NYSBA FALL 2001 | VOL. 27 | NO. 2

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

ARBITRATION

27-24. The United States Supreme Court unanimously concluded that a federally recognized Indian tribe had clearly waived its sovereign immunity from suit by entering into a standard form American Institute of Architects (AIA) construction contract containing an unambiguous arbitration clause. The contract related to the reroofing of a commercial building owned by the tribe outside of its reservation and not held in trust by the federal government. The Indian tribe expressly agreed to arbitrate disputes relating to the contract under the Construction Industry Arbitration Rules of the American Arbitration Association, and expressly agreed to the enforcement of arbitral awards in any court having jurisdiction thereof. Such agreements were construed by the Court to be a clear waiver of tribal immunity. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, ___ U.S. ___, 121 S.Ct. 1589 (2001).

27-25. Construction manager's motion to stay subcontractor's breach of contract action, pending compliance with a dispute resolution provision incorporated into the subcontract from the prime contract, was granted. The prime contract provided for non-binding adjudication by a dispute resolution committee. Nothing in the provision limited the dispute resolution procedure to those claims attributable to the construction manager's conduct in performing the prime contract. The claims were held to be within the scope of the dispute resolution procedure because they arose from work on the project, notwithstanding the fact that those claims were raised after substantial completion of such work. *BAE Automated Systems, Inc. v. Morse Diesel Int'l., Inc.*, 2001 WL 547133 (S.D.N.Y. 2001).

INSURANCE

27-26. The proper measure of damages for breach of a construction contract insurance procurement clause is the damaged party's full cost of insurance, including the premiums it has paid for its own insurance, any out-of-pocket costs that it may have incurred incidental to the policy, and any increase in its future insurance premiums resulting from the liability claim. *Trokie v. York Preparatory School, Inc.*, ___ A.D.2d ___, 726 N.Y.S.2d 37 (1st Dep't 2001).

27-27. A construction contract between a general contractor and the New York State Department of Transportation (DOT) required the general contractor to indemnify all of its subcontractors as well as certain consultants separately hired by DOT, and to purchase liability insurance covering them. The consultants hired by DOT were not entitled to summary judgment against the general contractor on the issue of indemnification because the contract did not expressly state that it was intended to benefit third parties and because the ordinary construction contract does not give third parties who contract with the promisee (DOT) the right to enforce its contract with another. *Perron v. Hendrickson/Scalamandre/Posillico (TV)*, ___ A.D.2d ___, 725 N.Y.S.2d 662 (2d Dep't 2001).

LABOR LAW §§ 200, 240, 241

27-28. In one case, a worker standing on a ladder to remove steel window frames was injured by falling glass from an adjacent window. In another case, a worker standing on a ladder was injured when the electrical fixture he was installing fell and cut him seriously. In neither case did the worker fall from the ladder. Accordingly, the Court of Appeals concluded that Labor Law § 240(1) did not apply to these accidents because the falling objects

were not being hoisted or secured and did not fall as a consequence of the absence or inadequacy of any safety device listed in the statute. These cases did not involve a falling worker because neither worker was injured by a fall from an elevated workplace. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).

27-29. An intoxicated roofer was told to report to his foreman. As he walked across the roof, he stepped onto yellow insulation where a roof panel had been removed. The insulation had no underlying support, and he fell through the roof at least 21 feet to the floor below. A unanimous panel of the Fourth Department held that the injured roofer was entitled to summary judgment on liability as a matter of law under Labor Law § 240(1) because there were no safety devices in place to prevent such an accident. In the absence of safety devices, no reasonable jury could conclude that the roofer's intoxication and consequent actions were the sole proximate cause of his injuries. *Sergeant v. Murphy Family Trust*, ___ A.D.2d ___, 726 N.Y.S.2d 537 (4th Dep't 2001).

27-30. The natural sand surface of an excavation trench did not constitute a "slippery condition" within the meaning of the Industrial Code (12 N.Y.C.R.R. § 23-1.7(d)). An employee who sustained injuries when loose sand shifted beneath his feet could not prevail under Labor Law § 241(6) in his action against the defendants. *Miranda v. City of New York,* 281 A.D.2d 403, 721 N.Y.S.2d 391 (2d Dep't 2001).

