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Deconstruction

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

Summary of Decisions and Statutes

ALTERNATIVE DISPUTE RESOLUTION

41-1. Plaintiff subcontractor brought a breach of contract action in connection with work performed on a project in the state. The defendant moved to stay the action and compel the subcontractor to submit to arbitration in another state pursuant to an arbitration provision in the subcontract. The court held that General Business Law § 757 provides that a provision in a construction contract, other than a contract with a material supplier, making the contract subject to the laws of another state or requiring any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state is void and unenforceable. The court, finding that plaintiff was a subcontractor and not merely a material supplier, ordered the arbitration scheduled to take place in the other state permanently stayed and enjoined and further ordered the parties to go forward with the arbitration in New York and also found that New York law applied. *HVS, LLC v. Fortney & Weygandt, Inc.*, 49 Misc. 3d 1143 (Sup. Ct. Rockland Co. 2015).

ARCHITECTS, ENGINEERS, AND SURVEYORS

41-2. In an architectural malpractice action based upon a failure to measure a space and inspect, the court found for the defendant architectural firm. First, the court found that an architectural firm had no professional duty to accurately measure a space in a tenant's lease negotiation with its landlord. The tenant could not establish that it informed the architect that its measurements would be used to negotiate the lease and that the architect acknowledged that its measurements would be used for that purpose.

Second, the contract between the tenant and the architect never mentioned inspections as being within the scope of the architect's duties. However, there was no dispute that the architect agreed to perform inspections under Directive 14 as part of its involvement in the project. The architect acknowledged that his signature on the TRI form, which set forth his inspection responsibilities, carried with it a professional obligation. Specifically, the architect agreed to perform inspections of certain systems as well as a final inspection of the project and to certify to the New York City Building Department ("DOB") that all work substantially conformed to approved construction documents and applicable laws and rules.

The tenant argued that this certification required the architect to inspect the project for conformance with every aspect of the construction documents. The court disagreed for two reasons. First, there was little reason to think that the DOB, when crafting the language of the TR1 form, intending to form create liability for an inspector as a guarantor of every aspect of the work at a self-certified site, rather than just the aspects implicating the Building Code and other regulations.

Second, even if the broader scope of inspections envisioned by the tenant were required, the tenant had not demonstrated that the inspector's duty would be to ensure that construction conditions were fixed to match the plans. The court noted that this was evidenced by the fact that when the expeditor sent an email explaining the architect's TRI obligations, she wrote that if the conditions did not match the plans, the architect's duty would be to merely amend the plans to match the conditions.

The court found, at least as it related to any duty to inspect specifically to ensure conformance with the plans, the tenant would not be entitled to damages, which were the cost to bring the store into conformance. The court held that, at most, the tenant would be entitled to a new set of plans reflecting the conditions of the store. *Wax NJ-2, LLC v. JFB Const. & Dev.*, 111 F. Supp. 3d 434 (S.D.N.Y. 2015).

COMPETITIVE BIDDING

41-3. Respondent, a Town, issued a bid invitation for a waste removal contract and petitioner was the low bidder. The Town Board reviewed the bid and issued a resolution rejecting the bid. The resolution provided that the bid was

deficient for number of reasons including that petitioner failed to demonstrate it was a licensed Town carter or that it had a valid joint venture agreement with a licensed Town carter and that it had the required experience with such contracts. Petitioner commenced an Article 78 proceeding against the Town and respondent-successful bidder (collectively, "Respondents") to review the determination. After the petition was filed, the Town agreed to stay the contract award until the lower court issued a decision in the Article 78 proceeding.

While the Article 78 was pending, Respondents informed the lower court that petitioner's manager and president/owner had been named in an indictment alleging various crimes in connection with petitioner's waste hauling activities. Respondents noted that the indictment provided for forfeiture and criminal sanctions of petitioner's principals, and further noted that the contract required the successful bidder to affirmatively represent there were no pending actions against the principals and no pending actions or proceedings which could impact the bidder from performing. Respondents argued that, because petitioner could no longer enter into the contract, the Article 78 proceeding was moot.

