

Articles - Sheehan

Contractor's Violation of Zoning By-Law Held to Violate the Home Improvement Contractor Law

In yet another example of the strong protections given to consumers under the Home Improvement Contractor law, M.G.L. c. 142A, in *Reddish v. Bowen*, the Massachusetts appeals court held that the construction of a swimming pool with insufficient setbacks constituted a violation of c. 142A. Apparently, at least under the facts of this case, home improvement contractors must now not only be familiar with the state building code, but also be zoning experts.

In *Reddish*, the owner engaged Andrews Gunite Company, Inc. ("Andrews") to design and build an in-ground pool. Andrews told the owner that the pool would have to comply with local requirements and that it would ensure that everything complied. In an abundance of caution, however, in Andrews' contract, which contained all the standard language required by c. 142A, the owner verified the siting of the pool and expressly relieved Andrews from any liability whatsoever with respect to the pool's location.

There was a fence between the owner's property and an abutter's property. The fence was not on the property line but rather several feet into the abutter's property. The owner knew that the fence did not depict the property line, but failed to disclose that fact to Andrews. When it came time to excavate, the owner requested that the pool move closer to the fence and falsely advised the excavation subcontractor that the fence, in fact, was on the property line. The subcontractor measured the setback from the fence, had the owner approve the new location and sign a document confirming that approval. Due to the false information supplied by the owner, however, the pool encroached into the setback and the pool's concrete apron extended onto the abutter's property.

The abutter sued the pool owner. The pool owner then sued Andrews alleging breach of contract and negligence. It also brought a claim under the Consumer Protection Act, c. 93A, alleging that Andrews violated the State Building Code by locating the pool in an area which did not comply with zoning, and that by violating the Building Code, Andrews had violated c. 142A which, in turn, is a *per se* violation of c. 93A. Under c. 93A, the owner could potentially recover multiple damages and attorneys' fees.

At trial, Andrews relied on the contractual disclaimer of liability relating to the location of the pool. The trial court upheld the disclaimer with respect to the contract and negligence claims, but held that it was ineffective to avoid liability under c. 93A. The trial court reasoned that a party cannot contract away obligations imposed by statute, *i. e.* the statutory obligation to comply with the Building Code. Therefore, the trial court awarded damages against Andrews on the c. 93A claim in the amount of \$31,000 plus attorneys' fees and costs of approximately \$25,000.

Andrews appealed. For reasons that are not apparent, it did not challenge the trial court's ruling that the disclaimer was ineffective against the statutory claim. Instead, Andrews focused on the verbiage of c. 142A which prohibits construction which does not comply with "building laws." See Mass. Gen. Laws c. 142A, §17(10) ("The following acts are prohibited by contractors or subcontractors ... (10) violation of the building laws of the commonwealth or any political subdivision thereof."). Andrews argued that a violation of a zoning by-law is not a violation of a "building law" as that phrase is used in the statute. Therefore, even though the pool did encroach on the abutter's property, there was no "building law" violation and, ergo, no violation of c. 142A. The Court

disagreed, noting that the Building Code, irrefutably a "building law," expressly prohibits construction of a pool that does not comply with local zoning laws. See 780 C.M.R. 625.4 ("private swimming pools shall not encroach on any front or side yard required by this code, or the governing zoning law,"). Therefore, construction in violation of the zoning by-law also violated the Building Code and, as a result, constituted a violation of c. 142A. To make matters worse, because a violation of c. 142A is, by definition, a violation of c. 93A, the Court upheld the decision against Andrews. See Mass. Gen. Laws c. 142A, § 10 ("Violations of any of the provisions of this chapter shall constitute an unfair or deceptive act under the provisions of chapter ninety-three A.")

This is an extremely unsettling decision. The trial court's determination that one cannot disclaim statutory liability under c. 93A was left intact by the appeals court, although it aptly noted that it had not been asked to review that aspect of the decision. Had it reviewed that issue, it might have held that due to the absence of any express statutory prohibition against such disclaimers, the disclaimer should have been upheld as to *all* of the owner's claims. *Compare, e.g.* Mass. Gen. Laws c. 254, §32 (prohibiting lien waivers as a violation of public policy). We will have to await a future appellate decision, however, to know how the outcome of such a review in the context of a c. 142A claim.

More troubling, however, is the Court's determination that where a builder violates a zoning by-law, provided that such violation also constitutes a violation of the Building Code, the contractor will be deemed to violate c.142A and thereby subject itself to c. 93A damages. Does this effectively make the contractor a guarantor of zoning? In this case, Andrews assumed responsibility for drawing plans and ensuring compliance with the local laws. Even if Andrews had not expressly assumed that responsibility, the Building Code section for pools obligated compliance with zoning. The Court focused on the language of the Building Code and did not appear to be swayed by equitable considerations. Therefore, it appears that home improvement contractors will be deemed guarantors of zoning compliance where the Building Code and zoning overlap.

To minimize risk there are certain steps that can be taken: