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Construction & Surety Law Newsletter

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Summary of Decisions and Statutes

ARBITRATION

30-17. A construction contract included a provision requiring disputes to be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and to be governed by the law of New York. The First Department concluded that the Federal Arbitration Act ("FAA") applied because the subject project "affected" interstate commerce. A significant portion of the supplies and equipment and the engineer's drawings for the project were imported from outside New York. Accordingly, under the FAA, the question whether the demand for arbitration was timely served within the statute of limitations was a matter to be decided by the arbitrator, not the court. The choice of law provision did not explicitly state that New York law would govern enforcement of the contract. *Diamond Waterproofing Co., Inc. v. 55 Liberty Owners Corp.*, 6 A.D.3d 101, 774 N.Y.S.2d 32 (1st Dep't 2004), *mot. lv. app. granted*, 2 N.Y.3d 822, 781 N.Y.S.2d 285 (2004).

ARCHITECTS, ENGINEERS & SURVEYORS

30-18. An architect entered into an agreement to provide architectural and interior design services in connection with the construction of office space in Connecticut for a technology consulting group. The architect was specifically responsible under the agreement for code compliance, and binding arbitration was required for any claims, disputes, or breaches arising from the agreement. The client demanded arbitration more than three years after the project was completed, based on the architect's failure to specify fireproofing as required under the state building code. The First Department granted the architect's application to stay arbitration because the client's claim was essentially one for malpractice, making the claim untimely under CPLR § 214(6). *In re Kliment*, 3 A.D.3d 143, 770 N.Y.S.2d 329 (lst Dep't 2004), *mot. lv. app. granted*, 2 N.Y.3d 703, 778 N.Y.S.2d 462 (2004).

INDEMNITY

30-19. The common law indemnification claims of a property owner, vicariously liable under Labor Law § 240(1) for injuries suffered by a construction worker, were not limited by Article 16 of the CPLR. The owner was therefore entitled to full indemnification from the culpable contractors. With respect to the injured worker, the owner could be obligated to pay the entire judgment without limitation because CPLR Article 16 excepts claims based on Article 10 of the Labor Law (including 240(1)) from its operation. *Salamone v. Wincaf Properties, Inc.*, 9 A.D.3d 127, 777 N.Y.S.2d 37 (1st Dep't 2004).

30-20. "General Obligations Law § 5-322.1 was enacted to void indemnification agreements that seek to exempt the indemnitee from liability based on negligence, irrespective of whether that negligence is wholly or only partially the cause of the injury." It renders "void and unenforceable any provision or agreement in connection with building construction 'purporting to indemnify or hold harmless the promisee' against its own negligence." However, an insurance-procurement agreement "which simply obligates one of the parties to a construction contract to obtain a liability policy insuring the other" does not similarly violate public policy or the law. *Cavanaugh v. 4518 Assocs.*, 9 A.D.3d 14, 776 N.Y.S.2d 260 (1st Dep't 2004).

LABOR LAW §§ 200, 240, 241

30-21. The Court of Appeals declined to impose liability under Labor Law § 240(1) on an owner of property when a cable television technician was injured while performing work without the owner's knowledge or consent. The court stressed the lack of any nexus between the owner and the worker. Public Service Law § 211 states that landlords may not interfere with the installation of cable television facilities on their property. Therefore, any permission to work on the property was compulsory, and no relationship existed between the owner and the cable company or the technician. Furthermore, the work involved routine maintenance, not the erection, demolition, repairing, altering, painting, cleaning or pointing of a building. *Abbatiello v. Lancaster Studio Assocs.*, 3 N.Y.3d 46, 781 N.Y.S.2d 477 (2004).

30-22. Subcontractor's employee was struck in the shoulders and back by a pulley and rope which collapsed while being used to lift a heavy metal insert into the top of a silo under construction for paper production. The Fourth Department determined that the defective hoist, which collapsed while being used to lift an object, was itself a falling object. The defendants were subject to absolute liability under Labor Law § 240(1). *Gabriel v. The Boldt Group, Inc.*, 8 A.D.3d 1058, 778 N.Y.S.2d 829 (4th Dep't 2004).

