

## WHAT HAPPENS IN MEDIATION STAYS IN MEDIATION

by Andrew G. Wailgum and Sara P. Bryant

The Massachusetts Appeals Court recently held that statements made by a party during mediation cannot be used later in a lawsuit to support a claim of fraud or similar claims. *ZVI Construction Co. v. Levy, et al.*, 90 Mass. App. Ct. 412 (2016). In *ZVI*, a general contractor brought a suit for payment against the project owner and the parties settled in mediation. The parties' settlement agreement provided that the owner would make the \$250,000 settlement payment once it received an anticipated payment in the same amount from a third party. The owner represented to the contractor that the third party would send the money to the owner's lawyer, who would then distribute the payment to the contractor. Although the third party did send the payment to the owner's lawyer, the owner then directed its lawyer to pay other creditors with that money, including the owner's lawyer. The contractor received nothing. Shortly thereafter the owner filed for bankruptcy. The contractor then brought this action against the owner's lawyer and his law firm claiming, among other things, fraud, conversion, breach of fiduciary duty and unfair trade practices in violation of M.G.L. c. 93A.<sup>1</sup>

The contractor's claims were based primarily on statements purportedly made by the owner's lawyer during mediation. The owner's lawyer filed a motion in the Superior Court to strike the allegations in the contractor's Complaint that contained the alleged mediation communications. The motion relied on the confidentiality provision in the parties' mediation agreement, which provided:

The parties further agree that the mediation, including all communications, documents and other materials, used during said mediation, including all communications between and among the parties and their counsel, shall be confidential and shall not be used for any purpose other than for said mediation.

The Superior Court granted the motion to strike the mediation communications and also granted the owner's lawyer's motion to dismiss the claims that relied on those statements. The contractor's remaining claims were subsequently dismissed on summary judgment.

On appeal, the contractor urged the Appeals Court to adopt a fraud exception to the confidentiality provision in the mediation agreement. In declining to recognize such an exception, the Appeals Court first examined the Massachusetts mediation statute, which provides in pertinent part:

<sup>1</sup> The plaintiff also sued two members of the owner LLC, but those claims were not at issue in this decision.

If you have any questions about the issues addressed here, or any other matters involving Construction Law issues, please feel free to contact:

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Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding. . . .

M.G.L. c. 233, § 23C.<sup>2</sup> The Appeals Court noted that the legislature intended to keep mediation communications confidential and that there was no fraud exception in the statute. The Court also examined the Uniform Mediation Act<sup>3</sup> and observed that it too did not have an exception for fraudulent communications. In addition, the Court's review of the relevant case law did not reveal a single case adopting such an exception.

The Appeals Court examined another court's decision refusing to recognize such a fraud exception and found instructive the following factors considered by that court: the sophistication of the parties; whether the parties were represented by counsel; and, the amount of information the parties possessed regarding the issue at hand. In applying those factors to this case, the Appeals Court found that both parties were sophisticated business people and represented by counsel, and that the contractor had sufficient information regarding the owner's ability to pay such that it could evaluate the viability of any assurances of payment. Therefore, the Appeals Court held that the contractor failed to establish a basis for adopting an exception to the confidentiality provision in the mediation agreement and the agreement was therefore enforceable.

## Takeaways

The ZVI case reminds us and reinforces that mediation truly is meant to be a confidential process that encourages an open exchange of communications in an effort to resolve a dispute. It also underscores that parties should not rely solely on statements made during mediation and that they should verify information pertinent to the settlement before reaching an agreement. Last, this case also teaches us that when settling for a future payment from a party in a financially precarious position, the party to receive the payment should insist on terms in the agreement that in some way secure the payment.

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<sup>2</sup> Note, the Court concluded that M.G.L. c. 233, § 23C did not apply here because the alleged communications were not made in the presence of the mediator.

<sup>3</sup> The Uniform Mediation Act has been adopted by 11 states and the District of Columbia.