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Wyncrest Commons: Commonly Used Progress Payments in Construction Contracts Do Not Render Them Installment Contracts

In *BIL-JIM Construction Company, Inc. v. Wyncrest Commons, LP*, 2023 WL 7276637 (Unpublished, decided November 3, 2023), the New Jersey Appellate Division was asked to consider two issues regarding the interpretation and application of a construction contract that utilized the standard form American Institute of Architects owner/contractor agreement (AIA Document A101-2007) (the “AIA Contract”). Specifically, it was asked to consider: 1) whether a modified AIA Contract was an “installment contract,” whereby each progress payment was subject to its own statute of limitations; and 2) whether and when work had been approved in the context of New Jersey’s Municipal Land Use Law. While the decision is presently unpublished, it provides guidance as to how form contracts utilizing the same or similar terms will be treated by New Jersey’s courts and is a reminder that the potential for future claims must be considered during contract negotiations.

Discussion: The primary issue in *Wyncrest* was whether an AIA Contract was an “installment contract,” and the remaining issues turned on the resolution of this question. Wyncrest, the owner for the project at issue, did not dispute that its contractor, BIL-JIM Construction Company, Inc., had not been fully paid for work that it had performed in connection with a construction project located in Ocean County, New Jersey. Instead, Wyncrest argued that because its AIA Contract with BIL-JIM required that invoices be presented and paid monthly, it constituted an “installment contract.” As such, older payments would be treated as individual transactions and were time barred by the applicable statute of limitations. The trial court agreed with Wyncrest’s characterization of the AIA Contract as an “installment contract,” and found that BIL-JIM’s invoices were each subject to their own statute of limitations. However, the trial court disagreed with Wyncrest’s argument that BIL-JIM’s claim for retainage—which was submitted at the end of its work at the project—was time barred.

In reversing the trial court’s decision, the Appellate Division examined the precise language of the AIA Contract and determined that its “terms make clear beyond doubt that all the invoices and the progress payments on this AIA agreement are part of a single contract and are not separate transactions.” While the invoicing and payments were carried out on a monthly basis, this was in furtherance of performance of a single transaction and therefore could not be an “installment contract.” In reaching its decision, the Appellate Division also noted that the terms of the AIA Contract expressly provided for retainage and afforded Wyncrest with the right to correct or adjust payments as work progressed. As further evidence that the AIA Contract was not an “installment contract,” the Appellate Division noted that there was an express disclaimer that payments by Wyncrest did not constitute acceptance of the work. Further, the Appellate Division noted that the AIA Contract included a term addressing “Final Payment,” which was due only when BIL-JIM had “fully performed the Contract.” These factors—which, importantly, were reflected in the express provisions of the operable agreement—led the Appellate Division to conclude that the AIA Contract was not an “installment contract” and that the statute of limitations would only accrue upon Wyncrest’s failure to make final payment for retainage.

Per the AIA Contract, payment of retainage required approval of BIL-JIM’s work by the inspecting authority. Thus, the second issue before the Appellate Division was whether and when there had been approval of BIL-JIM’s work by the inspecting authority within the context of New Jersey’s Municipal Land Use Law. Wyncrest argued that the date of the letter of approval of the building inspector should control while BIL-JIM maintained that the operative date should be two weeks later, when the Township actually received the inspector’s letter. Citing the Municipal Land Use Law and the express language of the AIA Contract, the Appellate Division found that BIL-JIM’s reading was correct, “As

the Municipal Land Use Law does not recognize a municipal engineer's approval until it is filed with the governing body, we likewise construe the contract language that the retainage was 'to be released upon [the] approval of the inspecting authority' to mean Bil-Jim's claim to the retainage accrued when the Township engineer filed his letter approving the bonded improvements with the Township on June 18, 2013." (internal citations omitted).

Lessons Learned: Contractors should be mindful of two key takeaways from *Wyncrest*. First, to avoid future misinterpretation of an agreement, contractors should be mindful of the express terms of payment during negotiations, particularly when the terms are modifications of existing forms. Preserving a contractor's right to pursue a claim may require the inclusion of additional language or the modification of existing terms in the form being utilized. Second, when considering a potential claim, contractors should closely consider the terms of the operable contract and any deadlines for performance that may arise from its language. *Wyncrest* does not present "new" law but serves as an important reminder that even at the earliest negotiation phases, contractors should anticipate potential claims.

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