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Construction & Surety Law Newsletter

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of the New York State Bar Association

Summary of Decisions and Statutes

ARBITRATION

30-1. The developers sued the architect and the general contractor for faulty design and construction. The developers settled with the general contractor. They agreed to submit their dispute with the architect to binding arbitration. The arbitrator's award to the developers for total damages consciously failed to offset the settlement with the general contractor. That failure violated public policy and permitted the court to modify the arbitrator's award. Double recoveries are prohibited by common law and by statute. CPLR 4545 codifies the collateral source rule. General Obligations Law § 5-108 requires that a verdict be reduced by the greater of the settlement amount or the settlor's apportioned share of the damages. *Waehner v. Frost*, 1 Misc. 3d 893, 770 N.Y.S.2d 596 (Sup. Ct., Saratoga Co. 2003).

ARCHITECTS, ENGINEERS & SURVEYORS

30-2. A school renovation project disclosed the presence of asbestos 13 years after the architect and its consulting engineer certified that all asbestos had been removed from designated areas. The school district's action for professional malpractice was governed by the three-year statute of limitations under CPLR 214(6), and therefore barred. CPLR 214-c computes the three-year limitations period for injuries caused by the latent effects of exposure to any substance, from the earlier of the date of discovery of the injury or the date when the injury should have been discovered with reasonable diligence. That latter section was inapplicable because the district's property damage was caused by the original installation of the asbestos, and not by any intervening escape or exposure. *Germantown Central School District v. Clark, Clark, Millis & Gilson, AIA*, 100 N.Y.2d 202, 761 N.Y.S.2d 141 (2003).

LABOR LAW §§ 200, 240, 241

30-3. A self-employed contractor was renovating a two-family house. The upper portion of the ladder he was standing on retracted, injuring his ankle. The ladder was not defective and did not fall. The contractor sued the homeowner and the not-for profit lender under Labor Law § 240(1). The action was dismissed against the homeowner by reason of the statutory exemption for owners of one and two-family dwellings, who do not direct or control the work. The jury concluded that the accident was caused solely by the contractor's negligence. The Court of Appeals agreed that there was no statutory violation as a proximate cause of the injury, and therefore no liability. Furthermore, the not-for-profit lender was not the agent of the owner, having neither supervised nor controlled the job. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

30-4. When the worker was injured, he was performing a monthly maintenance check of air conditioning units. He was returning to a faulty unit with tools to make repairs when the ladder he was climbing "'kicked out'" and he fell. Such activities are not covered by Labor Law § 240(1). Although "repairing" is included among the enumerated activities of the statute, the work at issue was "routine maintenance." It involved replacing components that require replacement due to normal wear and tear. The injured worker's claim under Labor Law § 241(6) also failed because that section is "inapplicable outside the construction, demolition or excavation contexts." *Esposito v. New York City Industrial Development Agency*, 1 N.Y.3d 526, 770 N.Y.S.2d 682 (2003).

30-5. The injured roofer slipped on some frost and fell down the roof to the eaves, although not to the ground. He had not been provided with any safety

devices, and he was subjected to an "elevation-related" risk. Safety devices could have kept him from falling. It was undisputed that 12 N.Y.C.R.R. § 23-1.4 required roofing brackets, crawling boards or safety belts. The argument that Labor Law § 240(1) was inapplicable because the injured roofer did not hit the ground was called by the court "an overly strict interpretation." *Striegel v. Hillcrest Heights Development Corp.*, 100 N.Y.2d 974, 768 N.Y.S.2d 727 (2003). *See* Labor Law §§ 200, 240, 241, 26-8, *Construction & Surety Law Newsletter* (Spring 2000).

30-6. The employer contracted to clean, repair, and rehabilitate air handling units at the World Trade Center, including the leveling of floors, laying concrete, and rebuilding walls to replace large air filtering systems. The injured employee fell from a ladder while preparing an air handling unit for inspection. The inspections were ongoing and contemporaneous with the other work performed under the contractor/employer's single contract. The work involved building alteration, not routine maintenance. This activity was covered by Labor Law § 240(1). *Prats v. The Port Authority of New York and New Jersey*, 100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003).

30-7. An electrician was involved in the construction of a sewage pumping station and was employed by the electrical subcontractor for the project. While working in the basement, he and a coworker heard some crashes and felt a trembling in the building. The electrician climbed a ladder to investigate. Another coworker then came running toward the ladder, shouting "get out of the way" or "look out." The electrician feared for his safety and jumped from the ladder, fracturing his left foot and ankle. He sued, alleging common-law negligence and violations of Labor Law §§ 200 and 241(6). The noises had resulted from mishaps in the process of connecting a section of iron pipe, which injured other workers in the immediate vicinity. The Fourth Department found that the electrician's injuries were not a foreseeable consequence of the alleged negligence or Labor Law violations. The court also felt that the actions of the shouting coworker and of the injured electrician himself were intervening and superseding causes of his injuries. *Scarver v. County of Erie*, 2 A.D.3d 1384, 770 N.Y.S.2d 222 (4th Dep't 2003).

30-8. The injured worker's employer was a prime contractor, responsible for the electrical work, and not a subcontractor. The general construction contractor was also a prime contractor, and not a general contractor with respect to the project. It had no authority over other prime contractors and assumed no authority to control the activity which caused the injury. The general construction contractor was therefore not liable under Labor Law §§ 240(1) or 240(6). *Chavez v. Jordan-Elbridge Central School District*, 309 A.D.2d 1289, 765 N.Y.S.2d 565 (4th Dep't 2003).

