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Deconstruction

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

Summary of Decisions and Statutes

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ALTERNATIVE DISPUTE RESOLUTION

42-1. In the context of a petition to confirm an arbitration award and a motion to vacate that award, the Second Department affirmed the lower court's decision confirming the award and denying the motion to vacate. After noting judicial review of arbitration awards is extremely limited, the court explained that the party seeking to vacate an award has a heavy burden to establish that vacatur is appropriate by clear and convincing evidence. The court, after noting that an arbitration award should not be vacated for errors of law and fact committed by the arbitrator, cautioned that courts should not assume the role of overseers to mold an award to conform to their sense of justice. *Structure Tek Const., Inc. v. Waterville Holdings, LLC*, 140 A.D.3d 1151, 35 N.Y.S.3d 215 (2d Dep't 2016) (finding that parties agreed to submit dispute to an arbitrator and record did not reflect that arbitrator made an irrational award or that award violated a strong public policy).

42-2. After the lower court denied a petition to stay arbitration and granted a cross motion to compel arbitration and dismiss a proceeding, the First Department affirmed the decision. The court held that both the arbitration clause and the JAMS rule incorporated in the clause gave the arbitrators the power to resolve questions of arbitrability. *Skyline Steel, LLC v. PilePro LLC*, 139 A.D.3d 646, 33 N.Y.S.3d 201 (1st Dep't 2016) (explaining provisions governing specific issue take precedence over arbitration clause's generic incorporation of the New York statutes governing arbitration).

42-3. In this case, petitioners moved to confirm an arbitration award and respondent opposed the application arguing that the arbitrator was biased. The court explained that courts must confirm an arbitration award unless the arbitrator exceeded her powers because the award violated public policy, was irrational or because it clearly exceeded a specifically enumerated limitation on the arbitrator's power. Mere misconstruction of an arbitration agreement or disregard of its plain meaning or even misapplication of the substantive legal rules will not suffice. Here, respondent alleged the arbitrator was biased and that she pre-judged the matter.

Explaining the burden of proving misconduct rests with respondent and that it must be satisfied by clear and convincing proof, the court noted that respondent never moved to vacate the award, which was the proper response when alleging bias on the part of the arbitrator. The court also noted that respondent failed to submit evidence to establish such bias or prejudice sufficient to overcome this clear and convincing standard. Finally, noting that even assuming there was such bias, the court confirmed the award, explaining that respondent acted on the alleged bias and, thus, waived any claim. *Larison v. Magnotti*, Index No. 15-0739, 51 Misc. 3d 1212(A), 37 N.Y.S.3d 207, 2016 N.Y. Slip Op. 50634(U), 2016 WL 1590943 (Sup. Ct. Greene Co. Apr. 18, 2016).

ARCHITECTS, ENGINEERS, AND SURVEYORS

42-4. Plaintiffs, the owner of a landmark designated building under the Administrative Code of the City of New York § 25-302, hired defendant-architect to, among other things, obtain approvals from the NYC Landmarks Preservation Commission ("LPC") and the Department of Buildings ("DOB"). The architect retained an additional architect to assist with the drawings and the two architects obtained approvals for the initial construction from the LPC and the DOB. Subsequently, the architects submitted amended plans to the DOB to comply with various changes requested by plaintiffs. However, the architects failed to submit the amended plans to the LPC or obtain approval from the LPC for the requested changes. When the construction was almost complete, the LPC found that the construction did not comply with the plans it approved. After the LPC directed plaintiffs to partially demolish the construction, plaintiffs sued the first architect for breach of contract and both architects for professional negligence.

The court found that plaintiffs made a *prima facie* showing that the first architect breached the contract by not seeking approval from the LPC and also that the two architects committed professional malpractice as a matter of law by departing from the accepted standards of practice in the architectural profession. *143 Bergen St., LLC v. Ruderman*, 144 A.D.3d 1002, 42 N.Y.S.3d 252 (2d Dep't 2016).

42-5. Plaintiff, New York City, entered into an agreement with plaintiff, the Dormitory Authority of the State of New York ("DASNY"), to construct a 15-story biology lab for the City Medical Examiner on the Bellevue Hospital Campus. DASNY hired defendant-foundation contractor and also defendant-architect. After the foundation work at the project caused an adjacent building in the Bellevue campus to settle, delaying the project by more than 18 months and causing damage in the amount of approximately $37 million, plaintiffs commenced an action against the architect for various claims, including negligence.

