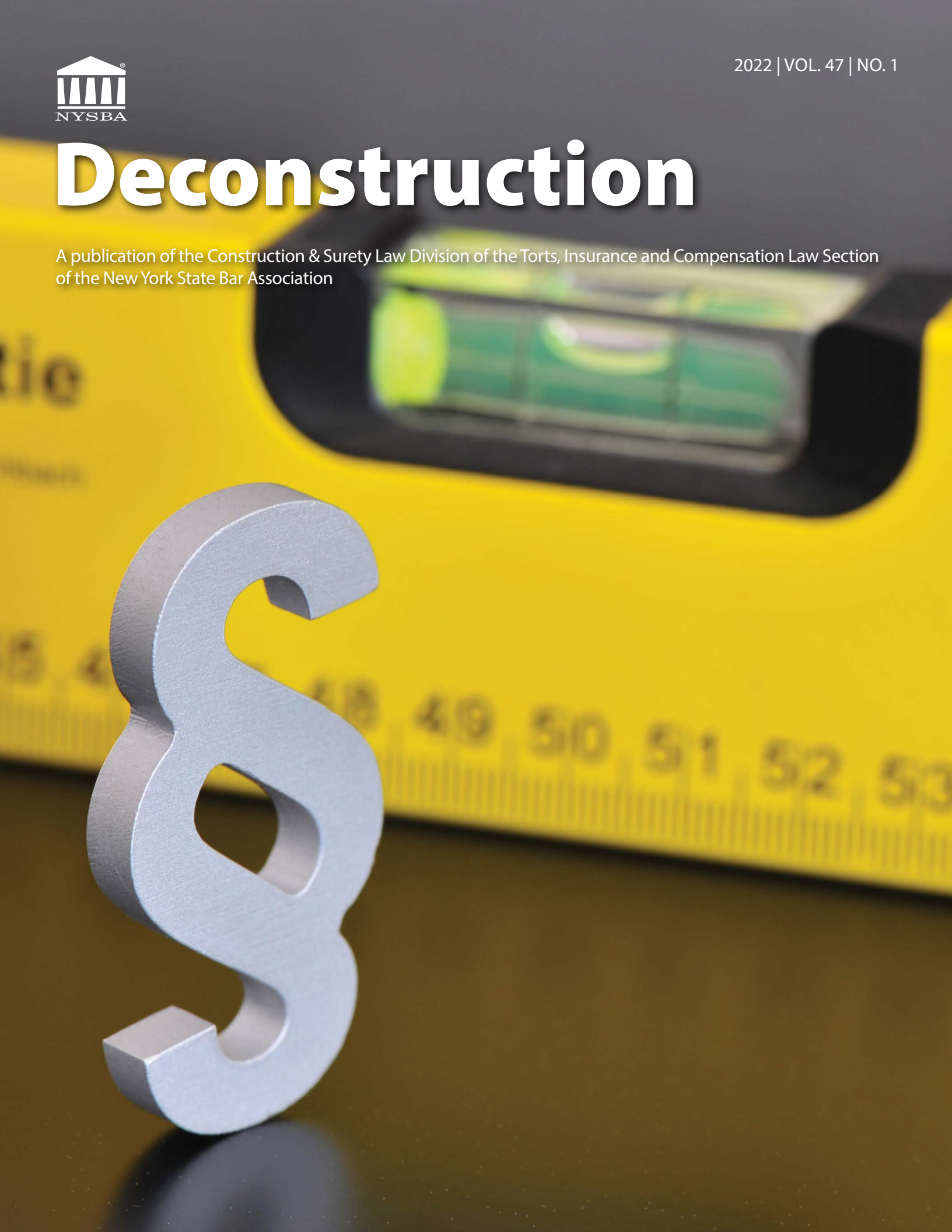
2022 | VOL. 47 | NO. 1

NYSBA

Deconstruction

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

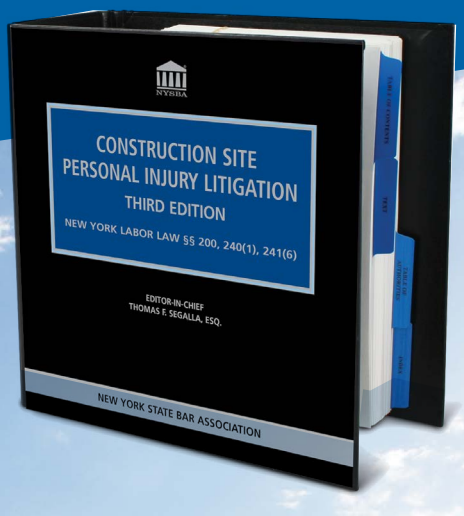


PUBLICATIONS

Construction Site Personal Injury Litigation

New York Labor Law §§ 200, 240(1), 241(6)
Third Edition

Editor-in-Chief
Thomas F. Segalla, Esq.
and The Goldberg Segalla
Construction Practice Group.



Topics Covered:

- Pleading and proving the necessary elements of a cause of action;
- Preparing for the motion for summary judgment;
- Construction accident investigation and handling discovery;
- Insured coverage issues and indemnification;

Construction Site Personal Injury Litigation covers all aspects of claims brought under New York Labor Law §§ 200, 240(1) and 241(6). Since these statutory obligations are not based on fault, even the most experienced attorney must carefully scrutinize an injured worker's eligibility to proceed under one of these statutes.

Also included is a new chapter covering OSHA inspections and enforcement actions, including employer requirements in general, guidance for taking COVID precautions and the impact of OSHA violations on civil litigation.

Book (404721)
eBook (404721E)

NYSBA Members $135.00
Non-Members $180.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

NYSBA Deconstruction
2022 | Vol. 47 | No. 1

Contents

Contents continued

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
Patricia Rooney, P.C.
394 South 15th St
Lindenhurst, NY 11757
prlaw@prlaw.pro

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.

NYSBA.ORG/TICL

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.

Publication Date: July 2022

ISSN 1933-8449 (online)

The Wicks Law—What Is a "Building" and Why Does It Matter?

The following is based on a memo Al Reeve recently prepared for a municipal client.

The Wicks Law (General Municipal Law Sec. 101 and State Finance Law Sec. 135) applies to "contracts for the erection, construction, reconstruction or alteration of "***buildings***" in excess of various statutory minimum amounts. The Wicks Law, however, does not define "buildings," which of course is not very helpful. The issue then becomes what is meant by the word "buildings" when determining whether the Wicks Law applies to a particular project.

