NYSBA FALL 2019 | VOL. 44 | NO. 1

# Deconstruction

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

# Message from the Chair

To Division Members:

As with prior editions of *Deconstruction*, this edition contains cases touching on various issues of New York law, both substantive and procedural, that we believe may be helpful to attorneys who practice or are interested in construction and surety law.

I would particularly point a couple of cases we have included:

*Matter of Plain Ave. Storage* (44-10) in which a mechanic's lien was lost due to an inadequate itemized statement required by Lien Law §38; and

*Pike v. Tri-kete* (44-14) in which a common provision in subcontracts, which leaves the option of arbitration up to the GC, was voided for violating the Private Prompt Pay Act [Gen. Bus. Law §757(3)].

On the legislative front, this is also to let you know that bill (S. 5933 Comrie), which prohibits no-damage-for-delay provisions in contracts with "state agencies," was overwhelmingly approved this session in both chambers. A copy of the bill is included.

Similar legislation has been vetoed twice by Governor Cuomo, and unfortunately he has done so again

Lastly, I need to request assistance to help us summarize cases for our newsletter, which I hope you find valuable. We would like to publish *Deconstruction* at more frequent intervals, and it's too much to ask Pat Rooney to do it all the work herself. If you (or your firm) are interested in helping us please contact me.

Of course, if you have any comments or suggestions let me know.

