

Owner Loses Defect Claim for Failure to Notify Contractor



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March 2011

In *Robertet Flavors, Inc. v. Tri-Form Construction et al.*, decided by the New Jersey Supreme Court on August 3, 2010, an owner's decision to move ahead with repairs in the face of contractors' request to inspect existing conditions turned out to be a costly one. The owner was precluded from recovery on almost all of its claims against its original contractors because its repair work destroyed physical evidence that the court found to be crucial to their ability to defend themselves. Robertet, the property owner, moved into a new administration/laboratory building in December 1998. The windows began to leak soon thereafter. Robertet continued to contact the window installer Academy Glass, but eventually gave up.

In January 2002 Robertet sued Academy Glass and Tri-Form, its construction manager. In February 2002 Robertet's consultant removed a section of the windows and found moisture and mold. Robertet then decided that it needed to replace not only the windows but also interior walls, insulation, and carpeting.

In March 2002 Tri-Form's attorney sent a notice to Robertet's attorney demanding to be "notified immediately of any intended, planned or ongoing remediation, replacements or other work that relates to the subject property. The property is evidence in this case and must be preserved in an unaltered condition so that this party may properly inspect the premises." Robertet's attorney was ill and apparently never advised Robertet of this letter.

Robertet began repairs in December 2002. When Tri-Form's and Academy's attorneys learned in January 2003 that work

had begun, they asked Robertet to stop in order to allow inspections of the original work. Robertet considered this to be impractical and kept moving forward.

When Academy's attorney visited the property in February 2003 with an expert, they found that the windows had been replaced, the remains of the original windows were stored in a pile, and all of the other conditions had been fixed.

An owner who tears out bad work without allowing the contractor to inspect it first, acts at their own risk.

Even though Robertet and its experts had photographed conditions before the work and as it progressed, Academy's expert testified that the photos were not sufficient for him to determine what caused the leaks and that he would have performed physical tests on the original windows if they had been left in place. He also testified that the removal of the original work prevented him from being able to evaluate the mold claims, determine whether the leaks might have been caused by other building features, or investigate less costly repair alternatives.

The trial judge found that Robertet never gave notice before starting work; that it failed to respond to requests to conduct an inspection; that it first notified Academy and Tri-Form when there was insufficient time to permit them to do their own investigation; and that it completed the repairs in spite of the lack of any real emergency. The judge concluded that Robertet's spoliation

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(destruction) of the evidence represented by the original work prejudiced Academy and Tri-Form's ability to defend themselves and agreed with Academy's expert that the photographs and other records were not an adequate substitute.

In order to try and compensate for the prejudice to Academy and Tri-Form resulting from the destruction of key evidence, the trial judge precluded Robertet from introducing expert testimony and eventually dismissed all of the window- and mold-related claims against Academy and Tri-Form.

The Appellate Division considered the trial court's remedy to be too harsh and reinstated some of the claims. The Supreme Court found that the case could move forward against Academy but only on those claims where Academy would be likely to be able to defend itself by using its own records and personnel, for example by showing that it had purchased adequate numbers of window components. The court allowed the dismissal of all of the mold claims to stand and reinstated the dismissal of all claims against Tri-Form, finding that Robertet's destruction of the physical evidence had deprived Tri-Form

of the evidence it needed in order to present a defense.

The Supreme Court's decision thus leaves Robertet with very little chance of recovering any more than a small fraction of the money it spent on repairs.

The lesson of Robertet is that no matter how long an owner has suffered with the consequences of faulty construction, a contractor and his representatives should receive notice and a reasonable opportunity to inspect defective work before the work is repaired or replaced. Except in the most dire of emergency circumstances, an owner who ignores a contractor's right to inspect bad work before it is torn out does so at their own risk.

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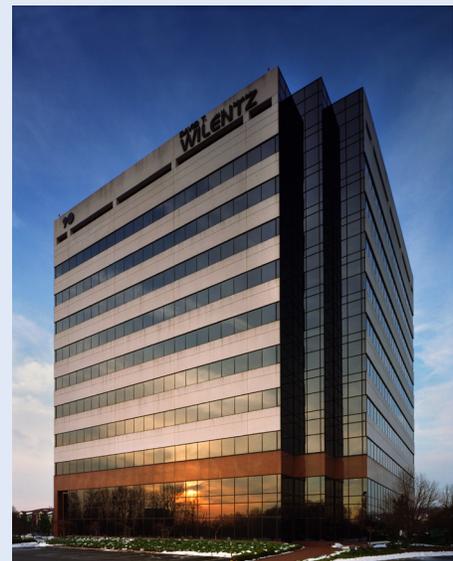
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