Two cases are particularly instructive as to the meaning of the word "buildings" as used in the Wicks Law. First, *Plumbing Contractors Ass'n of Erie County v.City of Buffalo*, 70 Misc. 2d 412 (Sup. Ct. Erie Cnty. 1972), involved the "Erie Basin Marina, consisting of approximately 24 acres of land and accessory buildings and facilities, all to be served with water lines, sanitary and storm sewer system, boat sewage disposal system and a fire protection system." The project was generally described as a "recreational area and complex" or a "recreational development project." The amount of the project in *Plumbing Contractors* exceeded the statutory minimum.

The Association in *Plumbing Contractors* argued that "installation of the water main and sewer pipe from outside the building complex areas through the site premises to the perimeter thereof was 'plumbing' work within the purview of [the Wicks Law], and was therefore required to be separately 'spec'd and bid' . . . ." The city however contended that the contested work was site preparation work outside the building complexes and therefore not part of 'erection, construction, reconstruction or alteration of buildings' as provided in said statutory provision . . . ."

The court stated, "Difficulty in [the Wicks Law] specific application, however, becomes readily apparent, considering the nature of the recreational project here in question and the statutory language contained in said section referable to 'buildings' . . . ." The court held that the contested water main and sewer pipe work was **not** covered by the Wicks law because it "would not appear to be solely for the benefit of or exclusively appurtenant to said" building complexes.

In so holding the court also stated that: ". . . the separate specification and bidding mandate of [the Wicks Law] is limited to that plumbing work which is an integral part of any building to be constructed thereon or immediately adjacent and contiguous thereto."

