NYSBA SPRING 2015 | VOL. 40 | NO. 1

Construction & Surety Law Newsletter

A publication of the Torts, Insurance and Compensation Law Section
of the New York State Bar Association

This is a consolidated issue of the Newsletter, *bringing it current through 2014. Having retired from active practice, I am also retiring as Editor after 20 years. The new Editor will be C. Allan Reeve of Rochester, NY. Please continue to support the* Newsletter *by sending your decisions of relevance and interest to Al for his consideration.*

Thank you.
Henry H. Melchor

Summary of Decisions and Statutes

ADMINISTRATIVE LAW AND PROCEDURE

40-1. Violation of that provision of the Administrative Code of the City of New York, which imposes a duty to preserve and protect adjoining structures from injury during excavation, constitutes negligence per se, rather than simply some evidence of negligence. The administrative provision had its origins in state law, and is therefore entitled to statutory treatment in tort cases. *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, 941 N.Y.S.2d 20 (2012).

ARCHITECTS, ENGINEERS, AND SURVEYORS

40-2. An owner entered a professional design services agreement with an architect, and a construction administration and management services agreement with a general contractor for the provision of all labor, materials, equipment and services. Because of the separate agreements, this was not a turnkey or design-build contract, where the design-builder bears all responsibility for the design and construction of the project. The owner's claims against the architect essentially alleged professional malpractice, and were time-barred because they were brought more than three years after completion of performance and termination of the professional relationship. There is no action for breach of implied warranty (strict product liability) by an owner against an architect with whom it has a contract. *797 Broadway Group, LLC v. Stracher Roth Gilmore Architects*, 123 A.D.3d 1250, 999 N.Y.S.2d 561 (3d Dep't 2014).

40-3. The three-year statute of limitations applicable to a claim of malpractice by an architect or engineer may be tolled under the "continuous representation" doctrine if the plaintiff shows that it relied on a continued course of services specifically related to the original professional services provided. *Regency Club at Wallkill, LLC v. Appel Design Group, P.A.*, 112 A.D.3d 603, 976 N.Y.S.2d 164 (2d Dep't 2013).

INDEMNITY

40-4. An indemnity contract was freely assignable absent a contractual, statutory, or public policy prohibition. The indemnity contract contained no express prohibition as to its assignability, the assignment was not statutorily barred, and there was no public policy issue because the assignment did not change the scope of the indemnitor's obligation. *Samaroo v. Patmos Fifth Real Estate, Inc.*, 102 A.D.3d 944, 959 N.Y.S.2d 229 (2d Dep't 2013).

40-5. An owner sued for breach of contract because its construction manager approved the defective design and inferior and improper materials prescribed by the architect. The construction manager brought a third-party action against the architect for common law indemnification. That action was subject to dismissal because any liability of the construction manager in the main action was based on its actual fault, and not vicarious liability. A party which has itself actually engaged to some degree

in wrongdoing cannot benefit from the doctrine of common law indemnity. *Genesee/Wyoming YMCA v. Bovis Lend Lease LMB, Inc.*, 98 A.D.3d 1242, 951 N.Y.S.2d 768 (4th Dep't 2012).

INSURANCE

40-6. Responding to two questions certified by the Second Circuit, the Court of Appeals interpreted the coverage for "vandalism" under a property insurance policy to include malicious damage resulting from acts not specifically directed toward the insured property, and defined "malice" as such a conscious and deliberate disregard of the interests of others that the conduct in question may be called willful or wanton. The construction of an underground parking garage allegedly caused foundation cracks and the settling of an adjacent building. Despite administrative stop work orders and a temporary restraining order, construction had allegedly continued. The property insurer rejected a claim under the vandalism peril because the alleged acts were not directed specifically at the covered property. *Georgitsi Realty, LLC v. Penn-Star Insurance Company*, 21 N.Y.3d 606, 977 N.Y.S.2d 157 (2013).

