



Construction Law Update

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Highlight Article

Court of Appeals Rules Homeowners may Recover Attorney Fees from Subcontractors under Third Party Beneficiary Theory

By Paul T. McBride

In *LoDuca v. Polyzos*, published in the Daily Appellate Record on July 18, 2007, the Court of Appeals awarded attorney fees to a homeowner in a breach of contract action against a cabinet subcontractor, ruling that the homeowner was a third party beneficiary of the subcontract agreement between the general contractor and the cabinet sub, and so could avail himself of the attorney fees provision in that subcontract. This case is important for construction defect practitioners and claims representatives because it arguably establishes a direct right to attorney fees against subcontractors for homeowners, even though no contractual relationship exists between the two. However, there are enough distinguishing factors between this case and the "typical" construction defect case that its application in construction defect cases is debatable.

In *Loduca*, the homeowner, Loduca, contracted with a general contractor, MCM, for construction of a custom home. MCM, in turn, contracted with Polyzos for installation of cabinetry in the home. The subcontract between MCM and Polyzos contained the following attorney fee provision: "If a court action is brought, prevailing party to be awarded attorney fees and collection costs, any unpaid balance subject to 18% interest annually."

Polyzos began installation of the cabinets, but delivered the wrong type and size, and delayed substantially in completion. Eventually, his contract was terminated and replacement cabinets were obtained. As the additional costs were borne by the homeowner, Loduca, Loduca filed a breach of contract action against Polyzos.

At trial, Polyzos stipulated that 1) Loduca was a third party beneficiary of the subcontract agreement between Polyzos and MCM, 2) Polyzos had breached the subcontract agreement, and 3) Loduca had suffered monetary damages of \$50,000 by virtue of Polyzos' breach of contract. The court awarded judgment of \$65,000, adding \$15,000 to the stipulated damages for additional interest on a construction loan which Loduca incurred by reason of the delay in completion of the cabinet work. In addition, the Court awarded Loduca \$190,350 in attorney fees, citing the attorney fee provision in the subcontract agreement between MCM and Polyzos.

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On appeal, the award of attorney fees was upheld. The court noted that, under California law, CCP 1021, each party to a lawsuit must pay its own attorney fees except where a statute or contract provides otherwise. In this case, the contract between MCM and Polyzos provided for attorney fees to be awarded to the prevailing party to an action brought on the contract. The parties stipulated, at trial, that Loduca was an intended third party beneficiary of the contract, and this stipulation was amply supported by the evidence. Loduca was the owner of the property on which the custom home was to be built, and paid Polyzos directly for many of the installments due on the contract. Therefore, Loduca was entitled to sue Polyzos directly for breach of contract.

In determining whether a third party beneficiary of a contract could enforce an attorney fee provision in the contract, the court stated the test is mutuality of remedy: "A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed." In disputing the applicability of the attorney fees provision to the litigation between Loduca and himself, the cabinet subcontractor, Polyzos, argued that his only remedy, had Loduca failed to pay him following completion of the work, was to file a mechanic's lien on the property. Therefore, Polyzos argued, as there existed no mutuality of remedy, the attorney fee provision should not be enforced in Loduca's favor.

The Court rejected this argument, noting that Polyzos's sole remedy was not limited to filing a mechanic's lien. "This is incorrect. He could have sued on the contract instead of filing a lien, and in so doing, availed himself of the attorney fee provision." Given the necessary third party beneficiary nexus and reciprocity of enforcement as to the attorney fee provision, the court held that the award of attorney fees to the homeowner, Loduca, was proper.

Plaintiffs' counsel in construction defect cases will undoubtedly rely on this case to argue for attorney fees against subcontractors in construction defect actions. Currently, plaintiff homeowners cannot obtain attorney fees from subcontractors in their own right, but instead can do so only if they are assigned the developer/general contractor's contractual rights against the subs. Now, citing *Loduca*, they may add an attorney fee claim to their standard breach of contract cause of action against subcontractors.

In our view, the *Loduca* case, properly interpreted, does not support an award of attorney fees against subcontractors to homeowners in construction defect cases. In *Loduca*, the facts were very different than a typical CD case. The homeowner contracted for construction of a custom home. He suffered immediate monetary damage when the cabinet subcontractor failed to perform, i.e., he was forced to obtain alternate cabinets at more expense. Thus, he had a classic breach of contract action against the non-performing subcontractor.

The key distinction, in our view, lies in the concept of mutuality of remedy. As the court in *Loduca* noted, had the homeowner failed to pay for the cabinets after they were installed, the cabinet subcontractor could have sued the homeowner directly on the contract, just as the homeowner was able to sue him directly on the contract when he failed to install the cabinets properly. This consideration is not applicable to construction defect cases.

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In the typical construction defect case, the home is several years old at the time the lawsuit is filed. The general contractor has been paid in full, the subcontractors have been paid in full, the transaction is finished. Any rights that exist under the contract are entirely one-sided, i.e., the right of the homeowner to sue the general contractor and subcontractor for defects in construction discovered after the home was completed and the homeowner moved in. There is no conceivable scenario under which the general contractor or the subcontractors could sue the homeowners for breach of contract. We believe this factor distinguishes the *Loduca* case sufficiently from typical CD cases as to make its holding inapplicable.

On the other hand, should a Court rule that homeowners in CD cases can obtain attorney fees from subcontractors as third party beneficiaries of the agreement between the general and the sub, this result would be a two-edged sword. The homeowners would then be liable for the subs' attorney fees should the subs prevail in the action.

For a copy of this case or for more information on construction law, feel free to contact Paul T. McBride of Kring & Chung, LLP.

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