

Contractors and Their Customers—When Things Go to Hell

by Stephen E. Berken, Attorney-at-Law

Let's start with the good news. Most contractors are honest, diligent, and thoughtful businessmen and women who make an honest living. Most contractors want to please their customers so they get repeat business. Good word-of-mouth throughout the community is the goal of most contractors.

Sometimes things don't go as planned.

Perhaps the contractor underestimated the cost of materials. Sometimes subcontractors walk off the job. There can be other unforeseen problems with the project such as inclement weather or changes orders that extend timelines. The types of problems a contractor may encounter during a project are endless.

There are certain things that you can do before you hire a contractor.

1. Tom Martino's Troubleshooter Network is a free service to our community and has already vetted every contractor on the referral list.
2. Asking for references is a great way to determine the quality of the contractor's work.
3. Perform a background check.
4. Ask around or research the contractor online. What do other people have to say about the contractor's work?

What is the Colorado Trust Fund Statute?

The Trust Fund Statute ("TFS") requires a general contractor to hold funds in trust for the payment to 1) subcontractors, 2) material suppliers, and 3) laborers. Let's call this group of people "the helpers."

The TFS does not allow a general contractor to take any money out of the "trust funds" for payment to himself until the helpers have been paid.

Failure to pay the helpers who work for the general contractor can have very serious legal consequences. The statute allows for treble damages plus payment of attorney's fees. Further, there may be criminal implications for violations of the TFS.

Who can bring an action under the Colorado Trust Fund Statute?

Colorado case law has expanded who may bring a violation under the trust fund statute. In particular, a homeowner may file a complaint (lawsuit) against the general contractor, when he has failed to pay his helpers with funds the general contractor received. The law has expanded to allow homeowners "standing" (the legal right to initiate a lawsuit) to sue under TFS in cases

where the homeowner has already paid the contractor's workers or material suppliers, or has the potential of having to pay them twice.

Fortunately, the law allows some protection to the homeowner in cases where he has paid the general contractor for services to be performed. This is called an "affirmative defense." For example, in cases where a homeowner paid a general contractor for materials but the general contractor failed to pay the material suppliers, the homeowner can invoke the affirmative defense in the event that he is sued by the material supplier. The homeowner will need proof of paying the general contractor for the materials to insulate from a lawsuit judgment.

I recommend that in cases where one of the general contractors' helpers has not been paid, the following letter is immediately sent to those unfortunate workers who were left "holding the bag."

Dear Sir:

I reside at 123 Anywhere St., Denver, CO. I hired Swifty Roofing to install my roof. I received a bid of \$12,000. I paid Swifty Roofing the requested \$12,000. I'm enclosing a copy of the canceled check for your records.

Unfortunately, I now understand that Swifty Roofing failed to pay your company for the shingles and other materials. That is unfortunate, however, Colorado Revised Statutes §38-22-127 provides that my payment to the general contractor is a defense against any claims you may have against me. May I strongly suggest that you consider suing the general contractor for your monies. I wish you the best of luck in the future.

It's quite possible that the helper will not be persuaded by your letter. He may file a lien against your home. It is also possible, but not likely, that he may try to foreclose. Let's talk about that.

If a helper is not paid by a general contractor, it is often near the end of a project. Helpers who do the preliminary work (excavation, framing, site work), are hired in the beginning of a project, a time that the general contractor has money. Helpers at the end of the project (painters, finish workers, carpet layers) are hired when the money is almost gone.

If a helper is not paid, and leaves the site, he has four months to file a lien (called a "mechanic's lien") against the property that he helped to "improve." The law requires that he first give the owner of the property ten days notice before the lien is filed. Thereafter, he has six months to begin a foreclosure action.

If the project that he "improved" is new construction, his lien jumps ahead of all other liens, including any consensual liens, like a mortgage.

For projects that involve existing structures, a helper's lien does not jump ahead of consensual mortgages. That means if there is little or no equity in the home, it's unlikely a foreclosure action will take place.

What if you are sued?

If a lien is filed, and the helper does not proceed with a foreclosure action, the lien becomes stale. Most competent title companies will ignore a stale lien if you later wish to sell your home or refinance the property. If the helper brings an action in court, use the defense we discussed earlier, that is, produce evidence that you paid the general contractor in full for the work he was hired to do.

Best of luck to you,

Steve Berken
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