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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

ARCHITECTS, ENGINEERS & SURVEYORS

31-1. A lessee's claim that the architect failed to provide fire protection, as required by the applicable building code and the interior design agreement between the parties, was governed by the three-year statute of limitations for all nonmedical professional malpractice claims under CPLR 214(6), rather than the six-year statute of limitations for breach of contract claims under CPLR 213(2). *In re Kliment*, 3 N.Y.3d 538, 788 N.Y.S.2d 648 (2004). *See* Architects, Engineers & Surveyors 30-18, *Construction & Surety Law Newsletter* (Fall 2004).

INDEMNITY

31-2. The indemnification clause of a contract between an owner and contractor for HVAC renovation obligated the contractor to indemnify the owner and its "agents." The owner and its construction manager were sued by an injured employee of the contractor. The construction manager had no contractual relationship with the contractor. In a third-party action, the construction manager claimed indemnification from the contractor on the grounds that it was an agent of the owner. The Court of Appeals determined that the contract failed to unambiguously identify the construction manager as an agent of the owner, entitled to indemnification from the contractor. Furthermore, Workers' Compensation Law § 11, in those cases where the injured employee has not suffered a grave injury, bars third-party actions for indemnification or contribution against the employer unless the employer has expressly agreed in a contract to indemnify the claimant. *Tonking v. Port Authority of New York and New Jersey*, 3 N.Y.3d 486, 787 N.Y.S.2d 708 (2004).

INSURANCE

31-3. An employee of an air conditioning subcontractor was injured by a fall from a ladder while performing renovation work. The owner was informed of the accident a few weeks later, when it was told by the general contractor that any loss would be covered by the general contractor's insurance. Four months after the accident occurred, the subcontractor's employee sued the owner under the Labor Law. When the owner informed its commercial general liability and umbrella insurer of the lawsuit, the insurer denied coverage based upon late notice. The owner then commenced a declaratory judgment action seeking defense and indemnification. The First Department panel decision was split. Two justices concluded that there were triable issues of fact as to whether the insurer was prejudiced by the four-month delay in notice, despite well-established New York common law precedent that an insurer need not show prejudice where the insured has failed to give prompt notice. A concurring justice concluded only that there were triable issues of fact as to whether the insured demonstrated the existence of a reasonable and good-faith belief that the injured worker would not seek to hold the owner liable. Two dissenting justices concluded that the insured had no reasonable basis to believe that it was not liable and that the insured failed to demonstrate that its delay in giving notice was reasonable, thereby warranting summary judgment for the insurer. *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004).

LABOR LAW §§ 200, 240, 241

31-4. "[W]here an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240(1) for injuries caused solely by his violation of those instructions, even though the instructions were given several weeks before the accident occurred." Citing *Blake v. Neighborhood Housing Services of New York City, Inc.*, the Court of Appeals notes that the controlling question is not whether the injured worker was "recalcitrant," but whether his own conduct of ignoring the safety instructions was the sole proximate cause of his accident, rather than any violation of 240(1). *Cahill v. Triborough Bridge & Tunnel Authority*, 2004 N.Y. LEXIS 3851 (2004).

31-5. Affirming a decision by the Fourth Department, the Court of Appeals agrees that the worker had completed repairs to an air conditioning system before he was injured. Retrieval of serial and model numbers and inspection of the completed work did not constitute "repair" work within the meaning of Labor Law § 240(1). In this case, there existed a bright line between the statutorily enumerated and non-enumerated work. *Beehner v. Eckerd Corp.*, 3 N.Y.3d 751, 788 N.Y.S.2d 637 (2004). *See* Labor Law §§ 200, 240, 241 30-9, *Construction & Surety Law Newsletter* (Spring 2004).

31-6. A private company which provided water service to Nassau County commenced emergency work on a water main beneath a State-controlled highway without obtaining a highway work permit from the Department of Transportation (DOT), as required by applicable sections of the Highway Law and the Vehicle and Traffic Law. No prior notice of the work was provided to DOT. The company's construction worker was injured by the collapse of an excavation wall. His claim against the State was dismissed because he and his company were trespassers, performing work without the State's permission or knowledge. He was deemed not to be a person "employed" at a worksite, and therefore did not fall within the class of persons protected by Labor Law § 241(6). *Morton v. State of New York*, 13 A.D.3d 498, 788 N.Y.S.2d 124 (2d Dep't 2004).