This holding can be reasonably interpreted to mean that the separate bidding required by the Wicks Law pertains only to work which is an integral part of a building. Similarly, according to the Assoc. Gen. Contractors of NY, the Wicks Law does not apply to site work, ball fields, and underground utilities five feet outside the building footprint. So again, the question is—what does "buildings" mean in the context of the Wicks Law statutes?

In such a situation, New York Statutes § 232 provides that "Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended." It is noteworthy that the statute does not refer to the New York State Building Code for guidance.

As stated in *People v. Fox*, 3 A.D.3d 577 (2d Dept 2004): "The "ordinary meaning" of the term "building" has been alternatively defined as a "constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling" (Webster's Third New International Dictionary of the English Language Unabridged, at 292), "a structure within a roof and walls" (Concise Oxford English Dictionary [10th ed. 2002] at 183) and "a structure or edifice enclosing a space within its walls and usually, but not necessarily, covered with a roof" (Blacks Law Dictionary [5th ed., 1979], at 176.

I also refer anyone interested in this issue to *Rouse v.Catskill & NY Steam-Boat Co.*, 13 N.Y.S. 126 (3d Dep't 1891); *A.S. Reynolds Elec v. Bd of Ed of City of New York,* 46 Misc. 2d 140 (Sup Ct. Queens Cty 1965); *Ottaviano v. NY City Hous. Auth.,* 176 A.D.2d 134 (1st Dep't 1991); 14 Op. State Comp. 374.

Based on the above authorities, the components of the water park, which are not integral to or immediately adjacent to what I will call the changing building, are not "buildings" under the meaning of the Wicks Law. It appears that the estimated cost of the changing building is less than $500,000, and that the rest of the work on the Spray Park was not associated with any other buildings. As a consequence, none of the bid specifications for the water park project were required to comply with the Wicks Law.

NYSBA CLE

Anchoring: How it Impacts Jury Verdicts and Negotiations, What Counsel Can Do to Mitigate its Effects

Friday, September 30, 2022
12:00 p.m. – 1:00 p.m.
Webinar

1.0 MCLE CREDIT

Summary of Decisions and Statutes

BREACH OF CONTRACT/NOTICE TO CURE

47A-1. Plaintiff subcontractor filed breach of contract action against general contractor for failing to comply with notice to cure provision before terminating subcontract and thereafter filed motion for summary judgment which was granted. Defendant appealed, arguing that the contract was terminated because of plaintiff's faulty work that could not have been remedied during the cure period.

The First Department affirmed the lower court's decision holding that notice to cure provisions must be strictly upheld except for very rare circumstances and the court found that faulty work alone would not qualify as such a circumstance. Thus, the court held that plaintiff's termination was ineffective because the required notice was not provided. *East Empire Constr. Inc. v. Borough Const. Group, LLC,* 200 A.D.3d 1, 156 N.Y.S.3d 148 (1st Dep't 2021).

CARDINAL CHANGE

47A-2. Plaintiff subcontractor brought breach of contract action against general contractor after it was terminated. Subcontract included specific exclusions of work the subcontractor would not be required to perform, including concrete pumping and tactile work. The project was suspended, and the owner requested changes be made to the concrete work done by the subcontractor including some of the exclusions. The subcontractor agreed to the changes and the general contractor agreed that additional compensation would be provided but wanted the subcontractor to return and commence work within a few days. When the subcontractor did not return, the subcontractor was terminated.

The court held that while the change to the concrete work was a material change, it was not a cardinal change affecting the essential purpose of the contract. Since there was no cardinal change, the court found that the subcontractor was not relieved of its obligation to diligently perform the contract. The court held the subcontractor's failure to perform was a breach of the subcontract and that the general contractor was entitled to damages in the form of offset costs. *McCarthy Concrete, Inc. v. Banton Constr. Co.,* 203 A.D.3d 1496, 166 N.Y.S.3d 306 (3d Dep't 2022).

DAMAGES

47A-3. The First Department found that the lower court correctly dismissed the portion of the breach of contract counterclaim seeking lost profit damages. The court explained that in order to recover lost profits, a party must establish that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made. In this case, the initial subcontract unambiguously precluded the recovery of lost profits because it contained a consequential damages waiver and a lost profits claim is a classic example of consequential damages.

