

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

32-1. A construction contract included an arbitration clause and a choice-of-law provision which stated that it was governed by New York law. The contract did not, however, expressly provide for New York law to govern its enforcement. Therefore, the Court of Appeals, affirming an order by the First Department, concluded that the Federal Arbitration Act ("FAA") applied because the contract had an "effect" on interstate commerce (out-of-state structural engineers, material suppliers, and equipment suppliers to the in-state project). Since the choice-of-law provision did not reference both the agreement and its enforcement, the Court of Appeals refused to apply the New York rule that threshold statute of limitations questions are decided by the court, not the arbitrator. The FAA recognizes contractual choice-of-law provisions which express the parties' intention to have statute of limitations issues determined by the court. Otherwise it is presumed that such questions are left for the arbitrator. Because this contract did not so express the intention of the parties, the timeliness of the demand for arbitration was a question reserved for the arbitrator. *Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 793 N.Y.S.2d 831 (2005). See Arbitration 30-17, *Construction & Surety Law Newsletter* (Fall 2004).

32-2. General Municipal Law § 399-c precludes mandatory arbitration of a residential owner's claims against the architects. In a case of first impression, the Second

Department decides that an agreement for the provision of architectural services in the design and construction of a home is a contract for the sale or purchase of "consumer goods" within the meaning of the statute. *Ragucci v. Professional Construction Services*, 25 A.D.3d 43, 803 N.Y.S.2d 139 (2d Dep't 2005).

ARCHITECTS, ENGINEERS & SURVEYORS

32-3. Pursuant to a liquidating agreement, the owner asserted its own claims as well as claims of the general contractor against the architect, even though the general contractor and the architect were not in privity of contract. The First Department held that the liquidating agreement was enforceable under New York law, and that the owner could pursue the general contractor's claims against the architect. The elements of an enforceable liquidating agreement are (1) acknowledgment and acceptance of liability for damages caused by a third party, (2) liquidation of such liability in the amount of a recovery against the third party at fault, and (3) pass-through of that recovery against the third party to the damaged party. *North Moore Street Developers, LLC v. Meltzer/Mandl Architects, P.C.*, 23 A.D.3d 27, 799 N.Y.S.2d 485 (1st Dep't 2005).

CONSTRUCTION CONTRACT INTERPRETATION

32-4. The owner's failure to give timely notice of its breach of contract claims against the contractor, as required by the modified AIA form of construction contract,

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did not result in a waiver of such claims (relating to the quality and timeliness of the work) to the extent that they were raised in defense of the contractor's payment claims against the owner. Similarly, the owner could assert breach of contract claims otherwise barred by the statute of limitations as recoupment pursuant to CPLR § 203(d), limited to the amount claimed by the contractor in its payment complaint. *United States Fidelity and Guaranty Company v. Delmar Development Partners, LLC*, 22 A.D.3d 1017, 803 N.Y.S.2d 254 (3d Dep't 2005).

INSURANCE

32-5. A two and one-half month delay by subcontractor's commercial general liability insurer in disclaiming liability and denying coverage did not comply with the prompt written notice requirement of Insurance Law § 3420(d), and was ineffective against an owner and general contractor named as additional insureds on the subcontractor's policy. That statute did not, however, provide relief to the general contractor's commercial liability insurer, because insurers are not among the specified categories of persons entitled to prompt written notice of such disclaimer of liability and denial of coverage. A policy exclusion for new residential construction did not apply to construction of a mixed-use building. *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Insurance Company*, 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005).

LABOR LAW §§ 200, 240, 241

32-6. Applying a new advertisement to the face of a billboard was no more than cosmetic maintenance or decorative modification, which did not "alter" the billboard's structure. A worker who fell while engaged in such activity had no Labor Law § 240(1) claim against the owner. *Munoz v. DJZ Realty, LLC*, 5 N.Y.3d 747, 800 N.Y.S.2d 866 (2005).

32-7. In a 4 - 3 decision, the Court of Appeals held that a construction manager, which assumed supervisory control and authority by the express terms of its contract with the owner, became liable as the statutory agent of the owner under Labor Law § 240(1) for injuries sustained by a prime contractor's special employee who fell. There was no general contractor on the project. *Walls v. Turner Construction Company*, 4 N.Y.3d 861, 798 N.Y.S.2d 351 (2005).

