

The Construction Manager At Risk: By Contract And By Conduct

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I. The Evolving Role of The Construction Manager

In the ceaseless quest to control costs and better manage projects, owners have turned to various contractual vehicles. In recent years, as owners have become increasingly sophisticated and desirous of continually improving control over construction projects, the Construction Manager (“CM”) has become more frequently utilized. While this trend was initially a rather simple tactic of hiring an experienced person to oversee the work, the CM’s role has evolved to include a growing array of obligations. CMs often become involved in construction projects prior to the design phase, and provide input on site selection, budgeting, and cost-estimating. Selection of the design team, negotiation of design contracts and oversight of the design itself are commonly among the CM’s duties, as are traditional construction oversight duties including management of bidding and contract award, administration of value engineering, supervision of contractors and subcontractors, oversight of worker safety, monitoring of the schedule, resolution of disputes and coordination with inspectors and public agencies.

However, as the role of the CM has evolved, its liability has expanded. In particular, CMs are increasingly placing themselves “at risk” on construction projects by contracting directly with design professionals and contractors on behalf of the owner. By taking on such contractual obligations, the “at risk” CM faces increased liability, as compared to a CM who merely acts as the owner’s agent or representative. But regardless of whether the CM acts “at risk” or as agent, the trend is for CMs to take on increased responsibilities and obligations, which exposes the CM to expanded liability. In general, the degree of liability a CM faces will be commensurate with the size of its role; thus, the larger the role taken, the greater the potential exposure to liability. CM liability can also be increased by “creative lawyering.”

This paper provides an explanation of the various theories under which CMs may be found liable, discusses representative cases, and provides some suggestions for mitigation of such liabilities and risks.



II. Liability For Failure To Supervise

Because CMs have expertise in the construction process, courts may find an implied duty to supervise, even where none is expressly stated in the CM's contract. In Gibson v. Heiman, 547 S.W.2d 111 (Ark. 1977), the Arkansas Supreme Court discussed the scope of a CM's work under its contract. The contract did not specify any particular duties, and the CM argued that he had fulfilled his contract by furnishing surveys, obtaining government approvals, and negotiating subcontractor bids. Id. at 113. However, the court found that as CM, his contract required "supervision of construction in a position of authority between the contractors and the owner." Id. Thus, because the CM admitted that he had not supervised the construction, the court found that the CM had breached the contract and denied him payment of his contractually agreed-upon fee. Id. at 115.

The Gibson case demonstrates that many courts perceive the primary role of the CM to be supervision of the construction itself. Thus, if a CM does not intend to provide such services, the contract must clearly state that no construction supervision or oversight will be performed. Otherwise, the CM is at risk of losing its project fee, or worse.

The CM's duties have not traditionally included direct responsibility to ensure that the project is constructed in accordance with the plans and specifications. However, where a CM places itself "at risk" by entering the chain of contracting, or even when a CM acting as agent for the owner assumes supervisory responsibility for construction work, it can be held liable for the failings of the contractors and subcontractors. For example, Martin County, Florida sued a CM and its sureties for breach of contract in the construction of a new courthouse and constitutional office building. Centex-Rooney Constr. Co., Inc. v. Martin County, 706 So. 2d 20 (Fla. Dist. Ct. App. 1997). The County alleged that the CM "failed to properly supervise the construction, resulting in shoddy workmanship and extensive damage," including defects that resulted in "extensive mold growth." Id. at 25. The Court of Appeal affirmed the trial court's judgment, which awarded the County \$14,211,156.00 for damages due to the defects found in the unhealthy building. Id. at 28-29.

III. Delay Claims

To the extent a CM has control over a project schedule, that CM will have potential exposure to delay claims from the owner, the contractor, or subcontractors. The CM could be liable for lost profits, liquidated damages, or extended overhead.



A. Liability for Delay

For example, in Perini Corp. v. Greate Bay Hotel & Casino, Inc., 610 A.2d 364 (N.J. 1992),¹ a New Jersey CM sued a casino after the casino sought to terminate its contract. The casino cross-complained against the CM alleging lost profits due to delay in completing the project. Id. at 368. Although the CM was awarded \$300,000.00 plus interest on its contract balance, the arbitration panel found that the CM was seven months late in achieving substantial completion of the project and awarded the casino owners \$14,500,000.00 in damages for lost profits. Id. The CM was unable to persuade the arbitration panel or the reviewing courts that the damage figure should be reduced on grounds that it was grossly disproportionate to its \$600,000.00 fee. Id. at 380-81.