According to DASNY, the architect's failure to adhere to a professional standard of care by not performing an adequate site investigation and/or by not providing an appropriate foundation design resulted in damages. The court affirmed the denial of that part of the architect's motion for summary judgment seeking dismissal of the professional negligence claim and held that the architect

may be subject to tort liability for failure to exercise due care in its duties. The court explained that to make such a determination it must look at the nature of the injury and whether the plaintiff is merely seeking the benefit of its contract. Noting that where a project is so affected with the public interest that a professional's failure to perform in a competent manner can have catastrophic consequences, the court explained the professional may be subject to both tort and contract liability.

According to the court, there was a question of fact as to whether the architect assumed an independent legal duty to perform its work in a manner consistent with the generally accepted standard of care in its profession. *Dormitory Auth. of State v. Samson Const. Co.*, 137 A.D.3d 433, 27 N.Y.S.3d 114 (1st Dep't 2016) (noting type of damage sustained by plaintiffs, i.e., damage to sidewalks, roadbeds, sewers and water systems near a major medical center in New York City, could easily have had catastrophic consequences).

CERTIFIED PAYROLLS

42-6. Plaintiff-subcontractor entered into a contract with defendant for masonry work. A condition precedent to progress payments was that defendant was required to submit certified payroll reports certifying that all union benefits had been paid. Defendant submitted the certifications and plaintiff tendered payment. When plaintiff found out that defendant never paid the union benefits, plaintiff commenced an action against defendant for fraud.

The elements of a cause of action to recover damages for fraud are a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. According to plaintiff, the certifications signed by defendants misrepresented material fact in two respects. First, by preprinted representations on the certified payroll reports noting that, in addition to the basic hourly wages, payments of union benefits have been or will be made and, second, by handwritten presentations that said benefits were, in fact, paid.

The court reversed the lower court's grant of plaintiff's motion for summary judgment explaining, with respect to the preprinted forms, that at the time defendants signed the certifications, plaintiff failed to demonstrate that defendant knew the benefits would not be paid in the future and, with respect to the handwritten representations on the forms, that plaintiff had established a *prima facie* case for fraud. *Summit Dev. Corp. v. Interstate Masonry Corp.*, 140 A.D.3d 1152, 35 N.Y.S.3d 207 (2d Dep't 2016).

CONTRACT FORMATION

42-7. In a construction dispute between plaintiff-contractor and defendant-building owner, the contractor commenced an action to recover damages for breach

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REQUEST FOR ARTICLES

of contract when the owner refused to pay the balance due on remediation work completed by the contractor. Although the contractor provided the owner with a written agreement and rate sheet, no written contract was ever executed. The parties did, however, execute an authorization to perform services and the evidence established that the parties entered into a time and materials contract. The owner argued that the parties had agreed to a cap on the contractor's fees and that the contractor had exceeded it. However, the court disagreed, finding that the owner failed to demonstrate that there was any agreement capping the contractor's fees and awarded judgment to the contractor. *Amcat Glob., Inc. v. Greater Binghamton Dev., LLC*, 140 A.D.3d 1370, 33 N.Y.S.3d 555 (3d Dep't 2016).

CONTRACTOR LICENSING REQUIREMENTS

42-8. Plaintiff, an elevator repair/maintenance company, commenced an action against defendants for work it performed at defendants' residence. Defendants moved for summary judgment and argued that, because plaintiff was not licensed by the City of New York Department of Consumer Affairs ("DCA") as required by New York City Administrative Code § 20-387 ("Code"), the complaint must be dismissed. The Code prohibits an unlicensed home improvement contractor from recovering for services rendered either in contract or in *quantum meruit*. However, certain professions such as plumbers, electricians, architects or professional engineers are exempt from this prohibition because they are required by other state or city laws to attain standards of competency before engaging in the practice of their profession. Because plaintiff raised a material issue of fact as to whether its application for a Department of Buildings elevator inspection license exempted it from obtaining a DCA license, the court denied defendants' motion for summary judgment. *McGlynn, Hays & Co. v. McMaster*, Index No. CV–004306–16, 52 Misc. 3d 1224(A), 41 N.Y.S.3d 720, 2016 N.Y. Slip Op. 51269(U), 2016 WL 4734668 (N.Y. Civ. Ct. New York Co. Sept. 1, 2016).

