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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

28-1. An owner was compelled to arbitrate with its contractor's surety under a construction contract's arbitration clause. The Second Circuit held that a signatory is estopped from avoiding arbitration with a nonsignatory "when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Choctaw Generation L.P. v. American Home Assurance Company*, 271 F.3d 403 (2d Cir. 2001).

28-2. The Second Circuit reversed the Southern District's decision to deny a motion to compel arbitration between an architect/contractor and a homeowner. The homeowner argued that the arbitration clause contained in the contract facilitated the architect/contractor's fraudulent scheme. But there was not a "substantial relationship" between the fraud and the arbitration clause itself, and therefore arbitration was appropriate. *Garten v. Kurth*, 265 F.3d 136 (2d Cir. 2001).

28-3. Arbitration was conducted in Philadelphia, Pennsylvania in accordance with the terms of a subcontract for work performed in Brooklyn, New York. The subcontractor brought an action in the Southern District (Manhattan) to vacate the arbitration award. Exercising its discretion, the Southern District Court transferred the action to vacate to the Eastern District of Pennsylvania (Philadelphia) because the "courts in this Circuit considering the proper venue for actions under the Federal Arbitration Act . . . have generally found that the interests of justice and the convenience of all involved are best served by having the action heard in the forum where the arbitration took place." *Crow Construction Company v. Jeffrey M. Brown Associates, Inc.*, 2001 WL 1006721 (S.D.N.Y. 2001).

28-4. A bankrupt general contractor was ordered by the bankruptcy court to complete an arbitration demanded by the subcontractor. An arbitration award was granted to the subcontractor. The general contractor's surety on its payment bond was collaterally estopped by the arbitration award, and the subcontractor was entitled to summary judgment against the surety, even though the subcontractor had filed a proof of claim in the bankruptcy court before moving to lift the automatic stay and to remit the arbitration proceeding and the state court actions to their original forums. *Azevedo & Boyle Contracting, Inc. v. J. Greaney Construction Corp.*, 285 A.D.2d 571, 728 N.Y.S.2d 743 (2d Dep't 2001).

ARCHITECTS, ENGINEERS AND SURVEYORS

28-5. Title III of the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*)(ADA) prohibits discrimination based on disability by any person who owns, leases (or leases to) or operates a place of public accommodation, and proscribes the failure to design and construct public accommodations and commercial facilities that are readily accessible to and usable by individuals with disabilities. The Ninth Circuit concludes that an architectural firm is not liable for injunctive relief under the ADA because it is not the owner, lessee, lessor or operator of a noncompliant public accommodation (movie theater complex) whose design and construction may have discriminated against the disabled. *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029 (9th Cir. 2001).

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Insurance Law Practice

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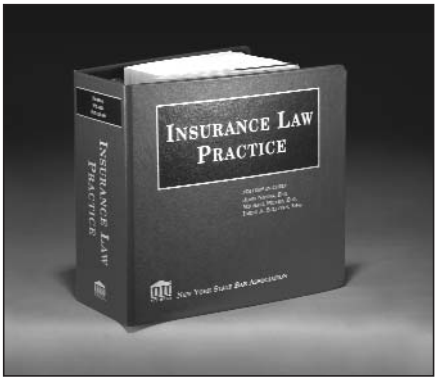

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LABOR LAW §§ 200, 240, 241

28-6. A construction worker injured himself when an unsecured ladder tipped over while he was installing conduit at a high school. The school district argued that it was not liable because the worker caused the accident by the negligent placement of the ladder. The Fourth Department held that the school was liable under Labor Law § 240 because the school district's statutory duty to provide a non-defective, properly placed ladder was non-delegable and the injured worker's contributory negligence is not a defense. *Kazmierczak v. Town of Clarence*, 286 A.D.2d 955, 737 N.Y.S.2d 177 (4th Dep't 2001).

28-7. Where the evidence showed that an injured worker was wearing a body harness and was attached to a safety line while performing his work, the state failed to establish a deliberate refusal to use the safety equipment provided. Therefore, as a matter of law, the worker could not be deemed to be a recalcitrant worker solely because he was not so attached when another safety device, a scaffold, collapsed. And contributory negligence by an injured worker is not a defense to a Labor Law § 240(1) claim. *Kouros v. State of New York*, 288 A.D.2d 566, 732 N.Y.S.2d 277 (3d Dep't 2001).