MECHANICS' LIENS

27-31. A contractor defaulted on its public improvement contract with a school district. The surety which issued performance and payment bonds for the defaulting contractor paid other contractors, laborers, and materialmen to complete the project. The surety claimed subrogation to their rights as trust fund beneficiaries under Lien Law article 3-A and sought to collect the unpaid contract balance from the school district. The Third Department concluded that the statutory trust claims of the New York State Department of Labor (DOL) under Labor Law article 8 for recovery of prevailing wage violations by the defaulting contractor were superior to the Lien Law article 3-A claims of the surety, even though some of the prevailing wage violations within DOL's claims related to other public improvement projects. *RLI Insurance Company, Surety Division v. New York State Department of Labor,* 282 A.D.2d 811, 722 N.Y.S.2d 618 (3d Dep't 2001).

27-32. A bank held perfected security interests in a defaulting subcontractor's equipment, inventory, accounts receivable, contract rights and general intangibles. Nevertheless, Lien Law article 3-A precluded the bank from intervening or being substituted as plaintiff for the subcontractor in its actions to foreclose a mechanic's lien or to recover for breach of subcontract unless and until all claims by subsubcontractors and suppliers, who were trust beneficiaries, were fully satisfied. The bank's subrogation claims were premature. The bank could not seize trust fund assets or direct the manner in which the subcontractor should discharge its fiduciary duties. *AMG Industries, Inc. v. A.J. Eckert Company, Inc.*, 279 A.D.2d 717, 719 N.Y.S.2d 192 (3d Dep't 2001).

PUBLIC CONTRACTS

27-33. To avoid unconscionable economic hardship, General Municipal Law § 103(11) permits withdrawal of a public works or public contract bid in which the bidder has made a computational error. The statute prohibits any renegotiation to rehabilitate or correct a computational error within a bid. However, an unsuccessful bidder could not use General Municipal Law § 103(11) to upset the apparent low bid, even though the municipality permitted correction of a typographical error which did not alter the total bid. The statute did not apply to these facts. *Picone/McCullagh v. Miele*, 283 A.D.2d 501, 724 N.Y.S.2d 473 (2d Dep't 2001).

TORTS

27-34. The collapse of a building during a construction project forced the closure of adjacent streets for several weeks and the consequent closure of businesses in the vicinity. Absent property damage, the closed businesses could not recover from the building owner for purely economic loss. Nor could they recover on their public nuisance claims unless they could demonstrate special injury beyond that which the community at large suffered. *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001).

WORKERS' COMPENSATION

27-35. A requisite element of the "special employee" defense is the employee's consent to the special employment relationship. Here, defendants' pleading and summary judgment motion papers were insufficient to establish actual or implied consent by the plaintiff employee to any new employment arrangement. *Shelley v. Flow International Corporation*, 283 A.D.2d 958, 724 N.Y.S.2d 244 (4th Dep't 2001).

27-36. A trucking company employee, transferred for a limited time to the service of a construction company, was a "special employee" of the construction company which controlled and directed the manner, details and ultimate result of her work. Because she received workers' compensation benefits from the trucking company, her general employer, for an injury she sustained, she could not maintain an action for negligent maintenance of the truck against the construction company, her special employer, which was immune from her claim. *Kramer v. NAB Construction Corp.*, 282 A.D.2d 714, 724 N.Y.S.2d 187 (2d Dep't 2001).

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[Inadvertently omitted from the Table of Cases appearing in the Fall 2000 issue of the* Construction & Surety Law Newsletter, *Vol. 26, No. 2, was the section on PRINCIPAL AND SURETY. Please supplement the Table with the cases listed above. The Editor.]

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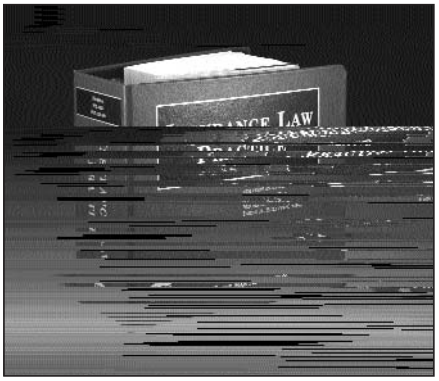

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New York State Bar Association

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 & 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 credits on their contribution.

ISSN 1530-3977

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