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

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DAMAGES MUST BE SUFFICIENTLY PLEAD TO PROVE FRAUD

Mid Atlantic Framing, LLC v. Varish Constr., Inc., 2015 U.S. Dist. Lexis 96493

Plaintiff filed a mechanic's lien in Tompkins County in the amount of $600,960 for framing and carpentry work performed as a sub-contractor for defendant Varish. The property was owned by co-defendant AVA. Plaintiff claimed that defendants falsely represented to the court and Wilmington Savings Fund Society that AVA had paid Varish for the full amount of plaintiff's work so that it would fraudulently appear that no money was owed at the time the plaintiff's lien was filed. Therefore, the lien would be discharged. The Court held that common-law fraud was not perpetrated by AVA because the plaintiff did not sufficiently plead damages resulting from reliance on any of AVA's actions. The Court granted AVA's motion for partial judgment on the pleadings regarding fraud. However, the Court held that the subcontractor's claim against AVA for aiding and abetting a breach of a fiduciary duty was sufficiently plead against AVA.

INDEMNIFICATION MAY BE PROVEN WITH EVIDENCE OF LOSS AND EXPSENSE ITEMIZATION

Colonial Sur. Co. v. Millennium Century Const., Inc., 44 Misc. 3d 1221(A) (Sup. Ct. New York Cty. 2014)

Colonial instituted action seeking indemnification from Millennium for payments made on performance and payment bonds issued on four construction projects. Colonial alleged several causes of action, including for contractual indemnification. Colonial moved for summary judgment and the court granted judgment in its favor under the indemnification agreement.

The court noted that indemnification agreements will be upheld where there is evidence of entitlement based on itemized statements of loss and expenses setting forth the amount to be indemnified. Here, Colonial's President itemized Colonial's losses and expenses under the indemnity agreement in the bonds, totaling $451,413.43 in fees and costs incurred. The Court held that these itemizations of losses and expenses were sufficient evidence to entitle Colonial to be indemnified under the terms of the contract.

Colonial was entitled to indemnification under its agreement with Millennium whether or not Millennium was in default or liable under the contract. In fact, Colonial was entitled to indemnification unless the payments it made to Millennium's obligees were made in bad faith or in an unreasonable amount. The Court granted summary judgment on Colonial's indemnification cause of action in the amount of $451,413.43.

PROMPT PAYMENT ACT PROCEDURE IS TO BE STRICLY FOLLOWED

Precast Restoration Servs., LLC v. Global Precast, Inc., 2014 NY Slip Op 32224 (U) (Sup. Ct. NY Cty. 2014)

Precast performed on two projects for Global. Precast alleged that upon completion of the projects, Global failed to remit payment within thirty days and, when Global finally paid, it failed to pay in full. Precast instituted an action under New York's Prompt Payment Act ("PPA"), and moved for summary judgment.

The Court held that where no record of an objection to a contractor's demand for payment on an invoice exists, and payment was not timely, summary judgment is appropriate. Precast provided invoices and an affidavit affirming that Global received invoices for the work performed by Precast, failed to pay within thirty days of receiving the invoices, and failed to timely object the invoices in writing within twelve days, per the PPA. Since Global failed to timely object under the terms of the Act, the Court granted summary judgment to Precast.

INSURER MAY NOT DISCLAIM COVERAGE WHERE DAMAGE NOT CAUSED TO WORK PRODUCT

Racanelli Constr. Co., Inc. v. Black Diamond Site Dev. LLC, 42 Misc. 3d 1215(A) (Sup. Ct. Suffolk Cty. 2014)

Racanelli had an agreement to install new water mains and subcontracted with Black Diamond for installation of two 8-inch pipes—a job Black Diamond completed in April 2010. Black Diamond was covered by a liability insurance policy with Southwest Insurance for the period October 2009 until October 2010. Racanelli was an additional insured.

