

Contractors Beware: You Must be Licensed!
by Dale Alberstone, Esq.

On July 14, 2005, the California Supreme Court issued an important decision applicable to all contractors who perform construction to real property, including apartment buildings. In MW Erectors v. Niederhauser, the high court determined that a contractor may not prevail in a lawsuit to recover compensation for its work unless he or she was duly licensed "**at all times**" during the performance of his/her services.

The California Supreme Court reversed the Court of Appeal and held that the contractor could not recover any portion of the nearly \$1,000,000 because it was not licensed **at all times** during the performance of its work.

The pertinent facts in the case were that the property owner (Disney Corporation) engaged a general contractor (Turner Construction) to construct a hotel. The general contractor entered into subcontracts with others. On October 19, 1999, subcontractor MW Erectors ("MW") executed a contract for the performance of "structural" steel work in connection with the hotel. (For purposes of this article there is no material distinction between a contractor and a subcontractor relative to their right to receive payment for services performed. The terms will be used interchangeably hereafter.)

MW was not licensed at the time the contract was signed. It began its performance of the structural steel work on December 3, 1999, but did not receive its "C-51" structural steel license until December 21, 1999.

Thereafter, MW performed nearly \$1,000,000 (\$955,553, to be exact) of work for which it was not paid under the contract. It then filed suit to recover that entire amount.

The Court of Appeal denied recovery to MW for the work it performed between December 3 and December 21, but allowed recovery for work performed from and after December 21 on the theory that the contractor was then duly licensed. The Court of Appeal believed that such a proration was fair and consistent with statutory law.

The California Supreme Court reversed the Court of Appeal and held that the contractor could not recover any portion of the nearly \$1,000,000 because it was not licensed **at all times** during the performance of its work.

While that determination might lead to a harsh result for the contractor, the Supreme Court quoted, and then applied literally, the statutory law pertaining to licensing and compensation for contractors. The current version of the applicable statute provides:

" . . . [N]o person engaged in the business or acting in the capacity of a contractor may maintain any action, or recover . . . for the collection of compensation for the performance of any act or contract where a license is required . . . without alleging that he or she was a duly licensed contractor **at all times** during the performance of that act or contract." B&P §7031(a)

An apartment owner who reads that law literally would conclude, as did the Supreme Court, that a contractor may not recover any amount for his work performed if he was not licensed at all times during the performance of the work.

The high court also held that the doctrine of "substantial compliance" does not apply, meaning that even though the contractor violated the statute for just a very short duration, he still cannot get paid for work performed subsequent to the issuance of his license.

However, the Supreme Court noted that there is a legislative exception to the statute which, in some circumstances, allows a contractor to seek payment where he has been **previously** licensed. Specifically, if the contractor had been duly licensed prior to the performance of the work, acted reasonably and in good faith to maintain his license, but for some reason something happened to his license that rendered it invalid at the time the work performed, the contractor could thereafter sue for payment if he promptly and in good faith reinstated his license upon learning that it was invalid. (B&P §7031(e))

In the MP Erector case, the subcontractor was never licensed in the State of California for the performance of structural steel work. Consequently, he did not fall within the exception to the rule.

When reversing the Court of Appeal's decision, the Supreme Court has closed the door once again on judicial activist judges who interpret and then revise statutes rather than apply them as written. While it may seem unduly harsh (depending on your point of view) that the contractor should lose \$1,000,000 for failing to be licensed during just the first 18 days of his work, it is my opinion that courts should be required to follow the law as written by the state legislature. Here, the California Supreme Court did just that, whereas the Court of Appeal decided to rewrite the law in accordance with its own sense of fairness.

My personal belief is that it is not for the courts to determine the wisdom of the law or change it when they do not like its application. The legislature is empowered to and charged with drafting and revising statutes. That is their job, not the job of the courts.

The unintended effect of courts demonstrating that are willing to modify statutes from the literal text is that it encourages and promotes volumes of questionable litigation. If a lawyer believes that a statute, as written, is against his client, but the court might invent an exception which would favor his client, the lawyer will be more prone to file suit than if he understands that the court will read and apply the law literally.

In the MW Erector case, the Supreme Court did what a court should do, to wit: it applied the legislative statute exactly as written and did not create a judicial exception.

If the California legislature now wants to change the law so as to allow contractors, such as MW Erector, to be paid if they become licensed after, rather than before, the commencement of their work, they have the right and power to do so. But for now, apartment and other property owners will benefit from the existing statute because, if their contractors are not licensed at or prior to the time they begin work, the contractors will not be entitled to recover any compensation.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law for the past 28 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

*Mr. Alberstone has been awarded an **AV** rating from Mardindale-Hubbell, which is a registered certification of Reed Elsevier Properties, Inc. An **AV** rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill in integrity.*

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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