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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

INSURANCE

35-14. Neither the "earth movement" nor the "settling or cracking" exclusions of a property insurance policy unambiguously excepted coverage for damage to the building caused by an excavation occurring on an adjacent lot, i.e., an intentional removal of earth. *Pioneer Tower Owners Association v. State Farm Fire & Casualty Company*, 12 N.Y.3d 302, 880 N.Y.S.2d 885 (2009).

35-15. It was a material misrepresentation for a general contractor to declare in its application for commercial general liability insurance that its business was solely that of a painting contractor. The insurer was therefore entitled to rescind the policy *ab initio*, but obligated to refund the premiums paid. *Kiss Construction NY, Inc. v. Rutgers Casualty Insurance Company*, 61 A.D.3d 412, 877 N.Y.S.2d 253 (1st Dep't 2009).

LABOR LAW §§ 200, 240, 241

35-16. One portion of 12 NYCRR § 23-9.2(a), which required any structural defect or unsafe condition in power-operated equipment to be corrected by necessary repairs or replacement upon discovery, imposed a specific, affirmative, non-delegable duty on the non-supervising owner of the construction project, sufficient to sustain an injured worker's claim under Labor Law § 241(6). The worker was injured by a handheld 9-inch electrically driven angle grinder which was missing a side handle. Whether the portable grinder qualified as power-operated *heavy equipment or machinery* intended to be covered by the regulation was a threshold question not presented or preserved on appeal and therefore not considered by the majority of the divided Court of Appeals. *Misicki v. Caradonna*, 12 N.Y.3d 511, 882 N.Y.S.2d 375 (2009).

35-17. The injured party's work, consisting of the periodic unclogging of paper dust particles intended to be burned in a power generating facility, did not entail the removal of any dirt or extraneous material, and therefore did not constitute "cleaning" within the meaning of Labor Law § 240(1). *Wicks v. Trigen-Syracuse Energy Corporation*, 64 A.D.3d 75, 877 N.Y.S.2d 791 (4th Dep't 2009).

MECHANICS' LIENS AND TRUST CLAIMS

35-18. As required by section 9(4) of the Lien Law, a notice of lien must set forth the labor performed or materials furnished, and the agreed price or value thereof. Failure to include either element renders the notice of lien fatally defective. If compensation under the contract or subcontract is based on the cost plus an agreed-upon percentage and not a specific dollar amount, the "agreed price or value" requirement may be satisfied by stating those cost plus percentage terms. *Sullivan Contracting, Inc. v. Turner Construction Company*, 60 A.D.3d 1315, 875 N.Y.S.2d 695 (4th Dep't 2009).

PREVAILING WAGES

35-19. A hospital financed part of its construction project through the issuance of tax-exempt bonds and part through other sources, including a HEAL NY capital grant under Public Health Law § 2818, administered by the Department of Health. The grant statute required that "work performed thereunder" be deemed public work and be subject to the prevailing wage law. As interpreted by the Second Department, the grant statute did not subject the entire project to prevailing wages, only that portion financed by the grant funds. *Maraia*

v. Orange Regional Medical Center, 63 A.D.3d 1113, 882 N.Y.S.2d 287 (2d Dep't 2009).

35-20. Charter schools organized under the Charter Schools Act (Education Law, article 56) have unique characteristics which distinguish them from the public entities subject to the prevailing wage law (Labor Law, article 8). Furthermore, the charter agreements under which charter schools operate do not constitute contracts between a public entity and another party, or by a third party for the benefit of a public entity, involving the employment of laborers, workers or mechanics on public works projects. Accordingly, construction projects undertaken by charter schools are not subject to the prevailing wage law. *New York Charter School Association v. M. Patricia Smith*, 61 A.D.3d 1091, 875 N.Y.S.2d 643 (3d Dep't 2009). *See*, Prevailing Wages 34-24, *Construction & Surety Law Newsletter* (Fall 2008).

35-21. The fact that he had produced false documentation of his eligibility to work in the United States of America did not preclude an employee from seeking prevailing wage payments for work he performed on municipal projects. Neither his employment contract nor the work he performed was illegal, and therefore the contract was enforceable. The employer could not defeat the employee's equitable claims by asserting the doctrine of unclean hands because the employer received the labor it bargained for and was not injured by the false documentation. *Jara v. Strong Steel Door, Inc.*, 58 A.D.3d 600, 871 N.Y.S.2d 363 (2d Dep't 2009).

PUBLIC CONTRACTS

35-22. Bid specifications composed by a public agency may include criteria for experience and qualifications to establish bidder eligibility, if such requirements are rationally based. A bidder may be disqualified for failing to comply with eligibility requirements. On public projects assisted by the state university construction fund, section 376 of the Education Law grants discretion for awarding a single contract without separate or independent bidding and without subdivision of the work to be performed, which would otherwise be required under section 103 of the General Municipal Law or section 135 of the State Finance Law. *E.W. Tompkins Company, Inc. v. State University of New York*, 61 A.D.3d 1248, 877 N.Y.S.2d 743 (3d Dep't 2009).

STATUTES

35-23. Chapter 224 of the Laws of 2009—amends General Obligations Law § 5-322.1 to prohibit enforcement of any term or condition relating to a construction contract, which would require a subcontractor or materialman to exhaust other legal remedies before filing a claim or commencing an action on a payment bond. Effective August 15, 2009.

WORKERS' COMPENSATION

35-24. A seriously injured employee recovered a judgment for damages directly against his employer. Upon the second appeal, the employer asserted for the first time the workers' compensation exclusivity defense. The First Department held that the defense was waived because of the employer's purposeful delay which prejudiced the employee's claims against other parties. *Miraglia v. H&L Holding Corp.*, 60 A.D.3d 407, 873 N.Y.S.2d 633 (1st Dep't 2009).

35-25. A workers' compensation carrier paid benefits to the injured employee. The same carrier contributed the policy limits under a general liability policy to settle the claims against the owner and general contractor, then asserted a workers' compensation lien against the settlement. This course of action did not violate the anti-subrogation rule because the two insurance policies covered different parties and not the same insured. *Romano v. Whitehall Properties, LLC*, 59 A.D.3d 697, 873 N.Y.S.2d 745 (2d Dep't 2009).

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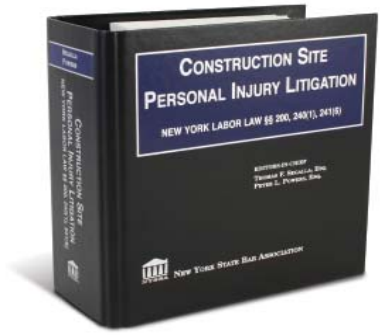

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Key Benefits

- Understand the statutory causes of action under N.Y. Labor Law §§ 200, 240(1) and 241(6)
- Be able to handle a construction site litigation case with confidence
- Understand the insurance implications between the parties involved

Perhaps no single scheme of statutory causes of action has initiated more debate between plaintiff's bar and its supporters and the defense bar than that promulgated under New York Labor Law §§ 200, 240(1) and 241(6).

The liability of various parties involved in a construction project—including owners, architects, engineers, other design professionals, general or prime contractors and employees—generate frequent disputes concerning the responsibilities of these parties. The authors discuss ways to minimize exposure to liability through careful attention to contract and insurance provisions.

The 2008 revision updates case and statutory law, with emphasis on recent developments in this area of practice.

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