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Construction & Surety Law Newsletter

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Summary of Decisions and Statutes

ADMINISTRATIVE LAW

29-16. The New York City Council failed to provide an adequate explanation why its 1999 ordinance requiring lead paint abatement in multiple dwelling units would have no significant environmental effects (negative declaration). That oversight violated the State Environmental Quality Review Act (SEQRA), thereby rendering the local law null and void. *New York City Coalition to End Lead Poisoning v. Vallone,* 100 N.Y.2d 337, 763 N.Y.S.2d 503 (2003).

29-17. The Trustees of the State University of New York determined that construction management services provided by the County for improvements to its community college were duplicative of services provided by the project's construction manager and unnecessary, had zero value to the project, and were not eligible for reimbursement from the University, the Dormitory Authority, or the State University Construction Fund under the Education Law. These determinations were neither arbitrary nor capricious. *County of Monroe v. Board of Trustees,* 307 A.D.2d 705, 763 N.Y.S.2d 194 (4th Dep't 2003).

INSURANCE

29-18. The Court of Appeals affirms a decision of the Second Department that an absolute pollution exclusion clause in a commercial general liability insurance policy applies only where the alleged damages are truly environmental in nature or result from pollution of the environment. Insurance coverage was not excluded for injuries suffered by an individual who inhaled paint or solvent fumes in an office building where a painting subcontractor was performing stripping and painting work. *Belt Painting Corp. v. TIG Insurance Company*, 100 N.Y.2d 377, 763 N.Y.S.2d 790 (2003). *See* Insurance 28-24, *Construction & Surety Law Newsletter* (Fall 2002).

29-19. The well-understood meaning of the term "additional insured" is an entity enjoying the same protection as the named insured. A commercial general liability policy provided primary coverage to the named insured, but only excess coverage to additional insureds unless there was a written contract for the coverage to apply on a primary or contributory basis. The written subcontract requiring additional insured coverage was sufficient to render that coverage as primary under the policy, even though the subcontract did not expressly designate the additional insured coverage as primary. *Pecker Iron Works of New York, Inc. v. Traveler's Insurance Co.*, 99 N.Y.2d 391, 756 N.Y.S.2d 822 (2003).

29-20. A subcontractor's commercial general liability insurance carrier was not obligated to defend or indemnify the general contractor against claims by an injured employee of the subcontractor where the insurance policy did not endorse the general contractor as a named insured or as an additional insured. A certificate of insurance, naming the general contractor as an additional insured but bearing a disclaimer that it was issued as a matter of information only, conferred no rights on the certificate holder. The certificate did not amend, extend or alter the coverage afforded by the policy, and it was ineffective to confer coverage not provided by the policy. Furthermore, coverage was properly disclaimed under an exclusion against bodily injury to an employee of an insured, occurring during the course of employment. The First Department declined to consider the general contractor's argument that this employee exclusion offends public policy, which argu-

ment was raised for the first time on appeal. *Moleon v. Kreisler Borg Florman General Construction Co., Inc.*, 304 A.D.2d 337, 758 N.Y.S.2d 621 (1st Dep't 2003).

29-21. Citing *Moleon* (above), a sharply divided panel of the Fourth Department agrees with the First Department and decides that the employee exclusion excuses a general liability insurer from defending and indemnifying the general contractor (additional insured) against Labor Law § 240(1) claims by a subcontractor's (named insured) employees. Criticizing *Moleon*, the dissent argues that the separability of insureds doctrine requires the insurer to treat the additional insured as though it has a separate policy, in which case the employee exclusion would not apply. *Hayner Hoyt Corp. v. Utica First Insurance Co.*, 306 A.D.2d 806, 760 N.Y.S.2d 706 (4th Dep't 2003). [Query: Does the employee exclusion conflict with the contractual liability endorsement under a commercial general liability policy, which insures the contractual indemnification promise? Will these decisions compel owners and general contractors to demand that the indemnitors purchase separate insurance policies for them?]

29-22. An injured commuter's negligence claims against the general contractor, coupled with the general contractor's negligent supervision claims against the construction manager, precluded the general contractor's third-party complaint and the construction manager's cross-claim against the owner, in accordance with the anti-subrogation rule. The general contractor and the construction manager both named the owner as an additional insured on their respective general liability insurance policies. The anti-subrogation rule denies the insurer any right of subrogation against its own insured for a claim arising from the very risk for which insurance coverage is provided. The rule prevents the insurer from passing the incidence of loss to its own insured and discourages conflicts of interest. "The anti-subrogation rule is implicated by an insurer's duty to defend as well as its duty to indemnify." *Pitruzello v. Gelco Builders, Inc.*, 304 A.D.2d 302, 757 N.Y.S.2d 280 (1st Dep't 2003).

LABOR LAW §§ 200, 240, 241

29-23. An engineer technician fell while disconnecting and removing air handlers from an air traffic control tower scheduled for destruction. Although the injured employee was not engaged in demolition, the Court of Appeals concluded that his activities constituted alteration within the meaning of Labor Law § 240(1) because the process of removing the 200-pound air handlers took two days of preparation and a mechanical lift. An alteration requires a significant physical change to the configuration or composition of the building. *Panek v. City of Albany*, 99 N.Y.2d 452, 758 N.Y.S.2d 267 (2003).

