

AIA LEGAL BRIEF – OCTOBER 2006

Getting Paid! What Architects Should Know

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I. Collecting Interest and Attorney's Fees.

Missouri architects have greater rights than ever to collect from slow-paying clients due to recent expansions of state “prompt pay” statutes and lien laws. When clients refuse to pay, you need to be aware of some collection tools that can help get the client's attention - and get you paid! Here is what you should know.

18% Annual Interest. Standard AIA contracts provide a blank space to insert an agreed rate of interest, which is often left blank. In absence of a contract rate, interest runs at the “prevailing legal rate.” Under Missouri law, the prevailing rate for most contract debts is 9% per annum when no rate is stated in the contract.² However, for design and construction contracts, Missouri's “Prompt Pay Act” states that a person failing to pay for private construction work may be liable for interest of 1.5% per month from the date payment is due.³ That is twice the standard 9% rate allowed for other businesses. The prompt pay law does not apply to private residential construction contracts for the building, improvement, repair or remodeling of “owner-occupied residential property of four units or less.” Be sure to add interest to all past due bills.

Collecting Your Legal Fees. In England, the prevailing party recovers his or her legal fees. Under the “American Rule,” however, attorney's fees are ordinarily recoverable only when authorized by statute or contract. The threat of being forced to pay the other side's legal fees is often used as a negotiating tool in collecting payment.

1. By Contract. Standard AIA contracts do not provide for the recovery of legal fees to collect unpaid fees. Forms published by DBIA provide that the “prevailing party” in arbitration or litigation shall be entitled to recover reasonable attorney's fees and expenses from the losing party.⁴ What is a “prevailing party”? In a 1999 Missouri court case, attorney's fees were denied to a contractor who was awarded only one-third of the amount

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² MO. REV. STAT. § 408.020 (2006).

³ MO. REV. STAT. § 431.180 (2006).

⁴ DBIA General Conditions, par. 10.3.4, Doc. No. 535, 1998 Edition.

he claimed was due.⁵ The court stated, “A party may only recover attorney’s fees under a contract provision if it is the prevailing party. A prevailing party is the party prevailing on the main issue in dispute . . . the rock removal cost was the main issue. On that issue Plaintiff received just slightly more than one-third of the amount requested.”

2. By Statute. Missouri’s Prompt Pay Act states that the prevailing party can recover legal fees in an architect’s contract collection case.⁶ Under a separate “frivolous suit” law, Missouri also allows legal fees to the prevailing party if a suit or a defense is made frivolously and in bad faith.⁷ For state construction projects, separate Missouri statutes require payment of interest at three points above the prime rate on state contracts for services not paid within 45 days after “approval” of the invoice.⁸ Interest is retroactive to the 30th day from approval. The statute applies to contracts for supplies and services purchased by the state, which includes architectural services.

II. Know Your Lien Rights.

Architects have greater lien rights than ever in Missouri to collect from slow-paying clients. Here is what you should know. A mechanic’s lien is a statutory collection device which allows a lien claimant who is owed money for providing labor, materials or goods or services used to improve real estate to encumber the property and sell the property, if necessary, to recover the amounts owed. Liens often get results, though architects rarely use this collection tool – unlike contractors and subs.

Lien Law. State statutes grant lien rights to every “registered architect or corporation registered to practice architecture” who does work directly connected with the erection or repair of any building or other improvement upon land “under or by virtue of any contract with the owner or lessee thereof, or such owner’s or lessee’s agent, trustee, contractor or subcontractor”.

Lien Rights - Even For Unbuilt Projects! In 1992, the Missouri Supreme Court dealt architects a blow, holding that architects had no lien rights if their plans are not actually used for construction.⁹ AIA/Missouri went to work after that case and successfully amended the lien law in 1997.¹⁰ State law now allows an architect to file a lien “whether or not actual construction of the planned work or improvement has commenced.” There are two conditions, however:

⁵ *Flamingo Pools, Spas, etc. v. Penrod*, 993 S.W.2d 588 (Mo. Ct. App. S.D. 1999).

⁶ MO. REV. STAT. § 431.180 (2006).

⁷ MO. REV. STAT. § 514.205 (2006).

⁸ MO. REV. STAT. §§ 34.055-057 (2006).

⁹ *Brownstein v. Rhomberg-Haglin & Assoc., Inc.*, 824 S.W.2d 13 (Mo. banc 1992).

¹⁰ Missouri S.B. 171 became effective August 28, 1997.