Al Reeve
Chair

# Summary of Decisions and Statutes

## Federal Cases



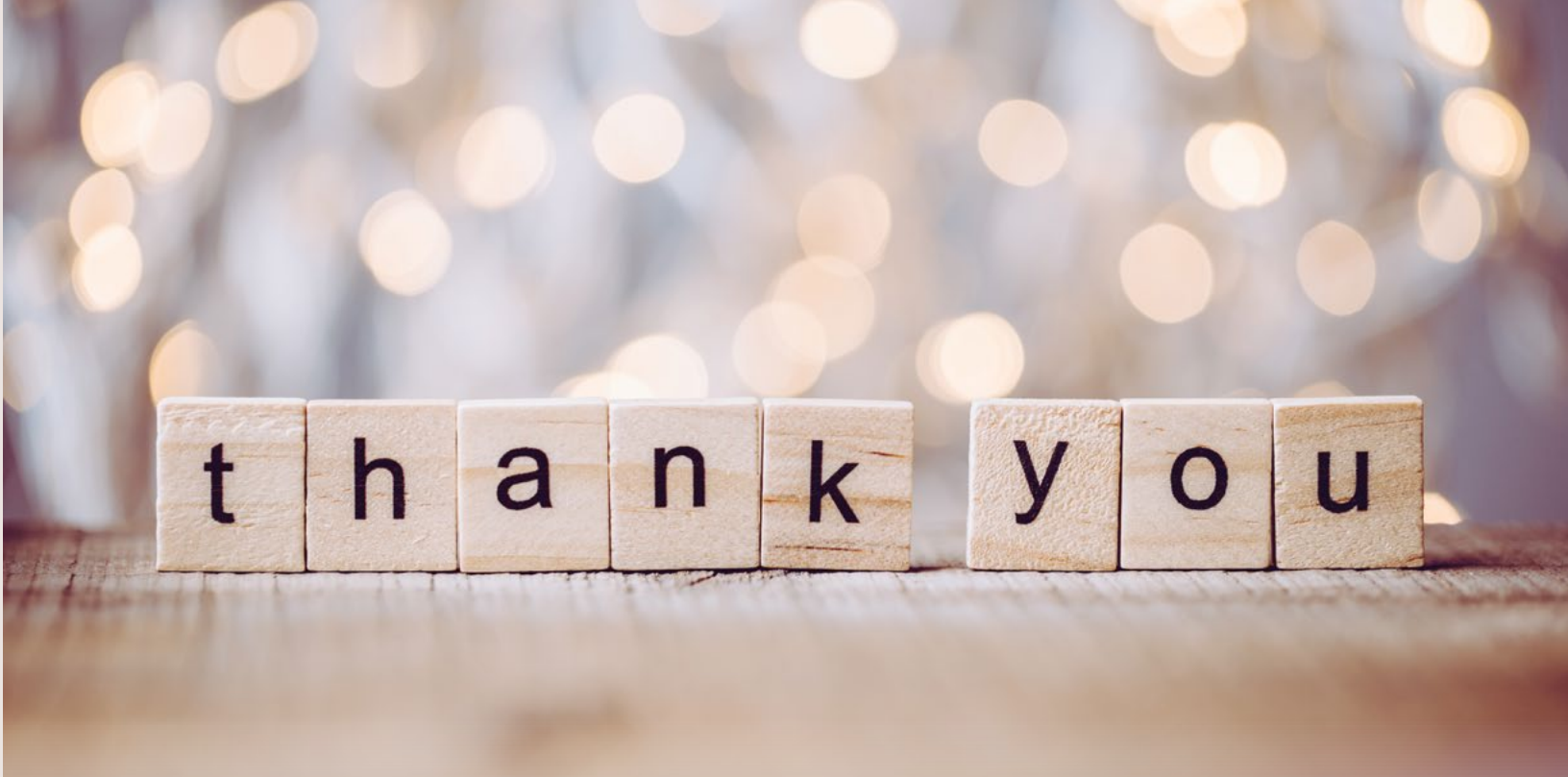
## State Cases



## State Statutes



## Municipal Codes




For your **dedication**,
For your **commitment**, and
For recognizing the **value** and
**relevance** of your membership.

As a New York State Bar Association member, your support helps make us the largest voluntary state bar association in the country and gives us credibility to speak as a unified voice on important issues that impact the profession.

**Henry M. Greenberg**
President

**Pamela McDevitt**
Executive Director

NYSBA NEW YORK STATE BAR ASSOCIATION

# Summary of Decisions and Statutes

## CONTRACTOR LICENSING REQUIREMENTS

**44-1.** When plaintiff-contractor brought an action in Nassau County to recover damages for an unpaid balance on a home improvement contract, defendants-homeowners alleged that the contractor did not have a home improvement license. In response, the contractor argued that, although it entered into the contract with a dissolved corporation, its current corporation was licensed. The court found that even if it were to accept this argument, recovery was still barred given the contractor failed to file the requisite certificate of doing business under an assumed name with the New York Secretary of State in accordance with General Business Law (GBL) § 130(1)(b) and Business Corporation Law (BCL) § 202(b). Accordingly, the court held that the contractor could not maintain the action. *Drexler Corp. Constr. v. Gold*, 62 Misc.3d 130(A), 2018 N.Y. Slip Op. 51905(U), 2018 WL 6802317 (Sup. Ct. App. Term 2d Dep't Dec. 20, 2018) (unpublished opinion) (noting GBL § 130(9) provides that a corporation which fails to file a certificate is "prohibited from maintaining any action … in any court in this state on any contract … made in a name other than its real name until the certificate required in this section has been executed and filed with the Secretary of State.").

## DAMAGES

**44-2.** The plaintiff hired defendant-contractor to perform some construction work at her rental property. Although the parties did not execute a formal written contract, there was an agreement embodied in a series of emails with regards to the cost and scope of the work to be performed. The plaintiff gave the defendant an initial installment payment of $8,000 and the work began immediately and was to be completed by July 31, 2018. After a little more than a week, plaintiff fired the defendant and commenced a small claims action for breach of contract. It was unclear to the court how the defendant could have breached the contract when he had been on site performing work and was fired before the agreed upon deadline. The court noted that the plaintiff's internal expectation that work would be completed in a specific order had no binding effect on the defendant, as the essence of a contract is mutual assent. Instead, the court found that the plaintiff herself had breached the contract by firing the defendant.

While that determination would have normally ended the case, small claims courts must do substantial justice. Therefore, the court considered whether the plaintiff could still collect damages even though she was the party in breach. Considering the $8,000 installment payment received by the defendant, the amount of work performed, the cost of equipment, cost of labor and the defendant's lost profit, the court determined that the defendant owed the plaintiff $585 and ordered payment of same as well as payment of the filing fee. *Desir v. Gordon*, Index No. SC-379-18/CO, 60 Misc. 3d 1229(A), 2018 WL 4212488 (City Court Cohoes, Albany Co. Sept. 4, 2018) (unpublished opinion).

