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

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MECHANIC'S LIEN IS DISCHARGED WHERE IT FAILS TO NAME TRUE OWNER OF PROPERTY AGAINST WHICH IT IS FILED

Longview Construction LLC v. JAT Construction Company, Inc., Index No. 6901/2012, Supreme Court, Dutchess County (Sproat, J.S.C.)

JAT Construction Company, Inc. filed a Notice of Mechanic's lien against real property for monies it claimed Longview Construction, LLC, the prime contractor on a construction project built on the property owed JAT. Prior to the lien's filing, the property owner conveyed the property in an arm's length transaction. However, the Notice of Mechanic's lien listed the former owner as the property owner. Longview moved to have the mechanic's lien discharged because it "misidentified" the true owner as of the date the lien was filed. The court held that misidentifying the property owner on a Notice of Mechanic's lien is a jurisdictional defect which an amendment *nunc pro tunc* cannot cure. Longview's petition was granted and the Notice of Mechanic's lien was discharged.

∗ *Lewis & Greer, P.C. represented Longview Construction LLC, the prime contractor in this matter.*

GENERAL CONTRACTOR NOT BOUND TO UNSIGNED SUBCONTRACT

Moulton Paving, LLC v. Town of Poughkeepsie, 98 A.D.3d 1009 (2nd Dept. 2012)

Marquise Construction and Development Corp. was retained by the Town of Poughkeepsie for a road improvement project. Pursuant to the contract between Marquise and the Town, Marquise was permitted to hire subcontractors subject to the Town's engineering consultant's approval. The Town's engineering consultant for the project was MA Morris Associates-Engineering Consultants, PLLC. Marquise was required to submit the names of its chosen subcontractors to Mark Long, a Morris employee who was the project engineer, for acceptance or rejection in a timely manner so as to avoid delay of the project. Marquise's project manager/site supervisor selected Moulton Paving, LLC to perform the work required for the project and an unsigned subcontract agreement was delivered to Moulton on September 3, 2009. Subsection 5.5 of the subcontract provided:

> The agreement, as tendered, shall in no way be construed to be a binding agreement, nor shall it in any way be considered or identified as an instrument or document of intent upon the part of Marquise … only upon complete execution of the Subcontract Agreement by an officer of Marquise … and the subsequent delivery thereof, is the Agreement considered to be effective and a binding agreement.

The initial communication between Moulton and Marquise took place in June or July of 2009, but Marquise did not inform Long (Morris) of Moulton's selection until September 16, 2009, several days before the work was scheduled to begin. After a September 17, 2009 meeting between Moulton, the Town, Marquise and Long (Morris), Marquise contacted Moulton to advise that it had been terminated based upon the Town's rejection of Moulton.

Moulton brought a suit for breach of contract as against Marquise and tortious interference with contract against the remaining parties, including Morris and Long. With regard to the tortious interference claim, Moulton and its principal, Joshua Reich claimed that the Town's rejection of Moulton was motivated by discrimination because Reich is a Hassidic Jew, a fact the defendants were not aware of until meeting Reich at the September 16, 2009 meeting. The trial court held that there was no contract between Moulton and Marquise and that the Town rejected Moulton as paving contractor for legitimate business reasons. The trial court dismissed the complaint.

Moulton appealed. The Appellate Division, Second Department held that Subsection 5.5 of the Subcontract was clear evidence that Marquise did not intend to be bound by the parties' agreement until the Subcontract was signed. As such, no contract was formed and Moulton could not

maintain a breach of contract claim against Marquise. Since there was no contract, there also could not be any tortious interference with a contract claim against the remaining defendants. Accordingly, the claims against the remaining defendants, including Morris and Long were also properly dismissed.