CONTRACTUAL CONDITIONS PRECEDENT

42-9. The court found that plaintiff-subcontractor made a *prima facie* showing on its breach of contract claim against defendant-general contractor. The court noted that plaintiff established the amount due from defendant by submitting an email exchange between the parties, reflecting their agreement on the amount due, and defendant's representation that payment would be made as soon as it received payment from third-party defendant owner. The court explained that the "pay-when-paid" provision in the subcontract was not an effective condition precedent to defendant's duty to perform, since such provisions are "void and unenforceable as contrary to public policy." *Nevco Contracting Inc. v. R.P. Brennan Gen. Contractors & Builders, Inc.*, 139 A.D.3d 515, 33 N.Y.S.3d 166 (1st Dep't 2016).

DELAY CLAIMS

42-10. Plaintiff-subcontractor commenced an action seeking damages for delays caused by defendant-owner. The court held that the damages sought by the plaintiff were barred by the contract's no damages for delay clause explaining that clauses exculpating a contracting party from liability to a contractor for damages as a result of delays are valid and enforceable. The only exceptions to such clauses are for delays caused by the contractee's bad faith or its willful, malicious or grossly negligent conduct, uncontemplated delays, delays so unreasonable that they constitute abandonment of the contract by the contractee, and delays resulting from the contractee's breach of a fundamental obligation of the contract. Because plaintiff failed to plead any of these exceptions in its amended complaint, the court would not permit recovery. *Weydman Elec., Inc. v. Joint Sch. Const. Bd.*, 140 A.D.3d 1605, 33 N.Y.S.3d 609 (4th Dep't 2016).

42-11. The court affirmed the dismissal of plaintiff-subcontractor's cause of action for delay damages because the contract contained a no-damages-for-delay clause. The court found that the delays constituted, at most, inept administration or poor planning and did not evince bad faith on the part of the contractor. *Advanced Automatic Sprinkler Co. v. Seaboard Sur. Co.*, 139 A.D.3d 424, 29 N.Y.S.3d 166 (1st Dep't 2016).

42-12. Defendant-construction manager's motion to dismiss a breach of contract cause of action was granted as the contract with plaintiff-subcontractor contained a no-damages-for-delay clause and further provided that the only remedy for delays would be an extension of the time for performance. *J. Petrocelli Contracting, Inc. v. Morganti Grp., Inc.*, 137 A.D.3d 1082, 27 N.Y.S.3d 646 (2d Dep't 2016).

42-13. A petition brought by a contractor to annul a determination of the Contract Dispute Resolution Board ("CDRB") was denied. Petitioner had sought damages in connection with a construction project. The CDRB determined that petitioner had waived its claims for damages because of its failure to include a statement, in detail, in its request for an extension of time, that petitioner waived all claims except for those delineated in the application, and the particulars of any claims which petitioner did not agree to waive as required by the parties' contract. The CDRB found that petitioner failed to set forth the claims at issue with sufficient particularity in the broadly worded list of reserves in petitioner's extension request and, thus, that petitioner waived said claims. In addition, the court found that the petitioner's claim for extra work was really a delay damages claim which was precluded by the no-damages-for delay clause in the contract. *Laws Constr.*

Corp. v. Contract Dispute Resolution Bd., 145 A.D.3d 523, 45 N.Y.S.3d 385 (1st Dep't 2016).

NOTE: Legislation is being drafted to permit delay damages in public contracts subject to a notice requirement.

INSURANCE

42-14. Plaintiffs were hired as construction managers on a project involving the construction of a 15-story building with a double basement for use as a DNA lab for the Chief Medical Examiner of New York City. The construction management agreements provided that any prime contractor retained by the City for the project was required to name plaintiffs as additional insureds.

The City hired Samson Construction as a prime contractor for the foundation and excavation work. The insurance endorsement in Samson's CGL policy provided that an additional insured is "any person or organization with whom you [the insured] have agreed to add as an additional insured by written contract." Notably, plaintiffs and Samson never entered into a written contract.

The City later commenced litigation against Samson and the architect for negligence in performing the work. The architect brought a third party action against the construction managers who then sought defense and indemnification from defendant-insurance company. When the insurance company denied coverage, the action was commenced seeking a declaration that the insurance company was obligated to provide plaintiffs with coverage as an additional insured under their CGL policy issued to Samson.

The court held that the language of the insurance clause requiring a written contract for an additional insured was clear and unambiguous. Therefore, the court found that plaintiffs were not additional insureds under the policy, and defendant was not obligated to provide coverage. *Gilbane Bldg. Co./TDX Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 143 A.D.3d 146, 38 N.Y.S.3d 1 (1st Dep't 2016).

