

Pursuing Legal Defenses at the Outset of Litigation Can Be the Difference Between Winning and Losing

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More often than not, clients, and in some instances their counsel, tend to overlook the importance of pursuing legal defenses at the outset of litigation and focus their attention on what will happen at trial. Seasoned litigation attorneys, however, know that the failure to recognize and pursue a legal defense at the early stages of litigation can be just as harmful as a misstep at trial. For example, in a recent lawsuit arising out of the construction of a municipal golf course in Massachusetts (the "Project"), through the foresight of its attorneys at Donovan Hatem LLP, an architectural firm (the "Architect") was able to avoid the costs associated with a prolonged litigation and the risks of a trial.

The General Contractor on the Project brought a lawsuit against the Owner for breach of contract, promissory estoppel, and misrepresentation. The breach of contract claims were based on the failure of the Owner to pay the General Contractor for the work performed on the Project and the additional construction costs incurred as a result of the Owner's delays. The Owner in turn filed a third-party complaint against the Architect for indemnification and contribution.

The Architect's attorneys moved for summary judgment based on the following two arguments. First, the Architect's attorneys argued that because the Owner/General Contractor Agreement contained an express no damages for delay provision, the Owner could not be held liable for "delay damages" and, therefore, as a matter of law the Owner could not bring a claim for either contribution or indemnification against the Architect. Second, the Architect's attorneys argued that because the Owner satisfied the definition of a "public employer" under the Massachusetts Tort Claims Act, the Owner was exempt from suit for an intentional tort, i.e., misrepresentation, and therefore, as a matter of law, the Owner could not bring a claim for either contribution or indemnification against the Architect. Counsel for the Owner likewise moved for summary judgment against the General Contractor based on the Architect's arguments.

The Court granted judgment in favor of both the Architect and the Owner and, therefore, the Architect was dismissed from the lawsuit. The Owner and General Contractor proceeded to trial on the remaining breach of contract claims for failure to pay for work performed on the Project. At the jury-waived trial, the Court entered a significant verdict against the Owner.

In hindsight, had the Architect's attorneys failed to pursue summary judgment based on the no damages for delay provision in the Owner/General Contractor Agreement and the status of the Owner as a "public employer", at trial the Court may have also entered a verdict against the Architect. Accordingly, although often overlooked, the legal defenses pursued by counsel at the outset of litigation can mean the difference between a significant adverse verdict and a favorable outcome. ■

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