Girolametti v. Michael Horton Associates, Inc., 173 Conn.App. 630 (2017)

Under Connecticut law, contractors and subcontractors pursuing construction related claims may find their claims barred because the underlying issue was previously resolved in arbitration or litigation involving other parties. This is the holding of a case known as Girolametti v. Michael Horton Associates, Inc., decided by the Connecticut Appellate Court in 2017. (173 Conn.App. 630 (2017)). Contractors, subcontractors, and their counsel need to be aware that their ability to bring suit or to institute arbitration may be barred by collateral estoppel, if the underlying claim was resolved in litigation or arbitration involving other parties.

At issue in Girolametti was a construction project for the expansion of a Party Depot Store owned by the plaintiffs. Id. at 635. The owners of the store, brought actions against the general contractor on the construction project – the Rizzo Corporation ("Rizzo"), and seven subcontractors and sub-subcontractors on various claims relating to the quality of the work provided. Id. The subcontractors and sub-subcontractors filed motions for summary judgment. Id. The plaintiff appealed the trial court's grant of summary judgment to Rizzo, and the subcontractors and sub-subcontractors appealed the court's judgment denying all their motions for summary judgment. Id.

The Plaintiff and Rizzo executed the contract for construction of the store expansion on November 12, 2007 in the amount of $2,435,100. Id. at 637. The contract included a provision requiring the submission of all disputes to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration

Association. Id. The contract had an article concerning subcontractors providing in pertinent part, "Rizzo shall require each subcontractor, to the extent of the work to be performed by the subcontractor, to be bound to Rizzo, by the terms of the contract documents and to assume toward Rizzo all the obligations and responsibilities which Rizzo, by these documents, assumes toward [Girolametti]." Id. The project would involve the construction of a pre-engineered building ("PEB"). Id. In July of 2007, Rizzo entered into a subcontract with Michael Horton Associates, Inc. ("Horton"), wherein Horton was to design the lower level parking garage structure and the supported floor slab at grade level and the building above grade level would be designed by the PEB manufacturer. Id. at 638. Thereafter, Rizzo and the Pat Munger Construction Company Inc., ("Munger") entered into a subcontract for the purchase and erection of a pre-engineered steel building for the project. Id. Munger would be liable to Rizzo "for any direct costs Rizzo incurs as a result of Munger's failure to perform." Id. at 639. Munger then subcontracted with Varco Pruden Buildings Inc./BlueScope Buildings North America ("BlueScope") for the purchase of the PEB. Id. Rizzo then subcontracted with Lindade Corporation ("Lindade") to perform construction services. The Rizzo/Lindade subcontract provided in part, "Lindade acknowledges that Girolametti's payment to Rizzo for any work performed by Lindade is an express condition precedent to any …payment to [Lindade from Rizzo] and that [Rizzo] is under no obligation to make any partial or final payments to Lindade until and unless [Girolametti] first pays Rizzo." Id. at 40. The contract also provided, "Lindade shall be liable to [Rizzo] for any costs Rizzo incurs as a result of [Lindade's] failure to perform this

subcontract in accordance with its terms. [Lindade's] failure to perform includes the failure to perform of its subcontractors of any tier and all [suppliers]." Id. In turn, Lindade entered into a sub-subcontract with Domenic Quaraglia Engineering, Inc., ("Quaraglia") for structural steel engineering services for the project. Id. Lastly, Girolametti retained Test-Con Inc. ("Test-Con") to perform construction material inspection and testing services as requested by Girolametti. Id. at 641.

The project was completed on November 3, 2008. On April 29, 2009 Rizzo applied for arbitration claiming that the plaintiffs owed it further sums beyond the contract price for extra work. The plaintiff filed a counterclaim seeking compensation of $406,431 for the cost of repairing Rizzo's alleged defects and completing the project, and an additional sum of $354,572 for lost income. Id. In its submission to the arbitrator, the plaintiff alleged Rizzo was responsible for multiple construction defects. Id. The arbitration was held over thirty-five days. Id. at 642. On the thirty-third day of hearings, the plaintiff made the decision to abandon the arbitration. Id. On March 28, 2011, the arbitrator issued an award in which plaintiff was ordered to pay Rizzo $508,597. Id.

The essence of the plaintiff's claims against Rizzo, the subcontractors, and the sub-subcontractors, was the design and construction of the steel joists. Id. at 645. Specifically, the allegation that the joists' design was defective, did not comply with the design requirements, and lacked the necessary loading capacity. Id.

In the underlying cases, the defendants moved for summary judgment on the basis of collateral estoppel and/or res judicata. Id. at 648-49. The Court cited several cases regarding the rules for collateral estoppel and res judicata.

> Collateral estoppel, or issue preclusion … prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim. (citation omitted). An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. … An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered. … If an issue has been determined, but the judgment is not dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually have the characteristics of dicta." (Citations omitted; emphasis in original; internal quotation marks omitted.) (Citations omitted). Furthermore, "'[t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding …'

Id. at 649-50. The Court discussed the concept of privity which is not a requirement for asserting collateral estoppel. "[C]ollateral estoppel should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." Id. at 654. (Citing Mazziotti v. Allstate Ins. Co., 240 Conn. 799, 813-14 (1997)).

The Court upheld the trial court's grant of summary judgement in favor of Rizzo. Id. at 659-60. The Court further held that the trial court incorrectly denied Horton's motion for summary judgment on the grounds of res judicata. Id. at 663. Evidence indicated that the plaintiff's arbitration claim against Rizzo was that the PEB had not been designed and engineered properly, but plaintiff chose not to introduce evidence in support

of the claim. Id. The Court found that Rizzo and Horton were in privity. However, under Connecticut law, "privity is not a requirement for the defensive use of collateral estoppel." Id. at 661. (Citing Marques v. Allstate Inc. Co., 140 Conn.App. 335, 340-41 (2013)). The Court upheld the trial court's denial of summary judgment in Horton's favor on its collateral estoppel argument, not for reasons related to privity, but "because the records does not disclose that the design and construction defect issue raised by [plaintiff] in this action was fully and fairly litigated in the arbitration, much less that its resolution adverse to [plaintiff] was necessary to the arbitration award." Id. at 662.

How does the case's holding affect resolution of disputes? If an issue was actually litigated and necessarily determined in prior litigation or arbitration, the resolution of that issue is final and binding on a party that did not participate in the prior litigation or arbitration. However, to invoke collateral estoppel, the issue sought to be litigated in the new proceeding must be identical to those in the prior proceeding. Stated simply, if two parties resolve an issue, any contractors, subcontractors or sub-subcontractors will not be permitted to relitigate that issue. Collateral estoppel will be invoked against them either offensively or defensively depending on the facts at hand.

How to draft for this problem? There may be situations where a general contractor/ subcontractor/sub-subcontractor does not want to draft a contract limiting or eliminating collateral estoppel. For example, it may be economically advantageous to let two parties resolve an issue without having to pay to participate in the dispute. On the other hand, it may be harmful to have an issue resolved which is averse to the interests of the general

contractor/subcontractor/sub-subcontractor without that party even being aware of the litigation or arbitration. Nonetheless, here is proposed contract language which will limit the applicability of collateral estoppel: "Any decision rendered in any arbitration or litigation, to which the signatories do not participate, will be conclusive only as to the matters being adjudicated or litigated in said arbitration or litigation, pertaining only to those parties, and will have no collateral estoppel effect as to the same or similar issues in companion claims or actions arising out of the incident which is the subject of said arbitration or litigation."