
The Authoritative Source for Plumbing, Hydronics, Fire Protection and PVF
Plumbing Engineer
THE OFFICIAL PUBLICATION OF
ASPE
American Society of Plumbing Engineers
April 2015
Find us on Facebook & Twitter!
twitter.com/plumbingeng
facebook.com/PlumbingEngineer
Commercial High-rise Plumbing
A take on the difference between low and high-rise plumbing. Is it related to height or population? p64
INSIDE THIS ISSUE
• NKBA veteran discusses how hands-free is being used in universal design
• Conversation on coming standard for pumps
• SJE-Rhombus hosts first winter training on control products

Legal Pipeline

Steven Nudelman, Greenbaum, Rowe, Smith & Davis LLP

Paying the piper

Litigation is an expensive enterprise. Just ask anyone who has ever paid an attorney's bill. Smart businesspeople consult with attorneys before the deal, with the hope of avoiding a lawsuit after the deal. This is perhaps one of the most efficient and effective uses of attorney time. Yet, it is also one of the most overlooked, ignored strategies by small- to medium-sized businesses. As a result, businesspeople unwittingly find themselves mired in a legal mess – a mess that costs more in legal fees than overlooked, preventive measures would have cost had they been taken.

The problem

This introduction brings us to the fictional case of Paul Piping Company (Paul). ABC Plumbing Contractors, Inc. (ABC) entered into a written agreement with Paul, under which Paul had agreed to supply a specific quantity of piping for a commercial project. The agreement, which was signed by both Paul and ABC, specifically called for Paul to supply creamy plastic chlorinated polyvinyl chloride (CPVC) pipe for the project. Instead, due to an internal shortage of this particular kind of pipe, Paul actually provided ABC with a superior, high density polyethylene (HDPE) pipe.

This substitution was clearly indicated on the packing slip that accompanied the HDPE pipe. Also, the substitution was readily apparent upon visual inspection by ABC. Much to Paul's relief, ABC was willing to accept the HDPE pipe in lieu of CPVC pipe, and ABC orally advised Paul that it would "pay an additional sum" for the HDPE pipe. In an effort to "paper his file," Paul sent a written change order to ABC, reflecting the provision of HDPE piping instead of CPVC piping, as well as the increased price per lineal foot. ABC ignored Paul's change order as well as his subsequent phone calls and invoices seeking payment. Yet, ABC kept and utilized Paul's HDPE piping.

Paul decided that he had to take action; ABC could not keep this expensive HDPE pipe without paying for it. He figured that since he went to a contractor's class on mechanic's liens last year, Paul knew precisely what to do (and could save himself the expense of an attorney). He ran down to the office supply store and purchased a blank "Mechanic's Lien Claim" form for $9.95. He completed the form and went to the local county clerk's office to file it and pay the $20 filing fee. The lien indicated that payment was due and owing from ABC for the HDPE pipe, pursuant to the terms of the change order. After filing the lien, Paul served it on both ABC and the owner of the commercial project (Owner). Paul felt proud of himself, accomplishing this "legal" task for approximately $30, plus the cost of postage to mail the papers.

Within about two weeks, Paul's feeling of pride began to dissipate. He received letters from the lawyers representing the Owner and ABC demanding that the mechanic's lien be discharged immediately. Both lawyers threatened Paul with legal action and said that they would seek payment of their legal fees and costs if they had to go to court to have the lien discharged. Sensing that he was "in over his head," Paul called Avery Attorney, his trusted lawyer and counselor of many years, for some advice. After looking over the papers and the lawyers' letters, Avery looked down, threw his arms up, and shook his head steadily. He said nothing. Paul was getting nervous.

"OK, Avery, enough with the theatrics. What should I do?" Paul asked.

Lien laws are state-specific

"What a mess," Avery sighed.

He advised Paul to discharge the lien as demanded, because if he failed to do so, Paul very well could be subject to a claim for damages, including attorneys' fees and costs, by ABC and the Owner. Avery told Paul that in their particular jurisdiction, Paul needed to have a written agreement with ABC, signed by both parties, in order to enforce his mechanic's lien rights. While this is *not* a universal requirement in all states, it is a requirement in this particular jurisdiction. Avery reminded Paul that mechanic's liens are creatures of statute. That is, they are state-specific and the requirements vary widely from state to state, depending on the law in a particular jurisdiction.

Paul flapped his hand at Avery's dissertation, telling him that Paul had actually thought of the written-agreement requirement, remembering the issue from his contractor's class. Paul said that he did have a written agreement, signed by ABC and Paul for the CPVC pipe, and that the HDPE was only part of a change order (signed only by Paul).

"Doesn't that count?" Paul asked. "Besides, ABC accepted the HDPE pipe and did not reject it as nonconforming."

Paul impressed himself and thought he sounded more lawyer-like than Avery. Paul was insistent that ABC should not be able to keep his HDPE pipe without paying for it.