30-23. A roofer was injured when a scaffold collapsed beneath him while he was installing a roof on a new, one-family dwelling owned by defendant wife. Defendant husband was actively involved in the creation of the construction design, and he hired and paid all subcontractors, including the injured roofer. The Fourth Department held that defendant husband was not entitled to the homeowners' exemption from liability under Labor Law § 240(1), because he had no legal interest in the property and his spousal relationship with the owner did not make him an "owner." The court further held that defendant husband owed the roofer the duties imposed by Labor Law §§ 240(1) and 241(6) in his capacities as the general contractor and as the owner's agent. *Fisher v. Coghlan*, 8 A.D.3d 974, 778 N.Y.S.2d 812 (4th Dep't 2004).

30-24. Subcontractor's employee was assisting in the recovery and cleanup efforts at the World Trade Center site after the September 11, 2001 attacks. A heavy tank of liquid oxygen being used by ironworkers slipped from an unstable pile of debris and fell onto the employee. The Port Authority maintained that the City of New York had taken possession and control of the site after the attacks and that the Port Authority did not control the cleanup work. The First Department held that, nonetheless, the Port Authority could be held liable under Labor Law § 240(1) due to the fact of its ownership of the site. *Spagnuolo v. The Port Authority of New York and New Jersey*, 8 A.D.3d 64, 778 N.Y.S.2d 23 (1st Dep't 2004); *see also Sferrazza v. The Port Authority of New York and New Jersey*, 8 A.D.3d 53, 777 N.Y.S.2d 645 (1st Dep't 2004).

30-25. Subcontractor's employee was injured while conducting pressurized air tests in underground storm sewer pipes. The employee's motion for summary judgment on his Labor Law § 200 claim against the general contractor was denied because the general contractor raised an issue of fact whether it supervised or controlled the pressurized air tests. In addition, the Fourth Department overturned the lower court's grant of summary judgment on the employee's Labor Law § 241(6) claim, which was based on an alleged violation of 12 N.Y.C.R.R. § 23-1.10, governing hand tools. The Fourth Department found that, as a matter of law, neither the air compressor nor the gauge used in conducting the pressurized air tests was a hand tool within the meaning of that section. *Szafranski v. Niagara Frontier Transportation Authority*, 5 A.D.3d 1111, 773 N.Y.S.2d 332 (4th Dep't 2004).

30-26. The general contractor installed cardboard covering as temporary protection for tile walls of a room in which subcontractor's welder was working. The cardboard caught fire, and the welder was injured when he ran to get water and tripped in the dark over debris in the janitor's closet. There was enough evidence to find a violation of Labor Law § 200 because the welder's injury arose from the condition of the workplace, rather than the method of his work. The general contractor had created the unsafe condition by installing the flammable cardboard. Additionally, the general contractor had actual or constructive notice of the debris left by workers who were there two days earlier. Furthermore, there was sufficient evidence to support a finding that Labor Law § 241(6) was violated. The welder relied on 12 N.Y.C.R.R. §§ 23-1.3 and 1.7(e) requiring that work areas be kept illuminated and free of debris, which are sufficiently specific to support a 241(6) claim. *Murphy v. Columbia University*, 4 A.D.3d 200, 773 N.Y.S.2d 10 (1st Dep't 2004).

30-27. A worker brought claims under Labor Law §§ 240(1) and 241(6) against the owner of a house after he fell from the roof while performing renovation work. A divided panel of the Fourth Department rejected the owner's argument that the homeowners' exemption applied. The owner was a developer who rehabilitated homes for resale, and he had a contract with plaintiff's employer to renovate at least four houses on the same street. The dissent would have applied the exemption because the developer resided in the upper apartment of this two-family house while leasing the lower apart-

ment to a tenant, and thus the house was used for both residential and commercial purposes. *Greenman v. Page*, 4 A.D.3d 752, 772 N.Y.S.2d 439 (4th Dep't 2004).

30-28. A painter was injured when the extension ladder he was using on an icy sidewalk kicked out from underneath him. Defendants argued that the painter's own actions were the sole proximate cause of the accident because he positioned the ladder on a sheet of plywood. The Third Department rejected this argument, finding that the lack of ropes, harnesses or other safety devices was a proximate cause of the accident. Even if the painter did place the ladder over the plywood, his conduct was not the *sole* proximate cause, and the painter was still protected by Labor Law § 240(1). *Morin v. Machnick Builders, Ltd.*, 4 A.D.3d 668, 772 N.Y.S.2d 388 (3d Dep't 2004).