The lower court agreed and, without reaching the merits, denied the petition, dismissing the proceeding as moot. Because the contract services were not completed or substantially completed, the Second Department found that the lower court erred. The court also found that because the indictment was not announced until after the Article 78 proceeding had commenced, the lower court should have limited its review to the grounds relied upon by the Town in its resolution rejecting petitioner's bid. The court affirmed the decision on different grounds finding that the Town had a rational basis for rejecting the bid. *AAA Carting & Rubbish Removal v. Town of Clarkstown*, 132 A.D.3d 857 (2d Dep't 2015).

41-4. Petitioner, an unsuccessful bidder with the lowest bid for a contract to install a radio dispatch system for a fire district ("District"), brought an Article 78 proceeding against the District and its board of fire commissioners. The petitioner claimed that the Board acted arbitrarily and capriciously in awarding the contract to the successful bidder and that the District and successful bidder colluded to ensure the successful bidder's success. The court affirmed the lower court's dismissal of the petition finding that any of the following three reasons given by the District for rejecting the bid provided a rational basis for the decision. First, petitioner failed to demonstrate it had a service location within 20 miles of the District; second, petitioner offered to supply equipment which differed from the bid specifications; and third, over the life of the contract, the monthly maintenance costs would render the bid more expensive than the successful bidder's bid.

General Municipal Law § 103(1) provides that, in awarding any contract in excess of $35,000, public entities must award the contract to the lowest responsible bidder. However, it is a municipality's right to determine whether a bid meets its specifications, and that determination is entitled to deference if it is supported by any rational basis. Thus, a court may not substitute its judgment for that of the board it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion. It was the petitioner's burden to demonstrate that a bid has been wrongly awarded and, in this case, the court found that burden was not satisfied. *Hello Alert v. E. Moriches Fire Dist.*, 129 A.D.3d 966 (2d Dep't 2015).

CONTRACT INTERPRETATION

41-5. In a construction dispute between plaintiff-supermarket owner and defendant-contractor, the owner commenced an action for breach of contract and warranty when a concrete floor slab settled, causing damage. The contractor had submitted a Request for Clarification ("RFC") to the architect and subsequently constructed the floor in accordance with the plans and design specifications, as clarified by the RFC, and directed by a change order. The lower court granted the contractor's motion for summary judgment and dismissed the matter, finding that the contractor complied with its contractual duty when it constructed the building in accordance with the specifications, and the owner appealed.

The Third Department affirmed the lower court's order, finding that the contractor showed that it followed the design specifications and sufficiently established a *prima facie* entitlement to judgment as a matter law. The court also found that while the contractor had an obligation to "carefully study and compare" the various contract documents for any "errors, inconsistencies or commissions discovered," the contractor's review was in the capacity of a contractor to facilitate and coordinate the construction, and not as a licensed design professional undertaking the practice of architecture/engineering. The court held that the contractor was not responsible for the adequacy of the performance and design criteria specified in the contract documents; thus the contractor was not liable to the owner for breach of contract and warranty. Although the contractor was obligated to report any "errors, inconsistencies or omissions" it discovered to the architect, it was required to do so in its capacity as contractor, not as a licensed design professional. *Maines Paper & Food Serv. v. Pike Co.*, 137 A.D.3d 1366 (3d Dep't 2016).

INDEMNITY

41-6. In an action against project sponsors by a condominium board, the sponsors brought a third-party claim against the general contractor/construction manager ("GC"). The GC sought contractual indemnification from several subcontractors pursuant to the terms of an AIA subcontract, A401-1997, in the event that the sponsors recovered a judgment against the GC. The lower court examined the indemnity provisions contained in sections 4.6.1 (Indemnification) and 13.1 (Insurance and Bonds) of the subcontracts. While the first indemnity provision expressly carved out indemnification for "the Work itself," the second indemnity provision did not. Thus, the issue was whether the second provision applied to claims arising out of a subcontractor's faulty workmanship in the work product itself.

The court found that the ambiguous second provision must be read in the context of the indemnity provided for in the subcontractors' CGL policy, which did not insure against faulty workmanship in the work product itself. In reconciling the two provisions, the court looked to *Hooper Associates, Ltd. v. AGS Computers*, 74 N.Y.2d 487 (1989) in which the Court of Appeals held that when a party is under no legal duty to indemnify, an agreement to indemnify must be strictly construed to avoid reading a duty into the agreement which the parties never intended. Thus construing the second provision to include damages arising out of claims in connection with the performance of the work itself would improperly add a duty that was not clearly implied from the language of the entire subcontract. The court held that the second provision found in section 13.1 was not intended to expand the GC's right to indemnification from claims by the sponsor against faulty workmanship in the subcontractor's work product itself. *Bd. of Managers of 125 N. 10th Condo. v. 125North10, LLC*, 51 Misc. 3d 585 (Sup. Ct. Kings Co. 2016).

