

**FAILURE TO PLEAD NON-PAYMENT BY OWNER  
WAIVED AFFIRMATIVE DEFENSE**

In *Hassell Construction Co., Inc. v. Stature Commercial Co., Inc.*, a subcontractor, Hassell Construction Company (“Hassell”), sued its general contractor, Stature Commercial Company, Inc. (“SCCI”), claiming SSCI owed it over \$60,000.00 for work performed and withheld retainage. According to SSCI, the contract provided that payment would not be due to Hassell until SSCI had been paid by the owner of the project. However, SSCI filed only a general denial to Hassell’s claims. At trial, counsel for SSCI’s introduced evidence of: 1) the contract language delaying payment of the subcontractor until the contractor had been paid; and 2) the fact that the contractor had not been paid by the owner. Counsel for Hassell objected to the admission of this evidence, but the trial court overruled both of these objections. On appeal, the Houston [Fourteenth] Court of Appeals found that SSCI’s reliance on nonpayment from the owner as a basis for non-liability under the contract was an affirmative defense under Texas Rule of Civil Procedure 94, and SSCI’s failure to affirmatively plead this defense or request a trial amendment of its original answer waived this defense. Accordingly, the trial court’s judgment for SSCI was reversed and rendered in favor of Hassell.

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