Avery agreed that ABC should not be able to keep the HDPE pipe without paying for it.

"However," Avery explained, "There's a right way to do things and a wrong way to do things. You, my friend, demonstrated the wrong way."

Avery was no longer flapping his hand at Paul.

TWB Architects, Inc. v. The Braxton, LLC

Paul explained that this situation may be viewed in one of two ways. First, it may be viewed as two separate agreements – one with a writing signed by both parties (the original agreement) and one without such a writing (the change order). Arguably, the second agreement (i.e., the change order), for HDPE pipe, replaced the

Continued on page 62

Legal Pipeline

Continued from page 60

first agreement (for CPVC pipe) in its entirety. Avery explained this legal concept in contract law known as a "novation." It was the subject of a recent case, "TWB Architects, Inc. v. The Braxton, LLC," decided by the Court of Appeals of Tennessee.

TWB Architects (TWB) had entered into a written agreement with a developer, Progress Capital Partners (Progress), to provide architectural and design services for The Braxton condominium project. After Progress failed to pay TWB almost $900,000 in fees, TWB considered filing a mechanic's lien. However, instead of filing a lien, TWB's principal agreed to accept a penthouse at The Braxton as payment. However, once TWB learned that the penthouse was encumbered by a bank lien and The Braxton went into receivership, TWB tried to enforce its prior written agreement with Progress. TWB filed a mechanic's lien and subsequently filed a complaint to foreclose its lien. The defendant filed a counterclaim, arguing that the purchase agreement for the penthouse was a novation of the architect's written agreement with the developer. Thus, according to the defendant, TWB's right to seek relief under the architect agreement was extinguished. The trial court agreed with this position, granting the defendant summary judgment. TWB filed an appeal. While the appellate court considered a number of issues, it began its analysis with the novation.

Definition of a novation

As the Court of Appeals explained, "A novation is a contract substituting a new obligation for an old one[,] thereby extinguishing the existing contract."

To have a novation, four elements are required: "(1) a prior valid obligation, (2) an agreement supported by evidence of intention, (3) the extinguishment of the old contract, and (4) a valid new contract." The Court emphasized that "[a] novation is never presumed; rather, it must be established by a 'clear and definite intention on the part of all concerned . . . . '" (Emphasis added.) Furthermore, "[a] novation need not be shown by express words, because the evidence supporting the parties' intent to agree on a novation 'may be implied from the facts and circumstances attending the transaction and the parties' subsequent conduct.'" Finally, the Court noted that the party seeking to assert the novation has the burden of proving that a novation was intended.

After analyzing all of these facts, the Tennessee Court of Appeals held that a reasonable person could reach the conclusion that all parties did not intend for the penthouse purchase agreement to extinguish the architect's agreement or the mechanic's lien rights arising thereunder. As a result, the Court reversed the grant of summary judgment on the issue of novation.

Turning to Paul's case, it is quite possible that the fourth element, a valid new contract, may not be satisfied since it is not clear that all parties entered into a new agreement as set forth in Paul's change order.

The second way to view Paul's situation is that the first agreement is still technically effective, although neither party performed as required under that agreement. Paul did not supply CPVC pipe and ABC did not send Paul payment. Thus, neither party has any remedy for a breach. Paul might claim that the change order served to modify the terms of the first agreement. However, ABC never executed the change order and may argue that it did not agree to its terms. Nevertheless, the fact remains that ABC kept the HDPE pipe and did not reject it as non-conforming.

Quantum Meruit: Unjust enrichment

Under the Uniform Commercial Code and the principles of quantum meruit (Latin for "as much as he has deserved") or unjust enrichment, ABC had to pay Paul the fair and reasonable value of the pipe that it kept.

Paul breathed a sigh of relief.

"But what about my mechanic's lien?" he asked.

Avery said that the lien still had to be discharged, since it is based on an unsigned change order. However, Avery told Paul that he does have claims for breach of contract, quantum meruit and unjust enrichment that may be enforced in court – independent of any lien claim. Avery told Paul that he would be happy to prepare the lien discharge papers as well as the Complaint. While Paul felt that he could probably prepare the lien discharge, he was getting tired of "playing lawyer" (and paying for the privilege). Paul decided that he would be better off retaining Avery for that task as well as preparing the Complaint. It may have cost Paul additional time and money this time around, but the next time he contemplates filing a lien or entering into a commercial contract, Paul plans to call Avery first instead of last. ■

Steven Nudelman *is a partner at the law firm of Greenbaum, Rowe, Smith & Davis LLP in Woodbridge and Roseland, N.J. He is a member of the firm's Litigation Department and its Construction, Alternative Dispute Resolution and Alternative Energy & Sustainable Development Practice Groups. He may be reached at (732) 476-2428 or snudelman@greenbaumlaw.com.*