## DEFAULT JUDGMENT

**44-3.** After receiving a certificate of default against the corporate defendants, plaintiff-surety moved for a default judgment. With regards to damages, plaintiff submitted an affidavit, itemized statements, invoices and copies of checks which equaled more than what was estimated in the complaint. The court recognized that normally courts do not award a default judgment which is greater than the damages sought in the complaint. However, because the plaintiff explicitly requested continuing damages in the complaint, the court held that the plaintiff was entitled to recover the additional damages. *U.S. Specialty Ins. Co. v. North Star Concrete Constr. Corp.*, 16-CV-5051 (CBA) (SMG), 2018 WL 437657 (E.D.N.Y. Aug. 7, 2018).

## EVIDENTIARY ISSUES

**44-4.** Defendant-construction manager moved to dismiss an action including, among other things, a breach of construction management agreement claim, pursuant to CPLR 3211(a)(1) based on documentary evidence. In support of its motion, defendant submitted contracts, licenses, permit applications, payment requisitions and affidavits from its principals. The court denied the motion explaining that because such documents were not indisputable, they were insufficient documentary evidence to dismiss a claim pursuant to CPLR 3211(a)(1). *610 Park 8E LLC v. Best & Co., Inc.*, Index No. 651354/2017, 61 Misc. 3d 1225(A), 2018 WL 6424056 (Sup. Ct. New York Co. Dec. 5, 018) (unpublished opinion).

**44-5.** Plaintiff-business owner commenced a small claims action against defendant-contractor for conversion of personal property and breach of contract. The contractor argued, among other things, that because a certificate of occupancy was issued, the work was performed in a good and workmanlike fashion and, thus, there was no breach of contract. The court noted that while the issuance of a certificate of occupancy generally demonstrates conformity with municipal ordinances and approved plans, such a certificate is not conclusive evidence of same. The court explained that an owner who can demonstrate that, despite the issuance of the certificate of occupancy, the work was defective or failed to conform with the plans, is not precluded from bring an action. In this case, the owner's allegations were supported by the architect's testimony who testified that the contractor's work failed to conform to the plans and was, in many instances, defective.

The court also held, with respect to damages in this small claims action, that the one estimate provided by the owner along with corroborating testimony by the architect, was sufficient to prove damages. *Clark v. Brownell*, Index No. SC-0852-17/GF, 60 Misc. 3d 1227(A), 2018 WL 4102421 (City Court, Glens Falls, Warren Co. Aug. 29, 2018) (unpublished opinion).

## HOME IMPROVEMENT CONTRACTS

**44-6.** Defendants-home improvement contractors appealed a judgment awarding plaintiff-homeowner damages for breach of contract, restitution damages, statutory counsel fees and punitive damages. The dispute arose in connection with a home improvement contract for renovations to be performed by the contractors at the plaintiff's residence. Although the contract provided that the contractors were licensed, plaintiff later discovered that the licenses had been suspended at the time the contract was executed.

The Appellate Division, setting aside all of the damages except for the statutory penalty under GBL § 772 held that the plaintiff failed to meet her burden of proving her damages for breach of contract and that restitution damages were not permitted under GBL § 772. Additionally, the court found that because plaintiff failed to prove that the contractors' conduct was egregious, directed towards her and part of a pattern directed at the public, the plaintiff was not entitled to punitive damages. *Crippen v. Adamao*, 165 A.D.3d 1227, 87 N.Y.S.3d 608 (2d Dep't 2018).

## INSURANCE

**44-7.** Plaintiff-plant owner was sued by a subcontractor's employee for injury the employee sustained while working at plaintiff's cement plant. The work was being performed pursuant to a purchase order which required the subcontractor to procure commercial general liability insurance naming the owner as an additional insured. Nine months after the suit was commenced, the owner requested coverage from defendant, the subcontractor's insurance carrier, and defendant disclaimed on the grounds that the owner failed to give notice of the action as soon as practicable as required by the policy.

In this case, the court held that the owner failed to meet its burden of establishing a reasonable excuse for the delay. According to the court, the owner's excuse of lack of knowledge was baseless and wholly insufficient when taking into account that the owner knew an accident had occurred on its premises, that it was aware the accident involved a contractor's employee, that it possessed a copy of the certificate of liability insurance listing the owner as the holder and defendant as the project's insurance carrier and that it knew the language in its own purchase orders required contractors to name the owner as an additional insured. As a result, the court affirmed the lower court's order dismissing the complaint (explaining where an insurance policy requires notice of an occurrence to be given as soon as practicable, failure to comply with that provision voids the contract.). *Lafarge Bldg. Materials, Inc. v. Harleysville Ins. Co. of N.Y.*, 166 A.D.3d 1116, 86 N.Y.S.3d 654 (3rd Dep't 2018).