30-9. After making necessary repairs to an air conditioning unit, the repairman used a ladder to climb up on the roof of the building to obtain the serial and model numbers of the unit. He fell from the ladder as he was descending. A divided panel of the Fourth Department concluded that obtaining the serial and model numbers was not part of the repair work, and was not otherwise protected activity. The injured repairman could not recover damages under Labor Law § 240(1). *Beehner v. Eckerd Corp.*, 307 A.D.2d 699, 762 N.Y.S.2d 756 (4th Dep't 2003).

MECHANIC'S LIENS AND TRUST CLAIMS

30-10. A building construction lender and mortgagee took an assignment of the contractor's turnkey contract with the owner/purchaser. The purchase payments were made directly to the mortgagee which applied them in payment of the loan. The loan agreement and mortgage were duly recorded in accordance with Lien Law § 22, and the mortgage contained the requisite covenant required by section 13. The mortgage referred to the assignment, but the assignment itself was not filed. The mortgagee neglected to file any "Notice of Lending" under section 73. Accordingly, the mortgagee, as a statutory trustee, breached its fiduciary duty to unpaid subcontractors who were trust beneficiaries under Article 3-A. The payments applied to repay the loan constituted diversions of trust assets under these circumstances. Because the parties had entered into a stipulation on damages, the Court of Appeals did not consider the questions of whether the mortgagee's statutory priority as a secured lender was invalidated by the trust fund diversions, or whether the secured lender was liable to the trust beneficiaries for the full amount of the diverted trust funds. *Aspro Mechanical Contracting Inc. v. Fleet Bank*, __ N.Y.3d __, __ N.Y.S.2d __, 2004 N.Y. LEXIS 140 (2004).

PREVAILING WAGES

30-11. Public works contractors provide prevailing wage fringe benefit supplements by contributing to a fund or plan, or by making cash equivalent payments to the employee. New York's annualization regulation (12 N.Y.C.R.R. § 220.2 (d)(1)) computes the cash equivalent payment based on the total hours worked on both private and public works projects. This regulatory scheme is not preempted by the National Labor Relations Act (29 U.S.C. § 151 et seq.). The *Machinists* doctrine preempts state regulation of labor bargaining conduct if Congress intended that such conduct be left to the free play of economic forces between labor and management. Here, the Second Circuit found no connection between the mandated prevailing wage supplement benefit and labor/management bargaining. *Rondout Electric, Inc. v. New York State Department of Labor*, 335 F.3d 162 (2d Cir. 2003).

PUBLIC CONTRACTS

30-12. A school district's award of a construction contract to the second lowest bidder was not in violation of General Municipal Law § 103, where the lowest bidder elected not to bid on an alternate the district chose to have completed. The Fourth Department admonished the district that its failure to prioritize the alternates prior to bidding gave the appearance of impropriety. Nevertheless, absent a showing of actual favoritism or fraud, the district's decision would be left undisturbed. The district's inability to rank the alternates until it knew their costs was found to be a rational basis for its failure to prioritize. *Sicoli & Massaro, Inc. v. Grand Island Central School District*, 309 A.D.2d 1229, 765 N.Y.S.2d 109 (4th Dep't 2003).

STATUTES

30-13. Chapter 524 of the Laws of 2003—amends section 21.2(a) of the Lien Law. The period of time, within which a public improvement lien must be extended by filing, by court order, or by the filing of a notice of pendency in an action to enforce the lien, is increased from six months to one year (measured from the filing of the notice of lien or the filing of an extension thereof). If not extended, a public improvement lien will be discharged by the passage of time. Effective September 17, 2003.

30-14. Executive Order No. 127 (June 16, 2003)—New York State departments, offices, divisions, public benefit corporations, and public authorities or commissions, including SUNY and CUNY, are required to publicly identify persons who make contact for the purpose of influencing the procurement process and to provide public access to records of contacts made to influence the solicitation, evaluation or award of a procurement contract, or the preparation of specifications or requests for submission of proposals therefor. A "procurement contract" includes any contract or agreement for the purchase of goods or services, transactions involving interests in real property, and public works, if the annualized expenditure would exceed $15,000. Contracts required by law to be awarded to the lowest responsible bidder or pursuant to a competitive bid process are not included. Effective August 15, 2003.

WORKERS' COMPENSATION

30-15. The contractor paid for the workers' compensation benefits of an uninsured subcontractor's injured employee under Workers' Compensation Law § 56. The contractor could not assert the workers' compensation payments as a bar to the employee's action against it because such payments did not create an employment relationship and there was no evidence that the injured employee was a special employee of the contractor. However, the subcontractor was not precluded from asserting the workers' compensation payments as a bar to the contractor's third-party claims. *Joyce v. McKenna Associates, Inc.*, 2 A.D.3d 592, 768 N.Y.S.2d 358 (2d Dep't 2003).

30-16. The corporate landowner/general contractor and the corporate subcontractor were commonly owned by a single individual. An action brought against the landowner/general contractor by an injured employee of the subcontractor was not barred by the exclusivity provisions of Workers' Compensation Law § 29(6). *Laudisio v. Diamond "D" Construction Corporation*, 309 A.D.2d 1178, 765 N.Y.S.2d 720 (4th 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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