42-15. Plaintiff-contractor brought an action seeking a declaration that defendant Illinois Union Insurance Company ("IUIC"), plaintiff's excess liability insurer, was estopped from denying coverage to plaintiff in an underlying personal injury suit because IUIC provided untimely notice of disclaimer of coverage. IUIC moved to dismiss based on the ground that plaintiff's untimely disclaimer claim was time barred.

Plaintiff notified IUIC and Sirius America Insurance Company ("Sirius"), its CGL carrier, of the underlying accident on January 25, 2007. On May 4, 2007, IUIC denied coverage on the ground that its excess policy applied in the same manner as the primary policy from Sirius which had denied coverage on March 21, 2007. The Sirius policy had a Contractors' Exclusion which excluded from coverage claims for bodily injury arising out of work performed by a subcontractor.

Pursuant to Insurance Law Section 3420(d)(2), if an insurance carrier, including an excess carrier, fails to give timely written notice of disclaimer of coverage for death or bodily injury arising out of an accident occurring in New York, it is precluded from disclaiming coverage. The court applied the catch all six-year statute of limitations to the claim and held that plaintiff's claim was time barred as it was brought over eight years after IUIC's notice of disclaimer. *Quality Bldg. Contractor, Inc. v. Illinois Union Ins. Co.*, No. 15 CIV. 6830 (NRB), 2016 WL 4097847 (S.D.N.Y. July 28, 2016).

42-16. Defendant-insurer was not obligated to defend or indemnify plaintiff in the underlying personal injury action where plaintiff did not have a written contract with the policy holder, which was required by a blanket additional insured policy endorsement. *Three Boroughs, LLC v. Endurance Am. Specialty Ins. Co.*, 143 A.D.3d 480, 38 N.Y.S.3d 421 (1st Dep't 2016).

LABOR LAW

42-17. The court dismissed petitions brought to annul the Comptroller of the City of New York's determination to combine two formerly separate trades of asphalt and concrete pavers into a single trade classification with corresponding prevailing wage schedule. The court held that the decision was guided by the Collective Bargaining Agreement ("CBA") of the single union which represented most of the workers in those trades. *N.Y. Indep. Contractors All. v. Liu*, 144 A.D.3d 505, 41 N.Y.S.3d 227 (1st Dep't 2016) (explaining 1983 overhaul of Labor Law Section 220 performed to free fiscal officers from the heavy administrative burden of performing industry surveys of actual wages received by trade workers allowed for reliance on CBAs to determine wage rates).

MECHANIC'S LIENS AND TRUST CLAIMS

42-18. Plaintiff-subcontractor was hired pursuant to a written contract by defendant-general contractor in connection with a project to furnish and install framing and carpentry work. Plaintiff commenced this suit in November 2013 to recover its unpaid balance for the work it completed. In August 2015, plaintiff filed its second amended complaint adding the construction lender as a defendant. Plaintiff alleged that the lender violated Lien Law Section 7 by disbursing loan proceeds to defendant AVA Realty, one of the project owners, after receiving false certifications. The court disagreed explaining that Lien Law Section 7 only applies to owners, contractors and subcontractors and finding that there was nothing in the statute indicating that it was intended to be applied to building loan contracts or lenders. *Mid Atl. Framing, LLC*

v. Varish Constr., Inc., 3:13-CV-01376 (MAD/DEP), 2016 WL 4919944 (N.D.N.Y. Sept. 14, 2016).

42-19. Petitioners commenced this proceeding pursuant to Lien Law Section 19(6) to summarily discharge a mechanic's lien on the ground that the contractor did not comply with the requirements of Lien Law Section 11 which provides that, if a notice of lien is served on a corporation by registered or certified mail, the mailing must be addressed to the corporation at its last known place of business. The court affirmed the grant of the petition discharging the lien finding the contractor's contention, that Lien Law Section 19(6) did not permit petitioners to move to discharge the lien on this basis, was meritless. *EK Mt Kisco, LLC v. Arcon Const. Grp., Inc.*, 138 A.D.3d 1118, 28 N.Y.S.3d 908 (2d Dep't 2016).

42-20. The plaintiff commenced an action against, among others, the defendant to foreclose a mechanic's lien. The defendant moved to discharge the lien and the lien foreclosure claim and to cancel the notice of pendency that had been filed and the plaintiff then cross-moved for leave to amend the notice of lien. The lower court denied defendant's motion and granted that part of plaintiff's cross-motion for leave to amend the notice of lien. Upon reargument, the lower court adhered to its original decision and also permitted plaintiff to amend its complaint to add a reference to the amended notice of lien.