**Lewis & Greer, P.C. represented MA Morris Associates Engineering, PLLC and Mark Long in this matter.*

COURT CONFIRMS THAT CLAIM UNDER GBL §777-a WILL RUN FROM DATE REPAIR WORK WAS LAST PERFORMED

Rich v. Orlando, 108 A.D.3d 1039 (4th Dept. 2013)

In 2003, the parties entered into a custome home building contract, pursuant to which Rich agreed to build a home for the Orlandos. The contract stated that the only warranty provided with respect to the home was the housing merchant implied warranty set forth in General Business Law §777-a. After the Orlandos moved into their new home in 2004, Rich continued to work on the home by repairing certain purported defects in the construction. The Orlandos refused to pay Rich the final payment alleged to be due under the contract and Rick commenced an action contending that the Orlandos had, among other things, breached the contract. The Orlandos asserted three counterclaims for breach of the implied warranty, negligence and fraud. Rich moved for partial summary judgment seeking to dismiss the Orlandos' counterclaims. With regard to the counterclaim for warranty work, Rich claimed it was time barred under the one year limitations period provided for in GBL §777-a(4)(b). The trial court denied the motion and Rich appealed.

The Appellate Division, Fourth Department reversed the trial court's order with respect to the Orlandos' claims for negligence and fraud holding that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself had been violated. No such violation was presented in this case. With regard to the warranty claim, the Appellate Division held that a trial was required to determine the last date upon which repair work was performed at the home and whether it was within one year of the commencement of the action.

BOARD OF MANAGERS' CLAIMS AGAINST PROJECT ARCHITECT ARE PREEMPTED BY THE MARTIN ACT

Board of Mgrs. of NV101 N 5th St. Condominium v. Morton, 39 Misc.3d 1212(A) (Sup. Ct. Kings Cty. 2013)

Board of Managers of NV101 N 5th Street Condominium (the "Board") commenced an action in May, 2012, seeking to recover damages for the alleged defective and/or negligent design, development, construction and operation of a condominium project that consisted of a seven-story building with 40 residential units. Karl Fischer Architect, PLLC was the architect on the project. 150 Berry was the sponsor and Morton was a principal of the sponsor and served on the Board of Managers as the sponsor's designee.

The Board contended that, following the closing of the first unit, it began receiving complaints from unit owners for defects including leaks, HVAC problems, improper roofing, missing pavers, improper drainage and cracking of the concrete floor. In its complaint, the Board asserted three causes of action against Fischer: breach of contract, negligent misrepresentation and professional malpractice. The Board alleged the purchasers were third party beneficiaries of Fischer's contract with the sponsor. It also alleged that Fischer knew that its reports, which would be relied upon by purchasers of the units, omitted material facts and representations, were deceptive, and contained promises and representations that were untrue or unwarranted. Fischer moved to dismiss the causes of action against it.

The court granted Fischer's motion. The court held that the misrepresentations the Board complained of were preempted by the Martin Act (which regulates the offer and sale of securities within or from New York) and as such, enforcement is within the exclusive jurisdiction of the Attorney General. The Board failed to assert any further complaints that qualified as independent breaches of the architect's contract or independent acts of malpractice and failed to demonstrate that the unit owners were intended third-party beneficiaries of the contract. Thus, the claims were dismissed.

OMITTING NAMES OF GENERAL PARTNERS AND A NEW YORK ATTORNEY FROM NOTICE OF MECHANIC'S LIEN ARE MINIMAL DEFECTS THAT CAN BE CURED

5 Bros., Inc. v. D.C.M. of N.Y., LLC, 38 Misc.3d 1235(A) (Sup. Ct. Kings Cty. 2013)

The underlying dispute stems from a construction project at Kings Plaza Mall. D.C.M. of N.Y., LLC was the general contract. Manty Metals, Inc. was a subcontractor providing glass and glazing work, including all labor, materials and equipment. Manty contracted with JEB for the supply of glass, glass doors and hardware materials to be used on the project. JEB alleged that DCM did not pay in full for the supplies through a joint check agreement with Manty and filed a Notice of Mechanic's lien against the project. Several mechanic's liens were filed against the property and ultimately, a mechanic's lien foreclosure action was commenced.