The court noted that contrary to defendants' contention, a meeting between the parties during the project did not result in an entirely new subcontract. Here, the initial subcontract contained provisions regarding changes in the work and provided that such changes were to be made only in the form of modifications, not an entirely new agreement. The court further noted that there was no evidence that the purported new contract somehow superseded the first contract. Although defendants claimed for the first time in their reply that the representations made at the meeting were memorialized in a signed, written agreement, defendants' counterclaims contained no allegation regarding the existence of any such written agreement and defendants never cited any of the purported second contract's provisions or included the new contract as part of the record on appeal. *Rising Sun Constr. L.L.C. v. CabGram Dev. LLC*, 202 A.D.3d 557, 164 N.Y.S.3d 75 (1st Dep't 2022).

47A-4. In this case, a subcontractor, Frey Electric Construction Co., Inc. (Frey) entered into a subcontract with a general contractor, plaintiff LP Ciminelli, Inc. (LPC) to perform electrical work on a project. The project almost immediately experienced delays and an accelerated schedule was required forcing Frey to significantly increase its workforce and incur hundreds of thousands of dollars in damages and additional costs. Frey put LPC on notice of its damages and additional costs and Frey worked with LPC in preparing its claim. LPC required Frey to use a specific methodology called "measured mile" to prepare and support the claim. The required method was extremely tedious and required a tremendous amount of work, which resulted in Frey submitting a claim which was in excess of 620 pages to LPC.

LPC tried to argue that the "measured mile" approach was inappropriate and that Frey had not proved its claim for additional damages. The court found that LPC was estopped by its own conduct from finding fault in the "measured mile" method for the claim because LPC required Frey to prepare the claim using this method.

The court held that Frey met its burden of proving its additional damages for which it was not at fault and that LPC failed to produce any evidence negating the validity or amount of the claim. As such, the court granted Frey's motion for summary judgment. *LP Ciminelli, Inc. v. JPW Struct. Contr., Inc.,* Index No. 800414/2021, 2021 N.Y. Slip. Op. 51302(U), 2021 N.Y. Misc. LEXIS 8544, 2021 WL 7707266 (Sup. Ct. Erie Cty. Mar. 18, 2021) (unpublished opinion).

MECHANIC'S LIENS AND LIEN LAW

47A-5. Defendant owner entered into a contract with defendant general contractor, Pirri Builders, LLC (Pirri) for certain property renovations. Pirri then entered into a subcontract with the plaintiff to provide HVAC and plumbing work on the project. The plaintiff alleged that it was not paid for its work and it filed two notices of lien against the property. After the notices of lien were filed, the owner made two payments to Pirri but not to plaintiff.

Plaintiff subsequently commenced an action, asserting a cause of action to enforce the mechanic's liens against all defendants, and three causes of action against the owner including an eighth cause of action for payment over mechanic's lien. At the same time, Pirri filed a demand for arbitration against the owner on a breach of contract claim and sought damages for extra work. Pirri answered the demand, asserted counterclaims and moved to dismiss the complaint against it and/or to stay the action pending the related arbitration. Plaintiff then cross-moved for partial summary judgment against Pirri and for an order denying the owner's motion to dismiss. The lower court granted the owner's motion to dismiss plaintiff's eighth cause of action, holding that it was at best a defense to the owner's defense to plaintiff's lien foreclosure claim, and denied plaintiff's cross motion concluding that summary judgment on the eighth cause of action was moot in light of the court's dismissal of it. The court also granted the owner's motion to stay the action pending the arbitration between the owner and Pirri. Plaintiff appealed and the court affirmed.

The court began by noting that plaintiff's focus on this appeal was limited to the lower court's dismissal of plaintiff's eighth cause of action—a supposed claim for money damages for the owner's payment over the mechanic's lien. The lower court held that no such claim existed, independent of the right of a subcontractor such as plaintiff to enforce its entitlement to payment pursuant to the Lien Law in a lien foreclosure proceeding. The lower court reasoned that at best such a "claim" was not an affirmative cause of action. Rather, such a "claim" was a defense to any defense to a lien foreclosure action asserted by the owner, which claimed that it paid Pirri in full and in a timely manner before the lien attached to the property.

