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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

ARBITRATION

26-1. An arbitrator's determination that an owner had properly terminated the construction contract was res judicata and precluded the surety from relitigating that issue when the owner sued on the performance bond for completion of the work. *Huntington Fire District v. Steven Handlik Construction Corp.*, ___ A.D.2d ___, 699 N.Y.S.2d 454 (2d Dep't 1999).

26-2. As a matter of public policy, Lien Law article 3-A remedies cannot be contractually waived, but that principle does not vitiate the parties' agreement to arbitrate contractual disputes. *David B. Lee & Company, Inc. v. Ryan*, ___ A.D.2d ___, 698 N.Y.S.2d 377 (4th Dep't 1999).

ARCHITECTS, ENGINEERS & SURVEYORS

26-3. The seller of a building stated viable causes of action for common-law or implied indemnification, professional malpractice and breach of contract against a mechanical engineering firm which negligently designed a smoke purge system. Exclusive responsibility for the design of the system had been delegated by the seller to the engineer. The buyer's loss, for which it sought damages from the seller, was actually caused by the negligence of the engineer, thereby entitling the seller to indemnification. *17 Vista Fee Associates v. Teachers Insurance and Annuity Association of America*, 259 A.D.2d 75, 693 N.Y.S.2d 554 (1st Dep't 1999).

INDEMNITY

26-4. While the validity of partial indemnity agreements appears to be unsettled under New York law, a construction manager's claim for partial contractual indemnification from a subcontractor, whose employee was injured after falling from a scaffold, could not be resolved until it was determined whether and to what extent the construction manager was negligent. Only then could an allocation of liability be made, if necessary. As a matter of public policy, General Obligations Law section 5-322.1 precludes the enforcement of agreements to indemnify against the promisee's own negligence in connection with construction projects. Common-law indemnification requires proof that the negligence of the proposed indemnitor in some way caused or contributed to the accident for which the indemnitee was held liable to the injured party solely because of some obligation imposed by law on the indemnitee. In order to enforce contractual indemnification, the indemnitee need only establish that it was itself free from any negligence and was held liable solely by virtue of a statutory obligation, irrespective of the negligence of the indemnitor. *Correia v. Professional Data Management, Inc.*, 259 A.D.2d 60, 693 N.Y.S.2d 596 (1st Dep't 1999).

INSURANCE

26-5. The concrete slab on the fifth floor of a building under construction was defective and had to be removed. In addition to removing the concrete slab itself, it was necessary to remove and reinstall heating, ventilating and air conditioning ductwork, electrical fixtures, and plumbing. Furthermore, the full height of the building had to be shored during the corrective work. The District Court rejected the contractor's contention that the defective installation of the concrete "physically damaged" the building as a whole because the concrete was incorporated within the larger structure. Accordingly, the "ensuing loss" exception to the builder's risk insurance policy exclusion against coverage for faulty or

defective workmanship did not afford coverage for the cost of any of these repairs. *Laquila Construction, Inc. v. Travelers Indemnity Company of Illinois*, 66 F.Supp.2d 543 (S.D.N.Y. 1999).

LABOR LAW §§ 200, 240, 241

26-6. A carpenter was injured after jumping about six feet from a stalled freight elevator to the floor below under circumstances which did not constitute an emergency. The Court of Appeals held that the carpenter's conduct was unforeseeable and superseded any alleged negligence of defendants, thereby foreclosing his Labor Law section 200 claims. *Egan v. A.J. Construction Corp.*, ___ N.Y.2d ___, ___ N.Y.S.2d ___, 1999 WL 1202226 (1999).

26-7. A construction worker was injured while working on a floating raft secured to a land-based structure. The First Department held that federal maritime law does not preempt the strict liability provisions of Labor Law section 240(1). This decision conflicts with the position adopted by the Second Department. *Cammon v. City of New York*, ___ A.D.2d ___, ___ N.Y.S.2d ___, 1999 WL 1081544 (1999).

26-8. A divided panel of the Fourth Department affirmed summary judgment for a roofer injured when he slid 25 to 30 feet down a frost-covered roof while unloading felt. His pants snagged on nails, preventing him from falling off the roof. The majority concluded that the roofer's slide was caused by the effects of gravity, invoking liability under Labor Law section 240(1). *Striegel v. Hillcrest Heights Development Corp.*, ___ A.D.2d ___, 698 N.Y.S.2d 379 (1999).

26-9. Owners of one- and two-family residences are exempt from Labor Law sections 240(1) and 241(6) unless they direct or control the work being performed. Labor Law section 200 liability is imposed where the owner supervises or controls the work performed or has actual or constructive notice of the unsafe condition which allegedly causes the accident. *Murray v. South End Improvement Corporation*, ___ A.D.2d ___, 693 N.Y.S.2d 264 (3d Dep't 1999).

PUBLIC CONTRACTS

26-10. Section U of the New York City public works construction contract includes utility interference work within the specifications for public work, obligates the apparent low bidder to negotiate directly with the respective utilities to achieve a prompt resolution of economic issues related to the utility interference work, and compels the apparent low bidder and the utilities to engage in expedited and binding arbitration conducted by the American Arbitration Association if a dispute cannot otherwise be resolved. The contract is awarded based on the lowest responsible bid for the public work alone. The First Department concludes that Section U does not impermissibly impose preconditions on the competitive bidding process within the context of General Municipal Law section 103(1). *General Contractors Association of New York, Inc. v. Tormenta*, ___ A.D.2d ___, 696 N.Y.S.2d 155 (1999). *See* Public Contracts 25-12, *Construction & Surety Law Newsletter* (Fall 1999).