DCM moved to vacate JEB's lien and to dismiss JEB's cross-claim for foreclosure of its lien. JEB opposed the motion and cross-moved to amend its lien notice in the alternative. DCM claimed that JEB's lien did not comply with Lien Law §9 and was invalid because JEB's address included a P.O. Box; JEB failed to name its general partners; and JEB failed to name an attorney with a New York address. With regard to the address, the court found DCM's argument misplaced because while the address contained a P.O. Box, it also included a physical address and as such, satisfied Lien Law §9. With regard to JEB's failure to name its general partners and an attorney with a New York office, the court held that these were not "substantial defects" so as to invalidate JEB's lien and granted JEB leave to file and serve an amended lien.

NEW YORK ACTION STAYED IN FAVOR OF RESOLUTION IN PENNSYLVANIA COURT

Pabco Construction Corp. v. Allegheny Millwork PBT, 2013 U.S. Dist LEXIS 51815 (S.D.N.Y. 2013)

Pabco Construction Corp. is a drywall and carpentry company headquartered in Farmingdale, New York that specializes in millwork installation. Allegheny Millwork PBT is a millwork fabricator and supplier based in Pittsburgh, Pennsylvania. Allegheny routinely subcontracts with companies like Pabco to provide installation services for the materials Allegheny produces. Allegheny and Pabco had worked on a number of projects together. On November 30, 2010, Allegheny filed a Notice of Mechanic's lien with the New York County Clerk after Pabco withheld payment from Allegheny over the parties' contractual duties on a project known as the NFIC Project. On December 2, 2012, Pabco filed a Notice of Mechanic's lien with the New York County Clerk after Allegheny withheld payment from Pabco due to a dispute over contractual duties on a project known as the Alexandria Project. On July 28, 2011, Allegheny commenced an action against Pabco in Pennsylvania concerning the Alexandria Project. On September 23, 2012, Pabco commenced an action in New York against Allegheny and its surety also regarding the Alexandria Project. On October 16, 2012, Allegheny moved the New York court to dismiss, stay or transfer the New York action to the Pennsylvania court.

Allegheny urged that the New York action be dismissed pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) which provides that a district court may dismiss a party's claims where (1) the relevant state and federal actions are "parallel" and (2) an evaluation of a six-factor test weighs in favor of a stay or abstention. The U.S. District Court for the Southern District of New York held that under the *Colorado River* precedent, it was appropriate to stay Pabco's New York action pending resolution of Allegheny's Pennsylvania action. Both actions were parallel for *Colorado River* purposes. They have the same parties and concern substantially the same dispute. Considering the remaining Colorado River factors, the court held that stay or abstention was the appropriate result. Not only would a stay avoid "piecemeal litigation," but resolution of the July 28, 2011 action would presumably decide Pabco's entitlement to the damages arising from the Alexandria Project that it seeks in its New York case.

LENDER'S FAILURE TO FILE BUILDING LOAN CONTRACT SUBORDINATES PART OF ITS CLAIM IN FORECLOSURE TO LATER FILED MECHANIC'S LIENS

Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC, 21 N.Y.3d 352 (2013)

This case involved a mortgage foreclosure action from a failed redevelopment of the Hotel Syracuse complex in downtown Syracuse, New York. The lender for the redevelopment and numerous mechanic's lienors disputed the priority of their respective claims to the foreclosure sale proceeds from the action of the property. Altshuler Shaham Provident Funds, Ltrd. loaned GML Tower, LLC and its affiliates $10 million dollars to refinance its purchase money mortgage against the subject property as well as finance the construction of residential condominiums and commercial space. On December 4, 2008, Altshuler commenced a foreclosure action against GML Tower and other defendants, including The Hayner Hoyt Corporation, Syracuse Merit Electric and the Pike Company, Inc., contractors who worked on the project and filed Notices of Mechanic's lien. Altshuler sought enforcement of its $10 million in loans against the property as first priority liens. Hayner, Syracuse and Pike moved and cross-moved for summary judgment claiming their liens were superior to Altshuler's 2008 mortgage.

