

Where "Purposive Interpretation" Prevails: Court of Appeal Rules That Subcontractor Which Fails to Complete Work Is Not Entitled to Retention, Even Though Other Subcontractors Completed the Work

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Common in many construction contracts is a clause entitling the prime contractor to withhold ten percent of the subcontractor's invoices in order to ensure proper completion of work. A question arises, however, where a subcontractor does not complete the work, but other subcontractors complete the work, whether retention which was properly withheld prior to a subcontractor's leaving a project will be due at a later time.

Shedding some light on this question, the California Court of Appeal, Second Appellate District, in the matter of Regency Midland Construction, Inc. v. Legendary Structures, Inc. (2019) Westlaw WL 5799209 ("Regency case") ruled that a subcontract agreement, which provides for withholding of ten percent of the subcontractor's contract price until 35 days after completion of "subcontractors work", is not due where the subcontractor left the project and the work was completed by another subcontractor. In the Regency case, a subcontractor, Legendary Structures, Inc. ("Legendary"), contracted with Regency Midland Construction, Inc. ("Regency"), to provide concrete work for the construction of a 71-unit apartment building. About halfway through the project, Legendary quit, and Regency had ANM Construction complete the concrete work. Litigation then ensued over the retention, which was approximately \$125,000. The Trial Court granted Summary Judgment against Legendary on the basis that the contract did not require Regency to pay retention, even after another subcontractor, such as ANM Construction, completed work.

On appeal, Legendary argued that the subcontract (which was highly interlineated) provided:

"[t]en percent (10%) of Subcontractor's contract amount shall be withheld and will be released 35 days after completion of subcontractors work."

Legendary argued that, since there was no possessive to the words "subcontractors work," that retention should have been released to Legendary upon ANM Construction's completion of the concrete work. The Court of Appeal dismissed the fact that there was no possessive in the words "subcontractors work," and, relying on purposive interpretation, ruled that the purpose of the retention clause was, as Legendary put it in oral argument, to "ensure proper performance." The Court of Appeal ruled that, since a

purposive interpretation of the contract led to the conclusion that the retention clause was to ensure proper performance, the general contractor was relieved of any obligation to pay over the contract retention upon the completion of the work by another subcontractor.

The Regency case is important in that it affirms the notion that the purpose of a retention clause is to ensure proper performance of work and, based on purposive interpretation (at least where there are typographical errors in the contract or vague text), the obligation to pay retention to a subcontractor who quit the job may no longer exist.

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