In September 2011, there were multiple leaks at the fittings, which Racanalli repaired, as well as damage to other parts of the installation. Upon receipt of a claim, Black Diamond's insurer disclaimed coverage based on the expiration of the policy in October 2010 and moved for summary judgment. The insurer claimed Rancanelli could not prove that the leaks occurred during the policy period. The insurer also claimed that the claim was barred because faulty workmanship that causes damage to a work product was not covered under the policy. The Court rejected this argument holding that liability insurance policies do insure against property damage caused by faulty workmanship, where the damage is to something other than the work product.

CONSENT AND BENEFIT NOT ENOUGH FOR UNJUST ENRICHMENT CLAIM TO WITHSTAND SUMMARY JUDGMENT

Sears Ready Mix, Ltd. v. Lighthouse Marina, Inc., 127 A.D.3d 845 (2d Dept. 2015)

Property owners Lighthouse Marina, Inc. ("Lighthouse"), Larry's Lighthouse Marina, Inc. ("Larry's"), and Pierro-Galasso ("Pierro") hired V.M.A. Concrete Construction, Inc. ("V.M.A.") for various construction projects, including placing a concrete foundation in a building. V.M.A. then hired a sub-contractor, Sears Ready Mix. Ltd. ("Sears").

Sears sued the property owners and V.M.A. for unjust enrichment as a result of V.M.A.'s non-payment. The appellate court held that where a property owner hires a contractor and the contractor hires a sub-contractor, the owners will not be liable on a quasi-contract theory to the subcontractor, unless the owners expressly consent to the subcontractor's performance and pay for the work. The sub-contractor must prove that it was working for the property owners when it performed the work for which unjust enrichment is claimed. The owner's consenting to the improvements and receiving a benefit is not enough for unjust enrichment

A CONTRACT ITSELF DICTATES WHETHER EXTRA COMPENSATION IS ALLOWED FOR WORK PERFORMED

Mid-State Indus., Ltd. v. State of New York, 117 A.D.3d 1255 (3d Dept., 2014)

Mid-State Industries, Ltd., was the successful bidder on a contract with New York State to replace a roof at SUNY Plattsburgh. The bid was based on architectural drawings provided to the contractor. The contract also provided that the winning bidder was obligated to "visit the premises and verify conditions and dimensions which affect the work." The contractor acknowledged a careful examination of the work site, and agreed it was fully informed regarding all conditions regarding work to be done and materials to be furnished.

Once the contractor began replacing the roof, it discovered it had insufficient materials as a result of errors in the drawings. The contractor sued when SUNY refused to pay for the extra materials needed to finish the project. SUNY moved for summary judgment and the contractor moved for partial summary judgment. The Court granted SUNY's motion. The contractor appealed.

The Appellate Court noted that it must confine itself to only reviewing the "four-corners" of the contract document and if no ambiguity exists in its language, then the contract must be construed according to its plain meaning. The Court also held that the contract itself is the guide which determines whether a contractor is entitled to extra compensation for work performed. But, where the contract dictates that a contractor rely upon its own investigation, recovery for extra work will not be ordered unless fraud or misrepresentation exist.

The Court found that the contractor agreed that it would rely on its own investigation of the work site and would not solely rely on the estimates and blue-prints from SUNY. The Court reasoned that the extra work performed was only necessary because the contractor failed to perform its contractual duties of investigating the work site and blue-prints. SUNY showed that the contractor should have, per the contract language, verified the dimension of the roof prior to performing work by taking its own measurements, but chose not to, which disallowed the contractor from entitlement to payment for extra work.

The Court upheld the trial Court's order, granting summary judgment to SUNY.

CONTRACTOR FACES THE CONSEQUENCES OF DEFICIENT VERIFIED STATEMENT UNDER THE LIEN LAW

Anthony Demarco & Sons Nursery, LLC v. Maxim Construction Service Corporation, 126 A.D.3d 1105 (3d Dept. 2015)

LeChase Construction Services, LLC was the general contractor for a construction project undertaken by the Dormitory Authority of the State of New York at SUNY Binghamton.

