Choice of Law and Forum Selection Clause in Design Subcontract Unenforceable in California

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On a California project, where an architect's agreement with its landscape design subconsultant called for all disputes to be resolved by the courts in Texas, applying Texas law, a California appellate court held the forum selection clause was unenforceable as contrary to a California code and public policy. Texas law could have enforced a "pay-if-paid" clause to avoid paying the subconsultant since the owner had not paid the Prime. California law, however, makes such clauses unenforceable. Choice of law and forum make a big difference in the outcome in this dispute. *Vita Planning and Landscape Architecture, Inc. v. HKS Architects, Inc.,* 240 Cal.App.4th 763 (2015).

The Forum Selections Clause. The project owner hired HKS to provide architectural services for the Project pursuant to an "Agreement Between Owner and Architect" (Prime Agreement). Among other things, the Prime Agreement contained a Texas forum selection clause providing: "[a]s a condition precedent to the institution of any action [or] lawsuit[,]" that "all disputes shall be submitted to mediation" and that "[a]ll claims, disputes, and other matters in question between the parties arising out of or relating to [the Prime] Agreement ... be resolved by the ... courts in ... Texas." The Prime Agreement also contained a Texas choice of law provision.

The owner "ceased paying for any work," leaving HKS "with extensive unpaid bills" for its own services, and those provided by its "consultants." HKS obtained a judgment against Owner in 2010 in Texas for $1,617,073.70 but was "unable to recover anything on that judgment, despite diligent efforts to do so."

Subconsultant Sues For Its Fees. Vita Planning and Landscape Architecture, Inc. (Vita) filed a complaint against HKS seeking payment. HKS filed a motion to dismiss, asking the court to enforce the forum selection clause. The trial court granted the motion. This was reversed on appeal.

Vita raised several arguments in opposition. First, it characterized HKS as a "general contractor" and itself as a "subcontractor" and claimed the forum selection clause in the Contract was unenforceable under section 410.42. Vita also argued the case implicated "fundamental public policy concerning pay provisions in subcontractor-contractor contracts," and suggested enforcing the forum selection clause would violate California public policy, under which "pay-if-paid" provisions are unenforceable.

In reply, HKS argued section 410.42 did not apply because HKS is a design professional and not a contractor and Vita is a professional subconsultant not a subcontractor. HKS asserted that the code applied only to actual contractors performing construction work, and that this was not a "contract for construction."

Despite lack of signatures, court found there to be a contract. The first issue to be decided by the appellate court was whether there was even a contract between HKS and Vita. The problem was that the parties never signed a contract. The court, held that there was nevertheless a contract, and that the "absence of signatures does not render the Contract unenforceable." This is because the parties "conducted themselves as though they had an agreement[.]" There is no dispute Vita performed pursuant to the Contract, and HKS accepted Vita's performance. A "*voluntary* acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (Civ.Code, § 1589, italics added; see also Civ.Code, § 1584.

Forum Selection Clause is void. Turning next to the bar on enforcing a forum selection clause, the court analyzed section 410.42 of the code.

The court explained that, "Section 410.42 precludes out-of-state contractors from requiring California subcontractors to litigate certain contract disputes in the contractor's home state". It renders "void and unenforceable" a "provision [ ] of a contract between the contractor and a subcontractor with principal offices in this state, for the construction of a public or private work of improvement in this state" that "purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state" or that "purports to preclude a party from commencing such a proceeding or obtaining a judgment or other resolution in this state or the courts of this state."

Moreover, said the court, the code was intended to "provide California subcontractors with the protection of California courts and law (including prompt pay laws) to which they are entitled".

Designer is a contractor for purposes of the law. The court went on to address the question of whether design professionals were "contractor's on construction projects" within the meaning of the statute, and held that they are.

Here, the court said, Vita is unquestionably a subcontractor because it was "awarded a portion" of HKS's contract with Owner and because it did "not have a direct contractual relationship" with Owner.

The court stated: "We are not persuaded by HKS's contention that section 410.42 does not apply because it is not a "general contractor," which "construct[s] improvements," but rather a "design professional." In industry parlance, a " 'contractor' " may be "synonymous with 'builder'[.]" The court concluded that the term "contractor" in section 410.42 is not limited to builders, and does not exclude an architect or design professional

Comment:

This case demonstrates the importance in knowing the state law before inserting choice of law provisions into contracts and assuming that a term or conditions such as pay-if-paid clause will be enforced using some other state's law rather than the state in which the project is located. Another interesting aspect of the case is the fact that the court held a design professional to be a "contractor" for purposes of the statute. I am finding that more and more design professional contracts refer to the design firm as a "contractor," "supplier," "vendor,"

"provider", and other such terms. Rather than attempt to change this to "design professional" or "consultant," it may be simpler and better to just include a sentence somewhere in the contract specifying that the firm is providing professional services and is not doing construction or other "work." The same issue arises with more and more contractors calling professional services "work." Again, perhaps the answer is to carefully define that in the context of the contract the term "work" means professional services only.

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