



A WEAPON TO USE WHEN LITIGATING WITH AN OWNER

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Construction disputes often hinge on which party can better withstand the costs of litigation. Litigation is expensive. The ability to recover attorneys' fees from an owner can be the critical factor in deciding whether to file suit, continue with a lawsuit or settle. A relatively unknown law gives a home remodeler a weapon to use against an owner when litigation is brought, or contemplated.

Most laws that relate to the construction industry are focused on consumer protection. At both the State and County levels, most laws and regulations are designed to protect a homeowner from a contractor. Examples are licensing requirements, mandatory contract language, trust fund obligations and providing homeowners with a right to rescind a contract after it is executed. Aside from the Lien Law, there are few laws that assist a contractor when he or she is in a dispute with a homeowner. However, General Business Law Section 772 is one that provides a contractor with some recourse or utility.

There are two parts to this law. The first favors the homeowner. It allows the owner to recover reasonable attorney's fees from a contractor who makes false or fraudulent

representations, in writing, that induces the owner to sign a contract. The second part, however, states the owner may be liable to the contractor if the owner's lawsuit is without merit. This turns the tables and allows a contractor to potentially recover attorneys' fees from an owner where the owner alleges fraud (which owners often allege out of concern that a claim of breach of contract is not a strong enough claim).

It is generally difficult to recover attorneys' fees in a lawsuit. To do so, you must either have: (1) a law that allows you to recover fees, such as General Business Law Section 772; or (2) a clause in your contract authorizing the recovery of attorney's fees. Even with one of those, judges are reluctant to award fees and will almost certainly reduce the

amount you seek. However, on a practical level, the potential to recover legal fees from a homeowner can be very useful in resolving the dispute either before or after litigation is brought. The owner must consider the possibility that he or she will have to pay the contractor's legal fees, in addition to his or her own.

A better alternative than relying on General Business Law Section 772 is to include an attorneys' fees clause in your contract. While that law is limited to disputes in which the owner alleges fraud, a contractual attorneys' fees clause will be broader and can cover all types of claims and scenarios. An owner may balk at such a provision or may demand reciprocity – that the prevailing party be allowed to recover attorneys' fees, and not merely the contractor. That is not an uncommon or unreasonable demand but you should not automatically agree to it without thinking through all its potential consequences.

If you do not have an attorney's fees clause in your contract, General Business Law Section 772 may be a potent weapon to use when you are embroiled in a dispute with an owner.