31-7. A carpeting contractor's employee, who fell from an unsecured "wobbly" ladder while installing carpeting as soundproofing to the finished walls of a recording studio, was engaged in a significant alteration of the physical composition and acoustical function of the premises, not a mere cosmetic change. Accordingly, the injured employee's work came within the protection of Labor Law § 240(1). *Samuel v. Simone Development Co.*, 13 A.D.3d 112, 786 N.Y.S.2d 163 (1st Dep't 2004).

31-8. A subcontractor's ironworker, who was injured from a slip and fall while removing snow and ice from a deck at the construction site, could not bring a Labor Law § 241(6) claim against the owner and general contractor for violations of 12 NYCRR § 23-1.7(d) of the Industrial Code. That regulation requires removal of snow and ice in order to provide safe footing. It involves the very condition which the injured worker was directed to correct. *Gaisor v. Gregory Madison Avenue, LLC*, 13 A.D.3d 58, 786 N.Y.S.2d 158 (1st Dep't 2004).

MECHANIC'S LIENS AND TRUST CLAIMS

31-9. A general contractor financed its accounts receivable from a fiber optics network project with a factor. An unpaid subcontractor alleged that the payments received by the factor from the general contractor were unlawfully diverted trust funds within Article 3-A of the Lien Law. The Fourth Department concluded that the factor was a purchaser in good faith for value and had no notice that a transfer from the general contractor was a diversion of trust assets, a statutory defense under Lien Law § 72(1). The subcontractor was obliged to establish that the factor had actual notice of the trust fund diversion. The factor had no duty to inquire whether the payments to it constituted trust fund assets. *Le Chase Data/Telecom Services, LLC v. Goebert*, 12 A.D.3d 1093, 785 N.Y.S.2d 222 (4th Dep't 2004).

PREVAILING WAGES

31-10. The Department of Labor determined that the installation of preglazed windows and curtain wall frames within Columbia County was the work of ironworkers and not glaziers. The Third Department held that substantial evidence supported the Department's decision. The Department has special expertise to determine trade classifications. The pivotal question is the nature of the work performed. Collective bargaining agreements provide evidence if thirty percent (30%) of workers within a trade in a given locality are subject to collectively bargained rates. The employer bears the burden of demonstrating that less than 30% of such workers are subject to that wage. *Lantry v. State,* 12 A.D.3d 864, 785 N.Y.S.2d 758 (3d Dep't 2004).

PRINCIPAL AND SURETY

31-11. When the express terms of the indemnity agreement obligate the principal to reimburse the surety for all claims and expenses incurred by reason of the issuance of performance and payment bonds on behalf of the principal, give the surety the exclusive right to determine whether any claim should be settled or defended with binding and conclusive effect, and stipulate that proof of payment constitutes prima facie evidence of the propriety thereof, the surety is entitled to

indemnification from the principal upon proof of payment unless such payment was made in bad faith or was unreasonable in amount. The principal is liable whether or not it has actually defaulted on or is liable under its contract with the obligee. Conclusory allegations of collusion between the surety and the obligee or of excessive payment are insufficient to raise material questions of fact. *Frontier Ins. Co. v. Renewal Arts Contracting Corp.*, 12 A.D.3d 891, 784 N.Y.S.2d 698 (3d Dep't 2004).

STATUTES

31-12. Chapter 155 of the Laws of 2004—amends section 5 of the Lien Law. The private entity for which a public improvement is made must post a bond or other form of security guaranteeing prompt payment to the contractor, subcontractors, laborers, or materialmen of the public improvement. This amendment applies if no public fund has been established to finance the public improvement and if the estimated cost of the public improvement exceeds $250,000. Effective November 17, 2004.

31-13. Chapter 168 of the Laws of 2004—adds section 44-b to the Lien Law. The State or a public corporation with which a notice of lien has been filed against a public improvement is not a necessary party in an action to enforce the lien, if a contractor or subcontractor has issued a bond or undertaking to the public owner discharging the lien pursuant to section 21(5). Effective July 20, 2004.

31-14. Chapters 358 and 578 of the Laws of 2004—add section 9-105 to the General Obligations Law. A licensed, professional land surveyor and its authorized agents and employees may enter upon or cross any lands necessary to perform surveying services, if reasonable efforts are made to notify the landowner or lessee, if the surveyor's operations are conducted during reasonable hours and within a reasonable distance from the property line being surveyed, and if proper identification is carried and displayed upon request. The surveyor and its authorized agents and employees remain civilly liable for damage to land, chattels, crops or personal property, and have no authority to enter any building or structure used as a residence or for storage. Effective August 10, 2004.

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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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Construction and Surety Law Division
Torts, Insurance and Compensation Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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