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Construction & Surety Law Newsletter

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Bulletin

The *Summit* Decision: Is It Downhill for General Contractor Liability Under OSHA's Multi-Employer Worksite Doctrine?

Background

General contractors on construction projects should not be held accountable for safety violations that were created by a subcontractor on the project, provided no employee of the general contractor was exposed to the hazardous condition. On April 27, 2007, the Occupational Safety and Health Review Commission, the three-member body responsible for deciding contested violations, issued its decision in *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC No. 03-1622, and in so doing reversed precedent set more than thirty years ago, in what are commonly referred to as "multi-employer worksite" cases.

Construction sites are beehives of activity, with employees of multiple employers working on their particular part of the project. By the very nature of construction, the worksite is in constant change, a condition which makes safety violations almost inevitable. OSHA, in recognition of this reality, has applied a "multi-employer worksite" policy that permits more than one employer to be cited for a single safety violation. Obviously, this policy eliminates the opportunity for employers to argue that some other employer is responsible, and it also motivates each employer to seek corrective action for safety violations rather than ignoring ones that don't affect their own employees. The employer who "creates" the violation, one who "exposes" employees to the violation, as well as an employer who "controls" the site are all subject to a citation for a violation under the multi-employer citation policy. The controlling employer is typically the general contractor of the project in OSHA's view, as the general contractor has the power to direct the subcontracting employers.

Summit Facts and Decision

In *Summit*, OSHA issued a citation to Summit Contractors, Inc. ("Summit"), the general contractor on a dormitory construction project, for the scaffolding violations committed by one of its subcontractors. Although Summit did not create the hazard and none of its employees were exposed to it, Summit was cited as the "controlling" employer in accordance with OSHA's multi-employer worksite doctrine. The subcontractor was also cited as the employer who created the hazard and as the employer having employees exposed to the hazard.

Summit did not contest the existence of the hazard or deny that it lacked knowledge of the hazard. Rather, Summit argued that citations against "controlling" contractors, i.e., general contractors who only have contractual authority over subcontractors at a multi-employer worksite, are unenforceable. Summit's argument was based on the plain language of 29 C.F.R. § 1910.12(a), which states, in relevant part: "Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by com-

plying with the appropriate standards prescribed in this paragraph." Because Summit had no employees exposed to the hazard and did not create the hazard, it argued that the regulation prohibits the issuance of a citation against it for a hazard created by a subcontractor.

In a 2-to-1 decision, the majority of the Commission agreed with Summit's position and vacated the citation. Noting OSHA's "checkered history" with regard to its citation policy on multi-employer construction worksites, the Commission concluded that the phrase "his employees" in the applicable regulation precludes the issuance of a citation to a general contractor when none of its employees were exposed to the hazard.

Practical Implications

Although the *Summit* ruling will be greeted by general contractors as a long overdue change in policy, its practical effects may be limited. For example, the citation in *Summit* was issued under OSHA's construction standards, and multi-employer worksites are not the usual case in general industry; thus, its application to other industries is not certain. In construction inspections, the OSHA compliance officer will now seek evidence that one or more of the general contractor's employees has been exposed to the safety violation, thereby, permitting citation of the general contractor under traditional theories. Finally, OSHA has already started the appeals process which means the Secretary of Labor can seek to persuade the United States Court of Appeals for the Eighth Circuit that the *Summit* decision should be overruled. All general contractors should "stay tuned" for new developments, and, in the meantime, do the best job possible in preventing, and correcting, safety violations on their projects.

[The Editor thanks Paul M. Sansoucy and John S. Ho, of the Syracuse and New York City offices of Bond, Schoeneck & King, PLLC, for this Bulletin.]

Summary of Decisions and Statutes

ARBITRATION

34-1. Owners could not defeat contractor's contractual right to compel arbitration by consolidating their claims against the contractor with their claims against the architect in litigation. The Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) applied to the enforcement of the arbitration clause in the contract because it "evidences a transaction involving commerce." *Carlton Hobbs Real Estate, LLC v. Sweeney & Conroy, Inc.*, 41 A.D.3d 214, 838 N.Y.S.2d 516 (1st Dep't 2007).

