

Fee Awards May Help Lien Claimants Get Paid

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A recent Illinois Appellate Court case should help subcontractors who have to fight for their final payment at the end of a project. Unfortunately, it is an all too common occurrence for a subcontractor to be faced with an ugly dilemma when its work is complete and the final payment application on a project is ready to be submitted. Though there might be no dispute about incomplete or improper work, a shortage of funds at the owner or general contractor level often prompts a demand on a subcontractor to reduce its final payment application. The subcontractor is told to either accept a reduction in the final payment or instead, receive nothing and initiate expensive and time-consuming legal proceedings.

Faced with such a choice, many subcontractors agree to waive their right to full payment because they need the cash being offered to fund their operations and continue with other jobs. For example, if a subcontractor is asked to accept \$10,000 less so it will receive a final draw of \$90,000 rather than \$100,000, it might recognize that

even if it sued and won, it would pay attorneys' fees of more than \$10,000, so it would not be worth litigating. If, however, all parties knew in advance that if the final draw was withheld without justification and, that the party who would prevail in the dispute would be paid its attorneys' fees by the losing party, then maybe the subcontractor would insist on full payment and the owner and general contractor might be more willing to pay the full amount due.

In 1995, in an effort to correct this problem, through the work of IMSCA and others, section 17 of the Mechanics Lien Act was amended to provide that if an owner fails to pay "without just cause or right, ... the court may ... [award] reasonable attorney's fees of the lien claimant...." Until a court case decided this June, however, *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC*, such fees were very rarely awarded to successful lien claimants. Instead, trial court judges only awarded fees in extreme circumstances, choosing to keep with the traditional rule whereby litigants pay their own fees; even if they lose the case. The *O'Connor* case advances the intention of section 17 of the Mechanics Lien Act by making it clear that courts must award attorneys' fees to successful claimants when their money is withheld for no legitimate reason.


In *O'Connor*, the appellate court overturned the trial court's award of minimal attorneys' fees for a portion of the work and determined that section 17 of the Mechanics Lien Act mandated an award of fees to the successful subcontractor in the case, perhaps in a substantial amount. The *O'Connor* opinion reads in relevant part:

We hold that the trial court erred in refusing to consider an award of attorney fees to *O'Connor*. It is important to note that the defendants acknowledged in the trial court and during oral argument before this court that they knew that *O'Connor* was owed an undisputed amount of \$47,562.19 pursuant to the contract. Yet, the defendants paid *O'Connor* nothing on that amount and have offered no reasonable explanation for withholding payment on an amount which was not in dispute. Therefore it is clear that *O'Connor* was entitled to attorney fees. Because the trial court never reached the issue of whether the amount of attorney fees sought by *O'Connor* was

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justified and reasonable, we remand the matter to the trial court with directions to conduct a hearing on that issue.

This is the first explicit ruling from the appellate court that the provision in the Mechanics Lien Act awarding fees to successful lien claimants is not subject to the unfettered whim of the trial court. In other words, the appellate court held for the first time that, though the trial court has discretion on whether to award fees, that discretion is limited by its reasonable judgment as to whether there was any good reason to not make a payment. After all, the intention of the amendment to section 17 was to prevent the withholding of payment when there is no reason to do so and to provide a financial incentive to all parties to the dispute to make payment when it is due. Conversely, when a lien claimant makes a claim for no good reason, whether he is a subcontractor, material supplier or general contractor, the same section of the Mechanics Lien Act makes that claimant liable for

attorneys' fees incurred by others in defending against it.

This decision benefits all well-intentioned parties to a construction dispute by helping to curb unjustified claims and to encourage payment of earned draws, especially at the end of a project. Of course, there will still be efforts to exert unfair advantage by those who have the ability to withhold money, just as there will be overly aggressive lien claims by those hoping to intimidate owners. Nonetheless, laws are good when they exert economic incentives which punish bad behavior and reward good behavior and this decision does just that. 

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