statute from violating building laws and, also by statute, no home improvement contract may waive any statutory rights of the owner, including the right to have the contractor meet and comply with the building code. In other words, no matter the circumstance, Massachusetts courts will always hold the contractor liable for a building code violation. In fact, the *Downey* court stated that "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. Additionally, it may be the case that an uncomfortable conversation to press the homeowner to expand the scope of work (thus increasing the cost of the job) to, for example, permit opening a wall or performing test cuts, might save the contractor from having to pay multiple damages later. Sometimes giving clients exactly what they want allows them to take even more later. ■

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