The Third Department agreed with the lower court. The court noted that plaintiff's argument that there was a cause of action for payment over a mechanic's lien as applied to the facts of this case—where plaintiff contended that the payments by the owner to Pirri were made after it received the notices of the mechanic's lien—hinged upon the last sentence of Lien Law § 11, which provides that "[u]ntil service of the notice [of lien] has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien." According to the court, even a cursory reading of Lien Law § 11 revealed that it was not intended to confer a right of action on any party, much less a subcontractor like the plaintiff here. The court explained that the statute was written in the language of a defense, a defense available to the owner who pays in good faith before a mechanic's lien is served. Although a subcontractor may be the beneficiary of such payment, or a person or entity subject to the defense, a subcontractor is not afforded by it the ability to bring suit against an owner who abides by it; that would subvert the prophylactic purpose of the statute. Rather, the court explained, a subcontractor such as plaintiff here remains free to challenge the right of the owner here to assert such a defense, while pursuing its remedies of foreclosure under other provisions of the Lien Law.

As the owner rightly pointed out, this is what the subcontractor did in the two cases relied upon by plaintiff in this case to challenge the validity of the owner's assertion of the defense provided to it under Lien Law § 11 while attempting to foreclose on the lien. The court concluded that Lien Law § 11 did not confer a right of action. *Crisafulli Bros. Plumbing & Heating Contrs., Inc. v. Pirri Bldrs.,* 200 A.D.3d 1519, 159 N.Y.S.3d 566 (3d Dep't 2021) (noting that at best, what plaintiff was asserting here was a defense against the safe harbor afforded by section 11 should an owner "do the right thing" and pay its obligations to its contractor and subcontractor before a lien attaches).

47A-6. Plaintiff filed a mechanic's lien for goods sold and delivered and commenced an action against defendants. The lien was then bonded and discharged. Thereafter, the complaint was amended to add surety defendants seeking recovery on the bond without seeking to foreclose the lien. The

sureties moved to dismiss the complaint based on the fact the lien had expired by operation of law and no lien foreclosure action had been commenced within one year of its filing.

The court denied the sureties' motion, explaining that the bond took the place of the property and became the subject of the lien. Although the plaintiff did not commence an action to foreclose the mechanic's lien, it did timely file a claim seeking recovery on the bond. Accordingly, the court found that the lien did not expire and that no notice of pendency needed to be filed. The decision has been appealed. *American Universal Supply, Inc. v. Gibson Air Mech. Inc.,* Index No. 617381-18, 2022 N.Y. Slip. Op. 50018(U), 2022 N.Y. Misc. LEXIS 58, 2022 WL 109012 (Sup. Ct. Suffolk Cty Jan. 10, 2022).

47A-7. A contractor filed a mechanic's lien against real property owned by the petitioner and the petitioner then served a demand for an itemized statement and commenced a proceeding to compel petitioner to provide such an itemized statement that complied with the requirements of the Lien Law. The court canceled the lien after finding the itemized statement did not meet the statutory requirements. The contractor then filed a second notice of mechanic's lien with additional itemization and petitioner moved to cancel the second lien on the basis that the first lien had already been canceled.

The Second Department held that since the second lien was filed within the time provided by statute and because the statute does not prevent a lienor from filing another lien on the same claim, the lower court erred in canceling the lien. *Red Hook 160, LLC v. 2M Mechanical, LLC,* 203 A.D.3d 932, 161 N.Y.S.3d 806 (2d Dep't 2022).

NEGLIGENCE

47A-8. In this Article 78 proceeding, petitioner Empire Chapter of the Associated Builders and Contractors, Inc. (ABC) sought an order vacating the DOT's determination denying ABC's FOIL request for a due diligence study (the report) prepared internally or by a consultant to study the feasibility of using a Project Labor Agreement (PLA) for a NYSDOT bridge project.

