
Do Architects and Engineers Owe a Legal Duty to Non-Contracting Parties?

By Scott D. Garbo, Jeffrey M. Gallant / Feb 14, 2018

Do architects and engineers owe a common law duty (i.e. non-contractual duty) to Contractors or Owners for alleged negligence, errors, or omissions when performing services? That answer may depend on what services are at issue. A recent unpublished Michigan Court of Appeals opinion provides some guidance with respect to the Architect's and Engineer's common law duty when processing pay applications.

The Court recently held that the Owner of a construction project could not maintain a professional negligence claim against the Architect for failing to adequately review payment applications. In *Auburn Hills Tax Increment Finance Authority v. Haussman Construction Co.*, the Owner entered into a design-build contract with the Contractor. The Contractor in turn entered into a contract with the Architect whose services included reviewing and certifying pay applications. The Owner relied upon the Architect's certifications of the Contractor's payment applications when it processed each payment to the Contractor. However, after the Owner paid the Contractor in full, the Contractor dissolved without paying certain subcontractors, exposing the Owner to paying subcontractor claims. The Owner also did not retain funds to account for liquidated damages assessed against the Contractor for late delivery.

With no privity of contract between the Owner and Architect, the Owner initiated a claim in professional negligence against the Architect. The Court dismissed the suit holding that when reviewing payment applications, the Architect did not owe a common law duty *to the Owner* in professional negligence to withhold payments for liquidated damages or confirm that the Contractor actually paid its subcontractors. Rather, the Court of Appeals found the Architect's duties with respect to reviewing payment applications arose solely out of the contract between the Contractor and Architect, and as such, the Architect's duties (to the extent it had such duties) were only owed to the Contractor.

Notably, the Court of Appeals expressly refused to consider whether the Architect owed a similar duty under common law to the Owner under a negligent misrepresentation cause of action. However, in another recent Court of Appeals' opinion, *Ric-Man Construction, Inc. v. Neyer, Tiseo & Hindo, Ltd.*, the Court found a broad duty owed by design professionals (and other businesses) under a claim for negligent misrepresentation. Specifically that Court recognized that a business generally owes a duty to third parties who justifiably rely upon information provided by that business. Thus, if the *Haussman* Court would have analyzed the Owner's negligent misrepresentation claim—and not just the claim for professional negligence—there may have been a finding that the Architect owed the Owner a common law duty arising from the Architect's review and certification of the payment applications.

The problems that arose in *Haussman* highlight the need for owners and lenders to retain their own professionals when reviewing payment applications before processing payment. However, those involved in the draw process need to be aware of their potential liability to their contracting partners and third parties who justifiably rely upon their services—even if no direct contract exists. The narrow holding in *Haussman* and the broader duties recognized in other recent Michigan cases, provide some guidance on whether a design professional owes a common law duty to third parties on a construction project.

While you may only have a contract with one of many project participants, Michigan courts continue to elaborate on the potential obligations owed to all other participants, including architects, engineers, contractors, subcontractors, owners, and lenders. Clark Hill's Construction Law Practice Group has uniquely skilled legal professionals who provide advice and consultation to members of the construction industry on a daily basis to navigate the risks inherent on a project. If you have any questions, or would like assistance, please contact Scott Garbo at 313.965.8654 | sgarbo@clarkhill.com, Jeff Gallant at 313.967-4071 | jgallant@clarkhill.com, or another member of Clark Hill's Construction Law Team.