

Construction Law Practice Tip: General Contractor Liability for Subcontractor Injury

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PRACTICES Construction Litigation, Litigation

AIA Document A201™, General Conditions of the Contract for Construction (the “General Conditions”), is a form agreement often incorporated into a main contract between an owner and a general contractor.¹ The General Conditions place project control squarely in the hands of the general contractor. The issue is important because who controls the project might end up owing a duty of care to injured independent contractor employees.² For example, in *Saenz v. David & David Constr. Co., Inc.*, Saenz, an independent contractor employee, appealed the trial court’s take-nothing judgment in favor of David & David after a crane load struck him on the head, precipitating his fall from a roof.³ Saenz argued, *inter alia*, that the contract between the owner and David & David, and the subcontract between the latter and Saenz’s employer gave David & David control as a matter of law. The contract between the owner and the general contractor contained clauses almost identical to those in General Conditions §§ 3.3.1, 5.3, and 10.2.1.⁴ The contract provided that

[t]he contractor shall be solely, subject to the terms of Article 4, responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the contract unless contract documents give other specific instructions concerning these matters[;]⁵

and that

[t]he contractor shall take all necessary precautions for safety and shall provide all necessary protection to prevent damage, injury or loss to all persons on the work and other persons who may be affected thereby.⁶

But the contract also required the general contractor to pass its obligations on to its subcontractors via the following clause:

The contractor shall require each subcontractor, to the extent of the work to be performed by the subcontractor, to be bound to the contractor by terms of the contract documents and to assume towards the contractor all obligations and responsibilities which the contractor by the contract documents assumes towards the owner and architect.⁷

The court held that this last “contract clause modified the previous control clauses.” The *subcontract* gave effect to this last clause with the following clause:

Subcontractor . . . assumes the responsibilities of an employer for performance of the Work and acts as an employer of one or more employees by paying wages, directing activities, and performing other similar functions. Subject to the right (but not the obligation) of [David & David] to direct Subcontractor or its employees to cease or change unsafe work practices.

Subcontractor is an independent contractor, free to determine the manner in which the Work is performed. (emphasis added).⁸

The court held that the contracts assigned “the contractor’s responsibility for controlling the construction means, methods, techniques, sequences and procedures” to the subcontractor. The court could not agree, in light of the two contracts, that “David & David’s control of the subcontractor’s work is uncontroverted and thus established as a matter of law.”⁹ The court overruled Saenz’s issue on appeal and affirmed the trial court’s take-nothing judgment in favor of David & David. This next case shows what happens when the subcontract does not include a provision that passes project control to the subcontractor for the latter’s scope of work.

In *Maggi v. RAS Dev., Inc.*, the plaintiff, a subcontractor’s employee, fell from a height on a construction site and died of his injuries.¹⁰ A jury awarded Maggi’s estate \$3.3 million against RAS Development, the general contractor. On appeal, RAS Development argued, *inter alia*, that it should not be held liable for Maggi’s death because it did not control or supervise his work. The subcontract between RAS Development and Maggi’s employer “expressly incorporated” AIA Document A201TM, including form language from §§ 3.3.1, 3.3.2, 10.1, 10.2.1, 10.2.3, and 10.2.6, which gave the *contractor* control of the worksite and responsibility for its safety. For example, the General Condition’s § 3.3.1 stated that

[t]he Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract documents give other specific instructions concerning these matters.¹¹

The court of appeals held that these clauses made it “clear that the parties intended RAS Development to be responsible for supervising, directing, and controlling the construction project,” and it affirmed the trial court’s judgment.¹² We can infer that the subcontract did not contain a provision passing control to the subcontractor and making the latter an independent contractor, free to perform its work, as in *Saenz*.¹³ RAS Development might have avoided a holding of control-by-contract had such a provision been in place.¹⁴

¹ See, e.g., AIA Document A102TM - 2007 § 16.1.2 (Standard Form of Agreement Between Owner and Contractor for Cost Plus with GMP), enumerating AIA Document A201TM – 2007 as part of the contract documents.

² See Grosdidier, Pierre, [Questioning General Contractor Liability in Texas](#), originally published in Law360, March 27, 2017.

³ 52 S.W.3d 807, 808?09 (Tex. App.—San Antonio 2001, pet. denied).

⁴ *Id.* at 813.

⁵ *Id.* Compare with General Conditions § 3.3.1 (1997 version).

⁶ *Id.* Compare with General Conditions § 10.2.1 (1997 version).

⁷ *Id.* Compare with General Conditions § 5.3 (1997 version).

⁸ *Id.* (emphasis and parentheses in original).

⁹ *Id.* at 814.

¹⁰ 949 N.E.2d 731, 735 (Ill. App. Ct. 2011).

¹¹ *Id.* at 747.

¹² *Id.* at 747, 755.

¹³ *Id.* at 747. The subcontract was titled “Standard Form of Agreement Between Contractor and Subcontractor,” which suggests that it was based on the eponymous AIA Document A401TM 1997 (the accident occurred in 2000). *Id.* The opinion does not discuss whether the language in the latter’s § 4.1.1 (“The Subcontractor shall supervise and direct the Subcontractor’s Work, . . .”) was enough to transfer control to the subcontractor. The same language appears in the 2007 and 2017 versions of A401TM (§§ 4.1.2 and 4.2.2, respectively). Drafters relying on Document A401TM might want to be mindful of this issue.

¹⁴ The court also held that RAS Development exercised actual control of the project. *Id.* at 747–49.