The Law Offices of Lewis & Greer, P.C.
510 Haight Avenue, Suite 202
Poughkeepsie, New York 12603
Telephone: (845) 454-1200 Fax: (845) 454-3315

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

Construction Industry Newsletter Fall 2011

Home Improvement Contractor Did Work But Billed It in His Own Name While License Was in His Company's Name Is Not Barred from Recovery

Marraccini v. Ryan, 17 N.Y.3d 83 (2011)

M was the contractor, and the company, Coastal Construction, belonged to him. He applied for and got the license in his company's name. He did the work for the defendants (D), but a dispute arose about payment and M sued. He did so in his own name, however, while a Westchester law requires suit to be brought in the name of the licensee. The law imposes penalties for violation, but forfeiture of the claim is not among them. The Court of Appeals had to decide whether the common law imposes such a forfeiture. It does not, holds the Court in an opinion by Judge Smith in *Marraccini v. Ryan,* 17 N.Y.3d 83, 926 N.Y.S.2d 399 (June 2, 2011), denying D's motion for summary judgment. It would be different, the Court says, if M had no license at all, but he had, albeit in the company name. It was "undisputed", however, that M and Coastal are not separate legal entities. Even if the company was a distinct entity, i.e., a corporation, the reasoning of the Court might still be taken to indicate that there would not have to be a forfeiture, given that the mistake was "inadvertent and harmless" and that there was no indication of any intent to deceive. The Court distinguishes its 1990 *B & F Building* decision (Digest 377) because in that case there was no license taken out at all. That factor invoked CPLR 3015(e), which explicitly bars a recovery by a contractor who was not licensed at the time it did the work for the consumer. (A forfeiture resulted there, which some deem draconian even in the face of the explicit CPLR 3015[e]. It's not relevant here in *Marraccini,* in any event.)

Court Rules Lenders Can Be Lien Law Trustees Liable to Mechanic's Lienor

Garrison Commercial Funding IV REO LLC v. NMP-Group LLC, 30 Misc.3d 1227(A)(Sup.Ct. New York County 2011)

The instant action arose from a loan agreement I between plaintiff Garrison's predecessor, UBS, and defendant NMP, the borrower. The loan was secured by a mortgage on a parcel of land, and NMP executed a promissory note to UBS. UBS assigned its interest in the agreement, note and mortgage to StabFund, who assigned its interests to Garrison. Prior to the Garrison assignment, StabFund filed a complaint for foreclosure of the mortgage against NMP and certain mechanic's lienors on the property . Garrison now moved for partial summary judgment on its foreclosure claim. Garrison argued the mechanic s lienors admitted they filed the liens after the mortgage was recorded. Yet, Garrison failed to submit these answers, hence summary judgment on the foreclosure claim was denied. The lenders argued that third-party plaintiff Gateway Demolition's claims against them should be dismissed as a lender could not be a Lien Law trustee. The court disagreed, noting that if NMP, a Lien Law trustee, assigned its rights to 4 deposit account to its lenders, they would be trustees of the funds. Thus, the lenders' motion for a protective order was denied as the court found Gateway was entitled to relevant disclosure.

Contractor's Proof on Time Place of Work, Dooms Verizon's Property Damage Claim

Verizon New York Inc. v. SL Green Realty Corp., 31 Misc.3d 1211(A)(Sup.Ct. New York County 2011)

Tri Star Construction moved for summary judgment dismissing plaintiff Verizon's complaint in this action to recover for property damage. Defendant SL Green Realty owned the building in which two tenants hired Tri Star to conduct construction and renovation work. Verizon alleged its property was damages as a result of defendants' negligence at the site on April 5, 2006. A building incident report reported that the mechanical rooms were accessible to several contractors, including Tri Star. TriStar argued it began work at the location after April 5, and could not have caused the alleged damage. It stated its work did not begin until May, and it never worked on the second or third floor of the mechanical rooms, where the

incident was alleged to have occurred. The court stated Tri Star submitted sufficient evidence showing it began working at the premises after the date of the subject, incident, noting Verizon and SL Green merely attempted to uncut a submitted affidavit through speculative assertions They presented no other documentation to support their claim that Tri Star was working at the premises on the date of the accident and failed to raise any triable issue of fact. Hence, Tri Stars motion was granted.

Wells Fargo Absolved From Conducting Inspections on Home Construction

Gonzalez v. Vidal, 28 Misc.3d 1215(A) (Sup.Ct. Bronx County 2010)

Wells Fargo, the defendant, sought dismissal of a complaint based on documentary evidence. Plaintiff entered into a "residential construction loan agreement" with Wells Fargo to borrow $357,000 for construction of a three-family house. The proceeds were to be paid after Wells Fargo received confirmation that work was performed. Plaintiffs contracted with defendant MIR and Vidal to build the home, and defendant Harlal was to conduct inspections of all work. Plaintiffs alleged Harlal assured them everything "was alright and the work was proceeding on schedule," preparing inspection reports and submitting the requisitions to Wells Fargo. They argued that while MIR and Vidal were required to complete and submit disbursement requests, they did not perform the work as represented. Plaintiffs argued Wells Fargo was liable for failing to inspect the residence before advancing funds. Wells Fargo argued the pact did not require it to conduct inspections before advancing money. As such, it was absolved of any liability in connection with the construction. The court agreed, ruling the provisions in the agreement were clear and unambiguous in not requiring Wells Fargo to conduct inspections. Hence, dismissal was granted.

