

Construction ADVISORY

February 5, 2009

What Proof Is Necessary to Validate a Subcontractor Back Charge?

Across the board, there are not a lot of court decisions that get into the details of many of the typical problems that are seen on a troubled construction project. That is, where are the cases that deal with a general contractor's right to assess cleanup costs against its subcontractors, how a general contractor legitimately deals with the costs of repair to the work in place when it is difficult to determine which subcontractor caused the damage or, alternatively, what evidence does a contractor need to present to enable it to back charge a contractor? These are fairly minor issues in the context of a larger construction claim, but nevertheless, they seem to come up on most projects that go to claim.

The Court of Appeals decision in *Great Western Drywall v. Roel Construction*, 166 Cal.App.4th 761 (2008) is one of those unusual cases where the court rolled up its sleeves and delved into these thorny issues. Although the main issue in the case (and the officially reported portion) was whether the general contractor's "tort" claims for defective work could be applied as an offset to the subcontractor's breach of contract damages to prevent the subcontractor from recovering prejudgment interest (the court answered the question in the affirmative), the balance of the case (in the unreported portion of the decision) dealt with the legitimacy of Roel Construction's back charges.

Great Western involved the construction of the Renaissance Marina Condominium project, a 218 unit condo complex located in San Diego, California. Great Western, the drywall subcontractor, sued Roel for its subcontract balance and for unapproved change orders. Roel filed a counterclaim for breach of contract and negligence, alleging that Great Western's work was defective and that it damaged a significant amount of work in place, requiring repairs by other trades. After a bench trial, the court found that Roel had breached its contract with Great Western by failing to pay Great Western its subcontract balance and awarded Great Western prejudgment interest on that claim. The court also found in favor of Roel's defective work claims and the back charges it had assessed against Great Western, which were essentially equivalent to the subcontract balance claim of Great Western. Both parties appealed.

As indicated above, the Court of Appeals found that Roel's defective work claim, whether sounding in contract or tort, could be offset against Great Western's breach of contract award. It also found that, because the value of that claim was greater than Great Western's breach of contract damages, Great Western was not entitled to any prejudgment interest.

The court then went on to examine the various back charges assessed against Great Western, the first of which was a back charge for jobsite cleanup. Apparently, in addition to assessing subcontractors with specific cleanup back charges, Roel did what many general contractors do: because none of the subs were doing their cleanup, Roel assessed job site cleanup costs based upon each subcontractor's manpower for a given period of time. Roel argued that this was the only fair way to divide up the costs because several

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

subcontractors contributed to this problem, and it would be impossible for it to ascertain the cleanup costs that were attributable to a specific subcontractor on an \$80 million project with over 100 subcontractors. Roel also argued that Great Western waived its right to challenge these back charges because Roel's project manager announced his intention to issue such a back charge at a weekly subcontractor meeting and Great Western never objected to his warning.

The Court of Appeals rejected this argument and found that these pro rata back charges were not permitted. It held that, while the terms of Roel's subcontract permitted it to back charge a subcontractor for failing to perform jobsite cleanup, Great Western's subcontract did not allow Roel to assess back charges "unconnected to subcontractor fault." The court also noted that Roel had previously assessed cleanup back charges only against Great Western — thereby undermining Roel's argument that it was not possible to establish a subcontractor's individual responsibility for cleanup costs.

The Court of Appeals also rejected Roel's argument that Great Western's silence in the face of the warning that the subcontractors would be assessed these kind of back charges did not amount to a waiver of its contractual right that tied its responsibility to pay on proof of its conduct. Therefore, the Court of Appeals overturned the trial court's award of these cleanup costs.

The other interesting portion of the case dealt with back charges assessed against Great Western for damage caused by its workers to 1) drywall and 2) glass panels.

With respect to the drywall damage, the painting subcontractor testified that the drywall crews caused dings and scrapes to the drywall "throughout the project," which required drywall repair and repainting. Great Western pointed to testimony from the same subcontractor who acknowledged that there was vandalism to the project and that he could not exactly quantify the number of hours of repainting that was attributable to Great Western.

However, the Court of Appeals held that this evidence was sufficient to support this back charge. It noted that, while it was Roel's obligation to establish the **fact** of damage with certainty, it was not required to calculate the **amount** of damage with certainty. While the court acknowledged that Roel's "showing could have been stronger," it noted that Great Western admitted it had damaged drywall and focused on the painter's testimony, which established that Great Western was the main culprit.

The Court of Appeals also upheld the back charge for replacement of the damaged glass panels. The court pointed to testimony from the glass subcontractor, who testified that plaster overspray on the glass and subsequent efforts by the drywall subcontractor to clean the glass caused the scratches, thereby requiring replacement of the panels. Great Western admitted that it had some responsibility but argued that a number of other parties had scratched the glass. The Court of Appeals rejected this argument because Great Western did not come forward with affirmative evidence of damage caused by another party.

Thus, while the court in *Great Western* was not willing to validate back charges without some proof of fault, it was willing to validate a general contractor's back charge if the general contractor could tie the **fact** of damage to a subcontractor, even if the proof of damages was less than conclusive. Of course, the more that you can prove that a subcontractor had responsibility for damage to existing work or for a messy jobsite, the more forgiving a court or arbitrator will be in awarding you your claimed damages.

Although the court's discussion of the general contractor's ability to back charge its subcontractors is found in the unreported portion of the case, the court's discussion provides guidance for general contractors who often struggle in determining whether a particular back charge should be upheld.

If you would like to receive future *Construction Advisories* electronically, please forward your contact information including e-mail address to construction.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

If you have any questions, please contact your Alston & Bird attorney or any member of the Construction group.

Members of Alston & Bird’s Construction Group

Atlanta

John I. Spangler, III
Practice Group Leader
404.881.7146
john.spangler@alston.com

Jeffrey A. Belkin
404.881.7388
202.756.3065
jeff.belkin@alston.com

Donald G. Brown
404.881.7865
donald.brown@alston.com

Steven Campbell
404.881.7869
steven.campbell.com

Deborah Cazan
404.881.7667
debbie.cazan@alston.com

Jenna Moore Colvin
404.881.4483
jenna.colvin@alston.com

Daniel F. Diffley
404.881.4703
dan.diffley@alston.com

A. McCampbell Gibson
404.881.7769
mac.gibson@alston.com

J. Andrew Howard
404.881.4980
andy.howard@alston.com

William H. Hughes, Jr.
404.881.7273
bill.hughes@alston.com

Thu Trinh H. Huynh
404.881.4397
trinh.huynh@alston.com

Katherine L. Miller
404.881.7947
kate.miller@alston.com

Julie R. Ross
404.881.7648
julie.ross@alston.com

Mike H. Shanlever
404.881.7619
mike.shanlever@alston.com

Los Angeles

Kevin S. Collins
213.576.1184
kevin.collins@alston.com

Stephanie A. Jones
213.576.1136
stephanie.jones@alston.com

Kyle A. Ostergard
213.576.1036
kyle.ostergard@alston.com

G. Christian Roux
Practice Group Leader
213.576.1103
chris.roux@alston.com

Jessica L. Sharron
213.576.1164
jessica.sharron@alston.com

Nathan D. Sinning
213.576.1134
nathan.sinning@alston.com

Washington, D.C.

Jamil E. Nasir
202.756.3192
jamil.nasir@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

www.alston.com

© Alston & Bird LLP 2009