28-8. The hook on a crane is not one of the "moving parts" within the meaning of the Industrial Code (12 N.Y.C.R.R. section 23-8.1(i)). A construction worker who sustained injuries when he was struck by the hook on a crane could not prevail under Labor Law § 241(6). The regulation could not be reasonably interpreted to include the hook on the crane as among those "moving parts," such as gears and chains, which must have guards "securely fastened in place" when the crane is operating. *Penta v. Related Companies, L.P.*, 286 A.D.2d 674, 730 N.Y.S.2d 140 (2d Dep't 2001).

28-9. An injured worker brought suit against the owners of the land beneath the building and the building owners under the Scaffold Law. The Second Department held that the owners of the land beneath the building were liable because they were "owners" under Labor Law § 240(1), despite the fact that they leased the land to someone else, were not the owners of the building on the land and had not contracted for the work or benefited from it. Since their liability under § 240(1) rested upon their ownership of the land, the contract and benefit issues were "legally irrelevant." *Mejia v. Moriello*, 286 A.D.2d 667, 730 N.Y.S.2d 131 (2d Dep't 2001).

28-10. An employer volunteered to paint a church gymnasium free of charge. One of his employees brought suit against the church and the employer when he slipped and fell from an extension ladder while painting the gym. The church argued that the worker could not recover because it did not pay the employer. The First Department held that the employee was not a "volunteer" excluded from recovery under Labor Law § 240(1) because he reported to work on the day of his accident, was directed to perform the painting project at the church by his supervisor, was paid by his employer to complete the task and received workers' compensation benefits for his injuries. *Daniello v. Holy Name Church*, 286 A.D.2d 268, 730 N.Y.S.2d 56 (1st Dep't 2001).

28-11. A tree trimmer brought suit against the property owner after he allegedly injured himself when a tree limb hit him and the ladder he was standing on, causing him to fall. Tree trimming does not fall within the ambit of Labor Law §§ 240(1) and 241(6) because a tree is not a building or structure. The worker's claim also failed because the type of activity the trimmer was performing when he fell was routine maintenance in a non-construction, non-renovation context. *Burr v. Short*, 285 A.D.2d 576, 728 N.Y.S.2d 741 (2d Dep't 2001).

28-12. A worker who was removing sections of a city sidewalk was struck by a streetlight pole that fell due to its corroded condition. As a result, he sustained head and shoulder injuries. The worker sued the city under Labor Law §§ 200, 240 and 241(6). The Third Department held that the city was not liable under § 200 because it did not exercise any direct control over the contractor's employees or the manner in which they performed their work. Furthermore, the worker did not sufficiently demonstrate that the city had constructive notice of the pole's condition, despite the fact that a corroded light post fell at a different city location approximately three years earlier. *Saintano v. City of Albany*, 285 A.D.2d 708, 727 N.Y.S.2d 741 (3d Dep't 2001).

MECHANICS' LIENS AND TRUST CLAIMS

28-13. Pursuant to Labor Law § 220-b(2)(a)(1), the Department of Labor (DOL) may direct a contracting public agency to withhold funds from any payment due or earned by a contractor pending a determination of the contractor's statutory liability for unpaid wages on that agency's public improvement project (notice of withholding) or on an unrelated public improvement project (notice of cross-withholding). For purposes of cross-withholding to pay laborers' wages on an unrelated public improvement project, the DOL's claims are subordinate in priority to those of Lien Law article 3-A trust beneficiaries. The surety of a defaulting contractor, which has completed the project under its performance bond and has fully satisfied the claims of unpaid subcontractors and suppliers under its payment bond, is equitably subrogated to the owner's right to apply the unpaid contract balance to the completion of the project and is also subrogated to the rights of the article 3-A trust beneficiaries which it has paid. That surety therefore has priority over the claims of the DOL for cross-

withholding against the unpaid contract balance to the extent of the sums paid out by the surety to complete the project and to pay subcontractors and suppliers of the defaulting contractor. The Court of Appeals thus unanimously reverses the contrary decision of the Third Department. *RLI Insurance Company, Surety Division v. New York State Department of Labor*, 97 N.Y.2d 256, ___ N.Y.S.2d ___ (2002). *See* Mechanics' Liens 27-31, *Construction & Surety Law Newsletter* (Fall 2001).

[The Editor thanks Terrence J. O'Connor of the New York City School Construction Authority, Long Island City, New York, for reporting this case.]