PRINCIPAL AND SURETY

26-11. Interpreting State Finance Law sections 137(3) and (4), the Court of Appeals concluded that the one-year limitations period on a payment bond issued in connection with a public works project commences when a subcontractor demands final payment from the general contractor and 90 days have passed since the subcontractor ceased work on the project. This statutory limitations calculation cannot be altered by the terms and conditions of the subcontract. *Windsor Metal Fabrications, Ltd. v. General Accident Insurance Co. of America*, 94 N.Y.2d 124, 700 N.Y.S.2d 90 (1999).

[Query: Can the limitations calculation be altered by the terms and conditions of the payment bond itself?]

26-12. The surety on a payment bond was liable to unpaid subcontractors even though the subcontracts designated the general contractor as agent of the owner for payment. The payment bond contains an unqualified promise to pay any claimant having a direct contract with the general contractor. That promise is subject to defeasance by certain conditions subsequent. The agency status of the general contractor according to the subcontracts does not preclude the unpaid subcontractors' claims against the general contractor for unjust enrichment, and to the extent this contractual arrangement would cut off the subcontractors' mechanics' lien claims, it violates public policy. *Blandford Land Clearing Corp. v. National Union Fire Insurance Co.*, ___ A.D.2d ___, 698 N.Y.S.2d 237 (1st Dep't 1999).

STATUTES

26-13. Chapter 458 of the Laws of 1999 amends Section 220(3-a) of the Labor Law to prescribe that a weather-proof sign, setting forth all wage rates and supplements in plain English, be posted by the contractor and every subcontractor on public works projects at the site where the work is performed. Effective March 6, 2000.

26-14. Chapter 521 of the Laws of 1999 adds Section 7308 to the Education Law and requires mandatory continuing education for architects as a condition to practice in the State and as a condition for issuance of a certificate of registration. Effective January 1, 2000.

SUBROGATION

26-15. A burst water pipe damaged a building under construction. The anti-subrogation rule did not protect

defendant plumbing subcontractors who were not named as insureds on the builder's risk policy and who merely had insurable interests covering their own work as incorporated into the building. The insurer's subrogation claims against them were limited only to the extent of defendants' insurable interests. *St. Paul Fire & Marine Insurance Company v. L.E.S. Subsurface Plumbing Company, Inc.*, ___ A.D.2d ___, 699 N.Y.S.2d 31 (1st Dep't 1999).

WORKERS' COMPENSATION

26-16. The right to commence a third-party action against responsible parties is forfeited and statutorily assigned under Workers' Compensation Law section 29(2) to the workers' compensation carrier which pays benefits pursuant to an award, unless the injured worker commences such action within the statutorily prescribed period and within 30 days after the insurance carrier delivers written notice in strict conformity with the statute. Allocation between the injured worker and the insurance carrier of the proceeds of any recovery from such a third-party action is also statutorily prescribed, but following the assignment, the absolute ownership of the action and the right to dispose of it at any stage belongs to the assignee. *Treadway v. Agricultural Insurance Company, Inc.*, ___ F.Supp.2d ___, 1999 WL 649056 (S.D.N.Y. 1999).

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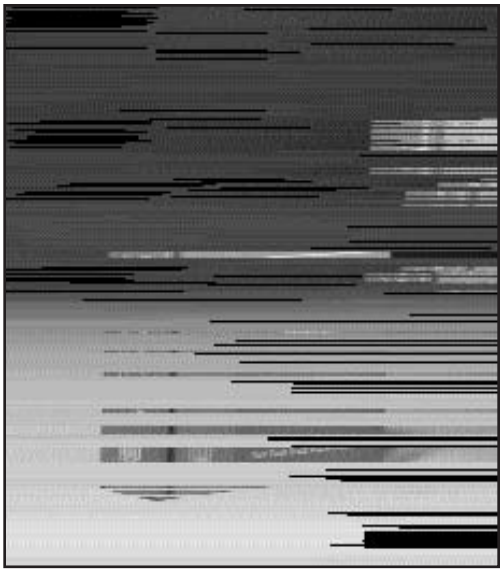

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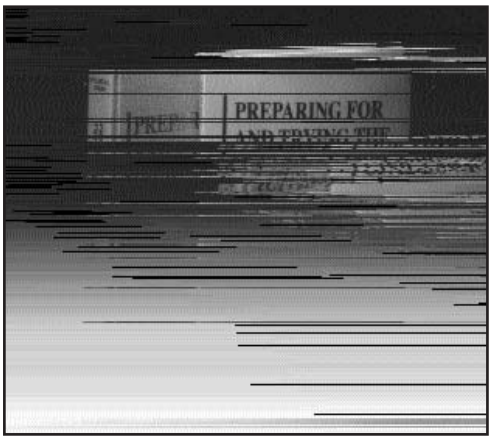

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