

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

ARBITRATION

33-1. The Court of Appeals reiterated its “long-standing rule” that “an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract.” *God’s Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP*, 6 N.Y.3d 371, 812 N.Y.S.2d 435 (2006).

33-2. The housing merchant implied warranty of General Business Law § 777-a applied to the sale of a new home, but did not apply to the construction of a custom (log cabin), single-family residence on property owned by the purchaser. The construction contract expressly incorporated § 777-a and broadly required that all disputes be settled by arbitration. The owner could not avoid arbitration by arguing that the express contractual reference to § 777-a also invoked § 777-b which prohibits arbitration in transactions governed by Article 36-B of the General Business Law. Nowhere did the contract refer to § 777-b, and this transaction was governed by Article 36-A which has no restrictions on arbitration. *Sharpe v. Mann*, 34 A.D.3d 959, 823 N.Y.S.2d 623 (3d Dep’t 2006).

33-3. General Business Law § 399-c precludes mandatory arbitration of a residential owner’s claims against the architects. In a case of first impression, the Second Department decides that an agreement for the provision of architectural services in the design and construction of a home is a contract for the sale or purchase of “consumer goods” within the meaning of the statute. *Ragucci v. Professional Construction Services*, 25 A.D.3d 43,

803 N.Y.S.2d 139 (2d Dep’t 2005). [The statutory reference in this case was incorrectly cited at Arbitration 32-2, *Construction & Surety Law Newsletter* (Fall 2006).]

ARCHITECTS, ENGINEERS & SURVEYORS

33-4. A cause of action for professional malpractice against an architect accrues upon the completion of the work to be performed and the consequent termination of the professional relationship. Because the architect was obligated to obtain a certificate of occupancy, the homeowner’s claims did not accrue until the certificate was issued. *Frank v. Maz Group, LLC*, 30 A.D.3d 369, 815 N.Y.S.2d 738 (2d Dep’t 2006).

CONSTRUCTION CONTRACT INTERPRETATION

33-5. A general contractor and a public school district negotiated a modified AIA construction contract. The contractor filed a notice of claim under Education Law § 3813 to preserve and perfect its right to commence an action on its claim for excess costs. The school district demanded preaction examination under Education Law § 1724. The review and examination provisions of § 1724 relate to the audit and payment of bills submitted to a school district. The Third Department held that the contractor had fully complied with the contractual requirements for dispute resolution and that § 1724 was inapplicable. The contractor was entitled to commence a civil action, whereupon discovery would be governed exclusively by the applicable provisions of the CPLR. *MLB Industries, Inc. v. East Greenbush Central School District*, 33 A.D.3d 149, 819 N.Y.S.2d 153 (3d Dep’t 2006).



33-6. The clear and unambiguous terms of a guaranteed maximum price construction contract precluded the contractor from recovering anything more than the guaranteed price, absent increase adjustments authorized by written change orders executed by the owner, the contractor, and the architect. A contingency built into the guaranteed maximum price insulated the contractor to some degree from the cost of additional work within the scope of the specifications. The owner had not waived and was not estopped from asserting the written change order requirement of this contract, despite the fact that the parties had not required written change orders to justify payment of additional costs in performing earlier construction contracts which did not include a guaranteed maximum price. *William H. Lane Incorporated v. Hartwick College*, Index No. 8698 (Sup. Ct. Otsego County March 22, 2006).

INDEMNITY

33-7. The general contractor was entitled to contractual indemnification from the subcontractor and employer of the injured worker. The general authority of the general contractor to coordinate subcontractors' work and to monitor work progress and safety conditions does not constitute supervision and control over the method and manner of the work of subcontractors' employees. *Nicholas v. Epo-Harvey Apartments, L.P.*, 31 A.D.3d 1174, 818 N.Y.S.2d 880 (4th Dep't 2006).

LABOR LAW §§ 200, 240, 241

33-8. The federal Immigration Reform and Control Act of 1986 (8 U.S.C. § 1324a et seq.) does not preempt or preclude the recovery of lost wages under Labor Law §§ 200, 240(1) and 241(6) by undocumented aliens. A jury may consider immigration status as one factor in determining the damages, if any, warranted under the Labor Law. *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 821 N.Y.S.2d 416 (2006). See also, *Affordable Housing Foundation, Inc. v. Silva*, 469 F.3d 219 (2d Cir. 2006). See Labor Law §§ 200, 240, 241 32-8, *Construction & Surety Law Newsletter* (Fall 2006).

33-9. Under the Highway Law, the State initiated the reconstruction of arterial highways within the City of New York. The State hired the contractors and consultants and caused the work to be performed. The City's only role was to issue work permits. The City was not the "owner" of the worksite for purposes of liability under Labor Law §§ 240 and 241. *Albanese v. City of New York*, 5 N.Y.3d 217, 800 N.Y.S.2d 538 (2005).

33-10. The plaintiff, injured in a fall from a roof he was installing, was not precluded from recovering damages under Labor Law § 240(1) because of his status as an "employer" of four other workers. The owner and general contractor failed to provide any safety and fall protection devices at the worksite, as they were required to do by the statute. *Arey v. M. Dunn, Inc.*, 29 A.D.3d 1137, 816 N.Y.S.2d 197 (3d Dep't 2006).

