

NAVIGATING HOMEOWNER DISPUTES IN THE CURRENT LEGAL LANDSCAPE

Adam Browser, Esq. / Ruskin Moscou Faltischek, P.C.

New York State recently announced it is cutting the budget for the judicial system by \$300 Million. What does this have to do with you? Well, if you get into a dispute with a homeowner that winds up in court, the lawsuit will likely take more time to resolve due to the budget cuts and accompanying reduced staffing and related resources. Whether in the construction industry or the legal industry, time is money. The longer your lawsuit takes, the more it will cost you, either in legal fees or time devoted to the dispute, which takes you away from growing your business. Just as you plan to minimize risks on your projects such as rising material costs, you must take steps to reduce the risks and potential costs of a dispute with a homeowner.

Fortunately, you can do several things without much effort. These include vetting the homeowner before being hired and having an effective dispute resolution clause in your contract. You have probably given little thought to the dispute resolution clause in your contract. You may not even know if your contract contains such a clause, much less what it says. You should.



When a project goes awry, your contract is what spells out (most of) your legal rights and responsibilities and those of the homeowner. A well-crafted dispute resolution clause will determine whether: (a) the dispute will be decided by litigation or arbitration; (b) any conditions that must be satisfied before litigation or arbitration takes place; or (c) you can recover your attorneys' fees if you successfully prosecute or defend the dispute.

The distinction between litigation and arbitration is often misunderstood. Litigation is a method of resolving disputes via the court system. Arbitration is a private dispute resolution procedure typically conducted by a private arbitration company, such as the American Arbitration Association. While both processes result in a binding decision, whether by a judge, jury or arbitrator, there are significant differences besides the public vs. private distinction. Arbitration is typically quicker than litigation. In light of the planned New York judiciary budget cuts, arbitration is likely to become a much faster way to resolve a dispute than litigation. However, two downsides to arbitration are: (a) the arbitrator's fees; and (b) if you lose the arbitration, it is very difficult to set aside the

arbitrator's decision. To do so, you must start a separate litigation and the arbitrator's decision is given great deference. In contrast, it is much easier to appeal an adverse ruling in a litigation (but it will still be costly and time-consuming).

Separate from both of those processes is mediation, which is non-binding and can take place as part of an arbitration or a litigation. Over the last few years, courts have implemented mediation programs to deal with the growing number of cases and its scarcer resources. Mediation is much less costly than arbitration or litigation, but there is no guarantee it will resolve the dispute.

The dispute resolution clause in your contract can combine mediation with either litigation or arbitration. Some contracts, like many AIA forms, require mediation as a pre-condition before one may resort to arbitration or litigation. If the prerequisite mediation does not take place, the arbitration or lawsuit may be thrown out as premature.

Another common pre-condition in a good dispute resolution clause is a requirement to provide notice and an opportunity to cure. This requirement can be onerous, and potentially dispositive of the dispute. For example, the contract may: (a)

require the homeowner to notify the contractor of defective workmanship within a certain time of discovering the defect; and (b) failure to timely notify the contractor is a waiver of the homeowner's claim. Homeowners tend not to focus on these conditions – especially if contained in boilerplate – when reviewing the construction agreement.

Whether you prefer arbitration or litigation, or require mediation or any other condition precedent, your dispute resolution clause should permit you to recover attorneys' fees if you prevail. That raises the stakes for the homeowner and makes your claims more potent. Absent an attorney-fee clause, a "victory" in the courthouse or at arbitration can be a financial defeat.

An hour of your time reviewing and revising the dispute resolution clause in your contract is a great investment. It can save you thousands – if not tens of thousands – of dollars and even help you resolve a dispute at its early inception.