40-7. The "filed rate doctrine" precluded a contractor's claim that its commercial liability insurer engaged in unlawful and deceptive conduct in violation of General Business Law § 349, by charging a premium for the use of uninsured subcontractors and at the same time excluding insurance coverage for liability caused by such uninsured subcontractors. The Insurance Department approved both the method of calculating the premium and the use of the exclusion. *W. Park Associates, Inc. v. Everest National Insurance Company*, 113 A.D.3d 38, 975 N.Y.S.2d 445 (2d Dep't 2013).

40-8. A commercial general liability insurer had no duty to defend or indemnify the building owners from liability for claims by a worker injured in a fall. The premises designated in the policy described a one-story building. The fall occurred within the construction of three additional floors. The owners had not notified the insurer of the construction nor applied for coverage of the addition. The policy therefore did not cover the construction site where the accident occurred. *Seneca Insurance Company, Inc. v. Cimran Co., Inc.*, 106 A.D.3d 166, 963 N.Y.S.2d 182 (1st Dep't 2013).

40-9. An injured construction worker and his spouse, seeking to recover the unpaid balance of a stipulated judgment against the owner, sued the owner's excess or umbrella liability insurer under Insurance Law § 3420(a)(2). Although the owner had notified the excess liability insurer of the claim, the insurer was not obliged to state untimely notice by the claimants as a basis for its notice of disclaimer of coverage and was not estopped from defending the claim on the ground of untimely notice. The owner delayed disclosure of the existence of the excess liability policy in response to claimants' discovery demands, but when it did disclose, claimants immediately notified the excess liability insurer. Claimants made a prima facie showing that they were reasonably diligent in identifying the excess liability insurer and in providing notice. The insurer failed to raise a triable issue of fact. *Golebiewski v. National Union Fire Insurance Co.*, 101 A.D.3d 1074, 958 N.Y.S.2d 161 (2d Dep't 2012).

40-10. A worker injured on an apartment renovation project sued the owners. The owners' liability insurer tendered the claim for defense and indemnification to the contractor's liability insurer, which had issued a certificate of insurance to the owners as additional insureds. The tender, however, was untimely, having been made almost five months after the accident. The contractor's liability insurer notified the owners' liability insurer by letter that it disclaimed coverage and rejected the tender because notice of the accident was late and failed to comply with the terms of the contractor's liability insurance policy. That notice of disclaimer was never sent to the owners. Accordingly, the notice was ineffective against the owners and violated Insurance Law § 3420(d)(2), which requires that written notice of disclaimer be delivered to the additional insureds. *Sierra v. 4401 Sunset Park, LLC*, 101 A.D.3d 983, 957 N.Y.S.2d 219 (2d Dep't 2012), *aff'd*, 24 N.Y.3d 514, 2 N.Y.S.3d 8 (2014).

LABOR LAW §§ 200, 240, 241

40-11. A cause of action asserting a claim under Labor Law § 241(6) must allege the violation of a specific and concrete provision of the Industrial Code. The belated identification of the Code provision in a bill of particulars and deposition testimony, rather than the complaint, was not fatal to the claim. The delayed disclosure involved no new factual allegations, raised no new theories of liability, and caused no prejudice or surprise to the defendants. *Klimowicz v. Powell Cove Associates, LLC*, 111 A.D.3d 605, 975 N.Y.S.2d 419 (2d Dep't 2013).

40-12. In deposition testimony, the injured worker stated that he disconnected himself from the steel lifeline so that he could move from one work area of the roof to another. While moving, he fell through the roof decking. Summary judgment on his Labor Law § 240(1) claims was precluded by triable issues of fact whether he had good reason for disconnecting himself or whether his own actions were the sole proximate cause of his fall. There was also abundant evidence in the record to demonstrate that he was not permitted to stand on the roof decking. The defendants failed to establish that the worker knew or should have known that he was expected to use either multiple retractable lanyards or a safety rope to reach all areas of the roof. *Bellreng v. Sicoli & Massaro, Inc.*, 108 A.D.3d 1027, 969 N.Y.S.2d 629 (4th Dep't 2013).

MECHANICS' LIENS AND TRUST CLAIMS

40-13. The subordination penalty for failure to file a building loan contract as required by Lien Law § 22 applies only to that portion of the mortgage loan proceeds which secures the costs of improvements to the subject real property. It does not apply to proceeds securing the purchase price. The subordination penalty gives subsequently filed mechanics' liens priority over the building loan mortgage. *Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC*, 21 N.Y.3d 352, 972 N.Y.S.2d 148 (2013).