Although the Second Department agreed with the lower court that, because the defect in the notice of lien was subject to amendment, defendant's motion was properly denied, the court found that plaintiff failed to give the five-day notice required by Lien Law Section 12–a(2) to the lienor and any mortgagees. Thus, the court held that plaintiff's motion to amend the notice of lien should have been denied without prejudice to a further application by plaintiff to amend the notice of lien on proper notice to all interested persons as required by Lien Law Section 12-a(2). *Vitale Dev. Grp., Inc. v. Kinsman*, 138 A.D.3d 1109, 30 N.Y.S.3d 325 (2d Dep't 2016).

NOTICE OF CLAIM/CONTRACTUAL NOTICE PROVISIONS

42-21. In 2000, defendant entered into a contract with the City of New York to construct a garage. Subsequently, defendant entered into a subcontract with plaintiff-elevator fabricator and installer to furnish and install five elevators for the project. Several years later, plaintiff commenced this action against defendant to recover damages allegedly incurred as a result of delays in the performance of the work. The Second Department reversed the lower court which had found that plaintiff was entitled to delay damages and which also rejected defendant's contention that plaintiff waived its claim for delay damages by failing to comply with a contractual notice requirement.

The Second Department began its analysis by explaining that where a contract contains a condition precedent-type notice provision setting forth the consequences of a failure to strictly comply, strict compliance is required. The court noted that express conditions precedent must be literally performed; substantial performance will not suffice, and that failure to strictly comply with such provisions generally constitutes a waiver of a claim. The court then pointed out that Article 11 of the prime contract between defendant and the City, which was incorporated into the subcontract, contained such a condition-precedent type notice provision.

Article 11 required a contractor claiming delay damages to submit, within forty-five (45) days from the time such damages are first incurred, and every thirty (30) days thereafter for as long as such damages are incurred, verified statements of the details and amounts of such damages, together with documentary evidence of such damages. Moreover, a failure to strictly comply with the requirements of Article 11 would be deemed a conclusive waiver by the contractor of any and all claims for damages for delay arising from such condition.

The court noted that the letters and emails relied upon by the lower court and plaintiff did not strictly comply with the contractual notice requirement, since they did not contain verified statements of the amount of delay damages allegedly sustained by plaintiff and because they were unsupported by documentary evidence. Contrary to plaintiff's contention, defendant's actual knowledge of the delay and the claims did not relieve plaintiff's obligation to serve a proper notice of claim, and defendant's alleged breach of the subcontract did not excuse plaintiff from complying with the notice requirements under the circumstances presented. Thus, the Second Department held that the lower court should have found that plaintiff failed to strictly comply with the notice requirement, and dismissed the complaint on that ground. *Schindler Elevator Corp. v. Tully Const. Co.*, 139 A.D.3d 930, 30 N.Y.S.3d 707 (2d Dep't 2016).

NOTE: Last year the New York State Assembly and Senate both passed SB6906 which would have required public owners to show prejudice in order to enforce strict compliance with notice provisions. The bill was vetoed by the Governor, but the industry is still working on it.

PAYMENT BONDS—PUBLIC CONTRACTS

42-22. Plaintiff commenced an action against a general contractor and its surety for breach of contract, account stated and to recover on a payment bond pursuant to State Finance Law Section 137 in connection with a project to remediate hazardous soil. Although plaintiff executed an Environmental Services Agreement for the project, defendant-contractor never signed the agreement. The Second Department found that the lower court prop-

erty granted the surety's summary judgment motion dismissing the complaint against the surety as time-barred.

The court explained that when the bond was issued in February 2010, State Finance Law Section 137(4)(b) provided that "no action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which final payment under the claimant's subcontract became due." However, on August 3, 2011, the statute was amended to provide that "no action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which the public improvement has been completed and accepted by the public owner." The amendment was to "take effect immediately."

The plaintiff argued that the amendment should be given limited retroactive effect and be applied to its cause of action, which accrued prior to the effective date of the amendment but was not barred by the pre-amendment statute of limitations when the amendment became effective. The court noted that the legislature did not explicitly state or clearly indicate, either in the amendment itself or in the legislative materials, that the 2011 amendment should be applied retroactively and, thus, that there was a presumption "at the outset that the amendment was to have prospective application." In addition, because a surety bond is a contract under New York law, a contract would generally incorporate the state of the law in existence at the time of its formation. *Clean Earth of N. Jersey, Inc. v. Northcoast Maint. Corp.*, 142 A.D.3d 1032, 39 N.Y.S.3d 165 (2d Dep't 2016) (concluding that, taking into consideration all of the relevant factors, the subject amendment applies only prospectively to payment bonds issued pursuant to State Finance Law Section 137 after the amendment's effective date).