In the DOT's final determination of ABC's FOIL appeal, the DOT found that the report was not subject to disclosure under Public Officers Law §§ 87(2)(g), 87(2)(a) and CPLR 4503. According to the DOT, because the report was intra-agency material and not a final report, and was part of the DOT's deliberative process, ABC was not entitled to the report. The DOT further determined that the report did not fall under any of the exceptions to the intra-agency exclusion—it was not a collection of statistical and factual tabulations or data, instructions to staff that affected the public, or final agency policy or determinations, or external audits. The DOT also determined that the report was protected by attorney-client privilege because it was material prepared for litigation.

In its petition, ABC asserted that the DOT erred when it denied its FOIL request, including that the DOT was incorrectly using the intra-agency exemption and "deliberative process" to shield the report from disclosure when there was no longer a deliberative process because the report resulted in the DOT's adoption of a PLA. ABC further asserted that the report was the final due diligence study by the DOT, and that the DOT's Commissioner already admitted as part of a prior determination (which directed the use of a PLA in the project), that statistical and factual tabulations of data were made by an independent consultant engaged by the DOT, and specifically referred to cost savings ($5,188 per day, total $706,326). ABC further argued, in order to determine whether the PLA was actually appropriate for the project, ABC needed to see the documentation contained in the report. According to ABC, by withholding the report, the DOT was making it impossible for ABC to ascertain whether the PLA satisfied the requirements of Labor Law 222(2)(a), thereby making any challenges to the same impossible.

ABC also argued that the report was not eligible for attorney work product exemption or the attorney-client privilege. ABC asserted that the DOT prepared the report pursuant to Labor Law § 222 for a possible PLA with respect to the project, and albeit the fact that the DOT's counsel may have hired the consultant to prepare the report alone and in itself did not shield the report from disclosure as attorney work product or because of possible future litigation involving the PLA. ABC also argued that the DOT's determination to withhold its due diligence study was arbitrary, capricious,

unreasonable, not supported by the record, and made in derogation of the law.

The court granted the petition in its entirety. First, the court noted that exemptions to FOIL requests must be narrowly construed as it is well settled that FOIL is based on the overriding policy consideration that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. The court explained that the intra agency exemption asserted by the DOT applied to "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making . . . such as documents that reflect an agency's preliminary thinking about an issue, as opposed to its final decision and reasoning." The court concluded the report was not an opinion piece, but merely reflected the job the DOT engaged it to do, which was to provide an analysis of the savings if a PLA was included in the subject project, and which is now reflected in the DOT's final decision and reasons for including a PLA in the project.

Second, the court found that the DOT "utterly failed to show" the report was subject to the attorney-client privilege. The court noted that the DOT counsel's affidavit contained only conclusory characterizations as to why the report was protected by the attorney client and attorney work product exceptions. After reviewing the report in-camera, the court found that the DOT's counsel merely reviewed the report for "legal sufficiency" as to its compliance with Labor Law § 222. The court explained that, other than the consultant's general understanding of what a PLA was and its legal history, the report did "not reflect or incorporate any protected communication between counsel and [the author of the report] and the court did not find that the report "was made in order for counsel to render legal advice or services to the DOT's Commissioner." *Empire Ch. of the Associated Bldrs. & Contrs. Inc. v. New York State Dept. of Transp.,* Index No. 907420-21, 73 Misc.3d 1233(A), 2021 N.Y. Slip. Op. 51224(U), 2021 N.Y. Misc. LEXIS 6559, 2021 WL 6069166 (Sup. Ct. Albany Cnty Dec. 22, 2021) (emphasis in original) (finding report was "clearly prepared *primarily* for the DOT for use in determining the feasibility of a PLA, and certainly not prepared *solely for litigation purposes* or in conjunction with a *pending* lawsuit.").