- The architect must have a direct contract with either the property owner; a tenant (lessee); or, the agent or trustee of the owner or tenant; and,
- The contract must be in writing.

Further, the owner or tenant with whom you have a contract must have owned or leased the property either: a) at the time the contract was made; or, b) at the time the lien is filed. This avoids problems caused by a sale of the property after design work is done, or work done for a prospective buyer (or developer) who does not own the property at the time the design work is done, but later acquires it.

Lien Waivers. Since architects have lien rights in Missouri, they may be asked to sign lien waivers as a condition of payment. Here are the different types of waivers:

1. Up-Front Waivers. Under Missouri law, a contract clause that requires an up-front waiver of all lien rights is illegal and unenforceable.¹¹
2. Conditional Waivers. A conditional waiver is one in which the waiver becomes effective only upon receipt of payment and final bank clearance of the check. Once the check clears, then the waiver becomes effective.
3. Unconditional Waivers. An unconditional waiver has “no strings attached” and is valid even if payment is not received.

The courts recognize the difference between the various types of waivers. In one case, five subcontractors who signed “conditional” waivers had lien rights, though two who signed “unconditional” waivers did not. As to the latter two, the court stated, “[u]nwisely perhaps, but effectively, they had exchanged their lien claims for [the general contractor’s] checks.”¹²

Filing On Time. The timing of a lien is important and the right to a lien against the owner’s property can be lost merely by not filing on time. In Missouri, a mechanic’s lien must be filed within six (6) months “after the indebtedness shall have accrued.” This is interpreted to mean the date that the last work was performed by the lien claimant or someone working under the claimant (i.e. a subcontractor or subconsultant).¹³ In Missouri, the foreclosure suit must be filed within six (6) months after the lien is filed.¹⁴ If suit is not timely filed, the lien disappears as a matter of law.

¹¹ MO. REV. STAT. § 429.005 (2006).

¹² *Polack Plumbing & Heating Co., Inc. et al. v. A.S.A. Builders, Inc. et al.*, 534 S.W.2d 505, 508 (Mo. Ct. App. 1976).

¹³ MO. REV. STAT. § 429.080 (2006).

¹⁴ MO. REV. STAT. § 429.170 (2006).

III. What You Should Know When Working for a City or County.

Architects must use caution when contracting with public and private owners to assure that fees can legally be collected. Here is what you need to know.

Government Contracts. Architects must be extra cautious when dealing with governmental agencies. Missouri Statute 432.070 requires public contracts with any county, city, town, village, school township, school district or other municipal corporation to be “in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.” As a result, an oral contract will not be enforceable.

Appropriation of funding is also required. In 1993, a Missouri architect was denied his fee in full because the contract lacked a certification by the county accounting officer that sufficient funds had been appropriated. So check before doing any work to be sure the treasurer has certified that he or she has “encumbered” funds to pay your fees. In a 1993 case, the Missouri Court of Appeals ruled that a person who contracts with a Class 2 county is required by state law to ensure that the required certification is obtained, otherwise he volunteers his services since the law forbids the contract.¹⁵ In this case, the architect lost over \$35,000 in fees for work performed through design development. (Class 2 counties in Missouri include Platte, Cass, Jasper, Camden, Cole, Callaway and Cape Girardeau.)¹⁶

IV. Caution When Working for a Tenant, or Agent – Who Does Not Own the Land.

In the private sector, the architect is not always hired directly by the property owner, but sometimes by the owner’s agent. This may be a developer, a construction manager, property manager, tenant or even a design-build contractor. Whether a suit or lien to collect fees can be filed against the owner depends on the agent’s authority. This often comes up in mechanic’s lien cases, where the landowner claims the contract was not entered into by its “agent.” Proof of agency can be tricky, and can limit what is lienable – if anything.

In a 1982 Kansas case, the court held that an owner’s agent can bind an owner (the “principal”) if the agent has *apparent authority*, even where no actual contract can be proved with the owner.¹⁷ Be careful, however, since agency relationship will not be inferred merely because an architect assumed the party with whom he dealt had authority. It must appear by the statements or acts of the owner or *the owner and agent together* that the acts of agent were authorized.¹⁸ If you are hired by someone other than the owner of the

¹⁵ MO. REV. STAT. § 50.660 (2006).

¹⁶ *Jablonsky v. Callaway County*, 865 S.W.2d 698 (Mo. Ct. App. 1993).

