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Green Building Litigation: No Tsunami But the Tide Will Rise

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Despite predictions that the construction industry would be inundated with “green building” lawsuits, at this time there have been few reported lawsuits with direct green building implications. There are several possible explanations for this – the cataclysmic downturn in the economy, the lack of measurement and/or disclosure of building performance which would make performance failures more apparent, or the possibility that green building disputes are being subject to resolution in private arbitration or otherwise being settled.

However, the number of green building lawsuits and reported decisions on green building issues will inevitably grow as green building mandates and pursuits proliferate and we return to a robust construction market in coming years. In the interim, those limited number of lawsuits that do make their way into the courts will provide insight into the various ways that sustainability will factor into construction related disputes. For example, a new case out of New York, and earlier case out of Maryland, are illustrative of how a project’s green building attributes or developer’s sustainability objectives can factor into claims and litigation in an unanticipated manner with potential implications for all project participants.

The Destiny USA Holdings Lawsuit – Irreparable Harm Found Based Upon Mega-Mall Green Features

On November, 13, 2009, an appellate court in New York upheld (in a split 3-2 decision) a trial court’s decision that the developer of a mega-mall project seeking LEED (LEED is the acronym for the U.S. Green Building Council’s Leadership in Energy and Environmental Design Green Building Rating System) Platinum certification was entitled to a preliminary injunction requiring its construction lender, Citigroup, to fund certain pending draw requests under Destiny’s construction loan. (*Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp., Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 2009 WL 2163483, 2009 N.Y. Slip Op. 51550(U) (N.Y. Sup. Ct. 2009)).

Notably, in upholding the injunction the court specifically identified the project’s sustainable design features – and construction financing, which employed federally-backed Green Bonds – as so “unique” and “revolutionary” that money damages alone would not be sufficient to compensate the developer if the injunction was denied.

What is significant about this case in terms of potential far reaching implications is that it bolsters the

proposition that the sustainability features of a project, from design features to innovative financing mechanisms, could increasingly impact courts’ decisions on damages and remedies for claims in connection with such projects in a manner different than projects that do not have such sustainability attributes. This adds an element of uncertainty for project participants, including designers, engineers, consultants, contractors, and insurers, when seeking to evaluate and manage project risk.

The Southern Builders Lawsuit – The First Reported “Green” Decision

An earlier case that is not new but warrants mention in any discussion of green building litigation given its distinction of being one of the first, if not the first, reported case involving green buildings was *Southern Builders, Inc. v. Shaw Development, L.L.C.*, Case No. 19-C-07-01145 (Circuit Court of Somerset County, Md. 2006).

This dispute arose from a \$7.5 million, 23-unit condominium project in Maryland. The owner desired that the project attain a LEED Silver certification, which would have resulted in more than \$600,000 in state tax credits if a certificate of occupancy was issued by a certain date. After the contractor

filed a \$45,000 mechanic's lien action, the owner counterclaimed against the contractor for, among other things, its failure to allow the owner to realize the state tax credits by delivering a LEED Silver certified project. The parties used an AIA A101 -1997 Standard Form of Agreement Between Owner and Contractor and the contract documents included LEED requirements in a project manual incorporated by reference.

Because the case was settled and not litigated to conclusion, the obligation of the contractor to deliver a LEED Silver certified building in light of the contract documents, or the contractor's liability for damages on account of missed tax credits due to project delay even if the LEED certification requirement was not incumbent on the contractor, were never construed by the court. The case is important, however, for elucidating the need for careful drafting of contracts to clearly allocate (or disclaim) responsibility for achieving an owner's sustainable development objectives, as well as a foreshadowing of the emerging damage claims that will surface that may not have been contemplated by a contracting party but result as a consequence of alleged non-performance on the sustainable development project.

A Variety of Potential Claims, A Variety of Potential Plaintiffs

The number of green building

lawsuits and reported decisions is expected to grow as the economy improves, state and local governments continue to enact green building statutes and regulations ranging from certification requirements to energy performance disclosure, owners voluntarily increase the uptake of green building certification programs to gain perceived market advantage or value enhancement, and the means and methods to measure post-occupancy performance are refined.

Design professionals, contractors, consultants, developers, building owners and insurers are all potential targets for green building suits. There are a variety of potential claims, including claims for misrepresentation, negligence and breach of contract based upon the failure to obtain a green building certification, the failure to fulfill representations regarding performance or cost savings from green building initiatives, greenwashing*, the failure of a "green product" to perform, the failure to meet code or municipal ordinances mandating certain levels of green building certification levels, and the failure to produce the promised health or human resource benefits from the use of sustainable development techniques.

Plaintiffs could include condominium unit owners, tenants and lenders who may claim reliance upon a landlord's representation of a project's sustainable development

attributes in marketing materials, leases and other project documents and may have contractual and other causes of action if the building proponent fails to obtain the allegedly promised certification or to perform as explicitly or implicitly represented. Similarly, a borrower's representations in loan documents of such sustainable development attributes, if not accurate or fulfilled, could cause a default under the loan documents.

While there has not been a tidal wave of green building litigation at this time, the tide will inevitably rise with potential implications for all involved in the development and operation of real estate. ■

**Greenwashing is the act or practice of overselling or overstating the environmental benefits of a product or project. For example, certain companies may claim that a product or project is LEED certified or will guarantee a number of LEED points. State and federal statutes governing the use of false and misleading advertising, may allow a cause of action to rescind a contract or collect damages.*

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As the fifth LEED Accredited Professional (LEED®AP) attorney in the United States and first in Florida, Paul was at the forefront of attorneys who recognized the significance of sustainability and green building trends on all aspects of real estate development, operations, and business in general and responded by receiving accreditation through the U.S. Green Building Council and focusing his practice on sustainable development.



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