Are Contractors Fiduciaries Under North Carolina Law?

By Steve DeGeorge

The term “fiduciary” calls to mind directors, trustees, attorneys and the like. Certainly not contractors. However, Article 3 of AIA A102-2007 (formerly A111-1997) and A103-2007 (formerly A114-2001), often overlooked during contract negotiation, might create a fiduciary relationship and significantly expand a contractor’s responsibilities and potential liability. Article 3 states in its entirety:

Article 3 Relationship of the Parties
The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner’s interests. The Owner agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.

“Relationship of trust and confidence” corresponds precisely with language used by North Carolina courts in describing a fiduciary relationship and allowing a claim for “constructive fraud.” E.g., Collier v. Bryant, 719 S.E.2d 70, 81 (N.C. App. 2011); Orr v. Calvert, 713 S.E.2d 39, 44 (N.C. App.), rev’d on other grounds, 365 N.C. 320, 720 S.E.2d 387 (2011). Unlike actual fraud, constructive fraud requires no misrepresentation, concealment or intent to deceive. Constructive fraud requires merely (1) a “relationship of trust and confidence”; (2) the defendant took advantage of the relationship to benefit itself; and (3) the plaintiff was injured as a result. Orr, 713 S.E.2d at 44. See also Sterner v. Penn, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003); Barger v. McCoy Hillard & Parks, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997). Even though no misrepresentation or intent is required, constructive fraud constitutes a per se violation of the North Carolina Unfair and Deceptive Trade Practices Act, which provides for automatic treble damages and a discretionary award of attorneys' fees. Governor's Club, Inc. v. Governor's Club LP, 152 N.C. App. 240, 250, 567 S.E.2d 781, 788 (2002); N.C.G.S. §§75-16.1 and 75-16.2. Finally, a constructive fraud claim is subject to a whopping 10-year statute of limitations. Orr, 713 S.E.2d at 44; Dixon v. Gist, 724 S.E.2d 639, 642 (N.C. App. 2012); Self v. Yelton, 201 N.C. App. 653, 662, 688 S.E.2d 34, 40 (2010).

Sparse Legal Guidance on Possible Fiduciary Relationship. Despite the extensive use of the AIA contracts containing “relationship of trust and confidence” and the enticing features of a constructive fraud claim, there is scant case law on the question of whether the language creates a fiduciary relationship, either automatically or under certain circumstances. The North Carolina Court of Appeals has issued one decision on the question. Eastover Ridge, LLC v. Metric Constructors, Inc., 139 N.C. App. 360, 533 S.E.2d 827 (2000). In Eastover Ridge, the project owner sued its contractor for defects in the construction of an apartment complex. The parties entered into A111-1997, including unmodified Article 3. The owner asserted a constructive fraud claim on the ground that the contractual “relationship of trust and confidence” created a fiduciary relationship, which the contractor allegedly breached through defective construction. Notwithstanding the contract’s plain language, the Court of Appeals concluded there was not a “relation of trust and confidence” which could give rise to a fiduciary relationship. This conclusion appears to have rested on two facts. First, the parties did not negotiate or even discuss Article 3. Second, the owner’s architect had “constant, close involvement” overseeing the entire project. A third factor, although not mentioned by the court, might have been that the case involved alleged construction defects, rather than over-charges. It is a mistake to surmise that Eastover Ridge shuts the door on a constructive fraud claim based on Article 3’s “relationship of trust and confidence” language.

The Reach of Eastover Ridge May be Limited. A leading construction law authority opines that “relationship of trust and confidence” is deliberately used by the AIA “to create a fiduciary relationship between the owner and the contractor,” as “a cost-control device” to keep contractors honest when performing under contracts affording the contractor control over costs. J. Sweet, Legal Aspects of Architecture, Engineering and the Construction Process §14.02B at p. 351 (9th Ed. 2009). Sweet’s view finds support in the fact that AIA’s lump sum/fixed price contract, A111-2007 (formerly A111-1997), does not describe the relationship between the contractor and owner in these terms. This distinction strongly suggests that the AIA views the contractor’s control of cost as creating the need for a special relationship imposing enhanced duties on the contractor.

If cost control is the decisive factor, Eastover Ridge, where there was no allegation of overcharges, may stand for the narrow rule that a fiduciary relationship should not be imposed where the parties’ dispute is limited to quality of work. According to Swee, had Eastover Ridge involved “an abuse of the contractor’s power to determine costs, it is likely the court would have concluded that there had been an abuse of the relationship of trust and confidence . . . “ Id. The only other reported decision addressing the issue involved cost overruns, and the court held that the contract imposed on the contractor “a fiduciary or confidential relationship.” Jones v. J.H. Hiser Constr. Co.,
Establishing Intent Is Simple. Irrespective of where North Carolina law ultimately comes to rest, owners and contractors can take simple steps to make clear their intent to create or disavow a fiduciary relationship. If the intent is to create a fiduciary relationship, Article 3 can be tweaked to make the intent plain. If the intent is to create no special relationship, Article 3 can be revised accordingly, or deleted.

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