**44-8.** Plaintiff-contractor sought to recover under insurance policies for remediation costs in connection with a bridge fire. Defendants, two insurance carriers, argued that the costs of the remediation were voluntary payments and not damages that they were obliged to pay. The court disagreed, explaining defendants failed to consider the emergency nature of the remediation required, that time was of the essence in performing the remediation and that plaintiff's damages would have grown without the remediation. The court, however, held that the plaintiff's markups for its own overhead and profit on the remediation would not be covered under the policies. *E. E. Cruz & Co. v. Axis Surplus Ins. Co.*, 165 A.D.3d 603, 87 N.Y.S.3d 173 (1st Dep't 2018).

**44-9.** Plaintiff-insurer moved for summary judgment declaring that it had no obligation to defend defendant-construction manager due to an exclusion in the policy at issue for construction management. The court denied the motion noting there were issues of fact as to whether defendant was a construction manager or a general contractor because its duties included, among others, working with the owner and architect and obtaining permits during the pre-construction phase as well as supplying workers and materials and performing work during the construction phase. Additionally, it appeared that defendant was being paid on a cost of work plus profit basis. Explaining that the label of construction manager versus general contractor is not necessarily determinative as such determination depends upon the duties defendant was assigned and performed, the court held that under these circumstances further discovery as to defendant's role was warranted. *U.S. Specialty Ins. Co. v. SMI Constr. Mgmt.*, 168 A.D.3d 431, 91 N.Y.S.3d 50 (1st Dep't 2019).

## MECHANIC'S LIENS AND LIEN LAW

**44-10.** In a proceeding brought by a building owner pursuant to Lien Law § 38 to compel a design-builder to provide a revised itemized statement of lien, the Appellate Division affirmed the lower court's cancellation of the of the design-builder's lien for failure to provide a proper itemized statement pursuant to Lien Law § 38. Lien Law § 38 requires that upon demand a lienor must provide a statement setting forth the items of labor and/or materials as well as the value of those items which make up the lien. Because the design-builder had filed the lien before the project was completed and because the nature and cost of the work was in dispute, the owner needed an itemized statement to check the design-builder's claim. However, because the itemized statement provided

by the design-builder failed to sufficiently set forth the cost of labor and materials, the court affirmed the lower court's decision cancelling the lien. *In re Plain Ave. Stor., LLC v. BRT Mgmt., LLC*, 165 A.D.3d 1264, 84 N.Y.S.3d 894 (2d Dep't 2018).

**44-11.** Defendant-landlord leased retail space to co-defendant Peaches Cafe pursuant to a ten-year lease agreement. The lease contained several requirements regarding the electrical work involved in the construction of the site including, but not limited to, requiring the landlord's approval of the contractors used for the construction and consent to all work, and requiring that detailed design drawings be submitted to the landlord. Peaches contracted with the plaintiff, an electrical subcontractor, for the electrical build out at the premises but subsequently closed its restaurant leaving a $50,000 outstanding balance due and owing to the plaintiff. Plaintiff thereafter filed a mechanic's lien against the premises and later moved to foreclose the lien.

The Court of Appeals affirmed the Appellate Division's order granting the plaintiff's motion for summary judgment noting that the Lien Law does not require a direct relationship between the property owner and the contractor in order for the contractor to enforce a lien against the owner. Rather, all that is required to enforce a lien under Lien Law § 3 is that the owner either was an affirmative factor in procuring the improvement or having possession and control of the premises assent to the improvement with the expectation that it would reap the benefit of it. The court, noting that the language of the lease made it clear that the owner retained close supervision and approval of the work, that such language was sufficient to establish consent under Lien Law § 3. *Angelo A. Ferrara v. Peaches Cafe LLC*, 29 N.Y.3d 917 (2018).