PREVAILING WAGES

42-23. A determination by the New York City Comptroller's Office that petitioner-contractor falsified payroll records and failed to pay prevailing wages to three employees was upheld by the court, but the calculation of unpaid wages and penalty was vacated and remanded. The court noted that when reviewing whether an administrative agency's determination was supported by substantial evidence, the court looks at whether there is a rational basis underlying the decision. In this case, while there was evidence to support petitioner's failure to pay prevailing wages, the determination of the amount of unpaid wages was not supported as it was more than twice the amount owed to all employees on the entire contract. *Astoria Gen. Contracting Corp. v. Stringer*, 144 A.D.3d 603, 42 N.Y.S.3d 120 (1st Dep't 2016).

SURETY/INDEMNITORS

42-24. In an action, *inter alia*, to recover damages for breach of contract and negligence, the court found that the lower court properly granted that part of defendant's motion for summary judgment dismissing the complaint. Defendant established that plaintiff lacked standing to commence the action because, pursuant to an indemnity agreement, plaintiff had assigned its rights to prosecute those claims asserted by it in the instant action to its surety. The court explained that where a contractor assigns its rights under a contract to a surety, it is no longer the real party in interest with respect to claims against the owner. Thus, the court found that defendant established, *prima facie*, that plaintiff was no longer the real party in interest and that, in opposition, plaintiff failed to raise a triable issue of fact as to whether its surety transferred or assigned its rights back to plaintiff. *Xavier Const. Co. v. Bronxville Union Free Sch. Dist.*, 143 A.D.3d 976, 39 N.Y.S.3d 517 (2d Dep't 2016).

42-25. Plaintiff, a surety, commenced an action against defendants-indemnitors, to recover pursuant to the terms of a general indemnity agreement ("Agreement") pursuant to which defendants agreed to indemnify and hold harmless the surety from and against all losses, costs, and expenses incurred in connection with the surety's issuance of bonds on behalf of one of the defendants and/or the enforcement of the Agreement. After the Agreement was executed, defendant was awarded a public contract ("Contract 1") and the surety issued a performance and payment bond (collectively, "Contract 1 Bond") in favor of the public owner, as obligee, in connection with the project ("Project 1").

Subsequently, a village awarded a public contract ("Contract 2") to defendant in connection with a water quality project ("Project 2") and the surety, on behalf of defendant, issued performance and payments bonds (collectively, "Contract 2 Bond"), in favor of the village as obligee.

About eight months later, one of the subcontractors on Project 2 made a claim against the Project 2 Bond seeking payment for work performed and/or materials supplied to Project 2 and, shortly after that, the subcontractor filed a public improvement lien ("Lien") in connection with Project 2. At defendants' request, the surety issued a lien discharge bond ("Lien Bond") discharging the Lien. The surety also received several other claims under both bonds from some of defendant's other subcontractors and/or suppliers.

Several months later after defendant was terminated by the village, the village demanded that the surety complete the Project 2 Contract pursuant to the terms of the Project 2 Bond. Eventually, the surety entered into a tender agreement with the village and a contrac-

tor pursuant to which the contractor was retained to complete Project 2 for approximately $841,000 and the surety paid the village the sum of approximately $481,000 under the terms of the Project 2 Bond. The subcontractor also brought a suit against the surety in state court to foreclose the Lien and to recover under the Lien Bond.

According to the surety, it incurred losses, costs and expenses in approximately $650,000 in connection with the Bonds, the Lien and the enforcement of the Agreement and, in a motion for summary judgment, the surety argued that it had made a *prima facie* showing of entitlement to indemnification in the amount requested by submitting an itemized statement of its costs and expenses to the court. However, the court disagreed, noting that the Agreement provided that only an itemized list sworn to by an officer would be sufficient as *prima facie* evidence of the amount of liability. Although the surety's president submitted a sworn affidavit, the itemized statement was attached only as an exhibit to the affidavit and the statement, itself, had not been sworn to. Thus, the court found a triable issue of fact existed.

Furthermore, although defendants tried to convince the court that the expenses sought by the surety were impermissibly inflated, the court did not buy this contention, finding that defendants' arguments amounted to little more than conjecture. Noting that defendants proffered no evidence that another contractor could see Project 2 through to completion at a lesser cost and no evidence that any delay in selecting a new contractor was undue and resulting from conduct on the part of the surety, the court held that conclusory and unsupported claims like the sort proffered by defendants were simply insufficient to overcome an otherwise supported claim for indemnification.