30-29. A sign repairman fell through an elevated electric sign immediately upon entering the sign to perform an inspection before doing repair work. The repairman's motion for summary judgment on his Labor Law § 240(1) claim against the store owner was properly granted because the inspection was necessary and incidental to the repair work his employer was hired to perform. In addition, summary judgment should have been granted on his 240(1) claim against the national management firm that contracted with the repairman's employer to repair the sign for the store. The Fourth Department found that the national management firm was responsible for the coordination and execution of the sign's repair, and the store was obligated to abide by the conditions of the contract the national management firm entered into with the repair shop. As a general contractor, the national management firm was absolutely liable for the violation. *Bagshaw v. Network Service Management, Inc.*, 4 A.D.3d 831, 772 N.Y.S.2d 161 (4th Dep't 2004).

30-30. The construction manager hired by a school district was not entitled to summary judgment on Labor Law §§ 240(1) and 241(6) claims brought by a prime contractor's injured employee. Parties to whom has been delegated the authority to supervise and control the work may be liable for violations of 240(1) and 241(6) as statutory agents of the owners and contractors. The Second Department overturned the lower court's grant of summary judgment because there was an issue of fact as to whether the construction manager was a general contractor or an agent of the owner. *Aranda v. Park East Construction*, 4 A.D.3d 315, 772 N.Y.S.2d 70 (2d Dep't 2004).

30-31. A stone derrickman was injured when a forklift operator backed up over his leg. He brought a Labor Law § 241(6) claim, premised upon 12 N.Y.C.R.R. § 23-9.7(d), which governs the backing up of "motor trucks." The First Department dismissed the claim, finding that a forklift is not a motor truck, and that the regulations pertaining to forklifts do not contain a "backing up" provision. In addition, the Labor Law § 200 claim against the construction manager was dismissed because its level of supervision and control over the forklift operation was insufficient to impose liability. *Scott v. American Museum of Natural History*, 3 A.D.3d 442, 771 N.Y.S.2d 499 (1st Dep't 2004).

30-32. A project superintendent employed by the general contractor was on a "walk-through" of a newly built store in a mall to compile a "punch list" of small unfinished items and last-minute changes. He was injured when he fell from a ladder while covering the store's windows with opaque brown paper at the mall manager's request. Finding that compiling a punch list is work that falls within the "erection" category of Labor Law § 240(1), the First Department held that the project superintendent was protected by the statute, even though he was not engaged in compiling the punch list at the time he fell from the ladder. *Greenfield v. Macherich Queens L. P.*, 3 A.D.3d 429, 771 N.Y.S.2d 498 (1st Dep't 2004).

30-33. Contractor's employee was injured when the bit on the magnetic drill he was using caught, causing the drill to spin rapidly and to repeatedly strike the employee in the forearm. The employee's Labor Law § 200 claim against the owner was properly dismissed because the contractor, not the owner, performed all supervision. However, summary judgment on the Labor Law § 241(6) claim was properly denied. The employee relied on 12 N.Y.C.R.R. § 23-1.10, which requires that electrical and pneumatic tools have a cut-off switch within easy reach of the operator. The Third Department held that this section is sufficiently specific to support a 241(6) claim. *Shields v. General Electric Company*, 3 A.D.3d 715, 771 N.Y.S.2d 249 (3d Dep't 2004).

30-34. A subcontractor's electrician working on a restoration project was injured when the ladder, which lacked anti-skid footing, slid out from under him as he grabbed the ladder with his right hand and placed his right foot on the first rung. His left foot was still on the ground. The First Department observed that Labor Law § 240(1) protects workers from injury related to the force of gravity, not injury caused by inadequate, malfunctioning or defectively designed devices. Thus, 240(1) was inapplicable because he did not fall from the ladder. In addition, the electrician's Labor Law § 200 claim was dismissed because the general contractor did not direct or control the electrician's work. *Vasiliades v. Lehrer McGovern & Bovis, Inc.*, 3 A.D.3d 400, 771 N.Y.S.2d 27 (1st Dep't 2004).