INSURANCE

41-7. A subcontractor's employee was injured and commenced an action against the owners and the general contractor ("GC") alleging negligence and Labor Law violations. The plaintiff, Hermitage Insurance Co., provided coverage to the owners and the GC under separate policies and defendant Aspen Insurance Co. provided coverage to the subcontractor. The Hermitage policies excluded injuries arising from the work of independent contractors or subcontractors on the premises unless those entities specifically agreed to make the owners and the GC additional insureds on their own policies. The subcontractor was the named insured on a policy issued by Aspen providing that an entity would be considered an additional insured only if the subcontractor agreed, in writing, to make that entity an additional insured. However, the subcontractor never made either the owners or the GC additional insureds under its policy. In addition, the subcontractor's policy limited coverage to specific types of interior work and the employee was outside when the accident occurred.

The Appellate Division held that the lower court correctly determined that Hermitage validly disclaimed coverage to the GC based on late notice and that Aspen did the same with respect to the GC and the owners. *Hermitage Ins. Co. v. Skyview & Son Const. Corp.*, 137 A.D.3d 712 (1st Dep't 2016).

41-8. Plaintiff-general contractor("GC") sought a declaration that the subcontractor's insurer was obligated to defend and indemnify the GC in a personal injury action commenced by a subcontractor's employee. The subcontract required the subcontractor to name the GC as an additional insured on the subcontractor's CGL policy and also to defend and indemnify the GC for all claims arising out of the subcontractor's work.

Shortly after the GC received notice of the injury, the GC's insurer sent a letter to the subcontractor about the claim. The GC's insurer asked for the name of the subcontractor's insurer and the policy number, noted that the subcontractor had agreed to defend and indemnify and hold the GC harmless and requested that the subcontractor's carrier be put on notice so the carrier could perform its own investigation. The subcontractor's broker forwarded the letter to the subcontractor's insurer along with a general liability notice of occurrence/claim form describing the injury, and the subcontractor sent a copy of the subcontract to the GC at the request of its insurer.

About three months later, the injured employee sued the GC and the owner. The GC's counsel notified the subcontractor's insurer of the action in a letter and indicated that the GC had not yet received a response to its previous request for defense and indemnification. This time, counsel expressly noted that the subcontractor was required to defend and indemnify the GC and name it as an additional insured, and include an insurance certificate demonstrating that the GC was named as an additional insured on the subcontractor's policy. The subcontractor's insurer denied coverage due to late notice because, in its initial letter, the GC framed itself only as a claimant against the subcontractor, not as an additional insured of the subcontractor's insurer, and coverage had been denied to the subcontractor for unrelated reasons. The lower court granted the subcontractor's motion to dismiss but, on appeal, the Appellate Division reversed and reinstated the complaint and certified a question to the Court of Appeals as to whether the court's order was proper.

The Court of Appeals, holding that the GC's initial letter constituted notice of an occurrence under the policy and under New York law, rejected the insurer's argument that, as a matter of law, documentary evidence established that the GC did not give the subcontractor's insurer timely notice. The subcontractor's insurer claimed it interpreted the GC's initial letter as seeking only a defense and indemnity from the subcontractor pursuant to the subcontract's indemnification provision because the GC did not expressly state that it was seeking coverage as an additional insured.

However, the letter itself did not identify the subcontract's indemnification provision as the basis for the communication—it simply requested a defense and indemnity under the contract without specifically invoking either the indemnification or additional insurance provisions. Moreover, the letter requested that the subcontractor place its carrier on notice of *this claim* (emphasis added) and provided information about the identity of the injured employee, as well as the date, location and general nature of the accident. That is, in addition to requesting that the insurer be put on notice, the letter provided the details required by the policy to be included by

an insured when making notice of an occurrence. *Spoleta Const., LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933 (2016).

