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Construction & Surety Law Newsletter

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Summary of Decisions and Statutes

ARBITRATION

28-21. A request for an extension of time to serve an answer and the service of an answer in response to the complaint did not amount to a waiver of the right to arbitrate, particularly where the right to arbitrate was asserted in the answer as an affirmative defense. *LES Constructions Beauce-Atlas, Inc. v. Tocci Building Corporation of New York, Inc.*, 294 A.D.2d 409, 742 N.Y.S.2d 356 (2d Dep't 2002).

ARCHITECTS, ENGINEERS & SURVEYORS

28-22. An architect could not be held liable for negligent misrepresentation to the subsequent owner of a building in which defects were discovered, based solely on the fact that the architect had issued a certificate of substantial completion to the original developer in connection with the sale of the building to the original owner. The subsequent owner could not establish the functional equivalent of privity between it and the architect. Nor could the subsequent owner establish conduct by the architect demonstrating that the architect understood the certificate would be relied upon by a subsequent owner. The fact that such reliance might have been foreseeable was not dispositive of the case. *MS Partnership v. Wal-Mart Stores, Inc.*, 294 A.D.2d 853, 741 N.Y.S.2d 793 (4th Dep't 2002).

28-23. As a general rule, natural landmarks and artificial monuments take precedence over mere metes and bounds descriptions to determine the location of property boundaries. *Brown v. Ames*, 290 A.D.2d 693, 735 N.Y.S.2d 664 (3d Dep't 2002).

INSURANCE

28-24. A commercial liability insurer could not disclaim coverage under an absolute pollution liability exclusion clause for injuries allegedly caused by the inhalation of noxious and toxic fumes from paint and paint solvents used to refurbish interior office space. Insurance policy exclusions are strictly and narrowly construed under New York law. The Second Department relied on the Court of Appeals decision in *Westview Associates v. Guaranty National Insurance Co.*, 95 N.Y.2d 334, 717 N.Y.S.2d 75, to conclude that the pollution exclusion clause need not be read literally, particularly where the injury occurs indoors. Furthermore, the court cited the Fourth Department decision in *Roofers Joint Training, Apprentice & Education Committee of Western New York v. General Accident Insurance Company of America*, 275 A.D.2d 90, 713 N.Y.S.2d 615, which held that the absolute pollution exclusion applies only to environmental pollution, and not to all contact with substances that can be classified as pollutants. *Belt Painting Corp. v. TIG Insurance Company*, 293 A.D.2d 206, 742 N.Y.S.2d 332 (2nd Dep't 2002).

LABOR LAW §§ 200, 240, 241

28-25. To state a claim against landowners under Labor Law section 200, a construction worker, severely injured by a diseased and decayed tree which fell on his vehicle during the course of his work, is not obliged to prove that the landowners were involved in the supervision of his work. He must prove that the landowners had notice of the dangerous workplace condition. *Jurgens v. Whiteface Resort on Lake Placid L.P.*, 293 A.D.2d 924, 742 N.Y.S.2d 142 (3d Dep't 2002).

28-26. A subcontractor, which built the ladder from which the general contractor's employee fell, was not liable to the injured employee under Labor Law sections 200, 240(1), or 241(6) because the subcontractor had no control over the employee's work for the general contractor and no authority to insist that proper safety practices be followed. Unlike general contractors or owners, subcontractors are not strictly liable under Labor Law sections 240(1) or 241(6). The fact that the subcontractor built the ladder was irrelevant to the threshold issues of authority and control. *Lopes v. Interstate Concrete, Inc.*, 293 A.D.2d 579, 741 N.Y.S.2d 73 (2d Dep't 2002).

PRINCIPAL AND SURETY

28-27. Finding no precedent under New York law, the Second Circuit certified to the New York Court of Appeals the question whether a professional employer organization (PEO) or employee leasing company is a proper claimant under a labor and materials payment bond. The PEO hired the contractor's former employees, leased them back to the contractor, paid employment taxes and withholding, issued payroll, provided workers' compensation coverage, and performed all employment-related bookkeeping under an oral agreement with the contractor. When the contractor failed to pay for these services, the PEO made a claim on the contractor's payment bond issued to the owner of a construction project. The surety argued that the PEO was no more than a creditor of the contractor or a provider of administrative services. The PEO argued that it was an employer for federal tax purposes. The PEO did not supervise the workforce; the contractor did. The question then is whether the PEO provided "labor and materials" within the meaning of the bond. *Tri-State Employment Services, Inc. v. Mountbatten Surety Co., Inc.*, 295 F.3d 256 (2d Cir. 2002).

WORKERS' COMPENSATION

28-28. In a case of first impression, the Third Department concluded that a workers' compensation carrier is liable for procedures involving the extraction of sperm from an injured worker and the intrauterine insemination of his wife. The worker suffered a compensable work-related injury requiring surgery which, in turn, affected his ability to procreate without medical intervention. The damage to the worker's reproductive system was causally connected to his work-related injury. The court recognized the fundamental principle that the Workers' Compensation Law is to be construed liberally to accomplish its economic and humanitarian objectives. *Spyhalsky v. Cross Construction*, 294 A.D.2d 23, 743 N.Y.S.2d 212 (3d Dep't 2002).

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