33-11. 12 N.Y.C.R.R. § 23-8.1(f)(1)(iv) of the Industrial Code requires that a load be inspected to determine that it is well secured and properly balanced in a sling or lifting device before it is lifted more than a few inches by a mobile crane. The First Department determines that this regulation is sufficiently specific to support a claim under Labor Law § 241(6). *Cammon v. City of New York*, 21 A.D.3d 196, 799 N.Y.S.2d 455 (1st Dep't 2005).

MECHANICS' LIENS AND TRUST CLAIMS

33-12. "Pay-if-paid" provisions in construction subcontracts are enforceable under Florida law, but not under New York law. Nevertheless, the "pay-if-paid" clause of a subcontract between a Florida general contractor and a Delaware subcontractor for work to be performed in New York is enforceable by New York courts because the subcontract included a Florida choice-of-law provision. The Court of Appeals concludes that New York's prohibition against "pay-if-paid" clauses, as expressed in Lien Law § 34 and *West-Fair*, is not so fundamental a public policy as to overrule the parties' contractual choice of the applicable law. *Welsbach Electric Corp. v. MasTec North America, Inc.*, 7 N.Y.3d 624, 825 N.Y.S.2d 692 (2006). See, *Mechanics' Liens and Trust Claims 32-11 and 32-13*, *Construction & Surety Law Newsletter* (Fall 2006).

33-13. A mechanics' lien against a private improvement project was properly reinstated by the court upon discovery that the surety of the bond filed with the county clerk to discharge the lien was not authorized to do business in New York, as required by Section 19(4) of the Lien Law for lien discharge by bond without a court order. *Sanco Mechanical Inc. v. DKS General Contractors*, 34 A.D.3d 271, 824 N.Y.S.2d 69 (1st Dep't 2006).

33-14. An owner must affirmatively and directly consent to the work performed or equipment provided by a contractor or supplier to a tenant before the contractor or supplier may assert or enforce a mechanics' lien against the owner's property pursuant to Section 3 of the Lien Law. Mere approval or acquiescence by the owner in the undertaking of the work or the provision of the equipment is insufficient to sustain the lien. *Elliott-Williams Co., Inc. v. Impromptu Gourmet, Inc.*, 28 A.D.3d 706, 813 N.Y.S.2d 778 (2d Dep't 2006).

PREVAILING WAGES

33-15. The county's 30-year lease agreement required the owner to construct a social services and health services administrative center and to pay prevailing hourly wage rates and equivalent supplements "in accordance with New York Labor Law Section 220." That statute did not apply to the owner because no public agency was party to the contract for employment of laborers, workmen, or mechanics, and because the contract did not concern a public works project. *County of Suffolk v. Coram Equities, LLC*, 31 A.D.3d 687, 821 N.Y.S.2d 215 (2d Dep't 2006).

PUBLIC CONTRACTS

33-16. For contracts exceeding \$100,000 annually, New York City's Equal Benefits Law prohibits the City from contracting with entities which do not provide benefits for employees' domestic partners equal to those provided to spouses. This municipal legislation conflicts with and is preempted by General Municipal Law § 103, which requires public contracts to be awarded to the lowest responsible bidder, and by ERISA. *Council of the City of New York v. Bloomberg*, 6 N.Y.3d 380, 813 N.Y.S.2d 3 (2006).

33-17. Seven separate contracts for the renovation of a community center were bid and awarded. When one of the successful bidders could not satisfy the bonding requirements, the city notified the general construction awardee that it would not proceed with the project. The city was liable in damages to the awardee for breach of contract. There was no express provision within the contract awarded making it contingent upon the acceptance of any of the other six contracts bid. *Xavier Contracting, Inc. v. City of Rye*, 29 A.D.3d 687, 815 N.Y.S.2d 638 (2d Dep't 2006).

STATUTES

33-18. Chapter 490 of the Laws of 2006—amends section 44-b of the Lien Law. Private owners are not neces-

sary parties to a lien foreclosure action if the lien has been discharged by the filing of a bond or undertaking.

SUBCONTRACTORS

33-19. The chain of subcontracts from the general contractor to the subcontractor to the sub-subcontractor clearly established that the general contractor was the intended beneficiary of the sub-subcontractor / claimant's performance and created the functional equivalent of privity between the general contractor and the sub-subcontractor. Accordingly, the general contractor's payment bond surety could assert the general contractor's claims and defenses against the sub-subcontractor / claimant. *Brownell Steel, Inc. v. Great American Insurance Company*, 28 A.D.3d 842, 813 N.Y.S.2d 550 (3d Dep't 2006).

WORKERS' COMPENSATION

33-20. Under section 120 of the Workers' Compensation Law, the award of damages to an employee unlawfully discharged for claiming or attempting to claim workers' compensation benefits may include predecision interest. *Greenberg v. New York City Transit Authority*, 7 N.Y.3d 139, 818 N.Y.S.2d 784 (2006).

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Construction & Surety

Editor

Henry H. Melchor
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202

Assistant Editors

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Ryan M. Finn
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Division Officers

Chair

Henry H. Melchor
One Lincoln Center
Syracuse, NY 13202

Secretary

Frederick S. Cohen
900 Third Avenue
New York, NY 10022

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NEW YORK STATE BAR ASSOCIATION
TORTS, INSURANCE AND COMPENSATION LAW SECTION
One Elk Street, Albany, New York 12207-1002

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