MECHANICS' LIENS AND TRUST CLAIMS

41-9. Condominium owners sued under the Lien Law as "trustee" of funds allegedly received and held by the contractors. Even though Lien Law § 77(1) provides that a trustee can maintain an action to enforce a trust, Lien Law § 70(5) provides that "[t]he assets of the trust of which [an] owner [of real property] is trustee are the funds received by him." The court dismissed the claim finding the owners lacked standing to maintain the claim because they were not the trustee of funds received by the contractors, and, therefore, they lacked standing to enforce the claim against the contractors. *Ferro Fabricators v. 1807–1811 Park Ave. Dev. Corp.*, 127 A.D.3d 479 (1st Dep't 2015).

41-10. An owner leased commercial premises to several tenants for a pizzeria. One of the tenants entered into a contract with the plaintiff, a contractor, to renovate the premises. After the contractor performed most of the work, the project stalled through no fault of the contractor. When the contractor was not paid, the contractor filed a mechanic's lien and commenced an action against, among others, the owner to foreclose the lien.

Lien Law § 3 provides that a contractor who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner or his agent, contractor or subcontractor shall have a lien on the real property for the value or the agreed price of such labor or materials. When the property is leased, a contractor performing work for a tenant may file a mechanic's lien against the premises where the owner affirmatively gave consent for the work directly to the contractor, but not where the owner has merely approved or acquiesced in the undertaking of such work. Although the consent does not have to be explicit, there must be some affirmative act or course of conduct on the part of the owner establishing confirmation.

There was testimony that the owner's agent was present when the contractor first met with the tenant to assess the job and give his bid. The agent then approved the plans for the project and the owner acknowledged her approval, in writing, to the building department. Once the work started, the contractor alleged the agent was constantly present at the work site, to supervise and approve the work. The court found there was an issue of fact as to whether the owner and her agent engaged in a course of conduct establishing consent for the contractor's work for purposes of Lien Law § 3. *Icdia Corp. v. Visaggi*, 135 A.D.3d 820 (2d Dep't 2016).

41-11. The court found that an attorney fee award should not have been granted pursuant to Lien Law §§ 39 and 39–a, explaining that the action before the court was not an action or proceeding to enforce the lien, noting that the lien had been discharged without a finding of willful exaggeration. The court explained that Lien Law § 39–a is penal in nature, and must be strictly construed in favor of the person upon whom the penalty is sought to be imposed. *Harrington v. Smith*, 138 A.D.3d 548 (1st Dep't 2016).

NOTICE OF CLAIM

41-12. Plaintiff-software company entered into a license with a Town which required the Town to pay any fees due within 60 days of receipt of an invoice and provided that, should the Town fail to pay any fee due, upon 30 days' written notice, plaintiff could terminate the license. The license would remain in force and the termination would not take effect if the Town paid the amount due prior to the expiration of the 30-day notice period.

Plaintiff sent the Town an invoice for payment of the annual fee and, when no payment was received, an email exchange occurred between the parties which ultimately resulted in plaintiff receiving assurances that the Town was working on getting the invoice paid. When the invoice still remained unpaid almost a year later, plaintiff sent the Town a notice of default informing it that if payment was not received within 30 days, the license would be terminated. When the Town failed to respond, plaintiff sued the Town for breach of contract and account stated. The Town moved to dismiss on the basis that plaintiff failed to file a timely notice of claim pursuant to Town Law § 65(3) and, when the lower court denied the motion, the Town appealed and the court affirmed, although on different grounds.

Town Law § 65(3) provides that no action shall be maintained against a town upon or arising out of a contract unless a written verified claim is filed with the town clerk within six months after the cause of action accrued. Given a contractor's cause of action accrues when it should have viewed its claim as actually or constructively rejected, the court found the notice of claim was timely filed within six months of the "constructive rejection" of the claim which was when 30 days had passed and plaintiff still had not received payment. *Inform Applications v. Town of Brookhaven*, 136 A.D.3d 670 (2d Dep't 2016).

PERFORMANCE BOND

41-13. A contractor sued, among others, a hotel owner for breach of contract, claiming that the owner failed to keep payments current under a construction contract. The owner then brought a third-party action against the performance bond surety seeking to compel the surety to perform under the bond. The surety answered and moved for summary judgment to dismiss the third-party complaint and the lower court granted the motion. The Appellate Division affirmed, finding that several paragraphs of the bond unambiguously created express conditions precedent to performance by the surety and

that the owner failed to comply with at least one of these conditions. The court was not persuaded by the owner's argument that economic hardship rose to the level to excuse the bond's conditions under a theory of impossibility of performance. *Granger Const. Co. v. TJ, LLC*, 134 A.D.3d 1329 (3d Dep't 2015).