Construction Manager's Lien Law Application For Verified Statement Survives Dismissal

Matter of Bette & Cring LLC v. Brandle Meadows LLC, 81 A.D.3d 1152 (3d Dept. 2011)

Bette & Cring (B&C) was construction manager for the Brandle Meadows senior condominium. Claiming that it was owed $2.1 million for work completed pursuant to contract, B&C demanded a verified statement of entries in Brandle Meadows LLC's (BM) books as to the trust established for the project under Lien Law §76. After BM's responses failed to satisfy minimum requirements, B&C sued to compel compliance. After BM's verified response, the parties' contract dispute was referred to arbitration. The Third Department rejected BM's motion to dismiss B&C's challenge to the dismissal of its petition for a verified statement. B&C's claims as to deficiencies in BM's verified statement were not mooted when BM permitted B&C's examination of the trustee's books. The Third Department also found BM's verified statement insufficient as to four of the five categories of entries comprising books or records under Lien Law 75(3). BM failed to specify "trust assets receivable" and payments made pursuant to a "Line of Credit Agreement." As to "trust funds received," BM failed to set forth particulars about funds received through the sale of certain condominium units which purportedly exceeded $10 million.

Issue Exists If Remedation Violated Act As Result of Contractor's Noncompliance

Rococo Assocs. Inc. v. Award Packaging Corp., 2011 WL 1260108 (E.D.N.Y. 2011)

In 1967, Rococo Assocs. Inc.'s predecessor and Award Packaging Corp. contracted for the long term lease of premises where Award carried on its business of printing on plastic bags. The parties acknowledged Award's routine use of volatile organic compounds. Under a settlement agreement negotiated in the 1990s, Award and R&E Packaging agreed to reimburse Rococo $267,300 to clean interior floor drain and drywell areas where chemical waste was dumped. An incorporated Remedial Action Plan (RAP) noted excavation "to a depth of approximately twenty (20) feet below grade." Rococo was forced to excavate to 32 feet. The parties disputed whether the settlement agreement required Rococo to excavate to 32 feet despite the RAP's instruction to dig to approximately 20 feet. The court dismissed Rococo's claim for injunctive relief was §7002 of the Resource, Conservation and Recovery Act. There was genuine dispute whether the remediation contractor's partial noncompliance with the RAP rendered remediation efforts inconsistent with the National Contingency Plan, a necessary criterion for a claim under the Comprehensive Environment& Response, Compensation, and Liability Act.

By Bringing Arbitration Proceeding, Homeowners Were Barred By Res Judicata From Bringing Trust Diversion Claim Under Lien Law

Ippolito v. TJC Development LLC, 83 A.D.3d 57 (2d Dept. 2011).

Homeowners, contracted for home improvement renovations by TJC Development. They later ended TJC's involvement with the project. At arbitration against TJC—asserting its breach of agreement—the homeowners were awarded $121,155 in damages and interest. At about the same time that they filed their arbitration demand, the homeowners sued TJC—and its principals claiming the money paid to TJC were trust funds under Lien Law article 3-A, and that TJC did not apply those funds for their benefit as trust beneficiaries. On appeal of Supreme Court's dismissal of their Lien Law claim, the Second Department ruled that as homeowners contracting for improvements, they were beneficiaries of a trust created under operation of Lien Law §70 and had standing to assert a cause of action pursuant to Lien Law article 3-A against TJC or its officers, alleging diversion of trust funds. However, the homeowners claims against TJC were barred by res judicata based on the prior arbitration proceeding. Both claims arose from the same facts and transactions and involved largely the same determinative issues.

Claims For Unjust Enrichment Are Precluded Where There Is A Valid Contract Governing The Same Subject Matter

Burns v. Fleetwood, Lenahan & McMullan LLC,
2011 NY SlipOp 30638(U)
(Sup.Ct. New York County 2011)

Defendant moved for summary judgment dismissing a breach of contract and unjust enrichment complaint. Plaintiffs contracted with defendant to provide architectural services to build a house. Plaintiffs found the construction costs would be substantially higher than defendant estimated and terminated their agreement. Defendant sent a final bill of $438,875. Plaintiffs disputed the bill and sought to recover damages, arguing defendants missed deadlines, adding to the costs, and did substandard work that needed to be redone. Based on the evidence presented, the court found issues of fact existed regarding the extent of defendant's obligations under the contract and the extent of its performance. Hence, defendant's motion for summary judgment dismissing the breach of contract claim was denied. Further, where parties executed a valid, enforceable written contract governing the instant subject matter, recovery for unjust enrichment for events arising from that matter was precluded. As plaintiffs' unjust enrichment cause was duplicative of their breach of contract claim, it was dismissed.

