



## **Nebraska Federal Court Denies Summary Judgment for Architect on Professional Negligence Claim**

In a June 2007 federal court decision in Nebraska, the court denied summary judgment, requiring a defendant architect to stand trial on a professional negligence claim for noncompliance with the building code where the architect failed to hire a special inspector as mandated by the code. *Turner v. Moen Steel Erection, Inc.*, 2007 U.S. Dist. LEXIS 40957 (D. Neb., June 5, 2007). The court found a triable issue of fact on the issue of the architect's compliance with the applicable standard of care. Specifically, the court determined that there were triable issues of fact as to whether the architect had a duty and, if so, whether any breach of that duty was the proximate cause of the accident and subsequent injury.

The case arose from a construction project in the City of Omaha, Nebraska (the "City"). The City retained Beringer, Ciaccio, Dennell, Mabrey, Inc. ("BCDM") to provide architectural services. BCDM's agreement with the City required it to: visit the construction site at appropriate intervals; stay abreast of progress and work quality; and evaluate the work's conformance with the contract provisions. The agreement also provided that BCDM was not required to make unreasonable inspections of the work.

BCDM, in turn, retained AGA Consulting, Inc. ("AGA") to serve as engineering subconsultant. The subconsulting agreement called for BCDM to review AGA's work for compliance with the City's architectural and engineering requirements. Four months later, the City entered into a construction contract with Lund-Ross Constructors, Inc. ("Lund") to serve as the general contractor. Lund proceeded to enter into a subcontract with Moen Steel Erection, Inc. ("Moen"). Moen was contracted specifically to unload and erect structural steel and to unload and erect pre-cast concrete made available by others. Moen's subcontract prohibited direct communication between Moen and BCDM or the City. As a result of Moen's subcontract, Moen directed its communications to Lund. During construction, Moen departed from the installation specifications but failed to notify BCDM of its design departure. Stephen Turner ("Turner"), a concrete finisher, and an employee of Lund, suffered an injury when a 4,600-pound pre-cast concrete wall panel fell on him at the construction site.

The plaintiff argued that BCDM failed to retain a qualified expert to determine whether the contractor constructed the panel in conformance with the applicable building code. Turner claimed that if BCDM retained a special inspector, the inspector could have determined whether the wall met the applicable code. Turner filed suit against Moen, which filed a third-party complaint against AGA, BCDM, and others. Moen's third-party complaint alleged that BCDM was negligent in its design and professional supervision of the construction project and that BCDM knew or should have known that the panel was defective and dangerous. BCDM moved for summary judgment asserting that: 1) under BCDM's contract with the City, BCDM had no duty to control the means and methods of construction or ensure job-site safety; 2) Moen's failure to follow the installation specification was the proximate cause of Turner's injury; and 3) Moen failed to designate an architectural expert witness to support its claim that BCDM was negligent.

On the question of the architect's duty, Nebraska courts have ruled the standard contractual language regarding means and methods of construction does not absolve the architect from liability for failure to inform the owner of deviations from the building plans when the architect has agreed to make periodic inspections. In this case, the court held the contract language also does not serve to absolve BCDM from liability for failure to employ special inspectors. While the court found there is nothing inherent in the architectural field that requires a professional architect to evaluate stated duties for building code requirement for special inspectors, BCDM retained some duty for overall compliance with the building code by agreeing to ascertain whether AGA's services complied with the building code.

The court found that both Moen and BCDM raised plausible, alternate theories of proximate cause against the other, and that questions of material fact precluded a finding of summary judgment.

In Nebraska, as elsewhere, the plaintiff's burden to prove a violation of a design professional's standard of care generally can only be established by expert testimony. Moen did not designate an architectural expert, but argued that an engineering expert is qualified if he possesses special skill or knowledge regarding the subject matter. The court found Moen's engineering expert qualified to offer an opinion as to whether an engineer failed to follow the building code and whether that failure was the proximate cause of Turner's injury. The court ruled Moen's expert was similarly qualified to opine on whether BCDM failed to employ a special inspector.

This decision brings to light interesting and important issues regarding an architect's responsibility for code compliance, specifically in situations in which the code mandates that special inspectors be employed to ensure such compliance. From the design professional's standpoint, this decision emphasizes the necessity of adhering to building code provisions and maintaining responsibility for any subconsultants' work which includes ensuring its compliance with code. Although at this point only a triable issue of fact has been raised, the decision exemplifies the consequences for the architect in failing to comply with code by not retaining a special inspector.

#### **Risk Management Prevention Tip**

Had the architect retained a qualified inspector as required by the code, the defective wall installation could have been identified, preventing the concrete worker's injury. Additionally, the architectural firm maintained responsibility for work quality and conformance, which they failed to properly supervise—personally or through the service of an inspector. Whenever a design professional's duties include code compliance, it is crucial they adhere to all regulations, including employing the services of appropriate specialists to not only ensure structural stability, but also worksite safety.

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