32-8. The federal Immigration Reform and Control Act of 1986 (8 U.S.C. § 1324a et seq.) does not preempt, and the United States Supreme Court opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), does not preclude an undocumented alien employee from recovering damages for common law negligence and violations of Labor Law §§ 200, 240, and 241(6), including lost wages. *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 802 N.Y.S.2d 56 (2d Dep't 2005).

32-9. To impose liability for alleged violations of Labor Law §§ 240(1) and 241(6), such violations must be the proximate

cause of the injury. Here the sole proximate cause of the worker's injuries was his failure to have his harness lanyard reattached to the structure before he continued his elevated work. *Negron v. City of New York*, 22 A.D.3d 546, 803 N.Y.S.2d 664 (2d Dep't 2005).

32-10. A divided panel of the Fourth Department dismissed the Labor Law § 240(1) claims of a subcontractor's employee who wrenched his back when his ladder tipped but he regained his balance by grabbing a hanger rod on the ceiling. The majority concluded that he had not fallen and was therefore not protected by the statute. *Robinson v. East Medical Center, L.P.*, 17 A.D.3d 1027, 794 N.Y.S.2d 184 (4th Dep't 2005).

MECHANICS' LIENS AND TRUST CLAIMS

32-11. The Second Department declines to enforce a "pay-when-paid" clause set forth in a subcontract governed by Florida law between a Florida general contractor and a subcontractor for work to be performed in New York. The "pay-when-paid" clause is enforceable in Florida, but the court concludes that it violates New York public policy, as expressed in Lien Law § 34 and the *West-Fair* decision by the Court of Appeals. *Welsbach Electric Corp. v. MasTec North America, Inc.*, 23 A.D.3d 639, 804 N.Y.S.2d 805 (2d Dep't 2005). See Bulletin; Subcontractors 22-16, *Construction & Surety Law Newsletter* (March, 1996).

32-12. An owner recovered an arbitration award and court order for significant damages on its claims against the defaulting general contractor which never completed the work. Retainage applied as an offset against such claims did not constitute trust assets under Article 3-A of the Lien Law, as asserted by an unpaid subcontractor, because the general contractor never received such funds and was not entitled to them. *Pecker Iron Works, Inc. v. N.Y.C. Health Center*, 22 A.D.3d 259, 802 N.Y.S.2d 399 (1st Dep't 2005).

32-13. Notwithstanding Lien Law § 34 and the Court of Appeals decision in *West-Fair*, the First Department recognizes the enforceability of a "pay-when-paid" clause set forth in a subcontract including a Florida choice-of-law provision. The court finds that the public policy expressed by Lien Law § 34 as interpreted by *West-Fair* is not "fundamental," and the prohibition against "pay-when-paid" clauses is not based on a deep-rooted tradition because such clauses were enforced in New York prior to the 1995 *West-Fair* decision. Accordingly, in the court's unanimous opinion, the Florida choice-of-law provision takes precedence. *Hugh O'Kane Electric Co. v. MasTec North America, Inc.*, 19 A.D.3d 126, 797 N.Y.S.2d 45 (1st Dep't 2005).

PREVAILING WAGES

32-14. It was neither arbitrary nor capricious for the Department of Labor to employ a "nature of the work" test, as opposed to an "actual or prevailing practice" test, for the purpose of establishing an appropriate trade classifica-

tion for a particular category of work in order to determine the applicable prevailing wage for such work. The DOL's methodology was consistent with statutory authorization, and its determination was entitled to deference by the courts. *Lantry v. State*, 6 N.Y.3d 49, 810 N.Y.S.2d 729 (2005). See Prevailing Wages 31-10, *Construction & Surety Law Newsletter* (Spring 2005).

32-15. The Court of Appeals determines that annualization of wage supplements is a reasonable methodology by which the Department of Labor evaluates compliance with the prevailing wage requirements of Labor Law § 220(3) and is entitled to deference by the courts. *Chesterfield Associates v. N.Y.S. Department of Labor*, 4 N.Y.3d 597, 797 N.Y.S.2d 389 (2005).

