

In Colorado, you may now be able to recover attorneys' fees and costs expended in piercing a corporate veil.

In 2001, Swinerton Builders contracted with Beauvallon Corporation to construct The Beauvallon, a condominium building in downtown Denver. The contract, though amended, was an AIA Document A201, which included mandatory arbitration and 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 attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party.

After construction, Swinerton instituted an arbitration proceeding against Beauvallon Corporation and Craig Nassi, individually. The claims included against Beauvallon Corp. included breach of contract and unjust enrichment. The sole claim against Mr. Nassi was for breach of contract, arising out of an alleged personal guarantee. Swinerton later voluntarily dismissed its claims against Mr. Nassi, without prejudice, but expressly noted its contention that Beauvallon Corp. might be the alter ego of Mr. Nassi.

Ultimately, the arbiters awarded Swinerton more than \$1,000,000 in damages, interest, attorneys' fees, and costs against Beauvallon Corp. The district court confirmed the arbitration award. In a separate action, Swinerton brought two claims against Mr. Nassi, the first seeking a declaratory judgment that Beauvallon Corp. was Mr. Nassi's alter ego and that he was bound by the terms of the contract between Swinerton and Beauvallon Corp. and by the arbitration award. The second claim sought to pierce Beauvallon Corp.'s corporate veil. The district court found in favor of Swinerton and found that Swinerton could pierce Beauvallon Corp.'s corporate veil and hold Mr. Nassi personally liable for the arbitration award. The district court did not, however, award Swinerton its attorneys' fees and costs in the action, finding that: "The attorney fees necessary for this [veil-piercing] action are separate and distinct [from the arbitration award fees], therefore, now awardable under the contract retroactively." It is from this ruling that Swinerton appealed.

In Swinerton Builders v. Nassi, 2012 WL 310781 (Colo. App. February 2, 2012), the Colorado Court of Appeals reversed the trial court's denial of award of attorneys' fees and costs. In so ruling, the Court of Appeals noted: "Numerous courts have held that an action to pierce the corporate veil is not a separate and independent cause of action, but rather is merely a procedure to enforce an underlying judgment." Id., at ¶ 13. The holding of the Court of Appeals was that:

[A] party who prevails in an action to pierce the corporate veil of a corporation may recover the attorney 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 enforcing the judgment against the corporation.

Id. at ¶ 1.

The Court of Appeals remanded the case to the district court for a determination and award of the appropriate amount of attorneys' fees and costs to Swinerton.

If you have questions about the Swinerton Builders v. Nassi case, or generally about construction litigation in Colorado, you can reach David M. McLain by telephone at (303) 987-9813 or by e-mail at mclain@hhmrlaw.com.