Maxim was the site contractor and entered into a subcontract with DeMarco for landscaping services on the project. Although Maxim paid the subcontractor, DeMarco claimed that it was owed additional monies and filed a mechanic's lien to secure funds. In response, LeChase withheld 1.5 times the lien amount from Maxim to cover DeMarco's lien.

DeMarco demanded that Maxim furnish it with a verified statement of trust under Section 76 of the Lien Law. Maxim's response was deficient, and DeMarco moved the Court to fully respond to its demand. The court agreed that Maxim's statement was deficient but rather than just compel them to provide an adequate statement, the court granted DeMarco summary judgment against Maxim finding that Maxim was liable to diversion of statutory trust funds.

GOOD WILL IS AN ASSET WITH VALUE

All County Paving Corp., v. Darren Construction, Inc., 2015 NY Slip Op 51144(U) (Sup. Ct. Suffolk Cty. 2015)

In 2011, All County obtained a money judgment against Daren Construction Services ("DCS"). Since that time, All County had been unable to collect on the judgment. In August, 2011, DCS's principal, Michael Fusco formed Darren Construction, Inc. ("DCI") which he admitted was done to make a "fresh start." Thwarted in its collection efforts by Mr. Fusco's action in forming DCI, All County sued by DCI and Fusco personally seeking to pierce the corporate veil and hold DCI and Fusco personally liable for All County's judgment against DCS under the New York Debtor Creditor Law which bars fraudulent conveyances done to avoid judgments.

Fusco argued that there had not been any transfer of assets from DCS to DCI and as such, there was no violation of the Debtor Creditor Law. The court disagreed. Relying on the concept of "goodwill" the court held that DCI's used of the same place, name and reputation constituted valuable goodwill that transferred from DCS to DCI. While Fusco did not transfer any "hard assets" from DCS to DCI, by keeping the same office space, telephone number and owner, he transferred goodwill for which DCI did not pay any consideration. Given the timing of the goodwill transfer, in addition to the lack of

consideration, the court found that it was done with an intent to defraud DCS's creditors. Thus, All County was able to collect its judgment against DCI, as the alter ego of DCS.

ADDITIONAL INSURED ENDORSEMENT UPHELD FOR CLAIM BY SUBCONTRACTOR'S EMPLOYEE

HBE Corp. v. Harleysville Group, Inc.,
7:14-CV-145, NYL 120238896076

HBE was the general contractor at a construction project in Watertown, New York. HBE entered into a subcontract with Demeo for the electrical and emergency electrical system work on the Project. The subcontract required Demeo to obtain insurance coverage including, comprehensive general liability insurance naming HBE as an additional insured with respect to Demeo's work on the Project. The subcontract also required Demeo to furnish HBE with a certificate of proof of insurance coverage prior to starting work on the Project. Demeo furnished HBE with the Certificate of Liability Insurance which further provided that HBE was named as an additional insured on the general liability policy for the Project.

Toth, a Demeo employee was allegedly injured on the Project. He commenced an action against HBE and Samaritan Medical Center seeking damages for his alleged injuries. Upon receipt, HBE notified Harleysville in writing and requested that Harleysville defend and indemnify HBE. Harleysville disclaimed coverage claiming that HBE did not notify them soon enough. It then issued a second disclaimer indicating that Toth's injuries did not arise from the acts or omissions of Demeo and therefore did not trigger the Additional Insured Endorsement or indemnification under the subcontract between HBE and Demeo.

HBE filed an amended complaint seeking a declaratory judgment that Harleysville has a duty to defend and indemnify HBE against Toth's claims. HBE and Harleysville both moved for summary judgment.

The court held that Harleysville had a duty to defend and indemnify HBE because Toth's alleged injury occurred while acting on behalf of Demeo in the performance of Demeo's ongoing operations for HBE, and as such was covered by the Additional Insured Endorsement.

In reviewing the record, the court also found that HBE's claim was not untimely! There was no evidence that HBE was aware of the accident prior to the lawsuit. Thus HBE satisfied its obligation to notify Harleysville of the accident as soon as it became aware of the accident. Harleysville could not decline coverage on this basis.