Appeals Court Issues Important Clarification of its Recent Prompt Payment Decision

By Bradley L. Croft on June 27, 2022



On June 24, 2022, the Massachusetts Appeals Court issued a revised decision of its recent highly anticipated opinion affirming judgment in favor of RIW's client, a general contractor, under the Massachusetts Prompt Payment Act (the "Act"). The revision clarified a small, but significant part of the decision regarding whether an owner who has violated the Act waives the right to bring counterclaims arising from alleged construction defects.

In a June 7, 2022 opinion in Tocci Building Corporation v. IRIV Partners, LLC, et al., Nos. 21-P-393 & 21-P-733, the Appeals Court held that a construction project owner breached its contract with the general contractor, Tocci Building Corporation ("Tocci"), by failing to properly reject payment applications within the time and format required by the Act and by failing to make payment of the amounts which were thus deemed approved by operation of the Act. The Court also included in its decision, however, a statement that the owner may still bring "any and all claims they have for breach of contract against Tocci, and they may recoup any money they may be owed."

Tocci sought to modify only the portion of the decision regarding an owner's right to bring counterclaims for defective construction where it had violated the Act. In a rare allowance of such a motion, the Appeals Court agreed with Tocci's position and issued a revised decision, clarifying that its decision did not include a determination as to what rights, if any, an owner who has violated the Act may still have to bring claims against the contractor for alleged construction defects.

Tocci offered two primary reasons in support of its motion. First, procedurally, the validity of the Owner's counterclaims was not part of the issues on appeal and therefore the Appeals Court should not have considered or ruled upon the legal sufficiency of such claims. The Court agreed, noting in its revised decision that "[w]e express no opinion on the merits of those counterclaims or any defenses thereto."

Second, substantively, an owner that fails to reject a pay application in a timely and act-compliant manner still must make payment to the general contractor in order to pursue counterclaims to try to "recoup" amounts it believes it should not have had to pay to the contractor. Tocci argued in its motion that only where an owner makes payment of all amounts which were not rejected, either deliberately or through the "deemed approval" operation of the statute, can it assert counterclaims against the contractor for alleged construction defects.

Although the issue remains to be decided at the trial court level, based upon its revised decision and allowance of Tocci's motion, the Appeals Court indicated that an owner that has, in fact, paid the disputed but "deemed approved" amounts preserves its right to bring

PROFESSIONALS

Bradley L. Croft

Kirk J. McCormick

PRACTICES

Litigation

Commercial Real Estate

Construction Law

INDUSTRIES

Commercial Real Estate

Construction

© 2026 Ruberto, Israel & Weiner, P.C. | 255 State Street, 7th Floor Boston, MA 02109 | p 617.742.4200 | f 617.742.2355 | info@riw.com

a counterclaim. The court replaced the deleted sentence with one reading, "A party that under the statute makes a periodic payment in response to an application, rather than rejecting it, may nonetheless bring any and all claims it has for breach of contract against the payee and may recoup any money it may be owed." (Emphasis added.) Because the legal sufficiency of the Owner's claims in the case had not yet been challenged by Tocci, the Appeals Court expressed no specific opinion as to whether the Owner had waived its counterclaims by failing to make the periodic payments to Tocci under the Act.

Bradley Croft *is President of RIW and Chair of its Litigation Department. He can be reached at 617.570.3506 or* ***blc@riw.com****;* ***Kirk McCormick*** *is Chair of RIW's Construction Law Practice Group and can be reached at 617.742.4200 or* ***kjm@riw.com****;* ***Roger Smerage*** *is a member of RIW's Construction law and Litigation groups and can be reached at 617.742.4200 or* ***rls@riw.com****.*

POSTED IN: **COMMERCIAL REAL ESTATE**, **CONSTRUCTION LAW**, **LITIGATION**

© 2026 Ruberto, Israel & Weiner, P.C. | 255 State Street, 7th Floor Boston, MA 02109 | p 617.742.4200 | f 617.742.2355 | info@riw.com