

MASSACHUSETTS Lawyers Weekly

Judge strictly construes Prompt Payment Act

Construction bar: decision sounds 'loud warning bell'

By: Kris Olson December 10, 2020



The plaintiff was hired to construct a building that would eventually house office and lab space at 645 Summer St. in Boston's Seaport District.

A contractor's applications for periodic progress payments should be deemed approved because the project owner had not strictly adhered to the requirements of the Prompt Payment Act, a Superior Court judge has decided in a case of first impression.

Judge Michael D. Ricciuti also took the rare step of issuing a final and separate judgment under Rule 54(b), ordering the project owner to pay \$4.6 million within 45 days.

As its name suggests, the Prompt Payment Act, G.L.c. 149, §29E, seeks to ensure that when a contractor submits a periodic payment requisition, the project owner will review it promptly and either make payment or issue written statements of reasons for any rejection or reduction of payment.

Under the law, the recipient of a request for a progress payment has 15 days to approve or reject the request and 45 days to make payment. If the 60th day passes without a proper objection, the request "shall be deemed to be approved," the law states.

When an owner wants to reject an application for a periodic progress payment in whole or in part, the law requires that the objection be in writing and "include an explanation of the factual and contractual basis for the rejection and shall be certified in good faith."

But with seven progress payment applications in *Tocci Building Corp. v. IRIV Partners, LLC, et al.*, the requirements of the act were not met, Ricciuti found.

Instead, the undisputed facts established that defendant IRIV Partners had failed to reject the requisitions in the time or manner prescribed by the act. While IRIV had replied to the requests with email and a letter, they did not suffice as a rejection of any of the requisitions, Ricciuti found.

"While they may have been timely in rejecting some of the Requisitions, they did not specifically reject a Requisition in dispute, did not include an explanation of the factual and contractual basis for the rejection, and did not include a certification that the rejection was made in good faith," Ricciuti wrote, adding that those were not mere "technical errors," as the defendant had suggested.

IRIV had also waived objections it may have had under the contract by failing to raise any factual or contractual basis for rejecting the requisitions in compliance with the act, Ricciuti added.

The full text of the 16-page decision, Lawyers Weekly No. 12-055-20, can be found here.

Filling a void

Until Ricciuti's decision, there was little direction available as to the practical consequences of missing a deadline or otherwise violating the Prompt Payment Act, noted the plaintiff's attorney, Bradley L. Croft of Boston.

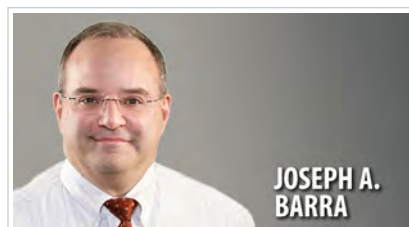
For example, while the law said a request for payment would be "deemed approved," it was unclear whether that meant the payment would actually have to be made and, if so, when, Croft said.

Now, at least some of the questions have been answered.

The Massachusetts construction bar has been waiting for a decision determining how the statute would be interpreted since it was first adopted, said Boston construction attorney Joseph A. Barra.



"I believe [the ruling] will have serious and far-reaching implications in the way private construction projects in Massachusetts will be managed."



Ricciuti's answer, at least, is that courts intend to construe its terms strictly. That should be "a loud warning bell" for owners, their construction agents, their project managers and design professionals to pay close attention to the statute's requirements," Barra said.

"I believe that it will have serious and far-reaching implications in the way private construction projects in Massachusetts will be managed," Barra said.

Ricciuti's decision "puts teeth into the statute," agreed Boston construction attorney Samuel M. "Tony" Starr.

In light of the decision, construction lawyers should be reaching out to their clients — owners and contractors alike — to stress the importance of adhering strictly to the requirements of the Prompt Pay Act, he suggested.

Boston construction attorney James L. Rudolph said Ricciuti's decision should also curtail the practice of some in the construction business of demanding that parties waive rights provided under the Prompt Payment Act.

"If this decision stands — and it should — clearly that cannot be done, and the statute controls," Rudolph said.

Starr noted that while *Tocci* dealt with a progress payment, the statutory language at issue is equally applicable to change order requests, which in practice have tended to languish even longer than requisitions. Now, those requests, too, should get more prompt attention.

Westborough attorney David L. Fine, who represents one of the subcontractors in *Tocci*, said he has seen Prompt Payment Act compliance "all over the map" in the fast-paced world of major construction projects. That is particularly true with respect to the requirement that any rejection of a request be certified in "good faith."

In light of Ricciuti's decision, parties would be well advised to make sure boxes are checked and timelines are met, according to Fine.

"This doesn't change the game; it just changes some of the procedural rules," he said.

Barra agreed.

“Emails vaguely objecting to or commenting upon deficiencies in a contractor’s pay requisitions are simply not enough to satisfy the statute’s requirements,” he said.

Barra added that Ricciuti did not consider whether the contractor was truly entitled to full payment on each requisition. The owner’s noncompliance with the act’s technical requirements was enough for the plaintiff to prevail.

Barra also flagged the aspect of Ricciuti’s decision that suggested that an owner who fails to comply with the statute waives its right to assert contract-based objections to payment.

