Construction Industry Newsletter

SPRING 2006

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PILOT PAYMENTS SYNONYMOUS WITH REAL PROPERTY TAXES FOR PURPOSES OF ENFORCING TAX ESCALATION PROVISION

Sears, Roebuck and Co. v. PCM Development Co.

The tenant in a commercial lease moved for summary judgment for a refund of amounts paid to landlord pursuant to a tax escalation provision within the parties' lease. The tax escalation provision provided for the tenant to compensate the landlord for it's pro rata share of real estate taxes starting the third year of the lease term. The landlord, under a Payment in Lieu of Taxes Agreement ("PILOT"), made payments to the Town of Wallkill Industrial Development Authority ("IDA"). The property was owned by the IDA. The IDA remitted the PILOT payment to a mortgage lender and to the taxing entities. The tenant argued that the landlord's PILOT payment was not subject to reimbursement by the tenant under the tax escalation provision because the property is owned by a public benefit corporation which is tax exempt, and such payments are contractually agreed to in the lease between the IDA and the defendant. The court held that although the lease was silent as to the tenant's responsibility when a PILOT agreement was in place, PILOT payments were identical to and interchangeable with real property taxes. Therefore, the tax escalation provision applied to PILOT payments.

CONTRACT LANGUAGE PLACES RISK OF ENCOUNTERING UNEXPECTED CONDITIONS ON CONTRACTOR

All County Paving Corp. v. Suffolk County Water Authority

Contractor sued water authority to recover damages allegedly resulting from unforeseen subterranean obstacles. The plaintiff contracted with the defendant for the installation of a water main. During the course of the plaintiff's performance, the plaintiff encountered unforeseen subterranean conditions. According to the plaintiff, the conditions caused damage to its equipment and interrupted and delayed its work. The

plaintiff alleged that the defendant misrepresented the condition of the soil at the construction site. The defendant had performed test borings at a location approximately one mile from the construction site. The results were furnished to the contractor as part of the contract specifications. The court rejected the contractor's argument, holding that the test borings did not constitute a representation as to the condition of the soil when taken with the express language in the contract. The contract expressly stated that there was no guaranty that unknown, adverse, conditions did not exist underground in the vicinity of the drill site. The contract placed the risk of encountering unexpected condition onto the contractor.

CLAIM FOR TORTIOUS INTERFERENCE REQUIRES SHOWING OF FRAUD OR MALICE WHERE DEFENDANT HAS ECONOMIC INTEREST IN CONTRACT

Gulf Insurance Co. v. Mian Contracting, Inc.

Sub-subcontractor alleged tortious interference of a contract against the surety of the party it was in contract with; the claim was dismissed for failure to state a cause of action. Subcontractor Dillon Contracting Corp. ("Dillon") defaulted on a project with the New York City School Authority. Dillon's surety, RLI Insurance Company ("RLI"), agreed to complete performance and used Dillon as its subcontractor. Dillon then contracted with Mian Contracting, Inc. ("Mian") to perform masonry work at the project. Thereafter, Gulf Insurance Co., ("Gulf") as surety, issued a performance bond on behalf of Mian, as principle and in favor of Dillon, as obligee. Mian subsequently defaulted. Mian alleges, that due to inclement weather and revised plans, it was unable to adhere to the work schedule and that it had requested an extension of time to complete its work. Mian further alleges that RLI's approval was required before the extension could be granted. The request was ultimately denied and Dillon made a demand under the Gulf bond; Gulf paid RLI, as Dillon's subrogee, the sum of $250,000.00 in settlement of Dillon's claim under the bond. Mian sued RLI alleging, in part, tortious interference with contract and fraud; both counts were dismissed. The elements of a cause of action for tortious interference are: 1) a valid contract between plaintiff and a third party; 2) the defendant's knowledge of that contract; 3) the defendant's intentional procuring of the breach; and 4) damages. However, where the defendant has an economic interest in the contract between the plaintiff and a third party, the plaintiff must also plead facts that would support a finding that defendant acted with malice or employed fraudulent or illegal means to induce the breach. Mian alleges that RLI refused to grant Mian's extension request because it wanted to seek payment under the Gulf bond. Mian alleges that RLI thought it was in its financial interest to obtain

payment under the bond because the Project was going over budget and Dillon was becoming insolvent. The court held that Mian failed to plead facts that would support a finding that RLI acted with malice or employed fraudulent or illegal means to induce the breach of the contract between Dillon and Mian.

