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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

INDEMNITY

37-15. Contractual authority to supervise the work of a construction project and to implement safety procedures to protect workers is alone an insufficient basis to impose liability for common law indemnification on a party which did not actually exercise such authority. In this case, the owner's tenant contracted with a construction manager, who subcontracted with a subcontractor, who subcontracted with a second tier subcontractor. The second tier subcontractor's employee fell from a ladder. There was no evidence that the construction manager supervised in any way or provided any materials or equipment related to the second tier subcontractor's work. The owner's common law indemnification claims against the construction manager were denied. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d 369, 929 N.Y.S.2d 556 (2011).

37-16. A subcontractor's employee was struck by a falling object. The general contractor stipulated to liability under Labor Law § 240, but the subcontractor did not consent to that stipulation. Dismissal or severance of the general contractor's complaint against the subcontractor for contractual indemnification was not required by law based on the subcontractor's claim that it was prejudiced by the stipulation. The subcontractor was free to plead and prove that the general contractor was actively negligent and therefore not entitled to contractual indemnification. *Zawadzki v. 903 E. 51st Street, LLC*, 80 A.D.3d 606, 914 N.Y.S.2d 272 (2d Dep't 2011).

INSURANCE

37-17. The construction contract required the contractor to name the owner as an additional insured on the contractor's commercial general liability policy, its commercial umbrella liability policy, and its excess liability policy. The owner had a primary general liability policy and an umbrella liability policy. The owner's umbrella policy was triggered by the exhaustion of its primary liability policy and "any other insurance available to the insured." Accordingly, with respect to an action brought against the owner by an injured employee of the contractor, the owner's umbrella policy was excess to the contractor's excess liability policy, which was excess to the contractor's commercial umbrella policy. *Vassar College v. Diamond State Insurance Company*, 84 A.D.3d 942, 923 N.Y.S.2d 124 (2d Dep't 2011).

LABOR LAW §§ 200, 240, 241

37-18. A divided Court of Appeals found that safety features missing from a front-end loader sustained a claim that Labor Law § 241(6) had been violated, even though the underlying regulation, 12 NYCRR § 23-9.4(e), specifically identified only "power shovels and backhoes" used for material handling. Subpart 23-9 of the Industrial Code is expressly applicable to "power-operated equipment or machinery used in construction, demolition and excavation operations." The majority held that a front-end loader is undeniably a piece of power-operated equipment, and that the same dangers from unsecured loads are present whether the equipment involved is a power shovel, a backhoe, a front-end loader, or anything similar in function. *St. Louis v. Town of North Elba*, 16 N.Y.3d 411, 923 N.Y.S.2d 391 (2011).

37-19. The First Department rejected the conclusion reached by the Fourth Department that there is no Labor Law § 240(1) claim arising out of the use of a plank as stairs or a passageway as distinguished from its use as a

safety device. The First Department ruled instead that liability is imposed whenever the defendants fail to satisfy their statutory duty to provide safety devices adequate to protect construction workers from elevation-related hazards. The injured worker in this case fell four-to-six feet from a plank providing access to the bottom of a pit. *Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dep't 2011).

PREVAILING WAGES

37-20. The State of New York Executive Department Office of General Services violated the separation of powers doctrine by including a prevailing wage clause in all leases it entered into with private landlords on behalf of state agencies, whether or not the alteration or construction work, or the janitorial or other services work, performed for the state agency tenant met the definition of "public work" under Labor Law § 220. *Ellicott Group, LLC v. State of New York Executive Department Office of General Services*, 85 A.D.3d 48, 922 N.Y.S.2d 894 (4th Dep't 2011).

PUBLIC CONTRACTS

37-21. The Diesel Emissions Reduction Act ("DERA") mandates that diesel-powered heavy-duty vehicles operated "on behalf of" a state agency must use low-sulphur diesel fuel and be retrofitted with emission-reducing technology. The Department of Environmental Conservation exceeded its regulatory authority under DERA by defining "on behalf of" in 6 NYCRR Part 248 to include vehicles operated by subcontractors and sub-subcontractors performing contract work for a state agency. After reviewing common legal usage of the phrase "on behalf of," the explicit language of other statutes imposing diesel retrofitting requirements on contractors and subcontractors, DERA's other provisions, and DERA's legislative history, the Third Department held that "on behalf of" in Part 248 means contractors which have a direct, prime agency relationship with a state entity, but not their subcontractors or sub-subcontractors. *In re New York Construction Materials Association, Inc. v. New York State Department of Environmental Conservation*, 83 A.D.3d 1323, 921 N.Y.S.2d 686 (3d Dep't 2011). *See*, Public Contracts 37-8, *Construction & Surety Law Newsletter* (Spring 2011).

SUBROGATION

37-22. A repair contractor was hired to complete the installation of an electric generator. The repair contract disclaimed all warranties related to the generator and required the owner to indemnify the repair contractor against any and all claims related to its work on the generator, other than claims based on the repair contractor's willful misconduct. Following a fire, the owner's property insurer brought a subrogation claim for negligence and breach of contract against the repair contractor. The Second Department held that the insurer's subrogation claim was derivative and was barred by the indemnification provisions of the owner's repair contract. Enforcement of the indemnification provisions was not precluded by General Obligations Law § 5-322.1 because it was not the legislative purpose of that statute to protect an owner from agreeing to contract terms, including indemnification, which had the effect of making the owner a self-insurer. *Westport Insurance Company v. Altertec Energy Conservation, LLC*, 82 A.D.3d 1207, 921 N.Y.S.2d 90 (2d Dep't 2011).

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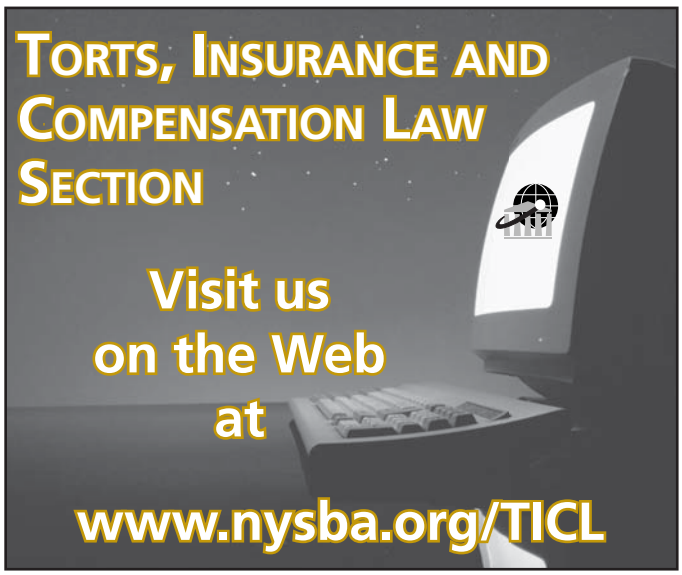

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This newsletter is published for members of the New York State Bar Association's Torts, Insurance and Compensation Law Section by the Construction and Surety Law Division. Attorneys should report decisions of interest to the Editor. Since many of the decisions are not in the law reports, lawyers reporting will be credited on their contribution.

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