

ROGERS JOSEPH O'DONNELL

To: AGC CA-LAC Members
From: Tyson Arbuthnot
Date: June 17, 2010
Re: New Case Summaries through June 16, 2010

1. **Loranger v. Jones**
10 C.D.O.S. 5913, docket No. C061517 [Cal. App. 3d Dist.] (May 14, 2010)

Licensed contractor who carried workers' compensation insurance and unknowingly used unlicensed subcontractor but knowingly hired two minors without work permits was not precluded from suing for work performed

A licensed general contractor, Shane Loranger, entered into a contract with Ronald and Carol Jones for the construction of a residence. He maintained workers' compensation coverage throughout the project. Unbeknownst to Loranger, his electrical subcontractor had allowed its license to expire. Loranger did knowingly used his teenage son and his son's minor friend as extra help, without a work permit. He also knowingly used a retired, unlicensed electrician to perform some dirt excavation tasks.

After finishing the project, the Joneses complained that a number of items were incomplete or not properly completed, and refused to pay Loranger's final billings. Loranger sued for breach of contract, foreclosure of mechanic's lien, quantum meruit, and fraud. The Joneses cross-complained for breach of warranties, negligence, negligent misrepresentation, and recovery on license bond.

The Joneses later added a claim for disgorgement of all compensation based on Loranger's alleged unlicensed status during construction, as well as the defense that they did not have to pay for the remaining funds due because of that status. Under Business & Professions Code Section 7031, a person who utilizes the services of an unlicensed contractor can bring an action to recover all compensation paid for the contractor's work, and the contractor is prohibited from bringing an action to recover any unpaid compensation.

Citing *Wright v. Issak*, 149 Cal. App. 4th 1116 (2007), the Joneses claimed that Loranger was technically unlicensed because he did not properly maintain workers' compensation insurance. *Wright* held that under Business & Professions Code Section 7125.2, a contractor that knowingly failed to obtain workers' compensation coverage was unlicensed and thus subject to disgorgement of compensation under Section 7131. Section 7125.2 provides that a contractor's license is suspended on the day he or she either fails to obtain workers' compensation coverage

or allows it to lapse. However, if there is a lapse of coverage, the License Board's registrar must provide notice to the licensee of the suspension for it to be effective. The Joneses argued that Loranger did not have proper workers' compensation coverage because he did not report the salaries of the unlicensed subcontractor, the two minor workers and the unlicensed excavator, and therefore his license was subject to automatic suspension.

The trial court rejected this argument, finding that Loranger had testified that he was licensed and insured, and that the Joneses did not submit any evidence to the contrary. The Court of Appeal affirmed. It found that the mere fact that Loranger did not report certain employees' salaries did not prove that he had insufficient workers' compensation coverage. The Court also distinguished *Wright*, because there the contractor intentionally reported zero payroll so that it did not have to obtain any workers' compensation insurance. Loranger, on the other hand, did have workers' compensation coverage when he started the Joneses' project, so at worst there was a lapse of coverage and not a failure to obtain. In that instance, the registrar would have had to provide Loranger with notice for there to be an effective suspension of his license. To the extent that *Wright* could be read to find that "any" underreporting of payroll is a failure to "obtain" workers' compensation coverage and thus an automatic suspension of a contractor's license, the Court expressly disagreed with and refused to follow this application.

2. *Villa Vecenza Homeowners Assoc. v. Nobel Court Development, LLC*
10 C.D.O.S. 6700, docket No. D054550 [Cal. App. 4th Dist.] (May 27, 2010)

Developer's pre-contract recording of CC&R's that purported to require homeowners association to arbitrate any construction defect claims did not establish binding arbitration agreement.

A condominium HOA sued the developer of the condo complex for construction defects. The developer sought to enforce an arbitration clause in the condo's CC&R's. The Court of Appeal rejected this effort. It found that the Federal Arbitration Act did not apply to require arbitration because the CC&R's are not an enforceable contract between the developer and the HOA or the individual owners. "[T]he recorded CC&R's, standing alone, are not a contract between the developer and the homeowners association, which only came into existence after the CC&R's were recorded."

The Court stated that given the manner in which CC&R's operate, they cannot give rise to any sort of binding agreement between developers who have recorded the CC&R's and those who might in the future be burdened by them. Civil Code Section 1350, et seq., governing condo developments, intended that CC&R's constitute equitable servitudes that inure to and bind owners in the development. To the extent CC&R's operate as a contract, non-owners such as developers are not parties to the contract. This is also supported by the fact that HOA's are entitled to unilaterally amend CC&R's, which conflicts with the notion that there is a contractual

obligation to non-owners. Thus, a developer of a condo complex cannot seek to bind the HOA and subsequent purchasers through any terms in the CC&R's.

3. **TWC Storage, LLC v. State Water Resources Control Board**
10 C.D.O.S. 6945, docket No. HO33228 [Cal. App. 1st Dist.] (June 3, 2010)

Property owner was subject to civil fine where it hired demolition contractors who negligently caused toxic discharge.

TWC Storage, LLC challenged a \$25,000 fine imposed by the Regional Water Quality Control Board for a chemical spill that infiltrated the groundwater. TWC hired a contractor to demolish a two-story building on its property, including an electric transformer. A subcontractor neglected to drain the liquids out of the transformer, and damaged the transformer while moving it with an excavator. The liquid chemicals spilled onto the ground and into the groundwater.

The transformer was clearly labeled with the name of a highly toxic contaminant. Yet the subcontractor left it on soil to fully drain-out. TWC was notified about an hour or two after the spill. It hired a company to clean up the chemical, which commenced about two days later, but did not notify any government agency. It was not until a local public safety officer arrived for a routine inspection several days later that notification occurred. After clean-up efforts, soil testing showed very high levels of the chemical. The Board issued a complaint, held a hearing, and imposed the fine.

TWC argued, *inter alia*, that it did not cause or permit the spill because it was caused by the subcontractor. The Court of Appeal disagreed, finding that possession and control of the property is sufficient to impose liability for the spill, particularly when the landowner engaged the contractor that caused the spill. Water Code Section 13350 is different than a tort, where an owner may be insulated from liability for the acts of an independent contractor. This statutory section imposes strict liability.