28-14. For purposes of Section 17 of the Lien Law, the term "a single family dwelling" means at least one such dwelling and perhaps more than one. *Cook v. Carmen S. Pariso, Inc.*, 287 A.D.2d 208, 734 N.Y.S.2d 753 (4th Dept. 2001).

PUBLIC CONTRACTS

28-15. Under Section 137(4) of the State Finance Law, a subcontractor has one year from the date final payment became due to commence an action on a statutory payment bond. This is a statute of limitations which may be tolled by CPLR 205(a) (new action commenced within six months after termination of prior action). *Scaffold-Russ Dilworth Ltd. v. Shared Management Group, LTD*, 289 A.D.2d 932, 734 N.Y.S.2d 764 (4th Dept. 2001).

STATUTES

28-16. Chapter 119 of the Laws of 2001—amends specified sections of the Executive Law to define "truss-type construction" and to require that commercial and industrial structures utilizing truss-type construction be marked by a sign or symbol sufficient to warn fire control and other emergency personnel against the danger of premature collapse during fires. The development of such signs or symbols is delegated to the State Fire Prevention and Building Code Council. Local governments are to enforce this legislation, which shall not apply to cities of one million or more persons. Effective January 1, 2002.

28-17. Chapter 217 of the Laws of 2001—amends specified sections of the Education Law to require every electronically operated partition or room divider (within school buildings) to be equipped with safety devices under standards in rules and regulations to be promulgated by the Commissioner of Education, and to apportion building aid for such safety devices. The disabling of any such safety equipment is made a violation punishable by not more than fifteen days imprisonment, or a fine not to exceed $100, or both. Scheduled to take effect August 29, 2002.

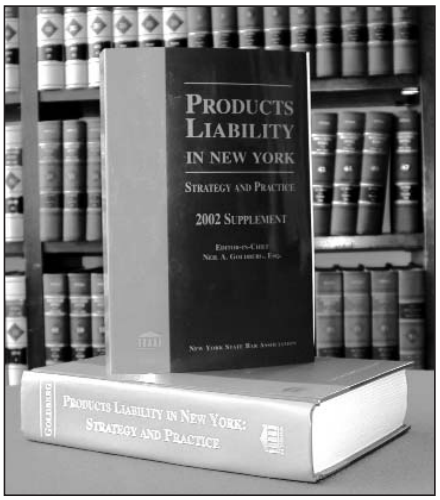
28-18. Chapter 490 of the Laws of 2001—amends specified sections of the General City Law, the Town Law and the Village Law to establish a procedure whereby such municipalities may grant a revocable license upon written request following a public hearing, authorizing the owner of property, whose front or exterior walls encroach on a street or highway but do not adversely impact the users thereof, to maintain any such encroachment during its existence. The license may be revoked if it is subsequently determined that improvement of the street or highway would be impeded or interfered with, or that traffic or use of the improved street or highway would be obstructed by such encroachment. The license does not confirm any right or claim against the municipality. Effective November 21, 2001.

28-19. Chapter 526 of the Laws of 2001—adds article 10-A to the Labor Law, which specifies the standards for plumbing materials and the use of standard piping materials. The amendment is effective on January 1, 2002, and applies to all new construction commenced on that date or thereafter, but expires and is deemed to be repealed on December 31, 2004.

SUBCONTRACTORS

28-20. A liquidating agreement (1) imposes liability upon a general contractor for the subcontractor's increased costs, providing the general contractor with a basis for legal action against the owner, (2) liquidates the general contractor's liability to the amount of its recovery against the owner, and (3) provides for the "pass-through" of that recovery to the subcontractor. A "no damages for delay" clause in the subcontracts did not preclude the general contractor from assuming liability for its subcontractors' delay damages under a liquidating agreement negotiated subsequent to the original general contract and the subcontracts. The general contractor was not required to obtain permission from the developer or owner as a condition precedent to entering into the liquidating agreement with subcontractors, despite the developer's and owner's contractual right of pre-approval as to subcontractors who would perform the work. The developer and owner had neither a generic right to pre-approve contracts between the general contractor and its subcontractors, nor a specific right to pre-approve a liquidation agreement. *Bovis Lend Lease LMB v. GCT Venture, Inc.*, 285 A.D.2d 68, 728 N.Y.S.2d 25 (1st Dep't 2001).

Products Liability in New York: Strategy and Practice



Editor

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Products Liability in New York: Strategy and Practice is a comprehensive, practical guide for instituting or defending a products liability case. All aspects of handling a products liability case—from both the plaintiff's and the defendant's perspectives—are covered in this landmark text.

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