SANDBERG PHOENIX

CONSTRUCTION BLOG

I’m a subcontractor, material supplier, or design professional?

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I don’t need to worry about the implied warranty of habitability – Right?

While the implied warranty of habitability has been a concern to homebuilders, since it was first recognized by the courts, subcontractors need to be concerned with the effect of the warranty, as well. In a recent case brought by the Sienna Court Condominium Association in Evanston, Illinois, the first District Appellate Court addressed the holdings that allow a property owner to bring a claim to correct a latent construction defect directly against one or more subcontractors. As early as 1983, the Court had ruled that a homeowner could proceed against a subcontractor, directly, where the general contractor was insolvent, so the homeowner has no other recourse against the general contractor; *and* the defect was caused by the subcontractor(s). The issue in Sienna was whether recourse had been available, so that claims could not be made against the subcontractors, where the general contractor had filed for bankruptcy; but the general contractor’s warranty fund and/or insurance had provided some funds to the homeowner. The Court reiterated what it believed to be a bright-line rule that the solvency of the general contractor controls whether a claim may be brought directly against a subcontractor or not. Insolvency, the Court found, means that the general contractor’s liabilities exceed the value of its assets; and the general contractor has stopped paying its debts in the ordinary course of business. Once it has been determined that the general contractor is insolvent, under this definition, the court found it irrelevant whether the homeowner had received some funds from the GC’s warranty fund or might receive some funds from the GC’s insurance; and allowed the claims to be brought against the involved subcontractors.

The ruling of the court is better news for design professionals and material suppliers. The court held that the implied warranty is a claim for construction defects; and may not be imposed against design professionals or material suppliers who do not engage in actual construction activities.

The bottom line, from this ruling, is that both general contractors and subcontractors need to be concerned about the implied warranty of habitability. As discussed in previous blogs, there is a means to eliminate claims under the implied warranty of habitability. But the construction contract needs to address the warranty. Contractors and subcontractors should both consult their attorney, to discuss how to lessen the risk of being held liable under an implied warranty claim.