**44-12.** When a general contractor filed a mechanic's lien against a homeowner's property, the homeowner petitioned the court to summarily dismiss the lien. The lower court discharged the lien despite a dispute between the parties as to when the contractor last performed work on the premises and the nature of the work performed. The Appellate Division reversed and held that since the lien was timely on its face, a lien foreclosure trial was necessary to determine when the last date of work was performed. *In re Beebe v. Liebel*, 168 A.D.3d 1246, 92 N.Y.S.3d 446 (3rd Dep't 2019).

## PREVAILING WAGES / PUBLIC CONTRACTS

**44-13.** At issue in this case was the interpretation of Labor Law § 220(3-e) which defendant New York State Department of Labor (DOL) interprets to mean that apprentices can only be paid apprentice rates for work they perform within the classification of work they are registered for as an apprentice. According to the DOL, should the apprentices perform work outside their trade classification, the statute requires that they be paid journey worker level wages.

Plaintiff, a labor union that represents skilled tradespersons in several industries including glaziers, commenced an action for a declaratory judgment that the DOL's interpretation violated the statute and argued that, pursuant to the statute they can pay apprentices the posted apprentice rates for any work performed. Plaintiff sought this declaration because the glazier apprenticeship program requires apprentices to perform the installation of storefronts and entrances which involves both glazier tasks and ironworker tasks. Plaintiff argued that having to pay the apprentices' journey worker level wages for the ironworker tasks results in an unwarranted increased cost to customers on public projects. The DOL argued that its interpretation of the statute prevents public work contractors from treating apprentice labor as a commodity and ensures that apprentices receive the required training.

The Court of Appeals reversed the Appellate Division's decision and deferred to the DOL's interpretation and policy of limiting payment of apprentice wages on public jobs to apprentices who are performing tasks within their respective trade classifications. The court noted that the statute and later amendment was enacted to prevent employers from employing unskilled employees and to ensure that apprentices receive approved, supervised training. Although finding the language of Labor Law § 220(3-e) was ambiguous, the court held that the DOL's interpretation was rational and consistent with the language of the statute. *Int'l Union of Painters & Allied Trades, Dist. Council No. 4 v. N.Y. State Dep't of Labor,* 32 N.Y.3d 198 (2018).

## PROMPT PAYMENT ACT

**44-14.** Plaintiff-construction manager contractor commenced an action for breach of contract and defendant, an architectural precast subcontractor, asserted several counterclaims including violations of the New York Prompt Payment Act (the "PPA"), GBL §§ 756-758. The subcontractor moved to stay the action and compel arbitration and the contractor moved to stay arbitration claiming that the arbitration provision in the subcontract did not apply to the subcontractor's claims. The case arose over several payment applications submitted by the subcontractor to the contractor as well as change orders which the contractor withheld and/or denied as a result of the subcontractor's alleged defaults and untimeliness.

The court, noting that the purpose of the PPA is to expedite payment of monies owed to those who performed contracting services, explained that if there is a dispute regarding invoices or payment that cannot be resolved, the parties may refer the matter to the American Arbitration Association for an expedited arbitration. The contractor argued that the language of the subcontract, which provided that the contractor had the option of accepting or

rejecting any demand for arbitration for all claims, disputes and other matters in question between the subcontractor and the contractor arising out of or related to the subcontract, allowed the contractor to reject arbitration and to commence litigation if it chose to so do. Noting however that the PPA voids any contract provision which makes the PPA's expedited arbitration provision unavailable to one or both parties, the court granted the subcontractor's motion to compel arbitration as to the PPA claims only. The court then directed that the rest of the action be stayed and the remaining claims and counterclaims be resolved through litigation after the arbitration was completed. *The Pike Inc. v. Tri-kete Ltd.*, 349 F. Supp. 3d 265 (W.D.N.Y. 2018).

## TOWN LAW

**44-15.** Plaintiff-contractor was developing two parcels of property located within the defendant-Town and, although the Town Planning Board approved the subdivision parcel, the Town withheld the issuance of building permits for 10% of each subdivision lot until the contractor completed certain required infrastructure and improvements and they had been dedicated to the Town pursuant to Clarkson Town Code § 254-18B. The contractor sought a declaration that this section of the Town Code was void as *ultra vires*. The court noted that Article 16 of the Town Law allowed towns to zone and regulate growth and development and Town Law § 277(9) authorized the Town to obtain specific forms of security to cover the costs of infrastructure in case a developer failed to finish the work. However, the court found that Town Code § 254-18B was inconsistent with Town Law § 277(9). Because Town Law § 277(9) did not permit the imposition of the lot holdback, the court found the Town Code section *ultra vires* and void as a matter of law. *Joy Bldrs., Inc. v. Town of Clarkstown*, 165 A.D.3d 1084, 87 N.Y.S.3d 60 (2d Dep't 2018).