COMPUTER GENERATED FORMS ADDRESSED BY COURT

Otto Interiors, Inc. v. Nestor

For purposes of contract interpretation, a computer generated document was a "printed form" and words added by word processor were a "typewritten" addition that carried greater weight. This action arises from a contract entered into between a homeowner and a painting contractor. The contractor used a software program to format its standard agreement. The form agreement could not be altered and contained the contractor's name, address, and standard terms and conditions. The form also contained a blank space identified as an "estimate." Information was added to the form using processing software. The contractor added a price and inserted the following statement below the price: "This is a Guesstimate." Thereafter, a dispute arose between the contractor and homeowner concerning the contract price. The contractor contends that the agreement was a "printed form" and that the words added by word processor were a "typewritten" addition. Typewritten words are given greater weight under the law than preprinted form language. The homeowner argued that the entire document was created at the same time and that language inserted by word processor carried no greater weight than any other terms. The court held that the standard form set up in a manner where it could not be altered and had to be printed as-is, was a "printed form" of standardized, pre-established terms. However, when the blanks on the form were completed by word processor prior to printing, this was functionally the same as completing the form using a typewriter. The added language was a "typewritten" addition. Thus, the word "guesstimate" carried more weight than the term "estimate."

ANNUALIZATION

Chesterfield Associates v. New York State Department of Labor

Chesterfield involves yet another challenge to the New York State Department of Labor's annualization regulation (12 N.Y.C.R.R. §220.2), which requires contractors who work in both the public and private sectors to pay employees prevailing benefits on all hours worked during the year on both public and private projects, rather than on

just the hours worked on public jobs. The articulated purpose of the regulation is to prevent employers from diluting the value of the prevailing supplements by "pooling" the supplement with benefits received for private work. Unlike Rondout Electric, Inc. v. New York State Department of Labor, 335 F3d 162 (2nd Cir. 2003), where the Court dismissed a challenge to the annualization regulation under the National Labor Relations Act, Chesterfield challenged the regulation as an arbitrary and unreasonable enforcement mechanism. Although the New York Court of Appeals rejected Chesterfield's challenge under the particular facts of that case, the Court left open the possibility of future challenges on a case by case basis where the contractor maintains separate benefit plans for each employee for both public and private work and as a result, does note engage in the type of "pooling" that the annualization regulation is allegedly intended to prevent. Perhaps as an unintended consequence, the Court of Appeals may have also provided non-union contractors with grounds for contesting a union contractor's compliance with the annualization regulation to the extent the union contractor pays prevailing supplements into a plan that does not immediately vest and/or provides benefits to employees for work on private projects.

NOTICE OF MECHANICS LIEN DISCHARGED

Matter of Radovsky

Section 10 of the Lien Law operates as a statute of limitations and sets forth the procedure for filing a mechanics lien. On a non-commercial job the lien must be filed within four months of the last work. However, a lienor can be forced to commence an action on the lien by service of a thirty day notice under Section 59. If an action is not commenced the owner can then bring on a proceeding to discharge the lien. In this case the owner argued not only that the lien was not timely filed but also that that the contractor had not timely commenced an action in response to the thirty day notice. The contractor took the position that the lien was timely because it was filed within four month of completion of the contract and that such completion did not occur until the Town of Hempstead plumbing inspector had "signed off" on the work. The owner contended that the four months should be measured from the last day that the contractor was at the job site. The Court relied on a letter from the general contractor which set forth the last date of the plumbing sub's work as a basis for granting the application to dismiss. In effect the Court rejected the argument as to timing of the inspection of the work. The application to dismiss on the basis of the thirty day notice was denied as discretionary.

Editor's comment: It will be interesting to see how this case is treated on appeal. The sub here was unable to produce a copy of any written contract with the prime to buttress his argument as to completion of the contract. However, Section 10 does contain the language "after the completion of the contract..." and acceptance by the building inspector is a usual and customary precedent to completion of residential work – just as a certificate of final completion is customary on commercial work.