PRINCIPAL AND SURETY

41-14. In the context of an action by a surety seeking enforcement of a General Agreement of Indemnity and payment of loss incurred on multiple payment and performance bonds, an indemnitor moved to stay the action pending resolution of state court actions. The district court denied the motion, holding that the indemnitor had not met its burden of demonstrating the necessity of a stay. Contrary to the indemnitor's argument, the legal issues in the federal court action were not the same as those pending in the state court actions. The court found that resolution of the state court actions would not affect the indemnitor's liability under an agreement to indemnify against damages suffered by the surety. *Travelers Cas. & Sur. Co. of Am. v. DiPizio Const. Co.*, 103 F. Supp. 3d 366 (W.D.N.Y. 2015).

SURETY—PAYMENT BOND

41-15. A subcontractor on a School Construction Authority ("SCA") project brought a payment bond claim against a general contractor's ("GC") surety to recover money owed by the GC. It was undisputed that the GC, who was paid in full for the subcontractor's work by the SCA, had not paid the subcontractor. General Municipal Law § 106–b(2) requires a contractor who receives any payment from a public owner to make prompt payment to its subcontractors for their work less an amount necessary to satisfy any claims, liens or judgments against the subcontractor which have not been suitably discharged. The court held that, contrary to the surety's contention, an unrealized, admittedly potential claim for liquidated damages that the SCA may or may not assert against the GC, does not constitute a claim for liquidated damages against the subcontractor by which the surety or the contractor may offset its payment to the subcontractor. *ACS Sys. Assocs. v. Safeco Ins. Co. of Am.*, 134 A.D.3d 413 (1st Dep't 2015).

WARRANTY

41-16. A letter written by the homeowners' counsel was sufficient to put the builders of a new home on notice of the homeowners' claims regarding flooding in their basement as required by General Business Law S 777-a(4)(a) in an action for the breach of the housing merchant implied warranty. The letter set forth the defects and offered the builders a reasonable opportunity to inspect, test and repair the defects. Given it was necessary for the repairs to begin promptly due to the condition caused by the flooding, the amount of time the homeowners gave the builders was reasonable under the circumstances. *Furino v. O'Sullivan*, 137 A.D.3d 1208 (2d Dep't 2016).

WORKERS' COMPENSATION

41-17. Plaintiff, an employee of a contractor, sued defendant-site owner claiming a violation of the Scaffold Law, Labor Law § 240(1). The lower court granted partial summary judgment to plaintiff on liability and the site owner appealed, arguing that it was the "alter ego" of the plaintiff's employer and, thus, the action was barred by the Workers' Compensation Law. The court affirmed and found that, although the contractor was the general partner of the site owner, the contractor and site owner functioned as separate entities—they kept separate files and did not commingle any funds. Moreover, the property management plan between the two entities provided that the site owner had no employees and required the contractor to indemnify the site owner. The court held that the Workers' Compensation Law did not bar the plaintiff's claim. *Ocana v. Quasar Realty Partners L.P.*, 137 A.D.3d 566 (1st Dep't 2016).

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To Rescind or Not to Rescind—That Is the Question When a Subcontractor Is Delayed by Unforeseen Site Conditions

By Marc S. Brown

An attorney is often faced with a situation where a client who is a subcontractor on a project that has been delayed due to unforeseen site conditions asks whether she can terminate/rescind the subcontract with the general contractor. The short answer is yes. The better answer is, yes, but not without substantial risk.

Consider the following hypothetical. On or about March 26, 2015, a General Contractor ("GC") and Subcontractor enter into a subcontract for certain work associated with Project No. 2222, Center for Writing About Made Up Places, 121 Nowhere Street, Somewhere, New York ("Project") owned by the State. Although it's not clear whether the Subcontractor has started to perform the subcontract work ("Work"), upon information and belief, the Subcontractor anticipated completing the Work in the summer of 2016.

Unforeseen site conditions, namely asbestos, delayed the Project and the Work and the Subcontractor now anticipates completion of the Work in the summer of 2017. Although the Subcontractor has been financially impacted by the delay and has communicated same to the GC, it's unclear whether the GC has communicated the impact to the Owner. Regardless, the Subcontractor is now interested in terminating/rescinding the Subcontract due to the impact. The following assumes for the purposes of this article that rescission is a remedy for a breach of contract caused by delay.