Next, the surety argued, regardless of any right it might have to contractual indemnity, it was entitled to common law indemnification. Although the court would not grant summary judgment on this issue because there was a factual issue with respect to the amount owed, the court did note that the surety's contractual indemnity rights coexisted with its right to common law indemnity, explaining that where "payment by one person is compelled, which another should have made, a contract to reimburse or indemnify is implied by law." *Colonial Surety Co. v. A&R Capital Assocs.*, Docket No. 13-CV-7214 (LDH) (ARL), 2017 WL 1229732 (E.D.N.Y. Mar. 31, 2017).

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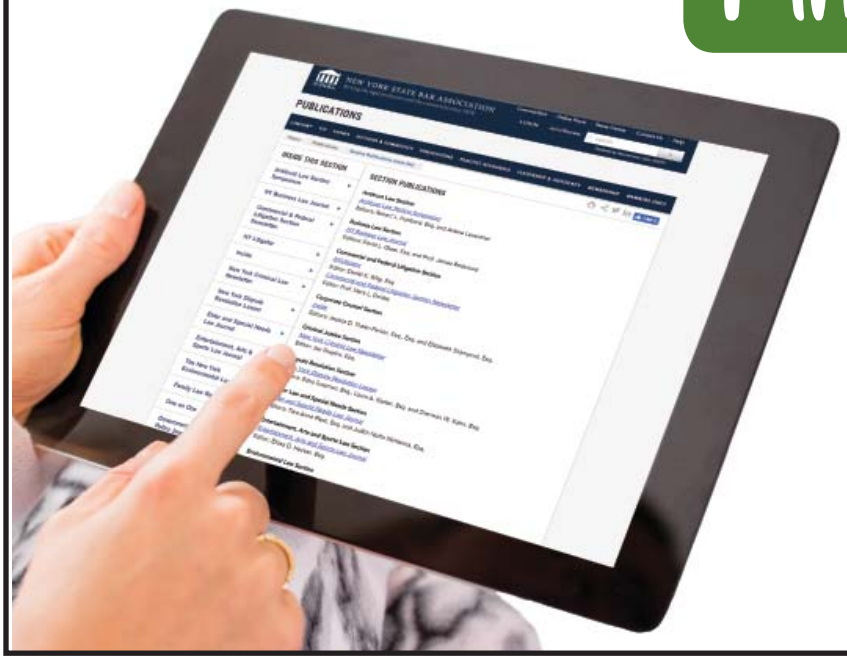

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9:00 a.m. ..... 9:10 a.m. Welcome & Introduction
9:10 a.m. ..... 10:00 a.m. Top 10 General Liability Coverage Decisions
10:00 a.m. ... 10:50 a.m. Emerging Trends for Cyber Liability Coverage
10:50 a.m. ... 11:00 a.m. Refreshment Break
11:00 a.m. ... 11:50 a.m. Hot Topics in Professional Errors & Omissions Liability Coverage
11:50 a.m. ... 1:00 p.m. Lunch (on your own)
1:00 p.m..... 1:50 p.m. Consequential Damages: Where Do We Stand?
1:50 p.m..... 2:40 p.m. Can Coverage Defenses Really Be Forfeited?
2:40 p.m..... 2:50 p.m. Refreshment Break
2:50 p.m..... 3:40 p.m. The Trigger of Coverage Conundrum
3:40 p.m..... 4:30 p.m. Preparing an Effective Position Letter and Understanding the Corollaries
4:30 p.m..... Adjournment

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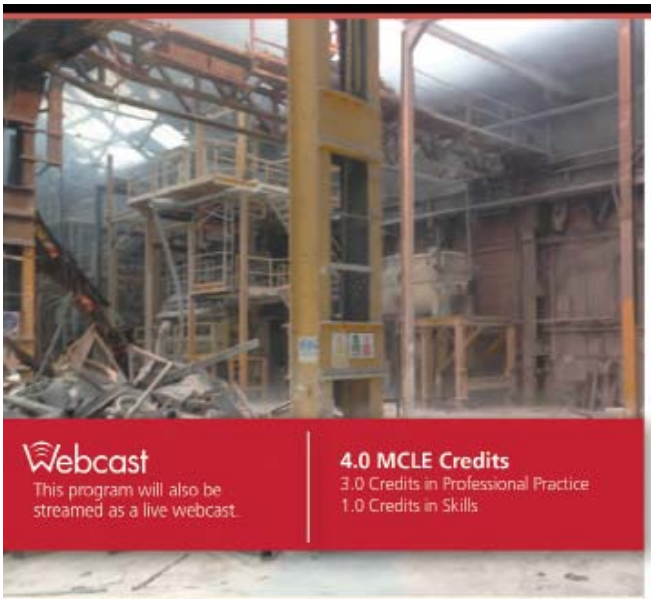
NYSBA Members: $175 | Torts, Insurance and Compensation Law Section Members: $148.75 | Non Members: $275

