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Construction Law - Corporate Law - Education Law - Labor Relations - Municipal Law - Real Estate Law - Real Property Taxation

Construction Industry Newsletter

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Negligent, Misrepresented Claim Is Dismissed; No Privity Exists With Contractor, Architect

Travelers Casualty and Surety Company v. Dormitory Authority of the State of New York

Complex litigation arose from the construction of a 785,000 square-foot vertical campus for Baruch College, part of the University of New York, between 1998 and 2002. Plaintiff Travelers Casualty & Surety Company equitably subrogated to the rights of third-party defendant, a contractor for the project, sued defendants' architect and construction manager for economic damages and attorney's fees resulting from their allegedly negligent work performance. The court granted defendants' motions to dismiss plaintiff's claims against each of them. The court found that plaintiff failed to adduce sufficient proof showing that the functional equivalent of privity existed between the contractor and the architect as would enable plaintiff to have a triable claim for negligent misrepresentation. The court noted that even if allegedly "very extensive communication" between the architect and the contractor during the active phase of construction constituted "linking conduct" or amounted to evidence that the contractor was a "known party," the contractor did not identify any contemporaneous statements on which it relied to its detriment.

Dismissal Of Claim For Costs To Repair Damages From Engineer's Allegedly Defective Plans Denied

East 77 Owners Co. LLC v. King Sha Group Inc.

In this action Plaintiff alleged the structural integrity of its property was compromised due to the construction project on STA's property abutting plaintiff's. Defendant Kin Sha, the general contractor, commenced an action against Zaloum, the engineer, alleging he was negligent and must indemnify King Sha. STA sued Zaloum for costs to repair

damages to STA's property as a result of Zaloum's defective engineering plans. Zaloum argued that as the third cause of action did not arise from liability asserted in the main action, STA did not assert a claim against Zaloum, warranting dismissal. The court stated while plaintiff in the main action never named Zaloum as a defendant, it referred to his role in the alleged negligent work at the site. Also, part of STA's argument in defense of the main action was that all or a portion of the damages alleged by plaintiff resulted from the actions or inactions of Zaloum. The court concluded STA set forth a cause of action against Zaloum that was related to the main cause of action by questions of law or facts common to both controversies, denying Zaloum's motion.

Contractor Is Denied Summary Judgment To Dismiss City's Third-Party Negligence Claims

O'Halloran v. City of New York

Third-party defendant Halycon moved for summary dismissal of third-party plaintiff New York City's claims against it. The case arose from the collapse of a sewer pipe in front of plaintiffs' building, creating a large hole in the street. Halycon excavated the street, exposed and removed the damaged sewer pipe, installed the new pipe and connected the new pipe to the remaining old pipe. The hole in the street remained and Halycon resumed work but, raw sewage entered plaintiffs' property. Plaintiffs and their insurer sued the city seeking damages, and the city filed a third-party complaint against Halycon. Halycon argued the city could not meet its burden of proving it was negligent or that its negligence caused damages, alleging a city inspector observed and approved Halycon's work. The court noted that the fact the inspector never accused Halycon of negligence did not satisfy Halycon's burden of proof. While evidence of the city's oversight and approvals of work precluded summary dismissal in the city's favor, it provided no supporting legal authority or sufficient admissible evidence that Halycon was not negligent. Thus, Halycon failed to establish prima facie that it did not cause plaintiffs' damages.

Arbitration On One Of Three Contracts Stayed As Home Improvement Contractor Unlicensed

Novogratz v. MIA Contracting Inc.

Petitioners sought a permanent stay of an arbitration demand filed by respondent contractors. They alleged the agreement entered into with respondents for the renovation of three properties were “home improvement contracts.” Petitioners argued that as respondents were unlicensed contractors, the contracts were unenforceable. The court agreed, stating public policy, prohibited a home improvement contractor not licensed by the Department of Consumer Affairs from enforcing the terms of a contract in state court or in arbitration. The court stated only a person who resided or intended to reside in the dwelling upon which a contractor was working was entitled to the protections of the licensing statute. The court found that as petitioners intended to reside on one of the properties-one they owned-the contract may not be enforced by respondents. Thus, it granted petitioners’ application for a permanent stay of arbitration regarding that property. Yet, the court denied the stay in connection with the remaining two properties, ruling as petitioner did not own them, nor intend to reside in them, the statute’s protections were unavailable.