# STATE OF NEW YORK

5933--A

2019-2020 Regular Sessions

# IN SENATE

May 16, 2019

Introduced by Sens. COMRIE, RANZENHOFER -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the state finance law, in relation to damages to contracts occasioned by delay

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. The state finance law is amended by adding a new section 138-b to read as follows:

**§ 138-b. Damages occasioned by delay. 1. For purposes of this section the following terms shall have the following meanings:**

**(a) "State agency" shall mean any state department, board, bureau, commission, division, office, council, or state committee or any state authority as defined in subdivision one of section two of the public authorities law. Such term shall not include the legislature or judiciary.**

**(b) "Contract" shall mean any agreement awarded by a state agency for the design, construction, reconstruction, demolition, alteration, repair or improvement of any public works project.**

**(c) "Delay" shall mean any delay, disruption, interference, inefficiencies, impedance, hindrance or acceleration in the performance of the contract which causes damages to be incurred by a contractor.**

**(d) "Claim" shall mean a request for additional costs only from the following causes:**

**(i) the failure of the state agency to take reasonable measures to coordinate and progress the work;**

**(ii) extended delays attributable to the state agency in the review or issuance of orders-on-contract or field orders, in shop drawing reviews and approvals or as a result of the cumulative impact of multiple orders**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD11735-03-9

Source: https://www.nysenate.gov/legislation/bills/2019/S5933

on contract, which constitute a qualitative change to the project work and which have a verifiable impact on project costs; or

(iii) the unavailability of the site for such an extended period of time which significantly affects the scheduled completion of the contract.

2. All contracts made and awarded shall contain a clause which allows a contractor to make a claim for additional costs arising from delay in the performance of a contract if such delay is caused by a material act or omission of the state agency.

3. The contractor shall provide a notice of claim of an anticipated claim for delay to a state agency by personal service or certified mail no more than fifteen days after such contractor knew the facts which form the basis of the claim. The state agency shall acknowledge receipt of the notice, in writing, within five days. Such notice shall at a minimum provide a description of any operations that were, are being or will be delayed, and the date or dates and reasons for the delay. In no case shall oral notice constitute notice pursuant to this section or be deemed to constitute a waiver of the written notice requirement. For the purposes of this section, failure to provide such notice shall be considered to have prejudiced the state agency.

4. Failure by a contractor to adequately progress the completion of work shall be considered in determining the causes of delay. For any claim asserted pursuant to this title, the contractor shall keep detailed written records of the costs and shall make them available for the purposes of audit and review. Failure to provide the required written notice or to maintain and furnish records of the costs of such claims shall constitute a waiver of the claim.

5. The following information shall be provided by the contractor upon request of a state agency if not previously supplied:

(a) a description of the operations that were delayed, the reasons for the delay and an explanation of how they were delayed;

(b) a detailed factual statement of the claim providing all necessary dates, locations and items of work affected by the claim;

(c) the date on which actions resulting in the claim occurred or conditions resulting in the claim became evident;

(d) the names, functions and activities of each contractor involved in, or knowledgeable about facts that gave rise to such claim;

(e) the identification of any pertinent documents, and the substance of any material oral communication relating to such claim;