40-14. To recover on a mechanics' lien, a materialman must furnish material to an owner, contractor, or subcontractor. To prevail on a summary judgment motion to recover on a mechanics' lien discharge bond as a materialman, the movant must make a prima facie showing that it has a valid lien, that there are funds due and owing on the contract, that it provided materials to an owner, contractor, or subcontractor, and that the materials were used for the improvement of the subject real property. *Infra-Metals Co. v. DK Industrial Services Corp.*, 120 A.D.3d 762, 991 N.Y.S.2d 353 (2d Dep't 2014).

40-15. A subsubcontractor failed to prove at trial either the price of its contract or the value of the materials it supplied to the project. This evidence is required by Lien Law § 3 to recover damages on a mechanics' lien claim. The complaint was accordingly dismissed against the owners, the general contractor, and the surety issuing the mechanics' lien discharge bonds. *Peri Formwork Systems, Inc. v. Lumbermens Mutual Casualty Company*, 112 A.D.3d 171, 975 N.Y.S.2d 422 (2d Dep't 2013).

40-16. A tribal corporation organized to develop a golf course outside of the reservation was not an "arm of the tribe" and was not entitled to the defense of sovereign immunity against the contract and mechanics' lien claims of an unpaid contractor. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 109 A.D.3d 80, 968 N.Y.S.2d 271 (4th Dep't 2013), *aff'd*, 24 N.Y.3d 538, 2 N.Y.S.3d 15 (2014).

40-17. The deposit of money with the County Clerk to discharge a mechanics' lien did not operate as the payment or discharge of the lienor's trust fund claims under Article 3-A of the Lien Law. *NY Professional Drywall v. Rivergate Development, LLC*, 100 A.D.3d 216, 952 N.Y.S.2d 852 (3d Dep't 2012).

PREVAILING WAGES

40-18. The Court of Appeals articulated a three-prong test for determining whether particular projects constitute "public works" for purposes of requiring the payment of prevailing wages under Labor Law § 220—a public agency must be a party to the contract involving the employment of laborers, workers, or mechanics; the contract must concern a project that primarily involves construction-like labor and is paid for with public funds; and the primary objective or function of the work product must be the use or other benefit of the general public. The Court concluded that the repair, refurbishing, and maintenance of municipal ferries, fireboats, and garbage barges constituted public works. *De la Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 N.Y.3d 530, 975 N.Y.S.2d 371 (2013).

40-19. An employee was statutorily obliged to exhaust administrative remedies before commencing a civil action against his employer to recover prevailing wages under Labor Law § 231. However, the employee, as a third-party beneficiary of the public agency contracts requiring the payment of prevailing wages, had a common law breach of contract claim to recover damages for the employer's default. Furthermore, the employee's contractual claims for failure to pay overtime wages did not require exhaustion of administrative remedies and was not dependent on the viability of a statutory claim for failure to pay prevailing wages. *Stennett v. Moveway Transfer & Storage, Inc.*, 97 A.D.3d 655, 949 N.Y.S.2d 91 (2d Dep't 2012).

PRINCIPAL AND SURETY

40-20. A roofing materials supplier was not obliged to demonstrate that its supplies were actually delivered to the site of a public works project in order to prevail on its claim against a labor and material payment bond issued pursuant to State Finance Law § 137. Some of the materials were picked up by the defaulting subcontractor, and other materials were apparently diverted from the project by it. An award of attorneys' fees was within the proper discretion of the court because of the surety's aggressive defense of the supplier's entire claim when only a relatively minor portion was actually in dispute. *Erie Materials, Inc. v. Universal Group of New York, Inc.*, 101 A.D.3d 1529, 956 N.Y.S.2d 683 (3d Dep't 2012).

STATUTES

40-21. Chapter 2 of the Laws of 2012—amends Section 103 of the General Municipal Law to condition authorization for best value procurement of purchase contracts upon the adoption of a local law in the case of a political subdivision (other than a city having a population of one million or more) or any district, board, or agency having jurisdiction therein, or upon the adoption of a rule, regulation, or resolution at a public meeting in the case of a district corporation, school district, or BOCES. Effective January 27, 2012.