B. Enforceability of “No Damage For Delay” Clauses

Many CM contracts contain exculpatory clauses or “no damage for delay” provisions, which can provide significant benefit to the CM. In addition, in a sort of modified flow-down argument, the CM can sometimes take advantage of a “no damage for delay” clause in the contractor’s contract with the owner. See L.K. Comstock & Co. v. Morse/UBM Joint Venture, 505 N.E.2d 1253 (Ill. App. Ct. 1987) (holding that state intended to protect CM from liability for delay by including a “no damage for delay” provisions in contract with contractor.) However, CMs should be aware that courts often fail to enforce such clauses. See, e.g., John E. Green Plumbing & Heating Co. v. Turner Constr. Co., 500 F. Supp. 910 (E.D. Mich. 1980) (permitting intentional interference claim to stand in spite of “no damage for delay” clause and stating that such clauses are “not in every case an absolute bar to recovery”).

IV. Liability For Worker Safety

Because CMs have expertise in the construction process and frequently assume contractual responsibility for safe working conditions, CMs are exposed to liability for worker injuries.

¹ The Perini case was overruled on other grounds.



If the CM contracts to provide for safety programs and procedures, liability may be imposed.² Even if the CM does not explicitly contract to provide for safety, a court may impose liability if the CM impliedly takes over responsibility for safety or actively supervises safety compliance.³ Also worth considering is the possibility that a CM may become involved in activities which are not part of its scope of work. In such a case, the CM is arguably a mere volunteer; however, the CM may not avoid liability on that basis.⁴

By contrast, where the CM exercises little or no control over a project or where the contractor assumes primary responsibility for job site safety, the CM may usually escape liability for workers' injuries. In a wrongful death and survival action brought by a widow, the court held that the contractor, not the CM, was ultimately responsible for safety on the project. Jones v. Parsons Transp. Group, Inc., 2004 WL 1254029 (D. Md. May 20, 2004). In that case, the CM had contracted to review safety plans and observe contractors' activities to ensure compliance with safety standards; however, the court observed that no evidence existed to show that the CM actually undertook the safety inspection and enforcement responsibilities to serve the contractor or its employees. Id. at *3-*4. See also Reno v. Concrete Coring, Inc., 2005 WL 1415041 (Ohio Ct. App. June 17, 2005) (affirming grant of summary judgment for CM in worker's claim because although CM had retained contractual responsibility for jobsite safety, it did not actively supervise construction activities); Buccini v. 1568 Broadway Assocs., 250 A.D.2d 466 (N.Y. App. Div. 1998) (holding that CM was not liable to injured worker when CM's duties were limited to supervising work to ensure compliance with safety regulations).

V. Liability Based on Third Party Beneficiary Theory

One who is not a party to a contract may attempt to rely on a third-party beneficiary theory to recover damages for breach of the contract. Typically a court

² See Perryman v. Huber, Hunt, & Nichols, Inc., 628 N.E.2d 1240 (Ind. Ct. App. 1994) (construction management agreement imposed nondelegable duty to enforce state and federal safety regulations); Piccirillo v. Beltrone-Turner, 284 A.D.2d 854, 856 (N.Y. App. Div. 2001) (CM had overall responsibility to maintain safety, including responsibility to take "every precaution against injuries to persons"); Riggins v. Bechtel Power Corp., 722 P.2d 819 (Wash. Ct. App. 1986) (CM contracted to develop and execute safety program and had authority to stop work in case of noncompliance).

³ See Gruter v. Lehrer McGovern Bovis, Inc., 272 A.D.2d 229 (N.Y. App. Div. 2000) (CM actively supervised safety at work site and had authority to correct unsafe condition).

⁴ See Plan-Tec, Inc. v. Wiggins, 443 N.E.2d 1212 (Ind. Ct. App. 1983) (CM voluntarily acted to appoint safety director, hold safety meetings, and issue safety directives).



will assess such claims by analyzing the contract itself in order to determine whether the contracting parties intended to confer any benefit on the third party.

Thus, in Broadway Maintenance Corp. v. Rutgers State University, 434 A.2d 1125 (N.J. 1981), aff'd 447 A.2d 906 (N.J. 1982), the owner delegated responsibility

for supervision and construction coordination of several prime contractors to a CM. Id. at 1127. The trial and appellate courts found that certain clauses in the contract between the owner and the contractors demonstrated that the parties intended to exculpate the owner from liability for the duties assigned to the CM and accordingly ruled that the contract created third-party beneficiary rights for contractors on the project against the CM. Id. at 1127-28.

