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Construction Law - Corporate Law - Education Law - Labor Relations - Municipal Law - Real Estate Law - Real Property Taxation

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ONE-YEAR STATUTE OF LIMITATIONS BEGINS FROM THE DATE WORK IS FULLY COMPLETED

MDB Development Corp. v. Shirin Construction, Inc., 2015 NY Slip Op 32013(U) (Supreme Ct, New York County, 2015)

MDB Development Corp. commenced an action to recover certain amounts from Shirin Construction Inc. for construction work that Shirin performed, as subcontractor, on two separate construction projects. According to the complaint, Shirin had previously contracted with Con Ed to perform all Local 11 work at both sites. MDB asserted causes of action against Shirin and its principals, seeking damages resulting from their alleged diversion and conversion of trust funds created under New York's Lien Law.

MDB alleges that Under Article 3-A of the Lien Law, the sums that Con Ed paid to Shirin on each of the projects constitute trust funds that were to be applied to the payment of claims of the various subcontractors, laborers and materialmen and that Shirin used those trust funds for other purposes, thereby depriving MDB of the money to pay its own subcontractors and suppliers.

Defendants argued that the court should dismiss certain causes of action as time-barred under the applicable one-year statute of limitations contained in Lien Law §77(2). The court denied their motion to dismiss, noting that the one-year statute of limitations on an action to enforce a trust under Article 3-A of the Lien Law only begins to run from the date that the work on the project is fully completed, and not from the date on which any portion of the work on the project has been completed. With regard to the misuse of trust funds, the court granted MDB twenty days to serve an amended complaint in order to replead that issue because MDB originally asserted that it was entitled to indemnification to recover damages as a result of Shirin's failure to pay the full amount due but later asserted that is was entitled to indemnification as a result of defendant's wrongful diversion of Lien Law Trust funds.

CLAIM AGAINST THIRD PARTY DISMISSED BECAUSE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR NEGLIGENCE SINCE DAMAGES SOUGHT ARE ONLY ECONOMIC

610 West Realty, LLC v. Riverview West Contracting, LLC, 2016 NY Slip Op 30946(U) (Decided May 24, 2016)

Plaintiff is the sponsor of a condominium project comprised of forty-six residential condo units. They hired non-party, BFC Construction, and then defendant, Riverview West Contracting, LLC as its general contractor to construct the building. Riverview entered into a subcontract with defendant B&V Contracting Enterprises, Inc. to install drywall, ceiling, soffits and "fire safing and smoke seals".

The sponsor alleged that B&V had installed ineffective and inadequate fire stopping or fire proofing, therefore breaching the subcontract. The sponsor claimed they suffered damages in having to carry our repair work at significant

additional cost. They also alleged that A-1 Testing Laboratories, which was hired by BFC, failed to detect and report the defective and inadequate work performed by B&V, thus breaching its contract.

A-1 moved for summary judgment dismissing the complaint against it arguing that the complaint failed to state a claim as there was no privity between A-1 and the sponsor, and the sponsor had not alleged facts to show it was a third-party beneficiary under the A-1 prime contract with BFC. A-1 also argued that with regard to negligence, the claims were insufficient since only economic damages were sought.

The court agreed, finding that the sponsor stated no claim for breach of contact against A-1 as no privity of contract existed between A-1 and BFC and their contract contained no language where A-1 promised to warrant materials and equipment it provided under the subcontract. The court also found that the complaint stated no cause of action for negligence against A-1 since the damages sponsor sought were only economic. The complaint against A-1 was dismissed.

"TOTAL POLLUTANT EXCLUSION" DOES INCLUDE DAMAGES CAUSED BY SEWAGE

Cincinnati Ins. Co. v. Roy's Plumbing, Inc.,
2016 U.S. Dist. LEXIS 75958 (WDNY2016)

Cincinnati Insurance insured contractor Roy's Plumbing Inc., which were defendants in an action pending in State Supreme Court. The case against them alleged that Roy's recklessly, negligently, or carelessly disturbed, exposed, and discharged hazardous chemicals while performing sewer refurbishment in the area of Love Canal. The District Court ruled that Cincinnati need not defend or indemnify Roy in the state action. The "Total Pollutant Exclusion" provisions in Cincinnati's policies - neither unambiguous nor overly broad-applied to the hazardous substance claims at issue in the underlying litigation. The District Court concluded that sewage may be construed as a pollutant within the Total Pollutant Exclusion. Because the injuries alleged in the underlying complaint consist only of "bodily injury" or "property damage" that would not have occurred but for the actual, alleged, or threatened discharge, seepage, migration, release or emission of "pollutants," per the Total Pollutant Exclusion, there was no "reasonable possibility" of coverage. Cincinnati was not obligated to defend Roy's.

FAILURE TO COMPLY WITH GENERAL BUSINESS LAW §771 SHOULD NOT BAR RECOVERY

All Season Awning Corp. v. Hartofelis,
2016 NY Slip Op 50457(U) (2d Dep't. 2016)

Contractor appealed from a judgment in owners favor, awarding the owner $3,800, and only $200 to the contractor on his counterclaim.

The contractor sued to recover sums allegedly due after installing an aluminum awning. The owner sued in a separate action for return of his $3,000 deposit, arguing breach of contract. In the appeal, he argued that contractor should not have been allowed to recover as it violated General Business Law §771 by not "containing essential statutory provisions," contending also the judgment did not provide substantial justice. The court noted that it was undisputed that plaintiff was a home improvement contractor, that the installation was a home improvement subject to Article 36-a of GBL, and that plaintiffs contract did in fact fail to fully comply with the provisions of §771(1). However, the court believed this fell within the cases that were an exception to the rule requiring full compliance with §771, stating that the loss of judicial recourse here was out of proportion to the requirements of public policy and that the contractors failure to fully comply with §771 should not bar recovery. Since there was ample support for the court's decision, the judgment was affirmed.