34-2. Owner and architect executed a tolling agreement which extended the statute of limitations period for demanding arbitration under their contract. Although the tolling agreement extended the limitations period to an indefinite date in the future, it was not rendered void by General Obligations Law § 17-103(1). The owner's claims against the architect were based on professional malpractice, not contract. The statute therefore did not apply to this tolling agreement. *In re Stantec Consulting Group*, 36 A.D.3d 1051, 827 N.Y.S.2d 762 (3d Dep't 2007).

34-3. An unlicensed home improvement contractor may neither sue to recover damages for breach of a construction contract by a consumer, nor recover in *quantum meruit*. Therefore, such unlicensed contractor cannot enforce a construction contract in arbitration. *Al-Sullami v. Broskie*, 40 A.D.3d 1021, 834 N.Y.S.2d 873 (2d Dep't 2007).

INSURANCE

34-4. Pursuant to the indemnification provision of the subcontract, the general contractor was named as an additional insured on the subcontractor's general liability insurance policy. Accordingly, the general liability insurer was obligated to defend the general contractor as an additional insured against claims by an injured person in the same manner that it was obligated to defend the subcontractor as a named insured on the policy. The insurer's obligation to defend the additional insured was not dependent on any advance determination that the named insured is liable for the claims. The obligation to defend was triggered by the possibility that the named insured is liable. *BP Air Conditioning Corp. v. One Beacon Insurance Group*, 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007).

34-5. A general contractor sought judgment pursuant to Insurance Law § 3420 against a subcontractor's insurer for indemnity from liability for injuries sustained by the subcontractor's employee. The subcontractor had agreed to waive its Workers' Compensation Law § 11 defense against third-party claims by the general contractor for indemnity against liability for injuries suffered by the subcontractor's employees. Although the insurance policy excluded coverage for liability assumed under a contract, the court concluded that the waiver of a defense was not excluded from coverage by the policy. *Bowker v. NVR, Inc.*, 39 A.D.3d 1162, 834 N.Y.S.2d 798 (4th Dep't 2007).

LABOR LAW §§ 200, 240, 241

34-6. Interior window washing may fall within the protections of Labor Law § 240(1). The question is not whether such cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under 240(1). Nor is the question whether it is the interior or exterior of the window that is being cleaned. The critical inquiry for 240(1) liability is whether the window washing activity "creates an elevation-related risk" which requires safety devices to be provided to the window washer. *Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 839 N.Y.S.2d 714 (2007).

34-7. A construction manager was hired by the school district owner to provide general oversight of the project. Although the construction manager routinely brought safety concerns to the attention of various contractors, it had no control over or responsibility for the safety of workers at the construction site. It did not assume the role of general contractor or agent of the owner. The construction manager therefore could not be liable under Labor Law § 240(1). *Titus v. Kirst Construction, Inc.*, 43 A.D.3d 1324, 843 N.Y.S.2d 878 (4th Dep't 2007).

PRINCIPAL AND SURETY

34-8. The time within which a supplier of materials must give notice for payment under a private payment bond is measured from the final delivery of materials for which the claim is made, rather than from the date of each separate delivery of materials. This result is consistent with the period within which claims for delivery of materials must be made on a public payment bond subject to State Finance Law § 137. *Triboro Hardware & Supply Corp. v. Federal Insurance Co.*, 45 A.D.3d 134, 841 N.Y.S.2d 600 (2d Dep't 2007). *See* Principal and Surety 29-28, *Construction & Surety Law Newsletter* (Fall 2003).

PREVAILING WAGES

34-9. Breach of contract claims alleging non-payment of prevailing wages under a public works contract which incorporated the prevailing wage schedule of a collective bargaining agreement are not preempted by Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). The right to the prevailing wage under Labor Law § 220 exists separate and apart from the collective bargaining agreement. *Wysocki v. Kel-Tech Construction, Inc.*, 46 A.D.3d 251, 847 N.Y.S.2d 166 (1st Dep't 2007).