However, in Dynamic Constr. Co. v. Barton Malow Co., 543 N.W.2d 31, 34 (Mich. Ct. App. 1995), the court held that a general contractor was only an incidental beneficiary and was not entitled to assert a third-party beneficiary claim against the owner's CM on the project. The court stated that “[t]hird-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of contract.” Id. at 33 (citations omitted). The court also recognized that, as a general rule, subcontractors are not third-party beneficiaries of a contract between the owner and the general contractor. Id.

VI. Negligence, Negligent Misrepresentation and Other Torts

Separate from their contractual duties, CMs may be found liable for negligence, negligent misrepresentation or other claims founded in tort.

A. To Whom Does The CM Owe a Duty of Care?

An initial question in any tort claim involving parties that are not in contractual privity with one another is whether any duty exists between them. Numerous courts have allowed parties not in contractual privity with a CM to bring actions for breach of duty by the CM. See e.g., Coons v. Beltrone Constr. Co., 4 A.D.3d 584 (N.Y. App. Div. 2004); City of N.Y. v. Aetna Cas. & Sur. Co., 1997 WL 379704 (S.D.N.Y. July 9, 1997).

However, in Ratcliff Architects v. Vanir Constr. Mgmt., Inc., 106 Cal. Rptr. 2d 1 (Ct. App. 2001), the appellate court sustained the demurrers of school CMs in an architect's cross-complaint for, *inter alia*, negligence in mismanaging a school renovation project. The court held that even though privity of contract is not necessary to recover for negligence, the architect had “not cite[d] any authority holding a [CM] liable to a project architect for negligence when the damages were



purely economic loss.” Id. at 8. Furthermore, the court reasoned that the CMs’ duty was to protect the school district’s interests, and any duty to the architect would have been a potential conflict of loyalty. Id. at 9. The court also noted that because the CM did not determine whether the architect should be paid and had no contract with the architect, the relationship between the two was “tenuous.” Id.

Likewise, the Indiana Court of Appeals in Stelko Elec., Inc. v. Taylor Comm. Sch. Bldg. Corp., 826 N.E.2d 152 (Ind. Ct. App. 2005), recently held that a CM owed no duty of care to an electrical contractor because the CM was not in privity with the contractor. The trial court had granted summary judgment on the grounds that the economic loss doctrine barred the contractor’s negligence suit. Id. at 155. On appeal, the contractor conceded that there was no privity between him and the CM, but alleged that the CM had actual knowledge that he was relying on the CM’s actions. Id. at 159. The court acknowledged that it had previously found a duty in circumstances where the professional had actual knowledge that third persons relied on the rendering of his professional services. Id. at 159-60. The court noted, however, that the contractor failed to demonstrate that the CM had or should have had actual knowledge that the contractor was relying on its services. Id. at 160. If the contractor had been able to demonstrate that the CM was aware of such circumstances, the court likely would have found that a duty existed.

Nevertheless, a New York appellate court affirmed a CM’s duty of care to other trade contractors in James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc., 92 A.D.2d 991 (N.Y. App. Div. 1983), aff’d, 462 N.E.2d 137 (N.Y. 1984). In that action, the contractor claimed that the CM negligently and fraudulently permitted use of defective design documents. Id. at 992. The court acknowledged that there was no contractual relationship between the CM and the contractor, but reasoned that the “negligence allegations assert[ed] legitimate causes of action.” Id. at 993. The court further noted that the CM’s “responsibilities under the contract appear[ed] to be such as to establish a duty of care to subcontractors like plaintiff.” Id. The court cited the CM’s responsibilities under the contract as managing, supervising, inspecting the construction, reviewing the drawings and specifications for the contract, reviewing the design during its development, and identifying defects of commission or omission in the design. Id. The court concluded by stating that “[t]hese duties can reasonably be said to inure to the benefit of subcontractors as well as the owner for the former are ‘members of a limited class’ whose reliance upon the project manager’s ability is clearly foreseeable.” Id. (citing White v. Guarente, 372 N.E.2d 315, 319 (N.Y. 1977)).