Even if a contractor installs work that fails to follow the plans and bills for its defective or non-conforming work, the contractor will nevertheless be entitled to payment just because the owner missed a deadline, failed to include an adequate explanation as to why it is not paying, or failed to certify its rejection as being in good faith, Barra said.

“This is huge,” he said.

IRIV’s attorney, Michael B. Donahue of Boston, had not responded to requests for comment as of Lawyers Weekly’s deadline.

Seven disputed requests

Tocci Building Corp. was officially hired by IRIV Partners to construct a building, which would eventually house office and lab space at 645 Summer St. in Boston’s Seaport District.

The contract price of nearly \$3.8 million brought it within the ambit of the 10-year-old Prompt Pay Act, which applies to all private projects with prime contracts that have original values of \$3 million or more.

The contract between Tocci and IRIV provided for shorter deadlines than the act. The owner, IRIV, could disapprove or nullify all or part of an application for payment no later than 14 days after receipt by giving written notice, instead of 15, and payment was then due 30 days after submission for payment, instead of 45.

With respect to seven disputed payment applications, IRIV did not meet even the friendlier deadlines contained in the act, Ricciuti found.

To the extent that IRIV communicated with Tocci, it failed to provide an explanation of the factual and contractual basis for the partial rejection of the requisitions and did not certify that the rejections were being made in good faith.

IRIV did, at one point, have its attorney send Tocci a letter informing Tocci that it was withholding nearly \$3.2 million from unidentified payment requisitions but did not explain its rationale for that decision.

Email from IRIV to Tocci also requested more information, such as “an analysis of the cost to date versus the budget,” but did not include an explanation of the factual and contractual basis for the partial rejection of the requisitions.

After Tocci filed its complaint in Suffolk Superior Court, it filed a motion arguing that it was entitled to partial summary judgment on its breach of contract claim under the Prompt Pay Act.

IRIV and its co-defendants’ pending counterclaims against Tocci, which include claims for breach of contract and a violation of Chapter 93A, were not addressed in the motion for partial summary judgment.

Rare relief warranted

Tocci asked for a final and separate judgment on its contract claims under Rule 54(b), arguing that to do otherwise would frustrate the purposes of the Prompt Payment Act.

Tocci Building Corp. v. IRIV Partners, LLC, et al.

THE ISSUE: If a project owner does not strictly adhere to the requirements of the Prompt Payment Act, should a contractor’s applications for periodic progress payments be deemed approved, and should a separate and final judgment enter on the claim?

DECISION: Yes, on both counts (Superior Court)

Ricciuti noted that Rule 54(b) allows issuance of a partial judgment under very limited circumstances, in which the court makes an “express determination that there is no just reason for delay.”

“It is a remedial device that should be considered a ‘special dispensation’ to be used ‘sparingly,’” he wrote.

Rule 54(b) requires a high showing in part because issuing a separate judgment on only some claims risks confusion and complication on appeal, Ricciuti explained.

“On the other hand, however, the [Prompt Payment] Act reflects a policy decision made by the Legislature that progress payments in construction cases like this are to be made promptly, and failing to issue a separate and final judgment as to the Requisitions in dispute would frustrate that legislative choice,” he wrote.

The judge cited the 2006 decision in *O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Industries, Inc.*, in which the Appeals Court upheld a Superior Court judge’s decision to award separate and final judgment on a payment issue, which was “sufficiently separate from the remaining disputes.”

Such was the case with Tocci’s claims under the Prompt Pay Act, Ricciuti concluded.

“While the remaining claims will have to be separately adjudicated, the payment requisitions covered under the Act are legally distinct from them and can and should be resolved separately and promptly to comport with the Legislature’s will,” he wrote.

LAWYERS: Bradley L. Croft and Kirk J. McCormick, of Ruberto, Israel & Weiner, Boston (plaintiff)
Michael B. Donahue and Adam M. Santeusanio, of Duane Morris, Boston (defense)

RELATED JUDICIAL PROFILES

Ricciuti, Michael D.

LAWYERS WEEKLY NO. 12-055-20

Massachusetts Lawyers Weekly

Contract – Prompt Payment Act

Full-text Opinions

Tocci Building Corp. v. IRIV Partners, LLC, et al. (Lawyers Weekly No. 12-055-20)

ORDERING FULL TEXT OPINIONS

To search the marketplace for this full text opinion, click the Lawyers Weekly Number below.

12-055-20

Please Note: Supreme Judicial Court and published Appeals Court opinions are not available for purchase, but can be accessed online by clicking on the full-text opinion link under “related articles.”

For information on ordering full text opinions, click here.

Issue: DEC. 14 2020 ISSUE

YOU MIGHT ALSO LIKE

Trial Court to launch eDelivery of documents, notices
 ☉ December 11, 2020



DENNIS M.
COYNE



HEATHER M.
GAMACHE

Non-union
employees can't
recoup pre-'Janus'
'agency' fees

SJC panel floats rules
on 'incivility,'
attorney-client sex
⌚ December 10, 2020



Copyright © 2020 Massachusetts Lawyers Weekly
40 Court Street, 5th Floor,
Boston, MA 02108
(617) 451-7300