

Lending Institution Liability to Contractors After Foreclosure on a Construction Loan

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The issue of whether unpaid subcontractors who have furnished and delivered labor and materials on a construction project can recover on an unjust enrichment theory against a lending institution which foreclosed on the project after the owner defaulted on the construction loan has been revisited in the case of *D.A. Hill Company v. CleveTrust Realty Investors, Inc. et al.* 524 Pa. 425, 573 A.2d 1005 (1990).

Prior to this case the superior court determined that a mortgagee which had foreclosed on a construction project had not been unjustly enriched where it had already advanced monies budgeted for the work for which the plaintiff subcontractor was suing. *Myers-Macomber Engineers v. M.L.W. Construction Corp.*, 271 Pa. Super. 484, 414 A. 2d 357 (1979). Also in the case of *Gee v. Eberle* 279 Pa. Super. 101, 420 A. 2d 1050 (1980), the superior court held that a lender who purchased a construction project at a sheriff's sale, having made advances sufficient to pay for the work of a subcontractor, was not unjustly enriched. In both these cases the issue turned on the extent to which the lender had advanced funds sufficient to pay for the subcontractor's work.

In *CleveTrust* the supreme court took a different tack. At the time of default, CleveTrust had disbursed approximately \$1.9 million (not including retainage) leaving the lender with approximately \$300,000.00 in undisbursed funds. CleveTrust purchased the property at a Sheriff's sale for taxes and costs in the amount of approximately \$121,000.00.

A subcontractor brought an action alleging that CleveTrust had been unjustly enriched. Another subcontractor filed a joint complaint. CleveTrust responded to these complaints by answering that it had not been unjustly enriched, on the basis that the value of the project was less than the amounts disbursed to the owner, and that even if it had been enriched, any enrichment was not unjust, for CleveTrust advanced funds to the owner adequate to pay for the work performed by each subcontractor.

The court accepted CleveTrust's arguments that the value of the subcontractors' invoices was not a proper measure of enrichment. The appraised value of the property was viewed as being the relevant standard for enrichment. In this case, the court found that the property was worth no more than the amount CleveTrust advanced. To the extent the value of the improved property at the time of foreclosure exceeded amounts already advanced by the lender, presumably the subcontractors would have met their burden of proving enrichment.

However, the court went further in stating that the subcontractors could not recover on an unjust enrichment theory because, even assuming that CleveTrust

was enriched, it was not unjustly enriched. There was no evidence on the record that CleveTrust either requested anything from the subcontractors or misled them in any way. Because the subcontractors had voluntarily waived their rights to mechanics' liens and gone forward without being protected by a payment bond, the court concluded "it would be manifestly unfair to a way as to place all of the risk on the CleveTrust."

Plaintiffs in *CleveTrust* filed their complaints in 1981, and the actions wended their way through the courts until 1990. While the supreme court mentioned *Myers-Macomber Engineers* and *Gee v. Eberle* supra in a footnote, it neither discussed the analyses set forth in those decisions nor attempted to distinguish them. Given the current economic climate of the construction industry in Pennsylvania, and given that the supreme court did not discuss *Myers-Macomber Engineers* and *Gee v. Eberle* at any length, it appears that we have not yet heard the last word on what may well be an increasing subject of litigation.