

ROGERS JOSEPH O'DONNELL

To: AGC CA-LAC Members
From: Tyson Arbuthnot
Date: February 5, 2010
Re: New Case Summaries through February 4, 2010

1. *UDC-Universal Development, L.P. v. CH2M Hill*
181 Cal. App. 4th 10 [Cal. App. 6th Dist.] (January 15, 2010)

When a contract imposes on a subcontractor the duty to defend a developer from any claim implicating the subcontractor's work, this duty arises as soon as defense is tendered for such a claim, regardless of the outcome of the litigation and regardless of whether the developer was properly licensed.

UDC-Universal Development, L.P. ("UDC") and CH2M Hill ("CH2M") entered into two contracts under which CH2M would provide engineering and environmental planning services for UDC's condominium development. The contracts included an indemnity provision that covered all claims and damages, including attorneys' fees, "to the extent they arise out of or are in anyway connected with any negligent act or omission" by the CH2M. The duty to defend clause obligated CH2M "to defend any suit, action or demand" brought against UDC "on any claim or demand covered herein," upon written request from UDC.

After completion of the development, the condo HOA filed a complaint against UDC for "defective conditions" at the project, due in part to negligent planning and design of open space and common areas. UDC cross-complained for indemnity against numerous subcontractors, including CH2M. These included a tender of it defense against the HOA's action based on the contract indemnity provisions. CH2M answered the cross-complaint and rejected the tender of defense.

CH2M argued that under the contract it was not obligated to pay attorneys' fees unless it was found negligent. The court disagreed. Relying on the California Supreme Court decision in *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal. 4th 541 (2008), the court held that because the duty to defend commenced before there could be a finding of negligence, than necessarily a finding of negligence was not a predicate to the duty to defend. Although the indemnity provision required a finding of negligence, this did not extend to the duty to defend. The court also noted that it was sufficient that the claim implicate CH2M's scope of work, even if it did not specifically allege that CH2M was negligent.

CH2M also argued that UDC's claims were barred because it lacked a "Class A" contractor's license when it entered into the contracts. Business & Professions Code §7031(a) precludes actions to "recover compensation for any act or contract where a [contractor's] license is required," when brought by a person who does not possess such a license. The court rejected this argument, reasoning that the term "compensation" denotes sums claimed as an agreed price or fee earned by performance, and this does not include indemnification for claims related a subcontractor's work. Thus, a valid contractor's license is not a prerequisite to a claim for indemnity and duty to defend.

2. *Goodman v. Lazano*
10 C.D.O.S. 1582, docket no. S162655 [Cal. Sup. Ct.] (February 4, 2010)

In a construction defect action, the defendant and not the plaintiff was the prevailing party for purposes of recovering costs and attorneys fees when plaintiff's judgment against the lone non-settling defendant was less than the settlement sums it received, resulting in zero net monetary recovery at the settlement sums were offset.

Plaintiff Randall Goodman contracted with defendant Jesus Lozano to purchase a newly constructed home. The house was built by AMPM Construction, a partner of Lozano's. The contract had a prevailing party attorneys' fee provision. Goodman sued Lozano, as well as AMPM, the architect and the real estate brokers, based on construction defects in the homes.

The other defendants settled for a total of \$230,000. At trial, Goodman received a "total damage award" of \$146,000 against Lozano. The trial court found that this was entirely off-set by the settlement award, and declared Lozano the prevailing party for purposes of attorneys' fees and cost. It reasoned that an off-set judgment that resulted in zero recovery was did not fit the definition in Code of Civil Procedure §1032(a)(4) of prevailing party as "the party with a net monetary recovery."

The Court of Appeal affirmed, and the California Supreme Court agreed. It overruled *Wakefield v. Bohlin*, 145 Cal. App. 4th 963 (2006), which had held that a party who receives a damage award "categorically qualifies as a prevailing party with a net monetary recovery," even if that award is off-set to zero by settlement funds from other defendants. Analyzing the legislative intent, the Supreme Court determined that "net" means the amount recovered after judgment. Because Code of Civil Procedure §877 operates to off-set settlement funds against an award before judgment is entered, the there is zero net recovery after a total settlement offset. Thus, a party whose award is completely off-set cannot be the prevailing party.

3. *Reddell v. California Coastal Commission*
180 Cal. App. 4th 956 [Cal. App. 2d Dist.] (December 1, 2009)

California Coastal Commission can independently assess a coastal project's compliance with a city's development plan, even if the city has already approved the project.

Dan Reddell was a property owner who sought a coastal development permit from the California Coastal Commission for a residential and commercial development on the bluffs above Morro Bay. The city of Morro Bay had earlier approved his building permit, but a resident had appealed to the Commission. The Commission denied the permit on the basis that the project was inconsistent with the city's local coastal plan policies with respect to bluff development, parking, visitor-serving priorities, and community character. The trial court denied Redell's petition for writ of mandate to overturn this decision, and the Court of Appeal affirmed. The Court of Appeal determined that the Commission had authority to independently assess compliance with the city's plan, and also consider interference with "visual resources" in coastal areas, and that there was substantial evidence to support the Commission's finding.