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Construction & Surety Law Newsletter

A publication of the Torts, Insurance and Compensation Law Section
of the New York State Bar Association

Summary of Decisions and Statutes

ADMINISTRATIVE LAW AND PROCEDURE

34-19. A building permit cannot be withheld because of concern that a proposed building might, in the future, be used illegally. Where, however, there is reason to doubt that a proposed structure can ever be used for a lawful purpose, municipal authorities are not required to allow it to be built and then see what happens. *In re 9th and 10th Street L.L.C. v. Board of Stds. & Appeals of the City of New York,* 10 N.Y.3d 264, 856 N.Y.S.2d 28 (2008).

INSURANCE

34-20. The New Jersey workers' compensation and employer liability insurer of a New Jersey subcontractor, whose employee was injured on a New York construction site, was not time-barred by Section 3420(d) of the New York Insurance Law from disclaiming any obligation to defend and indemnify its insured. The policy was not "delivered or issued for delivery" in New York. *Preserver Insurance Company v. Ryba*, 10 N.Y.3d 635, 862 N.Y.S.2d 820 (2008).

34-21. Where the liability insurance policy requires notice "as soon as practicable" of an occurrence which might result in a claim, as well as notice of any claim or suit brought against any insured, an additional insured has an implied duty, independent of the primary insured, to provide timely notice to the insurer before the insurer is obligated to defend and indemnify the additional insured against the claim. *23-08-18 Jackson Realty Associates v. Nationwide Mutual Insurance Company*, 53 A.D.3d 541, 863 N.Y.S.2d 35 (2d Dep't 2008).

34-22. In a declaratory judgment action to determine the priority of insurance coverage for the construction manager and project owner, as additional insureds on the respective primary and umbrella liability insurance policies of the subcontractor and general contractor, the First Department acknowledged existing precedent and held that the umbrella policies should be treated as true excess coverage and not as a second layer of primary coverage. The extent of insurance coverage, including a given policy's priority in relationship to other policies, is controlled by the relevant policy terms, and not by the terms of the underlying trade contracts among the insureds. *Bovis Lend Lease LMB, Inc. v. Great American Insurance Company*, 53 A.D.3d 140, 855 N.Y.S.2d 459 (1st Dep't 2008).

LABOR LAW §§ 200, 240, 241

34-23. Reversing the First Department, the Court of Appeals held that a landlord of commercial property is strictly liable under Labor Law § 240(1) for injuries suffered by an air conditioning installer, even though the landlord had no notice that the work was being performed by its tenant, and the lease expressly prohibited changes of any nature in the premises without the landlord's prior written consent. The Court declined to introduce a notice requirement into the statute, or to create a lack-of-notice exception to owner liability. *Sanatass v. Consolidated Investing Company, Inc.*, 10 N.Y.3d 333, 858 N.Y.S. 67 (2008).

PREVAILING WAGES

34-24. Construction, renovation, repair, and maintenance of charter school facilities are "public work," subject to the prevailing wage provisions of Article 8 of the Labor Law. A charter agreement is a contract between a public entity and a third party that may involve the employment of laborers, workers, or mechan-

ics. Construction, renovation, repair and maintenance of charter school facilities constitute projects for public works. *In re Foundation for a Greater Opportunity v. Smith*, 20 Misc. 3d 453, 860 N.Y.S.2d 734 (Sup. Ct., Albany Co. 2008).

WORKERS' COMPENSATION

34-25. The New York State Workers' Compensation Board had jurisdiction over the claim of a New York resident employed as a carpenter by an Illinois corporation, who was injured on a Pennsylvania construction site. There was sufficient evidence to sustain a finding of jurisdiction because the claimant was hired in New York, he worked on projects for the employer in New York, he returned to his New York residence when he completed out-of-state assignments for the employer, and the employer communicated with him at his New York residence. There were sufficient and significant contacts between New York and the employer to support a reasonable conclusion that the employment was to some extent sited in New York. *Deraway v. Bulk Storage, Inc.*, 51 A.D.3d 1313, 858 N.Y.S.2d 459 (3d Dep't 2008).

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