As a general rule, the contract documents dictate the rights and responsibilities of the parties. The Subcontract between the parties incorporates the terms and conditions of the prime contract between the GC and the Owner, including its general requirements, bid documents, drawings, specifications, addenda and riders. This reference to the prime contract is known as a "flow down provision" and attempts to hold the Subcontractor liable to the GC in the same manner that the GC is liable to the Owner.[1] In theory, with a "flow down" clause, all obligations and duties of the GC or Prime Contractor to the Owner "flow down" to the Subcontractor. Flow down provisions, however, are not absolute, and, therefore, not everything "flows down."

In New York, "general incorporation clauses in a construction contract, incorporating prime contract clauses by reference into a subcontract, bind the subcontractor *only* as to prime contract provisions relating to the *scope, quality, character and manner of the work* to be performed by the subcontract."[2]

These "scope, quality, character and manner of the work" type provisions go to the essence of the Subcontractor's Work since such Work cannot be performed adequately without such standards being understood between the parties. As a result, the courts have held such provisions as having "flowed down" successfully against the Subcontractor and enforceable.[3] However, provisions other than those relating to the "scope, quality, character and manner" of the Subcontractor's work, items which might be considered ancillary, will not bind the Subcontractor unless the provision is specifically incorporated in the Subcontract.[4] For example, clauses relating only to the resolution of disputes are not incorporated by a mere general incorporation clause; instead clauses of this kind must be incorporated by language "sufficient and specific" to assure that the parties intended that they apply.[5]

The prime contract between the GC and the Owner has a provision regarding Site Conditions, paragraph 2.12, requiring the GC to provide immediate notice of the condition (which may or may not have been done), and a provision regarding Notice of Conditions Causing Delay, paragraph 3.04, which calls for 10 days' written notice to the Owner (which may or may not have been done). Assuming that the GC complied with the notice requirements in the prime contract, paragraph 3.05 of the contract limits "damages" to an extension of time only, and does not allow for any action against the Owner unless the delay was caused by the Owner's willfulness, bad faith or unless the delay was "uncontemplated."

Assuming the asbestos was "uncontemplated," an argument can be made that there is an entitlement to more than a time extension, but paragraph 4.22, Contractor Limited to Money Damages, provides that if the GC can be adequately compensated by money damages no action by the State constitutes a material breach allowing contractor to cancel, suspend, rescind or abandon performance. This is a critical paragraph, in that it limits what the GC can do in the face of a breach by the Owner. The presence of asbestos is the responsibility of the Owner and it will need to issue time extensions and likely additional funds to the contractors, but the existence of asbestos and the resultant delays (by themselves) are not a material breach. Even if it was a material breach, the prime contract does not allow the GC to rescind or abandon the Work. What the GC can or cannot do is relevant to this inquiry, because of the "flow down" provision and the language of the Subcontract.

The author contends that a very strong argument can be made that the above-cited provisions do not "flow down" to the Subcontractor, as they do not relate to the scope, quality and character of the Work. The Subcontract

does not have a paragraph comparable to paragraph 4.22 in the prime contract, and, therefore, an argument can be made that the Subcontractor is not bound by the same limitation that the GC is.

However, Article VIII of the Subcontract, *Delays in Performance of Work*, provides in pertinent part: "Additionally, this Subcontractor specifically agrees that *the Contractor shall not be liable* to this Subcontractor for damages or any increase to the Subcontract price *on account of any delay caused by the Owner,* architect or any of their agents, servant, consultants, or employees. Should this Subcontractor suffer damages as a result of delays by the Owner, this Subcontractor agrees to file a joint claim with the Contractor against the Owner. Should this Subcontractor suffer damages as a result of delays by the Owner, this Subcontractor agrees to file a joint claim against the Owner with the Contractor" (emphasis added).

If the delay is truly due to the presence of asbestos, it is an Owner caused delay. This very specific paragraph in the Subcontract makes it clear that the Subcontractor cannot hold the GC responsible for the Owner's delay. However, the paragraph does allow the Subcontractor to bring an action against the Owner alongside the GC, but that raises a number of other issues.