IMPROPER DESCRIPTION OF PROPERTY OWNER DOES NOT INVALIDATE MECHANIC'S LIEN

PM Contracting Co. Inc. v. 32 AA Associates LLC

Owners moved to dismiss lien based on an alleged misidentification of the owner. The owner had leased space to Global Crossing who in turn engaged the contractor for the fit up. When the work was done more than two million remained unpaid. The contractor had filed a lien naming 32 AA as the owner but seven month previously 32AA had formed a limited liability company and then conveyed the property to 32 Sixth Avenue – the deed was recorded seven months before the filing of the lien. In denying the motion to dismiss the court distinguished between misdescription of an owner, which does not invalidate a lien, and misidentification, which does. Here, the court concluded that naming the parent company rather than the subsidiary as the owner constituted only a misdescription – the owner had not been prejudiced. Accordingly the motion was denied

Editor's Comment: The difference between "misdescription" and "misidentification" may appear inconsequential; however, New York courts have recognized the distinction. Whether or not a description will be deemed sufficient depends on whether the name cited in the lien provides adequate notice to all concerned. In this case the court noted that 32AA stands for 32 Avenue of the Americas – and the inaccurate description was adequate to provide notice of the true owner's identity.

PUBLIC AUTHORITIES LAW REQUIRES NOTICE OF CLAIM BEFORE DISPUTE ARISES

C.S.A. Contracting Corp. v. New York City School Construction Authority

Contractor sued School Authority for breach of contract to recover monies it contended were due under its contract with the School Authority. Contractor contracted with the School Authority to perform asbestos abatement work. On December 3, 1999

Contractor submitted a request for payment for extra work performed under the parties' contract. The School Authority approved the request in February, 1994, but two months later informed Contractor that it would not remit payment because it determined that Contractor had overcharged the School Authority for work performed under the contract at a different school location. Thereafter, Contractor purportedly filed a notice of claim pursuant to Public Authorities Law § 1744(2) on May 9, 1994, June 30, 1994 and September 21, 1994. Section 1744 requires that a notice of claim be served within three months after the accrual of such claim. A claim accrues, generally, where the damages are ascertainable or once the work is substantially completed. Contractor was unable to substantiate having served its May 9, 1994 notice of claim, nonetheless, the court held that even were service established, Contractor's notice of claim was untimely. The court declined to extend to the Public Authority Law an amendment of section 3813(1) of the Education Law mandating that accrual of a claim arising out of contract to be deemed to have occurred as of the date payment for the amount claimed was denied.

COMPLAINT DISMISSED FOR CONTRACTOR'S FAILURE TO SATISFY NEW YORK CITY ADMNISTRATIVE CODE LICENSING REQUIREMENT

Isogon Interim, LLC. V. Crnkovic

The plaintiff contracted with the defendant to perform repair and alteration work at the premises owned by the defendant located in New York City. After completion of the contract, the defendant refused to tender payment to the plaintiff. The plaintiff filed a mechanic's lien and sought to enforce the lien. The defendant moved to dismiss the complaint on the grounds that it never entered into contract with the entity known as "Isogon, LLC" and that the plaintiff failed to allege that it is licensed by the City of New York as a home improvement contractor pursuant to New York City Administrative Code §§ 20-385 and 20-387. Defendant did not object to amending the complaint to correct plaintiff's identification, but objected to that part of plaintiff's relief seeking to add the allegation that plaintiff is a licensed home improvement contractor. The plaintiff claims that it is a licensed contractor in Westchester County and that its principal was licensed in New York City at all relevant times and that it acquired licensing by New York City after it was no longer at work on the defendant's contract. The plaintiff also argued that the property at which it performed work for the defendant was not the primary residence of the defendant. However, the court disregarded this, as the statute does not limit the home improvement contractor's licensing requirements to work performed on a *primary*residence and dismissed the complaint.

CONTRACTOR'S DELAY AND NEGOTIATION TACTICS BREACHED COVENANT OF GOOD FAITH AND FAIR DEALING WITH SUBCONTRACTOR

Fabcon East LLC v. Steiner Building Co.

Subcontractor who contracted with contractor to manufacture and install pre-cast concrete later sued alleging breach of good faith and fair dealing. The defendant counterclaimed for breach of contract claiming that the plaintiff failed to perform certain contract provisions. It is well settled law in New York that every contract contains an implied covenant of food faith and fair dealing which requires that neither party do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. The court found that project delays were solely the responsibility of the defendant and that the defendant had not negotiated its contract with the plaintiff in good faith. The court found that the defendant had only contracted with the plaintiff to obtain rights to work at a Navy Yard project, while leaving the door open to terminate plaintiff and avoid any costs if the Navy Yard deal fell through. The defendant conduct amounted to a breach of the covenant of good faith and fair dealings. The court awarded the plaintiff compensatory damages for work performed prior to termination and recovery of its costs and expenses of the litigation, including attorney's fees, as permitted under the parties' contract.

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