34-10. The First Department confirms a finding by the New York City Comptroller that Supervisor Highway Repairers (SHRs) are entitled to the same prevailing wage rates as foremen performing comparable duties in the private sector. Part of their supervisory duties include performing "related" manual labor while instructing new employees and providing assistance where necessary to insure that the work is completed properly and on time. The court accepted the Comptroller's conclusion that SHRs face the same risks as their crew members. *Hanley v. Thompson*, 41 A.D.3d 207, 838 N.Y.S.2d 59 (1st Dep't 2007).

PUBLIC CONTRACTS

34-11. The six-year catchall period of limitations under CPLR 213 governs a cause of action based on failure to comply with the competitive bidding requirements of General Municipal Law § 103. *Town of Poughkeepsie v. Espie*, 41 A.D.3d 701, 840 N.Y.S.2d 600 (2d Dep't 2007).

STATUTES

34-12. Chapter 84 of the Laws of 2007—amends section 9 of the Public Buildings Law to authorize the Commissioner of General Services to award emergency contracts not exceeding $300,000 for public work or purchase of supplies, materials or equipment relating to a construction emergency affecting State buildings or property, after soliciting three oral bids but otherwise without formal competitive bidding. This authority is extended until June 30, 2009. Effective June 29, 2007.

34-13. Chapter 159 of the Laws of 2007—amends section 381(1) of the Executive Law to exclude agricultural buildings used directly and solely for agricultural purposes from rules promulgated by the Secretary of State in administering the New York State Uniform Fire Prevention and Building Code, which otherwise would require regular, periodic inspections of such buildings. Effective July 3, 2007.

34-14. Chapter 343 of the Laws of 2007—amends section 103(3) of the General Municipal Law to permit one county to make purchases of materials, equipment or supplies, or to contract for services, through other counties within the State. Prior to amendment, this authority was construed to be limited to political subdivisions other than counties. Effective July 18, 2007.

34-15. Chapter 542 of the Laws of 2007—amends the Administrative Code of the City of New York and the Education Law to prohibit the City's Department of Buildings from accepting plans or other documents relating to work permit applications from architects or professional engineers unless lists provided by the State Education Department verify that such professionals are qualified to practice in the State. Effective August 15, 2007.

34-16. Chapter 629 of the Laws of 2007—amends section 220(3-a)(a) of the Labor Law and requires contractors and subcontractors to notify all laborers, workers or mechanics employed by them of the prevailing wage rate for their particular job classification in writing on each pay stub. Following the commencement of every public works contract and with the first paycheck issued after July 1 of each year, written notice of contact information for the Department of Labor regarding prevailing wage issues must be provided. Civil penalties for notice violations to be assessed by the Commissioner of Labor are established. Effective February 24, 2008.

34-17. Chapter 678 of the Laws of 2007—extends application of prevailing wage requirements under sections 220(2) and (3) of the Labor Law to any contract for public work performed under a lease, permit or other agreement between a public entity and a third party, which grants the responsibility for contracting for such public work to the third party, or if ownership of the public work is intended to be assumed by the pubic entity subsequent to completion. Effective October 27, 2007; expiring and repealed October 27, 2012.

SUBCONTRACTORS

34-18. A general contractor issued a written term sheet to a prospective subcontractor, which expressly stated that the general contractor would not be bound until it executed a formal subcontract and would not be obligated to pay the prospective subcontractor for work it might perform prior to such execution. Upon reaching agreement on compensation, the general contractor allegedly told the prospective subcontractor that it had been awarded the subcontract and allegedly directed the prospective subcontractor to commence work while the general contractor drafted the subcontract agreement. Within weeks, the general contractor notified the prospective subcontractor that the subcontract had in fact been awarded to another. Over a passionate dissent, the First Department panel majority concluded that the general contractor's alleged conduct did not constitute an implied waiver of the subcontract execution precondition established by the term sheet. The prospective subcontractor's claims for breach of contract, promissory estoppel, and *quantum meruit* were dismissed. *Jordan Panel Systems, Corp. v. Turner Construction Company*, 45 A.D.3d 165, 841 N.Y.S.2d 561 (1st Dep't 2007).

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This newsletter is published for members of the New York State Bar Association's Torts, Insurance and Compensation Law Section by the Construction and Surety Law Division. Attorneys should report decisions of interest to the Editor. Since many of the decisions are not in the law reports, lawyers reporting will be credited on their contribution.

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