

MONTANA

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I. MECHANIC'S LIEN BASICS

Montana Code Ann. ("MCA") § 71-3-521, *et. seq.* provides for and governs "construction liens" on real estate. The statutes provide the exclusive means for the attachment and enforceability of a construction lien by persons furnishing labor or materials under a real estate improvement contract to secure payment of the person's contract price.

A. Requirements

Prior to filing a construction lien, the claimant must give to the contracting owner, by certified mail or personal delivery, written notice of the right to claim a lien no later than 20 days after the date on which the services or materials are first furnished to the contracting owner. MCA § 71-3-531. If notice is not given within 20 days, the construction lien is enforceable only for the services or materials within the 20-day period before the date on which notice was given. *Id.* The notice must then be filed in the county clerk and recorder's office within 5 business days after the contracting owner receives notice. *Id.* A notice of right to claim a lien is effective for 1 year, upon which it expires if no notice of continuation is filed. *Id.* A sample form is provided in MCA § 71-3-532.

There are significant exceptions to who has to comply with the notice requirement. The following persons are not required to give notice: (1) an original contractor who furnishes services or materials directly to the owner at the owner's request; (2) a wage earner or laborer who performs personal labor services for a person furnishing any service or material pursuant to a real estate improvement contract; (3) a person who furnishes services or materials pursuant to a real estate improvement contract that relates to a dwelling for five or more families; and (4) a person who furnishes services or materials pursuant to a real estate improvement contract that relates to an improvement that is partly or wholly commercial. MCA § 71-3-531.

In order for a construction lien to attach and be enforced, it must be filed not later than 90 days after the lien claimant's final furnishing of labor or materials, or the owner's filing a notice of completion. MCA § 71-3-535. The lien must be filed in the office of the County Clerk and Recorder of the county in which the improved real estate is located, and must certify that a copy has been served, either by certified mail return receipt requested or personal delivery, upon each owner of record of the subject property. MCA §§ 71-3-534 and 535. A sample form is provided in MCA § 71-3-536.

The Montana Supreme Court has consistently held that the procedural requirements of the construction lien statutes must be strictly construed. *Swain v. Battershell*, 294 Mont. 282, 983 P.2d

873 (Mont. 1999). This includes not only the time and notice requirements, but also the language that must be contained in the lien itself. *Id.* Once that procedure has been fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. *Id.*

B. Enforcement and Foreclosure

A construction lien claimant must file an action to foreclose within 2 years from the date the lien was filed. MCA § 71-3-562. Reasonable attorney fees and costs are allowed to the prevailing party in an action to enforce or foreclose a lien. MCA § 71-3-124. The priority of construction liens relative to other liens and encumbrances is governed by MCA §§ 71-3-541 and 542.

In order for a general contractor to have lien rights on a residential construction project, there must be a written contract with the owner as required by MCA § 28-2-2201. *Mandell v. Ward*, 384 Mont. 377, 377 P.3d 1228 (Mont. 2016). The Court in *Mandell* held that because a contract for the construction of a new residence was not in writing, the contractor had no claim for breach of contract, nor any right to file and foreclose a construction lien since liens may only arise from a “real estate improvement contract.” *Id.* However, the Court did allow the contractor’s unjust enrichment claim to survive, holding that § 28-2-2201 does not bar equitable remedies. *Id.*

An owner cannot avoid foreclosure of an otherwise valid construction lien merely by claiming dissatisfaction with the work performed. *See Vintage Construction, Inc. v. Feighner*, 387 Mont. 354, 394 P.3d 179 (Mont. 2017). The Court emphasized its prior decisions holding that work completed or substantially completed, in addition to lienable materials, establishes the construction lien. *Id.* It noted that the owner had other remedies available to complain about the quality of the work, which it did not adequately pursue at trial. *Id.*

C. Ability to Waive and Limitations on Lien Rights

Contractors routinely execute lien waivers in exchange for payment. However, a construction contract may not contain provisions requiring the contractor, subcontractors or suppliers to waive the right to claim a construction lien (or the right to make a claim against a payment bond) before payment has been made. MCA § 28-2-723.