In recent years, courts have been increasingly willing to find that a duty of care exists for a cause of action for negligent misrepresentation, even when they will not so find with regard to a cause of action for negligence. For example, last



year, the Kentucky Supreme Court in Presnell Constr. Managers, Inc. v. EH Constr., LLC, 134 S.W.3d 575 (Ky. 2004), relying on and adopting Restatement (Second) of Torts section 522 (“Section 522”),⁵ found that although the trial court had properly dismissed a claim for negligent supervision, a separate cause of action for negligent misrepresentation was properly alleged. Id. at 582. In so ruling, the court explained that the CM’s duty “was not to supply false information, and [the contractor’s] complaint alleges that ‘[the CM] supplied faulty information and guidance to the Project’s contractors.’” Id. at 582. The court concluded that this allegation was sufficient to avoid a dismissal for failure to state a claim for relief.⁶ However, the court found that the negligent supervision claim “did not articulate a claim that is independent of [the CM’s] contractual duties”; thus, the CM owed no duty to the contractor on that claim, since they were not in privity of contract. Id. at 582-83.

⁵ Restatement (Second) of Torts section 522 addresses the issue of information negligently supplied for the guidance of others. It states in part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

⁶ The court joined many other jurisdictions in the “steady and continuing development in the area of [negligent misrepresentation],” noting that “many courts have now recognized that under some restrictive circumstances the defendant may be under a duty of care to make his representations accurately and may be liable for a limited measure of damages to a limited group of persons if his negligent misrepresentations induce[d] justifiable reliance to the plaintiff’s loss.” Id. at 581-82 (quoting Dan B. Dobbs, *The Law of Torts* § 472 (West Group 2001)). See John Martin Co. v. Morse/Diesel, Inc., 1990 WL 28776 (Tenn. Ct. App. March 20, 1990) (reversing summary judgment for CM by relying in part on Section 522 and holding that economic loss caused by negligent misrepresentation was recoverable by parties not in privity); Gilbane Bldg. Co. v. Nemours Found., 606 F. Supp. 995 (D. Del. 1985) (holding in suit by subcontractors against owner that per Section 552, subcontractors had alleged facts which, if proven, would satisfy elements of negligent misrepresentation cause of action); Donnelly Constr. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292 (Ariz. 1984) (holding in suit by contractor against architect that negligent misrepresentation cause of action did not require privity to be maintained, such that persons, for whose benefit or guidance representations were made, could bring claim against maker of representations). But see Garofalo Elec. Co. v. N.Y. Univ., 270 A.D.2d 76 (N.Y. App. Div. 2000) (holding that electrical contractor was not entitled to recover economic damages resulting from CM’s alleged misrepresentations absent evidence of existence of special relationship, presence of negligent misrepresentations, and reliance on them by contractor).



B. Interference With Contractual Relations

A CM may also be the target of a claim that it interfered with a contract between the owner and the contractor. See, e.g., Parkway Windows, Inc. v. River Tower Assocs., 108 A.D.2d 660 (N.Y. App. Div. 1985) (denying motion to dismiss actions against CM as agent for interference and harassment, interference with contract, wrongfully paying third parties, barring contractor from worksite, and conversion of personal property); John E. Green Plumbing & Heating Co. v. Turner Constr. Co., 500 F. Supp. 910, 913 (E.D. Mich. 1980) (plumbing and heating contractor that had contracted directly with the owner was permitted to maintain a cause of action against the CM for intentional interference with its contract with the owner).⁷

C. Defamation

A CM may even become the target for a defamation claim. In Pontos Renovation v. Kitano Arms Corp., 226 A.D.2d 191 (N.Y. App. Div. 1996), a New York contractor sued a CM for defamation. The contractor complained that the CM had stated at a meeting that the contractor was “terrible,” “incompetent,” “caused [the CM] a lot of problems,” and that the CM would “not be unhappy to see them go.” Id. at 191-92. The court maintained that these statements were “pure opinion” and “did not imply any undisclosed detrimental facts which would be unknown to those at the meeting who were involved in the construction project”; thus, the contractor was unable to maintain a cause of action. Id. at 192.

VII. Conclusion

A CM’s exposure can extend to liability in contract, tort, statute or other theories such as copyright infringement⁸ or even racketeering.⁹ The potential for liability will accompany each construction project a CM undertakes, and may come from one of numerous parties including the owner, the prime contractor, subcontractors, design professionals, or a subsequent purchaser.

⁷ The court allowed the cause of action in spite of a “no damage for delay” clause in the contractor’s contract with the owner. See section III.B, supra.

⁸ See Constr. Mgmt. Sys. v. Assurance Co. of Am., 23 P.3d 142 (Idaho 2001).

⁹ See Brandt v. Schal Assocs., Inc., 664 F. Supp. 1193 (N.D. Ill. 1987).



Carefully drafted contracts reflecting the intentions of the parties can minimize liability, but will not eradicate it. Thus, the CM should endeavor to become aware of the risks on any project, and in so doing, should recognize that the greater its role, the greater the potential for liability.

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