

## The Saiber Construction Law Column: June 2022

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In a recently decided case, New Jersey's Appellate Division looked at the plain language of a subcontract and, after doing so, rejected a contractor's defenses to avoid paying subcontractors who had performed all of their work pursuant to the subcontract and who sued to be fully paid.

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In *J&M Interiors v. Centerton Square Owners*, a case decided by the Superior Court, Appellate Division on May 18, 2021, the court considered whether subcontractors who completed work but only received partial payment were entitled to be paid in full, notwithstanding the fact that the subcontractors had signed partial lien waivers and their subcontracts provided that they would be paid only after the contractor had received payment from the owner for their work. The court also considered whether the subcontractors had contractually waived their rights to assert claims for damages under New Jersey's Prompt Payment Act ("PPA"). The court ruled in favor of the subcontractors on each of the issues the court considered.

In reaching its decision, the court initially looked at the plain language of the parties' contract and found that while the contract recognized that the owner was entitled to withhold retainage on its payments to the contractor, "Nothing in the subcontracts' plain language" required the contractor to receive full or final payment from the owner before paying the subcontractors. The court stated:

Plaintiffs performed all work under their subcontracts. Defendant received total payment for the plaintiffs' work, as the only money not paid by [the owner] to defendant was the contractually designated retainage. Therefore, defendant was obligated to make full payment to plaintiffs.

Next, the court rejected the contractor's argument that a subcontract provision providing that the subcontractor "waives and releases all claims or rights to recover lost property . . . and any other indirect charges, costs or expenses in any way arising out of or related to the Agreement, including the breach thereof by [contractor]" constituted a waiver of the subs' rights under the PPA. In reaching this holding, the court noted that waiver-of-rights provisions require a party to "have full knowledge of his legal rights and intent to surrender those rights." And, where statutory rights are being waived, the waiving party should at least be informed "that it agrees to waive all statutory claims arising out of the contractual relationship." Here, the court found that the waiver-of-rights provision failed "to constitute an unambiguous and clear waiver of plaintiff's statutory rights" because it did not specifically state that the subcontractors waived their statutory rights associated with the subcontract.

Finally, the court also rejected the contractor's argument that the subcontractors waived their rights to receive full payment by signing partial lien waivers. The court held that an agreement to modify an existing contract had to be based on new or additional consideration. Here, the contractors did not provide any such new or additional consideration in return for the subs executing the partial waivers. Thus, the court found that the partial lien waivers did not alter the contractor's obligation to pay the subs under the subcontracts.

Accordingly, the Appellate Division was satisfied that the contractor's arguments lacked substantive merit and it affirmed the decisions of the trial judge in favor of the subcontractors.

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Each issue's Legal Construction Column will discuss a recent decision by New Jersey courts or courts from other states which may be of interest to people in the construction industry.

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