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Mechanic’s liens are not available against public property in Montana. Rather, Montana law requires performance, labor, and materials bonds on state government projects in an amount equal to the full contract price, and on municipal projects in an amount to be determined by the municipality, provided the amount required is not less than 25% of the contract price. *See* MCA § 18-2-201 through § 18-2-208.

In lieu of a surety bond, a cash bond may be posted. *Id.* Bonds may be waived for state and local government costing less than \$50,000, and on school district projects costing less than \$7,500. *Id.*

i. Notices and Enforcement

To perfect a right of action on the bonds, written notice of a claim must be presented and filed with the public body, as well as the contractor, within the applicable time period and using the statutory prescribed form of notice. MCA § 18-2-204 and § 18-2-206. Attorneys' fees are available to a party prevailing against a surety under MCA § 18-2-207.

B. Claims to Public Funds

The state of Montana is responsible in respect to any contract entered into in the same manner and to the same extent as a private individual under like circumstances, except the state is not liable for punitive damages. MCA § 18-1-404. The state is generally liable for interest from the date on which the payment on the contract became due, and costs including attorney fees to the successful claimant. *Id.* Payment of a construction contractor or subcontractor for services performed on public projects is governed by the Montana Prompt Payment Act, MCA § 28-2-2101, *et seq.* MCA § 18-2-123.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

There is no specific statute of limitations for construction-related claims in Montana. Therefore, the claim is subject to the statute of limitations applicable to the underlying cause of action.

The statute of limitations for actions on written contracts is 8 years. MCA § 27-2-202(a). The statute of limitations for non-written contracts is 5 years. MCA § 27-2-202(b). The statute of limitations for actions based in unjust enrichment/quantum meruit is 3 years. MCA § 27-2-202(c). The statute of limitations for a tort claim is 3 years. MCA § 27-2-204. The statute of limitations for injuries involving real or personal property is 2 years. MCA § 27-2-207. Montana's statutes on residential construction defects allow for limited tolling of applicable statutes of limitations upon certain conditions related to notice and opportunity to repair. MCA § 70-19-427.

B. Statutes of Repose and Limitations on Application of Statutes

MCA § 27-2-208 provides a 10-year statute of repose for actions for damages arising out of work on improvements to real property or land surveying. *See Assoc. of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc.*, 245 Mont, 64, 798 P.2d 1018 (Mont. 1990). This includes actions for damages arising out of design, planning, supervision, inspection, construction, or observation of construction. MCA § 27-2-208.

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

Montana has a series of statutes related to residential construction defect claims which require the claimant, prior to bringing an action against a construction professional, to provide the construction professional with written notice of the defect, describing the claim in reasonable detail sufficient to determine the general nature of the defect, and an opportunity to cure. MCA § 70-19-

426, *et seq.* The construction professional has 21 days to respond to the claimant either proposing inspection of the property, offering to compromise/settle, or denying responsibility. MCA § 70-19-427. The statute outlines the procedures the parties must follow in each circumstance. *Id.* However, for a construction professional to avail himself of these procedures, he or she must have provided the homeowner with notice of the applicable statutes. *Id.*

The statutes also limit the damages in residential construction defect actions to the cost of repairs to cure the defect, the expenses of temporary housing during the repair period, the reduction in market value due to the defect, and costs and attorneys' fees. MCA § 70-19-428.

Aside from residential construction defect claims, and the requirements pertaining to notice of the right to claim a construction lien (discussed above), there are no statutes requiring pre-suit notice of claims and opportunity to cure more generally.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Montana courts have issued a number of decisions in recent years addressing commercial general liability (CGL) coverage and the insurer's duty to defend construction-related claims. Generally speaking, coverage exclusions must be narrowly construed, while ambiguities are interpreted against the insurer and in favor of extending coverage. *Lukes v. Mid-Continent Cas. Co.*, 2013 WL 496203 (D. Mont. Feb. 11, 2013).

