



HOME CONSTRUCTION PITFALLS

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Most Americans' personal wealth is directly proportional to the equity in his or her home. It should come as no surprise then, that Americans collectively spend hundreds of millions of dollars each year on new home construction and existing home renovations, making the home construction industry a significant driver of the economy on the national, state, and local scale. (As of this posting, the U.S. Census Bureau is projecting a spend of nearly \$590 million dollars on private residential housing in 2020—despite a general slowdown due to COVID-19.) Such high-value and high-volume commerce brings with it myriad legal issues and opportunities for disputes. Opportunities that are only exacerbated by the financial stressors of the pandemic (as litigation tends to increase during economic downturns). Unfortunately, and surprisingly, many actors in this sector leave themselves dangerously exposed.

A few of the most critical things a competent construction attorney can do to help you avoid disputes—or at least resolve them efficiently if they arise—are:

- Before the project begins, ensure its terms are well-defined and vetted. Appropriately tailored contract documents will, among other things, delineate the scope of work to be done and the process for changing that scope of work during the project. They will anticipate potential disputes and establish procedures to resolve them that are efficient and account for the scope of work being performed. And they will contain self-righting terms such as setting appropriate insurance obligations for all parties, clarifying interim inspection rights, and expressly stating project payment procedures (including establishing appropriate retainage amounts and allowing for partial lien waivers).
- During the project, ensure the contract terms are assiduously followed and enforced, including guiding the process of creating appropriate project documentation, such that any

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future disputes concerning, for example, scope changes, inspection results, permits, payments, or lien rights are easily resolved.

- If disputes do arise during or after the project, ensure that rights are not lost due to waiver or time limitations, and ensure any lawsuits stemming from your project are pled or defended appropriately. Construction contracts are specialized documents, as are the disputes that arise from them and the law developed around them. Experienced construction counsel is therefore essential to successfully handle construction disputes. This is especially important when mechanic's liens are at issue. The Illinois Mechanic's Lien Act is byzantine and draconian—*g.*, failure to strictly adhere to its timing requirements will more than likely leave a contractor without lien rights, whereas a contractor who expertly navigates the Act may force the sale of a delinquent homeowner's property regardless of the relative size of the debt to the value of the property. For both parties, the Mechanic's Lien Act is a high-wire act—high risk/high reward—and the help of experienced counsel is your best safety net.

Two recently local court cases demonstrate just how high the stakes can be in home construction disputes. *Schaffer v. Greenview Home Builders & Cabinetry Designers, Inc., et al.*, 2020 IL App (2d) 190230, documents a seemingly interminable dispute that arose from the construction of a new home in Highland Park, Illinois. In plaintiff's October 2015 complaint, she alleged that Greenview Home Builders "did not complete the project and that there were deficiencies in the portions that it did complete"—an exceedingly common complaint in home construction disputes. Nearly **five years** later, in until July 2020, an appellate court decision left her with no recovery and no case to pursue further. This even though early on she obtained a default judgment against Greenview and its president for \$350,000. But both Greenview and its president filed for bankruptcy by early 2017—leaving the plaintiff with little recourse against them. After that, as they say, it was all over except the shouting. But that shouting continued for more than three years and cost untold fortune. It's impossible to know, but it's not hard to imagine a better result for all concerned if appropriate measures had been prescribed in the project contracts—including sufficient insurance and bond obligations, appropriate retainage, and tailored dispute resolution procedures.

On a more modest scale, *Hayden v. Adams*, 2020 IL App (1st) 191441-U, deals with a home renovation gone awry. In early 2017, plaintiff hired Adams Remodeling to renovate his home for the quoted price of slightly over \$16,000. Within months, the contractor allegedly walked off the job, the homeowner withheld final payment, and the contractor placed a lien on the homeowners property. However, the contractor failed to give notice of the lien and did not to immediately enforce it. When the homeowner learned of the lien through sheer happenstance, he attempted to send a demand letter to Adams, which under the Illinois Mechanic's Lien Act would have compelled the contractor to enforce his lien or lose it—but the letter was never received. As such, the contractor took no action and the homeowner eventually filed suit to extinguish the lien. In April 2020—nearly **three years** after the litigation began—the homeowner prevailed, but only on the technicality that Adams had received the demand letter when it was attached as an exhibit to the homeowner's complaint! Three years of litigation—and its costs—plus all that uncertainty over a relatively modest \$16,000 home renovation. It's not hard to imagine the attorneys' fees outstripping the renovation costs.

At bottom, what is so shocking about these cases is how pedestrian the underlying disputes are—issues like these arise all the time between homeowners and contractors, even sometimes on projects that ultimately are successful. Yet in *Schaffer* the homeowner spent five years and untold fortune chasing an unobtainable recovery and along the way (presumably) pushed both the contractor and its president



into bankruptcy. And in *Hayden* both the homeowner and contractor spent years unsure of the status of their property and lien rights, respectively, and presumably also spent significantly on legal fees. Moreover, in the end, none of the parties to either litigation received the full benefits of bargains they struck.

Don't let this be your fate. Attorneys at Burke, Warren, MacKay & Serritella, P.C. regularly assist both homeowners and contractors in all phases of project construction, management, and close-out. Whatever phase your project is in, reach out to us today to learn more about how we can help.

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