40-22. Chapter 308 of the Laws of 2012—adds subdivision 16 to Section 103 of the General Municipal Law to permit any officer, board or agency of a county, political subdivision or of any district therein to purchase apparatus, materials, equipment or supplies, or to contract for the installation, maintenance, or repair thereof, through contracts awarded by the United States of America or any agency thereof, any state or any other county or political subdivision or district therein, so long as such contracts

are awarded through competitive bidding consistent with New York law and are made available for use by other governmental entities. Applicable minority and women-owned business enterprise program mandates and preferred source requirements of the State Finance Law are not waived or preempted. Effective August 1, 2012.

40-23. Chapter 9 of the Laws of 2013—permits existing professional service corporations to become design professional service corporations offering an employee stock ownership plan, without reincorporating as a new entity. Effective October 3, 2012.

40-24. Chapter 497 of the Laws of 2013—further amends Section 103 of the General Municipal Law to clarify that political subdivisions may purchase apparatus, materials, equipment and supplies, and may contract for services related to the installation, maintenance, or repair thereof, under contracts negotiated by the United States of America or any agency thereof, by any state, or any other political subdivision or district therein, and based on competitive bidding or best value award consistent with Section 103. It also amends Section 104 to authorize purchases through certain federal programs available to local government. Effective November 13, 2013.

40-25. Chapter 201 of the Laws of 2014—adds Article 35-F to the General Business Law. Prior to entering into the construction contract, the prospective builder of a one- or two-family residential dwelling less than three stories is required to furnish the buyer with written materials developed by the Office of Fire Prevention and Control, detailing the benefits and cost considerations of installing an automatic fire sprinkler system. Effective December 3, 2014.

40-26. Chapter 322 of the Laws of 2014—authorizes the City of New York to include "utility interference work" in its contracts for public works projects. Effective August 11, 2014; expires December 31, 2024.

40-27. Chapter 353 of the Laws of 2014—adds Section 383-b to the Executive Law and requires that the permit application for construction of a residential structure include express notification where truss type, pre-engineered wood or timber construction is being utilized. Upon receipt of the application, the municipality is required to notify the local firefighting organization. As a condition for issuance of a certificate of occupancy, a sticker must be affixed by the contractor to the exterior of the electric pan box whenever the building permit application includes this notification. Furthermore, a plan for notifying persons conducting fire control and other emergency operations that the structure includes truss type construction must be developed by the local building department or local code enforcement official. Effective September 17, 2014.

SUBCONTRACTORS

40-28. Alleged misrepresentations made by a construction manager to the subcontractor of a general contractor were sufficient to sustain a claim for negligent misrepresentation, even though the construction manager was not in contractual privity with the complaining subcontractor. The subcontract, which furthered the purpose of the construction manager's prime contract, created a relationship which approached privity. *North Star Contracting Corp. v. MTA Capital Construction Company*, 120 A.D.3d 1066, 993 N.Y.S.2d 11 (1st Dep't 2014).

WORKERS' COMPENSATION

40-29. The federal Immigration Reform and Control Act of 1986 (IRCA) requires an employer to verify the immigration status of employees. A construction company's violation of the IRCA does not make it liable for contribution or indemnification based on injuries sustained by its undocumented employees on a third party's premises. Absent grave injury or contractual obligations, an employer of undocumented workers is exclusively liable under Workers' Compensation Law § 11 and is not subject to third-party claims for indemnification or contribution. *New York Hosp. Med. Ctr. of Queens v. Microtech Contracting Corp.*, 22 N.Y.3d 501, 982 N.Y.S.2d 830 (2014). *See* Labor Law §§ 200, 240 and 241 33-8, *Construction & Surety Law Newsletter* (Spring 2007).

NEW YORK STATE BAR ASSOCIATION
TORTS, INSURANCE AND COMPENSATION LAW SECTION
One Elk Street, Albany, New York 12207-1002

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

Construction & Surety Law Newsletter

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.

ISSN 1530-3977 (print) ISSN 1933-8449 (online)