B. Trigger of Coverage

The duty to defend is independent from and broader than the duty to indemnify created by the same insurance contract. *United National Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 352 Mont. 105, 214 P.3d 1260 (Mont. 2009). The duty to defend arises when a complaint against the insured alleges facts that, if proven, represent a risk covered by the terms of the policy. *Id.* Unless there is an unequivocal demonstration that the claim against the insured does not fall within the policy coverage, the insurer has a duty to defend. *Farmers Union Mut. Ins. Co. v. Staples*, 321 Mont. 99, 90 P.3d 381 (Mont. 2004).

If there is a duty to defend one claim alleged in a complaint, the insurer must provide a defense for the whole case even if there is no possibility the remaining claims would be covered. *Haskins Const., Inc. v. Mid-Continent Cas. Co.*, 2011 WL 5325734 (D. Mont. Nov. 3, 2011). While the duty to defend thus arises where the alleged facts even potentially fall within the scope of coverage, the duty to indemnify does not arise unless the policy actually covers the alleged harm. *Skinner v. Allstate Ins. Co.*, 329 Mont. 511, 127 P.3d 359 (Mont. 2005).

In determining whether CGL coverage exists for a particular claim, Montana Courts have frequently interpreted the term "occurrence." In policies defining "occurrence" as an "accident," the Montana Supreme Court has held that term 'accident' reasonably refers to any unexpected happening that occurs without intention or design on the part of the insured." *Blair v. Mid-Continent Cas. Co.*, 339 Mont. 8, 167 P.3d 888 (Mont. 2007). Under that rationale "occurrence" has been held to encompass claims of property damage or other injury arising out of faulty

workmanship. *Thomas v. Nautilus Ins. Co.*, 2011 WL 4369519 (D. Mont. Sep. 19, 2011). The Montana Supreme Court clarified its decision in *Blair* by holding that policy language defining “accidents” may include intentional acts if the damages were not objectively intended or expected by the insured. *Employers Mut. Cas. Co. v. Fisher Builders, Inc.*, 383 Mont. 187, 371 P.3d 375 (Mont. 2016).

Montana courts have upheld unambiguous policy provisions (i.e., “your work” exclusions, and products-completed operations hazard provisions) excluding coverage for property damage to the insured’s own work product and materials. *See Lukes v. Mid-Continent Cas. Co.*, 2013 WL 496203 (D. Mont. Feb. 11, 2013); *Taylor-McDonnell Construction Co. v. Commercial Union Ins.* 229 Mont. 34, 744 P.2d 892 (Mont. 1997); and *Generali-U.S. Branch v. Alexander d/b/a Pioneer Plumbing and Heating*, 320 Mont. 450, 87 P.3d 1000 (Mont. 2004).

C. Allocation Among Insurers

There are no Montana cases directly addressing issues of allocation among CGL carriers in construction-related disputes. Generally speaking, when multiple insurance policies apply to the same loss, the “other insurance” policies are examined to determine the proper allocation of the loss. *Mountain W. Farm Bureau Mut. Ins. Co. v. Credit Gen. Ins. Co.*, 247 Mont. 161, 805 P.2d 569 (Mont. 1991). In situations where there is a conflict between two insurance policies covering the same interest (i.e., one specifying excess coverage and one specifying pro-rata coverage), Montana has adopted the majority rule that the terms of the excess clause prevail over the terms of the pro-rata clause. *Id.* Therefore, the policy containing the pro-rata clause is considered the primary insurance for the loss and must be exhausted first. *Id.* Where two or more policies provide only excess coverage for a particular event, it is generally held that the excess clauses are mutually repugnant and must be disregarded, rendering such insurers liable *pro rata*. *Bill Atkin Volkswagen v. McClafferty*, 213 Mont. 99, 108, 689 P.2d 1237, 1241 (Mont. 1984).