LIENS AGAINST COOPERATIVE APARTMENTS CANNOT BE EXTENDED WITHOUT A COURT ORDER

Hong v. Guillermo N. Gomez Architect,
As reported in NY Law Journal on 4/7/16

The petitioner, the co-op owner, brought a special proceeding seeking an order: (i) discharging, vacating, and cancelling the mechanic's lien filed by the respondent, (ii) discharging, vacating, and cancelling a purported "extension of mechanic's lien" notice filed by the architect against her apartment, and (iii) permitting the co-op owner to cancel her surety bond that she had filed to discharge the lien against her apartment.

The co-op owner took the position that the lien had expired and that the extension notice was not valid to extend the lien because, her co-op apartment qualified as a "single family dwelling" and, therefore, the architect was required to obtain a court order to extend the lien.

Shortly after service of the lien notice, the co-op owner bonded the lien, which caused the lien to attach to the bond rather than her apartment. Thereafter, the architect filed an "extension" notice with the New York County Clerk's Office just one day before the one-year anniversary of the lien filing. He did not commence an action to foreclose the lien or obtain a court order.

Although no appellate court has yet ruled that a co-op apartment should be treated as a "single-family dwelling" under the Lien Law, the New York state and city trial courts tend to treat them as such, even though a co-op apartment is not itself considered "real property" under New York law and is located within a cooperative building that contains multiple dwellings.

These cases have generally held that the four-month filing period, under Lien Law §10(1), for liens filed against single-family dwellings is applicable to a mechanic's lien filed against a co-op apartment where the lienor's work is performed solely for the co-op unit itself, and does not include work that benefits the cooperative building's entire ownership, such as work performed for the building's common areas.

The question of whether an extension of such lien can be obtained by the mere filing of a statutory extension notice or whether a court order is required to extend the lien was ripe for determination in *Hong*, where the Supreme Court ruled that, under Lien Law §17, a mechanic's lien filed against a co-op apartment with regard to work performed solely for that co-op, only can be extended by a court order, and that a statutory extension notice will not suffice.

In *Hong*, the architect had argued that its extension notice was effective to extend its lien because (i) the cooperative corporation's building is a multiple dwelling, and (ii) its work benefitted the entire building and affected its common areas, and not just the owner's co-op apartment.

Rejecting those arguments and finding that "there is no indication on the notice" on the mechanic's lien "that the work that was done was for anything other than a single family residence," the court treated the co-op apartment as a "single family dwelling" under the Lien Law, and held that, as such, Lien Law §17 dictates that a court order is required to extend the lien (unless a timely action to foreclose the lien is commenced). Having failed to obtain a court order or commence a foreclosure action, the architect failed to extend his lien.

This ruling directly determines, for the first time, that in the absence of a lien foreclosure action, a mechanic's lien filed with regard to work performed solely for a co-op apartment can only be extended by a court order obtained before the expiration of the one-year anniversary of the lien filing.

MILLER ACT DOES NOT CONSTITUTE A WAIVER OF THE GOVERNMENT'S SOVEREIGN IMMUNITY

DME Construction Assoc., Inc. v. USA,
2016 WL 2992131 (EDNY 2016)

DME Construction Associates was prime contractor on a project for the Navy and one for the U.S. Postal Service (USPS). The Navy claimed it overpaid DME by $149,758. Payment for the USPS project was allegedly offset by that amount. DME sued the government and Treasury Secretary under the Declaratory Judgment Act: claiming they violated the Miller Act and Article 3A of New York's Lien Law by misapplying $149,758 for the USPS project to satisfy DME's purported overpayment debt on the Navy project. The court dismissed suit for lack of subject matter jurisdiction. Courts have consistently held the Miller Act does not constitute a waiver of the government's sovereign immunity. The court noted that the Miller Act preempts application of Article 3A of New York's Lien Law against the United States. Thus Article 3A cannot serve as a waiver of sovereign immunity. Finding DME's true aim to recover amounts allegedly due it under the USPS project, the court concluded DME attempted to engineer jurisdiction by weaving together the Administrative Procedure Act, the DJA, and the Miller Act in an attempt to defeat defendants' sovereign immunity and therefore denied their claim.

FIRST-HAND CONFIRMATION OF THE FACTS IS REQUIRED TO SUPPORT A BREACH OF CONTRACT CLAIM

Parker Management N.Y., LLC v. U.S. Elevator, Inc.,
As reported in NY Law Journal on 12/9/15

Plaintiffs, Parker Management New York LLC and others brought an action to recover liquidated damages arising out of a written agreement between plaintiffs and defendant. Plaintiffs claimed that, pursuant to the contract, plaintiffs hired defendant to perform elevator modernizations to the premises located in Forest Hills. Plaintiffs moved for an order granting judgment on default in their favor in the amount of $1,392,000, together with attorney's fees. The court denied plaintiffs' motion, finding that they failed to provide sufficient first-hand confirmation of the facts to support a breach of contract claim against the defendant. The court found that although the affidavit of the registered managing agent of the premises referenced defendants "default" under the contract, it did not provide sufficient information to determine whether defendant failed to accomplish substantial completion of any portion of the work for purposes of the contract's liquidated damages provision. The court added that the complaint was not verified and the termination letter, not executed by the registered agent, was insufficient to prove the facts constituting the claim, the default and the amount due.