Custom-Made Rolling Shades Do Not Qualify As Improvement; Mechanic’s Lien Discharged

230 FA LLC v. Kajo Associates

Petitioners sought to summarily discharge a mechanic’s lien under Lien Law §19(6) claiming the rolling shades that respondent installed at petitioner’s request did not qualify as an improvement of real property. Respondent argued the shades qualified as an improvement of real property under Lien Law §2(4). The court noted respondent neither demolished, erected nor altered any structure, nor did it perform work or furnish materials qualifying as a permanent improvement. Thus, the court ruled no basis existed for a lien, that the shades were custom made was irrelevant. Section 2 of the Lien Law makes no allowance for custom made materials. The primary issue is whether the shades are permanently affixed, making them a part of the structure. The court further ruled that, petitioner had standing to bring the proceeding even though it was not the owner because it was responsible for removing the lien. The petition to discharge the mechanic’s lien was granted.

Unlicensed Home Contractor Cannot Recover For Breach Of Contract Or Quantum Meruit

ENKO Construction Corp. v. Aronshtein

Homeowner defendant sought dismissal of plaintiff’s complaint seeking monetary damages for defendant’s alleged breach of a construction contract. Plaintiff was to perform construction services at defendant’s residence, and plaintiff alleged defendant failed to pay the balance due under the contract. Defendant moved for dismissal, arguing plaintiff was barred from pursuing recovery for its failure to obtain a license as a home improvement contractor. Plaintiff argued the work it performed was not home improvement, but construction of a new home, alleging the “new construction” exception was applicable. The court disagreed, finding the home already existed on defendant’s property at the time the contract was entered into. It noted even assuming that plaintiff’s allegation the project was converted from a renovation to a new construction to be true, the original contract was one for renovation. Plaintiff also argued that as defendant was not using the residence during the construction period, plaintiff was not required to be licensed. The court declined to adopt such position as it was not indicative of the legislative intent. Hence, it ruled the contractor was barred from recovering for breach of contract or quantum meruit.

Insurance Policies Exclude Plaintiff’s Work Product; Plaintiff Denied Declaration Insurer Must Defend

Savik, Murray & Aurora Construction Management CO., LLC v. ITT Hartford Ins. Group.

Plaintiff moved for leave to reargue a prior decision and sought a declaration that defendant’s insurers were obligated to defend plaintiff in an underlying arbitration. Non-party Farmingdale sought damages from plaintiff in connection with the construction of a shopping center. Farmingdale alleged that leaks in the center’s roof and walls caused damage as a result of plaintiff’s negligence. Plaintiff alleged that none of the property damage at issue in the arbitration constituted its “work product,” and thus excluded from coverage under the policies. The court disagreed. The court noted the policies contained work product exclusions, finding the costs sought in the arbitration were for the cost of correcting work plaintiff was contractually obligated to supervise, hence involved plaintiff’s work product. Thus, plaintiff failed to show the prior determination was unwarranted.

Unlicensed Contractor Circumventing Law By Suing On Alleged Loan Against Public Policy

Capital Construction Management of NY LLC v. East 81st LLC

Plaintiff, alleging it was a “construction manager,” moved for summary judgment in lieu of complaint. Plaintiff claims to have entered into a loan agreement with defendant in which defendant would repay a balance previously due to plaintiff with additional interest. Plaintiff claimed defendant issued three checks for \$775,000, which “failed collection.” Defendant argued plaintiff was an unlicensed general contractor hired to renovate defendant’s condominium. The court found that plaintiff was attempting to avoid the issue of whether it was licensed by moving for summary judgment in lieu of complaint on the checks defendant issued, but not the work performed or the loan agreement. The court held that unlicensed home improvement contractors may not sue homeowners on “stopped” checks. Moreover plaintiff admitted checks by defendant were issued for “work performed.” The court ruled that allowing an unlicensed contractor to circumvent CPLR 3015(e) by entering into a loan agreement, then suing on the agreement or checks under the CPLR 3213, would be against public policy, hence, denying Plaintiff’s motion.