PREVAILING WAGES / DISPUTE RESOLUTION

47A-9. Plaintiffs, construction workers working on public works projects, brought an action against construction companies for breach of contract alleging they were not paid the prevailing wages, overtime premiums or supplemental benefits as required by their contracts. The First Department affirmed the lower court's denial of the defendants' motions to dismiss holding that plaintiffs sufficiently alleged a claim for breach of contract as third-party beneficiaries of public works contracts entered into by defendants. The court noted that plaintiffs produced evidence that they were employed by defendant and worked on twelve different public works construction projects but were not paid what was required in these contracts.

In response to defendants' argument that the contracts at issue incorporated project labor agreements (PLAs) that contained exclusive dispute resolution procedures that plaintiffs failed to follow, the court found the defendants failed to show that plaintiffs ever saw the PLAs or assented to their terms so the dispute resolution provisions were not binding. *Perez v. Long Island Concrete Inc.,* 203 A.D.3d 552, 165 N.Y.S.3d 504 (1st Dep't 2022).

PUBLIC AUTHORITIES LAW/PUBLIC WORKS BIDDING

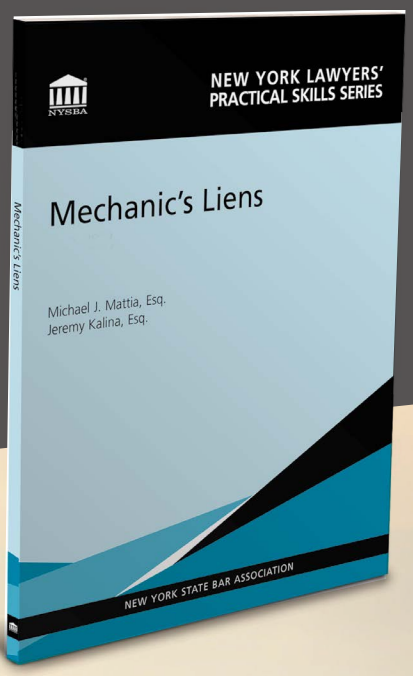
47A-10. Petitioner filed an Article 78 proceeding against respondent Olympic Regional Development Authority (ORDA) to vacate the award of a public works contract. The bid instructions provided that the bid price for alternate work would not be used in combination with the base bid to determine the lowest bidder. Petitioner submitted the lowest bid for the base contract and second lowest bid for the alternate. Respondent construction company submitted the second lowest bid for the base and lowest bid for the alternate and when combined had the lowest bid overall. Therefore, the contract was awarded to respondent construction company.

The court found the provision in the bid specifications which stated the lowest bid would be determined on the base bid only without the price of the alternate work violated the language of Public Authorities Law Section 2620(2) as the alternate work was not a separate contract. The court noted that it could lead to fraud allowing a company to bid very low on the base bid to be awarded the contract but make up the difference in the bid on the alternate work. Since the alternate work was in the general contract as an option, defendant ORDA had to determine lowest bidder by combining the base bid and the alternate bid and comparing the total sums.

Since petitioner was not the lowest bidder when the base and alternate bids were combined, the court held ORDA correctly awarded the contract to the other bidder and dismissed the petition. *Cutting Edge Grp., LLC v. Olympic Reg'l Dev. Auth.*, 75 Misc. 3d 208 (Sup. Ct. Essex Cnty. 2022).

NYSBA PUBLICATIONS

Mechanic's Liens



Authors
Michael J. Mattia, Esq.
Jeremy Kalina, Esq.

Covering the methods of preparing, filing and enforcing mechanic's liens on both public and private works construction, this practice guide addresses pleadings in an action to foreclose the private or public lien, the construction trust, and more. A thorough understanding of mechanic's liens is crucial, whether you represent the construction industry or a property owner.

Numerous practice guides and forms commonly used in connection with Lien Law procedures are provided, making *Mechanic's Liens* an invaluable reference for all attorneys who practice in this field. Current through the 2021 New York legislative session. Includes downloadable forms.

Book (40319222)
eBook (40319222E)

NYSBA Members $125.00
Non-Members $165.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

Torts, Insurance and Compensation Law Section

Save the Date

FALL 2022 MEETING

Friday, November 11 -
Sunday, November 13, 2022

Hammock Beach Golf Resort & Spa, Palm Coast, Florida

More information coming soon!