Court Denies Dismissal of Subcontractor's Breach of Contract Claim on Three Projects

Clarke Industries Corp. v. Prince Carpentry Inc., 2010 NY SlipOp 33443(U)(Sup.Ct. New York County 2010)

GCG, the subcontractor plaintiff of defendant Prince Carpentry, sued for breach of contract arising from work it performed for Prince at three locations. Defendants' answers in the three actions contained two counterclaims in common—breach of contract and willful exaggeration of lien. Defendants sought summary judgment dismissing the complaint and damages on their counterclaims. They alleged GCG's president signed an affidavit and waiver of lien. Prince terminated each contract arguing GCG provided "inadequate manpower," and overestimated the percentage of work it claimed it performed on the projects. The court found defendants failed to demonstrate their entitlement to judgment dismissing the complaint or awarding damages on their counterclaims. It noted defendants' assertions of overestimations and inadequately staffed projects were based on conclusory affidavits. Thus, as defendants failed to show GCG failed to perform under the contract, and that it was properly terminated, defendants' motions for summary judgment dismissing GCG's breach of contract claims were dismissed. However, as there existed a valid written contract, dismissal of plaintiffs' quantum meruit claim was precluded.

Pipeline Builder Granted Indemnification By Safety Contractor Following Settlement

Seidita v. Millennium Pipeline Co. LLC,
2011 WL 4036095 (S.D.N.Y. 2011)

Millennium Pipeline LLC was organized to build a pipeline. Although Precision Pipeline LLC was general contractor, Millennium hired MBF Services Inc. to provide inspection, safety, and construction services. Precision employee Seidita was hurt while doing excavation work. After withdrawing claims against Precision, he settled with Millennium and MBF. The settlement agreement reserved Millennium's indemnification claim against MBF. The court summarily granted Millennium indemnification against MBF, whose legal responsibility for worksite accidents was decided in *McCaffrey u. Millennium Pipeline Co.* In rejecting MBF's position that the indemnification

clause at issue was unenforceable because it indemnified Millennium's and Precision's own negligence contrary to York General Obligations Law §5-322.1, the court observed that the provision stated that it did not indemnify Millennium's own negligence, which MBF did not show. Thus the indemnification clause was consistent with §5322.1. Citing *Correia n Professional Data Management Inc.* the court observed that because MBF did not show negligence by Millennium, it had no claim for common law indemnification superceding any contractual indemnification.

Owner, Contractor Denied Indemnification From Subcontractor in Ladder Fall Lawsuit

Dwyer v. Goldman Sachs Headquarters,
2011 WL 3629192 (S.D.N.Y. 2011)

Structure Tone Inc., was general contractor for a project at Goldman Sachs' headquarters. It subcontracted work to OH&M Electrical Corp. OH&M employee Dwyer fell from a ladder placed on a raised floor, into an 18-inch deep hole created after a floor tile's removal. He slipped on the tile and Structure Tone sought contractual indemnification from OH&M in Dwyer's suit alleging breaches of New York Labor Law §§200, 240(1), and 241(6). The court dismissed Dwyer's §§200 and 240(1) claims. On his §241(6) claim the court found issues as to whether defendants allowed Dwyer to use a floor that was in a "slippery condition" contrary to Industrial Code §23-I .7(d), and whether the floor was kept free of scattered materials as required by Industrial Code §23-11(e) (2). The court dismissed the contractual indemnification claim against OH&M. Nothing in the indemnification provision within the purchase order that OH&M signed suggested that its enforceability depended on OH&M's negligence. Because Dwyer's claims were covered *by* the indemnification provision's terms, and because Goldman and Structure Tone were not negligent as a matter of law, OH&M must defend and indemnify Goldman and Structure.

Contract's Forum Selection Clause Unenforceable; No Prima Facie Showing of Personal Jurisdiction

Armstrong Pumps Inc. v. The Brewer-Garrett Co.,
2010 WL 447394 (W.D.N.Y. 2010)

Plaintiff makes devices for heating, ventilation and air conditioning (HVAC) systems. It has an office near Buffalo and an agent, the Northrich Co., in Ohio. Plaintiff's action for contract breach and unjust enrichment arose after defendant an Ohio-based HVAC contractor agreed to engage it, through Northrich, as a subcontractor on a Cleveland project. Defendant moved to dismiss. Alternatively, it sought transfer to the Northern District of Ohio because the transaction occurred there among Ohio-based parties. Plaintiff countered that the parties entered a valid forum selection agreement designating the Western District as the exclusive forum for litigation arising from defendant's 2007 purchase of an $80,000 control system from plaintiff. The court dismissed plaintiff's complaint. The parties' contract ended no later than March 28, 2008, and no language as to defendant's explicit agreement to the forum selection clause at issue appeared anywhere in the undated and unsigned "Order Acknowledgment" or "Terms of Sale and Warranty" documents. As plaintiff's purported forum selection clause was unenforceable, the absence of a valid forum selection clause left plaintiff unable to make a prima facie showing of personal jurisdiction.

Our Firm:

Lou Lewis
J. Scott Greer
Veronica McMillan
- - - - - -
Joan Quinn
Paul E. Denbaum
Alana R. Bartley