Pre-registration Strongly Advised: You can save money and guarantee your seat and course materials by registering early. Registrations received at the door are subject to an additional $15.00 registration fee. Registrations cancelled less than three days from the program date will be assessed a cancellation fee of $25.00. 4.0 MCLE Credits



Toxic Tort Litigation 2017

Friday, June 2, 2017 | Melville Marriott
1350 Walt Whitman Road | Melville, L.I., NY 11747

Friday, June 2, 2017 | Sheraton Syracuse University Hotel
801 University Avenue | Syracuse, NY 13210
Continental Breakfast sponsored by *First Environment, Inc.*

Friday, June 9, 2017 | New York Society of Security Analysts
1540 Broadway, Suite 1010 | New York, NY 10036 | Live & Webcast

Program Co-Sponsors:
Torts, Insurance and Compensation Law Section
Environmental & Energy Law Section
Committee on Continuing Legal Education

Program Description:
This half-day program provides a thorough overview of toxic tort litigation. Our faculty, a mix of distinguished litigators and experts, will highlight the intricacies of a toxic tort claim. This program will explore the skills necessary to demonstrate causation and harm, and will analyze recent cases and industry developments. This unique program is not to be missed!

For more information, visit nysba.org/ToxicTort2017

3.0 Professional Practice, 1.0 Skills

Not Able to Attend in Person? A Live Webcast Option Is Available: Friday, June 9, 2017*

If you cannot watch the webcast at the scheduled time and date, the recording will be available to you to access after the presentation date for a 60-day period enabling you to watch on your schedule and earn your MCLE credits.

*Newly admitted attorneys (less than twenty-four months) must attend the live program in order to earn Skills credits. Newly admitted attorneys are not able to earn Skills credits by viewing the webcast.

Who Should Attend? Environmental Law practitioners, Toxic Tort litigators, Real Estate transactional attorneys.

Agenda

8:30 a.m. – 9:00 a.m. Registration
9:00 a.m. – 9:10 a.m. Welcome & Introductions
9:10 a.m. – 10:00 a.m. Toxic Tort Litigation – Overview
10:00 a.m. – 10:50 a.m. The Science of Causation and Harm – Toxicology 101
10:50 a.m. – 11:05 a.m. Refreshment Break
11:05 a.m. – 11:55 a.m. Update on Recent Toxic Tort Cases – Asbestos, Lead Paint, and Beyond
11:55 a.m. – 1:00 p.m. Emerging Toxins and How They Have Impacted the Industry
1:00 p.m. Adjournment

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November 9-12, 2017

The Hutton Hotel | 1808 West End Avenue | Nashville, TN

Reserve your hotel room by calling The Hutton at (615) 340-9333 or emailing them at hreservations@huttonhotel.com

If emailing your reservation info, please do not forget to include your dates of stay.

You must identify yourself as an attendee of the "NYSBA TICL Fall Meeting" when making your booking to receive our preferred rates:
$249 plus taxes and fees for Single/Double
$269 plus taxes and fees for Triple
$299 plus taxes and fees for One Bedroom Suites.

Meeting Information Coming Soon. Questions: Contact Catheryn Teeter at 518-487-5573, or cteeter@nysba.org

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NYSBA Communities are private, online professional networks for members. They are built on the concept of listserves, allowing for member-to-member communication across the Section, but they also offer enhanced features for networking and participation, including personalized member profiles, a member directory, and a shared online document library.

How Can I Use It?

Communities are seamlessly integrated with nysba.org: you can use your NYSBA member login and password. To access the TICL Section Community, you must be a member of the TICL Section. You can interact with Communities via the online interface, by email, in NYSBA's LawHUB, or via a mobile app, at your preference. To download the app, search for "NYSBA Communities" in the Apple or Google Play Store. Find our community at www.nysba.org/ticlcommunity.

Deconstruction

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

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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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