VI. CONTRACTUAL INDEMNIFICATION

Construction contract provisions that require one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract (or the other party's officers, employees, or agents) for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party (or the other party's officers, employees, or agents) generally are void as against Montana public policy. MCA § 28-2-2111. However, the statute does expressly allow for contractual provisions requiring a party to indemnify, hold harmless, or insure the other party for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party (or the indemnifying party's officers, employees, or agents). *Id.* Moreover, construction contracts may require a party to the contract to purchase a project-specific insurance policy, such as a builder’s risk policy. *Id.*

VII. CONTINGENT PAYMENT AGREEMENTS

The Montana Code contains no provisions for contingent payment agreements, and Montana courts have not yet addressed the issue. However, other statutory language suggests “pay-if-paid” clauses may be unenforceable as against public policy. For example, under Montana’s

prompt pay statutes, performance by a contractor of a construction contract in accordance with the provisions of the contract entitles a contractor to payment from the owner; and performance by a subcontractor of a subcontract entitles the subcontractor to payment from the contractor. MCA § 28-2-2102.

Construction contract provisions which state that a party to the contract may not suspend performance or terminate the contract if another party to the contract fails to make prompt payments are against public policy and are void and unenforceable. MCA § 28-2-2116(2). The Montana Supreme Court has, however, upheld a construction contract provision that prohibited the contractor from delaying work pending the resolution of a disagreement over the proper amount due on a progress payment. *JEM Contracting, Inc. v. Morrison-Maierle, Inc.*, 373 Mont. 391, 318 P.3d 678 (Mont. 2014). As previously discussed, a construction contract may not require a party to waive the right to file a construction lien or make a claim on a payment bond before the party has been paid. MCA § 28-2-723.

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury v. Construction Defect Damages

In personal injury actions, the statutory measure of damages is the amount which will compensate the injured party for all the detriment proximately caused, whether it could have been anticipated or not. MCA § 27-1-317. Each case must depend upon its own peculiar facts, and the award rests in the discretion of the trier of fact. *Sheehan v. DeWitt*, 150 Mont. 86, 430 P.2d 652 (Mont. 1967). For breach of contract claims, recovery is prohibited for emotional or mental distress, except in those actions involving actual physical injury to the plaintiff. MCA § 27-1-310.

There are statutory limitations on the recovery of damages for residential construction defects. MCA § 70-19-428 limits such damages to the cost of repairs to cure the defect, the expenses of temporary housing during the repair period, the reduction in market value due to the defect, and reasonable costs and attorneys' fees.

B. Attorney's Fees Shifting and Limitations on Recovery

Attorney's fees are generally not awarded in Montana unless allowed by statute or agreement of the parties. However, in construction disputes there are statutes allowing for the recovery of attorney fees by the prevailing party. Montana's prompt pay statutes provide for an award of attorney's fees to the prevailing party in actions brought by contractors or subcontractors to collect payment. MCA § 28-2-2105. Attorney's fees are also allowed in construction lien enforcement and foreclosure actions. MCA § 71-3-124. Another statutory basis for the recovery of attorney's fees is for residential construction disputes. MCA § 70-19-427. If attorneys' fees are provided for in a construction contract, the right to those fees is reciprocal. MCA § 28-3-704.

C. Consequential Damages

Damages for breach of contract are "the amount which will compensate the party aggrieved for all the detriment which was proximately caused [by the breach]..." MCA § 27-1-311. The measure of damages for breach of contract is expectancy; to put the party in the position he or she

would have been had the contract been properly performed. *Bradley v. Crow Tribe of Indians*, 329 Mont. 448, 124 P.3d 1143 (Mont. 2005). Any damages that cannot be clearly ascertained in both nature and origin are not recoverable. *Id.*; MCA § 27-1-311. Plaintiffs in breach of contract cases are entitled to the “benefit of the bargain” that the defendants promised to deliver and are, therefore, entitled to damages in the amount that will put them in that position. *Poulsen v. Treasure State Industries.*, 192 Mont. 69, 626 P.2d 822 (Mont. 1981).