Court Rules \$7,000 Per Day Penalty Provision For Incomplete Work On Condos Not Enforceable

225Fifth Ave. Retail LLC v. 225 5th LLC

This was a commercial contract action for breach of a license agreement. Defendants cross-moved for partial summary judgment dismissing the portions of the complaint. Defendant 225 Fifth Ave. Retail LLC was the owner and sponsor of a condo development project, and plaintiff was the purchaser of two commercial units. The court noted that at the time of closing all work on the project was not yet completed, and some of the remaining necessary work involved the two subject units. It also noted the parties executed documents to ensure the work was completed and the units usable within a certain time frame, designating the pending work as “vanilla box work.” The court noted paragraph 6(H)(i) of the parties’ license agreement called for a \$7,000 per day penalty by defendant to plaintiff in the event defendant failed to substantially complete any aspect of the vanilla box work by the date. The court rejected defendant’s arguments regarding ascertainability of damages and that the \$7,000

calculation was per se disproportionate. The court concluded paragraph 6(H)(i) of the agreement was not unenforceable as a prohibited penalty.

Issue Of Fact Exist Whether Contractor May Be Estopped From Using Pay-If-Paid Defense

Hylan Electrical Contracting Inc. v. Mastec North America Inc.

Mastec North America Inc. moved for summary judgment dismissing Hylan Electrical Inc.’s complaint. Plaintiff Hylan cross moved for partial summary judgment on its claim for breach of contract under a subcontractor agreement to install a fiber-optic network. The agreement contained a pay-if-paid clause providing that all payments to Hylan by Mastec were expressly contingent on and subject to receipt of payment for the work by Mastec from owner Telergy. Mastec argued by entering into the agreement with this clause, Hylan expressly assumed the risk that Telergy would not be able to pay, alleging it never received payment from Telergy for the work that was the subject of Hylan’s complaint. Hylan argued the clause was unenforceable as it violated public policy. The court disagreed, relying on the choice of law provision contained in the agreement. Pursuant to the agreement Florida law governed. Under Florida law, pay if paid clause is enforceable. Yet it noted Mastec misrepresented Telergy’s finances, continuing to assure Hylan that Telergy had the funds to pay Hylan for its work. Thus, in precluding summary judgment, the court found an issue of fact regarding whether Mastec may be equitably stopped from employing the defense of the clause.

Amended Contract Does Not Terminate Action; Questions Remain Precluding Summary Judgment

175 Mulberry Realty LLC v. Kam Cheung Construction Inc.

This breach of contract action arose from a contract to build a new mixed-use building on plaintiff’s property. The parties amended their contract purportedly to settle the case. The contract amendment required plaintiff’s counsel to file stipulation discontinuing the action. Plaintiff refused to authorize counsel to sign and file the stipulation, and defendants moved for summary judgment dismissing the action pursuant to the amended contract. Plaintiff argued that under the agreement defendants were required to complete construction and obtain a certificate of

occupancy and that the defendants failed to do so. The court noted it was undisputed the stipulation was never signed by plaintiff's counsel and filed with the court, thus, the agreement did not terminate the action. It found the defendants failed to establish their entitlement to enforcement of the purported settlement or an order compelling plaintiff's counsel to sign and file stipulation. Questions of fact remained regarding whether the amended contract was a valid settlement. It was unclear from the four corners of the document whether the parties intended to discontinue all claims regardless of project completion or the issuance of a certificate of occupancy. Summary judgment was denied.

Absent Express Provision, Cost Of Fixing Pipes Ruled Responsibility Of Landlord

Mini Mint Inc. v. Citigroup Inc.

Under a sublease for commercial space located on a portion of the first floor of a building on Park Avenue, plaintiff is the sublessee and defendant the sublessor. The parties' dispute centers around a pipe leak that occurred in 2008. Defendant fixed the leak and then sought to charge plaintiff \$13,000 for the repair cost. Plaintiff, who operates a restaurant called Dishes on the premises, denied responsibility to pay for the repair. Plaintiff also claimed the repairs done by defendant were shoddy and, as a consequence, a bathroom on the premises had become unusable. Plaintiff further claimed defendant entered into the premises without permission. The court granted plaintiff summary judgment, declaring it had no obligation to repair the leak at its own cost. The court held that since there is no express provision regarding such continuous

pipes being the tenant's responsibility, it must be interpreted that they are the landlord's responsibility. In addition, e-mails between the parties show that around the time access was given, plaintiff was told defendant would be sending a plumber to inspect and possibly fix the leak.

Announcements

The American Arbitration Association has appointed J. Scott Greer, Esq. to its National Roster of Neutrals for Commercial and Construction Disputes. Mr. Greer is a member of the law firm of Lewis & Greer, P.C., Poughkeepsie, New York, and has provided legal services to the construction industry for more than 22 years. The American Arbitration Association is the nation's largest full-service alternative dispute resolution provider.

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The firm currently provides legal services for construction projects throughout the Northeastern states and internationally as required by the needs of our clients.

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