

The 60-Second Construction Law Journal



Winter 2023

MS Construction Industry Team

Important contractual rights and remedies can be lost, hard-won statutory protections waived, and serious liabilities incurred—all through ignorance of the law. This newsletter is designed to give you, in 60 seconds, some more insight into legal problems faced by contractors, subcontractors, and suppliers in the construction industry, so that you do not repeat their mistakes and, instead, successfully complete the job.

You Be the Judge

FACTS: Nature-Tech, LLC (“Nature-Tech”) entered into a sub-subcontract (“Agreement”) with Capitol Woodwork, LLC (“Capitol”) to fabricate millwork as part of Capitol’s scope of work for general contractor Tutor Perini Building Corporation (“Tutor Perini”) in constructing a hotel and transition space at a casino in Maryland. The Agreement stated, “Retainage and/or the Final Application payment shall be paid to Subcontractor only after . . . (e) all disputes, claims, liens, causes of action, and/or lawsuits which are related in any way to this Agreement or to Subcontractor’s performance of the Work are resolved.” Following a dispute between Tutor Perini and Capitol over delays in the schedule, Tutor Perini terminated Capitol, and Nature-Tech ceased working on the project. The project owner sued Tutor Perini; Capitol and its surety, Hartford Fire Insurance Company (“Surety”), are parties in that lawsuit, but Nature-Tech is not. Nature-Tech claim on Capitol’s payment bond included retainage of \$135,603. The Surety denied the retainage claim, asserting that the ongoing lawsuit involving the project triggered condition precedent “(e)” regarding final payment. Nature-Tech sued the Surety and Capitol, and the suit included this claim for retainage. The case went to trial before a judge in federal court.

ISSUE: Is Nature-Tech entitled to payment of its retainage, because it is not a party to the lawsuit involving Capitol, the owner, and others, and there is no allegation that Nature-Tech’s work was deficient?

Legislative Update

As noted in our last issue, the Virginia General Assembly is currently in session and considering several proposed amendments to the statutes that prohibit “pay-if-paid” clauses in construction subcontracts. A final version of the amendments has not yet passed both chambers, and if it does, will then go to the governor for approval. The governor may also propose additional changes to the legislation, as he did last year. The current proposed amendments include clarifications on definitions, the notice requirement if a contractor withholds payment, and the types and amounts of contracts to which these provisions will apply. We will provide an update on the final version of the legislation once it is enacted.

Have a lawyer review your construction contracts before you sign them. Know that you are protected before starting the work.

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You Be the Judge

RULING: The court ruled against Nature-Tech. The court found the Agreement’s condition for payment of retainage –that all disputes “related in any way to this Agreement” are resolved – is broad enough to encompass the current circumstances. The other aspects of Capitol’s work at issue in that lawsuit – shop drawings and installation – although they are beyond Nature-Tech’s fabrication scope, are clearly “related” to Nature-Tech’s work for Capitol, and thus covered by the condition precedent.

Nature-Tech, LLC v. Hartford Fire Ins. Co., No. 19-CV-2053, 2022 WL 17094584 (D. Md. Nov. 21, 2022)

LESSON: Contractors and subcontractors should carefully review all contract language that affects their right to payment, including the release of retainage. Do not accept conditions that permit the other party to withhold money for work properly performed. Broad language like that in Nature-Tech’s Agreement can result in lengthy withholding of retainage through no fault of the contractor performing the work.

Construction Industry Team

Miles & Stockbridge’s Construction Industry Team represents general contractors, subcontractors, suppliers and sureties in all aspects of construction law, including contract drafting and negotiation, mechanics liens, bid protests, and the preparation, litigation, arbitration and mediation of construction claims.

Key Construction Lawyer Profiles



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TOM WOLF leads the Construction Industry Team at Miles & Stockbridge and is recognized by Best Lawyers in America® for pre-eminence in Construction Law, Construction Litigation and Commercial Litigation and by The Virginia Lawyers Hall of Fame. He has been Adjunct Professor, Construction Law at the University of Richmond School of Law since 1986 and lectures frequently on construction law issues for the Virginia State Bar, the Associated General Contractors of Virginia and various construction industry groups.



KEN STOUT is a Principal and advises clients on drafting and negotiating contracts, subcontracts and related agreements; evaluating payment claims and defenses; and filing mechanic’s liens in Virginia.

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