Lien Law §22 requires that a building loan contract, with or without the sale of land and before or simultaneously with the recording of a building loan mortgage made pursuant to it, bust be filed in the clerk's office of the county where land subject to the contract is located, along with a borrower's affidavit stating the consideration paid or to be paid for the loan, any expenses incurred or to be incurred in connection with the loan and the net sum available for the construction project. The purpose of the filing requirement is to give notice to all, especially those planning to furnish labor or materials on the project, about the finances of the property owner. The failure to so record changes the priority of liens, with a properly filed mechanic's lien taking priority over the interests of the parties to the building loan contract. Here, Altshuler filed the mortgage but did not file the building loan contract.

The Court of Appeals held that the Lien Law §22 penalty "applies only to funds loaned to pay for improvements." Of the $10 million Altshuler loaned, $4.5 million was for

improvements. The other $5.5 million was used to pay off the existing purchase-money mortgage. Thus, the court concluded that $4.5 million of $10 million loan was subordinate to the lienors' interest in the property by virtue of their mechanic's liens. The remaining $5.5 million was accorded first priority position.

Judge Graffeo dissented only on the last point. She would hold the lender's interest in the $5.5 million also subordi-nate to the other liens. She acknowledges that her conclusion would appear to wipe out any recovery for the lender, however, the Legislature adopted this statutory penalty to dissuade lenders from engaging in the very conduct that occurred here. To Judge Graffeo, the rule adopted by the majority is "antithetical" to the aim of the statute. The Legislature, she says, made a considered decision that as between the lender, who could have protected its investment in full merely by timely recording its documents, and the contractors, laborers and material suppliers, who were inappropriately kept in the dark, it is the lender who should bear the loss.

ARCHITECT LOSES BID TO PROTECT BASIC HOUSE DESIGNS

Zalewski v. Cicero Builder Dev., Inc., 2014 U.S. App. LEXIS 10603 (2nd Cir. 2014)

In the 1990s, James Zalewski was a self-employed architect doing business through Draftics, Ltd. He granted T.P. Builders and Cillis Builders licenses to use several colonial home designs he created. Zalewski claimed that after the licenses expired, T.P and Cillis continued to use his designs and hired V.S. Sofia Engineering and DeRaven Design & Drafting to customize his designs for their customers and continued marketing his designs without his consent. Cicero Builders built two houses using Zalewski's designs as customized by DeRaven. Zalewski filed suit in the U.S. District Court for the Northern District of New York against these parties as well as several others alleging that the defendants infringed the copyright of his original designs. He also asserted claims under the Digital Millennium Copyright Act which prohibits, among other things, "intentionally remov[ing] or alter[ing] any copyright management information." After several amendments to the complaint, discovery and the voluntary dismissal of several defendants, the remaining defendants moved to dismiss and/or for summary judgment. The court ultimately dismissed all the claims and entered judgment in favor of the defendants.

Zalewski appealed to the Second Circuit Court of Appeals. The Court affirmed the district court's conclusion. According to the Second Circuit, there was no dispute that Zalewski's copyrights were valid and there was substantial evidence that the defendants copied from those designs. However, according to the Second Circuit, the question was whether the copying was lawful. Here, the defendants took only the unprotected elements of Zalewski's work and as such, did not violated copyright laws which protect only "'original works of authorship,' those aspects of the work that original with the author himself…" Everything else, according to the Court, is in the public domain.

The Second Circuit explained that there are numerous doctrines that separate protected work from that which is in the public domain. For example, efficiency is an important component for architects thus "any design elements attributable to building codes, topography, structures that already exist on the construction site, or engineering necessity should therefore get no protection." There are also "recognized styles from which architects draw" such as neoclassical government buildings, colonials and high rise office buildings, which are not protected. Similarly, "design features used by all architects because of consumer demand, also get no protection." Zalewski could not get protection "for putting a closet in every bedroom, a fireplace in the middle of an exterior wall, and kitchen counters against the kitchen walls. … Furthermore, the overall footprint of the house and the size of the rooms are 'design parameters' dictated by consumer preferences and the lot the house will occupy, not the architect." Thus, the Court concluded that the defendants' houses shared Zalewski's general style but did not include his original expression. As such, they were not liable for copyright infringement.