First, is this a fight that the GC is even interested in fighting? The Subcontractor is not in contractual privity with the Owner, so the only way it can sue the Owner is with or in the shoes of the GC. Second, if the GC does not want to sue the Owner on the Subcontractor's behalf, the GC might want to offer the Subcontractor a liquidating agreement. A liquidating agreement allows the Subcontractor to stand in the GC's shoes and bring an action against the Owner.[6] However, the Subcontractor would arguably be limited to whatever rights the GC has, and, as we have seen, the GC is not entitled to rescind the contract.

In conclusion, if the Subcontractor is being negatively impacted by project delays through no fault of its own, it may be entitled to damages in the form of a time extension or equitable adjustment of the Subcontract price if the various notice provisions are met. If, however, the Subcontractor is not interested in monetary damages but rather a "way out" of the Subcontract, it is facing a tough road. The Subcontract provides that the Subcontractor cannot look to the GC for delays caused by the Owner, which is what we have here. It does allow the Subcontractor to make a claim against the Owner alongside the GC (or possibly in the GC's shoes), but that would likely limit the Subcontractor's recovery options to time and money as well. If the delay is caused by the GC, the Subcontractor may have a better argument for a right to rescind the Subcontract. Regardless, if the Subcontractor elects not to perform, it will likely be exposing itself to a lawsuit by the GC. The Subcontract is for roughly $2 million. The GC would need to find another Subcontractor to complete the Work and, if it costs the GC more than the Subcontract balance, the Subcontractor would be exposed to the difference, which could be significant. The Subcontractor would be risking exposure to money damages, its attorney's fees and possibly the GC's attorney's fees.

Given the Subcontractor's history of honoring its contractual obligations and avoiding conflict, taking a risk this large would be out of character and not advisable under the circumstances. Accordingly, the author suggests that the Subcontractor honor its obligations under the Subcontract, but do everything in its power contractually to get compensated for the delay.

Endnotes

1. *See* 33 N.Y. Practice, N.Y. Construction Law Manual § 3.6 (2d ed.) (noting "not unusual for a subcontract to incorporate the prime contract by reference," explaining such clauses, "also known as flow down clauses …, often attempt to bind a subcontractor to all obligations of the prime contract in addition to the obligations of its subcontract.").
2. *U.S. Steel Corp. v. Turner Const. Co.,* 560 F. Supp. 871, 873-74 (S.D.N.Y. 1983) (emphasis added).
3. *New York Tel. Co. v. Schumacher & Forelle, Inc.*, 60 A.D.2d 151, 152, 400 N.Y.S.2d 332, 332 (1st Dep't 1977).
4. *U.S. Steel*, 560 F. Supp. at 872.
5. *See CooperVision, Inc. v. Intel Integration Technologies, Inc.,* 7 Misc. 3d 592, 600-01, 794 N.Y.S.2d 812, 819-20 (Sup. Ct. Monroe Co. 2005) (citing *Fischbach & Moore Elec. v. Bell BCI Co.,* No. 02-CV-6536 (CJS), 2004 WL 1811392, *5 (W.D.N.Y. Aug. 11, 2004)) (recognizing prime contract provisions unrelated to subcontractor's work, such as dispute resolution clauses, are not incorporated by reference into subcontract unless subcontract is sufficiently specific.).
6. *See Lambert Houses Redevelopment Co. v. HRH Equity Corp.*, 117 A.D.2d 227, 230, 502 N.Y.S.2d 433, 435 (1st Dep't 1986 (explaining standard form of liquidating agreement provides "that all recovery will, in effect, pass through the general contractor to the injured party, thereby leaving the subcontractor and the owner to pursue their claims against each other.").

Marc S. Brown, a member of Reeve Brown, PLLC in Rochester, New York, has practiced law for more than 20 years, focusing primarily on construction law, commercial litigation, and personal injury matters. He frequently represents owners, contractors, subcontractors, suppliers and bonding companies, and has extensive experience handling construction contracts, lien law, trust fund, construction defects, and surety claims. Marc has also defended architects and engineers in professional liability disputes relating to the negligent design of buildings and structures. An experienced litigator, he has successfully tried cases to verdict and has handled numerous arbitrations and appeals in New York courts. Marc was previously a partner with the statewide law firm of Hiscock & Barclay, LLP, where he was the Chair of the Construction & Surety Law Practice Area.

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