NYSBA SPRING 2012 | VOL. 38 | NO. 1

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

LABOR LAW §§ 200, 240, 241

38-1. While laying a concrete floor in the basement of a building undergoing renovations, a worker stepped back into a trench for piping, among several that were being filled with concrete as the work progressed. A split Court of Appeals holds that it would be illogical to require the owner or general contractor to cover the trench when the objective of the work was to fill it. In the view of the majority, there was no claim under Labor Law § 240(1). *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134, 936 N.Y.S.2d 624 (2011).

38-2. A demolition worker was injured by two four-inch pipes rising vertically about ten feet from the floor on which he was standing, when they were knocked over by other demolition debris. A split Court of Appeals holds that an injured worker is not categorically barred from recovery under Labor Law § 240(1) because the base of the falling object stands at the same level as the worker, and that the Court's decision in *Misseritti v. Mark IV Construction Co.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995) should not be interpreted to the contrary. (*See*, Labor Law 22-4, *Construction & Surety Law Newsletter* (March, 1996)). The issue here is whether the injuries were proximately caused by the failure to provide a safety device of the kind required by the statute. *Wilinski v. 334 East 92nd Housing Dev. Fund Corp.*, 18 N.Y.3d 1, 935 N.Y.S.2d 551 (2011).

MECHANIC'S LIENS AND TRUST CLAIMS

38-3. A contract for architectural services to improve real property in New York made Virginia the jurisdiction and forum for resolution of disputes. The architect filed a mechanic's lien and commenced an action for breach of contract in Virginia. In response to the owner's demand under Section 59 of the Lien Law, the architect commenced a lien foreclosure action in New York and moved pursuant to CPLR 2201 to stay that action pending the adjudication of the Virginia action. The Second Department affirmed the denial of the architect's motion to stay because there was not complete identity of parties, claims, or relief sought in the two actions. It reversed the order granting the owner's cross-motion to cancel the architect's notice of pendency pursuant to CPLR 6514(b). It could not be concluded that the architect had commenced the lien foreclosure action in bad faith or that it was using the notice of pendency for an ulterior purpose. The architect's failure to immediately seek leave under RPAPL 1301(3) to continue to maintain the Virginia action was not conclusive proof of bad faith. *Lessard Architectural Group, Inc., P.C. v. X & Y Development Group, LLC*, 88 A.D.3d 768, 930 N.Y.S.2d 652 (2d Dep't 2011).

38-4. The dispute resolution provisions of a public improvement subcontract (1) made the contractor or its designee the sole arbiter of all claims or disputes, (2) required the subcontractor to submit a detailed notice of claim to apply for a change order, supplemental agreement, or any other type or form of relief, and (3) required the subcontractor to specifically plead full compliance with the dispute resolution provisions as an express or absolute condition precedent to any action or proceeding against the contractor. The sole arbiter provision is void and unenforceable with respect to the subcontractor's trust claims under Article 3-A of the Lien Law because the contractor is a statutory trustee, the subcontractor is a trust beneficiary, and the sole arbiter role assumed by the contractor inherently conflicts as a matter of public policy with the contractor's duties of good faith, honest dealing, and undivided loyalty to the trust. The pleading precondition cannot operate as a waiver of the subcontractor's

mechanic's lien claims because that would violate Lien Law § 34. However, the subcontractor's failure to comply with the dispute resolution provisions is grounds for dismissal of its breach of contract and delay damages claims. Lastly, the payment bond surety cannot rely on the subcontract's notice of claim requirement to defeat the subcontractor's payment bond claims. The notice requirements of statutory payment bonds are governed by State Finance Law § 137, and the public policy expressed by that statute precludes differing notice requirements. *American Architectural, Inc. v. Marino*, 34 Misc.3d 194, 930 N.Y.S.2d 832 (Sup. Ct., Kings Co. 2011).

STATUTES

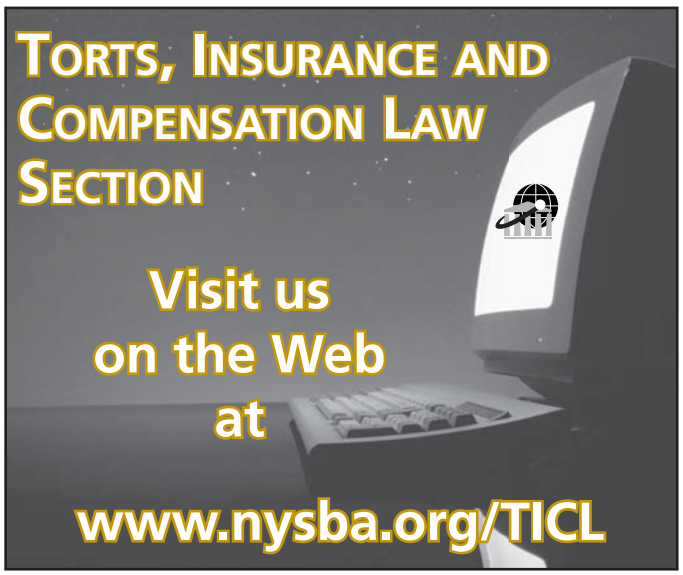
38-5. Chapter 174 of the Laws of 2011—amends Section 2802 of the Public Health Law. Hospitals possessing a valid operating certificate are exempt from Certificate of Need ("CON") review and prior approval by the Department of Health for construction projects involving repair or maintenance, including routine purchases and acquisition of minor equipment, non-clinical infrastructure projects, e.g., replacement of heating, ventilating, and air conditioning systems, roof, fire alarms and call bell systems, parking lots, and elevators, or one-on-one equipment replacement. A hospital would be required to submit a notice to the Department for an exempt project and, where appropriate, a written architect and/or engineering certification that the project complies with applicable statutes, codes, and regulations. The Department could also require the hospital to implement a plan to protect patient safety during construction. Where CON approval is necessary, the Commissioner of Health may waive any requirement for pre-opening certifications and/or surveys of construction projects. Effective January 16, 2012.

38-6. Chapter 367 of the Laws of 2011—amends Section 10 of the Lien Law to permit the filing of a notice of lien for retainage within ninety (90) days after the date the retainage was due to be released. Effective August 3, 2011.

38-7. Chapter 380 of the Laws of 2011—amends Section 137(4)(b) of the State Finance Law to bar commencement of an action on a payment bond more than one (1) year after the date on which the public improvement has been completed and accepted by the public owner, except as provided in Section 220-g of the Labor Law. Effective August 3, 2011.

38-8. Chapter 550 of the Laws of 2011—amends the Business Corporation Law and the Education Law to permit a non-licensee to participate in the ownership of a design professional service corporation, a new type of professional service corporation, practicing any combination of professional engineering, architecture, landscape architecture, or land surveying. More than seventy-five percent (75%) of the directors and officers of the design professional service corporation must be licensed professionals. The largest single shareholder, the president, chief executive officer, and chair of the board of directors must also be design professionals. Effective January 1, 2012.

NEW YORK STATE BAR ASSOCIATION
TORTS, INSURANCE AND COMPENSATION LAW SECTION
One Elk Street, Albany, New York 12207-1002



Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

Construction & Surety Law Newsletter

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.

ISSN 1530-3977 (print) ISSN 1933-8449 (online)