

AGCC Member Creates New Law in Colorado

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AGCC member, Swinerton Builders, recently prevailed in a case that established new law in Colorado regarding the recovery of attorney's fees and costs by a prevailing party in an action to pierce the corporate veil. *Swinerton Builders v. Nassi*, 272 P.3d 1174 (Colo. App. 2012).

The case involved a construction contract between Swinerton and Beauvallon. The contract incorporated by reference the dispute resolution provisions of AIA Document A201, which provided for arbitration of claims arising out of or related to the contract. The contract also contained a fee shifting provision which provided, "in the event of any litigation between the parties, the prevailing party shall be entitled to reimbursement for all reasonable attorney's fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party."

After the project was complete a dispute arose and Swinerton filed a demand for arbitration asserting breach of contract claims against Beauvallon and Craig Nassi (Beauvallon's president) and an unjust enrichment claim against Beauvallon. Ultimately, the arbitrators ordered Beauvallon to pay Swinerton more than \$1 million in damages, interest, attorney fees and costs, which was confirmed by the district court.

When Beauvallon failed to pay the judgment, Swinerton separately brought a district court action against Nassi seeking a declaratory judgment finding that Beauvallon is Nassi's alter ego and, therefore, Nassi is bound by the terms of the agreement between Beauvallon and Swinerton. Swinerton also sought to pierce Beauvallon's corporate veil to obtain a personal judgment against Nassi.

The district court ruled in favor of Swinerton, concluding that Swinerton could pierce Beauvallon's corporate veil and hold Nassi personally liable for the arbitration award against Beauvallon. Afterwards, Swinerton sought to recover the attorney's fees and costs that it incurred in the veilpiercing litigation, pursuant to the contract's fee-shifting provision. The district court denied Swinerton's request and Swinerton appealed the denial of its attorney's fees and costs for the veil-piercing action.

As a matter of first impression in Colorado, the court of appeals held that a party who prevails in an action to pierce the corporate veil may recover the attorney's fees and costs incurred in that action if 1) the action was brought to enforce a breach of contract judgment against the corporation; and 2) the contract underlying the judgment authorized an award of fees and costs for the enforcement of the judgment against the corporation.

In doing so, the appellate court explained that an action to pierce the corporate veil is not a separate and independent cause of action, but rather a procedure to enforce an underlying judgment. When the corporate veil is pierced, a shareholder who did not sign the corporation's contract may be held personally liable for the contractual obligations of the corporation. Thus, the court held that Beauvallon's veil was pierced and Nassi was responsible for Beauvallon's contractual obligations, including its obligations under the Swinerton contract's fee-shifting clause.

For additional information, please feel free to contact Gene Commander or Rebecca Ross at 303.572.9300.