D. Delay and Disruption Damages

Montana law contains no specific limitations on the recovery of delay and disruption damages. Absent a contractual provision that limits or excludes them, actual damages from delay and disruption may be recovered provided that they are foreseeable and otherwise qualify as consequential damages. The Montana Supreme Court has held that a subcontractor cannot recover delay damages from the general contractor when the subcontractor works “as directed” by the general, according to the terms of the construction contract. *Keeney Const. v. James Talcott Const. Co., Inc.*, 309 Mont. 226, 45 P.3d 19 (Mont. 2002).

E. Economic Loss Doctrine

The Montana Supreme Court addressed the economic loss doctrine in a case involving a third-party professional negligence claim against a design professional. Noting that the majority of jurisdictions have rejected the economic loss doctrine, the Court held that a third-party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the plaintiff was at risk in relying on the information supplied. *Jim's Excavating Service, Inc. v. HKM Associates*, 265 Mont. 494, 878 P.2d 248 (Mont. 1994). Generally speaking, in order for a party to recover on a tort claim arising out of the same set of facts underlying a breach of contract claim, there must exist an independent duty, separate and distinct from the contract obligation. *Boise Cascade Corp. v. First Sec. Bank of Anaconda*, 183 Mont. 378, 600 P.2d 173 (Mont. 1979).

F. Interest

Montana law entitles parties to recover interest for damages capable of being made certain by calculation from the day the right to damages is vested in him. MCA § 27-1-211. That right is discretionary in non-breach of contract cases. MCA § 27-1-212. Any legal rate of interest stipulated by a contract remains chargeable after a breach until the contract is superseded by a verdict. MCA § 27-1-213.

G. Punitive Damages

Under Montana law punitive damages may not be recovered in an action arising from contract or breach of contract. MCA § 27-1-220. However, the Montana Supreme Court has held that an underlying contract will not defeat a claim for punitive damages where the defendant's conduct was fraudulent under MCA § 27-1-221. *Lee v. Armstrong*, 244 Mont. 289, 798 P.2d 84 (Mont. 1990). Further, the Court clarified that while MCA § 27-1-220 prohibits punitive damages in claims arising from contract, punitive damages are nevertheless allowed where the plaintiff can

prove by clear and convincing evidence that the defendant is guilty of actual fraud or actual malice (as defined by MCA § 27-1-221) outside the contract context. *Weter v. Archambault*, 313 Mont. 284, 61 P.3d 771 (Mont. 2002).

Residential construction disputes frequently involve claims under the Montana Consumer Protection Act, which allows for treble damages in certain circumstances. *See* MCA § 30-14-133(1).

H. Liquidated Damages

Liquidated damages provisions are generally void under Montana law, except that the parties to a contract may agree upon a liquidated amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. MCA § 28-2-721. In practice, Montana courts typically look beyond the language of the liquidated damages clause, and instead consider how the clause actually operates, in order to analyze reasonableness. *Arrowhead Sch. Dist. No. 75 v. Klyap*, 318 Mont. 103, 79 P.3d 250 (Mont. 2003); *see also Morgen & Oswood Constr. Co. v. Big Sky of Montana, Inc.*, 171 Mont. 268, 277, 557 P.2d 1017, 1022 (Mont. 1976) (contract provision allowing for delay damages of \$500 per day was enforceable given that it was a reasonable estimate of damages which were impractical or extremely difficult to fix).

I. Other Damage Limitations

MCA § 28-2-702 prohibits on public policy grounds contracts that exempt persons from responsibility for that person's own fraud, willful injury, or violation of the law. However, Montana courts have upheld contractual limitations on damages against challenges based on that statute. The Montana Supreme Court has held that, particularly in cases where the contracting parties are business entities of equal bargaining power, contract terms that bar certain types of damages, or cap the amount of damages that can be recovered, are not against public policy. *Zirkelbach Construction, Inc. v. DOWL, LLC*, 389 Mont. 8, 402 P.3d 1244 (Mont. 2017); and *Keeney Const. v. James Talcott Const. Co., Inc.*, 309 Mont. 226, 45 P.3d 19 (Mont. 2002).

IX. CASE LAW AND LEGISLATION UPDATE

Legislation proposed in the most recent sessions of the Montana Legislature has not resulted in any significant changes to Montana construction law.