

LEGAL PIPELINE



Consumer Protection Statutes Protect General Contractors, Too

If corporations acting through authorized representatives are not careful, they face exposure to enhanced damages.

By Steven Nudelman

Suppose that you are a subcontractor who enters into a contract to work on a large construction project. You convince the general contractor to pay an advance deposit for materials and equipment. However, you do not actually intend to use the deposit for those purposes; you intend to pay debts on another, unrelated project. (You also fail to disclose your true intentions to the general contractor.)

Soon, you come to realize that you do not have enough money left to finish the large project and you are unable to return the deposit or purchase the materials and equipment. You were already in financial trouble, and now, by diverting project funds, you have dug yourself deeper into the hole. Even worse, you are facing statutory liability for fraud. What do you do? How does the movie end?

To find out, we take a close look at the case of *Pointe Residential Builders BH, LLC v. TMP Constr. Grp., LLC*, 2013 Conn. App. 445 (2022).

Background

In *Pointe Residential*, plaintiff/general contractor *Pointe Residential Builders BH* and defendant/subcontractor *TMP Construction Group (TMP)* entered into a standard subcontract agreement. Under the parties' agreement, TMP was to perform certain tasks for a fixed sum and was to receive payment upon delivery for materials and equipment stored on-site.

Notwithstanding this contractual promise, TMP persuaded the plaintiff to pay a 30 percent deposit upfront for



materials and equipment by making false representations about how the funds would be used. Specifically, TMP informed the plaintiff that the funds would be used to buy materials in advance to avoid price increases and delays.

However, unbeknownst to the plaintiff, TMP was struggling financially and actually intended to use the funds for payroll financing and other projects.

When *Pointe Residential* learned that TMP diverted funds, it brought suit in the Superior Court of Connecticut, alleging breach of contract, unjust enrichment and violations of the Connecticut Unfair Trade Practices Act (CUTPA). Significantly, TMP's manager and controlling member, Olin Paige III, was also named as an individual defendant in the case.

After hearing the evidence in the matter, the trial court held that TMP breached its contract by failing to perform its obligations or return the payment. It also held that TMP was unjustly enriched as a result of the

deposit.

The trial court also found that both TMP and Paige, in his individual capacity, engaged in conduct that was "deceptive, unethical and unscrupulous and constituted an unfair and deceptive business practice" in violation of CUTPA. 2013 Conn. App. 445 at 450.

Notably, the trial court determined that Paige was cognizant of TMP's intentions from the beginning and failed to disclose them to the plaintiff. He was also the individual who used the funds provided by the plaintiff to pay other expenses.

The trial court found that Paige recklessly put the plaintiff at risk because he knew that TMP was neither capable of finishing the project nor paying the plaintiff back. After the defendants were found liable at trial, they filed an appeal with the Connecticut Appellate Court.

The CUTPA statute

In relevant part, CUTPA provides that "no person shall engage in unfair

methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Id. at 452.

To determine what constitutes an unfair practice, Connecticut courts have adopted the criteria set forth in the Federal Trade Commission’s “cigarette rule.” The factors outlined in the rule include:

“(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons].” Id.

In certain instances, the same facts that establish a breach of contract claim may also establish a CUTPA violation. Accordingly, the court must determine whether the defendant’s breach was simply negligent or incompetent or whether it resulted from intentional, reckless, unethical or unscrupulous conduct.

If the breach was the former, then a plaintiff could not sustain a claim under CUPTA. In the latter case, the contractual breach would be sufficient to establish a CUTPA claim under the second prong of the cigarette rule.

Applying these principles to the facts of the case, the appellate court found that there was sufficient evidence to support findings that both TMP and Paige engaged in intentional, reckless, unethical or unscrupulous conduct in violation of CUTPA under the second prong of the cigarette rule.

The court rejected the defendants’ argument that there was insufficient evidence to support a finding of aggravating, unscrupulous conduct. Specifically, the court focused on documentary and testimonial evidence

that TMP made false representations to the plaintiff regarding its intended use for the deposit money. The court also relied on testimony from the plaintiff’s managing director that Paige himself admitted that the deposit money was being used for other projects.

Accordingly, the court reasoned that Paige was also liable for knowingly or recklessly engaging in the unscrupulous acts because he personally made the false representations on behalf of TMP and controlled how the deposit was spent. In light of the foregoing, the appellate court concluded that both TMP and Paige violated CUTPA.

The defendants argued that the trial court erred in awarding judgment to the plaintiff under CUTPA because the plaintiff did not suffer “any ascertainable loss of money or property” due to the violation. Id. at 453-54. Under CUPTA, a plaintiff must prove an ascertainable loss to be entitled to relief.

The appellate court found that this claim lacked merit because the ascertainable loss provision does not require a plaintiff to prove specific damages. In this case, the plaintiff satisfied the “ascertainable loss” requirement by providing evidence that showed the difference between the money paid on the deposit and the value received.

Finally, the defendants argued that the trial court abused its discretion in awarding plaintiff enhanced damages (i.e., double damages) and attorneys’ fees to the plaintiff. Under CUTPA, the lower court has the discretion to award punitive or exemplary damages to the prevailing party if the evidence reveals “a reckless indifference to the rights of others or an intentional and wanton violation of those rights.” Id. at 461.

Here, the appellate court concluded that the trial court did not abuse its discretion because TMP and Paige engaged in “intentional, deceptive, unethical, and unscrupulous” conduct by making false representations to the plaintiff.

Takeaway

While the obvious moral of the story is don’t rob Peter to pay Paul, there is a more subtle point of note for general contractors and subcontractors. Most consumer protection statutes — such as CUPTA or the New Jersey Consumer Fraud Act — typically afford protection to the individual consumer.

However, in certain cases, they protect corporations as well as individuals. If corporations (acting through their authorized representatives) are not careful, they face exposure to enhanced damages — double damages and attorney’s fees.

The precise contours of consumer protection statutes vary based on the jurisdiction of their enactment, but they are worth paying attention to. They remind contractors of the very simple principle: When you get money to pay somebody, you had better pay the person you are supposed to pay.

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