(f) the amount of additional compensation sought; and

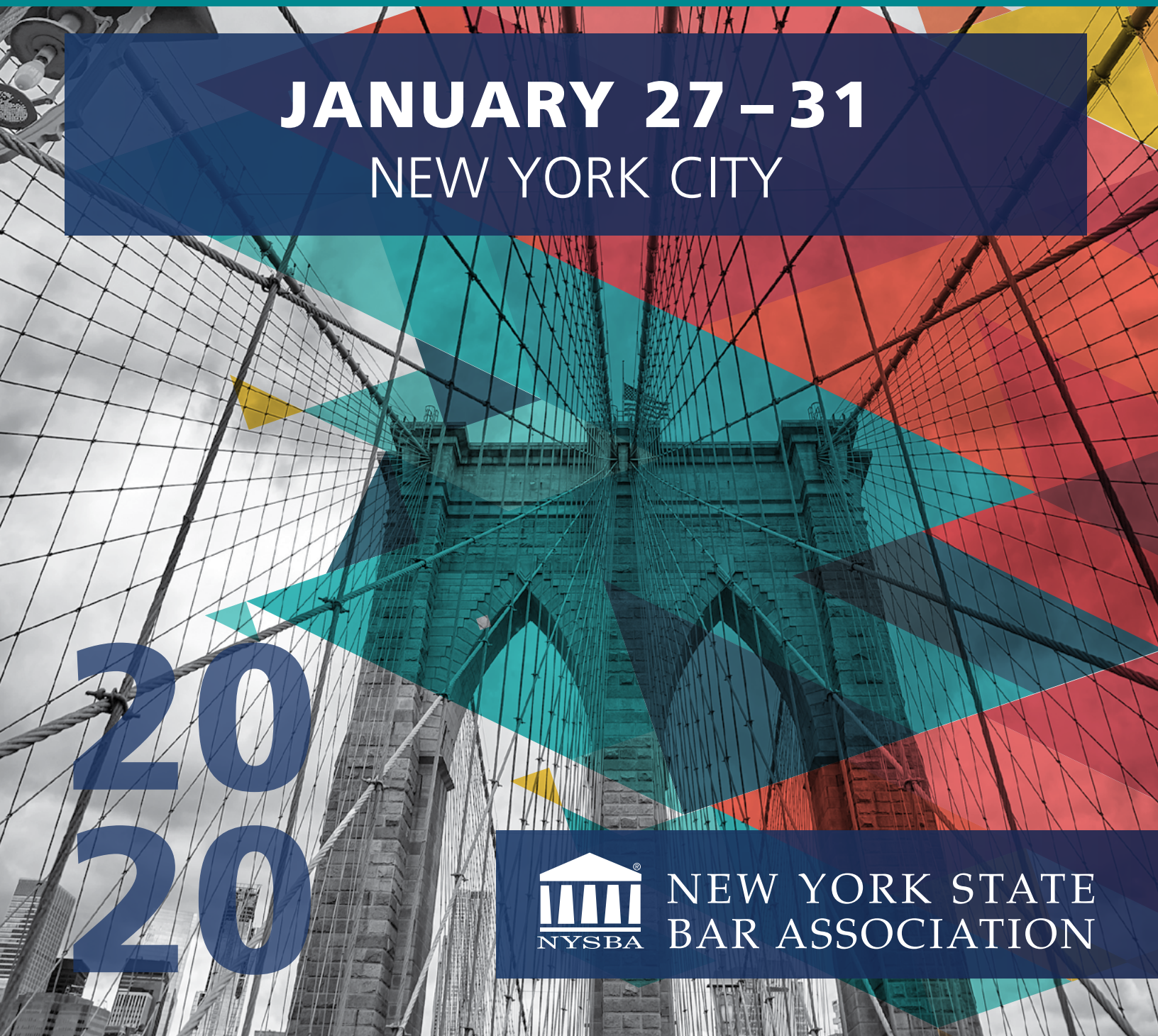
(g) if an extension of time is also requested, the specific number of days for which it is sought and the basis for such request as determined by an analysis of the construction progress schedule.

6. When submitting any claim, the contractor shall certify in writing and under oath that the supporting data is accurate and complete to his or her best knowledge or belief, and that any amount demanded reflects, in good faith, what he or she believes to be the state agency's liability.

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all contracts entered into on and after such date.

# ANNUAL MEETING

CONNECT • INSPIRE • LEARN



## JANUARY 27–31
NEW YORK CITY

2020

NYSBA® NEW YORK STATE BAR ASSOCIATION

# Deconstruction

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



**Editor**
Patricia A. Rooney
Adjunct Professor
Jacob D. Fuchsberg Law Center
Touro College
Patricia Rooney, PC
394 South 15th Street
Lindenhurst, NY 11757
prlaw@prlaw.pro

**Student Editor**
Michael W. Spinelli, AIA
Jacob D. Fuchsberg Law Center
Touro College


**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.




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 1933-8449 (online)