30-35. An exterminator was injured when he fell from a ladder while applying pesticide to the upper roof of the premises. The Supreme Court rejected the exterminator's Labor Law § 240(1) claim, finding that the application of pesticides does not fall under the activity of "cleaning," or any other activity in that section. In addition, the exterminator's Labor Law § 241(6) claim was denied because pesticide application is "routine maintenance," and not construction, demolition or excavation. Finally, the owner of the premises was entitled to summary judgment on the Labor Law § 200 claim because the owner did not supervise or control the exterminator's work, and the owner did not have actual or constructive notice of a dangerous condition. *Vanderwiele v. Steiglehner*, 3 Misc. 3d 681, 773 N.Y.S.2d 849 (Sup. Ct., Sullivan Co. 2004).

MECHANIC'S LIENS AND TRUST CLAIMS

30-36. Where a subcontractor's notice of pendency expired after three years and was not extended prior thereto, its lien foreclosure action must be dismissed because the underlying mechanics' lien has also expired as a matter of law. *MCK Building Associates, Inc. v. St. Lawrence University*, 5 A.D.3d 911, 773 N.Y.S.2d 475 (3d Dep't 2004).

30-37. The lien foreclosure action by an unpaid subcontractor on a condominium conversion project was dismissed because the lien was not filed against the tax lots created when the declaration establishing a plan of condominium ownership was recorded (Lien Law § 7). A subsequent action by the subcontractor sought to recover against common charges upon which a trust is imposed by Real Property Law § 339-l. That action was similarly dismissed. The board of managers elected by the unit holders had not contracted for or consented to the work and had no authority to collect common charges at the time the subcontractor's work was performed. The condominium conversion sponsor had no contractual relationship with the subcontractor. The court concluded that the trust fund statute could not be interpreted so as to require the unit holders to pay twice for the same improvements. *Northeast Restoration Corp. v. K&J Construction Co., L.P.*, 4 Misc. 3d 197, 776 N.Y.S.2d 780 (Sup.Ct., N.Y. Co. 2004).

PREVAILING WAGES

30-38. Employees of a steel company, which acted solely as a materials supplier, were not subject to the prevailing wage laws. The court found that while public works contracts are generally subject to the prevailing wage law under Labor Law § 220(3), wages paid to workers under contracts for the sale of goods used in

public works projects are not covered under that section of law, even in cases where the worker creates a custom product or performs finishing work on materials before delivery. *Ramaglia v. New York State Department of Transportation*, 5 A.D.3d 909, 773 N.Y.S.2d 167 (3d Dep't 2004).

PRINCIPAL AND SURETY

30-39. A subcontractor incurred substantial costs in labor and materials to specially fabricate replacement windows for a public improvement project. When the prime contractor failed to pay an earlier invoice, the subcontractor refused to deliver the windows unless and until it was paid. The prime contractor was terminated. Neither Lien Law § 5 nor State Finance Law § 137 supported a claim by the subcontractor against the terminated prime contractor's surety on the payment bond. By withholding delivery, the subcontractor had not "furnished" labor or materials for the public improvement. *Graham Architectural Products Corp. v. St. Paul Mercury Insurance Company*, 303 F. Supp. 2d 274 (E.D.N.Y. 2004).

30-40. The provisions of a labor and material payment bond which purported to condition claimants' recovery against the surety upon the receipt of payment by the principal (general contractor) from the obligee (owner) were contrary to public policy, void, and unenforceable, in accordance with the Court of Appeals decision in *West-Fair Electrical Contractors v. Aetna Casualty & Surety Company*, which abrogated "pay-when-paid" clauses in construction subcontracts. *American Building Supply Corp. v. Avalon Properties*, 8 A.D.3d 515, 779 N.Y.S.2d 517 (2d Dep't 2004).

WORKERS' COMPENSATION

30-41. A subcontractor's employee was injured when he tripped and fell on a piece of iron rebar at a construction site. He sued the property owner and the general contractor who commenced a third-party action against the subcontractor. Pursuant to an insurance, indemnification and safety agreement, the subcontractor contractually agreed to indemnify the owner "to the fullest extent permitted by law." The agreement did not specify the persons covered or the types of losses covered and did not refer to the job site on which subcontractor's employee was injured. The indemnification clause was inadequate to overcome the limit on an employer's exposure to third-party liability under Workers' Compensation Law § 11. *Rodrigues v. N & S Building Contractors, Inc.*, 8 A.D.3d 876, 778 N.Y.S.2d 543 (3d Dep't 2004).

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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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