

# Construction & Surety Law Newsletter

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

## Summary of Decisions and Statutes

### ADMINISTRATIVE LAW

**36-14.** OSHA inspectors may cite employers on multi-employer worksites for violations that do not expose their own workers to occupational hazards. On August 19, 2010, the Occupational Safety and Health Review Commission reversed its April 27, 2007 position after the Eighth Circuit concluded, in a split panel decision, that OSHA's Secretary had statutory authority and regulatory authority to enforce the multi-employer worksite policy against controlling employers (e.g., general contractors). *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009). See, **Bulletin**, *Construction & Surety Law Newsletter* (Spring 2008).

### ARBITRATION

**36-15.** Section 399-c of the General Business Law renders null and void the provisions of a mandatory arbitration clause in a written contract for the sale or purchase of consumer goods to which a consumer is a party. The Second Department applied this statute to the contract between a landowner and a builder for the construction of a single family residence, and upheld the denial of the builder's motion to compel arbitration. *Byrnes v. Castaldi*, 72 A.D.3d 718, 898 N.Y.S.2d 640 (2d Dep't 2010).

### INSURANCE

**36-16.** The owner instituted an "Owner Controlled Insurance Program" (OCIP), a comprehensive insurance program under which all contractors and subcontractors working on the project would be insured. Each subcontractor was required to include within its bid a credit reflecting the cost which would have been added if the

subcontractor provided its own insurance. The OCIP and the subcontract agreement permitted the contractor to charge the subcontractor for the proportionate, additional cost of the OCIP attributable to change order work. The Second Department held that this post-completion adjustment and increase in the credit violated Insurance Law § 2505, which prohibits owners and contractors from requiring a subcontractor on a nonpublic project to pay a premium or related charge for a policy of insurance. Furthermore, the subcontractor was not precluded by the doctrines of equitable estoppel or unclean hands from asserting this claim. *East Hills Metro, Inc. v. Jeffrey M. Brown Associates, Inc.*, 74 A.D.3d 730, 907 N.Y.S.2d 16 (2d Dep't 2010).

### LABOR LAW §§ 200, 240, 241

**36-17.** A swimming pool contractor was not liable under Labor Law § 240(1) for the injuries sustained by another contractor's employee, who fell from scaffolding attached to the roof of a garage. The swimming pool contractor was listed on the work permit as the general contractor, but it did not supervise or control the injured employee's work, it provided no equipment to the injured employee, and it was not present at the site on the date of the accident. *Kilmetis v. Creative Pool & Spa, Inc.*, 74 A.D.3d 1289, 904 N.Y.S.2d 495 (2d Dep't 2010).

**36-18.** The First Department held that the owner and general contractor were liable under Labor Law §§ 240(1) and 241(6) to a subcontractor's employee, who stepped back into a trench two feet wide and almost four feet deep while spreading freshly poured concrete on the basement floor of a building. The panel majority



held that the risk was sufficiently elevation-related to justify application of 240(1) under First Department precedent, and the extant conditions also violated 12 NYCRR 23-1.7(b)(1)(i) concerning hazardous openings, thereby invoking 241(6). The dissent argued that the holding is inconsistent with precedent of the Court of Appeals, precedent of all three other Departments of the Appellate Division, and other precedent of the First Department. *Salazar v. Novalex Contr. Corp.*, 72 A.D.3d 418, 897 N.Y.S.2d 423 (1st Dep't 2010).

**36-19.** The admission by plaintiff's counsel in his opening statement, that plaintiff had removed his protective eye gear in order to clean it prior to being struck in the left eye by flying debris, absolved defendant from liability under 12 NYCRR 23-1.8(a) regarding the provision of suitable, approved eye protection, and under Labor Law § 241(6). *Beshay v. Eberhart L.P.#1*, 69 A.D.3d 779, 893 N.Y.S.2d 242 (2d Dep't 2010).

### MECHANICS' LIENS AND TRUST CLAIMS

**36-20.** If a notice of mechanic's lien does not properly distinguish between condominium property which is subject to the lien and condominium property which is not, it is facially invalid and may not be cured. Leave to amend pursuant to Lien Law § 12-a must be denied because that statutory provision presumes the existence of a valid lien. *Matter of Bridge View Tower, LLC v. Roco G.C. Corp.*, 69 A.D.3d 711, 892 N.Y.S.2d 520 (2d Dep't 2010).

### PREVAILING WAGES

**36-21.** A labor union did not have standing to challenge the New York City Comptroller's prevailing wage rate determinations. The union claimed that the Comptroller should have set the prevailing wage and supplemental benefits according to its collective bargaining agreement because it was the predominant union for

asphalt pavers in the City. The Supreme Court held that Labor Law § 220(6) only permitted employers to contest prevailing wage rate determinations. Therefore, the union was not entitled to relief under Article 78. *Matter of Local 175 v. Thompson*, 28 Misc.3d 283, 899 N.Y.S.2d 542 (Sup. Ct. N.Y. Co. 2010).

### PUBLIC CONTRACTS

**36-22.** If a subcontract does not contain explicit references to alternative dispute resolution provisions found in the prime contract and the municipal owner's procurement rules, those provisions will not be incorporated into the subcontract by a general incorporation clause and will not be enforced against the subcontractor. *Navillus Tile, Inc. v. Bovis Lend Lease LMB, Inc.*, 74 A.D.3d 1299, 904 N.Y.S.2d 207 (2d Dep't 2010).

**36-23.** The New York City Contract Dispute Resolution Board's decision to deny a request for additional compensation for repair after a fire at the construction site was rationally based, was not arbitrary and capricious, and was not affected by an error of law. The Board properly determined that the contractor could not receive compensation for the additional work because the contractor had an absolute obligation under the contract to protect its work against fire damage and to repair that work in event of such damage. *Matter of L&L Painting Co., Inc. v. City of New York*, 69 A.D.3d 517, 893 N.Y.S.2d 54 (1st Dep't 2010).

### SUBCONTRACTORS

**36-24.** Under New York law, oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claims. *Penava Mechanical Corp. v. Afgo Mechanical Services, Inc.*, 71 A.D.3d 493, 896 N.Y.S.2d 349 (1st Dep't 2010).

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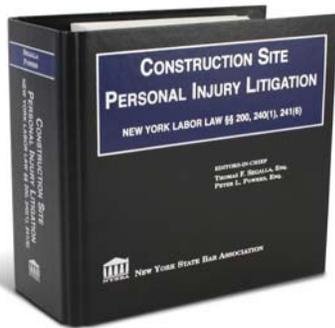
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- Understand the statutory causes of action under N.Y. Labor Law §§ 200, 240(1) and 241(6)
- Be able to handle a construction site litigation case with confidence
- Understand the insurance implications between the parties involved

Perhaps no single scheme of statutory causes of action has initiated more debate between plaintiff's bar and its supporters and the defense bar than that promulgated under New York Labor Law §§ 200, 240(1) and 241(6).

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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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