¹⁷ *Bucher & Willis Consulting Eng'rs v. Smith*, 643 P.2d 1156 (Kan. Ct. App. 1982).

¹⁸ *Kansas City Heartland Constr. Co. v. Maggie Jones Southport Cafe, Inc.*, 824 P.2d 926 (Kan. 1992).

property, be sure to include some affirmative statement in the contract that the party signing is authorized to contract on behalf of the owner.

Remember also that Missouri lien law provides that architects have liens if they perform “under or by virtue of any contract with the owner or lessee thereof, or such owner’s or lessee’s agent, trustee, contractor or subcontractor.” If with a tenant, that tenant must have leased the property either: a) at the time the contract was made; or, b) at the time the lien is filed.

V. Termination Costs.

Architects may be able to recover fees if a project is abandoned or the contract is terminated prematurely, but what is recoverable may depend on your contract. Owners today often strike any provisions for termination expenses or lost profits, and want the right to terminate “for convenience” – without cause. Here is what you need to know.

Termination Expenses. AIA’s B141 Owner/Architect contract recognizes that an owner may terminate its contract with the architect for cause or merely for convenience. However, if termination is not the fault of the architect, the contract allows the architect to recover payment for services rendered to date, plus “termination expenses.” B141, par.1.3.8.7 (1997 edition). These expenses usually compensate the architect for lost profits and the cost to wind down the project. The AIA no longer includes a formula for these costs (unlike the old 1987 version) so the contract should be modified to specify these costs – like the older forms did. Typical is a percentage of the remaining unpaid fee. In one Missouri case, where the architect’s contract provided for termination expenses if the project was abandoned, the court held that the owner could not abandon the project and deprive the architect of its fee.¹⁹

Even in absence of such a clause, Missouri courts have held that if an owner terminates the contract and prevents an architect from performing its services, the architect may still sue for the value of services rendered.²⁰ In another case, the architect was held entitled to recover the reasonable value of services up to termination, but was denied his full fee, including services not performed, i.e. during the construction phase. The architect’s damages were based on the contract price (a percent fee) based on actual cost of construction, less the cost to complete the architect’s services.²¹

VI. Conditions Precedent.

Architects are occasionally asked to perform preliminary services for free, with payment contingent upon some event, such as re-zoning, construction financing, or the

¹⁹ *Curtis v. Bales*, 241 S.W. 83 (Mo. Ct. App. 1922).

²⁰ *Cann v. Church of the Redeemer*, 85 S.W. 994 (Mo. Ct. App. 1905).

²¹ *Pallardy v. Link’s Landing, Inc.*, 536 S.W.2d 512 (Mo. Ct. App. 1976).

award of a prime contract. If the condition is met, then the design professional can bill for services.²² Architects must carefully evaluate the risk of non-payment in these situations. In a 1990 Missouri case, for example, an architect lost its entire fee because the contract said that recovery of fees was expressly contingent upon bond financing. The financing fell through and the court said that this contract condition was not met nor excused.²³

In a 1994 Missouri case involving a courthouse, an architect entered into a contract before a special sales tax election was held to finance the project. The contract provided that the architect would be paid after a sales tax or bond issue was approved. The county refused to pay for the architectural services, claiming the contract violated R.S.Mo. § 50.660, which requires that unencumbered funds be available and appropriated for a contract before it is binding on the county. The court found the contract provision was a “condition precedent” which did not require the county to pay the architect until a sales tax or bond issue was passed. In a close call, however, the condition precedent was found satisfied by the passage of a sales tax to finance the project and, therefore, the contract was enforceable. Whew! As mentioned above, government contracts call for special attention to proper appropriation of funds.²⁴

VII. Got A Collection Problem? Think It Through, Before You Sue!

One cautionary note. Professional liability insurers advise that collection actions by architects against their clients must be approached with caution. It is common for a suit to recover unpaid fees to be met with a malpractice counterclaim by the client, seeking damages which offset or exceed the fees owed. Talk to your insurance agent and attorney before pursuing any action against a client, and understand the risks.

²² For a collection of these cases, see Timothy E. Travers, *Right of architect to compensation under contract provision that fee is to be paid from construction loan funds*, 92 A.L.R.3d 509 (2006).

²³ *Hastings & Chivetta Architects v. Burch*, 794 S.W.2d 294 (Mo. Ct. App. E.D. 1990).

²⁴ *Hood-Rich, Inc. v. County of Phelps*, 872 S.W.2d 584 (Mo. Ct. App. S.D. 1994).