32-16. Substantial evidence within the record supported the finding that contractor/employer willfully violated the prevailing wage law by paying an apprentice employee, who worked without the supervision of a journeyman, at the apprentice rate rather than the journeyman rate. A 20% civil penalty was therefore justified. The fact that neither the employee nor his union complained about the rate of pay was irrelevant. *In re Sarco Indus. v. Angello*, 23 A.D.3d 715, 804 N.Y.S.2d 440 (3d Dep't 2005).

PUBLIC CONTRACTS

32-17. The contractor bore the risk of unforeseen subterranean obstacles which damaged its equipment, interrupted and delayed the project, and required additional labor and material. The public owner's procurement documents made each bidder responsible for inspecting soil conditions at the construction site and precluded extra compensation. The specifications included test borings more than one mile from the construction site, but expressly disclaimed any guarantee that such borings were representative of the site of the work. The public owner made no misrepresentation and withheld no information. The contractor was not entitled to additional compensation. *All County Paving v. Suffolk County Water Auth.*, 20 A.D.3d 438, 798 N.Y.S.2d 523 (2d Dep't 2005).

STATUTES

32-18. Chapter 1 of the Laws of 2005—among other comprehensive regulations on lobbying, adds sections 139-j and 139-k to the State Finance Law. Lobbying of governmental entities engaged in governmental procurements is prohibited, and contracting agencies are required to designate a person or persons to be exclusively responsible for procurement-related communications. Contacts between contractors and governmental entities engaged in procurement must be disclosed. Effective January 1, 2006.

32-19. Chapter 683 of the Laws of 2005—adds section 7328 to the Education Law. Mandatory continuing education requirements for licensed landscape architects are established by this act. Effective January 1, 2006.

32-20. Chapter 720 of the Laws of 2005—amends subdivision 3 of section 220 of the Labor Law. The same criminal penalties imposed on prime contractors who willfully pay less than prevailing wages on public works projects are now imposed on subcontractors. Effective October 11, 2005.

SUBCONTRACTORS

32-21. Settling a split between the First and Second Departments, the Court of Appeals concludes that State Finance Law § 137 permits subcontractors' assignees to recover payment from bond sureties. *Quantum Corporate Funding, Ltd. v. Westway Industries, Inc.*, 4 N.Y.3d 211, 791 N.Y.S.2d 876 (2005).

WORKERS' COMPENSATION

32-22. A generic, written indemnification agreement by a subcontractor to a general contractor, which did not refer to any specific worksite but related to the "performance of subcontracted work," was sufficiently particular and sufficiently clear and unambiguous to be enforceable as an express agreement and a statutory exception to the prohibition against third-party indemnification or contribution claims against employers, otherwise imposed by Workers' Compensation Law § 11. *Rodrigues v. N & S Building Contractors, Inc.*, 5 N.Y.3d 427, 805 N.Y.S.2d 299 (2005).

32-23. The general contractor/employer obtained commercial general liability insurance coverage, procured a payment and performance bond, and performed the work required by a written construction contract, but it never signed the contract. The Court of Appeals applied the common law rule that the parties' intent to enter into an enforceable contract may be determined by their course of conduct. Accordingly, the "written contract" requirement of section 11 of the Workers' Compensation Law did not preclude the owner's third-party action against the general contractor/employer for common law and contractual indemnification from liability for the claims of the general contractor/employer's injured employee brought against the owner. *Flores v. Lower East Side Service Center, Inc.*, 4 N.Y.3d 363, 795 N.Y.S.2d 491 (2005).

32-24. A subcontractor's employee fell from a scaffold and suffered an injury not considered "grave" within the meaning of the Workers' Compensation Law. The injured employee sued the general contractor under Labor Law § 240(1). The general contractor brought a third-party action against the subcontractor/employer for common law indemnification and contribution. The Court of Appeals concluded that Workers' Compensation Law § 11 did not shield the subcontractor/employer from liability in the third-party action because it had failed to procure workers' compensation coverage for its injured employee. *Boles v. Dormer Giant, Inc.*, 4 N.Y.3d 235, 792 N.Y.S.2d 375 (2005).

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