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Construction & Surety Law Newsletter

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Summary of Decisions and Statutes

INSURANCE

39-1. An insurer may seek rescission against an additional insured if the named insured makes misrepresentations during the underwriting stage, thereby rendering the policy void ab initio. *Admiralty Insurance Company v. Joy Contractors, Inc.*, 19 N.Y.3d 448, 948 N.Y.S.2d 862 (2012).

39-2. An insurer may not delay issuance of a notice of disclaimer on grounds then known to be valid while it conducts an investigation of other possible grounds for disclaimer. Insurance Law § 3240(d)(2) requires a liability insurer to give a written notice of disclaimer "as soon as is reasonably possible." In this case, the owner and general contractor, seeking coverage as additional insureds, waited two years before delivering a notice of claim to the subcontractor's excess liability insurance carrier. The insurer knew that the claim was late, but waited another four months, while it investigated the claimants' status as additional insureds, before it issued a disclaimer on the grounds of late notice. The First Department held, as a matter of law, that the insurer had failed to give timely notice of disclaimer, and expressly overruled its prior decision in *DiGuglielmo v. Travelers Property Casualty*, 6 A.D.3d 344, 776 N.Y.S.2d 542 (2004), which would have supported the insurer's course of action. *George Campbell Painting v. National Union Fire Insurance Co.*, 92 A.D.3d 104, 937 N.Y.S.2d 164 (1st Dep't 2012).

LABOR LAW §§ 200, 240, 241

39-3. A worker was injured when he was thrown off a specialized, enclosed scaffold after it was struck by another piece of equipment. To sustain liability under Labor Law § 240(1), it is not necessary that a plaintiff produce expert testimony on the foreseeability of the accident. Evidence of foreseeability is only required if the accident involves the collapse of a permanent structure which is not, by its nature, a safety device. *Ortega v. City of New York*, 95 A.D.3d 125, 940 N.Y.S.2d 636 (1st Dep't 2012).

39-4. 12 NYCRR 23-6.1(h) provides that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines." The First Department concludes that this regulation sets forth a specific standard of conduct and not simply a recitation of common-law safety principles. It is therefore sufficient to sustain liability under Labor Law § 241(6). Other courts disagree, but the First Department relies on its prior findings with respect to analogous regulations. *Naughton v. City of New York*, 94 A.D.3d 1, 940 N.Y.S.2d 21 (1st Dep't 2012).

39-5. After descending a ladder, a welder crossed the floor and stepped into an opening, whereupon his left leg, but not his entire body, fell through up to his groin. Liability under Labor Law § 240(1) was properly denied because he was not working at elevation and the floor on which he was walking was a permanent structure. Protective devices are not required for such activity. However, the opening in the floor was sufficiently large enough to create a hazard which required a safety railing pursuant to 12 NYCRR 23-1.7(h)(1)(i). Accordingly, liability for the injury could be predicated on Labor Law § 241(6). *Coleman v. Crumb Rubber Manufacturers*, 92 A.D.3d 1128, 940 N.Y.S.2d 170 (3d Dep't 2012).

39-6. The owners of a residence classified as a three-family dwelling claimed the homeowners' exemption from liability under Labor Law § 240(1) for one- or two-family dwellings, because two of the three apartments were occupied by related persons and because they did

not direct or control the work of the injured laborer. The administrative classification of the building as a three-family dwelling does not automatically foreclose the owners from claiming the protection of the exemption. However, the owners failed to demonstrate, as a matter of law, that the occupants of the two separate apartments, with living spaces on different floors and separate entrances, were living together and maintaining a household as a single family (see Multiple Dwelling Law § 4(5)). *Hossain v. Kurzynowski,* 92 A.D.3d 722, 939 N.Y.S.2d 89 (2d Dep't 2012).

MECHANIC'S LIENS AND TRUST CLAIMS

39-7. Under CPLR 6513, a notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon good cause shown. The extension must be requested prior to expiration of the notice. A lapsed notice of pendency may not be revived. *Ampul Electric, Inc. v. Village of Port Chester*, 96 A.D.3d 790, 946 N.Y.S.2d 232 (2d Dep't 2012).

PRINCIPAL AND SURETY

39-8. A surety was not discharged from its performance bond obligations when part of a payment owed to the prime contractor / principal was assigned by the school district / owner, with the contractor's assent, to the Department of Labor for the contractor's prevailing wage violations related to other projects. The payment made by the school district was based on work already completed by the contractor, was not in excess of what was owed, and was not made prematurely. Therefore, the violations payment did not have any effect on the surety's obligations. Furthermore, because the surety did not complete or fund completion of the work upon the contractor's default, it was not subrogated to the rights of Lien Law article 3-A trust beneficiaries as a completing surety. The Court of Appeals acknowledged that surety obligations are generally discharged due to any alteration, material or not, to the underlying contract. However, this rule does not apply to compensated sureties in the construction context, where the surety will only be discharged if the alteration adversely affects the surety's obligations. *Mount Vernon City School District v. Nova Casualty Company*, 19 N.Y.3d 28, 945 N.Y.S.2d 202 (2012).

SUBCONTRACTORS

39-9. Despite seemingly broad definitions expressed in the Labor Law, the general contractor is not the employer of its subcontractors' employees in the typical general contractor / subcontractor context. Here, the Court of Appeals found that the Industrial Board of Appeals improperly applied the six-factor test set forth in *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003) for assessing the "economic reality" between entities in a given business relationship and for determining, in this case, whether the general contractor was the joint employer of a subcontractor's workers. The Board relied too heavily on the fact that the general contractor "controlled" the premises of the worksite, which is actually quite common in the construction industry and therefore not determinative. However, the Court noted that there may be situations where the business relationship between a general contractor and a subcontractor supports the finding that the general contractor assumed the role of employer of the subcontractor's workforce. *Ovadia v. Office of the Industrial Board of Appeals*, 19 N.Y.3d 138, 946 N.Y.S.2d 86 (2012).

39-10. The courts will recognize a property owner's claim for breach of contract against a subcontractor, absent privity, if it is demonstrated that performance of the subcontract is intended to directly benefit the property owner as a third-party beneficiary, and that such benefit is sufficiently immediate, rather than incidental, to support a presumption that the subcontractor has assumed a duty to compensate the property owner for a failure of that performance. Conversely, courts routinely decline to deem a subcontractor to be the intended third-party beneficiary of a contract between a general contractor and a property owner because the property owner does not generally intend to benefit any subcontractor subsequently hired by the general contractor. *Logan-Baldwin v. L.S.M. General Contractors, Inc.*, 94 A.D.3d 1466, 942 N.Y.S.2d 718 (4th Dep't 2012).

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