29-24. 12 N.Y.C.R.R. § 23-2.3(A)(1) regulates the use of hoisting ropes for the placement of structural steel members, but does not require that hoisting ropes be actually used. 12 N.Y.C.R.R. subparts 23-6 and 23-8 set forth standards for the use of hoisting devices, but do not specify when the use of such devices is required. Accordingly, none of these regulations support a claim of liability under Labor Law § 241(6) in an injury case in which neither hoisting ropes nor hoisting devices were employed. *Hasty v. Solvay Mill Limited Partnership*, 306 A.D.2d 892, 760 N.Y.S.2d 795 (4th Dep't 2003).

29-25. The trial court rejected the Labor Law §§ 240(1) and 241(6) claims of an injured public utility employee. He had leaned his utility-supplied ladder against the owner's building so that he could disconnect electric service at the attachment point to the utility's power lines. The ladder slipped away from the building. The court concluded that neither the owner nor its contractor had any ability to direct the manner in which the utility employee performed his work, to dictate safety practices, or to furnish tools or equipment to the utility employee, who was required to use those provided by the utility. Accordingly, it would serve no legislative purpose to impose strict liability on the owner or its contractor under these circumstances. The employee could be best protected by the public utility. Furthermore, at the time of the accident, the employee was working on property owned by the utility, not the building owner, whose liability was therefore precluded. Lastly, the contractor was in this context at best a prime contractor, not a general contractor, having no authority to control the work of the public utility employee. The court held that the contractor's liability was similarly precluded. *Williams v. LeChase*, 196 Misc. 2d 450, 763 N.Y.S.2d 450 (Sup. Ct., Monroe Co. 2003).

PRINCIPAL AND SURETY

29-26. Unlike the more specific American Institute of Architects' AIA-312 form of performance bond, the AIA-311 form does not require a declaration of default by the obligee, the principal's cessation of work, or the surety's refusal to perform, in order to sustain an action on the bond. All AIA-311 requires is that the action be commenced within two years after the date on which final payment under the contract becomes due. *Walter Concrete Construction Corp. v. Lederle Laboratories*, 99 N.Y.2d 603, 758 N.Y.S.2d 260 (2003).

29-27. Responding to a question certified by the Second Circuit, the Court of Appeals concludes that a professional employer organization (PEO), whose sole or primary role is to provide administrative and human resources services and to finance payroll, is presumed not to provide labor to a contractor for purposes of a

payment bond claim. The Court acknowledges that the inquiry is essentially factual. The presumption may be overcome if the PEO exercises sufficient direction and control over worksite employees. The Court notes that the subsequently enacted New York Professional Employer Act (Labor Law § 915 et seq.) does not apply to the facts of this case. *Tri-State Employment Services, Inc. v. Mountbatten Surety Co., Inc.*, 99 N.Y.2d 476, 758 N.Y.S.2d 595 (2003). *See* Principal and Surety 28-27, *Construction & Surety Law Newsletter* (Fall 2002).

29-28. Under State Finance Law § 137(3), a claimant on the payment bond for a public improvement, who has a contractual relationship with a subcontractor but no contractual relationship with the contractor furnishing the bond, must give written notice of its claim for payment to the contractor within 120 days after the last of its labor was performed or the last of its material was furnished. In an open account arrangement for materials (separate, successive deliveries and invoices), the 120-day period is measured from the final delivery of materials to the project. *Specialty Products & Insulation Co. v. St. Paul Fire & Marine Ins. Co.*, 99 N.Y.2d 459, 758 N.Y.S.2d 255 (2003).

PUBLIC CONTRACTS

29-29. A municipal owner had discretion to waive noncompliance with its bid specifications and determine that its best interests dictated acceptance of a late bid offering substantial savings. The municipal owner concluded that delivery of the bid by overnight courier had been delayed by events related to September 11, 2001. The waiver neither deprived the municipal owner of assurance that the contract would be performed in accordance with its specified standards, nor adversely affected competitive bidding by giving any bidder a competitive advantage over the others. *Hamlin Construction Co., Inc. v. County of Ulster,* 301 A.D.2d 848, 753 N.Y.S.2d 602 (3d Dep't 2003).

STATUTES

29-30. Chapter 62, Part X, §§ 4 and 5 of the Laws of 2003—amends subdivisions 1 and 2 of section 103 of the General Municipal Law to permit the receipt of sealed bids in electronic format, if authorized by resolution of the board of the political subdivision or district soliciting bids.

WORKERS' COMPENSATION

29-31. The general contractor subcontracted a painting project to the employer of a temporary services worker who was injured when he fell from the roof. Workers' compensation was the injured worker's exclusive remedy against the painting subcontractor, because he was its "special employee." His Labor Law § 240(1) claim against the general contractor was sustained even though the general contractor and the painting contractor were commonly owned and controlled. The Third Department rejected the argument that the painting subcontractor was the alter ego of the general contractor, therefore entitling the general contractor to the workers' compensation defense. The two corporations were formed for different purposes, neither was the subsidiary of the other, their finances were not integrated, their assets were not commingled, and they were treated by their principals as separate and distinct. *Longshore v. Paul Davis Systems*, 304 A.D.2d 964, 759 N.Y.S.2d 204 (3d Dep't 2003).

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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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Construction and Surety Law Division
Torts, Insurance and Compensation Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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